MAKING A COMEDY OF COMITY: ANALYZING *IN RE VITRO*'S IMPLICATIONS FOR CROSS-BORDER INSOLVENCY LAW

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> "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . . [C]ourts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness."[1]

> "[W]hen an action is brought upon a cause arising outside of the [court's] jurisdiction, it should always be borne in mind that the duty of the court is not to administer *its* notion of justice, but to enforce an obligation that has been created by a different law."[2]

> "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[3]

Table of Contents

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[1] Loucks v. Standard Oil Co. of N.Y., 224 N.Y. 99, 111 (1918) (Cardozo, J.).

[2] Cuba R.R. Co. v. Crosby, 222 U.S. 473, 478 (1912) (Holmes, J.) (emphasis added).

[3] The M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) (Burger, C.J.).

INTRODUCTION

Founded in 1602 as a spice trading organization, the Dutch East India Company was one of the earliest corporations to operate and own assets in more than one country.[4] Notably, in an age where coveted Asian spices such as cinnamon, cloves, mace, nutmeg, and pepper were originally transported over land, the discovery of a new sea route to the East Indies opened new opportunities for more efficient and lucrative business.[5]

Today, countless such "sea routes" have dramatically altered the way companies do business. Importantly, the use of air travel and the growth of the Internet have allowed even the most basic companies to exploit international markets in much the same way as the Dutch East India Company did more than five centuries ago, with exponentially greater ease.[6] In fact, nearly a quarter of global GDP comes as a result of production generated by multinational companies.[7]

However, just as death follows birth, as the number of multinational companies has grown, so naturally has the number of corporate insolvencies transcending national boundaries. And in spite of the long and well-established history of the multinational corporation, a global movement toward legal uniformity in resolving cross-border insolvencies has emerged only recently.[8]

Responding to global demand for achieving cooperation between differing systems of bankruptcy law internationally, the United Nations Commission on International Trade Law (UNCITRAL) began evaluating the possibility of harmonizing international insolvency laws into one cohesive model

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[4] V.O.C. 1602-2002: 400 YEARS OF COMPANY LAW 1 (Ella Gepken-Jager et al. eds., 2005); *see generally* NIALL FERGUSON, THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD 128–29 (2008).

[5] *See* FERGUSON, *supra* note 4, at 128.

[6] *See generally* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005).

[7] United Nations Conference on Trade and Development, *World Investment Report 2011*, U.N. Doc. UNCTAD/WIR/2011 (July 26, 2011).

[8] *See generally* Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency: A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 TUL. J. INT'L & COMP. L. 307, 308–19 (2004) (overviewing various initiatives and protocols leading up to the UNCITRAL Model Law, including numerous colloquia and joint international initiatives, such as the 1994 UNCITRAL-INSOL Colloquium on Cross-Border Insolvency and the Model International Insolvency Cooperation Act).

code.[9] Extensive research and countless international initiatives eventually culminated in the creation of a model law in 1997, which the United States adopted, with variations, in 2005.[10]

However, the trend toward global cooperation in cross-border bankruptcy may be at a critical turning point. In a recent bankruptcy case, *In re Vitro*,[11] the United States Court of Appeals for the Fifth Circuit affirmed the bankruptcy court's decision refusing to honor a plan of reorganization that had been approved under the *Ley de Concursos Mercantiles* ("LCM") by a Mexican bankruptcy court.[12] This move may not only have serious and far-reaching effects on global finance and capital markets, but also flies in the face of the progress made by the international bankruptcy community to achieve global cooperation in cross-border insolvencies. To date, *Vitro* stands as the only published decision ever to deny a Mexican reorganization plan approved under the LCM the since the creation of chapter 15.

Part I of this Article discusses the background and policy behind the implementation of chapter 15 in 2005, tracing the notion of comity through history to its roots at common law. Importantly, Part I distills a paradigm that courts have followed in determining when to extend comity, and when not to. After analyzing case law under various iterations of comity jurisprudence, Part I argues that the appropriate framework to apply to analyzing comity in international insolvencies should be one that is based primarily on due process, rooted in a strong presumption of *caveat emptor*—that is, the

[9] *See* Andre J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 319 (1998).

[10] The Model Law on Cross-Border Insolvency was formally adopted by UNCITRAL on May 30, 1997, and has since been adopted in approximately 20 jurisdictions. Look Chan Ho, *Overview*, *in* CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 7 (3d ed., 2012). This model law was subsequently codified into United States law through a new Chapter 15 to the Bankruptcy Code, which was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. 109-8, 119 Stat. 23. *See infra* Part I.B.

[11] *In re* Vitro, S.A.B. de C.V., 701 F.3d 1031 (5th Cir. 2012), *cert. dismissed sub nom.*, Vitro, S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 2013 WL 1629212 (U.S., Apr. 16, 2013). *Vitro* is a consolidation of three cases on appeal from the bankruptcy court in the Northern District of Texas. 473 B.R. 117 (Bankr. N.D. Tex. 2012); 470 B.R. 408 (Bankr. N.D. Tex. 2012); 2012 WL 2367161 (Bankr. N.D. Tex. June 21, 2012).

[12] The *Ley de Concursos Mercantiles*, or "LCM," is the Mexican Business Reorganization Act, analogous to chapter 11 reorganization law. Similarly, a *concurso* proceeding is analogous to a voluntary judicial reorganization proceeding under chapter 11. *Vitro*, 701 F.3d at 1038 n.1.

creditor seeking to loan to a foreign entity is presumptively assumed to subject herself to the laws of that foreign nation.

Part II of this Article examines the *Vitro* decision and analyzes the merits of that decision, arguing that the Fifth Circuit failed to apply the framework to the *Vitro* situation. This Part offers an explanation of the *Vitro* decision that comports with the due process framework discussed in Part I and conforms to the ideals of global cooperation and coordination across jurisdictions under chapter 15. Additionally, Part II posits that the court may have considered, *sub silentio*, the potential impact of corruption in the Mexican court system in its comity analysis.

Finally, Part III critiques the *Vitro* decision based on the far-reaching implications the decision will have on cross-border insolvency proceedings as well as other areas in business including the financial markets and managerial decision-making. More importantly, this Part argues that the hubris of the bankruptcy court in *Vitro* ensures that, going forward, other countries will be less apt to accept U.S. bankruptcy court orders and holdings in their respective jurisdictions,[13] ultimately paving the way for a reversal of the global cooperation and coordination the bankruptcy bar has put so much effort into achieving over the years.

I. The Role of Comity in Cross-Border Insolvency Law

The role of comity, or respect for foreign judgments, has evolved from a mere consideration to a central concern in international insolvency proceedings, thanks to the efforts of policymakers around the world. This Part explores the progression in importance of the notion of comity from its beginnings at early common law, to its codification into United States bankruptcy law, to its current state as part of a globally coordinated initiative to promote international cooperation in cross-border insolvency proceedings.

A historical approach to comity is particularly useful in highlighting the occasions how the United States approaches foreign judgments. Hopefully,

[13] *Cf.* Jay Lawrence Westbrook, *Chapter 15 and Discharge*, 13 AM. BANKR. INSTL. L. REV. 503, 514 (2005) (citing Roberts v. Picture Butte Municipal Hosp., [1999] 64 Alta. L.R. 3d 31, as the "one reported case where the foreign court has been asked to enforce a United States corporate discharge," and noting that "[the Canadian court] based its holding on comity and 'common sense") [hereinafter Westbrook, *Discharge*]; *see generally* Edward J. Janger, *Reciprocal Comity*, 46 TEX. INT'L L.J. 441, 457 (2011) (explaining that reciprocal deference "reduce[s] the pushback that occurs" when dealing with an ancillary court and "streamline[s] proceedings").

a closer look at the case law will illuminate the rubric by which courts should determine the issue of comity.

A. Neither Courtesy Nor Obligation

At the turn of the nineteenth century, French glovemaker Charles Fortin & Co. sought to recover outstanding payments owed by an American trading company, A.T. Stewart & Co., which had, at the time of the commencement of the trial, closed its business in France.[14] Even though the American company no longer owned any property under French jurisdiction out of which a judgment could be paid, a French court nevertheless issued a judgment ordering payment.[15] In considering whether to honor the French judgment in an American court of law, Justice Gray explained the notion 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 the international duty and convenience, and to the rights of its own citizens . . . .[16]

Nevertheless, Justice Gray refused to give the French judgment conclusive effect, noting that the French judgment would be considered "prima facie evidence only of the justice of the plaintiffs' claim" rather than conclusive evidence as to the merits of such claim.[17]

The Court's reasoning was one of mutual skepticism—because "the French courts would not have executed or enforced [a similar American judgment], except after examining into its merits," the Court adopted a reciprocal approach, remanding to the circuit court to evaluate the merits of the case on its own.[18] Thus, the *Hilton* ruling established reciprocity as the basis for evaluating international cases.[19] Indeed, as Justice Gray aptly con-

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[14] Hilton v. Guyot, 159 U.S. 113, 114 (1895).
[15] *Id.*
[16] *Id.* at 163–64.
[17] *Id.* at 227.
[18] *Id.* at 228.
[19] Charles D. Booth, *A History of the Transnational Aspects of United States Bankruptcy Law Prior to the Bankruptcy Reform Act of 1978*, 9 B.U. INT'L L.J. 1, 16–17 (1991).

cluded: "[I]t appears to us equally unwarrantable to assume that the comity of the United States requires anything more."[20]

Since *Hilton*, however, courts have abandoned the requirement of reciprocity and become progressively more open to cooperating with other jurisdictions in international bankruptcies.[21] As Professor Westbrook comments, "[w]hereas in earlier times skepticism might have been understandable (or even appropriate) in light of the enormous differences among the various insolvency laws, today there exists a world-wide convergence in the area of these laws."[22] This movement toward cooperation eventually culminated in the codification of American notions of comity into law as Congress adopted § 304 of the 1978 Bankruptcy Code.[23] The next section recounts the history of § 304 and its role in shaping chapter 15.

B. From Section 304 to Chapter 15: Comity in the Bankruptcy Code

Section 304 was enacted "[a]gainst the backdrop of . . . confused and conflicting case law governing the adjudication of international insolvency claims,"[24] making clear the "need for specific United States provisions that would accommodate the increasing number of foreign insolvency proceedings having effects within the United States."[25]

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[20] 159 U.S. at 228.
[21] *See* Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 718 (2005) [hereinafter Westbrook, *Chapter 15*].
[22] JAY LAWRENCE WESTBROOK ET AL., A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS 231 (2010).
[23] 11 U.S.C. § 304 (2000), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) § 802(d)(3), Pub. L. 109-8, 119 Stat. 23, 146; *see also* Westbrook, *Chapter 15*, *supra* note 21, at 718-19 (calling the adoption of § 304 as "merely a next step in American law" given that "[t]he United States courts have long been open to cooperation with foreign bankruptcy proceedings").
[24] Stacy Allen Morales & Barbara Ann Deutcsh, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573, 1583 (1984). The 1974 *Herstatt* affair is widely attributed as the catalyzing event for Section 304. There, the failure of Herstatt, a West German Bank, sparked a run on U.S. held assets by U.S. based creditors. With no integrated rules or laws governing international bankruptcies, the parties were forced to resort to an out-of-court liquidation, in what the above authors have called "a transatlantic juridical calamity." *Id.* at 1573–74. For additional background information on the *Herstatt* affair, see Joseph D. Becker, *International Insolvency: The Case of Herstatt*, 62 A.B.A. J. 1290 (1976).
[25] Terri P. Finister, *1988 Developments and the Conflicts Arising Under Section 304*, 6 BANKR. DEV. J. 345, 346 (1989).

Indeed, this was the first time that the notions of comity and deference to foreign judgments had been formally mentioned in United States law.[26] Specifically, section 304 identified comity as one of six factors the court was to consider in determining whether relief should be granted.[27] Congress specifically expanded the role of comity in section 304, noting that the section was "designed to give the court maximum flexibility in handling ancillary cases" in order to best serve the "[p]rinciples of international comity and respect for the judgments and laws of other nations."[28]

It is worth highlighting that, under section 304, comity was merely one of six factors to be considered in a cross-border insolvency case. Therefore, initial reactions to the statute were that, by relegating comity to one factor and "giving courts a set of tools other than just comity with which they could work on cross-border bankruptcy issues,"[29] comity was still of limited importance. Nevertheless, given the legislative history behind section 304, many courts interpreted the statute to imply that comity was the central consideration, and that the other factors were subordinated in importance.[30] For this reason, "[a] substantial number of cases over the quarter century since the adoption of § 304 have, on the whole, nurtured and expanded its central notion of deference [to] and cooperation [with]" foreign courts.[31]

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[26] Morales & Deutcsh, *supra* note 24, at 1585.

[27] 11 U.S.C. § 304(c) provided:

"In determining whether to grant relief . . . the court shall be guided by what will best assure an economical and expeditious administration of [the] estate, consistent with–

(1) just treatment of all holders of claims against or interest in such estste;

(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."

11 U.S.C. § 304(c) (2000), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) § 802(d)(3), Pub. L. 109-8, 119 Stat. 23, 146.

[28] S. REP. NO. 95-989, at 35 (1978)

[29] The Hon. Leif M. Clark & Karen Goldstein, *Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies*, 46 TEX. INT'L L.J. 513, 526 (2011).

[30] *See* Finister, *supra* note 25 (noting that "[t]he significance of comity to courts deciding Section 304 cases" led to courts giving only "cursory attention" to the other Section 304(c) factors"); *In re* Culmer, 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982) ("All of the factors listed in Section 304(c) have historically been considered within a court's determination whether to afford comity to a proceeding in a foreign nation.").

[31] Westbrook, *Chapter 15*, *supra* note 21, at 719.

However, the implementation of section 304 was a unilateral move by the United States: as several commentators note, Congress proceeded with section 304 despite the risk that foreign jurisdictions might not follow suit or would continue to snub United States court rulings.[32] This is precisely what happened in the *Maxwell* case.[33] There, the debtor in question was the corporation of British media magnate Robert Maxwell.[34] Though the corporation was headquartered and managed in U.K., approximately 80 percent of its assets were located in the U.S.[35] Prior to its bankruptcy filing, the debtor made several transfers to European creditors that would have been deemed avoidable preferences under chapter 11,[36] but not under U.K. law.[37] As such, the U.K. administrators of the estate sought to bring avoidance actions under U.S. law.[38]

Nevertheless, the bankruptcy court held, and the district court and the Second Circuit affirmed, that, in deference to U.K. laws, U.S. avoidance laws would not govern payments made to English creditors by an English company.[39] Indeed, even though the bankruptcy court acknowledged that the most valuable assets of the corporation were located in the U.S., and that by disallowing the preference actions, those European creditors would benefit at the detriment of U.S. creditors, the bankruptcy court concluded, and the district court and the Second Circuit agreed, that "the doctrine of international comity precludes application of the American avoidance law."[40] So, despite well-established American law regarding preferential transfers,[41]

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[32] *See* Barbara K. Unger, *United States Recognition of Foreign Bankruptcies*, 19 INT'L LAW. 1153, 1167 (1985) ("It was hoped that the expansion of the sections of the Code addressing foreign insolvency issues would encourage other countries to adopt similar provisions and enhance the probability that U.S. bankruptcy proceedings would receive greater recognition abroad."); *In re* Condor, 601 F.3d 319, 322 n.10 (5th Cir. 2010) ("Section 304 gave U.S. courts significant latitude in extending comity to foreign jurisdictions; however, many countries did not have similar provisions in their bankruptcy law allowing their courts to reciprocate.").
[33] *In re* Maxwell Comm'n Corp., 93 F.3d 1036 (2d Cir. 1996).
[34] *Id.* at 1039–40.
[35] *Id.* at 1040–41.
[36] *See* 11 U.S.C. § 547(b) (permitting the trustee to "avoid any transfer of an interest of the debtor in property" if certain conditions are met).
[37] 93 F.3d at 1040.
[38] *Id.*
[39] *Id.* at 1055.
[40] *Id.*; *see also In re* Maxwell Comm'n Corp, 170 B.R. 800, 818 (Bankr. S.D.N.Y. 1994), *aff'd* 186 B.R. 807 (S.D.N.Y 1995), *aff'd* 93 F.3d 1036 (2d Cir. 1996).
[41] *See supra* note 36.

the Second Circuit, expressly "giving effect to comity," stated that "the strong British connection to the present dispute . . . [indicated] that England has a stronger interest than the United States in applying its own avoidance law."[42]

After the adoption of section 304, the idea of global cooperation in multinational insolvency proceedings continued to gain traction around the globe, though the progress was, according to Professor Westbrook, "painfully slow."[43] At the behest of the United States and several other countries, the United Nations eventually formed a working group to explore a multinational solution to cross-border insolvency issues.[44] In May 1997, despite "great skepticism . . . about making any progress in so localized and technical a field" as bankruptcy, UNCITRAL created a Model Law on Cross Border Insolvency.[45]

However, it was not until April 2005 that the Model Law was passed into law by Congress as a new chapter 15, replacing section 304 as the statutory source for comity in the United States Code.[46] As several commentators note, chapter 15 was drafted to follow the UNCITRAL Model Law closely, and in fact incorporates most provisions of the Model Law.[47]

Even though section 304 was repealed, the legislative history of chapter 15 makes explicit reference to the idea that a primary goal of chapter 15 is to "permit the further development of international cooperation begun under section 304."[48] In fact, the drafters of chapter 15 recognized that

> comity is the central consideration, [but] its physical placement as one of six factors in subsection (c) of section 304 is misleading, since those factors are essentially elements of the grounds for granting comity. Therefore, . . . comity is raised to the introductory language [of section 1507] to make it clear that it is the central concept to be addressed.[49]

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[42] 93 F.3d at 1052.
[43] Westbrook, *Chapter 15*, *supra* note 21, at 719.
[44] *See generally* Clift, *supra* note 8, and Berends, *supra* note 9.
[45] Westbrook, *Chapter 15*, *supra* note 21, at 719.
[46] *See supra* note 10.
[47] Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, 82 AM. BANKR. L.J. 269, 269 (2008) (noting that chapter 15 "incorporates most of the provisions" of the UNCITRAL Model Law); Westbrook, *Chapter 15*, *supra* note 21, at 719 ("Chapter 15 was drafted to follow the Model Law as closely as possible, with the idea of encouraging other countries to do the same.").
[48] H.R. REP. NO. 190-31, at 108 (2005).
[49] *Id.*

Thus, based on the stated legislative intent and the emphasis on comity, it is unmistakeably clear that chapter 15 was meant to expand the role of international cooperation in American bankruptcy law.[50]

However, despite the apparent focus on promoting recognition of foreign judgments, comity under chapter 15, as applied, is far from being completely deferential. For instance, there are several statutory "outs" that permit courts to avoid extending comity in certain circumstances. A prime example of this is section 1507,[51] which apparently incorporates and expands on the role of comity in the Bankruptcy Code under former section 304[52] while nevertheless limiting its application to specific circumstances. Professor Westbrook explains in more detail:

> [The] drafters were anxious to adopt those approaches in Chapter 15 that are more cooperation-friendly than existing United States law, but did not want to lose the benefits of § 304 case law that might be more advanced in the cooperative direction. Section 1507 . . . adds back to the Model Law some language that is a virtual copy of § 304 . . . . Thus the § 304 language and prior case law apply only where they enable the court to go *beyond* Chapter 15 in cooperating with the foreign court. . . . On the other hand, the additional assistance offered by

[50] *See also In re* SPhinX, Ltd., 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006) ("Although chapter 15 replaced section 304 of the Bankruptcy Code, which previously governed cases ancillary to foreign proceedings, chapter 15 maintains—and in some respects enhances—the maximum flexibility, that section 304 provided bankruptcy courts in handling ancillary cases in light of principles of international comity and respect for the laws and judgments of other nations." (internal citations, quotation marks omitted)).

[51] 11 U.S.C. § 1507 provides that "[s]ubject to the specific limitation stated elsewhere" in chapter 15, the court "may provide additional assistance to a foreign representative." 11 U.S.C. § 1507(a). Importantly, § 1507(b) raises the importance of comity from one of six factors to an primary concern. § 1507(b) provides: "In determining whether to provide additional assistance . . . the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—[listing factors]." 11 U.S.C. § 1507(b).

[52] H.R. REP. NO. 190-31, at 77 ("Although the case law construing section 304 makes it clear that comity is the central consideration, its physical placement as one of six factors in subsection (c) of section 304 is misleading, since those factors are essentially elements of the grounds for granting comity. Therefore, in subsection (2) of this section, comity is raised to the introductory language to make it clear that it is the central concept to be addressed.").

> § 1507 is available only if the preexisting § 304(c) criteria are satisfied.[53]

Nevertheless, some commentators have noted, and courts have agreed,[54] that even while the drafters intended to expand the scope of relief under section 1507, where specific relief is provided for under the provisions of chapter 15, section 1507 is unavailable to a foreign representative to prevent an end run around the specific provisions of chapter 15.[55]

So where exactly is role of comity situated within the modern statutory framework? Given the lack of explicit statutory guidance,[56] even after the *Vitro* ruling, the answer is not altogether clear. The section that follows examines certain important cases and distills a paradigm for evaluating comity in international cases.

C. Toward a Paradigm for Modern Comity Practices

Chapter 15 is just eight years old, and, while "scores of chapter 15 petitions have been filed,"[57] chapter 15 comity jurisprudence remains confusingly underdeveloped. For instance, *Vitro* is the *only* reported decision since the adoption of chapter 15 that has refused to grant comity to a Mexican bankruptcy court ruling. Therefore, in order to examine the nuances of

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[53] Westbrook, *Chapter 15*, *supra* note 21, at 720; *see also* Clark & Goldstein, *supra* note 29, at 529 n.100 ("The redesign of § 1507 is likely to permit courts to color slightly more outside the lines than they might [be] free to do under former § 304(c).").

[54] Notably, the *Vitro* court. *In re* Vitro, S.A.B. de C.V., 701 F.3d, 1031, 1057 (5th Cir. 2012), *cert. dismissed sub nom.*, Vitro, S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 2013 WL 1629212 (U.S., Apr. 16, 2013).

[55] *See* Ranney-Marinelli, *supra* note 47, at 316–17 (explaining that, while "§ 1507 is subject to the specific limitation stated elsewhere in Chapter 15," it nevertheless was "intended to afford relief beyond that authorized by" other sections of the code—ultimately raising the question of whether "a foreign representative seeking relief that is specifically contemplated by [provisions under chapter 15] should be bound by the standards, conditions, and evidentiary burdens set forth in those sections and should not be allowed to end-run them by requesting the relief under § 1507").

[56] *See* Clark & Goldstein, *supra* note 29, at 529 (noting that whether a "court [would] ever dare to employ § 1507 as a substitute for (or, worse, an end-around of) § 1521" remains an open question); Ranney-Marinelli, *supra* note 47, at 317 (observing that "the language of § 1507 does little to explain what additional assistance is" and that "neither the statute nor the legislative history contains such a limitation" preventing courts from using § 1507 as an end-run around specific chapter 15 provisions").

[57] *See* Ranney-Marinelli, *supra* note 47, at 270.

comity properly, it is critical to consider a variety of cases—under chapter 15 as well as its predecessors.[58]

A good starting point for analysis is the Supreme Court's language in *Canada Southern Railway Company v. Gebhard*.[59] In that case, American creditors loaned money on a secured basis to a Canadian railroad company, which subsequently became unable to pay its debt.[60] Despite a Canadian statute approving the debtor's restructuring scheme, the American creditors argued that Canadian law eliminated their right to payment in contravention of what they were entitled to under an American scheme of distribution.[61] The Supreme Court nevertheless entered a judgment in favor of the Canadian debtor.[62] Chief Justice Waite forcefully explained:

> [E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government . . . . He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere. . . . [T]he true spirit of international comity requires that schemes of those character, legalized at home, should be recognized in other countries.[63]

Of course, such a binary approach to comity appears overly simplistic—after all, if international comity were intended to imply complete and automatic deference to another country's laws, there would be no need for a separate chapter 15 to govern international insolvencies. Rather, as Justice Harlan aptly points out in the *Gebhard* dissent, "[c]omity can ask no recognition of such unjust foreign legislation . . . [which] is repugnant" to the

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[58] Professor Westbrook has noted that "[u]nlike section 304, however, chapter 15 has no specific factor list comparable to section 304(c)." While this might necessarily imply that "section 304 cases . . . will be general guides to the exercise of discretion in enforcing discharges under chapter 15, but probably no more than that," it is important to recognize that Congress specifically included a virtual carbon copy of 304 in chapter 15 so as not to lose the benefit of preexisting § 304 case law. *See generally* Westbrook, *Chapter 15*, *supra* note 21, at 720 and Westbrook, *Discharge*, *supra* note 13, at 511.
[59] 109 U.S. 527 (1883).
[60] *Id.* at 530–31.
[61] *Id.* at 531.
[62] *Id.* at 537–39.
[63] *Id.*

laws of the forum state.[64] Ultimately, however, *Gebhard*'s effect was to send an unmistakable message that the United States would presumptively enforce foreign judgments at the expense of domestic creditors under the right circumstances—in other words, *caveat emptor*.[65]

But under what specific circumstances? In several recent cases arising under Argentinian insolvency law, the court again revisited the issue of whether to recognize foreign discharges of indebtedness.[66] *In re Board of Directors of Multicanal, S.A.* involved an *acuerdo preventivo extrajudicial*[67] proceeding and an activist holdout creditor who attempted to block the reorganization.[68] Nevertheless, when the plan reached the required majority for approval of the APE, the plan was confirmed.[69] When the holdout creditor then attempted to bring action in the United States to recover on its debt, Multicanal initiated a section 304 proceeding to recognize the foreign APE and to permanently enjoin any actions interfering with the administration of the APE.[70]

The bankruptcy court, noting that "the fifth factor [of § 304], comity, is preeminent in determining whether relief should be granted," ultimately held in favor of Multicanal over the holdout creditor's objections.[71] Opening its discussion by quoting language from *Gebhard*, the bankruptcy court

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[64] *Id.* at 548 (Harlan, J. dissenting).
[65] *See* Westbrook, *Discharge*, *supra* note 13, at 508 ("If Gebhard had been decided in 1983 rather than 100 years earlier, one could say with complete confidence that the United States will recognize and enforce a discharge granted in a debtor corporation's home country.").
[66] *In re* Bd. of Directors of Telecom Argentina, S.A., 528 F.3d 162 (2d Cir. 2008); *In re* Bd. of Directors of Multicanal S.A., 314 B.R. 486 (Bankr. S.D.N.Y. 2004), *aff'd* in part, 331 B.R. 537 (S.D.N.Y. 2005).
[67] An *acuerdo preventivo extrajudicial*, or APE, is similar to a prepackaged bankruptcy under chapter 11. Notably, APE proceedings give rise to no judicial oversight after creditor approval has been solicited. The Argentine APE laws were amended and expanded in breadth in May 2002 in response to the Argentine economic crisis. *Multicanal*, 314 B.R. at 493; *see also id.* at 504–05. "[T]he APE permits a debtor that suspends its payments or has financial difficulties to seek court approval of a privately negotiated, majority-approved restructuring plan and thereby make the plan binding on all creditors." *Telecom Argentina*, 528 F.3d at 166.
[68] It is worth noting that the negotiations leading up to the APE vote were particularly contentious – the activist investor, Huff, sought to purchase blocking positions in the debt and transferred many of its holdings into a separate LLC to bolster its voting position. *Multicanal* eventually commenced criminal proceedings against Huff for alleged bribes to Argentine criminal authorities. 314 B.R. at 497–98.
[69] *Id.* at 498–99
[70] *Id.* at 499.
[71] *Id.* at 502, 523.

first framed the creditor's arguments under the presumption that the creditor voluntarily "subjects himself to those laws of the foreign government."[72] Then, in determining whether to extend comity, the bankruptcy court arrived at the rule that comity is proper when "fundamental standards of procedural fairness are observed and state and federal law and public policy are not violated."[73]

To examine fairness, *Multicanal* court analyzed the procedures involved in the APE proceedings to determine whether such procedures afforded adequate due process. The court aptly observed:

> This was not a Chapter 11 proceeding under the U.S. Bankruptcy Code, whether prepackaged or not. This was an Argentine APE, and the issue before the Court is *not* whether Multicanal followed all of the procedures for solicitation and voting that would apply in a Chapter 11 case . . . but *whether there was fundamental due process afforded to Multicanal's creditors*.[74]

Further, the *Multicanal* court held that while notice was a key element of due process, class voting decidedly was not.[75] Because ample notice had been given and "votes are [typically] calculated in this manner in an Argentine *concurso*," the due process check passed and comity was granted.[76]

A similar result followed in *In re Board of Directors of Telecom Argentina, S.A.*, where one investor challenged Telecom Argentina's attempts to restructure through an APE proceeding.[77] Telecom Argentina filed a proceeding pursuant to former section 304 seeking a judgment declaring that APE should be given full force in the United States, binding all creditors and cancelling the former indebtedness.[78]

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[72] *Id.* at 500–01.
[73] *Id.* at 502–03 (gathering cases).
[74] *Id.* at 509–10 (emphasis added).
[75] *Id.* at 510 ("[C]lass voting is not a basic requirement of due process or of § 304 recognition."); *see also In re* Garcia Avila, 296 B.R. 95, 111 (Bankr. S.D.N.Y. 2003) (finding that Mexican reorganization law, which does not provide for class voting, nevertheless comports with § 304 recognition and due process by requiring a simple majority vote of creditors).
[76] *Id.* at 515, 523. The district court affirmed in all material respects except a discrimination claim relating to certain technical requirements under American securities laws. The overall result was to approve the bankruptcy court's granting of comity to the foreign APE proceeding. *See* Westbrook, *Discharge*, *supra* note 13, at 510–11.
[77] *Telecom Argentina*, 528 F.3d at 165.
[78] *Id.* at 167–68.

In affirming the bankruptcy court's decision to grant comity to the Argentine APE, then Circuit Judge Sotomayor reiterated the importance of due process and fair treatment of creditors.[79] In finding that the investor had indeed been afforded due process, Sotomayor noted that "[the investor] had the opportunity to object to the terms of the proposed plan, to vote on the plan, and then to submit objections."[80]

Moreover, Sotomayor deferred to the foreign court's findings regarding whether the procedures of the APE process were fair. Sotomayor recognized that, because

> *the Argentine court* in this proceeding *did* consider whether the plan was abusive, fraudulent, or discriminatory . . . the bankruptcy court did not abuse its discretion by finding that this APE proceeding comported with due process and ensured just treatment of creditors.[81]

Therefore, Circuit Judge Sotomayor seemingly laid out in clear terms the metric by which to determine whether due process is satisfied—the creditor must receive notice and an opportunity to be heard in the insolvency proceeding.

Additionally, Sotomayor emphasized that examining whether the foreign proceedings treated creditors justly and fairly should be done from the perspective of the *foreign* court. For instance, in *Telecom Argentina*, even though the Argentine proceedings did not provide for a "best interest of creditors" analysis for dissenting creditors,[82] and instead gave them a fraction of their principal, Sotomayor reiterated that comity "does not require that the amount of a distribution in a foreign insolvency proceeding be equal to the hypothetical amount the creditor would have received in a proceeding under U.S. law."[83]

[79] *Id.* at 170–71.
[80] *Id.* at 171.
[81] *Id*. at 172.
[82] *See* 11 U.S.C. § 1129(a)(7) (requiring that creditors must receive no less in a reorganization that they would receive in a liquidation). In *Telecom Argentina*, the investor argued that because Argentine law did not contain such a "best interest of creditors" protection that the APE laws were counter to American public policy and thus not entitled to comity. 528 F.3d at 173.
[83] 528 F.3d at 173.

Instead, recognizing that differences in law will invariably exist from country to country, Sotomayor emphasized that, so long as principles of due process are met, "our longstanding recognition that foreign courts have an interest in conducting insolvency proceedings concerning their own domestic business entities" mandates that fairness be left to the determination of the foreign court, and that comity be extended to foreign insolvency proceedings.[84]

So, reviewing the state of comity law after the APE cases reveals the following framework. *Gebhard* establishes a presumption, *ab initio*, of *caveat emptor* for a creditor extending a loan to a foreign corporation: "[E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government."[85] The Argentine cases clarify the *Gebhard* presumption, requiring that the foreign insolvency proceedings comport with due process and fundamental fairness, the latter of which is determined from the point of view of the foreign court.[86]

At first glance, this framework again seems to have its flaws. Most obviously, wouldn't permitting the foreign court to determine its own standards of fairness be circular? Consider, however, that perhaps this solution is precisely the deference that section 304, and thus chapter 15 requires, according to the plain language of Sotomayor's *Telecom Argentina* opinion.[87] The next section applies this modern case law framework to a chapter 15 case involving discharge of a non-debtor third-party under facts that are substantially similar to the *Vitro* situation.

D. Applying the Paradigm: The Metcalfe Case

In re Metcalfe & Mansfield Alternative Investments arose under chapter 15 and considered the specific context of third-party non-debtor releases, similar to the facts of the *Vitro* case.[88] Specifically, the Canadian plan of reorganization in that case sought to release from liability certain non-debtor third parties who had become involved in the Canadian asset-backed

[84] *Id.* at 175.
[85] Canada S. Ry. Co. v. Gebhard, 109 U.S. 527, 537 (1883).
[86] See *supra* notes 71–84 and accompanying text.
[87] But this may not be the entire story. The "fairness" element of the comity test may have additional "bite" depending on the specific foreign country involved in the chapter 15 case. *See infra* Part II.C.
[88] *In re* Metcalfe & Mansfield Alternative Investments, 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

commercial paper market.[89] Despite noting that the non-debtor third-party releases are subject to rigid limitations and should be permitted only sparingly, the bankruptcy court nevertheless ultimately determined that extending comity to the Canadian plan was appropriate.[90]

In arriving at this conclusion, the bankruptcy court applied the abovementioned framework, relying only on due process and fundamental fairness rather than analyzing specific aspects of Canadian law relative to American law.[91] Importantly, though the bankruptcy court recognized that United States courts only very rarely permitted non-debtor third-party releases, that result "[was] a function of the jurisdictional limits placed on U.S. bankruptcy courts by Congress. . . . The Canadian statute, on the other hand, was interpreted . . . to grant jurisdiction to its courts to approve such relief in appropriate circumstances."[92]

Just as then Circuit Judge Sotomayor and others before her correctly refused to focus on specific differences in law and instead sought simply to determine whether due process concerns were met, Judge Glenn noted that "Canadian courts afford[ed] creditors a full and fair opportunity to be heard in a manner consistent with U.S. due process."[93]

With respect to the fairness inquiry, the bankruptcy court in *Metcalfe* apparently did even less than what Sotomayor did in *Telecom Argentina*—rather than verify that the Canadian court had found fairness on its own, the bankruptcy court instead issued what appeared to be a blanket statement that "Canada—a sister common law jurisdiction with procedures akin to our own" and its legal proceedings are presumptively fair.[94]

[89] *Id.* at 694.
[90] *Id.* at 694, 700.
[91] *Id.* at 697 ("A U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court. . . . The key determination required by this Court is whether the procedures used in Canada meet our fundamental standards of fairness."); *compare* 11 U.S.C. § 524(e) (forbidding third-party releases) *with* Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (Can.) (expressly permitting non-debtor releases of liability for directors).
[92] 421 B.R. at 698.
[93] *Id.*
[94] *Id.* For a comparison of the *Metcalfe* and *Vitro* courts' approach to fairness, see *infra* Part II.C.

Accordingly, even though third-party releases must generally "pass muster under the rigorous standards for release and injunction provisions"[95] under United States law, in the context of an international insolvency, so long as fundamental due process concerns are met and fairness is not implicated, "[t]here is no basis for . . . [c]ourt[s] to second-guess the decisions of [foreign] courts, [and] [p]rinciples of comity in chapter 15 cases support enforcement of the [foreign orders] in the United States *whether or not* the same relief could be ordered in a plenary case under chapter 11."[96]

Unfortunately, United States comity case law analyzing foreign discharges is sparse,[97] but a synthesis of the aforementioned cases leaves us with a seemingly straightforward approach for analyzing comity in cross-border insolvency proceedings. Namely, there exists a fundamental presumption that the foreign court's decision interpreting the law will apply, subject to checks for due process and fairness. Importantly, in considering whether creditors are treated fairly, the issue is decidedly not whether such creditors would receive similar treatment under chapter 11—after all, such an approach renders the principle of comity pointless. Instead, the relevant question is whether the plan is abusive, fraudulent, or discriminatory, as determined from the point of view of the foreign court.[98] With this approach in mind, the following Part analyzes the Fifth Circuit's *Vitro* decision.

II. THE *VITRO* DECISION

Notwithstanding the United States' long-standing commitment to pioneering uniformity in cross-border insolvency law,[99] the Fifth Circuit, in a recent decision,[100] chose instead to buck the trend, thumbing its nose at a court order that had been approved by the Mexican bankruptcy court in the most heavily litigated case under chapter 15 of title 11 since its enactment in 2005. This move repudiates the efforts of the international bankruptcy bar in achieving cooperation across jurisdictions and hearkens back to the *Hilton*-era skepticism of foreign courts. What makes this move even more

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[95] 421 B.R. at 694 (citing *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir. 1992)).
[96] *Id.* at 700 (emphasis added).
[97] *See* Westbrook, *Discharge*, *supra* note 13, at 504 ("It must be said that there is little authority in the United States or elsewhere as to the effect in the United States of a foreign bankruptcy discharge.").
[98] *See supra* note 81 and accompanying text.
[99] *See supra* Part I.B.
[100] *Vitro* is a consolidation of three cases on appeal from the bankruptcy court in the Northern District of Texas. *See supra* note 11.

egregious is the fact that Mexico is and historically has been one of the United States' most important trading partners.[101] The discussion that follows analyzes the Fifth Circuit's reasoning in *In re Vitro* and offers an alternative explanation for the Fifth Circuit's resolution of the *Vitro* dilemma.

A. The Case

Founded in 1909, Vitro S.A.B. de C.V. ("Vitro"), together with its subsidiaries, constitutes the largest glass manufacturer in Mexico.[102] Vitro borrowed approximately $1.2 billion (the "Old Notes"), primarily from U.S. investors; the Old Notes were guaranteed by Vitro's subsidiaries.[103] During the 2008 financial crisis, Vitro's operating income fell by nearly 37%, and as a result Vitro stopped paying interest and announced intention to restructure.[104] Approximately one year later, Vitro entered into a sale-leaseback transaction with one of its largest third-party creditors, Fintech Investments, Ltd. ("Fintech"). Fintech paid $75 million in exchange for Vitro subsidiaries' real estate, which was subsequently leased back to Vitro. Moreover, the sale-leaseback agreement gave Fintech an option to acquire 24% of a Vitro entity in exchange for transferring Fintech's interest back to Vitro or its subsidiaries. Partially as a result of this sale-leaseback, Vitro subsidiaries, which before owed Vitro $1.2 billion, became Vitro creditors.[105]

For nearly one year, Vitro was engaged in negotiations with creditors, who rejected each proposal for reorganization. In fact, one group of noteholders even issued a press release "strongly recommend[ing] that all [noteholders] deny consent to any reorganization plan."[106] Having no other options, Vitro initiated a voluntary bankruptcy proceeding under the LCM. On December 5, 2011, Vitro's submitted plan purported to "substitute, pay, replace, and terminate" the Old Notes. In exchange, Vitro would provide old noteholders with approximately $814 million in new debt, $96 million in convertible debt, and $60 million in cash.[107] In sum, old noteholders

[101] *See infra* Part III.A.
[102] *In re* Vitro, S.A.B. de C.V., 701 F.3d 1031, 1036–37 (5th Cir. 2012), *cert. dismissed sub nom.*, Vitro, S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 2013 WL 1629212 (U.S., Apr. 16, 2013).
[103] *Id.* at 1037.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 1038.
[107] *Id.* at 1039 ("Vitro would issue new notes payable in 2019 . . . with a principal amount of $814,650,000. . . . Vitro would also provide to the holders of the Old Notes $95,840,000

would receive 81% of the face value of their claims, a rather sizeable recovery.[108]

As a result, creditors holding 74.67% of the aggregate principal amount of the recognized claims voted in favor of the plan, reaching the 50% threshold required for plan confirmation under Mexican law.[109] Approval of the plan effectively discharged all extant indebtedness, including the third-party non-debtor guarantees, a result that was permissible under Mexican law.

The objecting creditors filed suit in the United States seeking to enforce the Old Note indentures and to collect on the Old Notes from the subsidiary guarantors. Vitro, in turn, commenced a chapter 15 proceeding to enforce the *concurso* plan and to grant a permanent injunction enjoining the objecting creditors from litigating against the guarantors. The bankruptcy court denied Vitro's request for relief, and Vitro appealed.[110]

On appeal, the Fifth Circuit affirmed. Disagreeing with the bankruptcy court on approach, but nevertheless coming to the same conclusion, the Fifth Circuit held that section 1521's relief was unavailable for Vitro's requested form of relief, namely a discharge of third-party non-debtor indebtedness.[111] Finally, with respect to section 1507, which generally permits

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aggregate principal amount of new mandatory convertible debt . . . . Finally, the plan also provided cash consideration of approximately $50 per $1000 of principal of Old Notes.").

[108] As a point of reference, an expert in the *Telecom Argentina* case testified that a foreign plan providing creditors with a minimum of 80% of outstanding principal face amount of their claims was "the best consideration [he] [had] ever seen in an APE." *In re* Bd. of Dirs. of Telecom Argentina, S.A., 528 F.3d 162, 173 (2d Cir. 2008).

[109] 701 F.3d at 1039.

[110] *Id.* at 1041–42.

[111] Specifically, section 1521 allows the court to, *inter alia*, "stay[] the commencement or continuation of an individual action or proceeding concerning the debtor's assets" or to "stay execution against the debtor's assets." 11 U.S.C. § 1521. The Fifth Circuit noted that because Vitro was not seeking a stay of actions concerning its own assets, but rather a permanent discharge of actions concerning the assets of its subsidiaries, relief under the enumerated provisions of section 1521 were not available. Moreover, with respect to § 1521(a)'s general relief provision authorizing the court to grant "any appropriate relief," the Fifth Circuit noted that such relief must be otherwise available under relevant United States law. Because, according to the Fifth Circuit, 11 U.S.C. § 524 (providing that "discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt") explicitly prohibits non-debtor releases under United States law, § 1521(a)'s general relief provision was also unavailable. This article does not dispute the Fifth Circuit's application of § 1521, but see Rafael X. Zahralddin-Aravena, *Shattered: Vitro SAB de CV, Chapter 15 and § 1507*, 32 AM. BANKR. INST. J. 32, 34 (2013) (arguing that the Fifth Cir-

the court to grant "additional assistance" outside the scope of the laws of the United States,[112] the Fifth Circuit, noting that "the devil is in the details," concluded that "relief was precluded . . . [because] the relief requested was [not] comparable to that available under the Bankruptcy Code."[113]

In denying the enforcement of the *concurso* plan, the Fifth Circuit issued the only reported decision under chapter 15 denying a Mexican reorganization plan under the LCM. Additionally, the Fifth Circuit may not only have created a circuit split,[114] but it also did so by crafting its reasoning based on logic contrary to the framework discussed above and that effectively writes comity considerations out of the Bankruptcy Code. The next section analyzes the Fifth Circuit's reasoning using the framework of case law developed earlier and argues that the Fifth Circuit improperly discounted the historical importance of comity in analyzing the *Vitro* problem.

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cuit's approach of weighing § 1521 above § 1507 in priority was "novel and without significant prior precedent" because, "[a]pplying a rule of construction" with "[s]ection 1508 provid[ing] that chapter 15 will be interpreted by considering its international origin and is to be consistently applied as similar statutes are applied in other jurisdictions," implies that the Fifth Circuit's "declar[aration] [that] one provision in chapter 15 subservient to another" "seems an overreach of the rule of construction, especially when there is no legislative directive that § 1521 is in fact hierarchically superior to § 1507").

[112] 701 F.3d at 1059 ("Because our law prohibits the requested discharge, a request for relief more properly falls under § 1507, which was included to address such circumstances.").

[113] *Id.* at 1060. Specifically, section 524(e) of the Bankruptcy Code states that "discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt. 11 U.S.C. § 524(e). Courts have interpreted this section to prohibit non-debtor releases. *In re* Zale Corp., 62 F.3d 746, 760 (5th Cir. 1995) ("Section 524 prohibits the discharge of debts of nondebtors.").

[114] The Fifth Circuit itself noted that non-debtor releases are available in other circuits. *Id.* at 1061–62. *See also In re* Metcalfe & Mansfield Alternative Investments, 421 B.R. 685 (Bankr. S.D.N.Y. 2010); *In re* DBSD N. Am., Inc., 419 B.R. 179, 217–18 (Bankr. S.D.N.Y. 2009), *aff'd*, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *aff'd in part, rev'd in part*, 634 F.3d 79 (2d Cir. 2011) ("[E]xculpation provisions (and their first cousins, so-called 'third-party releases') are permissible under some circumstances, but not as a routine matter. They may be used in *some* cases, including those where the provisions are important to a debtor's plan; . . . the enjoined claims would directly impact the debtor's reorganization by way of indemnity or contribution; [and] the released party provides substantial consideration." (citing *In re* Metromedia Fiber Network, Inc., 416 F.3d 136 (2d Cir. 2005) and *In re* Adelphia Comm'ns Corp., 368 B.R. 140 (Bankr. S.D.N.Y. 2007)); Zahralddin-Aravena, *supra* note 111, at 34 (noting that "[n]onconsensual third-party releases are actually not uncommon in the U.S." and that the Fifth Circuit's decision "relies squarely on a minority position under U.S. law, which conflicts with a determination that the relief was not otherwise available under U.S. law").

B. Applying the Framework to the Vitro Problem

Despite acknowledging that "[section] 1507 theoretically provides the relief Vitro seeks because it was intended to provide relief not otherwise available under United States law,"[115] the Fifth Circuit nevertheless chose to ignore the well-developed body of prior case law identifying due process as the appropriate metric to use in determining whether to provide such relief.[116] In fact, due process is not mentioned once in the entirety of the Fifth Circuit's opinion. Accordingly, the Fifth Circuit's act of purportedly "get[ting] into the weeds of Chapter 15"[117] might actually be barely scratching the surface of comity jurisprudence.

If instead, the Fifth Circuit had followed the approach established by the case law and championed by then Circuit Judge Sotomayor, it appears that the Fifth Circuit may have wrongly taken issue with the *concurso* plan. Based on Sotomayor's approach, creditors had been afforded ample due process and then some: in fact, evidence on both sides of the debate showed that the objecting creditors were intimately involved in the negotiation of the reorganization plan.[118] In fact, the Fifth Circuit emphasized that "[t]hroughout th[e] [plan negotiation] process, the parties were apparently in frequent contact with the Mexican court."[119] Further, the objecting creditors were given the opportunity to voice and in fact voiced their objections to the plan throughout the plan's path to confirmation within the Mexican judicial system.[120]

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[115] *In re* Vitro, S.A.B. de C.V., 701 F.3d 1031, 1060 (5th Cir. 2012), *cert. dismissed sub nom.*, Vitro, S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 2013 WL 1629212 (U.S., Apr. 16, 2013).
[116] *See supra* Part I.C.
[117] *Vitro*, 701 F.3d at 1054.
[118] *See* Opening Brief of Appellant at 16, *In re* Vitro, S.A.B. de C.V., 701 F.3d 1031 (5th Cir. 2012), *cert. dismissed sub nom.*, Vitro, S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 2013 WL 1629212 (U.S., Apr. 16, 2013) (No. 12-10689) [hereinafter Opening Brief]; Brief of Appellee Ad Hoc Group of Vitro Noteholders at 9, *In re* Vitro, S.A.B. de C.V., 701 F.3d 1031 (5th Cir. 2012), *cert. dismissed sub nom.*, Vitro, S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 2013 WL 1629212 (U.S., Apr. 16, 2013).
[119] *Vitro*, 701 F.3d at 1038.
[120] *Id.* at 1039 n.4 ("[S]ubstantially all of the issues relating to enforcement of the Plan before us are also being appealed in Mexican courts."); *see also* Brief of Amicus Curiae the Government of the United Mexican States Supporting Vitro, S.A.B. de C.V. and Reversal at 1–2, *In re* Vitro, S.A.B. de C.V., 701 F.3d 1031 (5th Cir. 2012), *cert. dismissed sub nom.*, Vitro, S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 2013 WL 1629212 (U.S., Apr. 16, 2013) (No. 12-10689) [hereinafter UMS Amicus Brief].

And, just as the court evaluated the fairness of the APE proceeding in *Telecom Argentina* from the perspective of Argentinian law,[121] the Fifth Circuit should have examined the proceedings of the Mexican court approving the *concurso* plan from the perspective of the Mexican court. Indeed, the Mexican court, under the legal rules and standards established under the LCM, found that Vitro's *concurso* plan was validly confirmed, because *under Mexican law*, fairness in a confirmed plan is evidenced by a majority vote of unsecured creditors.[122] Therefore, contrary to the objecting creditors' allegations that the Mexican proceedings were unfair, the creditors' arguments were fundamentally mistaken: as then Circuit Judge Sotomayor explained, fairness is determined with deference to the point of view of the foreign court.[123]

The incorrectness of the *Vitro* decision becomes magnified when applied alongside the *Gebhard* presumption that creditors who voluntarily contract with foreign entities subject themselves to the rules and standards governing such foreign entities.[124] Indeed, *Gebhard* emphasizes that the "laws of the foreign government" are controlling for an entity that chooses to deal with a foreign corporation.[125] Correspondingly, it makes sense that an evaluation of fairness be done from the perspective of and pursuant to those same "laws of the foreign government."[126]

Somewhat unsurprisingly, the Fifth Circuit made no mention of *Gebhard* or its long-established principles of deference and *caveat emptor*. Rather, it applied a balancing test for comity that put United States interests on equal footing with foreign interests, something that *Gebhard* warns specifically against.[127] Additionally, the Fifth Circuit placed undue empha-

[121] *See supra* notes 80–84 and accompanying text.
[122] *Vitro*, 701 F.3d at 1039. In fact, courts have explained that it is actually explicitly *for* the purpose of fairness that unsecured creditors are placed in the same class. *See In re* AOV Industries, Inc., 792 F.2d 1140, 1151 (D.C. Cir. 1986) ("We also note in passing that, while there is no restriction on the total number of classifications, logistics and fairness dictate consolidation rather than proliferation of classes, so long as they are internally homogeneous." (citing *Scherk v. Newton*, 152 F.2d 747, 751 (10th Cir. 1945))
[123] *See supra* notes 81–84 and accompanying text.
[124] *Supra* note 63.
[125] *Gebhard*, 109 U.S. at 537.
[126] *Id.*
[127] *Compare Vitro*, 701 F.3d 1053 ("In applying the principles of comity, we take[ ] into account the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law." (citing *In re* Artimm, S.r.L., 335 B.R. 149, 161 (Bankr. C.D. Cal. 2005)) (internal quotation marks omitted)) *and Gebhard*, 109 U.S. at 538 ("[An entity]

sis[128] on the Mexican bankruptcy law's categorization of all unsecured creditors as one class for voting purposes, even though not a single United States court before it has taken issue with the Mexican scheme of tallying votes.[129] Courts have been explicit in their admonition that class voting is decidedly not determinative with respect to the question of whether adequate due process has been afforded to a creditor.[130]

Ultimately, instead of applying the framework for comity analysis developed through prior case law, the Fifth Circuit contradicted itself—on the one hand, the court states that "it is not necessary, nor to be expected, that the relief requested by a foreign representative be identical to, or available under, United States law[;]"[131] on the other, the court expressly denies Vitro's requested relief solely on the grounds that "the relief requested was [not] comparable to that available under the Bankruptcy Code."[132] In other words, the Fifth Circuit rejected Vitro's plan based on distinctions between United States and Mexican reorganization law, something that the drafters of chapter 15 specifically intended to avoid.[133]

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has no power to contract with a view to any other laws with which [the foreign laws] are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such [foreign] laws, which discharges it from liability there, discharges it everywhere.").

[128] It is worth mentioning that even though the Fifth Circuit raises the argument that "Vitro cannot rely on the fact that substantial majority of unsecured creditors voted in favor of the Plan," purportedly due to the fact that insiders were unsecured creditors also, the Fifth Circuit never attempts to couch the issue in terms of improper due process. *Vitro*, 701 F.3d at at 1067. Nevertheless, that argument is rebutted here.

[129] Indeed, as mentioned earlier, Vitro is the only reported decision since the adoption of the chapter 15 to reject a plan of reorganization that was confirmed under the LCM, which categorizes all unsecured creditors as a single class. *See also In re* AOV Industries, Inc., 792 F.2d 1140, 1150–51 (D.C. Cir. 1986) (noting that "the Code's rule on classification is permissive rather than mandatory").

[130] *See Multicanal*, 314 B.R. at 509; *AOV Industries*, 792 F.3d at 1151 ("The existence of a third-party guarantor does not change the nature of a claim vis-a-vis the bankrupt estate and, therefore is irrelevant to a determination of whether claims are 'substantially similar' for classification purposes." (citing *In re* McKenzie, 4. B.R. 88, 91–92 (Bankr. W.D.N.Y. 1980)); *supra* note 75 and accompanying text.

[131] 701 F.3d at 1053.

[132] *Id.* at 1060.

[133] *See In re* Schimmelpenninck, 183 F.3d 347, 364 (5th Cir. 1999); *In re* Sivec SRL, 476 B.R. 310, 324 (Bankr. E.D. Ok. 2012); *In re* Qimonda, 462 B.R. 165, 184 (Bankr. E.D. Va. 2011) ("[T]he mere fact that application of foreign law will result in different creditor priorities than those recognized by U.S. law is hardly a sufficient basis for not affording comity to foreign law.").

In effect, the Fifth Circuit mandated that, in order to grant comity, the relief that a foreign bankruptcy system fashions must be available under American bankruptcy law. Such a requirement is tantamount to writing comity considerations out of the Bankruptcy Code[134]—if all relief granted under a foreign system of law must precisely match what is available under title 11, there is no purpose whatsoever to deferring to foreign judgment at all. A court could simply check to see whether the plan would pass muster under our title 11 without having to perform any comity analysis. Such a result clearly cannot be what the drafters of chapter 15 had imagined.

Returning briefly to the framework discussed above, the following conclusions are clear. First, third-party non-debtor releases are not per se impermissible, and may be granted under certain situations.[135] Second, because the Mexican court permitted such releases, the presumption should exist that such releases are valid and enforceable in the United States as a matter of comity.[136] Third, ensuring that principles of due process have been met simply requires that the creditor receive notice and an opportunity to be heard in the insolvency proceeding, both conditions that were clearly satisfied in the *Vitro* case.[137] Finally, concerns of fundamental fairness should be left for the foreign country to adjudicate. Under this framework, there is no apparent reason for the Fifth Circuit's rejection of Vitro's *concurso* plan.

Perhaps, then, something else is at play behind the *Vitro* court's legal analysis. The following section attempts to reconcile the Fifth Circuit's approach to the *Vitro* situation with the case law framework by factoring in something that the court inevitably considered but did not discuss at length in their written reasoning—corruption.

C. Corruption as a Silent Factor in the Vitro Analysis

Applying the framework discussed above,[138] the reasoning behind the Fifth Circuit's *Vitro* decision is puzzling. Under the Bankruptcy Code,

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[134] *See also UMS Amicus Brief*, *supra* note 120, at 4 (arguing that the Fifth Circuit's decision, "seiz[ing] upon any deviation from U.S. bankruptcy law as a basis to challenge the enforcement of a foreign plan," sends a "signal to dissatisfied parties (creditors and debtors alike)" and "reduce[s] [comity] from a strong norm of international cooperation to mere rhetoric").
[135] *See supra* note 114 and accompanying text.
[136] Canada S. Ry. Co. v. Gebhard, 109 U.S. 527 (1883).
[137] *See supra* notes 118–20.
[138] *See supra* Part I.C.

third-party non-debtor releases are permissible,[139] and, even if they were not, they are under Mexican law, meaning that deference to that law should be expected, especially considering the objecting creditors voluntarily bargained for exposure to the Mexican judicial system.[140] Moreover, due process concerns are mitigated by the objecting creditors' thorough involvement throughout the plan process.[141] On what, then, did the Fifth Circuit really base its reasoning?

There was a concern addressed briefly in the *Vitro* cases that corruption of the Mexican judicial process may have tainted the LCM proceedings.[142] The objecting creditors unabashedly argued that the judicial system as a whole in Mexico "[was] corrupt and [that] its rulings should [therefore] not be respected by [a United States] Court."[143] Arguing that "the systemic corruption of the Mexican judiciary undermines confidence in the judiciary as a whole," the objecting creditors went so far as to call an expert witness to testify regarding the inadequacies of the Mexican judicial system and the proceedings throughout the LCM process.[144] Ultimately, however, the bankruptcy court held,[145] and the Fifth Circuit agreed,[146] that there was insufficient evidence to demonstrate that corruption had impacted the *Vitro* proceedings.

However, note how the courts phrased their conclusions. Rather than rise to the defense of the Mexican judiciary, the bankruptcy court instead passively noted merely that "[it] ha[d] not seen evidence that the Mexican

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[139] *See, e.g.*, *In re* Metcalfe & Mansfield Alternative Investments, 421 B.R. 685 (Bankr. S.D.N.Y. 2010); *In re* Airadigm Communications, Inc., 519 F.3d 640 (7th Cir. 2008) (allowing release of third parties where such release was important to the reorganization); *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir. 1992) (same); *In re* Metromedia Fiber Network, Inc., 416 F.3d 136 (2d Cir. 2005) (same).
[140] Canada Southern R. Co. v. Gebhard, 109 U.S. 527, 537–39 (1883).
[141] *See supra* notes 118–20.
[142] The bankruptcy court considered and dismissed this argument in the *Vitro* proceedings. The Fifth Circuit apparently did not reach this issue, as it was not raised on appeal. *Vitro*, 701 F.3d at 1052.
[143] *In re* Vitro, S.A.B. de C.V., 473 B.R. 117, 130 (Bankr. N.D. Tex. 2012), *aff'd* 701 F.3d 1031 (5th Cir. 2012), *cert. dismissed sub nom.*, Vitro, S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 2013 WL 1629212 (U.S., Apr. 16, 2013).
[144] *Id.* For a discussion on the impacts that such an action may have had for mutual respect and reciprocal comity, see *infra* Part III.A.
[145] *Id.*
[146] In re Vitro, S.A.B. de C.V., 701 F.3d 1031, 1052 (5th Cir. 2012), *cert. dismissed sub nom.*, Vitro, S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 2013 WL 1629212 (U.S., Apr. 16, 2013).

Proceeding is the product of corruption, or that the LCM itself is a corrupt process."[147] Similarly, the Fifth Circuit, on appeal, simply stated that the question of corruption "[was] not before [them]."[148] Even though they claim not to have considered the issue, might the courts have given some consideration to the fact that corruption could have influenced the Mexican proceedings?

It is understandable for the courts considering the *Vitro* problem to shy away from a detailed discussion on whether corruption actually played a part in the *Vitro* case process. After all, Mexico is one of America's largest and most important trading partners, and it would hardly be wise for the courts to create an international relations problem on top of a multibillion-dollar cross-border bankruptcy dispute.[149] Nevertheless, with the extensive evidence and testimony presented in the case[150] as well as the deep body of existing literature[151] on the subject, it is difficult to believe that the potential for corruption in the Mexican *Vitro* proceedings played no part in the courts' decisionmaking process.

Of course, proving that a court did something that it expressly says it did not do is a tall task. One approach might be to consider other cases in which comity was not granted. However, most of these cases appear to turn on a question of inadequate due process. In *In re Hourani*, for instance, the bankruptcy court declined to extend comity to a Jordanian court where "access to information and an opportunity to be heard in a meaningful manner . . . [were] not fully guaranteed."[152] Similarly, *In re Papeleras Reunidas, S.A.* refused to recognize a Spanish bankruptcy proceeding where a creditor was not given notice of the foreign proceedings.[153] Moreover, given the substantially different factual situations of these cases, it would be virtually impossible to isolate corruption as the specific determinative factor at work behind the courts' reasoning.

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[147] 473 B.R. at 130.
[148] 701 F.3d at 1052.
[149] *See infra* Part III.A.
[150] In addition to "expert" testimony on corruption in Mexico, the objecting creditors also cited "reports by, among others, the U.S. State Department, United Nations, World Bank, Transparency International." 473 B.R. at 130.
[151] *See, e.g.*, Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT'L & COMP. L. 715 (2004); Alicia E. Yamin & Pilar N. Garcia, *The Absence of the Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy*, 21 LOY. L.A. INT'L & COMP. L.J. 467 (1999).
[152] *In re* Hourani, 180 B.R. 58, 67 (Bankr. S.D.N.Y. 1995).
[153] *In re* Papeleras Reunidas, S.A., 92 B.R. 584 (Bankr. E.D.N.Y. 1988).

A better approach might be to consider a factually similar case, but that comes out a different way. One such case, discussed above, is *In re Metcalfe & Mansfield Alternative Investments*, which also involved a third-party non-debtor release under chapter 15.[154] Recall that in that case, as in *Vitro*, the foreign plan called for a release from liability for non-debtors.[155] The bankruptcy court, despite noting that "Second Circuit case law places narrow constraints on bankruptcy court approval of third-party non-debtor release and injunction provisions," nevertheless correctly applied the case law framework and approved the Canadian plan "as a [m]atter of [c]omity."[156]

But notice how the *Metcalfe* court discusses fundamental fairness. The only analysis it does is to strongly emphasize the fact that the foreign country involved is Canada. In fact, the court devotes nearly an entire section of its opinion explaining why comity should be presumptively afforded to Canadian proceedings.[157] With Canada, a country whose "system of jurisprudence [is] likely to secure an impartial administration of justice between the citizens of its own country and those of other countries," the bankruptcy court explains, comity should be readily extended, even with respect to non-debtor releases, which otherwise must pass rigorous muster.[158] Might such an impartial "system of jurisprudence" play a role in determining whether fundamental fairness exists, and thus whether to extend comity to a foreign proceeding?

Compare this reasoning with the *Vitro* court's approach. Unsurprisingly, there is no analogous language in the *Vitro* opinion lauding the similarities between Mexican and American law, even though Mexico, like Canada, is a North American Free Trade Agreement (NAFTA) country,[159] LCM proceedings "easily" meet the standards for granting international comity,[160]

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[154] 421 B.R. 685 (Bankr. S.D.N.Y. 2010).
[155] *Id.* at 692.
[156] *Id.* at 697–98; *see supra* part I.D.
[157] 421 B.R. at 698–99 ("The fact that the foreign country involved is Canada is significant . . . [because] Canada is a sister common law jurisdiction with procedures akin to our own, and thus there need be no concern over the adequacy of the procedural safeguards of Canadian proceedings.").
[158] *Id.* at 698 (quoting Hilton v. Guyot, 159 U.S. 113, 202–03 (1895)).
[159] *See infra* Part III.A.
[160] *See In re* Garcia Avila, 296 B.R. 95, 108–09 (Bankr. S.D.N.Y. 2003) (explaining that "Mexican bankruptcy proceedings easily meet . . . concerns" relating to the factors under former § 304, factors that have been incorporated into chapter 15); Ecoban Finance Ltd. v.

and no reported decision since the implementation of chapter 15 has refused to grant comity to a plan approved under the LCM. Rather than attempt to affirmatively defend the Mexican system of law, the *Vitro* court simply rolled over.

In essence, *Metcalfe* and *Vitro* are two cases, both involving third-party non-debtor releases and both where due process was clearly afforded to all parties involved, that arrive at opposite conclusions. A skeptic might argue that this disparate result boils down to a circuit split: maybe non-debtor releases are fine in the Second Circuit but per se impermissible in the Fifth. However, this explanation seems overly simplistic, especially in light of the Supreme Court's recent dismissal of Vitro's petition for certiorari.[161]

Instead, the *Vitro* court, *sub silentio*, has grafted an additional requirement—the existence of an impartial system of jurisprudence[162]—onto the framework for deciding whether to extend comity. Namely, while fairness is *generally* to be determined from the foreign court's perspective, the bankruptcy court reserves the right to "veto" comity if it senses foul play. And, perceiving a risk of corruption in the *Vitro* proceedings specifically, or perhaps the Mexican judicial system generally,[163] the Fifth Circuit chose not to recognize Vitro's *concurso* plan.

Consider the effect that this new "silent" fairness analysis would have on existing comity jurisprudence. On the one hand, if the bankruptcy court may insert its own opinions on whether the foreign court is corrupt and thus override the foreign court's findings on fairness, then the wholly deferential test articulated by then Circuit Judge Sotomayor[164] no longer appears weak and circular. The "silent" veto power gives the otherwise deferential stand-

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Grupo Acerero Del Norte, S.A. de C.V., 108 F. Supp. 2d 349, 353 (S.D.N.Y. 2000) ("[I]t is not necessary for this Court to 'split hairs to determine that the [Mexican] law, in general, provides a fair forum in which to litigate [plaintiff's] claims." (quoting Allstate Life Ins. Co. v. Linter Group Ltd., 994 F.2d 996, 999 (2d Cir. 1993), *cert. denied*, 510 U.S. 945 (1993) (second and third alterations in original))); *see infra* note 167. *See also* Douglas A. Doetsch & Aaron L. Hammer, *Observations on Cross-Border Insolvencies and Their Resolution in the NAFTA Region: Where Are We Now?*, 10 U.S.-MEX. L.J. 61, 68 (2002) ("[B]oth Canada and Mexico have adopted new insolvency statutes that aim, in part, to facilitate the administration of cross-border insolvency proceedings by incorporating provisions of [the UNCITRAL Model Law].").

[161] Vitro, S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 2013 WL 1629212 (U.S., Apr. 16, 2013).

[162] 421 B.R. at 698 (quoting Hilton v. Guyot, 159 U.S. 113, 202–03 (1895)).

[163] *See supra* notes 150–51.

[164] *See supra* notes 81–84.

ard of review for fairness some teeth. On the other, such an approach seems to completely eviscerate the fundamental underpinning of comity—respect for and deference to foreign jurisdictions and their judgments.

Of course, there is nothing in the record that firmly supports the notion that corruption was a material element in crafting the *Vitro* court's decision. Nevertheless, the stark contrast between the *Metcalfe* court's stalwart defense of Canada's judiciary and the *Vitro* court's refusal to offer even the slightest support to Mexico is revealing.

Perhaps, instead of construing the *Vitro* court's reasoning as a willful departure from centuries of established comity case law, it is plausible (if not probable) that corruption played an unspoken yet crucial role in the *Vitro* court's fairness analysis. Regardless of whether corruption influenced the Fifth Circuit's comity analysis, the court's unprecedented decision to reject Vitro's *concurso* plan will surely have negative ramifications. The next Part of this Comment posits several important implications of the *Vitro* decision, hypothesizing that the Fifth Circuit's bucking of the comity trend will have far-reaching and important consequences for global enterprise.

III. IMPLICATIONS OF THE *VITRO* DECISION

Section 1501 of title 11 enumerates in very clear terms the drafters' priorities in enacting chapter 15.[165] Based on the historical deference shown to foreign judgments in cross-border insolvencies in the United States, it should come as no great surprise that "cooperation between courts of the United States . . . and the courts and other competent authorities of foreign

[165] 11 U.S.C. § 1501(a) provides, in relevant part, that "[t]he purpose of this chapter [15] is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with Cases of cross-border insolvency with the objectives of—

(1) cooperation between—

(A) courts of the United States . . . ; and

(B) 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."

11 U.S.C. § 1501(a).

countries" is listed as the first priority.[166] Unfortunately, it may also be the first and most important casualty of the *Vitro* decision.

However, the fallout from *Vitro* does not end there. The other considerations of section 1501—greater certainty for trade and investment, fairness, maximization of asset value, and providing a fresh start—will also suffer greatly as a result of the Fifth Circuit's unprecedented decision to ignore the guidance of the Mexican court. This section discusses several of these implications in greater detail.

A. Erosion of Cooperation

The *Vitro* decision is antithetical to perhaps the most important concept in the very first section of chapter 15—cooperation. Mexico, which has long since been one of the United States' most important trading partners, a country with which the United States has shared a history of mutual respect and understanding, now sits at the opposite end of an awkward exchange in which a United States court has spurned the judgment of a Mexican court, even though the insolvency systems of the two countries are in many respects substantially similar.[167] Indeed, as mentioned earlier, the Fifth Circuit's decision in *Vitro* is the first reported decision in which a U.S. court has refused to enforce a plan of reorganization under the LCM.

That Mexico is a NAFTA country makes the Fifth Circuit's decision even more egregious. Notably, the American Law Institute's NAFTA Transnational Insolvency Project proffers a set of "general principles that offer policy recommendations . . . [that] [a]ny U.S. bankruptcy court with a case involving Canada or Mexico should strongly consider."[168] The very first of these general principles calls for NAFTA "courts and administrators [to] cooperate in transnational bankruptcy proceedings."[169]

However, at the core of these principles of cooperation is the idea that, in light of their special trading relationships, NAFTA countries should af-

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[166] *Id.*

[167] AM. LAW INST., PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES § II.C (2003) ("[T]he bankruptcy laws of Canada, Mexico, and the United States rest on fundamentally similar premises and policies . . . . Mexico and the United states are both viewed as somewhat more inclined toward the interests of debtors and unsecured creditors.") [hereinafter PRINCIPLES OF COOPERATION]; *see also supra* note 160 and accompanying text.

[168] SAMUEL L. BUFFORD ET AL., INTERNATIONAL INSOLVENCY 68 (2001).

[169] PRINCIPLES OF COOPERATION, *supra* note 167, § III.GP1.

ford each other a higher degree of deference in insolvency proceedings. Procedural Principle 26 reads:

> Where a Plan of Reorganization is adopted in a main proceeding in any NAFTA country and there is no parallel proceeding pending within the NAFTA region, *that Plan should be final and binding upon the debtor and upon every creditor who participates in any way in the main proceeding*. For this purpose, participation includes i) filing a claim; ii) voting; or iii) accepting a distribution of money or property under a Plan.[170]

No such deference or cooperation was apparent in the Fifth Circuit's reasoning.

The ALI's Transnational Insolvency Project recognizes that despite the differences that may exist between different NAFTA insolvency systems, there nevertheless remains an overarching need for interjurisdictional cooperation. In fact, the Project devotes an entire section to exploring certain of the "Differences Among Bankruptcy Regimes Within [t]he NAFTA."[171] Two observations necessarily follow. First, noticeably absent from the ALI's discussion of important distinctions between Mexican and American law in this section is the notion that the Mexican scheme of classification of voting interests is different from the American scheme. From this perspective, the Fifth Circuit seems to have improperly emphasized this fact in the *Vitro* case.[172]

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[170] *Id.* § IV.D.2.B.PP26 (emphasis added). The Official Comment accompanying Procedural Principal 26 is also informative and highly relevant to the *Vitro* facts:

> Even a creditor who does not ultimately consent to the plan, but who was involved in the reorganization case—for example, by asserting a claim or voting—should be bound by the final result. Otherwise, the creditor could get all the benefits of participation while remaining free to evade the final result of a collective decision made under the same national law whose help and protection the creditor sought. Basic principles of contract and consent to jurisdiction, as well as fairness, would require the courts in all three NAFTA countries to prevent such conduct. While national laws might vary as to the theories involved, all three NAFTA countries would agree on these results.

Id. Clearly, however, one of those three NAFTA countries did not agree with the foregoing statements.

[171] *Id.* § II.C.

[172] *See also supra* notes 128–30 and accompanying text.

Second, the ALI expressly reasoned that, precisely because NAFTA countries are considered to be more similar jurisprudentially with one another than with non-NAFTA countries, "the solution [to transnational bankruptcies involving NAFTA countries] lies in taking into account differences in specific rules and providing cooperation in specific cases . . . [and] develop[ing] practical procedures and rules that follow logically from *common* policies."[173] The Fifth Circuit took the exact opposite route. By choosing to craft its holding based on a *difference* between Mexican and American bankruptcy law rather than seek a common ground to promote cooperation, the Fifth Circuit specifically contravened the ALI's advice.

Choosing not to heed the tradition and history of cooperation between countries in insolvency proceedings might have serious and far-reaching implications for the United States' international relations with Mexico and other trading partners. Indeed, Professor Westbrook warned of the consequences of the cavalier "go it alone" approach to international insolvency championed by the Fifth Circuit in *Vitro*:

> [I]f a United States creditor would be disadvantaged, then we go it alone territorially. . . . Obviously, that understanding of [chapter 15] would be *squarely contrary* to its intent to promote international cooperation, because it would leave only two possibilities: the case in which the United States creditors all feel they will be better off abroad, in which case no United States proceeding is needed or will be brought, or the case in which the United States creditors can realize some advantage through a parochial treatment in the United States courts and are absolutely entitled to it. To put it another way, to understand [chapter 15] as saying we only cooperate when it is in our interest to do so (or worse, in the interest of every one of "our" creditors) is to say we will cooperate rarely.[174]

Professor Westbrook's comment appears to have predicted the *Vitro* situation perfectly: identifying an avenue for realizing "some advantage through a parochial treatment in the United States courts," the objecting creditors have identified, and the Fifth Circuit has permitted, an exploit based on differences in law that coopts international comity.

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[173] PRINCIPLES OF COOPERATION, *supra* note 167, § II.C. (emphasis added). "[T]he problem of transnational bankruptcy within the NAFTA does not arise from profound differences about the form and function of bankruptcy . . . ." *Id.*

[174] Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2323-24 (2000) (emphasis added) [hereinafter Westbrook, *Global Solution*]. This latter mindset is precisely the one taken by the creditors in *Vitro*.

Indeed, ignoring the principles of comity and cooperation may result in foreign courts becoming less apt to defer to United States judgments.[175] This is perhaps because, while United States courts have rejected the idea that reciprocity is material in considering international insolvencies,[176] several other countries still consider reciprocity as an important consideration in evaluating international court decisions.[177]

Of course, one such country is Mexico. Article 280 of the LCM adopts Article 3 of the UNCITRAL Model Law[178] with no substantial changes except that Article 280 explicitly requires that there be reciprocity with the state in which the foreign proceeding be conducted.[179] The Mexican government, which filed an amicus brief in the *Vitro* case, emphasized the fact that "[t]he Mexican [c]ourt [d]id [n]ot [d]eny [c]omity to the New York [c]ourt," and, as such, "the legal significance of [the] facts [of the case] *under the LCM* is for *Mexican courts* to determine."[180] The language used by the Mexican government highlights the weight that the country places on reciprocity:

> If the situation were reversed, and a Mexican court determined the legality of particular debts in Mexico, a U.S. bankruptcy court would

[175] *See* Westbrook, *Discharge*, *supra* note 13, at 514 (explaining that in the sole reported case "where the foreign court has been asked to enforce a United States corporate discharge," it did so on the basis of comity); *see supra* Part I.B.

[176] *See* Tandi A. Panuska, *The Chaos of International Insolvency: Achieving Reciprocal Universality Under Section 304 or MIICA*, 6 TRANSNATIONAL LAW. 373, 395 (1993) (explaining several cases where reciprocity was expressly excluded from a comity analysis); Richard H.M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: The Next Time You Get a Chance, Please Look at Hilton v. Guyot; We Think It Needs Repairing*, 5 J. INT'L LEGAL STUD. 1, 1 (1999) ("Hilton's definition of comity is quoted endlessly; its pronouncement of the element of comity known as reciprocity is uniformly rejected. The Court has practically ignored the reciprocity wing of Hilton . . . .").

[177] *See* Ho, *supra* note 10, at 8 (noting that "[a]lthough reciprocity is not a requirement of the [UNCITRAL] Model Law, the reciprocity requirement has been imposed *de jure* or *de facto* by a number of states–namely the British Virgin Islands, Mauritius, Mexico, Romania, and South Africa").

[178] Article 3 of the UNCITRAL Model Law deals with international obligations of the local state when there are conflicts between the Model Law and the laws or requirements of any treaty or other agreements entered into by the local state. *Report of the United Nations Commission on International Trade Law on the Work of Its Thirtieth Session*, U.N. Doc. A/52/17 (1997) [hereinafter Model Law].

[179] Pablo Perezalonso, *Mexico*, *in* CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 317 (3d ed., 2012).

[180] *UMS Amicus Brief*, *supra* note 120, at 5 (second emphasis added).

> still have the authority (and indeed the obligation) to resolve the status of those debts in a U.S. insolvency proceeding, and the Mexican courts would afford a high degree of respect to those judgments. What happened here is no different.[181]

Regrettably, the Fifth Circuit appears to have considered neither NAFTA membership nor Mexico's reciprocal practices in crafting its unprecedented *Vitro* decision. What the Fifth Circuit's *Vitro* proceedings did include, however, were hearings regarding the inadequacy and corruption of the Mexican court system, notwithstanding decades of comity practice (in which not a single confirmed plan under LCM had not been granted recognition in the United States) and a treaty agreement for increased trade between the United States and Mexico. The Fifth Circuit therefore not only refused to recognize the Mexican judgment, but also permitted a mockery of the Mexican judiciary as a whole without once rising to Mexico's defense.

What will be the ultimate reaction of foreign courts when they learn that Mexico, one of the United States' closest allies and trading partners, had one of its court decisions rejected and its legal system ridiculed by an American court? Of course, there is no way to be completely certain—there is a chance that, given the exceptionally strong historical track record of United States courts deferring to foreign law and foreign courts,[182] *Vitro* will join the thin ranks of cases considered one-off and "likely wrong[ly]" decided.[183]

Two takeaways, however, are clear. The first is that for Mexico, *Vitro* is a gut punch that will not soon be forgotten.[184] The second is that just as the United States was at the forefront of pioneering international cooperation in cross-border insolvency before the creation of the Model Law, after *Vitro*, it now stands at the vanguard of its downfall.[185]

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[181] *Id.* at 6–7.
[182] *See* Westbrook, *Global Solution*, *supra* note 174, at 2323 n.197 (gathering cases).
[183] *Id.* at 2324.
[184] *See UMS Amicus Brief*, *supra* note 120, at 1 ("Mexico has a strong interest in the international recognition of the approved reorganization plan of Vitro . . . . The decision below constitutes the first time since Mexico modernized its bankruptcy laws in the year 2000 that a U.S. court has refused to enforce a Mexican insolvency decision.").
[185] *See also In re* Lehman Bros. Holdings Inc., 422 B.R. 407, 418 (Bankr. S.D.N.Y. 2010) (refusing to grant preclusive effect to judgments of the English courts that would enforce ipso facto clauses that would be unenforceable under the Bankruptcy Code).

B. Managerial and Operational Uncertainty

The Fifth Circuit's decision to refuse to enforce an approved plan of reorganization creates inconsistency that subjects the Vitro enterprise to drastic operational and managerial uncertainty. Let's review the facts of *Vitro*. Nearly three-quarters of unsecured creditors voted in favor of the plan, including Fintech, one of the largest unsecured claimants.[186] Accordingly, those creditors were (and still are) bound by the terms of the plan, as confirmed by the Mexican court, in Mexico.[187]

However, the Fifth Circuit's refusal to honor the already-confirmed Mexican plan creates a serious problem for Fintech and the remaining 74.67% of creditors. Namely, Fintech and the other creditors bound in Mexico will be subject to different recoveries in Mexico and the United States. This is because the hold-out creditors are free to "pursue state law judgment enforcement actions in the United States seeking preferential recoveries through immediate collection on judgments" based on the debt guarantees, even though under the confirmed plan in Mexico, such rights to recovery would be extinguished and discharged.[188] In essence, the inconsistent enforcement of Vitro's confirmed *concurso* plan would lead to a "chaotic outcome" in which Vitro subsidiaries are "subject to different obligations to creditors depending on the legal regime those creditors opt to rely on."[189] Such a result is in obvious and direct contravention of Bankruptcy Code section 1501(a)(2), which calls for the court to promote "greater legal certainty" in considering cross-border insolvency cases.[190]

A quick look at the remaining subsections of Bankruptcy Code section 1501(a) shows that the Fifth Circuit quite literally took none of the considerations listed therein into account. Regarding section 1501(a)(3), the Vitro

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[186] *In re* Vitro, S.A.B. de C.V., 701 F.3d 1031, 1039 (5th Cir. 2012), *cert. dismissed sub nom.*, Vitro, S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 2013 WL 1629212 (U.S., Apr. 16, 2013).

[187] *See* Opening Brief of Appellant Fintech at 12, *In re* Vitro, S.A.B. de C.V., 701 F.3d 1031 (5th Cir. 2012), *cert. dismissed sub nom.*, Vitro, S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 2013 WL 1629212 (U.S., Apr. 16, 2013) (No. 12-10689) [hereinafter Fintech Brief].

[188] *Fintech Brief*, *supra* note 187, at 13–14.

[189] *Id.* at 28.

[190] *See also* BUFFORD, ET AL., *supra* note 168, at 41–42 ("[C]laims against the estate should be decided in the courts of the country where the main case is pending, because the equitable and orderly distribution of the debtor's property can be best accomplished in the main proceeding.").

decision fails to "protect the interests of all creditors, and other interested entities, including the debtor" since the *Vitro* decision unfairly penalizes Fintech and the majority of other creditors who voted for the plan at the expense of the minority of objecting creditors.[191] Indeed, though the plan may be protecting the holdout creditors, privileging a minority of creditors at the expense of the majority is particularly egregious, especially when considering that, under Mexican law, a majority of unsecured creditors is all that is necessary for those votes to be considered representative of the entire class.[192]

Moreover, subjecting the non-filed Vitro subsidiaries to uncertainty as to continuing liabilities limits the ability of Vitro to, *inter alia*, properly manage its risks, take on new risks, or obtain additional funding. For instance, uncertainty as to the value of the Vitro enterprise's liabilities will cause lenders either to compensate for the uncertainty in the form of increased rates, or worse, refusing to extend credit altogether. Either way, this uncertainty drives down the value of the Vitro enterprise as a going concern:[193] limited funding available means that the Vitro enterprise will not be able to raise capital to fund continuing operations, and increased rates mean that Vitro will spend more operating cash flow to fund its interest obligations. Both of these results lead to the same result—diminished asset value.

Therefore, what the Fifth Circuit has effectively done in crafting its *Vitro* opinion is obliterate virtually every consideration under section 1501 of title 11—in other words, it has ignored the very purpose behind the enactment of chapter 15.[194]

C. Creditors and the Financial Markets

A last but equally important negative effect of the Vitro decision is its impact on creditors and the financial markets. At its very core, the Vitro decision shielded opportunistic creditors who, after knowingly purchasing debt from a Mexican issuer and thus subjecting themselves to Mexican law,

[191] 11 U.S.C. § 1501(a)(3).
[192] *Supra* note 109 and accompanying text.
[193] *See* 11 U.S.C. § 1501(a)(4).
[194] *Fintech Brief*, *supra* note 187, at 28 ("A failure by the U.S. courts to enforce the result of an insolvency proceeding recognized as a 'foreign main proceeding,' after finding no due process issue with that proceeding . . . would contravene the cooperative approach set out in section 1501(a).").

sought to escape the consequences of such law.[195] While the creditors may have received the guarantee of the non-debtor subsidiaries under United States law, they must also have known that such guarantees were certainly voidable under Mexican law as well as under the Bankruptcy Code.[196]

Effectively, this creates an incentive for savvy creditors to "game" the system, exploiting differences in U.S. and foreign restructuring laws to make a profit, knowing that a U.S. court will protect its interests at the expense of honoring a foreign country's laws. Not only is this precisely the situation that the *Gebhard* court hoped to avoid,[197] but this also cuts against the very rationale behind enacting a model law for cross-border insolvency issues in the first place.[198] An opportunistic creditor therefore can choose to lend to a company whose home country has bankruptcy laws just distinct enough from those of the United States and, using those distinctions, obstruct the reorganization process.

Further, the effect of the *Vitro* decision may instill in creditors of multinational corporations a mindset of skepticism, whereby creditors are disincentivized to compromise to reach consensus. For instance, after *Vitro*, there is a very real chance that, comity considerations pushed to the wayside, a difference in law between two jurisdictions can be the deciding factor in whether a creditor is or is not paid. In this sense, the creditor has every incentive to hold out or litigate on the basis of its claim, in the hopes that, like the objecting creditors in *Vitro*, they may earn some incremental return.

[195] A significant portion of the objecting noteholder group purchased debt "after the Mexican Proceeding commenced, which was well after the terms of Vitro SAB's proposed restructuring." *Fintech Brief*, *supra* note 187, at 24. In fact, one investor, Aurelius Capital Management, L.P., purportedly acquired its entire position in Vitro debt "around the time" Vitro had announced the terms of its restructuring. *Opening Brief*, supra note 118, at 13 n.12.

[196] *See* Canada Southern R. Co. v. Gebhard, 109 U.S. 527, 539 (1883) ("The fact that the bonds made in Canada were payable in New York is unimportant . . . . [E]very citizen of a country, other than that in which the corporation is located, may protect himself against all unjust legislation of the foreign government by refusing to deal with its corporations.").

[197] *Id*.

[198] Chapter 15's legislative history, in addition to explaining section 1501(a) enumerating "greater legal certainty for trade and investment" as one of its motivating principles, specifically references protections to avoid manipulations of certain sections of the statute "to avoid recognition of foreign proceedings in their home countries or elsewhere." H.R. REP. NO. 190-31, at 105–06 (2005); *see also In re* Condor Ins. Ltd., 601 F.3d. 319, 321–22 (describing the adoption of the Model Law as the "culmination of a long standing effort by the United States and other countries to develop a uniform system guiding needed cooperation" in cross-border insolvencies); *supra* Part I.B.

The disintegration of the notion of compromise in reorganizations will be costly to all parties involved.[199]

CONCLUSION

Since the United States has adopted chapter 15, global reception to the Model Law has been strong, with many countries adopting some version of the same UNCITRAL Model Law. Importantly, the text of Model Law recognizes the importance of achieving "uniformity in its application," and in every jurisdiction that has implemented a form of the model law, "the mandate embodied in Article 8 either has been implemented directly or is already part of the national legal culture."[200]

Nevertheless, this uniform approach was recently put to the test in the Fifth Circuit's evaluation of the *Vitro* scenario. And despite decades of effort and growing momentum toward a global insolvency system, the Fifth Circuit's unilateral decision bucks the trend, returning to the territorial, *quid pro quo* approach to cross-border insolvency of centuries past.

This Comment highlights the importance of recognizing that, even despite the global convergence of laws, differences in global legal systems do remain. The appropriate approach to bridging these differences is not to magnify them, but rather to find a common ground to promote long established principles of comity, cooperation, and respect for our fellow nations.

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[199] *In re* Jackson Brewing Co., 624 F.2d 599 (5th Cir. 1980) ("We must remember that compromises are 'a normal part of the process of reorganization,' oftentimes desireable and wise methods of bringing to a close proceedings otherwise lengthy, complicated and costly." (quoting Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 130 (1939) and Fla. Trailer & Equip. Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960)) (internal citations omitted)).
[200] *See* Model Law, *supra* note 178; Ho, *supra* note 10, at 7.