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CHAPTER 15 AND THE ADVANCEMENT OF INTERNATIONAL COOPERATION IN CROSS- BORDER BANKRUPTCY PROCEEDINGS

*Bryan Stark**

I. INTRODUCTION

With the growth of multinational corporations and the technological advances in communication and travel, the world is quickly becoming one global, financial community. Corporations, organizations, and even individual citizens are accruing assets in multiple countries, opening the world to cross-border legal proceedings that determine the rights of interested parties in a wide variety of cases. The field of bankruptcy is included in these cross-border proceedings, in which “[c]ases commenced under the [United States] Bankruptcy Code [or] insolvency or reorganization schemes in other countries increasingly involve assets in various countries as companies increasingly have international business interests.”¹ In response to this relatively new legal issue, the United States recently added Chapter 15 to the United States Bankruptcy Code, setting forth the procedures for U.S. Courts to follow in legal proceedings that are ancillary to foreign bankruptcy proceedings.² Chapter 15 substantially adopts the Model Law for Cross-Border Insolvency,³ which was drafted with the intention of promoting international coordination and cooperation in these cross-border proceedings⁴ and makes a valuable first step in advancing international cooperation and coordination.

This Comment examines the history of ancillary proceedings to foreign insolvency cases in the United States and analyzes what improvements, if any, have been made by the creation of Chapter 15. Part II discusses the state of ancillary jurisdiction proceedings in the United States under the recently repealed Section 304 of the Bank-

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¹ NATIONAL BANKRUPTCY REVIEW COMMISSION, *BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT*, 351 (1997), available at <http://govinfo.library.unt.edu/nbrcreport/10transn.html> (last visited Oct. 28, 2006).

² See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 801(a), 119 Stat. 23 (to be codified at 11 U.S.C. § 101).

³ Model Law on Cross-Border Insolvency, G.A. Res. 52/158, U.N. Doc. A/Res/52/158 (Jan. 30, 1998).

⁴ See *id.*

ruptcy Code.⁵ Part III goes on to discuss the international movement to promote international cooperation in cross-border proceedings and the creation of Chapter 15 in the United States' recent bankruptcy reform. Finally, Part IV discusses Chapter 15 in practice, including the improvements made to promote coordination and communication among foreign states and the straight-forward procedures Chapter 15 lays out to open an ancillary proceeding in the United States.

II. ANCILLARY JURISDICTION UNDER 11 U.S.C. § 304

Before Chapter 15 was added to update the Bankruptcy Code, proceedings in the United States that were ancillary to foreign bankruptcies were governed under section 304, which was included in the Bankruptcy Reform Act of 1978.⁶ Although section 304 was a significant step towards improving communication between courts of the United States and courts from foreign countries, it was not significant enough to withstand the pressures from the tremendous increases in international business and accumulation of assets over the next twenty-five years.

A. *Historical Background of 11 U.S.C. § 304*

The Bankruptcy Reform Act of 1978's "[m]ajor purpose [was] the modernization of the bankruptcy laws,"⁷ and it included the recently repealed section 304.⁸ The Bankruptcy Code had not been substantially updated since its inception in 1898,⁹ which the House Report on the Act of 1978 called "the horse and buggy era of consumer and commercial credit."¹⁰ In fact, the last time it had even been amended was 1938,¹¹ before the consumer credit industry had grown and before the Uniform Commercial Code had been widely adopted in the 1960's.¹² "There ha[d] been steady growth in the number of bankruptcies, both consumer and more complicated business reorganization cases, over the [previous] 20 years, and [that growth] led to great stresses and strains in the bankruptcy system,"¹³ which ultimately led

⁵ 11 U.S.C. § 304 (2000) (repealed 2005).

⁶ Bankruptcy Reform Act of 1978, 11 U.S.C. § 101 (2000).

⁷ H.R. Rep. No. 95-595, at 3 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5965; *see also* S. Rep. No. 95-989, at 2 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5788.

⁸ 11 U.S.C. § 304.

⁹ Act of July 1, 1898, ch. 541, 30 Stat. 544.

¹⁰ H.R. Rep. No. 95-595, at 5.

¹¹ Act of June 22, 1938, ch. 575, 52 Stat. 840 (updating and amending Act of 1898).

¹² H.R. Rep. No. 95-595, at 5; *see also* S. Rep. No. 95-989, at 2.

¹³ S. Rep. No. 95-989, at 2-3.

to the 1978 legislation to “upgrade and modernize [the] bankruptcy courts and . . . the law.”¹⁴

Included in the Bankruptcy Reform Act was section 304, which “govern[ed] cases filed in the bankruptcy courts that are ancillary to foreign proceedings. That is, where a foreign bankruptcy case is pending concerning a particular debtor and that debtor has assets in” the United States.¹⁵ Recognition of foreign proceedings and the notion of international comity had long been the United States’ conviction,¹⁶ and with the inclusion of this provision, Congress finally codified the concepts of “comity and cooperation” in bankruptcy matters pending in foreign jurisdictions that it had long supported.¹⁷ In doing so, it enabled a foreign trustee from a main proceeding to initiate an ancillary case in the United States to seek relief in the debtor’s home country,¹⁸ and, with the expansion of businesses and the ease of travel across borders and between countries, the possibility became increasingly likely that a bankruptcy proceeding could take place across borders.

The title of section 304 is “[c]ases ancillary to foreign proceedings,”¹⁹ and it indicates that there is a foreign proceeding that dominates. In following, section 304 only enabled a trustee or administrator to initiate a “limited action, as opposed to a full-fledged bankruptcy case” to secure assets in the United States from local creditors.²⁰ So, section 304 provided a procedure in which U.S. courts could assist foreign bankruptcy proceedings, contribute to the effect of those proceedings to property or assets within the United States, and ensure that the foreign debtor’s assets were not seized by local creditors.²¹ Importantly, this assisted in “prevent[ing] piecemeal distribution of assets in the United States” by local creditors initiating local bank-

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 35.

¹⁶ *Canadian Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 539 (1883) (“Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries.”).

¹⁷ Jay L. Westbrook, *Chapter 15 At Last*, 79 AM. BANKR. L.J. 713, 718 (2005).

¹⁸ *Id.* at 718-19.

¹⁹ 11 U.S.C. § 304 (2000) (repealed 2005).

²⁰ Robert E. Phelan & Scott W. Everett, *The Wretched Refuse—Leading the Foreign Corporation to a Fresh Start in the United States*, 59 CONSUMER FIN. L.Q. REP. 23, 30-31 (2005).

²¹ *Id.*; see also *In re Gee* 53 B.R. 891, 896 (Bankr. S.D.N.Y. 1985) (“A 304 case is a limited one, designed to function in aid of a proceeding pending in a foreign court.”); BANKRUPTCY REVIEW COMMISSION REPORT, *supra* note 1, at 367 (stating that the purpose of section 304 was to “assist the foreign insolvency proceeding”).

ruptcy proceedings,²² and thus endorsed the United States' longstanding support of international comity in bankruptcy proceedings.²³ Ultimately, a "304 petition creates a bankruptcy case limited in scope and designed to aid in the foreign proceedings."²⁴

B. Requirements for Filing a Section 304 Petition

To commence a case under section 304, the requirements to qualify for the petition stated that "[a] case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative."²⁵ Therefore, the definition itself laid out two statutory requirements to file the 304 petition, and a third requirement, venue, was necessary for a particular bankruptcy court to have heard the case. In following, a section 304 proceeding had three requirements: (1) one must be a "foreign representative"; (2) there must be a "foreign proceeding"; and (3) the petition must satisfy the venue requirements of 28 U.S.C. § 1410.²⁶

1. Foreign Representative

The first requirement was that the petition be filed by a foreign representative. The Code defined a foreign representative as a "duly selected trustee, administrator, or other representative of an estate in a foreign proceeding."²⁷ A basic reading of that definition indicates a broad possibility of representatives, signifying the court's recognition that the term's definition can differ between foreign states.²⁸ A foreign representative could be a court-appointed representative²⁹ or another entity that the court decided to include in its interpretation of

²² *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 348 (2d Cir. 1992); see also *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987) ("[Section 304] allows foreign bankrupts to prevent piecemeal distribution of assets in this country by filing ancillary proceedings in domestic bankruptcy courts.").

²³ See *Canadian Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 539 (1883); *Cunard S.S. Co. v. Salen Reefer Services AB*, 773 F.2d 452, 458 (2d Cir. 1985) ("American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities.").

²⁴ *In re Koreag, Controle et Revision S.A.*, 130 B.R. 705, 710 (Bankr. S.D.N.Y. 1991).

²⁵ 11 U.S.C. § 304(a) (2000) (repealed 2005).

²⁶ See 28 U.S.C. § 1410 (2000); Jennifer Greene, Note, *Bankruptcy Beyond Borders: Recognizing Foreign Proceedings in Cross-Border Insolvencies*, 30 BROOK. J. INT'L L. 685, 688-92 (2005).

²⁷ 11 U.S.C. § 101(24) (2000).

²⁸ See Greene, *supra* note 26, at 689.

²⁹ Cf. *In re Board of Directors of Hopewell International Insurance Ltd.*, 238 B.R. 25, 53-54 (Bankr. S.D.N.Y. 1990) (stating that a board of directors can be a foreign

the definition. The interpretation could even go so far as to include the board of directors of the foreign debtor.³⁰ Thus, in a section 304 proceeding, the statutory requirement that the petition be filed by a foreign representative could easily be satisfied because of the bankruptcy court's broad application of the term.

2. *Foreign Proceeding*

The foreign representative must have filed a petition for an ancillary proceeding to a foreign proceeding to have qualified for section 304 relief.³¹ Therefore, to fully understand who can be considered a foreign representative, one must understand the definition of a foreign proceeding.³² Section 101(23) defined a "foreign proceeding" as:

[A] proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.³³

As was the case with the Bankruptcy's Code's definition of "foreign representative," the definition for "foreign proceeding" is extremely broad. Therefore, the court in *In re Netia Holdings S.A.*³⁴ identified three requirements to satisfy the Code's definition of "foreign proceeding":

- (1) the proceeding must entail an administrative or judicial process involving insolvency or reorganization;
- (2) it must be conducted for the purpose of liquidating an estate, adjusting its debts or effecting its reorganization; and
- (3) it must be pending in a foreign country where the debtor maintains its residence, domicile, [or] principal place of business.³⁵

representative and concluding that being appointed by the court is not the only way to be eligible as a foreign representative).

³⁰ See *In re Board of Directors of Multicanal S.A.*, 314 B.R. 486, 501 (Bankr. S.D.N.Y. 2004); *Hopewell*, 238 B.R. at 53-54.

³¹ See *Greene*, *supra* note 26, at 689.

³² See *Greene*, *supra* note 26, at 689 ("The true core of section 101(24)'s definition of foreign representative resides in the term 'foreign proceeding.'").

³³ 11 U.S.C. § 101(23) (2000) (amended 2005).

³⁴ *In re Netia Holdings S.A.*, 277 B.R. 571 (Bankr. S.D.N.Y. 2002).

³⁵ *Id.* at 581.

The first two factors are included in the Code's definition of "foreign proceeding."³⁶ The definition of the first factor included both judicial and administrative proceedings, accounting for peculiarities or differences in foreign legal systems, and liquidation proceedings. The second factor was the key point in the definition, demanding that a foreign proceeding must be "for the purpose of liquidating an estate, adjusting debts by composition, extension or discharge, or effecting a reorganization."³⁷ This effectively outlined the various bankruptcy proceedings utilized in the United States' legal system.³⁸

The third factor dealt with the location of the foreign proceeding, mandating that it be in the country of the debtor's residence, domicile, or principal place of business.³⁹ The Eighth Circuit evaluated the question of the third factor and held that the country of incorporation is the debtor's domicile.⁴⁰ The court reasoned that "[f]or years, federal courts interpreting jurisdictional and venue issues have considered a corporation's domicile to be its place of incorporation."⁴¹ In following, the court refused to "distinguish domicile in jurisdiction cases from domicile in bankruptcy cases involving section 304," and thereby held that a corporate debtor's domicile is its principal place of business.⁴² In order to determine whether a foreign proceeding exists, the courts specifically created another factor to join the two required by statute.

³⁶ See 11 U.S.C. § 101(23) (2000) (amended 2005).

³⁷ *Id.*

³⁸ See, e.g., *In re Koreag, Controle et Revision S.A.*, 130 B.R. 705, 711 (Bankr. S.D.N.Y. 1991) (stating that the foreign proceeding was a liquidation proceeding and "clearly falls within the definition of a foreign proceeding").

³⁹ See *Netia*, 277 B.R. at 581.

⁴⁰ *In re National Warranty Ins. Risk Retention Group*, 384 F.3d 959, 962 (8th Cir. 2004) (concluding that the "the term 'domicile' as used in § 304 refers to a corporation's place of incorporation").

⁴¹ *Id.* (rejecting the argument that a corporate debtor is not regarded as having a "domicile," because it is well-settled that the term applies to corporations).

⁴² *Id.* (concluding that "the term 'domicile' as used in section 304 refers to a corporation's place of incorporation"). Although "[s]cholars of comparative law have observed that domicile generally refers to a corporation's headquarters," *Wylar v. Korean Air Lines Co., Ltd.*, 928 F.2d 1167, 1175 (D.C. Cir. 1991), that is not true for all countries. "French law considers a corporation's *domicile* to be its *siege social*," which essentially means the corporation's headquarters. *In re Air Disaster Near Cove Neck, New York, on Jan. 25, 1990*, 774 F. Supp. 725, 728 (E.D.N.Y. 1991). This conflict has never been resolved in a U.S. bankruptcy proceeding ancillary to a foreign proceeding, however, it bears mentioning.

3. Venue

The final criteria for initiating an action under section 304 required the filing of the petition in the corresponding Bankruptcy Court under the venue requirements set forth in 28 U.S.C. § 1410, establishing three types of relief and a venue corresponding to each.⁴³ The action itself determined the venue for a particular proceeding.⁴⁴ Therefore, if the petition sought under section 304 was for an injunction to enjoin the commencement or continuation of a proceeding in a U.S. court, either state or federal, the proper venue was in the district where the action or proceeding sought to be enjoined was pending.⁴⁵ However, if the purpose of the petition sought was to enjoin a lien against a property or to turnover the property of an estate, proper venue would only lie in the district where the property was located.⁴⁶ Finally, if the purpose of the petition was to neither enjoin the commencement or continuation of an action nor enjoin a lien against a property, the proper venue for a section 304 petition would have been the district where the principal place of business in the United States, or the principal assets in the United States of the estate subject to the case, was located.⁴⁷ Thus, the venue requirement was determined and based on the specific action sought by the foreign representative, according to section 1410.

⁴³ 28 U.S.C. § 1410 (2000) (amended 2005). The text of 28 U.S.C. § 1410 read:

(a) A case under section 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 section 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 section 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.

⁴⁴ *Id.*

⁴⁵ *Id.* at § 1410(a).

⁴⁶ *Id.* at § 1410(b).

⁴⁷ *Id.* at § 1410(c).

C. Relief Under a Section 304 Petition

Relief in a section 304 petition was available under section 304(b),⁴⁸ and the relief “assure[d] an economical and expeditious administration of the estate.”⁴⁹ Specifically, section 304(b) allowed the bankruptcy courts to grant injunctive relief, order the turnover of property, or prescribe any other appropriate relief it believed necessary.⁵⁰

1. Forms of Relief Granted

Of the three forms of statutory relief, the most commonly sought was injunctive relief under section 304(b)(1),⁵¹ because the filing of section 304 petition did not trigger the automatic stay provision⁵² of the U.S. Bankruptcy Code.⁵³ Thus, the foreign representative, to secure property or enjoin a proceeding, should have sought injunctive relief in almost every instance. Furthermore, because there was “no express language in section 304(b)(1) requiring a foreign representative to adhere to all the . . . requirements for injunctive relief under Rule 7065 of the Bankruptcy Procedure,” the courts were able to grant injunctive relief at the filing of the petition.⁵⁴

Section 304(b)(2) authorized the Bankruptcy Court to order the turnover of a foreign debtor’s property located in the United States to the foreign representative.⁵⁵ The Second Circuit made it clear in *In re Koreag*,⁵⁶ that, before any property could be turned over to a foreign representative, the “bankruptcy court should apply local law to deter-

⁴⁸ 11 U.S.C. § 304(b) (2000) (repealed 2005).

⁴⁹ *Id.* at § 304(c).

⁵⁰ *Id.* at § 304(b)(1)-(3).

⁵¹ Greene, *supra* note 26, at 693.

⁵² The automatic stay provision in the U.S. Bankruptcy Code, 11 U.S.C. § 362 (2000) (amended 2005), stated that any petition filed voluntarily under § 301, jointly under § 302, or involuntarily under § 303 would operate as a stay against proceedings against the debtor, enforcement of a judgment against the debtor, an act to obtain possession of the estate, among other things. 11 U.S.C. § 362(a)(1)-(8). “The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws It stops all collection efforts, all harassment, and all foreclosure actions,” and allows the debtor to repay, reorganize, or “be relieved of the financial pressures that drove him into bankruptcy.” S. Rep. No. 95-989, at 54-55 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5840-41.

⁵³ *In re Goerg*, 844 F.2d 1562, 1568 (11th Cir. 1988) (stating that because a section 304 petition is not a full bankruptcy case or proceeding, a foreign representative filing for relief is not entitled to the full advantages and benefits of bankruptcy administration under United States law).

⁵⁴ Greene, *supra* note 26, at 694.

⁵⁵ 11 U.S.C. § 304(b)(2).

⁵⁶ *In re Koreag*, Controle et Revision S.A., 961 F.2d 341 (2d Cir. 1992).

mine whether the debtor has a valid ownership interest in that property.”⁵⁷ If a dispute arose over the ownership or interest in the property sought to be turned over, the laws of either the foreign jurisdiction or the jurisdiction where the section 304 petition was filed could be applied because both jurisdictions would have an interest in the proceeding.⁵⁸ The court in *In re Koreag* analyzed the competing interests by the foreign jurisdiction administering the estate and the local jurisdiction interested in enforcing the performance of a contract.⁵⁹ The court held that the local law “more closely related to the particular property dispute at issue,” concluding that the local law should apply.⁶⁰ Consequently, despite the possibility that a dispute over ownership of property could surface, section 304(b)(2) authorized the Bankruptcy Court to order a foreign debtor’s property to be turned over to a foreign representative as relief under a section 304 petition.

Finally, the Bankruptcy Court could issue other appropriate relief that it deems necessary under section 304(b)(3). “Section 304(b)(3) has . . . been used [to] . . . order[] entities to submit to discovery by a foreign representative, appoint[] co-trustees with responsibility for a debtor’s assets in the United States, and authorize[] a foreign representative to maintain foreign causes of action under the umbrella of the section 304 case.”⁶¹ Section 304(b)(3) could be used to grant relief to almost any foreign representative, and “the Court is free to broadly mold appropriate relief in near blank check fashion.”⁶² When injunctive relief and the turning over of property were not options, the Bankruptcy Court had broad discretion to issue other appropriate relief under section 304(b)(3), so long as it was awarded under the scope of relief provided by section 304(c).

2. *Scope of Relief*

Section 304(b) allowed the Bankruptcy Court to grant injunctive relief and enjoin an action against a debtor’s property, order the turnover of the debtor’s property to a foreign representative, and issue any other appropriate relief that it saw fit.⁶³ In determining if any of these forms of relief may be granted, though, the court used the guidelines set out in section 304(c).⁶⁴ These factors effectively worked as:

⁵⁷ *Id.* at 349.

⁵⁸ *Id.* at 351.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Haarhuis v. Kunnan Enterprises, Ltd.*, 177 F.3d 1007, 1012 n.4 (D.C. Cir. 1999).

⁶² *In re Culmer*, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982).

⁶³ *See supra* Part II.C.1.

⁶⁴ 11 U.S.C. § 304(c) (2000) (repealed 2005). The guidelines set forth under section 304(c) were:

[G]uidelines [that] are designed to give the court 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.⁶⁵

Therefore, they could be applied at the discretion of the judge and ultimately lead to a split in case law.

D. Problems with Section 304 Relief and Administration

Because these factors could be applied at the sole discretion of the Bankruptcy judges, the case law began to split between two approaches: universalism and territorialism.⁶⁶ Universalism treats a multinational bankruptcy as one unified proceeding administered by a single court and assisted by the courts of other countries that ultimately become involved.⁶⁷ Alternatively, territorialism, also known as the “grab rule,” is the more traditional approach to cross-border insolvencies in which courts seize the debtor’s assets in each country and use them to pay local creditors.⁶⁸

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

Id.

⁶⁵ H.R. Rep. No. 95-595, at 325 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6281; S. Rep. No. 95-989, at 2 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5821.

⁶⁶ See Greene, *supra* note 26, at 703 (“The inconsistency is embodied by two divergent approaches in determining whether to grant a foreign representative relief under 304. Specifically, some courts are willing to emphasize ‘universalism’ when interpreting section 304, while others emphasis [sic] the polar opposite, ‘territorialism.’”).

⁶⁷ Westbrook, *supra* note 17, at 715.

⁶⁸ *Id.* at 715-16.

Universalism, the approach expected when section 304 was adopted in 1978,⁶⁹ was the approach adopted by most courts in cross-border insolvencies.⁷⁰ Over time, it became clear that the split approach to cross-border proceedings was not going to improve. Increasing numbers of corporations and organizations procured multinational acquisitions and assets. In response, the United States successfully urged the international community to address the issue of international cooperation in these proceedings.⁷¹ As a result, the United States substantially adopted the Model Law on Cross-Border Insolvency⁷² as part of the Bankruptcy Abuse and Consumer Protection Act of 2005.⁷³

III. HISTORY OF THE MODEL LAW ON CROSS-BORDER INSOLVENCY AND THE ENACTMENT OF CHAPTER 15

“By adopting section 304 of the 1978 Reform Act, Congress put the United States in a position of leadership in the field of international insolvency.”⁷⁴ Locally, however, international cooperation did not follow, as section 304 did not explicitly favor a universalism approach to international insolvency proceedings.⁷⁵ In response to the United States’ lead in international insolvency coordination, countries around the world began expanding their cooperation in international proceedings.⁷⁶ Following along the same path, with urging from the International Bar Association, the United Nations Commission on International Trade (UNCITRAL) drafted the Model Law on Cross-Border Insolvency.⁷⁷ As a result, when the United States Congress overhauled the Bankruptcy Code in 2005, it added Chapter 15 to the Code, incorporating UNCITRAL’s Model Law on Cross-Border Insolvency.⁷⁸

A. *UNCITRAL’s Model Law on Cross-Border Insolvency*

UNCITRAL drafted the Model Law on Cross-Border Insolvency in May 1997, and it was adopted without a vote by the United

⁶⁹ See *supra* notes 15-24 and accompanying text.

⁷⁰ See, e.g., *Cunard Steamship Co. v. Salen Reefer Services*, 773 F.2d 452 (2d Cir. 1985); *In re Gee*, 53 B.R. 891 (Bankr. S.D.N.Y. 1985); *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982).

⁷¹ Model Law on Cross-Border Insolvency, *supra* note 3.

⁷² *Id.*

⁷³ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 801.

⁷⁴ NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT, *supra* note 1, at 354.

⁷⁵ See *supra* Part II.D.

⁷⁶ *Id.* at 355.

⁷⁷ Model Law on Cross-Border Insolvency, *supra* note 3.

⁷⁸ H.R. Rep. No. 109-31, at 105 (2005).

Nations General Assembly on December 15, 1997.⁷⁹ The United Nations felt it was important to create an “internationally harmonized model legislative provision on cross-border insolvency . . . to assist States in modernizing their legislation” in this field.⁸⁰ Because the increased prevalence of cross-border trade and investment led to an increased number of cases in which a debtor had assets in more than one country, the United Nations, for the sake of international business, needed to create a framework to facilitate cross-border cooperation.⁸¹ From its inception, UNCITRAL’s analysis and reasoning behind drafting the model law focused on international cooperation.⁸² Therefore, the Model Law’s adoption of universalism, rather than territorialism, furthers this goal of coordination and cooperation.⁸³

The increased frequency of cross-border insolvencies led the U.N. to adopt the Model Law to promote the cooperation of courts involved in these administrations and to advance the “[f]air and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons.”⁸⁴ To facilitate international cooperation and promote the adoption of this proposed legislation, UNCITRAL decided to draft a “model law,” as opposed to a less flexible convention, which States might find difficult to reconcile with national laws and procedural systems.⁸⁵ Because a model law was adaptive to national circumstances in which provisions could vary and be “acceptable to States with different legal, social, and economic systems,” it promoted the desired cooperation.⁸⁶ Although much of the appeal of a model law was its adaptability to the different political, judicial, and social situations of the many States, for the sake of clarity and unity, UNCITRAL advised the States to “adhere as much as possible to the uniform text so as to make the national law as transparent as possible for foreign users of the . . . law.”⁸⁷

⁷⁹ See U.N. GAOR, 52nd Sess., 72d plen. mtg. at 11, U.N. Doc. A/52/PV.72 (Dec. 15, 1997); Phelan & Everett, *supra* note 20, at 57.

⁸⁰ Model Law on Cross-Border Insolvency, *supra* note 3, at 2.

⁸¹ *Id.* at 1.

⁸² Westbrook, *supra* note 17, at 719.

⁸³ *Id.* at 716.

⁸⁴ Model Law on Cross-Border Insolvency, *supra* note 3, at 2.

⁸⁵ United Nations Commission on Int’l Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, 12 TUL. J. INT’L & COMP. L. 361, 368 (2004) [hereinafter *Guide to Enactment*].

⁸⁶ Model Law on Cross-Border Insolvency, *supra* note 3, at 1; see also *Guide to Enactment*, *supra* note 85, at 368.

⁸⁷ *Guide to Enactment*, *supra* note 85, at 379; see also Model Law on Cross-Border Insolvency, *supra* note 3, at 2 (promoting “[g]reater legal certainty for trade and investment”).

Although the United States urged the United Nations to promote international cooperation in these kinds of proceedings and played a major role in the negotiations to draft the Model Law, the United States did not adopt it until 2005 (despite the National Bankruptcy Review Commission's recommendations).⁸⁸

B. National Bankruptcy Review Commission Report

In its Final Report, the National Bankruptcy Review Commission supported the adoption of the Model Law.⁸⁹ The Commission saw this adoption as a good "first step" in international cooperation and bankruptcy reform because it controlled coordination among multiple jurisdictions.⁹⁰ Although skeptical of the primacy of local proceedings and the cooperation of local officials, the Commission thought the Rules would "help considerably in getting [the international cooperation for insolvency] situation under control until" a permanent and more concrete solution could be reached.⁹¹

From the beginning, the Commission saw the potential to dramatically increase cooperation among countries who adopted the Rules.⁹² Accordingly, it concluded that the most important provisions included establishment of a simple and guided process for recognition of foreign proceedings, the likelihood of quickly granting stays in proceedings to promote the court's control of assets, the strengthening of foreign creditors' rights through equal treatment and notice provisions, and the direction given to local courts to coordinate and cooperate with foreign courts.⁹³ The National Bankruptcy Review Commission's overwhelming support was one reason the Model Law remained nearly untouched when included in the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005.⁹⁴

⁸⁸ See NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT, *supra* note 1, at 361-62; Westbrook, *supra* note 17, at 719 (explaining that the Model Law on Cross-Border Insolvency had support in every version of the bankruptcy reform legislation, but were held up by the reform backers who wanted "to get all or nothing").

⁸⁹ NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT, *supra* note 1, at 361-62 (describing the reasons for the adoption of the Model Law "as a single section, with a few exceptions").

⁹⁰ *Id.* at 362.

⁹¹ *Id.*

⁹² *Id.* at 361.

⁹³ *Id.* at 361-62.

⁹⁴ See, e.g., Westbrook, *supra* note 17, at 719.

C. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

As previously stated, Congress had long supported the inclusion of the Model Law in a bankruptcy reform.⁹⁵ So, when the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became law, it substantially adopted the Model Law on Cross-Border Insolvency into a newly created Chapter to the Bankruptcy Code: Chapter 15.⁹⁶ Although some provisions and terminology changed, the United Nations actually took some of the changes into account when writing the Model Law.⁹⁷

Despite the intricacies each State is allowed to include, the United States significantly embraced, albeit somewhat grudgingly,⁹⁸ UNCITRAL's vision and language because they were substantially its own.⁹⁹ In fact, the reasons and support for the adoption of the Model Law and the creation of Chapter 15 given in the House Report echo the United Nations General Assembly's reasons for adoption.¹⁰⁰ Both the Report and Preamble encourage cooperation among international States, promotion of legal certainty for trade and investment, promotion of a "fair and efficient administration of cross-border insolvencies," and protection of the debtor's assets.¹⁰¹ In hopes that other countries follow suit, the Bankruptcy Reform of 2005 aids the U.S. by promoting international bankruptcy cooperation in its adoption of the Model Law for Cross-Border Insolvency.

⁹⁵ See NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT, *supra* note 1, at 361-62.

⁹⁶ H.R. REP. NO. 109-31, at 105-06 ("[This] Act adds a new chapter to the Bankruptcy Code for transnational bankruptcy cases. It incorporates the Model Law on Cross-Border Insolvency to encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases.").

⁹⁷ See, e.g., *Guide to Enactment*, *supra* note 85, at 382; see also H.R. REP. NO. 109-31, at 106 ("Although the consumer exclusion is not in the text of the Model Law, the discussions at UNCITRAL recognized that such exclusion would be necessary in countries like the United States. . .").

⁹⁸ See *supra* Part III.A and discussion about the creation of model law instead of a convention due to the adaptability to each country's particular nuances.

⁹⁹ See NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT, *supra* note 1, at 356 (stating that "over the course of the [drafting of the Model Law] the text moved decisively in the direction sought by the United States"); see also Westbrook, *supra* note 17, at 719.

¹⁰⁰ Compare H.R. REP. NO. 109-31, at 105, with Model Law on Cross-Border Insolvency, *supra* note 3, at 2.

¹⁰¹ Model Law on Cross-Border Insolvency, *supra* note 3, at 2; H.R. REP. NO. 109-31, at 105.

IV. CHAPTER 15 IN PRACTICE

If the intention of this new chapter is that “[c]ases brought under [C]hapter 15 are intended to be ancillary to cases brought in a debtor’s home country,”¹⁰² and the intention of old section 304 was that “a case ancillary to a foreign proceeding is commenced by the filing . . . of a petition under [section 304],”¹⁰³ what has changed in enacting this new chapter? The quick answer is that Chapter 15 promotes cooperation by U.S. courts when another “country is the primary jurisdiction.”¹⁰⁴ Specifically, Chapter 15 redefines a number of terms, promotes cooperation amongst jurisdictions, and creates a structured format for recognition of a foreign proceeding, thus providing United States courts with a process and system to assist foreign bankruptcy proceedings.

A. Revised Terminology and Definitions

1. Foreign Proceeding, Foreign Representative and Venue

An ancillary proceeding under section 304 could only be commenced when the court was satisfied that there was a “foreign representative” and a “foreign proceeding.” These terms were very important under a section 304 analysis, but offered little to the foreign representative or foreign jurisdiction. The Code has modified those definitions and provides rights for each, thereby expanding international, judicial cooperation.

A “foreign representative” is “a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceedings.”¹⁰⁵ This definition is similar enough to the previous definition under section 304 in that it will incorporate the judicial interpretations of “foreign representative,” including such things as the board of directors of the foreign debtor.¹⁰⁶ This inclusion is important because it expands the recognition of international cooperation and coordination in recognizing that a foreign jurisdiction may appoint a representative to administer an estate, which U.S. case law had not anticipated. Also of high importance for a foreign representative is the inclusion of section 1510, which limits the representative’s jurisdiction

¹⁰² H.R. REP. NO. 109-31, at 106.

¹⁰³ 11 U.S.C. § 304(a) (2000) (repealed 2005).

¹⁰⁴ Westbrook, *supra* note 17, at 726.

¹⁰⁵ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 802(b)(24).

¹⁰⁶ See *supra* Part II.B.1.

to solely the ancillary proceeding.¹⁰⁷ By granting the foreign representative a right to limited jurisdiction, the Code advances cooperation for cross-border administration; it forbids local creditors from initiating suits against the representative for matters that would be handled within the ancillary proceeding.¹⁰⁸

Under the revised Bankruptcy Code, the definition of “foreign proceeding” is:

[A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.¹⁰⁹

Most importantly for this analysis is that the third requirement, that the proceeding must be pending in the foreign debtor’s place of residence or primary place of business to qualify as a “foreign proceeding” under section 304,¹¹⁰ is removed.¹¹¹

That requirement still plays an important role, however, because it now determines whether a foreign proceeding is a “foreign main proceeding” or a “foreign nonmain proceeding.”¹¹² A “foreign main proceeding” is a proceeding that is “pending in the country where the debtor has the center of its main interests.”¹¹³ If the proceeding is a “foreign main proceeding,” section 1520 is automatically triggered, affording the petitioner an automatic stay under section 362 of the Bankruptcy Code.¹¹⁴

A “foreign nonmain proceeding” is a “foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.”¹¹⁵ Importantly, a classification of a proceeding as a “foreign nonmain proceeding” for which a petition is filed under

¹⁰⁷ Bankruptcy Abuse Prevention and Consumer Protection Act § 1510 (limiting the U.S. courts’ jurisdiction over a foreign representative to solely the proceeding ancillary to a foreign insolvency, once the representative files a petition for recognition of a foreign proceeding under section 1515).

¹⁰⁸ *See id.*

¹⁰⁹ *Id.* § 802(b)(23).

¹¹⁰ *See supra* Part II.B.2.

¹¹¹ Michael D. Fielding, *Ancillary Proceedings Under New Chapter 15 of the Bankruptcy Code*, 2005 NORTON BANKR. L. ADVISER 3, 3 (2005) (available on Westlaw without proper pagination).

¹¹² Compare Bankruptcy Abuse Prevention and Consumer Protection Act § 1502(4) (defining “foreign main proceeding”), *with id.* at § 1502(5) (defining “foreign nonmain proceeding”).

¹¹³ *Id.* at § 1502(4).

¹¹⁴ *Id.* at § 1520(a).

¹¹⁵ *Id.* at § 1502(5).

Chapter 15 will not receive an automatic stay and will have to apply for a stay and other benefits, under section 1521.¹¹⁶ Although a “foreign nonmain proceeding” does not receive the benefits afforded under section 1520, the expansive definition of a “foreign proceeding” allows the U.S. courts to recognize a nonmain proceeding for the first time, allowing debtors to file for an ancillary proceeding under Chapter 15. Because of this recognition of both foreign main and foreign nonmain proceedings, the Bankruptcy Code now promotes international cooperation on more international insolvency proceedings; this was missing under section 304.

The Bankruptcy Abuse Prevention and Consumer Protection Act also amended the venue provisions to simplify and facilitate proper determination of venue for an ancillary proceeding. If the foreign debtor has a principal place of business or a location of principal assets in the United States, that district has proper venue.¹¹⁷ If no principal place of business or location of assets exists, but litigation is pending against the debtor, then the proper venue would be in the district where the litigation occurs.¹¹⁸ Finally, if neither a principal place of business, location of assets, nor any pending litigation is present, the venue will be established in the interests of justice and convenience.¹¹⁹ The modifications to the venue provision create an effective “hierarchy of choices”; this maintains the interests of the parties involved, including the foreign jurisdiction and local courts.¹²⁰

2. Foreign Creditor

The inclusion of foreign creditors in Chapter 15 is a significant step from section 304 because the United States had no definition of foreign creditors before the adoption of Chapter 15.¹²¹ Now foreign creditors, those creditors who do not have an address inside the United States,¹²² are conferred the same rights “regarding the commencement of, and participation in an ancillary proceeding” as local creditors.¹²³ Thus, “[a]t a minimum . . . foreign claims must receive the treatment given to general unsecured claims . . . unless they are in a class of

¹¹⁶ *Id.* at § 1521(a)(1) (stating that upon recognition of a foreign proceeding if it is necessary to carry out the purposes of Chapter 15, and if the foreign representative requests it, the court may grant a stay in proceedings regarding the debtor’s assets).

¹¹⁷ *Id.* § 802(c)(4).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ H.R. REP. NO 109-31, at 119 (2005).

¹²¹ NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT, *supra* note 1, at 363.

¹²² See Bankruptcy Abuse Prevention and Consumer Protection Act § 1514(a).

¹²³ *Id.* at § 1513(a).

claims in which domestic creditors would also be subordinated."¹²⁴ Even though the United States already had a policy of nondiscrimination,¹²⁵ codifying a doctrine of nondiscrimination against foreign creditors clearly furthers cross-border cooperation.

Of equal importance to the notion of international cooperation, section 1514 demands that foreign creditors receive notification when a Chapter 15 petition is filed.¹²⁶ More importantly, the Code requires that foreign creditors receive personal notice, including the time period and place for filing proofs of claim, an indication whether secured creditors need to file proofs of claim, and reasonable time to file such proofs.¹²⁷ The notice provision promotes the coordination between local and foreign jurisdictions because the foreign proceedings and those creditors are kept informed of the debtor's assets in the United States.

B. Cooperation Among Local and Foreign Jurisdictions

While the various terms discussed above promote the cooperation and communication amongst local and foreign jurisdictions, section 1525 of the Code also demands cooperation and communication between the local courts and the foreign jurisdiction.¹²⁸ Not only is this duty imposed on the court to affirmatively and directly communicate with a foreign court or representative, but a trustee is also required to "cooperate to the maximum extent possible with a foreign court or representative."¹²⁹ Local and foreign courts must communicate to preserve the future of cross-border insolvencies; section 1525 authorizes and obligates that communication and cooperation.¹³⁰ As it necessarily should, the Code requires courts, trustees, foreign courts, and foreign representatives to communicate with each other as if they were in the same locale.

However, under the Code, cooperation means more than just simple communication of the happenings of each case. Such things as appointing someone to act at the direction of the court in the foreign jurisdiction, coordinating the administration of the debtor's assets, or coordinating concurrent proceedings regarding the same debtor are included under the heading of "cooperation."¹³¹ Moreover, section 1529 codifies the coordination of a case under Chapter 15 with a foreign pro-

¹²⁴ H.R. REP. NO. 109-31, at 111.

¹²⁵ NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT, *supra* note 1, at 363.

¹²⁶ Bankruptcy Abuse Prevention and Consumer Protection Act § 1514(a).

¹²⁷ *Id.* at § 1514(b)-(c).

¹²⁸ *Id.* at § 1525.

¹²⁹ *Id.* at § 1526(a).

¹³⁰ *See* H.R. REP. NO. 109-31, at 117.

¹³¹ Bankruptcy Abuse Prevention and Consumer Protection Act §§ 1527(1), (3), & (5).

ceeding, which maintains that the United States courts act ancillary to any foreign main proceeding to the furthest extent possible.¹³² This policy does not change if more than one foreign proceeding exists, because the U.S. courts will give assistance to the one foreign main proceeding (of which there can only be one) before any foreign nonmain proceeding.¹³³ Thus, in creating this hierarchy of proceedings, assisting the foreign main proceedings in administration of the debtor's assets is easy for the local courts and furthers Chapter 15's objective.

C. *Creation of a Structured Proceeding to Commence an Action*

1. *Application for Recognition*

While section 304 did not have a procedure for the recognition of a foreign bankruptcy proceeding, Chapter 15 specifically provides for a petition of recognition, outlining a straight-forward process to recognize a foreign case and open an ancillary proceeding. Under section 1515, the foreign representative must file a petition for recognition, accompanied by (1) a certified copy of the foreign court papers commencing the foreign proceeding and naming the foreign representative; (2) a certificate from the foreign court affirming that the proceeding and the representative are still in existence;¹³⁴ and (3) a statement identifying all other known foreign proceedings involving the debtor.¹³⁵ In weighing the foreign representative's petition for recognition, the court faces two presumptions: that the documents are authentic and the debtor's registered office or residence is the center of the debtor's interest, absent evidence to the contrary.¹³⁶

After the petition is filed, notice given to foreign creditors,¹³⁷ and a hearing occurs; the court enters an order recognizing the foreign proceeding and classifies the proceeding as a foreign main or foreign nonmain proceeding.¹³⁸

2. *Available Relief*

Once the petition is granted, available immediate relief is determined by the type of proceeding: foreign main or foreign nonmain. Although, in urgent situations, the Code allows relief to be granted upon the filing of a petition, the relief cannot extend to a full stay on

¹³² See *id.* at § 1529; H.R. REP. NO. 109-31, at 117.

¹³³ Bankruptcy Abuse Prevention and Consumer Protection Act § 1530(1)-(2).

¹³⁴ *Id.* at § 1515(b)(1)-(2). If, for some reason, the documents required by section 1515(b)(1)&(2) are absent, the court may determine if any other evidence is acceptable to prove the existence of such proceedings. *Id.* at § 1515(b)(3).

¹³⁵ *Id.* at § 1515(c).

¹³⁶ *Id.* at § 1516.

¹³⁷ See *supra* notes 18-19 and accompanying text.

¹³⁸ *Id.* at § 1517.

its own.¹³⁹ Thus, when a foreign main proceeding is granted an “automatic stay of the usual scope and subject to the usual exceptions and possible lift-stay orders,”¹⁴⁰ it enjoys a right to the automatic stay that does not extend to nonmain proceedings. This automatic stay is the only relief granted automatically by the granting of recognition.

Therefore, the foreign representative must request all other relief, including all relief sought in a nonmain proceeding.¹⁴¹ The court must also be satisfied that the United States creditors are protected.¹⁴² Nonmain proceedings must also show the court that the relief sought relates to assets that should be administered in a foreign nonmain proceeding.¹⁴³ If these conditions are met, the court can grant various types of relief, including stays, injunctions, and the turning over of assets to an authorized party.¹⁴⁴ Notably, the relief offered “does not expand or reduce the scope of relief . . . available in ancillary cases under section[] . . . 304.”¹⁴⁵

Although relief was not a significant impediment to cross-border insolvency administrations under section 304, revisions of procedures in granting relief were necessary. Therefore, even though the ultimate relief that can be granted to a foreign representative may not substantially differ from the pre-revised code, the revised procedures will help the U.S. courts assist foreign proceedings in the effective administration of insolvency proceedings by coordinating and communicating; the old section did not require this duty.

V. CONCLUSION

Even though the United States was ahead of its time in including section 304 regarding cases ancillary to foreign proceedings in its Bankruptcy Reform Act of 1978, the section had become outdated due to the substantial growth in multinational corporations and relative ease in international transportation and investment. Recognizing this fact, the United States urged the international community to create a method for international cooperation and coordination of insolvency proceedings. The result, having recently been adopted by the United States in the form of Chapter 15, will dramatically increase the coordination between U.S. courts and foreign jurisdictions in the administration of a debtor’s assets. The vital terminology and elements of

¹³⁹ See *id.* at § 1519.

¹⁴⁰ Westbrook, *supra* note 17, at 722; see Bankruptcy Abuse Prevention and Consumer Protection Act § 1520.

¹⁴¹ Bankruptcy Abuse Prevention and Consumer Protection Act § 1521.

¹⁴² *Id.* §§ 1521(b), 1522.

¹⁴³ *Id.* § 1521(c).

¹⁴⁴ See *id.* § 1521(a).

¹⁴⁵ H.R. Rep. No. 109-31, pt. 1, at 116 (2005).

repealed section 304 have been modified to further the purpose of Chapter 15 in cooperating with foreign proceedings without stripping the U.S. courts of their role within our borders. In all, Chapter 15, and the Model Law it represents, is a necessary “first step” in the advancement of international cooperation and coordination in cross-border insolvencies, and its introduction and usage will be well documented over the coming years.