

2005

## Bankruptcy Beyond Borders: Recognizing Foreign Proceedings in Cross-Border Insolvencies

Jennifer Greene

Follow this and additional works at: <http://brooklynworks.brooklaw.edu/bjil>

---

### Recommended Citation

Jennifer Greene, *Bankruptcy Beyond Borders: Recognizing Foreign Proceedings in Cross-Border Insolvencies*, 30 Brook. J. Int'l L. (2005).  
Available at: <http://brooklynworks.brooklaw.edu/bjil/vol30/iss2/8>

This Note is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized administrator of BrooklynWorks. For more information, please contact [matilda.garrido@brooklaw.edu](mailto:matilda.garrido@brooklaw.edu).

# **BANKRUPTCY BEYOND BORDERS: RECOGNIZING FOREIGN PROCEEDINGS IN CROSS-BORDER INSOLVENCIES**

## INTRODUCTION

As the globalization of the world's economies continues apace, so will the number of insolvencies that cross national borders. The increase in transnational bankruptcies has presented a unique and challenging dilemma, namely, to what extent should foreign bankruptcy proceedings be recognized locally? Unfortunately, this quandary has not been answered by the formation of a body of international bankruptcy law. Instead, domestic law determines how local courts will administer the claims of local creditors in connection with insolvency proceedings pending in foreign jurisdictions. This piecemeal approach to complicated cross-border issues impedes the successful administration of transnational insolvency cases.

The problem is illustrated in the following hypothetical. Imagine Foreign, Inc. ("Foreign"), a corporation that is incorporated and has its principal place of business in the nation of Far-and-Away. Foreign's main business operation is the production of gizmos. It has plants all over Far-and-Away and has built itself up to be one of the largest manufacturers of gizmos. The CEO of Foreign, a learned businessman with a propensity for expansion, decides to export gizmos to the United States. In doing so, Foreign exclusively transacts with American Pride, a U.S. retailer of gizmos. A few years later, in order to cut export costs and satisfy the avid demand for gizmos by the children of America, Foreign builds a gizmo manufacturing plant in the United States. Unfortunately, shortly after the U.S. plant is built, parents all around the world discover that children are using gizmos as weapons and forbid their children to play with them.

Foreign takes a hard hit, as the production of gizmos generates the majority of its earnings. Soon thereafter, unable to generate sufficient revenue to satisfy its debt obligations, Foreign decides to seek bankruptcy protection in its home jurisdiction of Far-and-Away. American Pride, realizing that Foreign has shut down all of its manufacturing plants, is angry because

it has already paid for another shipment of gizmos, which it has not yet received. With haste, American Pride gets a judgment in U.S. Federal district court against Foreign. Now American Pride wants to levy on Foreign's assets in the U.S., namely the manufacturing plant. Foreign contends that American Pride is stayed from collecting on the claim by the bankruptcy law of Far-and-Away.

The problem resides in the absence of a body of international bankruptcy law to address the complicated cross-border issues that inevitably arise in the administration of a transnational insolvency case. For example, can Foreign stop the collection efforts of American Pride? If so, through what remedies? To what extent is American Pride subject to Far-and-Away's priority scheme? Does the fact that U.S. law governed the sale of gizmos between Foreign and American Pride matter? Does the fact that Far-and-Away favors redistribution over efficiency, whereas the United States embraces efficiency as the core goal of bankruptcy proceedings matter? How is Foreign supposed to maintain its business as a going concern if American Pride is allowed to strip away its U.S. assets? What if Far-and-Away does not provide adequate protection for American Pride's collateral? There is no internationally recognized body of law that answers these difficult questions. Instead, we must rely on domestic law to determine which nation's bankruptcy laws will govern what assets.

In an effort to overcome the inherent conflicts that arise when different bankruptcy regimes intermingle and to provide uniform mechanisms to efficiently and equitably distribute a debtor's estate worldwide, Congress added a provision to title 11 of the United States Code (the "Bankruptcy Code" or the "Code"): Section 304.<sup>1</sup> Section 304 of the Bankruptcy Code, titled "Cases Ancillary to Foreign Proceedings," allows U.S. bankruptcy courts to aid in the administration of foreign insolvency proceedings in accordance with the bankruptcy law of foreign jurisdictions.<sup>2</sup>

Section 304(c) of the Bankruptcy Code provides the criteria that the Bankruptcy Court must consider in determining whether and how to aid in the administration of a foreign insol-

---

1. 11 U.S.C. § 304 (2003).

2. *See generally id.*

veny proceeding.<sup>3</sup> Congress created the section 304(c) factors with two important policy considerations in mind: international cooperation and protection of U.S. creditors.<sup>4</sup> The tension between these two goals can be seen in the individual factors of section 304(c).<sup>5</sup> Unfortunately, Congress did not assign priority to any section 304(c) factor or make any factor dispositive,<sup>6</sup> thereby granting the Bankruptcy Court broad discretion in balancing them to determine whether relief should be granted to a foreign representative.<sup>7</sup> The lack of guidance in section 304 has led to an ad hoc balancing approach by the courts, which, in turn, has contributed to inconsistent outcomes in case precedent.<sup>8</sup> Thus, section 304 has not proved to provide sufficient guidance to the administration of ancillary cases within the U.S. in connection with foreign insolvency proceedings.

This Note argues that section 304 lacks concrete guidance to govern the way in which international insolvencies are treated in the United States. It proposes that the problem rests within the factors enumerated in section 304(c), which are meant to guide the Bankruptcy Court in determining whether and how to aid in the administration of a foreign insolvency proceeding and to grant relief to the foreign representative. The Note specifically looks at two divergent approaches U.S. courts have taken in determining section 304 relief. On one hand, some courts overemphasize the section 304(c)(5) factor, comity,<sup>9</sup> and on the other hand, courts weigh all section 304(c) factors equally, including the desire to protect U.S. creditors.<sup>10</sup>

---

3. *Id.*

4. *See* Maxwell v. Barclays Bank (*In re* Maxwell), 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994) (stating the policy of § 304). 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." *Id.* at 816.

5. *See* 11 U.S.C. § 304(c). *See also*, discussion *infra* Part II.A (discussing conflicting factors of § 304(c)).

6. 11 U.S.C. § 304(c).

7. *See, e.g., In re* Culmer, 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982).

8. *See* discussion *infra* Part II.B (discussing divergent approaches courts have taken when interpreting section 304).

9. *See* cases cited *infra* note 70 (emphasizing the desire to use comity as the guiding factors of § 304(c)).

10. *See* cases cited *infra* note 114 (emphasizing the desire to weigh all § 304(c) factors equally).

Part I of this Note describes the statutory framework of section 304, including the predicates to commencing an ancillary proceeding, the relief available to foreign debtors, and limitations imposed on that relief. Part II discusses the statutory gaps and contradictory language of section 304 and then examines how the language of section 304 has resulted in courts taking divergent attitudes in interpreting how ancillary insolvency cases are to be managed. This section also introduces two polar approaches that have been followed in adjudication—universalism and territorialism—and the extent to which each has contributed to the divergent attitudes of the courts. Part III discusses a solution to the uncertainty and frustration created by the current section 304: the proposed Chapter 15. This section first explores the anticipated benefits of the proposed chapter, and then reveals the reasons for which those benefits are merely illusory. Part III concludes that the same uncertainty that exists under the current Code will persist under the proposed Chapter 15. Finally, the Note will conclude that in order to affect a true departure from the current inconsistency in case law dealing with international insolvencies, we must adopt a purer form of universalism.

## I. STATUTORY FRAMEWORK

### *A. Gaining Access to U.S. Bankruptcy Jurisdiction by Filing a § 304 Petition*

Section 304(a) establishes the predicates necessary for invoking section 304.<sup>11</sup> To commence an ancillary proceeding under section 304 of the Bankruptcy Code, a foreign representative of a foreign debtor, who is subject to a pending foreign proceeding, must file a petition under section 304.<sup>12</sup> Additionally, the petition must be filed in the appropriate Bankruptcy Court in accordance with the venue requirements of 28 U.S.C. section 1410.<sup>13</sup>

---

11. 11 U.S.C. § 304(a).

12. *Id.* Section 304(a) provides that “[a] case ancillary to a foreign court is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.” *Id.*

13. 28 U.S.C. § 1410 (2003).

### 1. Foreign Representative

The term “foreign representative” is defined in section 101(24) of the Bankruptcy Code as a “duly selected trustee, administrator, or other representative of an estate in a foreign proceeding.”<sup>14</sup> Generally, courts have defined foreign representative broadly, recognizing that the term can vary greatly from country to country.<sup>15</sup> A foreign representative can either be (i) a court appointed representative, or (ii) the debtor’s board of directors where there is no statutory or other requirement that a separate representative be appointed.<sup>16</sup>

### 2. Foreign Proceeding

The true core of section 101(24)’s definition of foreign representative resides in the term “foreign proceeding.” A foreign proceeding, as defined by section 101(23) of the Bankruptcy Code, is:

[A] proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.<sup>17</sup>

This definition is notably broad and the presence of an administrative proceeding, as opposed to a judicial one, does not appear to affect the proceeding’s status as a foreign proceeding.<sup>18</sup> In fact, the language of section 101(23) anticipates that a qualified foreign proceeding might take place in the form of either a judicial or administrative proceeding, or even a proceeding outside the perimeter of a foreign country’s bankruptcy laws, as long as

---

14. 11 U.S.C. § 101(24) (2003).

15. See, e.g., *In re Board of Directors of Hopewell International Insurance Ltd.*, 238 B.R. 25, 53-54 (Bankr. S.D.N.Y. 1990) [hereinafter *In re Hopewell*].

16. See *In re Hopewell*, 238 B.R. at 53-54.

17. 11 U.S.C. § 101(23) (2003).

18. See *In re Koreag, Controle et Revision S.A.*, 130 B.R. 705, 711 (Bankr. S.D.N.Y. 1991) [hereinafter *In re Koreag I*] (“[a] foreign proceeding is one which is either judicial or administrative”).

the goal of the proceeding is to liquidate an estate, adjust debts or effect a reorganization.<sup>19</sup>

The breadth of the definition has prompted courts to include a wide variety of foreign-pending proceedings in the term “foreign proceeding” for the purpose of section 304.<sup>20</sup> For example, the court in *In re Netia* held that the arrangement applications of two debtors in a Polish proceeding was a “foreign proceeding” for the purposes of section 304—even though the applications had not yet been granted—because the Polish court had held hearings, examined witnesses, maintained the right to grant injunctions against the enforcement of claims, and provided the creditors a significant right to be heard.<sup>21</sup> Similarly, the court in *In re Hopewell* held that a foreign reinsurer's stand-alone scheme of arrangement under Bermuda law, although not consistent with any other statutory vehicle for debt adjustment, qualified as a foreign proceeding because the court substantially reviewed the arrangement, resolved classification disputes, approved schedules, allowed creditors to object to the proceedings, and oversaw the administration of the creditor-approved scheme.<sup>22</sup> The case law suggests that determining whether a procedure is judicial or administrative, or even under the foreign country's bankruptcy law, is less important to U.S. bankruptcy courts than determining the extent and scope of judicial involvement and degree of access to the courts afforded to creditors.<sup>23</sup>

---

19. *Id.*

20. *See, e.g., In re Netia*, 277 B.R. 571 (Bankr. S.D.N.Y. 2002); *In re Hopewell*, 238 B.R. at 50-51.

21. *In re Netia*, 277 B.R. at 581.

22. *In re Hopewell*, 238 B.R. at 50-51.

23. *See, e.g., In re Ward*, 201 B.R. 357, 361-62 (Bankr. S.D.N.Y. 1996) (discussing the importance of determining the extent and scope of judicial involvement in a foreign proceeding). In *Ward*, the court determined that a Zambian voluntary winding-up proceeding, which was neither a judicial nor administrative proceeding, could qualify as a foreign proceeding under section 304. *Id.* at 361. While admitting that a Zambian winding-up proceeding was not “strictly a judicial proceeding,” the court found that the Zambian proceeding was accompanied by court supervision, a right to appeal the actions of the liquidator and a substantial opportunity for creditors to be heard. *Id.* at 361-62. Thus, *Ward* dictates the minimum level of court intervention in a foreign process tolerated by U.S. courts in order to qualify as a foreign proceeding. *Id.* That is, judicial supervision and an opportunity for creditors to be heard. *Id.*

### 3. Foreign Debtor

In several early cases, bankruptcy courts concluded that to qualify as a foreign debtor for the purpose of filing a section 304 proceeding, the debtor in the foreign proceeding had to be a “debtor” within the meaning of section 101(13) of the Bankruptcy Code and had to satisfy the eligibility requirements of section 109(a).<sup>24</sup> The bankruptcy court in *In re Goerg* concluded that a bankruptcy trustee appointed under German law to administer the estate of a German decedent could not file a section 304 petition because the decedent’s estate did not qualify as a “person,” nor, therefore, as a “debtor,” under the section 109(a) definition contained in the Bankruptcy Code.<sup>25</sup>

On appeal, the Eleventh Circuit reversed the bankruptcy court’s decision in *In re Goerg*.<sup>26</sup> The Court of Appeals recognized the impracticality of restricting the term debtor to that contained in the Bankruptcy Code when dealing with foreign debtors.<sup>27</sup> The court turned to the definition employed by the law of the country in which the foreign proceeding was pending, arguing that this would further the purpose of section 304 of aiding in the administration of foreign proceedings.<sup>28</sup> Thus, to qualify for a section 304 proceeding, a foreign debtor is only required to be “properly subject, under applicable foreign law, to a proceeding commenced ‘for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.’”<sup>29</sup>

### 4. Venue

The final requirement for commencing a section 304 petition is the filing of the petition in the proper Bankruptcy Court in accordance with the venue requirements of 28 U.S.C. section 1410.<sup>30</sup> Section 1410 addresses three types of relief available

---

24. See, e.g., *In re Goerg*, 64 B.R. 321, 324 (Bankr. N.D. Ga. 1986), *rev’d*, 844 F.2d 1563 (11<sup>th</sup> Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989).

25. See *id.* at 325.

26. *In re Goerg*, 844 F.2d 1562 (11<sup>th</sup> Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989).

27. See *id.* at 1566-67.

28. *Id.* at 1568.

29. *Id.*

30. 28 U.S.C. § 1410.



under Bankruptcy Code section 304(b).<sup>31</sup> When the purpose of the filing is to enjoin the commencement or continuation of any action in a U.S. court, venue is proper only in the district court where the action sought to be enjoined is pending.<sup>32</sup> When the purpose of filing is to enjoin the enforcement of a lien against property, or to require turnover of property, venue is proper only in the district in which such property is found.<sup>33</sup> When the purpose of filing is neither to obtain injunctive relief nor the turnover of property, venue is proper only in the district in which the foreign debtor's principal place of business or principal assets in the United States are located.<sup>34</sup> Courts tend to apply the section 1410 venue rules liberally in order to advance section 304's goal of preserving a foreign debtor's U.S. assets and to avoid unnecessary and excessive litigation costs.<sup>35</sup>

---

31. 28 U.S.C. § 1410 provides:

(a) A case under § 304 of title 11 to enjoin the commencement or continuation of an action or proceeding in a State or Federal court, or the enforcement of a judgment, may be 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.

(b) A case under § 304 of title 11 to enjoin the enforcement of a lien against a property, or to require the turnover of property of an estate, may be commenced only in the district court for the district in which such property is found.

(c) A case under § 304 of title 11, other than a case specified in subsection (a) or (b) of this section, may be 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.

*Id.*

32. 28 U.S.C. § 1410(a).

33. 28 U.S.C. § 1410(b).

34. 28 U.S.C. § 1410(c).

35. See, e.g., *In re Hopewell*, 238 B.R. at 45; *In re Evans*, 177 B.R. 193, 196-97 (Bankr. S.D.N.Y. 1995). It is unclear from 28 U.S.C. § 1410 whether venue requirements under § 304 require the presence of assets in the United States. However, in *Haarhuis v. Kunnan Enterprises*, the court held that it did not. *Haarhuis v. Kunnan Enterprises, Ltd.*, 177 F.3d 1007, 1012 (D.C. Cir. 1999). At issue in *Haarhuis* was the filing of a section 304 petition by the reorganizers of a Taiwanese corporation to enjoin a breach of contract action pending against the foreign debtor in that district. The petition was filed under § 304(b)(1)(A)(i) and (b)(3). *Id.* at 1010. The plaintiff in the pending action argued that the bankruptcy court lacked jurisdiction under § 304 since the for-

*B. Relief Available Under § 304(b)*

Section 304(b) of the Bankruptcy Code allows the Bankruptcy Court to (i) enjoin any proceeding in the United States against a foreign debtor with respect to property involved in the foreign proceeding, or against such property; (ii) order the turnover of property of the foreign estate; or (iii) compel any other appropriate relief.<sup>36</sup> Although the Bankruptcy Court is guided only by the considerations set forth in section 304(c) and has the power to “broadly mold appropriate relief in a near blank check fashion,”<sup>37</sup> a section 304 proceeding is an ancillary proceeding and does not vest the foreign representative with any rights or remedies under U.S. law.<sup>38</sup> Instead, foreign representatives are limited to the relief provided by section 304(b), which is instituted to “assure an economical and expeditious administration of [the debtor’s] estate” in the United States.<sup>39</sup>

### 1. Injunctive Relief

The most commonly sought form of relief available to a foreign representative under section 304(b) is injunctive relief. Since filing a section 304 petition does not prompt the automatic stay provision of the Bankruptcy Code,<sup>40</sup> the Bankruptcy Court must issue an injunction to enjoin actions against a foreign debtor with respect to property involved in the foreign proceeding or the enforcement of any judgment against the foreign

---

eign debtor owned no assets in the United States. *Id.* The bankruptcy court studied § 304(b)(1)(A)(i), which provides for the enjoinder of an action against a debtor with respect to property involved in a foreign insolvency proceeding, and concluded that the section did not limit itself to property located in the United States, but rather included all property tied up in the foreign proceeding. *Id.* at 1012. The court then turned to § 304(b)(3), which applies to any other appropriate relief not addressed in the other sections of § 304(b), and determined the provision does not expressly require the presence of assets in the United States. *Id.* The court, therefore held that the presence of property in the United States was not a jurisdictional requirement of § 304 relief, and that since the plaintiff in the pending action was suing the debtor in the United States with respect to property tied up in an insolvency proceeding abroad, jurisdiction was proper. *Id.*

36. 11 U.S.C. § 304(b).

37. *See In re Culmer*, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982).

38. *See, e.g., In re A. Tarricone, Inc.*, 80 B.R. 21, 23 (Bankr. S.D.N.Y. 1987).

39. 11 U.S.C. § 304(c).

40. *See In re Goerg*, 844 F. 2d at 1568.

debtor, or its property.<sup>41</sup> There is no express language in section 304(b)(1) requiring a foreign representative to adhere to all the substantive or procedural requirements for injunctive relief under Rule 7065 of the Federal Rules of Bankruptcy Procedure, such as the requirement of imminent and irreparable harm.<sup>42</sup> This absence of such stricter requirements has enabled the U.S. Bankruptcy Court to liberally grant injunctive relief to foreign representatives in connection with the commencement of an ancillary proceeding under section 304.<sup>43</sup>

## 2. The Turnover of Property

Under section 304(b)(2), the Bankruptcy Court may order the turnover of a foreign debtor's property located in the United States to the foreign representative.<sup>44</sup> Turnover allows the foreign representative to expatriate the property to the foreign country and distribute it under the supervision of the foreign court. For this reason, the turnover of local property to the foreign representative appears to be the ultimate form of relief available under section 304(b).

Although section 304(b)(2) refers to the foreign debtor's "estate," the term "estate" may not be defined in the same manner under foreign law as it is under the Bankruptcy Code section 541.<sup>45</sup> Early case law held that the court must look to the law of

---

41. 11 U.S.C. § 304(b)(1). § 304(b)(1) provides the Bankruptcy court broad power to enjoin the commencement or continuation of:

(A) any action against

(i) a debtor with respect to property involved in such foreign proceeding; 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 proceeding to create or enforce a lien against the property of such estate.

*Id.*

42. See *In re Rukavina*, 227 B.R. 234, 242 (Bankr. S.D.N.Y. 1998).

43. See, e.g., *In re Bird*, 222 B.R. 229, 234 (Bankr. S.D.N.Y. 1998); *In re Culmer*, 25 B.R. at 621.

44. 11 U.S.C. § 304(b)(2).

45. See 11 U.S.C. § 541(a) (2003). 11 U.S.C. § 541(a) provides in pertinent part that "the commencement of a case under section 301, 302 or 303 of this

the jurisdiction in which a foreign proceeding is pending to determine whether assets located in the United States are property of the foreign estate and therefore eligible to be turned over to the foreign representative.<sup>46</sup> In *In re Culmer*, a bankruptcy court ordered the turnover of property under section 304 for the first time.<sup>47</sup> In *Culmer*, the foreign representative filed a petition under section 304 requesting the turnover of the foreign debtor's property to the Bahamas for administration in the Bahamian proceeding.<sup>48</sup> Many U.S. creditors opposed this request, stating that the interests of U.S. creditors should be determined under U.S. law in a U.S. court.<sup>49</sup> The bankruptcy court, how-

---

title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

- (1) [A]ll legal or equitable interests of the debtor in property as of the commencement of the case.
- (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case.
- (3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.
- (4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.
- (5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date -
  - (A) by bequest, device, or inheritance;
  - (B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or
  - (C) as beneficiary of a life insurance policy or of a death benefit plan.
- (6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.
- (7) Any interest in property that the estate acquires after the commencement of the case."

*Id.*

46. See, e.g., *In re Culmer*, 25 B.R. at 628.

47. *Id.* at 628.

48. *Id.* at 623.

49. *Id.* at 627.

ever, granted the turnover application, stating that deference must be given to foreign insolvency proceedings, which afford equal distribution of the available assets.<sup>50</sup>

In 1992, however, the Second Circuit made clear that before issuing a turnover of property under section 304, a court must determine whether the foreign debtor has a valid ownership interest in the property.<sup>51</sup> In *In re Koreag*, a Swiss debtor sought relief under section 304, requesting that the district bankruptcy court stay a creditor's action to obtain access to one of the Swiss debtor's New York bank accounts.<sup>52</sup> The debtor also sought an order directing a local bank to turn the debtor's account over to the foreign representative.<sup>53</sup> The bankruptcy court granted the foreign representative's motion and held that property involved in a foreign proceeding could be turned over to a foreign representative as long as the section 304 proceeding was filed properly.<sup>54</sup> The court further indicated that it would be the foreign court's responsibility to determine the fate of the disputed property.<sup>55</sup>

Focusing on the distinction between the language in section 304(b)(1) and (b)(2), the Court of Appeals vacated the bankruptcy court's order.<sup>56</sup> The Court of Appeals determined that, before permitting the turnover of property under section 304(b)(2), it must be concluded that the property in dispute is in fact property of the foreign estate where there is a challenge by an adverse claimant.<sup>57</sup> This conclusion, the court held, must be reached through the application of U.S. law.<sup>58</sup>

According to the holding in *Koreag*, a dispute over the ownership of property turns on both the law of the foreign jurisdiction that defines the scope of the estate created in the foreign proceeding and on the principles of local law mandated by the venue provisions of 28 U.S.C. section 1410(b).<sup>59</sup> Thus, "for the

---

50. *Id.* at 628.

51. *See In re Koreag*, Controle et Revision S.A., 961 F.2d 341, 349 (2d Cir. 1992), *cert. denied*, 506 U.S. 865 (1992) [hereinafter *In re Koreag II*].

52. *See In re Koreag I*, 130 B.R. at 709.

53. *Id.*

54. *Id.* at 711-12.

55. *Id.* at 716.

56. *In re Koreag II*, 961 F.2d at 350.

57. *Id.* at 350.

58. *Id.* at 351.

59. *See id.* at 348-49.

purpose of section 304, the estate of a foreign debtor is defined by the law of the jurisdiction in which the foreign proceeding is pending, with other applicable law,” namely that of the jurisdiction in which the property resides, which serves to define the estate’s interest in particular property.<sup>60</sup>

### 3. Other Appropriate Relief

In addition to injunctive and turnover remedies available under section 304(b)(1) and (b)(2), the Bankruptcy Court can issue “other appropriate relief” under section 304(b)(3).<sup>61</sup> The courts have read section 304(b)(3) expansively by broadly interpreting the scope of other relief available to a foreign representative.<sup>62</sup> For example, some forms of other appropriate relief have taken the form of requiring parties to submit to discovery demands made by foreign representatives,<sup>63</sup> appointing a co-trustee responsible for assets of the foreign estate that reside within the United States,<sup>64</sup> and issuing a confidentiality order to protect the identity of creditors.<sup>65</sup> When determining the availability of discovery as an appropriate form of relief, the court in *In re Hughes* noted that it is necessary to keep in mind Congress’ intention to aid foreign tribunals.<sup>66</sup> The considerable flexibility afforded to the courts in ordering other appropriate relief under section 304(b)(3) is indicative of Congress’ desire to provide a

---

60. 2 COLLIER ON BANKRUPTCY ¶ 304.06 at 304-23 – 304-24 (Lawrence P. King et al. eds., 2003).

61. 11 U.S.C. § 304(b)(3).

62. *See* 11 U.S.C. § 304(b)(3). Section 304(b)(3) has been used by the Bankruptcy Court to, among other things, order parties to submit to discovery by a foreign representative, appoint co-trustees with responsibility for a debtor’s assets in the U.S., and authorize a foreign representative to maintain foreign causes of action. *See* cases cited *infra* notes 63-65.

63. *See, e.g., In re Hughes*, 281 B.R. 224, 226 (Bankr. S.D.N.Y. 2002); *In re Brierly*, 145 B.R. at 169.

64. *In re Lineas Aereas de Nicaragua, S.A.*, 13 B.R. 779 (Bankr. S.D. Fla. 1981) (“[Section] 304(b)(3) which gives this court authority to ‘order other appropriate relief’ permits this court to appoint a co-trustee whose authority and responsibility does not extend beyond the debtor’s assets and affairs in this country”). *Id.* at 780.

65. *In re I.G. Servs. Ltd.*, 244 B.R. 377, 391 (Bankr. W.D. Tex. 2000).

66. *In re Hughes*, 281 B.R. at 230.

forum for maintaining litigation under the substantive laws of the jurisdiction in which the foreign proceeding is pending.<sup>67</sup>

*C. The Scope of § 304 Relief*

As demonstrated above, the Bankruptcy Court may utilize section 304 of the Bankruptcy Code to enjoin the commencement or continuation of any action against property of the debtor, to order the turnover of property in the U.S. to the jurisdiction in which the foreign proceeding is pending, and to order any other relief the Bankruptcy Court deems appropriate. However, the broad relief afforded by section 304 is subject to the discretion of the Bankruptcy Court.<sup>68</sup> In addition to striving for the economic and expeditious administration of the debtor's estate, the Bankruptcy Court must consider the six factors enumerated in section 304(c) in determining which relief, if any, it should grant under a foreign representative's section 304 petition:

- (1) the just treatment of all holders of claims against or interests in such estate;
- (2) the protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) the prevention of preferential or fraudulent dispositions of property of such estate;
- (4) the 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>69</sup>

Although the statute does not bestow greater weight to any one of the above six factors, as will be discussed in Part II *infra*, a number of courts have interpreted comity to supersede the re-

---

67. See, e.g., *In re A. Tarricone, Inc.*, 80 B.R. at 23.

68. See 11 U.S.C. § 304(c).

69. 11 U.S.C. § 304(c).

maining considerations when granting foreign representatives access to and relief under the United States Bankruptcy Code.<sup>70</sup>

## II. LACK OF CONCRETE GUIDANCE PROVIDED BY § 304

In the absence of formal treaties and international law to govern cases involving transnational insolvency, the United States needs a concrete provision that U.S. judges can follow when cases involving cross-border insolvencies arise. Unfortunately, section 304 fails to guide courts in administering assets of a foreign debtor in ancillary proceedings. Thus, it is not the answer to governing transnational insolvency. The absence of guidance in section 304 has contributed to inconsistent outcomes in individual cases.

On first impression, it seems that Congress intended section 304 to enable the U.S. Bankruptcy Court to broadly grant ancillary proceedings and relief under those proceedings to foreign debtors. Indeed, the mere existence of section 304 implicitly indicates that U.S. courts should grant deference to foreign insolvency proceedings.<sup>71</sup> Moreover, section 304 provides that the court should aid in the “economical and expeditious” administration of the foreign debtor’s assets. This language seems to indicate Congress’ preference to administer all assets in one rather than multiple proceedings, preferably that of the foreign jurisdiction.

Yet, courts have still demonstrated uncertainty in how they are supposed to approach foreign bankruptcy proceedings, as is shown by the split in case law surrounding the issue of whether or not they should grant a foreign representative relief under section 304. This uncertainty is related to the factors enumer-

---

70. See, e.g., *Maxwell Communication Corp. v. Societe Generale (In re Maxwell Communication Corp.)*, 93 F.3d 1036 (2d Cir. 1996); *Cunard Steamship Co. v. Salen Reefer Services*, 773 F.2d 452 (2d Cir. 1985) (granting comity to Swedish bankruptcy proceeding); *In re Rubin*, 160 B.R. 269 (Bankr. S.D.N.Y. 1993); *In re Brierley*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992) (granting comity to English bankruptcy proceeding); *In re Lines*, 81 B.R. 267, 273-74 (Bankr. S.D.N.Y. 1988); *Universal Casualty & Surety Co. Ltd. v. Gee (In re Gee)*, 53 B.R. 891 (Bankr. S.D.N.Y. 1985); *Angulo v. Kedzep, Ltd.*, 29 B.R. 417 (S.D. Tex. 1983); *In re Culmer*, 25 B.R. at 624 (granting comity to Bahamian proceeding).

71. See, e.g., *Interpool, Ltd. V. Certain Freights of the M/V S Venture Star*, 878 F. 2d 111, 112 (3d Cir 1989) (stating section 304 proceedings are designed to function in aid of a proceeding pending in a foreign court).



ated in section 304(c) with which the Bankruptcy Court must be in accordance when aiding in the “economical and expeditious” administration of the foreign debtor’s assets.<sup>72</sup> While three of the section 304(c) factors are in line with the implicit goal of granting deference to foreign insolvency proceedings,<sup>73</sup> two of the remaining factors favor the interest of U.S. creditors and the protections afforded to them under the Bankruptcy Code.<sup>74</sup> The existence of these two competing goals in subsection (c) of the provision is the principal reason for which courts have adopted diverging interpretations when determining whether to grant section 304 relief if at all. These diverging interpretations have created inconsistency in case law and exemplify the frustration and confusion created through the attempt to administer a foreign debtor’s assets under section 304.

This section of the Note will, first, reveal the statutory gaps and contradictory language of section 304. The Note will then examine how section 304 has been a source of frustration and confusion by analyzing divergent approaches the bankruptcy courts have taken in interpreting the language of section 304, and why it is unlikely that the bankruptcy courts will ever adopt a uniform interpretation of these factors under the existing Code.

*A. The Lack of Concrete Guidance in the Statutory Language of § 304*

The lack of concrete guidance provided by section 304 results from a discrepancy between Congressional intent and statutory language. While legislative history supports the interpretation that Congress intended for comity to be the guiding principle in the determination of whether to allow an ancillary proceeding and relief under that proceeding,<sup>75</sup> the language of section 304(c) suggests otherwise. Moreover, the mere existence of a provision allowing a foreign debtor’s assets to be channeled back to the

---

72. See 11 U.S.C. § 304(c).

73. See 11 U.S.C. § 304(c)(1), 11 U.S.C. § 304(c)(3) and 11 U.S.C. § 304(c)(5).

74. See 11 U.S.C. § 304(c)(2) and 11 U.S.C. § 304(c)(4). See also, Melissa S. Remel, *American Recognition of International Insolvency Proceedings: Deciphering Section 304(c)*, 9 Bankr. Dev. J. 453, 456 (1992).

75. H.R. REP. NO. 95-595, 95th Cong. 1st Sess. 324-325 (1977); S. REP. NO. 95-989, 95th Cong., 2d Sess. 35 (1978).

foreign jurisdiction and distributed according to foreign law suggests that deference to foreign proceedings is an important goal in the management of bankruptcy cases that reach across borders.

The legislative history of section 304 of the Bankruptcy Code suggests that Congress fully intended for deference to the proceedings of foreign jurisdiction to be the guiding factor in the management of a section 304 ancillary case.<sup>76</sup> The legislative history confirms that, in drafting the section 304(c) guidelines for determining whether to allow a foreign representative to commence an ancillary proceeding, Congress intended 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>77</sup> In addition, the statutory language of section 304 indicates that, in an ancillary proceeding, courts should be principally guided by what will “best assure an economical and expeditious administration of the estate.”<sup>78</sup> The economic and expeditious administration of an estate can be met through a sole proceeding, since a sole proceeding would cut the cost of filing, attorney’s fees, and redundant litigation. Therefore, Congressional language implies that a foreign debtor’s estate should be administered in the foreign proceeding alone.

However, if the question of whether Congress intended to provide comity as a guiding factor in the management of ancillary proceedings is left up to statutory construction, Congressional intent is not forthright. There is no affirmative Congressional intention clearly expressed in the language of section 304 placing the importance of comity over any of the other factors in section 304(c). While the provision does call for the “economical and expeditious administration of the estate,”<sup>79</sup> it further asks that this be done in accordance with the principles enumerated

---

76. *See In re Metzeler*, 78 B.R. 674, 676 (Bankr. S.D.N.Y. 1987) (discussing congressional intention behind enactment of § 304). Congress enacted § 304 to further the policy of extending comity to foreign bankruptcy proceedings. *Id.*

77. H.R. REP. NO. 95-595, at 324–25; S. REP. NO. 95-989, at 35.

78. 11 U.S.C. § 304(c).

79. 11 U.S.C. § 304(c).

in subsection (c). However, the factors listed in section 304(c) are not completely in accordance with one another. Therein lies the problem. Representing the “legal interests inherent in every multinational bankruptcy case,”<sup>80</sup> section 304(c) factors embody the balancing of both Congressional goals to defer to the foreign proceeding and the protection of U.S. creditors. Instead of discussing each goal in the language of section 304, Congress simply incorporated them both into section 304(c), stating only that the section 304(c) factors are “designed to give the court maximum flexibility in handling ancillary cases.”<sup>81</sup>

The factors listed in section 304(c) include: the just treatment of all holders of claims, the protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceedings, the prevention of preferential or fraudulent dispositions of property, the distribution of proceeds substantially in accordance with U.S. bankruptcy law, comity, and the provision for the debtor’s fresh start.<sup>82</sup> Upon weighing these factors, the Bankruptcy Court is supposed to determine whether to allow or deny the foreign representative section 304 relief. However, in doing so, courts are often presented with the problem of weighing two conflicting policy goals—international cooperation and protection of U.S. creditors. On one hand, section 304(c) asks the court to consider the just treatment of all claim holders, the prevention of preferential dispositions of property of the estate, and comity.<sup>83</sup> On the other hand, it requires the court to protect U.S. creditors from inconvenience, prejudice, and foreign law not in accordance with U.S. law.<sup>84</sup> While the former reflects U.S. acknowledgement of the laws of foreign jurisdictions, the latter reflects U.S. interest in protecting its own citizens and the protections afforded them under the Bankruptcy Code. Therefore, the result of balancing the six factors will largely be motivated by which of the dual goals—deferring to foreign jurisdictions or protecting U.S. creditors—the court thinks is more important.

---

80. 2 COLLIER ON BANKRUPTCY ¶ 304.08 at 304-28 (Lawrence P. King et al. eds., 2003).

81. H.R. REP. NO. 95-595, at 324-25; S. REP. NO. 95-989, at 35.

82. 11 U.S.C. § 304(c).

83. See 11 U.S.C. §§ 304(c)(1), (c)(3), (c)(5).

84. See 11 U.S.C. §§ 304(c)(2), (c)(4).

Since Congress did not make any individual 304(c) factor dispositive, nor did it prioritize any one factor over the others, the statutory language of section 304 does not represent Congressional intent, as discussed above, to provide comity as the guiding principle in determining whether to grant a foreign representative section 304 relief. Therefore, it had largely been left to the courts to grant or withhold relief based on an examination of the competing interests listed in section 304(c).

*B. A Split in Case Law: The Application of § 304(c) by U.S. Courts*

The courts, in grappling with Congress' lack of instruction concerning the interpretation of the section 304(c) factors, have been decidedly inconsistent in their analysis. Such inconsistency supports the conclusion that Congressional intent is not as clear as it should be in guiding the management of international insolvencies. The inconsistency is embodied by two divergent approaches in determining whether to grant a foreign representative relief under section 304. Specifically, some courts are willing to emphasize "universalism" when interpreting section 304, while others emphasize the polar opposite, "territorialism." The two paradigms have contrary results, and as a result, case law is widely inconsistent.

Under the universalist model, courts have been largely willing to grant deference to the foreign jurisprudence in order to ensure that the assets of the estate are administered in accordance with the substantive laws of the debtor's "home" country.<sup>85</sup> Thus, courts that adhere to universalism are likely to follow comity as the guiding principle in section 304(c), defining comity as:

"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 citi-

---

85. See Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 461 (1991) [hereinafter Westbrook, *Theory and Pragmatism*].

zens or of other persons who are under the protection of its laws.<sup>86</sup>

Although the application of comity requires analyzing the interests of local parties, the reliance on comity as the guiding section 304(c) factor generally results in deference to the foreign insolvency proceeding. As noted in *In re Culmer*, the "analysis of [comity] has traditionally favored its regular application unless egregiously unjust consequences would flow from its implementation."<sup>87</sup> Therefore, the use of comity by courts following universalism will generally result in deferring to the laws of the foreign jurisdiction unless egregiously unjust consequences would result. As a result of the deference, the debtor's assets would be distributed in accordance with the law in which the foreign proceeding takes place. Proponents of universalism contend that the approach more efficiently allocates capital worldwide, eliminates the desire to forum shop, reduces the number of proceedings and therefore administrative costs, and most importantly, provides certainty of law for interested parties.<sup>88</sup> Alternatively, critics of universalism argue that the approach forces nations to overlook their own substantive law, thereby stripping local citizens of certain historical protections afforded them.<sup>89</sup> Additionally, critics argue, conflicting priority rules subject foreign creditors to disparate substantive law that results in discriminatory treatment.<sup>90</sup>

Territorialism advocates the idea that "courts in each national jurisdiction [can] seize the property physically within their control and distribute it according to local rules."<sup>91</sup> Under this approach, courts have advanced the claims of national creditors by protecting the supremacy of local procedures and

---

86. *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S. Ct. 139, 143 (1895).

87. *In re Culmer*, 25 B.R. at 633.

88. See Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2179 (2000).

89. See Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 709-713 (1999) [hereinafter LoPucki, *Cooperation in International Bankruptcy*].

90. See Daniel M. Glosband & Christopher T. Katucki, *Claims and Priorities in Ancillary Proceedings Under Section 304*, 17 BROOK. J. INT'L L. 477, 481 (1991) (asserting that "territoriality ... sacrifices international cooperation").

91. Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 513 (1991) [hereinafter Westbrook, *Choice of Law*].

protections in the distribution of local assets. Courts that adhere to territorialism are likely to administer a local reorganization or liquidation proceeding according to local bankruptcy laws.<sup>92</sup> Critics of the territorialist approach contend that the approach promotes protectionism and the preferential treatment of certain creditors over others, depending on the location of the debtor's assets.<sup>93</sup> Moreover, they argue, territorialism "sacrifices international cooperation,"<sup>94</sup> which results in a diminished estate through duplicative proceedings and administrative expenses.

Although conflicting approaches to the administration of assets involved in foreign insolvency proceedings are generally defined within the framework described above, universalism and territorialism are merely two opposite extremes of a single spectrum. U.S. bankruptcy courts, while not favoring one extreme over the other, have generally leaned toward universalism.<sup>95</sup> In the past decade, the Bankruptcy Court's position on the universalism-territorialism continuum has been referred to as "modified universalism."<sup>96</sup> Under modified universalism, the Bankruptcy Court has generally accepted the governing principle of universalism—that assets should be amassed and distributed worldwide by a "home-country" court—but has reserved discretion in determining the fairness of the foreign country's proceedings and the extent to which U.S. creditors are protected.<sup>97</sup> Therefore, while the Bankruptcy Court will deny section 304 relief when that relief would substantially prejudice a U.S. creditor, U.S. courts will generally cooperate with and aid in the expeditious administration of a foreign insolvency proceeding when the foreign debtor retains certain assets within the United States.

---

92. See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 89, at 701.

93. See Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 *Am. Bankr. L.J.* 135, 138 (1992) [hereinafter Booth, *Recognition of Foreign Bankruptcies*].

94. See Daniel M. Glosband & Christopher T. Katucki, *Claims and Priorities in Ancillary Proceedings Under Section 304*, 17 *Brook. J. Int'l L.* 477, 481 (1991).

95. See cases cited *supra* note 70.

96. *In re Maxwell*, 170 B.R. at 816.

97. *Id.*

The landmark case illustrating the Bankruptcy Court's willingness to adopt a universality-oriented, pro-recognition approach is *In re Culmer*.<sup>98</sup> In that case, a Bahamian debtor commenced a liquidation proceeding in Bahamian court. The foreign debtor then petitioned the U.S. Bankruptcy Court under section 304, requesting that its assets located in the United States be turned over to the insolvency proceeding in the Bahamas. The court, noting that Congress intended that courts have "maximum flexibility" in handling ancillary cases, ultimately granted the relief through setting up a presumption of comity. The presumption of comity resulted from the court's decision to extend comity to a foreign proceeding unless it would be "wicked, immoral or [in] violat[ion of] American law and public policy" to do so.<sup>99</sup> Furthermore, the court noted that the extension of comity generally results in deference to the foreign insolvency proceeding "unless egregiously unjust consequences would flow from its implementation."<sup>100</sup>

After examining the provision of Bahamian law, the court determined that the foreign proceeding would not favor national creditors over U.S. creditors, nor was the Bahamian law in violation of the Bankruptcy Code. Instead, the court stressed that the Bahamas was a "sister common law jurisdiction," which required protection of fairness and due process.<sup>101</sup> Moreover, the court decided that deferring to the foreign proceeding would best ensure the "economical and expeditious administration" of the foreign estate based on the location of the debtor's records, employees, and liquidation staff. Therefore, the Bahamian court could best deal with the debtor's creditors. Finally, the court stated that there was no real compelling U.S. public policy in the matter before it. Thus, the *Culmer* court found that, in the presence of comprehensive procedures for the economical and expeditious distribution of the debtor's assets and the omission of substantial discord with the Bankruptcy Code, extending comity was not only appropriate, but presumed.

---

98. *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982).

99. *Id.* at 629.

100. *Id.* at 633.

101. *Id.* at 631 (holding that Bahamian law required supervision of the liquidators, limited creditors' claims in liquidation, avoided fraudulent conveyances and the preference of domestic over foreign claims, and allowed the right to appeal).

A similar result occurred in *Cunard Steamship Company Limited v. Salen Reefer Services AB*.<sup>102</sup> In *Cunard*, a Swedish debtor commenced a bankruptcy proceeding in Sweden. A creditor had obtained an attachment on the foreign debtor's assets within the United States.<sup>103</sup> The debtor moved to vacate the attachment in deference to the Swedish bankruptcy proceeding and the court, relying on the principle of comity, complied. In doing so, the court followed the same line of reasoning as did the *Culmer* court, noting that, "The 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>104</sup>

In *In re Gee*, the court not only used comity to justify granting relief to the foreign debtor, but overemphasized the element to the point of excluding the other section 304(c) factors.<sup>105</sup> In *Gee*, a Cayman debtor, who had commenced a bankruptcy proceeding in the Cayman Islands, filed a section 304 petition, seeking discovery against parties in New York, and an injunction against disposing the debtor's assets, books, and records located in the Southern District of New York. In granting relief to the foreign debtor, the court proclaimed that "although comity is only one of six factors to be considered in determining whether to grant relief, it often will be the most significant."<sup>106</sup> Although the court briefly looked at the other section 304(c) elements, it was obvious that the court believed "comity will be granted to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated."<sup>107</sup> The *Gee* court further emphasized the central role of comity when it stated, "Particularly where the foreign proceeding is in a sister common law jurisdic-

---

102. See *Cunard Steamship Co. v. Salen Reefer Services*, 773 F.2d 452 (2d Cir. 1985).

103. Interestingly, this was not a U.S. creditor, but a British one, a fact that did not influence the court's final decision. See *Cunard Steamship Co. v. Salen Reeder Services*, 49 B.R. 614, 617 (S.D.N.Y. 1985).

104. See *Cunard Steamship Co.*, 773 F.2d at 458.

105. *In re Gee*, 53 B.R. 891 (Bankr. S.D.N.Y. 1985).

106. *Id.* at 901.

107. *Id.* (citing *Cunard*, 773 F.2d at 457).



tion with procedures akin to our own, exceptions to the doctrine of comity are narrowly construed.”<sup>108</sup>

The courts in *Culmer*, *Cunard*, and *Gee* all emphasized comity over the other factors enumerated by Congress in section 304(c). The trend to emphasize comity as “much more than a discrete element or factor to be considered as part of a larger analysis” and as “a pervasive principle of international law”<sup>109</sup> can be attributed to the widely held belief that “the foreign court presiding over the original proceeding is in a better position to decide when and where claims should be resolved in a manner calculated to conserve resources and maximize assets.”<sup>110</sup> In addition, many courts believe that the other five factors enumerated in section 304(c) are merely present to ensure that comity be granted in appropriate cases. The court in *Koreag*, for example, held that comity is the preeminent factor in determining whether to grant section 304 relief since the other factors “are inherently taken into account when considering comity.”<sup>111</sup>

In *Koreag*, a Swiss foreign debtor was placed into involuntary liquidation under the guidance of a Swiss court. The foreign debtor filed a section 304 petition, requesting the turnover of the debtor’s funds located in New York bank accounts. The Bankruptcy Court granted the requested relief, following several prior cases that trumped comity as the most important section 304(c) factor and rejecting other cases that afforded equal weight to all section 304(c) factors. The *Koreag* court asserted that the orderly distribution of the debtor’s estate could best be served by granting recognition to the foreign proceeding, and only withholding that recognition when the law of the foreign jurisdiction is “vicious, wicked or immoral, and shocking to the prevailing moral sense.”<sup>112</sup> The court concluded that comity should be granted to the proceedings in Switzerland since the “laws of Switzerland are not repugnant and violative of our fundamental notions of fairness.”<sup>113</sup>

---

108. *See id.* at 901 (citing *Clarkson Co.*, 544 F.2d at 630).

109. *In re Hopewell*, 238 B.R. at 66 (citing *Hilton*, 159 U.S. at 163-64).

110. *In re MMG LLC*, 256 B.R. 544, 549 (Bankr. S.D.N.Y. 2000).

111. *In re Koreag I*, 130 B.R. at 712.

112. *Id.* at 713 (citing *Intercontinental Hotels Corp.*, 15 N.Y. 2d 9, 13 (1964)).

113. *Id.* at 716.

The trend towards granting deference to the laws of a foreign jurisdiction, and thus towards universalism, does not, however, mean that courts will always blindly extend comity. A minority of bankruptcy cases give individualized consideration to the section 304(c) factors<sup>114</sup> and recognize the necessity of “reserving to local courts discretion to evaluate the fairness of [foreign] country procedures and to protect the interests of local creditors.”<sup>115</sup> For example, the court in *In re Treco*<sup>116</sup> recognized the importance of cooperating with foreign jurisdictions in cases of international insolvency and said that it expected, in many or most cases, the “analysis required by section 304 will ... support the granting of the requested relief.”<sup>117</sup> Nonetheless, the court recognized that it had a duty to examine the remaining five factors of section 304(c) and that “comity does not...automatically override the other specified factors.”<sup>118</sup>

In *In re Treco*, a Bahamian debtor sought, under section 304(b)(2) of the Bankruptcy Code, the turnover of certain bank accounts, which were held in the United States by a secured U.S. creditor. In support of its application, the foreign debtor argued that comity had always and should now be given greater weight than the other section 304(c) factors. The U.S. creditor, in support of its refusal to turnover the funds, argued that it had a security interest in the funds pursuant to a security agreement. Moreover, the U.S. creditor argued, there was a great disparity between the laws of the two jurisdictions, particularly those dealing with secured creditor’s claims, and the disparity would generate insurmountable injustice to U.S. creditor.

The Bankruptcy Court relied on the theory of universalism and insisted that the principle of comity required the court to grant the foreign debtor’s petition.<sup>119</sup> In doing so, the court held

---

114. See, e.g., *In re Hourani*, 180 B.R. 58 (Bankr. S.D.N.Y. 1995); *In re Banco Nacional de Obras y Servicios Publicos, S.N.C.*, 91 B.R. 661 (Bankr. S.D.N.Y. 1988); *In re Papeleras Reunidas, S.A.*, 92 B.R. 584, 591-95 (Bankr. E.D.N.Y. 1988); *In re Toga Mfg., Ltd.*, 28 B.R. 165 (Bankr. E.D. Mich. 1983); *In re Lineas Aereas de Nicaragua, S.A.*, 10 B.R. 790 (Bankr. S.D. Fla. 1981).

115. *In re Maxwell*, 170 B.R. at 816.

116. See *In re Treco*, 240 F.3d 148 (2d Cir. 2001) [hereinafter *In re Treco II*].

117. *Id.* at 161.

118. *Id.* at 156.

119. See *In re Treco*, 229 B.R. 280 (Bankr. S.D.N.Y. 1999) [hereinafter *In re Treco I*].

that the turnover of assets subject to security interests was appropriate because it would not deprive the creditor the benefit of the security interest.<sup>120</sup> On appeal, the Second Circuit determined that comity is not the most important factor under section 304(c), reasoning that if Congress had intended to give comity more weight, it would have been addressed in the preamble along with the terms “economical and expeditious,” and not as a separate factor.<sup>121</sup> Instead of relying on comity to guide its decision, the Second Circuit stressed the importance of comparing the U.S. and Bahamian schemes. The court, paying particular attention to section 304(c)(4),<sup>122</sup> considered the “effect of the difference in law on the creditor.”<sup>123</sup> It determined that an inequity existed in the discrepancy between the priority schemes of the two laws: namely, under Bahamian law, the secured creditor was unlikely to receive any distribution on account of its claims after the payment of administrative claims, taxes, and pre-petition wages in the Bahamian proceeding.<sup>124</sup> Thus, the court determined that the Bahamian scheme was not “substantially in accordance” with the priority prescribed in section 304 of the Bankruptcy Code, which affords special protection to secured creditors.<sup>125</sup> Therefore, the Second Circuit determined that comity would not be extended in this case, and the turnover was precluded.<sup>126</sup>

---

120. *Id.* at 291-92.

121. *See In re Treco II*, 240 F.3d at 157.

122. *See* 11. U.S.C. § 304(c)(4). Section 304(c)(4) provides that the extent to which the distribution of the proceeds of the foreign estate is in accordance with the Bankruptcy Code should be considered in determining what relief, if any, should be granted to a foreign representative. *Id.*

123. *In re Treco II*, 240 F.3d at 159.

124. *Id.* at 155.

125. *Id.* at 159.

126. *Id.* In addition to cases where granting relief in the form of injunction or the turnover of property would result in the unjust treatment of or prejudice to American Creditors, the Bankruptcy Court has denied section 304 relief where litigation concerning the debtor's property is allowed to proceed outside the boundaries of the foreign proceeding. *See, e.g., In re Smouha*, 136 B.R. 921 (S.D.N.Y.), *appeal dismissed*, 979 F.2d 845 (2d Cir. 1992); *Internal Revenue Service v. Ernst & Young, Inc.*, 135 B.R. 521 (S.D. Ohio 1991). One example is when government interests are involved. The justification behind this is that the doctrine of sovereignty prevails over comity and, therefore, the court must be more guarded when enjoining the federal government from taking action against a foreign debtor's property or issuing an injunction

The court in *In re Compania General de Combustibles*<sup>127</sup> analyzed the holding in *Treco*. In *Combustibles*, an Argentinean debtor filed a section 304 petition, requesting the turnover of funds located within the United States. The U.S. creditors objected to this request, stating that under Argentinean law they would be subject to a stay, whereas under U.S. law they would not. Before reaching a decision, the *Combustibles* court analyzed *Treco* under three interpretations.<sup>128</sup> Under the first interpretation, the decision in *Treco* could mean that a divergence in the treatment of creditors under foreign and U.S. law would require the Bankruptcy Court to deny the turnover of property. The *Combustibles* court declined to follow this interpretation since it would undermine the purpose of section 304 and was contrary to many other decisions involving the provision.<sup>129</sup> Under a second interpretation of *Treco*, the decision could warrant a rejection of the turnover of property when, under foreign law, secured creditors are not afforded the same special protections as afforded to them under the Bankruptcy Code. The court rejected this interpretation as well, stating that section 304 nowhere indicates that secured creditors are exempt from the operation of section 304.<sup>130</sup> Under the *Combustibles* court's final interpretation, "*Treco* requires denial of section 304 relief where the court finds clear evidence of maladministration or corruption."<sup>131</sup> In adopting this approach, the *Combustibles* court approved the foreign debtor's request to turn over its assets located in the United States and required the U.S. creditors to submit to the jurisdiction of the court in Argentina.<sup>132</sup>

---

against the IRS's collection efforts. See *In re Smouha*, 136 B.R. at 926. Another example is when public policy is so strong that it outweighs the principle of comity. See, e.g., *In re Banco Nacional de Obras y Servicios Publicos*, 91 B.R. 661 (Bankr. S.D.N.Y. 1988). In one such instance, a bankruptcy court found that the public policy behind allowing a union to continue a declaratory judgment action in federal court far outweighed the objections of the foreign representative and the general preference of deferring cases to the foreign tribunal. See *id.* at 668.

127. *In re* Petition of Board of Directors of Compania General de Combustibles S.A., 269 B.R. 104 (Bankr. S.D.N.Y. 2001).

128. See *id.* at 111.

129. See *id.*

130. See *id.*

131. *Id.*

132. See *id.* at 114.

While *Treco* and *Combustibles* represent cases where the Bankruptcy Court refused to give comity a paramount role over the other section 304(c) factors and have instead purported to weigh all of section 304(c) equally in their determination, other courts have allowed factors other than comity to dominate their determination of granting relief. In *In re Lineas*, a Nicaraguan debtor filed a section 304 petition, requesting the turnover of its assets located within the United States.<sup>133</sup> The court granted the requested relief, but on the condition that the foreign representative apply the assets to the claims of the foreign debtor's U.S. creditors.<sup>134</sup> In coming to its decision, the only section 304(c) factor that the Bankruptcy Court looked at was section 304(c)(2), that is, protecting the claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceedings.<sup>135</sup> In doing so, the court effectively protected the interest of U.S. creditors at the expense of other section 304(c) factors, namely, equally distributing the debtor's assets to all creditors and preventing preferential dispositions of property of the estate.<sup>136</sup>

Based on the foregoing discussion of the split in case law, it is clear that section 304 does not lend itself to ready comprehension. Instead, the provision is open to broad interpretation by the courts. Since this interpretation can be swayed by an adherence to a particular theoretical approach, namely, universalism, territorialism, or something in between, the application of section 304 can be somewhat unpredictable. The unpredictability in the current application of section 304 presents an intractable weakness in the current legal framework, since each proceeding under section 304 will invite a courtroom battle and unnecessary litigation.<sup>137</sup> In order to remedy this, Congress needs to provide the Bankruptcy Court concrete guidelines to follow when determining whether to grant relief to foreign debtors and what role comity should play in this determination.

---

133. *In re Lineas Aereas de Nicaragua, S.A.*, 10 B.R. at 791.

134. *See id.*

135. *See* 11 U.S.C. § 304(c)(2).

136. *See* 11 U.S.C. § 304(c)(3).

137. *See* Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329, 342 (1993).

## III. THE PROPOSED CHAPTER 15: A SOLUTION?

As described above, the Bankruptcy Code leaves many questions unanswered with respect to cross-border insolvencies. Specifically, when a foreign corporation with assets in the United States becomes insolvent, section 304 of the Code is silent as to how those assets should be distributed. The confusion and uncertainty resulting from the Code's silence ultimately creates a lack of predictability, which hampers the efficient administration of cross-border insolvencies, impedes capital flow and discourages cross-border investment. Ultimately, in the absence of more concrete guidelines from Congress, the existence of section 304 alone renders the United States ill equipped to adequately handle international insolvency issues.

The need to improve international bankruptcy systems, however, is not a novel idea. Protocols and international treaties have been adopted as measures to improve the system of international insolvencies. Yet, some commentators contend that the only way to affect an improvement in the international insolvency system is to first act on a national level.<sup>138</sup> One critic has said:

[E]fforts to harmonize the operation of conflicting insolvency systems by treaties have not been notably successful. It remains, then, for individual nations, motivated by the desire to promote international co-operation and to avoid wasteful duplication of effort, to establish unilateral procedures for the recognition of rights arising under foreign bankruptcy statutes.<sup>139</sup>

A recent effort to improve international insolvency systems has done just that.

In response to the lack of a consistent international body of law governing international insolvencies and the recent spike in bankruptcy proceedings that cross national borders, the United Nations Commission on International Trade Law (UNCITRAL) has proposed a Model Law on Cross-Border Insolvencies (Model Law). Unlike a treaty or convention, the Model Law does not mandate a change in the substantive rules in any country's

---

138. See Douglass G. Boshkoff, *United States Judicial Assistance in Cross-Border Insolvencies*, 36 INT'L & COMP. L.Q. 729, 745-47 (1987) (on file with author).

139. See *id.* at 729.

bankruptcy law. Instead, it has been offered as a model for participating countries to enact, with the hope that its adoption will set into motion cooperation among countries in regards to multinational bankruptcies.

In general, the Model Law, which imparts procedures meant to surmount the great disparity between international business and national insolvency regimes, has been considered the best prospect for international cooperation in respect to ancillary proceedings.<sup>140</sup> The objective of the Model Law is to provide countries with an internal legal regime for the effective, equitable, and efficient treatment of international insolvencies. Under the Model Law, the country that is the center of an insolvent company's main interest or is its principal place of business would be the home of the central, or "main" proceeding.<sup>141</sup> Upon judicial recognition of a main proceeding, a stay goes into effect, which applied to foreign and domestic creditors equally.

As part of the Bankruptcy Reform Act of 2001,<sup>142</sup> Congress has proposed Chapter 15<sup>143</sup> as an addition to the Bankruptcy Code in an effort to incorporate the Model Law into the current bankruptcy legislation. Chapter 15 would substitute section 304 and would govern the initiation and conduct of ancillary proceedings in the United States.<sup>144</sup> Chapter 15, although modeled on section 304, presents certain clarifications absent under

---

140. U.N. Comm'n on Int'l Trade Law, Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Sales No. E.99.V.3 (1999) [hereinafter *Model Law*], at [http://www.iiiglobal.org/organizations/uncitral/model\\_law.pdf](http://www.iiiglobal.org/organizations/uncitral/model_law.pdf); U.N. TDBOR Comm'n on Int'l Trade Law, 30th Sess., U.N. Doc. A/CN.9/442 (1997) [hereinafter *Guide*], at [http://www.iiiglobal.org/organizations/uncitral/model\\_law.pdf](http://www.iiiglobal.org/organizations/uncitral/model_law.pdf).

141. *Id.* "The foreign proceeding shall be recognized: (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests". *Model Law*, art. 17.

142. Bankruptcy Reform Act of 2001, H.R. 333, 107th Cong. § 801(a) (2001), at <http://thomas.loc.gov>; S. 420, 107th Cong. § 801(a) (2001), at <http://thomas.loc.gov>. As of the date of this Note, this legislation has not been adopted.

143. Bankruptcy Reform Act of 2001, H.R. 333, 107th Cong., § § 1501-1532 (2001).

144. *See id.* § 1501(b)(1). This provision would also govern relief sought in a foreign jurisdiction in connection with a bankruptcy proceeding under the Code, in parallel proceedings, and in cases commenced or joined by foreign creditors under the Code. *See id.* §§ 1501(b)(2), (b)(3), (b)(4).

the current Code that could seemingly impact the way in which ancillary proceedings are administered.

Through its incorporation of the UNCITRAL Model Law, Chapter 15 purports to have a more efficient system,<sup>145</sup> yet it is not clear that its adoption will resolve the uncertainty and confusion that exists under the current Bankruptcy Code. While the proposed Chapter provides the authority for a court to recognize and provide assistance to a foreign insolvency proceeding, it also establishes certain requirements that must be met before recognition can be granted and the extent of assistance can be determined. Accordingly, Chapter 15 suffers a measure of unpredictability similar to that which exists under section 304. This raises the question: to what extent will Chapter 15 clear up the confusion as it currently exists under section 304?

#### *A. The Recognition of Foreign Proceedings and Public Policy Considerations*

As stated above, Chapter 15 provides for the commencement and conduct of an ancillary proceeding. Section 1504 provides that an ancillary case can be commenced by filing a petition of recognition of a foreign proceeding.<sup>146</sup> Section 1515 provides the

---

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

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

*Model Law, supra* note 140, at 2.

146. See H.R. 333, § 1504. The term "foreign proceeding" is defined as "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of a 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." H.R. 333, 107th Cong., § 802(b) (2001) (amending 11 U.S.C. §



specific requirements for filing a petition of recognition, including a certified copy of the decision commencing the foreign proceeding, certification from the foreign court affirming the existence of the foreign proceeding, and the appointment of a foreign representative.<sup>147</sup> In light of the legislative intent “to make recognition as simple and expedient as possible,”<sup>148</sup> section 1516(a) provides that the court can presume that the requirements for recognition are met if the filing documents indicate that the proceeding is a foreign proceeding and that the representative is a foreign representative.<sup>149</sup> In addition, section 1517(a) makes recognition of a foreign proceeding mandatory if a foreign representative is present as defined by the proposed language and the filing requirements are met.<sup>150</sup> Section 1517(a) mandates a withdrawal from the section 304 requirement for judicial analysis over whether to recognize a foreign proceeding since the decision to grant recognition under Chapter 15 “is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c).”<sup>151</sup> Therefore, under Chapter 15, all that is required to grant recognition to a foreign proceeding is the performance of the above requirements.

At first glance, this seems to be a significant departure from the approach taken under section 304 of the Bankruptcy Code. Whereas the Bankruptcy Court could use its discretion to affect a dismissal of a section 304 petition, even if the proceeding qualified as a foreign proceeding, the Court does not seem to have the same authority to deny recognition to a foreign proceeding under Chapter 15. However, the section 1517(a) limits placed on the Bankruptcy Court to deny recognition to a foreign proceeding are qualified by section 1506. Section 1506 declares

---

101(23)). Chapter 15 further defines a “foreign main proceeding” as “a foreign proceeding taking place in the country where the debtor has the center of its main interest.” *See* H.R. 333, § 1504.

147. *See* H.R. 333, § 1515(b).

148. H.R. REP. NO. 107-3, pt. 1, at 83 (2001).

149. *See* H.R. 333, § 1516(a). Under Chapter 15, a foreign representative is defined as “a person or body...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 the foreign proceeding.” H.R. 333, § 802(b) (amending 11 U.S.C. § 101(24)).

150. *See* H.R. 333, § 1517(a).

151. H.R. REP. NO. 107-3, pt. 1, at 83.

“[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.”<sup>152</sup> Therefore, due to the allowance of policy considerations, the Bankruptcy Court will have at least a certain amount of discretion when determining whether to recognize a foreign proceeding under Chapter 15.<sup>153</sup> This is especially true since Chapter 15 does nothing to define American public policy. Thus, courts are given broad discretion in determining what constitutes important U.S. public policy. If the recognition of a foreign proceeding would be contrary to whatever a specific court deems to be U.S. public policy, that court could use its discretion to deny recognition of the proceeding and thereby deny the relief that accompanies it. The disadvantage here is that courts could manufacture public policy to achieve territorialist ends, thus bypassing Chapter 15’s attempt to universally recognize and respect foreign law.

### *B. Relief and the Inclusion of § 304(c) Factors*

Another provision exists in the proposed Chapter 15 that seems to alter the conduct and outcome of ancillary proceedings in the United States. Section 1520(a) of Chapter 15 provides that, upon entering an order recognizing a foreign proceeding, sections 361<sup>154</sup> and 362<sup>155</sup> of the Code will automatically go into

---

152. See H.R. 333, § 1506.

153. See *generally id.* However, the House Report notes that “public policy” is to be narrowly read and that the “word ‘manifestly’ in international usage restricts the public policy exception to the most fundamental policies of the United States.” H.R. REP. NO. 107-3, pt. 1, at 79.

154. See 11 U.S.C. § 361. 11 U.S.C. § 361 provides that when adequate protection is required under §§ 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by:

- (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
- (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

effect with respect to the foreign debtor's property located within the United States and sections 363,<sup>156</sup> 549,<sup>157</sup> and 552<sup>158</sup> of

---

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

*Id.*

155. *See* 11 U.S.C. § 362(a). 11 U.S.C. § 362(a) provides for an automatic stay against:

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

*Id.*

156. *See* 11 U.S.C. § 363 (11 U.S.C. § 363 provides for the use, sale, or lease of property by the trustee).

157. *See* 11 U.S.C. § 549 (11 U.S.C. § 549 provides for the avoidance by the trustee of postpetition transactions).

158. *See* 11 U.S.C. § 552. 11 U.S.C. § 552 provides:

(a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

the Code will automatically go into affect with respect to the transfer of the foreign debtor's property located in the United States.<sup>159</sup> That is, once the foreign proceeding is recognized, which is virtually automatic upon proper filing, the foreign representative is entitled to certain relief including, among other things, a stay against the commencement or continuation of all actions against the foreign debtor and the debtor's property located in the United States, the right to operate the debtor's business in the United States, and the right to sell and lease property in the same manner as a trustee in the United

---

(b)

(1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

(2) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, and notwithstanding section 546(b) of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to amounts paid as rents of such property or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties, then such security interest extends to such rents and such fees, charges, accounts, or other payments acquired by the estate after the commencement of the case to the extent provided in such security agreement, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

*Id.*

159. See H.R. 333, §§ 1520(a)(1), (2). Section 1520(a) states that these sections should be applied to the foreign debtor's property to the same extent that they would apply to property of an estate under the Bankruptcy Code. See H.R. 333, § 1520(a).

States.<sup>160</sup> Therefore, section 1520 represents a great departure from the scheme of relief under section 304 since it provides for automatic relief in place of judicial discretion, even though the factors of section 304(c) might not be satisfied.

At first glance, the proposed Chapter 15 seems to eliminate the need for bankruptcy courts to weigh the section 304(c) factors. This is true in terms of the relief provided in sections 361, 362, 363, 549, and 552 that automatically go into effect upon the recognition of the foreign proceeding. However, in order to receive “any additional relief that may be available to a [U.S.] trustee” the foreign representative must satisfy the section 304(c) factors.<sup>161</sup> The proposed section 1507 provides that “additional assistance” may be granted if, “consistent with the principles of comity,” such assistance will also be consistent with the first four factors of section 304.<sup>162</sup> Therefore, although Chapter 15 would replace section 304 if enacted, the 304(c) factors will still be necessary to determine whether “additional assistance” will be granted.

---

160. See H.R. 333, § 1520.

161. See H.R. 333, § 1507.

162. See *id.* H.R. 333, § 1507 provides:

(a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.

(b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure

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

*Id.*

Since the proposed chapter restricts the application of section 304(c) factors to determining the availability of “additional assistance,” Chapter 15, seemingly, will not generate as much confusion as does section 304, which requires the Bankruptcy Court to balance the section 304(c) factors before providing *any* relief to a foreign representative. However, under Chapter 15, the denial of relief based on extrinsic factors is not limited to “any additional assistance.” For example, the turnover of property addressed by section 304(b)(2) of the Bankruptcy Code remains a discretionary process under Chapter 15. Section 1521(b) provides that:

Upon recognition of a foreign proceeding...the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor’s assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of the creditors of the United States are sufficiently protected.<sup>163</sup>

Thus, the turnover of property located in the United States to a foreign representative will require the court to inquire whether “the interests of creditors in the United States are sufficiently protected” under Chapter 15, instead of an inquiry into all of the section 304(c) factors.<sup>164</sup> Yet, the Bankruptcy Court is likely to look to precedent under section 304(c) concerning the turnover of property, such as the *In re Treco* decision discussed above. Moreover, the House Report, in describing the intention behind section 1521, states that the section should not expand or reduce the scope of the relief currently available under section 304 of the Code.<sup>165</sup> Since the scope of relief available under section 304 has been determined by case law, case precedent will continue to be a guiding factor and the section 304(c) considerations will continue to be visited. In addition, the drafter of the Model Law did not intend for the court to authorize the turnover of assets until it assured that the interests of local creditors were protected.<sup>166</sup> This intention further supports reliance on the section 304(c)(c)(2) and 304(c)(4) factors.

---

163. See H.R. 333, § 1521(b).

164. See *id.*

165. H.R. REP. NO. 107-3, pt. 1, at 86.

166. See *Guide*, *supra* note 140, at 157.

The denial of relief based on extrinsic factors can arguably extend even past the determination of “additional assistance” and the turnover of property to the stay, even though the stay purports to be automatic under the proposed Chapter 15. As noted above, section 1520(a) incorporates section 362 of the bankruptcy code, which provides for an automatic stay.<sup>167</sup> By doing so, section 1520(a) makes the limitations on the stay under section 362 equally applicable to ancillary proceedings. The House Report states that the Bankruptcy Court, under section 1520(a) has the power to terminate the stay in an ancillary proceeding pursuant to section 362(d) for cause, including the failure of adequate protection.<sup>168</sup> In determining whether the creditor was adequately protected, it would be an outrage not to allow the Court to consider the existence of prejudice to U.S. creditors or the deviation of the foreign insolvency scheme from the Code. Instead, the term “adequate protection” presumes that the foreign scheme must be substantially in accordance with the Code, a factor listed for consideration under section 304(c). Therefore, if a foreign proceeding discriminates against a U.S. creditor in a way that offends the provision of the Bankruptcy Code, the Bankruptcy Court may deny certain relief under Chapter 15. Under this analysis, the proposed Chapter 15 seems to reject the notion that considerations of creditor protection and the fair operation of insolvency proceedings should only be considered when determining “additional assistance.”

### C. Comity

Although the section 304(c) factors have been incorporated into the proposed Chapter 15, it is important to note that it was done with a substantial modification, which was meant to clarify the role of comity in ancillary proceedings. Section 1507 eliminates comity as an individual factor and instead places it in the introductory language, making it clear that comity is the central consideration to be addressed.<sup>169</sup> However, this clarifica-

---

167. See H.R. 333, § 1520(a).

168. H.R. REP. NO. 107-3, pt. 1, at 85.

169. See generally H.R. 333, § 1507; see also H.R. REP. NO. 107-3, pt. 1, at 80. The House Reports explains:

Although the case law construing section 304 makes it clear that comity is the central consideration, its physical placement as one of

tion only goes so far in making comity the guiding factor. It does not make comity dispositive of the other factors and thus leaves room for a balancing of the other section 304(c) factors. In addition, as mentioned above, comity requires that the decision to defer to a foreign jurisdiction's law be weighted in light of local parties' interests.<sup>170</sup> Therefore, courts that have traditionally weighed each of the section 304(c) factors individually can use the definition of comity to continue to balance the interests of U.S. creditors, since comity does not mean automatic deference to the law of the foreign jurisdiction. Conversely, courts that have traditionally followed a more universalist approach will use the placement of comity in the proposed Chapter 15 as a justification to continue granting deference to the law of the foreign jurisdiction. Under this analysis, it seems unlikely that the decisions of the cases discussed in Part II would result in a different outcome under the proposed Chapter 15.

#### IV. CONCLUSION: A PURER FORM OF UNIVERSALISM

Chapter 15 clearly mandates a high level of cooperation among the United States and other nations in administering bankruptcy proceedings, while allowing the United States to retain its own substantive bankruptcy law and public policy. As such, Chapter 15 represents only a cautious step towards a universalist approach to international insolvencies.

A stricter, purer form of universalism needs to be widely adopted and efforts to provide a global approach to cross boarder insolvencies need to be undertaken. By requiring a single insolvency proceeding, pure universalism will lower the expenditure of valuable resources (both time and money) and, by guaranteeing greater predictability, will lower lending costs. In addition, knowing which country's law will apply in the case of insolvency helps creditors to make better-informed invest-

---

six factors in subsection (c) of section 304 is misleading since those factors are essentially elements of the grounds for granting comity. Therefore in subsection (2) of this section, comity is raised to the introductory language to make it clear that it is the central concept to be addressed.

*Id.*

170. See *In re Treco II*, 240 F.3d at 156-58.



ment choices. Finally, pure universalism promotes the fair and equal distribution of assets to all creditors. Ultimately, a scheme of pure universalism will minimize the costs of insolvency and will benefit both debtors and creditors alike.

In adopting a purer form of universalism, nations might look towards economic union legislation that link countries without regard to whether their legal systems are similar or not. The European Union Insolvency Regulation (the "E.U. Regulation"),<sup>171</sup> which was enacted in 2002, provides for automatic recognition (without formality) of an insolvency proceeding that is opened in a member state—that is, the state in which the debtor has its domicile or principle place of business. The law of the state in which the proceeding is pending applies and the representative of the debtor may exercise all of its rights throughout the rest of the member states. The courts of other member states are required to render assistance and provide necessary relief.

In departing from an adherence to sovereignty, the E.U. Regulation is a significant step in the direction of pure universalism. It embraces countries of both common law and civil law and applies to countries with considerable differences in their respective insolvency law schemes. It is truly reciprocal. Moreover, it covers a considerable number of countries, namely, Austria, Belgium, Finland, Germany, Greece, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom.

The United States must follow in this vein and seek to enact reciprocal legislation with as many other nations as possible, regardless of their respective insolvency regimes. This legislation must provide for the automatic recognition of any insolvency proceeding that is opened in the state in which the debtor is domiciled or has its principle place of business. Only in this way can creditors predict with certainty which insolvency law will govern the bankruptcies of foreign companies with whom they transact. Creditors can, thus, educate themselves about the law of the foreign company's jurisdiction and can make informed decisions regarding whether to proceed with the trans-

---

171. Council Regulation 1346/2000 European Union Regulation on Insolvency Proceedings, 2000 O.J. (L 160), at [http://www.iiiglobal.org/country/european\\_union/regulation.pdf](http://www.iiiglobal.org/country/european_union/regulation.pdf).

action. U.S. creditors may choose not to transact with foreign entities that are domiciled in jurisdictions whose insolvency laws are not favorable to creditors or that are not in accordance with the scheme and policies of the U.S. Bankruptcy Code. Countries whose insolvency laws unfairly prejudice foreign creditors will inevitably suffer a drop in foreign investment and trade.

There are also important trade and commercial benefits from the application of predictable rules. When laws are predictable, trade and commerce are encouraged and facilitated. In addition, predictability ensures lower transactional costs. Creditors can adjust the costs of loans to foreign debtors based on how likely (or unlikely) it is that one country's laws will be applied to any future insolvencies of the debtor.<sup>172</sup> In the absence of predictability, there is an increased risk and, therefore, an increased cost of lending.

There is, of course, the issue of whether it is practical to adopt a one-world view of international insolvency. The worldwide enforcement of a pure universalist regime unavoidably treads on traditional notions of national sovereignty. There is an obvious and understandable concern when enacting recognition and assistance legislation that a nation will be forced to surrender its sovereignty. The concern reflects the trepidation that exposing citizens of one country to the process and decisions of another detracts from the independence of the first country and its sovereign entitlement to control the affairs of its own citizens. It is for this reason that the benefit of any cross-border insolvency legislation hinges on worldwide participation and reciprocity.

Another problem is demonstrated by the apprehension that local creditors will be unfairly prejudiced if their claims cannot be realized in their local jurisdiction and if local assets are distributed not locally, but globally. Obviously, local creditors will receive less when local assets are made available for the global pool for the satisfaction of all creditors than when local assets are made available only to local creditors. However, it is necessary to remember that in a system of international insolvency

---

172. See Westbrook, *Theory and Pragmatism*, *supra* note 85, at 466. This argument is similar to the "Transactional Gain" argument proposed by Professor Westbrook. *Id.*

cooperation there will always be some relatively “innocent” party or parties left unsatisfied. Therefore, it is not wise to make international insolvency legislation contingent on the dilemma of the local creditor standing. Instead, it is imperative to recognize that any loss to local interests in one case will be balanced by gain in another case.<sup>173</sup>

The most obvious way to effect international insolvency cooperation is through treaty or convention. From a practical standpoint, multinational treaties and conventions have proved nearly impossible to enact. Save the European Union legislation, very few functioning international treaties on insolvency exist. However, the enactment of a multinational treaty is the exclusive means to achieve a significant improvement in the administration of international insolvencies. Therefore, progress in the international insolvency arena is highly dependent on the effort of the insolvency communities of every nation to develop a structure without any consideration of sovereignty and national interest. This might be a more realizable goal than one would imagine, considering that cooperating among nations in cross border insolvency cases has steadily increased in recent years.

*Jennifer Greene\**

---

173. *See id.* at 464-65. This argument is similar to the “Rough Wash” argument proposed by Professor Westbrook. *Id.*

\* I would like to express my great gratitude to Professor Claire R. Kelly for all the support and guidance she so generously offered throughout the process of writing this Note. In addition, warm thanks to Professors Michael A. Gerber and Edward J. Janger for their helpful comments on this Note and their immeasurable advice and assistance throughout my three years at Brooklyn Law School. Finally, my greatest thanks go to my wonderful parents, Carole and Richard Greene, for their endless love and encouragement.