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UNITED STATES CROSS-BORDER CORPORATE INSOLVENCY: THE IMPACT OF CHAPTER 15 ON COMITY AND THE NEW LEGAL ENVIRONMENT

Kevin J. Beckering*

I. INTRODUCTION

The major historical impediment to achieving sustainable unification in cross-border corporate insolvency administration is comity based theoretical analysis in bankruptcy reorganization or dissolution cases. In simple terms, comity is “[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts.”1 Rather than providing transnational bankruptcy law reform aimed at unifying administrative procedure, prior United States bankruptcy reform legislation focused on vague concepts of comity, enabling utilization of case-specific analysis that created a fragmented global legal environment. Comity appeased judicial skepticism of the competence and fairness of foreign bankruptcy laws, as well as fostering the means to continue the status quo, with no incentive to embrace positive reform aiming to unify such law and create greater certainty in transnational insolvency procedure. By maintaining comity as the focal point in the United States judiciary, which is still possible under the construct of Chapter 15, forward-looking reform of antiquated bankruptcy law in foreign countries will be negligible, at best. Consequently, the argument for coordination, cooperation among courts and certainty in the field of transnational bankruptcy through remittance of comity based theoretical analysis is markedly cogent because “by its very nature bankruptcy law must be symmetrical with the market. If the market is becoming global, bankruptcy law must become global as well.”2

With a focus on a form of governance of international insolvency that encourages cooperation and coordination among nations, the United Na-

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1. BLACK'S LAW DICTIONARY (8th ed. 2004).

tions Commission on International Trade Law (UNCITRAL) has taken the first step by adopting the Model Law on Cross-Border Insolvency (Model Law). The Model Law is clearly a first step toward a unified insolvency regime. It provides procedural recommendations for enacting nations and does not mandate procedural or substantive reform of domestic laws by adopting nations.

A. The Chink in the Globalization Chain: Fragmented International Bankruptcy Law

As globalization expands and increasing transnational business activities increase, procedural cross-border insolvency law must match this trend step-for-step by encouraging progression toward a more unified international bankruptcy regime. The leading players in the world market are encouraging countries to become more actively involved, yet are not adequately preparing them for all impending issues that arise with such involvement. Currently, most developed countries are ill-equipped to encourage and advise emerging countries regarding globally accepted bankruptcy law reform because the laws of even developed nations remain fragmented, with each contending to be the most adept regime and fervently unwilling to embrace reform. U.S. bankruptcy courts contribute to global fragmentation through adamant distrust of foreign bankruptcy laws, remaining content to conveniently dismiss the applicability of foreign laws in favor of local bankruptcy laws, which may or may not lead to an efficient result for all affected parties. Countries of every market and economic size are eager to grow with globalization, but few are willing to make the necessary bankruptcy law reforms to adapt to the interconnectedness of these markets and the additive corollary of cross-border insolvency. Globalization will prove bitter-sweet if all nations, above all the United States, are not adequately prepared to handle the complex issues of a multinational corporate entity (multinational) insolvency in a consistently transparent and unified manner.

Historically, attempts to utilize a single standard insolvency regime through international treaty or agreement proved unsuccessful due to differing legal, cultural, and political approaches toward transnational insolvency. Although it is unlikely that all nations will agree on a standardized bankruptcy law, states should not hesitate to integrate the procedural recommendations of the Model Law into their current insolvency frame-


work. The Model Law takes an initial step by procedurally aligning adopting nations for administering multinational insolvencies. Unfortunately, sovereign nations will remain reluctant to adopt procedural reforms if they cannot trust that adopting nations will be consistent in their practical application. The current global environment cannot sustain positive growth unless reformative steps are taken. Therefore, it is imperative for nations to take the first unifying step toward a single international insolvency framework by embracing the changing global legal environment through meaningful cross-border insolvency reform.

Cross-border insolvency issues will increase in complexity as multinationals become enmeshed in foreign bankruptcy proceedings involving multiple debtors with subsidiaries, assets, operations and creditors transcending multiple national boundaries. The United States, being one of the dominant forces in the global market, should take the lead. Until recently, however, even the United States lacked a model bankruptcy law framework that emerging countries around the world could imitate.

B. THE UNITED STATES TAKES THE FIRST STEP

In the early 1990s, U.S. scholars and academics began debating the differing theoretical approaches to solving issues of cross-border insolvency law. Such theoretical debates, however, failed to provide any clarity or substantive advice for U.S. bankruptcy courts to follow. In April 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) Congress incorporated the Model Law by adopting Chapter 15 into the Bankruptcy Code (Chapter 15) and simultaneously repealing former section 304. This constituted the first step by the United States towards creating an internationally recognizable standard. This article intends to provide meaningful advice to U.S bankruptcy courts regarding the significant substantive and procedural changes brought about by Chapter 15 and how the changes impact future judicial analysis.

C. OUTLINE

Addressing the need for a more transparent, cooperative, and accessible transnational bankruptcy system, this article examines how, by embracing the current legal environment under the Model Law, bankruptcy judges can establish precedent that clarifies Chapter 15 and gives certainty in its global application. Part I of this article analyzes the evolution of U.S. bankruptcy law, addressing, through significant case law, how Congress' overtly ambiguous language and lack of clear guidance is the genesis of uncertainty in the application of bankruptcy law in transnational insolvencies. Part II addresses the legal environment under the purview of the recently repealed section 304 of the Bankruptcy Code, illustrating the uncertain application of broad theoretical doctrines, such

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5. The BAPCPA was signed on April 20, 2005 and became effective on all cases filed on or after October 17, 2005.
as comity. Part III discusses the problematic underpinning of section 304, specifically subsection (c), and argues that Congressional emphasis on the maximum flexibility and theoretical doctrine is the reason why courts freely applied divergent analytical approaches, and inevitably reached inconsistent results in the past. With a clearer understanding of the problems associated with theory-based analysis, Part IV shifts focus to the legal environment created by the Model Law's adoption into the Bankruptcy Code and discusses how and why Congress drastically changed the legal environment. The main idea proposed is that Chapter 15's emphasis on cooperation and coordination is a significant procedural change. Less obvious is the intentional relegation of comity analysis to a single, relatively meaningless, section and how this relegation affects court analysis. Finally, Part V proposes a modest suggestion to courts for administering Chapter 15. I will argue that enhanced coordination and harmonization is best achieved through direct communication between courts in cross-border cases under adaptable guidelines, such as Protocols.

II. EVOLUTION OF UNITED STATES CROSS-BORDER INSOLVENCY LAW

Previous U.S. cross-border insolvency law is appropriately summed up by a single word: inconsistent. Prior to the advent of globalization, there was little need for Congress to provide a transnational insolvency law framework that promoted consistent analysis and results. Bankruptcy courts used broad discretion to fashion remedies, but did not follow a consistent methodology in their analysis. The result was inconsistent precedent that provided no clarity to the law, or guiding objectives. The following discussion will illustrate how use of theoretical doctrines and maximum flexibility to meet broad objectives does not provide the adequate guidance or procedural framework necessary in cross-border insolvency cases.

A. LACKING DEFINITIVE GUIDING OBJECTIVES: INVESTIGATING TRANSNATIONAL ASPECT OF U.S. BANKRUPTCY LAW

Historically, the application of international comity in the United States has wavered between two divergent approaches to solving international insolvency issues: territorialism and universalism. The first approach, territorialism, often referred to as the "grab rule," takes a narrow stance on comity and emphasizes control over all assets located within the nation's territory for the benefit of local creditors.6 Territorialism is based on the notion of national sovereignty, emphasizing application of

6. The "grab rule" refers to the selling of the debtor's assets located in the respective territorial jurisdiction and distributing them under local law without regard to the other court(s) involved. See Jay L. Westbrook, Multinational Enterprises in General Default: Chapter 15, The ALI Principles and the EU Insolvency Regulation, 76 AM. BANKR. L.J. 1, 5 (2002).
local administrative laws for distribution of a debtor’s property located within the sovereign’s borders. Refusing to recognize the interests of other jurisdictions, this approach requires a plenary proceeding in each country where the debtor’s assets are located. Territorialism results in an expensive and inefficient duplication of administrative procedures because of a lack of coordination; but, it protects local creditors from potential discrimination and unpredictability under foreign insolvency law.

Alternatively, universalism takes a broad approach toward comity and emphasizes cooperation between sovereign jurisdictions. A central proceeding is held in the country where the debtor is domiciled or has its principal place of business. This approach underlines the importance of granting deference to the nation’s laws in which the main proceeding resides, encouraging courts to collectively work to maximize the value of the debtor’s assets for equal distribution to all creditors. The conflict between these two competing approaches towards comity is clearly seen in the analysis and justification bankruptcy courts use for reaching a particular conclusion.

Despite the pervasive use of theoretical doctrines based on comity, the meaning of international comity remains uncertain. Comity has been defined disparately “as the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or ‘considerations of high international politics concerned with maintaining amicable and workable relationships between nations.’ The emphasis as well as the definition that U.S. courts apply to comity has varied with time and place due to competing approaches and techniques to multinational insolvency proceedings as a just form of governance. To fully understand the reformed legal environment under the purview of Chapter 15, analysis of the historical development of U.S. case law concerning cross border insolvency issues and the economic environment is helpful.

1. Comity: Differing Views and Definitions, Inconsistent Results

Prior to confirmation of the Bankruptcy Act of 1898, the Supreme Court adopted, although briefly, a pro-universalism approach toward


comity within a cross-border insolvency context. In 1883, the United States Supreme Court in Canada Southern Railway v. Gebhard rejected the territorial approach, holding “that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes.”

The court rejected the U.S. creditor’s arguments that it would be inconvenient and unfair to require the creditor to assert its claims in Canada and that it never agreed to the reorganization scheme ratified under Canadian law. Further, by recognizing the Canadian reorganization scheme, the U.S. bankruptcy court ensured equal treatment of all creditors.

Two years after the Supreme Court ruling in Gebhard, the New York Court of Appeals instituted a territorial-based view of comity toward recognition of a foreign bankruptcy proceeding in In re Accounting of Waite. The court of appeals did order the turnover of assets located in the United States as requested by the English trustee, but only after the court ensured that all U.S. creditors were paid in full out of other assets. The court instituted a territoriality approach by holding that a foreign trustee’s rights will only be recognized where there is a lack of harm to local creditors.

In 1895, the Supreme Court espoused the governing definition of comity in Hilton v. Guyot. The Supreme Court, basing its decision on reciprocity, refused to grant comity on the grounds that France refuses conclusory effect to judgments granted by the United States and other foreign countries absent a governing treaty between said nations. In light of the fact that there was no governing statute or treaty addressing the issues of private international law, conflicts of law, or the rights of persons within the United States, the Supreme Court reverted to its broad judicial discretion for declaring the governing law. In addressing the role of comity within the context of these issues, the Supreme Court tendered the oft-quoted definition of comity:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the pro-

13. Id. at 539.
15. Id. at 448.
17. Private international law, subject to varying interpretations, is designed to regulate disputes of a private nature, notwithstanding that one of the parties may be a private state. See BLACK'S LAW DICTIONARY 553 (2d Pocket ed. 2001).
This territorial approach toward comity is further illustrated by Justice Story in his *Commentaries on the Conflicts of Law*, which argues that the foundation of comity rests on "a paramount moral duty...assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity." Expanding on this idea, Justice Story concurs with Justice Porter, who opined "that comity is, and ever must be, uncertain...that whether they do or do not [grant comity] must depend on the condition of the country to which the foreign law is sought to be enforced," and when conflicts of law arise doubt should prevail, and when such doubt exists, the deciding court should oblige the laws of its own country.

When the Bankruptcy Act of 1898 (Bankruptcy Act) was enacted, courts applied territorialism but with a focus on principles of equity analysis, vague concepts of comity, and public policy. The adoption of the Bankruptcy Act of 1898 failed to provide a guiding context of comity in foreign bankruptcy recognition, or clarify the assertions made in *Gebhard* and *Hilton*. Congress, in a single sentence, addressed the issue of a debtor who was not only involved in a foreign bankruptcy proceeding, but had also filed for recognition in the United States:

> When a proceeding for the purpose of the liquidation or rehabilitation of his estate is commenced by or against a bankrupt in a court of competent jurisdiction without the United States, the court of bankruptcy may... having regard to the rights and convenience of local creditors and other relevant circumstances, dismiss a case or suspend the proceedings therein under such terms as may be appropriate.

As seen in the language of the provision, Congress did not adopt a pure territorial or universal approach. Instead, it allowed the courts to retain unlimited discretion to choose the theoretical approach toward comity, which provided protection to local creditors and achieved other objectives as the facts necessitated.

Still lingering in the background was the Supreme Court's general distrust for foreign bankruptcy procedures. After adoption of the Bankruptcy Act, the Supreme Court applied a narrow definition of comity in

18. *Hilton*, 159 U.S. at 163-64. Commentators citing to *Hilton* as primary support for their position differ as to whether comity is binding on states as a "law of nations" or a rule of "public international law," finding support for both within the context of this quote. See Paul, supra note 11, at 21-26.
19. JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (1st ed. 1834).
20. Id.
Disconto Gessellschaft v. Umbreit, holding that no provision required the courts to recognize the right of a foreign claimant to appropriate property against the demands of a local creditor.\textsuperscript{23} In that case, a foreign creditor applied a garnishment on assets located in Wisconsin before a garnishment was levied by a U.S. creditor.\textsuperscript{24} Reflecting a territorialistic approach, the Supreme Court upheld the Supreme Court of Wisconsin's decision to allow for the satisfaction \textit{in full} of the local creditor's claim before turning over the residual assets to the German bankruptcy court. The Supreme Court noted that to provide otherwise would violate the public policy of Wisconsin—ostensibly fearing that German courts would discriminate against U.S. creditors if the moneys were appropriated and distributed under German law.\textsuperscript{25} Citing to the definition espoused by Hilton, the Supreme Court placed international comity into the same context as national comity. Combining the Hilton definition of comity and prior case law defining national comity, the Supreme Court concluded that nothing requires the enforcement of judgments that cause prejudice to the rights of local creditors.\textsuperscript{26} The Supreme Court, however, did not acknowledge the fundamental differences between international and national comity: national comity considers only the impact on local creditors and does not consider the rights of the foreign party while international comity—during that time—requires courts to consider the merits of the foreign bankruptcy laws for granting comity, with regard for the rights of parties in interest. The Supreme Court in Umbreit did not find positive law directing comity recognition with regard to the specific facts; it simply assumed discriminatory treatment without ever investigating the procedural laws of the foreign nation.\textsuperscript{27} Indeed, under the global market environment of that time, economics did not require or depend on a high degree of legal certainty, which permitted courts to apply ad hoc analysis without significantly impacting trade or investment. Moreover, cross-border insolvency cases were not commonly heard, and courts inherently feared discriminatory treatment of U.S creditors who were forced to adjudicate their claims abroad.\textsuperscript{28} Therefore, Congress created a legal environment where courts were free to determine the level of deference toward international comity in recognizing requests for relief by foreign courts or foreign representatives.

Hilton and Umbreit encompassed a territorialistic approach where international comity was wholly discretionary with the court and where granting relief was never an absolute requirement. This territorialistic ap-

\textsuperscript{23} Disconto Gessellschaft v. Umbreit, 208 U.S. 570, 580 (1908).
\textsuperscript{24} \textit{Id.} at 578.
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{Id.}
\textsuperscript{28} The global legal environment was clouded with uncertainty with regard to the procedural framework of foreign bankruptcy laws. Few, if any, courts understood these laws and therefore distrusted them, which led to dismissal when remotely possible. \textit{See id.}
proach continued, but successive decisions exhibited characteristics of universalism. These subsequent decisions by U.S. bankruptcy courts instituted an analysis based on the principle of equality of distribution through fair and impartial treatment of creditors. Although these courts took an initial step towards universalism, the facts presented did not include disputes between rights of foreign representatives and rights of local creditors, and lacked obvious harm to U.S. creditors. U.S. courts felt confident that local creditors would receive reciprocal treatment from foreign courts and therefore, there was no reason to distrust foreign law. But the predominant view among courts—that comity could be recognized so long as the interests of local creditors were adequately protected—remained the majority view until the mid-1970s.

2. Cases Stressing a Need for Initial Reform

Beginning in the mid-1970s, as financial institutions and large corporations increasingly became transnational, the emerging global environment prognosticated a movement toward cross-border market integration. The Bankruptcy Act, when adopted, reflected the global economy of the late Nineteenth century, and did not provide a procedural framework for effective and efficient international reorganization involving progressively complex issues. Consequently, judges continued to work under the Bankruptcy Act, using its ad hoc case-by-case analysis. In the mid-1970s, two large multinational bankruptcy cases, In re Israel-British Bank (IBB) and In re Banque de Financement, S.A. (Finabank), exposed the need for U.S. bankruptcy law reform that would provide guidance to handle complex corporate transnational insolvency issues.

In the IBB case, a foreign bank filed a voluntary bankruptcy petition that reached the Second Circuit Court of Appeals, on appeal from the U.S. District Court for the Southern District of New York, to recover assets located in the United States. Although the Bankruptcy Act specifically excluded “banking corporations” from eligibility for voluntary bankruptcy, the court held that the exclusion did not apply. Justifying its holding, the Second Circuit found that when a foreign bank does no actual banking within the United States or is not licensed in any state to conduct such business, but merely borrows United States dollars and Eurodollars from U.S. banks and maintains deposits in the United States, it does not qualify as a banking corporation. The Bankruptcy Act provided no definition of a “banking corporation,” and the Second Circuit determined that Congress, in 1898, could not have intended that the term

32. Id. at 515.
include a foreign banking corporation not subject to any state or federal regulation. The line of reasoning proffered by the Second Circuit, couched in statutory interpretation that found "no real proof" for application of the exclusion, was a means to achieve recognition that would, under those facts, provide equitable distribution and protection for U.S. creditors.\(^{33}\) The Second Circuit applied a universality approach toward granting comity through ad hoc statutory interpretation to provide protection to local creditors.

The circuit court stated that the district court provided an "equally scholarly opinion" as the bankruptcy court in its ruling to reverse and dismiss the petition in bankruptcy. This was an issue of first impression in the Second Circuit and indicates that the facts weighed in favor of recognition.\(^{34}\) The district court's analysis addressed the same statutory language, concluding that the legislative history gave no indication or even suggested that the exclusion apply to domestic and not foreign banks.\(^{35}\) Each court provides adequate statutory analysis, sound reasoning and ad hoc rulings. The difference, however, lies in the results: one protects local creditors through recognition while the other does not. As a cautionary point in the court's opinion—understanding its justification is susceptible to alternate reasoning—the Second Circuit notes, "[t]here is no field in which contrary conclusions based on contrary premises may be so readily drawn as in the interpretation of statutes."\(^{36}\) Thus, the Second Circuit acknowledges that subsequent courts could quite possibly hold a differing statutory interpretation, concluding that the "banking corporation" exception is applicable to a foreign banking corporation if drawing such a conclusion protects the interests of U.S. creditors. Finally, expressing the need for greater certainty to address issues of cross-border insolvency, the Second Circuit concludes that to consider IBB a "banking corporation" under section 4 of the Bankruptcy Act would require Congress to provide a clearer manifestation of the statute's intent than it has currently furnished.\(^{37}\)

The second foreign recognition case, Finabank, involved a Swiss bank that filed for recognition and relief under Chapter 11 of the Bankruptcy Act to aid a proceeding in Switzerland.\(^{38}\) The First National Bank of

\(^{33}\) Since the court could not find within the statutory language or history of section 4a of the Bankruptcy Act that Congress clearly intended to exclude foreign banking corporations under the specific facts, the exclusion could not reasonably apply. Additionally, the court stated: "This is a case were United States creditors could be harmed if the preferential liens were permitted to survive." See id.

\(^{34}\) The Second Circuit was concerned that if they held jurisdiction over the bankruptcy then the trustee would be able to bring an avoidance action against liens obtained by attachment or judgment within four months prior to the filing of the petition. See Bankruptcy Act § 67a, 11 U.S.C. § 107(a)(1). If there was no jurisdiction, however, the liens would be good, and the appellees would "fare better than United States creditors among others." British Bank, 536 F.2d at 511.


\(^{36}\) Israel-British Bank, 536 F.2d at 512.

\(^{37}\) Id.

\(^{38}\) First Na. Bank of Boston, 568 F.2d at 914.
Boston (FNBB) and The Chase Manhattan Bank (the opinion includes "The" before the name of each bank), N.A. (Chase) both held attachment orders against Finabank and levied on the Finabank assets located in the United States. Finabank filed a petition for bankruptcy in the United States in order to avoid the Chase attachment as a preferential transfer, and to bide time to effectuate a plan in Switzerland that would result in the joint administration of all Finabank assets.

The Second Circuit, following similar analysis as in IBB, again stated that a foreign banking corporation not conducting banking business in the United States, but only holding assets in U.S. banks, was not precluded from bankruptcy under the "banking corporation" exclusion. The second issue pertained to the court's broad inherent power to dismiss a Chapter 11 petition under section 2a(22), an issue not addressed in IBB since they granted recognition. This provision permitted the court to suspend the exercise of jurisdiction for the convenience of local creditors where a bankruptcy proceeding is effective in a foreign court. In its analysis, the court considered the specific purpose for reverting to the broad powers granted under section 2a(22) as compared to the importance of orderly administration of the Bankruptcy Act in the context of foreign insolvency. The Second Circuit reasoned that while it has flexibility in such matters, it does not permit preferential transfers to U.S. creditors at the expense of undercutting a foreign court's dominion, especially where the creditors would not be treated inequitably by the foreign court.

These two cases raised several issues regarding the competing rights asserted by a foreign debtor and a U.S. creditor for whom the Bankruptcy Act was incapable of providing an answer. Further, the Bankruptcy Act did not address, or provide a means to address, additional issues associated with treatment of international insolvencies. To provide clarity to the remedial powers of the bankruptcy courts and proffer factors as a framework for providing appropriate orders, Congress enacted section 304 as part of the Bankruptcy Code.

III. BANKRUPTCY CODE SECTION 304

In response to the aforementioned issues, and in an effort to provide further procedural guidance, section 304 of the Bankruptcy Code was adopted as part of the Bankruptcy Reform Act of 1978. The limited stated purpose of the section was to "administer assets located in this country, to prevent dismemberment by local creditors of assets located here, or for other appropriate relief." To fulfill this purpose, Congress recommended, inter alia, that the courts be guided by what will best assure an economical and expeditious administration of the estate, with due

39. Id.
40. Id.
41. Id.
regard to the laws and judgments of other nations in the spirit of international comity.\textsuperscript{43} 

In adopting section 304 into the Bankruptcy Code, Congress addressed several issues brought up in \textit{IBB} and \textit{Finabank}, specifically: (1) the propriety of transferring local assets to a foreign bankruptcy forum for administration, (2) the recognition of foreign representatives of an estate in a local bankruptcy forum and the rights given to the foreign representative, and (3) the significance given to a foreign proceeding in the administration of a bankruptcy case in the local forum.\textsuperscript{44} Section 304, acting as a jurisdictional aid to a foreign proceeding, limited a foreign representative to an ancillary proceeding and did not create an actual bankruptcy estate or provide authority to fully liquidate or reorganize the debtor’s property. For purposes of this comment, it is not necessary to address the specific statutory rubric of section 304. Instead, analyzing specific case law reveals the struggle of courts to balance the protection of local creditors and notions of international comity. This balancing act resulted in ad hoc analysis and consequently conflicting decisions.

Several cases of note, some of which refused and some of which granted recognition of an ancillary petition, demonstrate the confusion and uncertainty of courts in balancing the factors specified under the statute. Section 304 cases considered the appropriateness of granting relief by consulting the factors espoused under section 304(c). This provision served as the primary source of broad discretion and maximum flexibility for bankruptcy judges to balance competing interests with bankruptcy policy.\textsuperscript{45} The factors are appropriately categorized as follows: 1) subsections (c)(1) and (c)(3) favor a unitary foreign proceeding, 2) subsection (c)(2) provides protection of U.S. creditors, 3) subsection (c)(5) contrasts the competing interests of comity versus conformity, and 4) the opportunity for a fresh start for individuals.\textsuperscript{46} Two notable cases, \textit{In re Toga Manufacturing Ltd.} and \textit{In re Treco},\textsuperscript{47} adamantly refused recognition of a foreign proceeding or to grant relief pursuant to the section 304(c) factors.

\textbf{A. \textit{In re Toga Manufacturing Ltd.}}

Not long after the newly reformed Bankruptcy Code took effect in 1978, the bankruptcy court in \textit{Toga} administered a ruling denying relief requested by a Canadian Bankruptcy Trustee. Toga Manufacturing Lim-

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} S. Rep. No. 95-989, at S. 2266 (1978).

\textsuperscript{45} \textit{Collier, supra} note 22, ¶ 304.01[2].

\textsuperscript{46} \textit{See Biery, supra} note 10, at 37-41; \textit{see also} 11 U.S.C. § 304(c) \textit{repealed by Bankruptcy Abuse and Consumer Protection Act of 2005}, Pub. L. No. 109-8, § 802(d), 119 Stat. 23.

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ited (Toga), a Canadian corporation, was brought into involuntary bankruptcy by an unsecured Canadian creditor. Subsequently, the court-appointed trustee in Canada filed an ancillary proceeding in the United States seeking injunctive relief against all creditors of Toga from initiating or continuing action against Toga or its assets. In addition, the trustee requested a turnover order for $215,000 held by the Wayne County Circuit Court Clerk in Michigan. These funds were held pending appeal from a ruling that the Imperial Bank of Commerce—a secured creditor in control of operations and assets of Toga—held a superior claim over the judgment lien of Peter T. Hesse Enterprise, Inc. (Hesse), a Michigan corporation, to accounts receivable of Toga.

Judge Graves prefaces his analysis by recognizing that "[h]istorically, the bankruptcy laws of our country have been hostile towards claims asserted by foreign trustees in bankruptcy against alleged estate property located in the United States. '[T]he bankruptcy law of a foreign country is incapable of operating a legal transfer of property in the United States.'" The court then affirms that section 304 of the Code embodies the universal theory of conflicts of laws with some qualifications set forth under section 304(c).

The bankruptcy court in Toga conceded that requiring Hesse to litigate his claim in Canada would not be inconvenient and the claim would receive just treatment. Further, the court stated that both the Canadian and U.S. bankruptcy laws provide for equal distribution among creditors. However, the court also noticed that under Canadian bankruptcy law, Hesse's claim priority would be treated differently than if it was brought under the U.S. Bankruptcy Code. The court distinguishes the Canadian priority scheme, concluding that Hesse is a judgment creditor with a perfected interest and in the United States would receive priority as a secured creditor. On the other hand, judgment creditors in Canada are not secured claim holders. The court reasoned that due to this variance, the basic distribution schemes for each country were not substantially similar. Further, the bankruptcy court found that notions of comity required that Hesse's claim be fully litigated in the Michigan and U.S. courts. The bankruptcy court concluded that consistent with comity, as codified in section 304, which embody notions of international fair play and justice, granting the requested relief would violate accepted U.S. pol-

48. Toga had previously entered into a default agreement with its largest secured creditor, Canadian Imperial Bank of Commerce (Bank), which gave Bank complete control over the operations and assets of Toga. In re Toga Mfg. Ltd. 25 B.R. at 165-66.
49. Id. at 167.
50. Id.
51. Id. (quoting Harrison v. Sterry, 9 U.S. 289, 302 (1809)).
53. Id. at 167 n.2.
54. Id. at 170.
icities by not protecting the interests of a U.S. creditors' claim.\footnote{55}

B. \textit{In re Treco}

In a more recent case, the Court of Appeals for the Second Circuit reversed the ruling of the New York District Court holding that a foreign representative is not subject to the same restrictions that apply to a bankruptcy trustee regarding turnover rights.\footnote{56} The official liquidators of the foreign debtor brought an ancillary proceeding in U.S. bankruptcy court requesting turnover of the debtor's property located in the United States held by Bank of New York and JCPL Leasing Corp. (together BNY). According to that case, while comity is the "ultimate consideration when deciding whether to provide relief in cases ancillary to foreign proceedings, comity does not automatically override other statutory factors."\footnote{57} The official liquidators then moved for partial summary judgment for a directive turnover order, which was granted by the bankruptcy court and affirmed by the District Court for the Southern District of New York.

In its analysis, the Second Circuit first noted, "[t]he enactment of § 304 was a step toward the universality approach," but qualified this by stating that it does not implement pure universalism and requires analysis through a case-by-case balancing of the section 304(c) factors.\footnote{58} The primary dispute on appeal before the Second Circuit was whether the bankruptcy and district courts properly analyzed the factors under section 304(c) in deciding whether to grant turnover. The Second Circuit noted that even though BNY would be granted priority as a secured creditor, BNY would be unlikely receive any distribution under the foreign scheme, which provided administrative payments before payment of secured creditors.\footnote{59} The court noted that, under the factual circumstances of the case, the significant harm BNY would incur negated justifications for granting comity to Bahamian law. "The principle of comity has never meant categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States."\footnote{60} Thus, the Second Circuit denied to extend comity and rejected the turnover, holding that the Bahamian insolvency scheme was not "substantially in accordance" with the priority scheme under U.S.

\footnotesize{\footnote{55. \textit{Id. But see} Petition of Davis, 191 B.R. 577 (Bankr. S.D.N.Y. 1996) (granting injunctive relief to prevent the debtor's assets located in the United States from being seized by U.S. creditors).}
\footnote{57. \textit{Id.}}
\footnote{58. \textit{In re Treco}, 240 F.3d at 154; \textit{see, e.g., In re Koreag, Controle et Revision S.A.}, 961 F.2d 341, 358 (2d Cir. 1992).}
\footnote{59. \textit{In re Treco}, 240 F.3d at 155.}
\footnote{60. \textit{Id. at} 157.}}
bankruptcy law, which provided special protection to secured creditors.\textsuperscript{61} Other cases proffering a legal standard for determining if a foreign jurisdictions insolvency law is in "substantial accord" with the Bankruptcy Code do not consistently align with the Second Circuit's standard or parallel similar consideration of facts.\textsuperscript{62} The following discussion will explain why bankruptcy courts were unable to apply consistent legal standards for analyzing the section 304(c) factors, reaching differing conclusions, and thus, furthering uncertainty.

IV. THE DIFFERING DEFINITIONS OF COMITY: A SOURCE OF UNAVOIDABLE CONFLICT

It is important to take note of the divergent definitions applied and the varying treatment of comity by courts in order to fully understand the reformative steps taken in Chapter 15. The traditional dichotomy analysis between universalism and territorialism will never be settled by bankruptcy court's analysis through notions of comity. Some courts adhere to a definition of comity that requires them to dispose of all authority in deference to the foreign nation's law.\textsuperscript{63} Other courts define comity as a balance between the competing approaches of territorialism and universalism.\textsuperscript{64} The Bankruptcy Code adopted the latter balancing approach, elusively termed by scholars as "modified universalism."\textsuperscript{65} The section 304(c) factors attempted to balance the competing theories, with courts noting that applying the factor of comity—a universalistic factor—requires the court to address the remaining factors—territorialistic factors.\textsuperscript{66} Unfortunately, courts applied these factors as if they constituted a politically neutral test for determining the level of deference to afford a foreign rule as opposed to a domestic rule.\textsuperscript{67} Clearly, this can never be the case as bankruptcy courts will inherently account for the policy consideration of protection of local creditors to varying degrees. The following discussion argues that because there is no agreement on the definition, U.S. bankruptcy courts considering comity in an interest-balancing analysis will never achieve consistency. The form of analysis

\textsuperscript{61} Id. at 159.
\textsuperscript{62} See In re Koreag, 961 F.2d 341, 358 (2d Cir. 1992) (holding that because the debtor was a multi-national sophisticated investor that freely invested in a fund subject to Bahamian laws, no local interests required protection); In re Board of Directors of Compania General de Combustibles, S.A., 269 B.R. 104, 109-110 (Bankr. S.D. N.Y. 2001) (concluding that the standard for substantial accord is not whether the creditor would do materially worse under foreign law, instead, requiring clear evidence of maladministration or corruption).
\textsuperscript{63} See Gebhard, 109 U.S. at 539.
\textsuperscript{64} See supra Part II case illustrations.
\textsuperscript{65} COLLIER, supra note 22, ¶ 304.01[2]. Modified universalism combines the theories of universality and territoriality such that one forum hosts a primary insolvency proceeding to which other jurisdictions supplement with ancillary or secondary proceedings. Elizabeth J. Gerber, Not All Politics is Local: The New Chapter 15 to Govern Cross-Border Insolvencies, 71 FORDHAM L. REV. 2051, 2056 (2003).
\textsuperscript{66} See Booth, supra note 21, at 174-75; see also, supra Part I.
\textsuperscript{67} Paul, supra note 11, at 62.
under section 304(c) cannot yield certain, or even predictable, results. One judge's balance of the interests of different States to achieve his/her understanding of justice will differ from the balance of another judge, and such variance is amplified by broad authority and flexibility.

A. Maximum Flexibility Equals Maximum Uncertainty

The legal environment under section 304 permits courts to prescribe any appropriate order that will best assure an economical and expeditious administration of the insolvent's estate.68 In addressing the balance between comity and the protection of local interests, Congress briefly notes that, "[p]rinciples 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."69 Congress envisions section 304 to bridge the gap between protecting the interests of local creditors and public policy concerns through interest-balancing analysis.70 "The interest-balancing analysis is the most obvious example of courts employing the rhetoric of comity in a variety of circumstances regarding jurisdictional and related issues."71 To create this bridge, courts will inherently draw on their subjective interpretation as how best to balance the competing objectives given the factual circumstances of the case.

During the tenure of section 304 as the sole provision for analyzing issues of transnational insolvency, subsection (c) proved to be the fatal flaw in the statutory scheme. Much like prior courts applied differing definitions of comity under the Bankruptcy Act, courts subjectively applied their understanding of modified universalism. The court in In re Maxwell Communication Corp. held that the Bankruptcy Code embraces "a modified form of universalism accepting the central premise of universalism . . . but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors."72 Applying a different understanding, the court in Treco noticeably agreed that there was a trend toward granting deference to the foreign judiciary and the "enactment of § 304 was a step toward the universality approach," but also understood that under the statute, the "principle of comity has never meant categorical deference to foreign proceedings."73 As a third alternative understanding, the Ninth Circuit concluded that the Code does not codify either the theory of universalism or territorialism, but concluded that "[i]f any philosophy can be attributed to the structure of the Code it is that of deference to the country where the primary insolvency proceeding is located . . . and flexible cooperation in administration

69. Id.
70. See Paul, supra note 11, at 61.
71. Id.
73. In re Treco, 240 F.3d at 157.
The conclusion reached by each of the courts is defensible under the given factual circumstances, but each case is also unclear as to why each court applied a different definition of comity and/or balanced the rights and interests of the foreign and local parties.

B. SAME LAWS, SAME RULES, DIFFERENT RESULTS?

As previously noted, interest-balancing analysis can be applied to varying degrees depending on the determination of the foreign interests and the importance of the public policies at stake. As an example, compare the court's holdings in In re Culmer (Culmer) and Treco, both addressing the merits of Bahamian insolvency law. As previously noted, the Second Circuit in Treco refused to grant comity to the Bahamian court because under their priority scheme, a secured creditor in the United States would likely receive no distribution. The Second Circuit concluded that the distribution scheme under Bahamian law was not "substantially in accordance" with the priority scheme under the U.S. Bankruptcy Code. In contrast, the Bankruptcy Court for the Southern District of New York, also considering the propriety of Bahamian insolvency law regarding distribution, held that "the Bahamian Companies Act, like [the U.S.] bankruptcy laws, provides a comprehensive procedure for the orderly and equitable distribution of [the debtor's] assets." Additionally, the bankruptcy court held that section 304(c)(4) was satisfied since, "the distribution of [the debtor's] estate in the Bahamas would be substantially in accord with the order and priorities prescribed by [the U.S. Bankruptcy Code.]" Each case considered the propriety of the same insolvency laws regarding the same factors, however, the court in Treco concluded Bahamian insolvency laws were not substantially in accord with the priorities provided under the Bankruptcy Code, while the court in Culmer concluded they were.

How can two bankruptcy courts addressing the same foreign law and applying the same factors reach such conflicting opinions? The answer is found in the legal standard each court has set that foreign laws must meet to be substantially in accord with the Bankruptcy Code. The Second Circuit in Treco, looking to the distribution the local creditor would receive, held that if the recovery was not substantially similar under the foreign law and the Bankruptcy Code, then the foreign law was not substantially in accord with the Bankruptcy Code, thus, violating U.S. public policy. The bankruptcy court in Culmer, however, did not specifically rely on equal creditor distribution as its standard. Instead of considering whether the foreign law was identical to U.S. law, the court required there be nothing inherently vicious, wicked, immoral, or shocking to the prevailing

74. In re Simon, 153 F.3d 991, 998 (9th Cir. 1998).
76. Id. at 630.
77. Id. (emphasis added).
78. In re Treco, 240 F.3d at 159.
U.S. moral sense or the law not be repugnant to the United State's idea of justice. This is not to conclude that one court came to the wrong conclusion or applied a wrong standard—both cases are still considered good law—but this illustrates the inconsistent results under section 304(c) comity analysis, even when analyzing the same foreign laws.

Bankruptcy courts did not maliciously use their deferential authority to achieve results adverse to the principles of the Bankruptcy Code, they merely applied the law in a manner they deemed most appropriate under the factual circumstances. Some courts determined, according to the facts, that it would be unjust to not protect the interests of local creditors. In contrast, other courts placed responsibility in the hands of the creditor, determining that they knew, or should have known, there was potential for such an outcome and it is not the duty of courts to rescue creditors from bad investments. Each view was properly justified under the language of section 304, but they significantly differ in their approach toward issues involving international comity.

If the objectives of comity, or the guiding principle of the procedural framework, is judicial certainty and stable expectations in the event of international insolvency to facilitate international transactions, "these objectives are not well served by a form of analysis that creates an illusion of objectivity that... yields unpredictable results."

C. The Need for Consistency: A Starting Point for Reform

Former section 304 of the Bankruptcy Code was not adequate to consistently adjudicate complex cross-border corporate insolvencies. The system of factorial analysis under section 304 presented foreign investors with tremendous risk and uncertainty. The philosophy of section 304 was "that of deference to the country where the primary insolvency proceeding [was] located... and flexible cooperation in administration of assets." The existence of competing objectives—territorialism and universalism—and flexible judicial discretion created significant precedential divergence in interpreting section 304. Further, this interest-balancing approach did not generate needed communication and coordination between sovereign bankruptcy courts and created an environment of reciprocal distrust.

It is the intent of Congress to limit discretion as global economic interdependence increases so that the courts, at least in theory, will lean in favor of granting relief where appropriate. Indeed, Congress provides a certain amount of discretion so bankruptcy courts are not bound by inflexible rules. Legislating inflexible rules will strip the courts ability to establish precedent that meets developing issues that Congress can not foresee.

80. Paul, supra note 11, at 63.
81. In re Simon, 153 F.3d 991, 998 (9th Cir. 1998).
As a point of caution, it is important that the courts be transparent: their analysis must be intelligible and consistent so that precedent may be effectively followed by successive courts. It is imperative, therefore, that courts apply similar reasoning when addressing the insolvency laws of a foreign nation—as opposed to case-by-case analysis—and abstain from the tendency to regress to former and now archaic analysis methodology.

V. CHAPTER 15: A MORE STRUCTURED AND CONSISTENT APPROACH

The purpose of Chapter 15 was not merely to codify precedent established under section 304. Congress also did not adopt Chapter 15 to settle the long-running theoretical spat between universalism and territorialism, or prescribe further interest-balancing analysis. Instead, Chapter 15 incorporates procedural mechanisms to maximize the aggregate value of the debtor's property, distribute available funds in an efficient and non-discriminatory manner, and allow businesses to liquidate or continue as a going concern, all achieved through communication and coordination with foreign courts and foreign representatives. In general, Chapter 15 is the sole avenue for foreign representatives to directly access the benefits and protections of the U.S. bankruptcy system, whether to conduct a full plenary proceeding or a more limited, ancillary proceeding. Congress envisioned that Chapter 15 will serve as a guidepost to foreign nations in dire need of transnational bankruptcy law reform. Realizing this vision requires U.S. bankruptcy courts to discontinue prior methods of analysis—using judicial discretion which results in ad hoc application rather than encouraging reformative law that results in transparency and certainty. Incorporating a transparent cross-border insolvency law framework required removal of prior legislation that mandated balancing competing interests. The following discussion will argue that Congress intentionally limited prior section 304(c) analysis to one, relatively insignificant provision and the reasons why this was necessary to adopt the objectives of the Model Law. Further, it will be argued that since the basic analytical approach of U.S. international bankruptcy

82. Specifically stating the adoption of one theory versus another within Chapter 15's framework would be ineffectual—leading to further reformative resistance by those bankruptcy courts that adamantly disagree with the chosen doctrine. Additionally, choosing a doctrinal approach will not necessarily provide certainty in analysis, therefore, not meeting the needs of the globalizing world economy.

83. Sections 1525(a) and 1526(a) are to be used in a manner consistent with the objectives under section 1501. By linking the objectives of Chapter 15 with the mandate to cooperate and communicate to the maximum extent possible creates an environment that fosters harmonization between foreign courts.


85. I understand that the term "comity" is used in two separate provisions, however, and as discussed infra, section 1509 uses the term comity in the context of a choice and not in a context requiring judicial analysis.
law is significantly changed, the overall mindset and approach toward foreign law taken by courts shall change too.

A. THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

The UNCITRAL Model Law provides the most pragmatic and predictable approach for governing cross-border insolvencies. The Model Law is geared toward the recognition of foreign insolvency proceedings through moderate choice of forum and choice of law provisions. The Model Law is purposely not intended to provide substantive laws because it would inevitably require enacting States to alter material rules regarding insolvency proceedings, potentially minimizing adoption by other nations. Rather, the Model Law incorporates procedural recommendations that adopting States should incorporate into their national bankruptcy law. Additionally, a State with a less developed international bankruptcy law framework is provided a comprehensive legal structure for managing cross-border insolvencies. By paralleling, nearly verbatim, the language of Chapter 15 to that of the Model Law, the United States will parallel the procedural law of all adopting nations, encouraging other nations to set aside their passé bankruptcy laws in favor of the modern Model Law.

B. CHAPTER 15: OBJECTIVES AND WHY COMITY IS NOT ONE OF THEM

The recently enacted Chapter 15 to the Bankruptcy Code as part of the BAPCPA is a response to the mounting difficulties in case-by-case analysis under the former section 304. Chapter 15 specifically incorporates the Model Law, taking a significant step toward global unification of cross-border insolvency laws among nations. Congress envisioned Chapter 15 to parallel the purpose, intent, and underlying principles of the Model Law, while also leaving bankruptcy courts with enough authoritative discretion to effectuate their intended role. The Model Law approach is not strictly based on a single doctrine like comity, as it does not, in and of itself, provide the same level of predictability and reliability as incorporating specific legislation. In accordance with the Guide to the Model Law's recommendation, Congress specifically did not prescribe comity as the overall guiding principle for cross-border insolvency administration. Instead, Congress uses a list of statutory objectives that guides bankruptcy court analysis and places into context what it means to adopt the Model Law. The listed objectives are, in pertinent part:

88. Id.
89. See id.
(1) Cooperation between courts of the United States and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
(2) greater legal certainty for trade and investment;
(3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
(4) protection and maximization of the value of the debtor's assets; and
(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.90

Aggregating these objectives contextualizes Chapter 15 and the contemplated procedural administration—outlining the current legal environment for bankruptcy courts to emulate. Adopting the Model Law means U.S. bankruptcy courts are now working within a legal construct that emphasizes harmonious interplay between international bankruptcy judiciaries based on coordination and communication. Reciprocal distrust between local and foreign bankruptcy regimes is inconsistent with a progressive legal environment that demands harmonious co-action. Thus, under the Chapter 15 legal environment, U.S. bankruptcy courts must take an open-minded approach toward transnational insolvency analysis in the context of interconnected global market growth and cross-border bankruptcy law reform.

Reaching a level of harmonious interaction between bankruptcy courts of different nations will prove challenging—a goal some scholars believe is unattainable.91 Nonetheless, it is a task derived by the courts from Congress which is attainable through proper application of Chapter 15. Section 304 directed bankruptcy courts to employ a balanced approach based on the doctrine of comity and public policy (which the courts have struggled to define consistently). The competing theoretical approaches, as previously noted, are not conducive to achieving predictability in judicial cooperation, recognition of foreign insolvency proceedings, and access for foreign representatives to courts.92 The objectives of Chapter 15 are intended to be a vehicle to achieve a higher degree of harmonization and certainty regarding cross-border insolvency administration. Due to the varying definitions toward notions of comity, Chapter 15 appropriately disinclined to provide comity in this list of objectives.

1. Where Comity is No Longer Applicable

The most important provision of Chapter 15, which also includes the most drastic change from former section 304, is subchapter III. This subchapter sets out the recognition requirements a foreign representative or foreign court must meet, relief available upon filing a petition and post-recognition, the effects of recognition, and provides important protections for creditors and interested parties from abuse of Chapter 15. Prior to Chapter 15, section 304(b) listed the forms of relief available, and section 304(c) determined whether to grant the relief requested, governed by principles of international comity and flexible cooperation.

a. Recognition of Foreign Proceedings and Right of Direct Access

A notable addition under Chapter 15 is the inclusion of a procedural framework for determining recognition of an ancillary proceeding. Under former section 304 there was no procedural process for recognizing a foreign proceeding. It merely gave United States courts authority to open an ancillary proceeding and grant relief to a foreign representative if they satisfied the statutory requirements. In the previously mentioned IBB case, the court granted recognition of the foreign debtor only after concluding that to do so would provide significant protection to U.S. creditors and equality of distribution—clearly combining recognition and relief into a single step. Combing two procedural steps into one did not provide instant protection to the debtor because relief was only available after conducting the lengthy section 304(c) analysis. Such a lengthy recognition and relief process subjected debtors to an unnecessary increase in risk exposure and significantly delayed distribution to creditors. Under Chapter 15, Congress instituted a separate process for recognition and relief. Section 1515 provides a more simplified, clearer procedure for recognition (requiring the mere filing of documents), realizing the absolute need for debtors to obtain quicker relief to preserve the estate.

b. Automatic and Discretionary Relief

Under the purview of Chapter 15, bankruptcy courts have two opportunities to afford a foreign representative with relief: first, under section 1519 the court may grant relief after the filing of the petition, and second, under section 1521 after recognition of a foreign proceeding. Relief is now granted in accordance with the section 1501 objectives: effectuate the purpose of Chapter 15, and protect the assets of the debtor and the

95. Section 304 was broad in application and the requirements (still not composing a framework) under section 304(a) will not be discussed in detail as they are not substantively relevant to the purpose or objective of this article.
96. Israel-British Bank, 536 F.2d at 511.
97. Section 1519 will likely be used primarily to provide injunctive relief for the foreign representative to protect the debtor's assets and preserve its value. See COLLIER, supra note 22, ¶ 1519.01.
interests of all creditors. Granting relief is not limited—as applied by courts under section 304—by comity and subjective factorial analysis.

When circumstances arise that delay the timely recognition of a foreign proceeding, or when there is an otherwise urgent need to protect the assets of the debtor or interests of creditors prior to recognition, a court may grant “collective” relief—similar to relief under section 1521.98 The court’s determination to refuse or grant collective provisional relief prior to recognizing a petition cannot be based on a theoretical analysis of comity. Instead, the courts shall limit analysis to the necessity for relief as presented by the facts alone and with a sense of urgency.

Immediately upon the recognition of a foreign main proceeding99 certain protections are effective—similar to those protections and limitations of a debtor-in-possession under Chapter 11.100 Section 1520(a) secures, as a matter of right, the foreign representative with certain rights and powers during the administration of the foreign main proceeding, which states in pertinent part:

Upon recognition of a foreign proceeding that is a foreign main proceeding—

(1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;
(2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;
(3) unless the court orders otherwise, the foreign representative may operate the debtor’s business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and
(4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.101

These automatic protections and rights are necessary to organize a fair and orderly transnational insolvency proceeding. Therefore, courts are not to contemplate the particular forms of relief available, as those may be modified as needed under section 1522.102 Most important to the debtor and the debtor’s property is the automatic stay protection, which gives a foreign representative certainty that all of the debtor’s property located in the United States will be protected from creditor action, and thus, reduces administrative burdens. Further, the foreign representative is afforded the same rights and powers as a trustee to operate the debtor’s

100. The specific forms of relief are still subject to the conditions set forth in the specific provisions within the other chapters of the Bankruptcy Code. See COLLIER, supra note 22, ¶ 1519.05.
102. 11 U.S.C. § 1522(c).
business. The prefacing language "unless the court orders otherwise," is similar to the limitation found under in section 1108. Therefore, the legal standard for removing a debtor in possession under section 1520(a)(3) shall be applied in the same manner as under section 1108, which, according to case law, is the good faith business judgment test. 103 Seemingly, Congress intends for foreign representatives to have the same authority to operate the debtor's business as a debtor-in-possession under Chapter 11, yet still protect creditor interests.

In addition to the protections and rights that are immediately effective upon recognition under section 1520, a court has discretion to grant, or continue, any appropriate form of relief. 104 For purposes of this article, section 1521 is of notable importance. Under this section, the court does not retain similar broad and flexible discretion previously held under section 304(c) to limit relief. Bankruptcy courts still may tailor relief to meet the needs of the factual circumstances. 105 Congress evidences this intent by stating that relief shall be granted "where necessary to effectuate the purpose of [Chapter 15] and to protect the assets of the debtor or interests of the creditors." 106 Noticeably, there is no mention of comity or maximum flexibility. Congress steers courts away from balancing broad competing objectives and instead, courts shall focus on the needs of the debtor business to facilitate its rescue and preserve employment.

So that courts can adjust to the changing needs of the current economic environment, they shall not revert back to the methodologies used under repealed section 304(c) to modify or terminate relief. Section 1522 permits the court to modify, terminate, or subject relief granted under sections 1519 or 1521, or operation of the debtor's business under section 1520(a)(3). 107 By considering section 1522 with other sections of Chapter 15 that provide relief, Congress is attempting to balance relief that may be granted to the foreign representative and the interests of the parties that may be effected by such relief. 108 At first glance, such co-action reflects analysis under repealed section 304(c), however, Congress intelligibly refrained from including comity or other broad language. Using such language would not achieve the objectives of Chapter 15. Instead, Congress references the interests of creditors, the debtor and other interested parties to provide useful elements—instead of competing objectives—to guide the court in exercising its powers under sections 1519 and 1521. The Model Law, and thus Chapter 15, does not inappropriately limit authoritative discretion of the courts. The courts retain enough discretion.

103. See, e.g., In re Curlew Valley Assoc., 14 B.R. 506, 509 and 514 (Bankr. D. UT. 1981) (defining the "order otherwise" language of section 1108 as allowing, at most, the court to direct the trustee, when he may not do otherwise, to discontinue an enterprise. The court further notes that section 1108 is of limited purpose).
106. § 1521(a).
107. See § 1522(c).
to tailor relief as needed, within a framework that properly guides such tailoring to meet the purpose of Chapter 15.

Under Chapter 15, the analysis for granting or limiting relief is simplified by Congress' removal of comity from the applicable provisions. U.S. bankruptcy courts can protect the foreign debtor's assets through granted relief and also sufficiently protect the interests of creditors in the same manner as Chapter 11: through negotiated security grants, filing of bonds, or other forms of adequate protection. By simplifying relief analysis to comprehensible standards within framework that provides clear guidance that bankruptcy courts already commonly adhere too, certain and transparent analysis will materialize.

c. Violations of Public Policy

Section 1506, the only broad limiting provision provided for under Chapter 15, states that "[n]othing in this chapter prevents the court from refusing to take action governed by this chapter if the action would be *manifestly contrary* to the public policy of the United States." Prior to Chapter 15's enactment, bankruptcy courts yielded inconsistent results by subjectively balancing the relative interests of U.S. public policy. As an example, the court in *Toga* held that Canadian insolvency law violated U.S. policy against unequal treatment, even though the foreign law providing for equality of distribution among creditors. As seen in reorganization and relief analysis, section 304 did not provide a separate public policy provision, thus, courts applied section 304(c) analysis to determine violations of public policy. Under section 1506, Congress excluded notions of comity from violations of public policy analysis, clearly to avoid future reliance on section 1506 in a like manner. Indeed, it is still possible for bankruptcy courts to apply a broad reading to section 1506 for denying recognition or relief. Such an approach would be inconsistent with the Model Law's intent regarding the public policy exception.

During the UNCITRAL commission sessions, a number of countries expressed concern that although a public policy exception was obligatory, a broad reading of the statute could be used to undermine the Model Law. To stress the need for a restrictive interpretation of the notion of public policy, the Model Law and Chapter 15 include the proviso "manifestly contrary." Use of the qualifier "manifestly contrary" is to "emphasize that public policy exceptions . . . [are] intended to be invoked under exceptional circumstances concerning matters of fundamental im-

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111. *In re Toga Mfg. Ltd.*, 28 B.R. at 167 (Prior discussion illustrates how through section 304(c) analysis the court came to the conclusion that foreign law violated public policy).
When interpreting section 1506, the District Court for the Southern District of New York recently stated that "[c]ongress instructed the courts that the exception provided [under section 1506] for refusing to take actions 'manifestly contrary to the public policy of the United States' should be 'narrowly interpreted.'" The district court noted all that was required by section 1506 is the foreign judiciary provide a fair and impartial proceeding. If the public policy exception is broadly applied—similar to the previously cited case under section 304—than international cooperation will be unduly hampered. The public policy exception is limited in application to promote cooperation between judiciaries and encourage other nations to adopt the Model Law.

2. The Limited Role of Comity

After granting recognition of a foreign proceeding, the bankruptcy court is permitted to grant additional assistance to a foreign representative pursuant to section 1507. Congress mandated in Chapter 15 that comity is the guiding principle for courts solely in the context of granting additional assistance to a foreign representative as needed. Special note should be given to the language of section 1507, which states:

(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—[former section 304(c)(1)-(4) and (6)]

It is imperative that U.S. bankruptcy courts understand the significance of the changes in the purpose and scope of comity under Chapter 15. Section 1507(b) is the sole provision addressing the role of comity analysis in Chapter 15. As previously discussed, prior case law under repealed section 304 resulted in ad hoc comity analysis and fragmentation between international insolvency judiciaries. Further, section 304(c) was often used as a limiting provision to protect the interests of local creditors. Sec-

116. In re Ephedra, at *3 (lack of a jury trial that resulted in a lower bargaining position did not violate a fundamental United States public policy despite being a constitutional right).
117. 11 U.S.C. § 1507(a), (b).
tion 1507(b) allows a court flexibility to grant additional or different assistance, but in no way should this flexibility be used to limit relief otherwise available under Chapter 15.\footnote{118}

Congress understands that bankruptcy courts are in the best position to assess the proper manner to efficiently and economically administer transnational insolvencies. Therefore, Congress did not have in mind to completely override prior cross-border insolvency case law but permits courts to continue further common law developments in forms of assistance, not relief analysis. In an effort to harmonize international courts, Congress limited comity analysis solely to section 1507(b) to minimize the uncertainty that erupted from section 304(c)'s application. However, the incorporation of the section 304 balancing factors, with the exception of comity, into section 1507 does not permit adherence to territorialism; and further, such incorporation does not permit application of prior case law that made relief solely dependent on protection of local interests.

As previously discussed, section 1521(a) does not provide an inclusive list of available relief, rather it permits courts to grant "any appropriate relief" that is "necessary to effectuate the purpose[s] of [Chapter 15]".\footnote{119} Therefore, courts are not limited under section 1521 by notions of comity or the section 1507 factors in granting relief available under title 11 or U.S. laws. Instead, and as previously noted, the limitation standard for relief is reserved to analysis under section 1522. Thus, section 1507(b) analysis is of little importance regarding granting relief, or even "additional assistance," to a foreign representative. It is appropriate to question the necessity of this provision, however, Congress wanted to make clear that Chapter 15 intended to allow and make available prior forms of assistance and not prior forms of analysis under section 304.

The statutory provision addressing comity, as opposed to comity as a guiding principal for analysis, is found under section 1509, which allows a foreign representative the right of direct access to commence an ancillary case under section 1504 and section 1515.\footnote{120} The important reference to comity in this provision is found under section 1509(b)(3), which states that a court, if awarding recognition, shall grant comity or cooperation to the foreign representative. It is important to note that there is no discretionary analysis to be taken by the court under this section regarding recognition. Basically, this section implements the "single point of entry" concept for determining recognition of a foreign proceeding.\footnote{121} If recognition is granted, the foreign representative will be permitted full access to state and federal courts in the United States. But if recognition is denied, the foreign representative is restricted from seeking relief from another court except for the purpose of collecting a claim or accounts

\footnotesize{\bibliography{citation}}

\footnotesize{\bibliography{{\textit{citation}}}}}
receivable owed to the debtor.\textsuperscript{122}

As prior discussion argues, the role of comity under the purview of Chapter 15 is significantly restricted to prevent inconsistent analysis for granting recognition or relief. It is imperative for courts to understand that notions of comity included in former section 304(c) are not applicable under Chapter 15, except for the limited purpose of providing additional assistance available under title 11 or other laws of the United States.

VI. PROPOSALS FOR ACHIEVING COORDINATION AND COMMUNICATION

Sections 1525 and 1526, implemented through section 1527, are two core provisions of Chapter 15 that will be important to maximizing the value of the debtor's property, curbing litigation, and reducing expense and delay.\textsuperscript{123} These three provisions mandate cooperation and communication by courts and administrators to the maximum extent possible. The objective of communication and cooperation "is to enable courts and insolvency administrators from two or more countries to be efficient and achieve optimum results."\textsuperscript{124} U.S. bankruptcy courts must provide a mechanism that implements coordination and communication between themselves and international courts. Section 1527 gives bankruptcy courts broad authoritative discretion to determine the appropriate manner for communicating with the foreign court(s), including implementation of agreements (i.e. protocols or guidelines), methods of coordination, concurrent proceedings, direct communication, or appointment of a person or body to act on behalf of the court.\textsuperscript{125} The following discussion emphasizes the importance of clear, direct forms of communication, arguing that a protocol—or other form of agreement setting guidelines applicable to court-to-court or administrator communications—is the most effective mechanism for achieving the objectives of Chapter 15.

A. ROLE OF THE COURT: DIRECT LINES OF COMMUNICATION

One essential element for cooperation in cross-border cases is direct communication between supervising judiciaries and administrators. Chapter 15 has significantly changed the legal environment, emphasizing communication and cooperation between the U.S. court and the foreign judiciary or administrator.\textsuperscript{126} The Third Circuit in Stonington Partners...
echoes preference for a direct communication approach by stating, "[w]e strongly recommend . . . that an actual dialog occur or be attempted between the courts of the different jurisdictions in an effort to reach an agreement as to how to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects of the foreign laws."127 Direct communication may not always reach an initial agreement between parties. Such communication will not be in vain as valuable information obtained develops an increased level of cooperation among courts and understanding of foreign insolvency laws.

As a note of caution: communication between courts or administrators in cross-border cases must be transparent and clearly fair to rest concerns of litigants and avoid issues of credibility and proper procedures.128 To encourage such communications, the American Legal Institute’s Transnational Insolvency Project prepared its Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases.129 The Guidelines are largely based on cross-border insolvency protocols entered into between courts in different countries.130 The Guidelines were “meant to be adopted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them.”131 Several transnational insolvency cases have effectively used the Guidelines, in the form of protocols, to achieve transparent and fair direct forms of communication between the involved judiciaries.

B. Protocols: Achieving

To staunch the negative impact that uncertainty has had on investors engaging in international trade and development, an increase in the willingness to enter into agreements between the courts and parties involved in the form of protocols has emerged. A protocol is an ad hoc agreement which provides a guiding administrative framework for the actions of the parties involved in cross-border insolvency proceedings.132 Historically,
protocols were especially important when U.S. bankruptcy courts were involved in concurrent plenary proceedings with two or three foreign jurisdictions. Conducting two plenary proceedings was necessary because repealed section 304 did not provide courts with authority to directly communicate or implement agreements with foreign judiciaries. When a foreign representative seeks refuge under the U.S. bankruptcy system, Chapter 15 encourages courts to take an ancillary role and coordinate with foreign courts or administrators through direct communication instead of conducting parallel proceedings.\textsuperscript{133} Protocols, consistent with the objectives of Chapter 15, seek to harmonize proceedings through a mechanism that controls how the parties will communicate, take actions, and apply both procedural and substantive elements of law. Although specific details of protocols will vary to suit the specific needs of each case, the basic construct will consistently address and resolve several issues, including "(i) coordination of hearing in the judiciaries involved; (ii) filing of claims; procedures dealing with the financing or sale of assets; (iii) recovery of debtor's property for the benefit of creditors and equality of treatment among unsecured creditors; and (iv) reorganization plans in the different jurisdiction."\textsuperscript{134} Finally, protocols will facilitate certainty in cross-border insolvency administration, as noted by Flaschen and Silverman: "The protocols implemented to date can serve as useful instruments for reference in crafting future cross-border cooperation agreements . . . [and] as an important guidepost for consideration or incorporation in future protocols."\textsuperscript{135}

Despite the success of protocols in furthering coordination and efficiency, they will be of little use in administering larger multinational insolvencies. In today's global environment, large multinationals include multiple subsidiaries located in any number of countries. Even Flaschen and Silverman have shown reservations regarding their effectiveness in light of the growing complexity of large cross-border insolvencies involving five, ten, or even fifty other nations.\textsuperscript{136} It will be increasingly difficult for U.S. bankruptcy courts to negotiate a single cooperative protocol, or individual protocols, with each foreign court or foreign representative in a plenary capacity. Instances where cooperation is not achieved will be rare, especially where all interested courts and administrators are motivated to cooperate and directly communicate in order to maximize the economic return to all parties.

\textsuperscript{133} See 11 U.S.C. §§ 1504, 1515.

\textsuperscript{134} SPRAYREGEN, supra note 123, at 12 (quoting Harold Maier, Interest Balancing and Extraterritorial Jurisdiction, 31 AM. J. COMP. L. 579, 589 (1983) (citations omitted)).


VII. CONCLUSION

The most important concept to understand is the following: to grant relief, section 304 required courts to balance deference toward notions of international comity and protection of U.S. public policies. Chapter 15 explicitly and unambiguously rejects such analysis, not only for relief, but for all significant facets of cross-border insolvency administration.

Reviewing the history of U.S. cross-border insolvency law, it should not be surprising that Chapter 15 does not parallel the intent, procedural framework or analytical approach of repealed section 304, because section 304 did not directly parallel the relevant provisions under the Bankruptcy Act of 1898. The intent of section 304 was to both clarify and expand the remedial powers of the court and the factors framing their application from under the relevant provisions of the Bankruptcy Act. At its basic level, section 304 significantly modified prior law to provide more clarity and to better define the powers of the court to achieve efficient and economical administration of insolvents. Much the same, though promoting a different legal environment, Chapter 15 significantly alters section 304, not to overrule all prior case law, but to provide clarity to the legal framework and consistency in case law application.

As markets converge on the global scene, sovereign transnational insolvency laws will become more interconnected and dependant on each other to achieve increasingly consistent outcomes. Congress envisions the United States will set reformative precedent for other nations to follow, and Chapter 15 is the most pragmatic step in reaching that goal. This goal will not be achieved if U.S. bankruptcy courts continue interest-balancing analysis between subjective, territorial policy interests and notions of international comity. As the Model Law does not contemplate the need for comity in a common procedural law, a common system of international insolvency law will not need to rely upon comity either.