WHEN DEFERENCE MAKES A DIFFERENCE: THE ROLE OF U.S. COURTS IN CROSS-BORDER BANKRUPTCIES

*Fabio Weinberg Crocco**

Abstract: While much ink has been spilled debating theoretical frameworks for dealing with cross-border bankruptcies, less attention has been paid to how courts resolve cross-border bankruptcy issues in practice. After more than one decade since the introduction of Chapter 15 into the U.S. Bankruptcy Code, much about the practice of cross-border bankruptcies in the United States remains unclear given that the few existing empirical studies have focused primarily on issues related to recognition of foreign proceedings. No systematic, comprehensive empirical work has examined in depth how U.S. bankruptcy courts exercise their discretion to grant relief requested by foreign representatives. Through the content analysis of pleadings and decisions made in 129 Chapter 15 cases, this paper fills this gap by providing descriptive statistics showing how U.S. courts decided discretionary relief motions, an area where they have broad discretion. Empirical evidence shows that U.S. bankruptcy courts very infrequently deny recognition to foreign insolvency proceedings and, in the great majority of cases, grant the discretionary relief requested. The empirical evidence does not support the views (i) that U.S. courts overprotect local creditors at the expense of foreign stakeholders or (ii) that the U.S. courts' non-interventionist approach erodes national sovereignty or leaves local creditors unprotected. The findings in this paper further support the view that U.S. courts have been successful in establishing a pragmatic and effective modified universalist bankruptcy regime. The deferential approach that U.S. courts generally took with respect to foreign proceedings makes a positive difference because it promotes economic efficiencies and facilitates cross-border restructurings and liquidations.

Keywords: Cross-border bankruptcies, empirical research, Chapter 15, discretionary relief, territorialism and universalism.

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1. INTRODUCTION

Cross-border bankruptcies are increasingly common in a world with interconnected economies, as it is common for firms to own assets and have creditors—both voluntary and involuntary—in multiple jurisdictions. As a result, transnational insolvency regulation has been widely discussed from a normative perspective.[1] In fact, this area of bankruptcy law has been marked by a long-standing scholarly debate between supporters of two competing conceptual paradigms: universalism and territorialism.[2] While much ink has been spilled debating theoretical frameworks for dealing with cross-border bankruptcies, less attention has been paid to how different jurisdictions have been addressing cross-border bankruptcies in practice.

In the United States, academic discussions have contributed to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which, among other matters, added Chapter 15 to the U.S. Bankruptcy Code,[3] introducing into the U.S. system a more detailed statutory framework designed to address transnational bankruptcies. In short, Chapter 15 provides a set of rules that govern (i) the recognition of foreign insolvency proceedings in the United States and (ii) the enforcement of foreign judicial decisions in the United States.[4]

The enactment of Chapter 15 is part of an international initiative because it largely

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1 *See* section 2.

2 These concepts are discussed in subsection 2.1. In short, under the territorialist approach, each jurisdiction where the debtor's assets are located is entitled to administer a full insolvency proceeding governed by its own laws. Thus, there can be as many bankruptcy proceedings as there are countries where assets are located, each of which is governed by a different set of rules. On the other hand, under the universalist approach, cross-border bankruptcies are treated as unified global proceedings and administered by one principal court under a single governing law.

3 U.S. Bankruptcy Code, 11 U.S.C. § 1501 *et seq.* (2012).

4 For more details regarding Chapter 15, *see* subsection 2.2.

incorporates[5] the Model Law on Cross-Border Insolvency developed by the United Nations Commission on International Trade Law (UNCITRAL).[6] In fact, the 2005 statutory reform was described as part of "an effort by the United States to harmonize international bankruptcy proceedings for the benefit of American businesses operating abroad."[7]

The objectives[8] that these international initiatives pursue are sound in theory and have been well articulated in practice. In addition to promoting harmonization and coordination between bankruptcy courts and proceedings across jurisdictions, policymakers have sought to establish a framework that promotes fair, transparent, orderly and efficient administration of insolvency cases and protects the rights and interests of the many stakeholders involved. At the same time, policymakers recognized the importance of preserving national sovereignty and judicial independence.

Surprisingly, after more than one decade of the enactment of Chapter 15, much about its operation in practice remains unknown. While some empirical studies have examined Chapter

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5 *See* Jay L. Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 720 (2005) (noting Chapter 15 so closely follows the Model Law. In the author's words, "any departures from the actual text of the Model Law in its official English version were as narrow and limited as possible. In only one or two respects were those departures meant to make any substantive change, and those instances are specifically identified." *See also In re Condor Ins. Ltd.*, 601 F.3d at 322.

6 U.N. Comm'n on Int'l Trade Law, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (hereinafter "Model Law" and "Guide," respectively), U.N. Doc. A/CN.9/442 (1997). Chapter 15 is easily distinguishable from the Model Law. The latter is not a self-executing instrument and States that implement it may do so in different ways. For example, in the U.S., Chapter 15 diverges, in limited ways, from the terms of the Model Law. According to the legislative history, adjustments were made in Chapter 15 to render the wording of the statute more compatible with the terms of the Bankruptcy Code and with U.S. civil procedure rules. Nevertheless, deviations from the Model Law can be problematic because they may hinder the objective of setting a minimum standard among different nations for resolving multinational bankruptcies. For a comparison between the U.K. and the U.S. *see, e.g.*, Gerard McCormack, *Universalism in Insolvency Proceedings and the Common Law*, 32 OXFORD J. OF LEGAL STUD. 325, 341-2 (2012) (noting that the main difference "lies in the fact that Chapter 15 has been held to be the sole gateway for a U.S. court to provide assistance to a foreign insolvency representative. There is no residual common law discretion in the United States according to the leading case—Bear Stearns").

7 *See Tacon* v. *Petroquest Res. Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319, 322 (5th Cir. 2010).

8 For a detailed description of the objectives that motivated the development of the Model Law, *see* Comm'n on Int'l Trade Law, Model Law on Cross-Border Insolvency, Practice Guide on Cross-Border Insolvency Cooperation 5 (2010).

15 cases in the United States,[9] researchers so far have focused primarily on issues related to recognition, which is the first stage of Chapter 15 cases. However, as discussed below, this is a relatively straightforward stage and involves significantly less judicial discretion in comparison with the relief stage.

So far, no systematic comprehensive empirical work has examined in detail how U.S. bankruptcy courts exercise their discretion in deciding motions for discretionary relief by representatives of foreign insolvency proceedings. This paper aims at filling this important gap in the existing literature by empirically investigating the practice of discretionary relief in the United States under Chapter 15.

For the reasons described in subsection 2.2, relief is an interesting topic for empirical research because it is an area where bankruptcy courts have broad discretion. This freedom is partially due to the fact that the language of the Model Law—and of Chapter 15 as a consequence—is significantly vague and sets forth broad standards, which is common for international documents that seek to promote legal harmonization.[10]

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9 For more details regarding these studies, *see* subsection 2.3.

10 *See* JAY L. WESTBROOK ET AL., A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS (World Bank Publications 2010), p. 250 (Noting that "the Model Law contains necessarily only partial and rather abstract provisions. This is the inescapable consequence of its global approach. Therefore, it is self-evident that it cannot go too deeply into details and that important features are just left aside. However, this may add some attractiveness to it since it leaves interested countries much space to fill the gaps individually"). *See also* Andrew B. Dawson, *The Problem of Local Methods in Cross-Border Insolvencies*, 12 BERKELEY BUS. L.J. 45, 57-8 (2015) (observing that "universal procedural rules do not directly challenge local interests: courts need only determine whether a foreign proceeding merits recognition as a 'foreign main' or 'foreign nonmain' proceeding. Only after recognition is granted does a court need to face the more difficult and 'prickly' choice of distributional rules: should the court defer to the re-distributional rules of the foreign court or adhere to its own local rules? Pottow suggests that pushing these difficult decisions down the road serves not only a political function of bridging the interests of universalists and territorialists, but it also provides an opportunity for states to adjust to the increasing frequency of cross-border insolvencies") (citations omitted). *See also* John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89, 91 (2006-2007) (stating that "perhaps Congress believes that the judiciary will be able to sort out any problems lurking in Chapter 15 by utilizing the safety valves built into the legislation. The law does contain safety valves, but their use obviously depends on judges who will recognize the problems").

Relief is also a critical matter with significant policy implications. For example, if one concludes that U.S. bankruptcy courts are interventionist or reluctant to enforce foreign orders domestically, many of the alleged benefits of Chapter 15 may be negatively affected. Moreover, if U.S. bankruptcy courts are biased in favor of local creditors, that approach might lead to inefficiencies and perverse incentives (*e.g.*, U.S. creditors may attempt to extract rents from debtors and other creditors by credibly threatening to oppose requests for discretionary relief).

The analysis of how U.S. bankruptcy courts have decided motions for discretionary relief also provides insights to determine where the U.S. system stands on the spectrum between universalism and territorialism. If empirical evidence suggests that U.S. courts are generally willing to grant discretionary requested by foreign representatives, this might support the claim that the U.S. bankruptcy system is closer to the ideal of a "one court, one law" ideal. Conversely, if findings indicate that U.S. courts are reluctant to grant discretionary relief, then an argument may be made that the U.S. system is more territorialist than many argue.

Examining how this complex part of U.S. bankruptcy law operates in action also allows measuring, for example, (i) the extent of the powers of foreign representatives in the United States,[11] (ii) the predictability of legal decisions, (iii) how cooperative U.S. bankruptcy courts are in practice,[12] (iv) the level of contentiousness of proceedings,[13] and (v) the actual role of courts in protecting local creditors and stakeholders.

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[11] *See* JAY L. WESTBROOK ET AL., A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS (World Bank Publications 2010), p. 243 ("It should be noted that the ideal of the universality principle would ask for granting the foreign administrator as much of the home jurisdiction's power as possible").

[12] *In re Artimm, S.r.l.*, 335 B.R. 149, 159 (Bankr. C.D. Cal. 2005) ("Chapter 15 mandates that U.S. courts cooperate "to the maximum extent possible" with foreign courts and representatives").

[13] *See* Andrew B. Dawson, *The Problem of Local Methods in Cross-Border Insolvencies*, 12 BERKELEY BUS. L.J. 45, 48 (2015) (noting that "Chapter 15 cases are less likely to be as litigation-oriented as large corporate bankruptcy cases might be"). However, so far there is no specific empirical data to measure how litigation-oriented Chapter 15 cases are.

This paper involved the content analysis of files extracted from 129 bankruptcy court dockets (*e.g.*, motions, orders and opinions) and provides statistics that describe (i) how U.S. bankruptcy courts have granted discretionary relief in Chapter 15 cases and (ii) how foreign representatives have used Chapter 15 cases. This paper also seeks to provide an account of the role of U.S. courts in cross-border bankruptcies cases and to evaluate whether there is a mismatch between courtroom practice and the discourse that led to the enactment of Chapter 15.

Empirical evidence suggests that U.S. bankruptcy courts are generally cooperative and, in the vast majority of cases, grant both recognition petitions and motions for discretionary relief. In 128 of the 129 coded cases (99.22%) courts recognized foreign proceedings in the United States, of which the great majority (126 cases or 97.67%) as foreign main proceedings. Also, only in 4.69% of the 128 cases recognized, courts denied discretionary relief and in 37.50% of these cases there were qualifications to the relief granted (predominantly, lifting the automatic stay protection with respect to certain creditors). In 60.15% of these 128 cases, U.S. courts granted the relief requested without qualifications. These evidences support the claims that U.S. bankruptcy courts (i) are generally deferential to decisions made in foreign insolvency proceedings and (ii) avoid exercising their discretion to refuse enforcing foreign bankruptcy orders in the United States.

The empirical evidence challenges the validity of some of the concerns and criticisms related to the practice of Chapter 15, including, for example, the claim that, despite the internationalist intent behind the enactment of the new legislation, U.S. bankruptcy courts engage in legal protectionism (*e.g.*, by protecting local creditors to the detriment of other stakeholders). As discussed in section 4, empirical evidence suggests, although not conclusively, that U.S. creditors are not being preferred over foreign creditors.

Do the findings of this paper give reason for concern? It could be argued that deference to foreign orders may be detrimental to local interests in the United States and erode national sovereignty. This paper suggests, however, that these concerns are likely to be overstated because Chapter 15 equips U.S. bankruptcy courts with effective legal tools to safeguard local interest and preserve national sovereignty. In practice, no evidence has been found suggesting these tools have been used improperly, for example, to protect the interests of U.S. creditors at the expense of other stakeholders. In fact, Chapter 15 cases involving complex balancing exercises concerning local interests or national sovereignty issues do not arise frequently. Empirical evidence suggests that, in practice, few are the instances where courts need to step in and actively protect local interests or preserve national sovereignty (*e.g.*, cases involving environmental and tort matters).

The empirical evidence was generally interpreted as good news, as deference by U.S. bankruptcy courts to decisions made in foreign proceedings can lead to important benefits, such as enhancing symmetry between legal proceedings and economic activities. That differential approach also facilitates rescuing viable businesses and maximizing creditor recoveries, which are fundamental policy goals of most insolvency regimes.

This paper is structured as follows. Section 2 provides a brief overview of the subject and focuses on the academic debate concerning cross-border corporate bankruptcies. The purpose of this part is to establish theoretical foundations for the empirical assessments that will follow. Section 2 also describes the main features of Chapter 15 that are relevant for this study, providing a general overview of the statutory framework applicable in the United States. Lastly, it identifies the prior empirical work that has been done in this field and points to the areas where further analysis is necessary. Section 3 focuses on the design of this research, specifying its

scope, target population and methods. It also identifies the hypotheses tested and describes the coding method adopted. Section 4 has descriptive statistics concerning the main characteristics of Chapter 15 proceedings and provides an empirical account of how discretionary relief operates in action, promoting a more accurate understanding of the dynamics of cross-border bankruptcies from the U.S. perspective. That part also contains assessments regarding the potential implications of these findings. Finally, section 5 contains concluding remarks.

2. OVERVIEW AND ACADEMIC DEBATE

This section provides a brief overview of part of the academic debate concerning cross-border corporate bankruptcies. Instead of exhausting the topic, its purpose is to establish theoretical foundations that are useful for the empirical assessments that follow.

Cross-border insolvencies often involve several layers of potentially complex legal issues.[14] For example, from the private international law perspective, bankruptcy judges first have to decide whether their courts have jurisdiction over the case. Subsequently, they have to determine which laws should govern the matter. Finally, it is often necessary to determine potential extraterritorial effects of the applicable laws. This last step can result in local laws producing effects abroad and foreign laws having consequences locally. As an example, in international bankruptcies, courts frequently have to determine whether foreign judicial decisions should be enforced domestically and whether local orders can affect persons and assets located abroad.

Cross-border bankruptcies also tend to be complex from a substantive perspective. This is in part due to the fact that national regimes often have significant differences. Unsurprisingly,

[14] For a private international law perspective of cross-border insolvencies, *see* Ian Fletcher, *Insolvency in Private International Law* (2nd ed. OUP, Oxford 2005), p. 6.

issues related to choice of law and extraterritoriality tend to be particularly relevant in this area. This is not to say that there are no general similarities between different bankruptcy systems. In fact, that is true in relation to the basic underlying principles and goals of insolvency regulation (*e.g.*, preventing races to collect, promoting the rescue of viable companies, maximizing the return for residual claimants, etc.). Nevertheless, it requires little effort to spot meaningful differences between bankruptcy regimes of different countries[15] given, among other factors, the wide range of insolvency-related rules,[16] the broad array of stakeholders affected by these provisions and the serious implications of bankruptcy regulation (*e.g.*, control shift provisions, stay periods, executory contracts and priority rules, etc.).

Why are cross-border insolvencies special? In other words, why not regulate bankruptcies only at the domestic level and apply the same set of rules to transnational ones? As discussed in more detail below, the answers to this question depend, among other factors, on the basic regulatory approach that one has in mind given that there are specific costs and benefits associated with the universalist and territorialist approaches to international bankruptcies, as well as to any approach within this broad spectrum.[17] Nevertheless—regardless of the preferred

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[15] *See, e.g.*, John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests,"* 104 MICH. L. REV. 1899, 1903 (2006) (claiming that "given this combination of attributes – broad-reaching scope, invasively displacing power, and normatively touchy legal rules – that characterize a typical bankruptcy code, it should not be surprising that international coordination engenders some difficulties"). *See also* Ian Fletcher, *Insolvency in Private International Law* (2nd ed. OUP, Oxford 2005), p. 4-5 (stating that "[n]ational attitudes towards the phenomenon of insolvency are extremely variable, as are the social and legal consequences for the debtors concerned. [I]nsolvency laws and procedures differ from one another almost infinitely in ways but great and small"). It is also worth noting that some scholars claim that bankruptcy law is a meta-level of domestic legal systems, as it is closely entangled several different areas. Jay L. Westbrook et al., *A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS* (World Bank Publications 2010), p. 246 (stating that insolvency law can be seen as a meta-level of any domestic law because "it is closely enmeshed in the whole body of that law and it forms even a kind of focal point for numerous fields of business law").

[16] Insolvency-related rules include not only those that are typically inserted in bankruptcy statutes, but also in other fields of the law (*e.g.*, environmental law, tax, tort, property, etc.) that have different implications for insolvent debtors.

[17] Here, the focus is on the general benefits of regulating cross-border insolvencies rather than on the debate between universalists and territorialists.

regulatory approach (*i.e.*, universalism, territorialism or any hybrid alternative)—it is possible to generally claim that there can be compelling reasons for bankruptcy law to step in and establish a special set of rules[18] to deal specifically with cross-border insolvencies.[19] The reason for this is that regulatory intervention in this field can, at the very least, promote legal certainty, reduce direct and indirect costs of transnational bankruptcies, facilitate the rescue of viable firms and maximize the value of assets.

First, regulatory intervention can enhance predictability and legal certainty by establishing, and facilitating the enforcement of, a clear set of conflict-of-laws rules applicable to cross-border insolvencies. For example, these rules allow determining *ex-ante* jurisdictional competence, applicable laws and extraterritorial effects, among other matters, which, due to their bearing on financial and judicial outcomes, tend to be particularly relevant in transnational bankruptcies. Enhancing legal certainty is also valuable in this field, not only to facilitate risk assessments by voluntary creditors, but also to decrease the time and resources spent in insolvency proceedings. The latter benefit is especially relevant for companies acting in sectors where, due to business reasons, going concern values rapidly deteriorate after the filing of bankruptcy petitions.

Second, establishing mechanisms that courts of different jurisdictions can use to cooperate can also decrease direct and indirect costs of bankruptcy since it streamlines proceedings and avoids unnecessary formalities and divergences among different insolvency proceedings. Enhanced coordination and cooperation are often crucial for preserving the debtor

[18] Regulatory intervention could take place either through statute or case law.

[19] For an economics-oriented analysis of cross-border insolvency regulation, *see generally* Lucian A. Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 778 (1999).

assets as going concerns, which is typically essential to restructuring viable firms[20] (in reorganizations) and to maximizing the returns of residual claimants (in liquidations).

It is not argued, however, that these problems—*i.e.*, legal uncertainty, potentially high bankruptcy costs and challenges in avoiding piecemeal sales of assets—do not exist in the context of local domestic bankruptcies. Rather, these issues tend to be exacerbated in the context of cross-border insolvencies. This fact, in turn, increases the expected benefits of regulatory intervention.

Regulating cross-border insolvencies is a complex and politically sensitive task.[21] Allegedly, the more willing a particular jurisdiction is to recognize and enforce foreign insolvency judgments domestically—thereby giving effect to foreign laws and court orders on their own territories—the less freedom it will have to regulate important bankruptcy-related matters. This can be problematic in this field of law due to the wide reach of insolvency-related rules and the diversity of stakeholders affected by them. For example, giving effect to foreign rules and judgments domestically may have relevant consequences for the environment and the safety of individuals (*i.e.*, potential tort victims). Thus, the approach towards cross-border

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[20] For a detailed analysis of the role of bankruptcy law concerning corporate rescue, *see* Horst Eidenmüller, *Trading in Times of Crisis: Formal Insolvency Proceedings, Workouts and the Incentives for Shareholders/Managers*, 7 Eur. Bus. Org. L. Rev. 239–258 (2006). *See also* the example of the bankruptcy of Maxwell Communication Corporation mentioned below.

[21] For remarks concerning political aspects of transnational bankruptcies, *see, e.g.*, John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89 (2006-2007). *See also* Gerard McCormack, *Universalism in Insolvency Proceedings and the Common Law*, 32 OXFORD J. OF LEGAL STUD. 325, 326 (2012) (stating that "the shape of insolvency law in a particular jurisdiction owes a lot to the balance of political power and the nature of the social arrangements in that jurisdiction"). *See further* Ian Fletcher, Insolvency in Private International Law (2nd ed. OUP, Oxford 2005), p. 6 (claiming that "although many of the issues of principle are essentially the same, the close identification between insolvency law and public policy can introduce additional considerations of a quite fundamental character into the approach that will be adopted by national courts when presiding over an international insolvency matter").

bankruptcies impacts not only business-related matters, but also other sensitive legal and political matters, including tax, public pension, employment, tort and environmental policies.

Furthermore, harmonizing national insolvency laws at the international level is also a difficult endeavor. The main reasons for this are that promoting substantive convergence among different jurisdictions requires reaching consensus: (i) regarding a broad array of sensitive public policy areas, (ii) on how to interfere with preexisting legal relationships, and (iii) concerning redistributive rules, which exist in several jurisdictions despite the existence of theoretical criticism.[22] Reaching agreement on these matters tends to be especially challenging in practice, because bankruptcy laws significantly impact the interests of many interest groups (*e.g.*, workers, secured creditors, trade creditors, managers, environmentalists, etc.), which have different political power and agendas across jurisdictions.

Because substantive harmonization is distant from the present reality, countries have explored in alternative to improve efficiency of proceedings involving transnational bankruptcies. In fact, both courts and legislatures have played important roles in the development of international insolvency regulation. As an example, the bankruptcy of Maxwell Communication Corporation[23] is a well-known case of successful *ad-hoc* cooperation between the courts of two countries: the U.S. and England. This case involved an English holding company with more than 400 subsidiaries spread around the world and two simultaneous main bankruptcy proceedings: one in the Southern District of New York under Chapter 11 and the

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[22] *See* John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests,"* 104 MICH. L. REV. 1899, 1901-02 (2006) (claiming that that makes cross-border insolvency complex, among other reasons, because bankruptcy "invades and displaces preexisting legal relationships" and often "contain[s] a panoply of redistributive provisions").

[23] *Maxwell Commc'n Corp.* v. *Barclays Bank (In re Maxwell Commc'n Corp.)*, 170 B.R. 800, 801 (Bankr. S.D.N.Y. 1994). For more detailed accounts of this case, *see generally* Jay L. Westbrook, *The Lessons of Maxwell Communication*, 64 Fordham L. Rev. 2531 (1996) and Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1 (1997).

other in London under the Insolvency Act of 1986. Although the majority of the firm's assets were located in the U.S., its center of management was based in England. In that case, despite the lack of preexisting formal mechanisms available to coordinate the two proceedings, the U.S. and the English Courts were able to cooperate in an *ad-hoc* and unprecedented manner and to avoid a piecemeal liquidation of the corporation.[24]

Ad-hoc cooperation has, however, limitations. For example, the Maxwell case may have been significantly less successful if the two main proceedings had taken place in jurisdictions without well-established bankruptcy systems and well-equipped courts. The fact that both proceedings were processed in the same language by courts of the same legal tradition (common law) facilitated a positive outcome. Cooperation might not have been so successful had the gains of avoiding the piecemeal liquidation of the corporation not been so evident and significant.[25]

Facing complex issues, bankruptcy courts have developed common-law doctrines aimed at resolving cross-border bankruptcies. In the U.S., for example, before the enactment of Chapter 15 (*i.e.*, a more detailed statutory framework designed specifically to address transnational insolvencies), the doctrine of comity[26] played a more central role in cross-border

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[24] More specifically, the U.S. court accepted the Chapter 11 case as a "full proceeding," and appointed an examiner with expanded powers. The English court, on the other hand, appointed administrators suggested by Maxwell's major creditors. A protocol approved by both courts governed the joint proceedings. As Robert K. Rasmussen described, "[t]his document in essence attempted to harmonize the two competing insolvency systems into a single regime. The examiner and the administrators agreed that MCC's Chapter 11 plan and the Administration in England would provide for essentially the same treatment of MCC and its subsidiaries. The parties also agreed that MCC's assets outside of the United States and England should be sold quickly. In effect, the two parties negotiated a bankruptcy treaty for this case." *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 31 (1997).

[25] Regarding this point, Robert K. Rasmussen noted that "the examiner and the administrators spent considerable resources in harmonizing the U.S. and English proceedings. Even where significant barriers exist, cooperation designed to achieve universality does occur when there are clear gains." *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 31 (1997).

[26] For the definition of comity, *see Hilton* v. *Guyot*, 159 U.S. 113 (1895), at 163-64 (noting that "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

insolvency cases.[27] Nevertheless, some have regarded that doctrine as uncertain and claimed that it has led to inconsistent results.[28]

As a consequence, there has been increasing support for pre-established and more detailed mechanisms designed to govern transnational bankruptcies. Among other benefits, the existence of *ex-ante* rules arguably promote legal certainty, enhances procedural efficiency—both in terms of time and costs—and reduces the room for opportunistic creditors to extract rents by engaging in hold-up strategies. Due to that perception, several efforts have been made at the international level to establish a common framework for dealing with cross-border bankruptcies. Uniform international strategies are desirable because, by establishing a common framework, they mitigate the risk of conflicting procedures and outcomes arising in different jurisdictions (*e.g.*, opening two *main* proceedings concomitantly in jurisdictions).

In short, the increased complexity, frequency and economic relevance of cross-border insolvencies have stimulated jurisdictions to pursue more stable and harmonic solutions at the

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nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws").

[27] For a more detailed analysis of this matter, *see, e.g.*, Rhona Schuz, *The Doctrine of Comity in the Age of Globalization: Between International Child Abduction and Cross-Border Insolvency*, 40 BROOK. J. INT'L L. (2014). *See also In re Iida*, 377 B.R. 243, 253 (B.A.P. 9th Cir. 2007) (noting that "[a]t least since the Nineteenth Century, principles of 'comity' or accommodation of foreign proceedings have provided the method by which foreign bankruptcies have been recognized in American jurisprudence." The author also notes that "Prior to the enactment of the Model Law, comity played a pivotal role in cross-border insolvency cases, but the inherent uncertainty of the doctrine led to inconsistent results") (footnotes omitted). It is worth clarifying, however, that the enactment of Chapter 15 did not mean the end of the comity doctrine. In fact, this concept still prevails in Chapter 15, but now under a more detailed statutory framework. *See, e.g.*, *In re Artimm, S.r.l.*, 335 B.R. 149, 161 (Bankr. C.D. Cal. 2005) (noting that the rationale behind the prevalence of the comity concept in Chapter 15 is that "[d]eference to foreign insolvency proceedings will often facilitate the distribution of the debtor's assets in an equitable, orderly, efficient, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion").

[28] *See, e.g.*, Guide ¶ 8 (noting that "approaches based purely on the doctrine of comity or on exequatur do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as contained in the Model Law, on judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts").

international level.[29] There was a general perception that more sophisticated tools were needed to enhance procedural efficiency, preserve going concern values and maximize the value of assets in the context of transnational insolvencies. The Model Law was developed in this context.[30] As Professor Westbrook[31] noted, the central goals of that project were to increase speed and certainty in obtaining recognition of foreign proceedings and to preserve asset value.[32] In addition, that initiative was expressly aimed at enhancing the efficiency of the administration of cross-border insolvencies and protecting the interests of creditors, debtors and other stakeholders involved, as well as facilitating business rescues of companies in financial[33] distress.[34]

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29 *See, e.g.*, Guide ¶ 5 (noting that "the increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. However, national insolvency laws by and large have not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets"). *See also* Ian Fletcher, *Insolvency in Private International Law* (2nd ed. OUP, Oxford 2005), p. 7, (noting that "the increased awareness in recent times of the negative consequences of such international fragmentation of policy and approach to cross-border insolvency issues has fueled the quest for improved solutions").

30 Other initiatives have taken place to address transnational insolvencies. However, given the scope and purpose of this paper, this analysis will focus only on the Model Law.

31 *See* Professor Westbrook was the co-head of the United States delegation to the UNCITRAL conference that created the Model Law on Cross-Border Insolvency.

32 *See* Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency*, 87 AM. BANKR. L.J. 247, 250 (2013).

33 For a general theoretical explanation of the difference between financial and economic distress, *see* Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 Yale Law Journal 573, 580-01 (1998). According to Professor Baird, a firm is in economic distress "because it cannot generate sufficient revenue to pay its debts," which is a problem that exists regardless of a firm's capital structure. On the other hand, financial distress means that "the firm's income is not enough to pay back what it has borrowed." In contrast to the former problem, the latter only exists if "a firm has creditors." That is, the problem concerns the company's capital structure, which can and should be addressed through bankruptcy law.

34 For the purpose of Chapter 15, which incorporates the Model Law, *see* U.S. Bankruptcy Code 11 U.S.C. § 1501(a)(1)-(5). *See also In re SPhinX, Ltd.*, 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006), *aff'd,* 2007 WL 1965597 (S.D.N.Y. July 3, 2007) (noting that Chapter 15 (and the Model Law as a consequence) had "express objectives of cooperation […]; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses").

Before discussing the details of the Model Law and of Chapter 15, it is important to have a clear understanding of the academic debate that preceded these legal developments. These theoretical assessments are important for evaluating where Chapter 15 stands—both "on the books"[35] and "in action"[36]—in the spectrum between territorialism and universalism.

2.1 Theoretical Framework

The purpose of this subsection is to briefly describe the territorialist and universalist theories and identify the main arguments in favor of and against each of them. Attention will also be paid to hybrid approaches, which lie within the broad spectrum between these two theoretical models. The goal is not to revisit or reiterate the debate between territorialists and universalists,[37] but, instead, to describe theoretical arguments that are relevant to the empirical study that follows.

Under the territorialist approach, each jurisdiction where the debtor's assets are located is entitled to administer a full insolvency proceeding governed by its own laws. As a consequence, in cases where there is a single multinational debtor, there can be as many bankruptcy proceedings as there are countries where assets are located. Each proceeding is governed by a different set of rules (*i.e.*, those of the jurisdiction in charge of administering the case). Territorialism proposes, therefore, a very simple and strict private international law rule of territorial jurisdiction.[38]

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35 *See* section 2.2.

36 *See* section 4.

37 For that purpose, *see, e.g.*, Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000). Given the purposes and scope of this research, no assessments will be made concerning contractualist theories. For a detailed analysis and defense of this theory, *see* Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1 (1997).

38 *See* John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests,"* 104 MICH. L. REV. 1899, 1904 (2006) (noting that "finding its animation in traditional rules of private international law, this approach advocates the bright-line rule of strict territorial jurisdiction").

The implications of this approach can be easily illustrated through a stylized example. Assume that a Canadian corporation is managed by a group of executives based in Toronto and that it owns assets in five countries (including Canada). Under the territorialist approach, if that company becomes insolvent, it will probably have to file for bankruptcy in all five jurisdictions, where full proceedings would be opened. As a consequence, the assets situated in Canada would be subject to insolvency proceedings administered by Canadian courts and governed by Canadian laws. The same would occur in each of the four remaining jurisdictions (*i.e.*, one proceeding for each country governed by different local bankruptcy regimes). Accordingly, there would very likely be substantial differences among the five applicable insolvency laws, and the outcomes of each of these proceedings would also likely significantly differ from one jurisdiction to the other (*e.g.*, labor creditors may be paid first in one state and not receive anything in another because there they rank relatively low in the pecking order).

What are the alleged benefits of territorialism? First, proponents of this approach claim that it benefits non-adjusting or small creditors,[39] who avoid facing the potentially high costs and inconveniences of litigating abroad. For example, using the example above, a tort victim residing in the U.S. would not need to go to Canada to satisfy her claims in the bankruptcy of the Canadian company. She would be able to rely on the U.S. proceeding, thus saving direct costs. As discussed below, the opposite outcome would take place under a universalist regime, as the victim would have to be represented in Canada. From this perspective, the territorialist approach

[39] *See* Lucian A. Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 778 (1999) (claiming this is the most popular defense of territorialism). *See also* Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2184 (1999) (noting that support to territorialism "leans heavily on a sense among judges, legislators, and some academics that territorialism can help small, local creditors"). This argument has, however, been subject to criticism. *See, for example,* Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 Mich. L. Rev. 2177, 2181 (1999) (noting that "Unless non-adjusting creditors suffer losses under universalism that outweigh the efficiency benefits of that regime, territorialism must be rejected." In his article, Professor Guzman refutes that argument).

would protect the referred creditors *ex-post* by retaining competence to administer and govern the case, as well as by refusing to entrust assets located domestically to foreign courts.[40] Second, others claim that the clarity of territorial rules compensates potential additional costs arising in connection with the existence of multiple proceedings and the application of several bankruptcy laws.[41] Third, some claim that national sovereignty would be eroded if countries subordinated their insolvency-related rules to a one-law, one-court (*i.e.*, universalist) approach.[42] There would, therefore, be an aversion to the application of foreign bankruptcy regimes to assets and individuals situated domestically. As mentioned above, territorialism would theoretically prevent that from happening.

There are, however, clear disadvantages associated with territorialism. For example, this approach may create incentives for creditors to engage in local races to collect by grabbing assets in certain jurisdictions before debtors are able to relocate them.[43] These incentives depend, of

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[40] *See* Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2184 (1999) (noting that "as a result, local creditors are often given protection *ex post* in the form of a refusal to turn local assets over to a foreign jurisdiction. Thus, reluctance to adopt universalist policies is premised on a general view, one even shared by many supporters of universalism, that local creditors suffer losses when a country abandons territoriality").

[41] *See, e.g.*, Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999). *See also* John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests,"* 104 MICH. L. REV. 1899, 1904 (2006) (observing that "good borders make good neighbors: international tension is minimized, and commercial actors have *ex-ante* clarity regarding which substantive law will govern the resolution of any given asset (even though that asset's location may change *ex post* to lending").

[42] *See, e.g.*, John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89 (2006-2007); Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000); Charles W. Mooney, Jr., *Insolvency Law as Credit Enhancement: Insolvency-Related Provisions of the Cape Town Convention and the Aircraft Equipment Protocol*, 13 INT. INSOLV. REV. 27 n.106 (2004); *see also* Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5, 8-9 & 12 n.22 (2003). This argument will be developed in further detail in the discussion about the universalist model.

[43] *See* John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. 936, 946 (2005) (observing that territorialism "encourages creditors to race to file local bankruptcy proceedings at the first signs of distress – 'grabbing' local assets – and to distribute them quickly under local law before they can leave the jurisdiction. The internationally dispersed assets of the multinational debtor are thus divided and conquered under multiple proceedings without any semblance of coherent, enterprise-wide adjudication").

course, on the nature of the debtor's business and of the assets involved, as some might be difficult (or even impossible) to relocate.

From the perspective of debtors, in certain cases, territorialism may encourage inefficient allocation of assets. That is, debtors may have incentives to allocate their assets in jurisdictions that have more debtor-friendly or convenient bankruptcy rules as opposed to the most efficient locations from a business perspective. Again, the strength of this perverse incentive is likely to depend on the nature of the assets and of the debtor's business.

Furthermore, territorialism increases the chance of piecemeal liquidation of assets and may render transnational business rescues more difficult. Artificial fragmentation of bankruptcy proceedings by territory is very likely incompatible with the organizational structure of the debtor's operations, which tends to be conceived as single enterprise (regardless of the location of the assets). That is to say, from a business perspective, it is common for an asset A (located in jurisdiction Y) to be integrated with an asset B (located in jurisdiction Z), being part of a unified production chain that, if broken, loses significant value.

Moreover, in certain cases, territorialism may render it more difficult for adjusting creditors to price and define the terms of their loans because they have to take into account the location of the firm's assets, the rules of the jurisdictions involved, and also monitor asset relocations.

The alternative approach is universalism, which treats cross-border bankruptcies as unified global proceedings, administered by one principal court under a single governing law,[44]

[44] *See, e.g.*, John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests,"* 104 MICH. L. REV. 1899, 1915 (2006), p. 1904 (noticing that "the choice of law rule favored by universalists to select the controlling jurisdiction is based on the "home" jurisdiction of the debtor"). Different criteria are used to define what is the debtor's "home" jurisdiction. A famous one is the well-known concept of "center of main interests," which is used in the Model Law, Chapter 15 and in the

but potentially with the assistance of courts in other jurisdictions.[45] Assets located in "secondary jurisdictions" are either transferred to the main one or simply subject to the same bankruptcy regime of the main proceeding. This is the reason why it is argued that the universalist approach derives from the principle of symmetry between legal regulation and economic activity.[46] In particular, the claim is that an entity with one main center of management that does business in many countries should be subject to one single collective insolvency proceeding administered by one main court, under one governing law, applicable to its entire activity and assets and as binding all creditors and other stakeholders.

The implications of universalism can also be illustrated through a stylized example. Assume that the same Canadian corporation referred to above becomes insolvent, but this time in a universalist context. In that case, it would file for bankruptcy in Canada (*i.e.*, its "home country" because the firm is managed from there). This would be the sole bankruptcy proceeding opened and would produce effects on all of the firm's assets, irrespective of asset location. Furthermore, a single national law (*i.e.*, Canadian law, the *lex fori concursus*) would

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European Regulation on Insolvency Proceedings (Council Regulation 1346/2000 European Union Regulation on Insolvency Proceedings, 2000 O.J. (L 160).

45 It is worth noting that there is a theoretical distinction between "unity of proceedings" and "universalism." As Professor Gerard McCormack explains, "the former signifies a single set of proceedings and the latter the collection and distribution of assets on a worldwide basis. The notion of universalism is compatible with the existence of separate insolvency proceedings in jurisdictions where the debtor's assets happen to be located so long as these separate proceedings are merely mechanisms for the more convenient collection of assets, which are then remitted to the insolvency representative in the principal proceedings. If the separate proceedings have their own independent distributional consequences, then the universalist ideal is compromised." *in* Gerard McCormack, *Universalism in Insolvency Proceedings and the Common Law*, 32 OXFORD J. OF LEGAL STUD. 325, 327 (2012). Professor Christoph Paulus explains that "[u]nitary proceedings are the only one set of proceedings that deals with the debtor's insolvency worldwide. Multiple proceedings serve the same purpose by job sharing." Christoph G. Paulus, *A Theoretical Approach to Cooperation in Transnational Insolvencies: A European Perspective*, EUR. BUS. L. REV. 435, 435 (2000). Given the purposes and scope of this research, this distinction will not be considered in further detail.

46 *See* Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2283 (2000) (claiming that "the central theoretical point [of universalism] is 'market symmetry': the requirement that some systems in a legal regime must be symmetrical with the market, covering all or nearly all transactions and stakeholders in that market with respect to the legal rights and duties embraced by those systems").

apply to both procedural and substantive matters. All the decisions taken by the Canadian bankruptcy court would be recognized and enforced in the remaining jurisdictions.

The majority of scholars agree that, at least in theory, universalism is the most efficient approach to dealing with international insolvencies.[47] Why is that so? That is, what is so attractive about universalism? The first advantage has already been pointed out: this approach establishes a bankruptcy regime that is symmetrical with the market, concomitantly encompassing nearly all assets, transactions and stakeholders irrespective of their physical locations. Accordingly, universalism would be desirable because it would allow a single court to apply a single insolvency regime globally, thus avoiding frictions, conflicts and mismatches across jurisdictions.

Second, some scholars have argued that universalism allows more efficient *ex-ante* allocation of capital.[48] According to this argument, territorialism would distort investment patterns because firms would have incentives to shift assets to jurisdictions with more debtor-friendly regimes. Conversely, that problem would be less acute in universal regimes because the

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[47] *See, e.g.*, Jay L. Westbrook, *A Global Solution to Multinational*. Default, 98 MICH. L. REV. 2276, 2284 (2000) (observing that "virtually all theorists have agreed that bankruptcy requires a single proceeding in which all of the debtor's assets and claims are administered under a single set of rules – in traditional terms, in rem. To achieve that result, it is necessary that the bankruptcy law cover the entire market in which the debtor company operates, and bind all of its participants"). Nonetheless, Professor Westbrook also acknowledges that some of the efficiency argument may not be as strong as most scholars believe. *See id.* at 2326 (noting that the author "fear[s] that the efficiency argument may be overstated. On reflection, I think we have to be cautious in claiming too much by way of increased efficiency and decreased transaction costs arising from predictability").

[48] For that argument, *see generally* Lucian A. Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 778-9 (1999) (arguing that "the choice of legal regime not only affects the distribution of assets when there is a bankruptcy, but also has an ex-ante effect on the allocation of capital." The authors also contend that, rules "that systematically favors some creditors over others *ex post* can lead to inefficient investment"). *See also* Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177 (1999). For a critique of this position, *see* Westbrook, *A Global Solution to Multinational. Default*, 98 MICH. L. REV. 2276, 2327-8, fn. 224 (2000) (stating that "one objection is that their analysis turns on discrimination against foreign creditors. In fact, there is little formal discrimination against foreign creditors in the great majority of countries. […] It seems unlikely that informal discrimination would be consistent enough to affect investment patterns materially in countries with reasonably reliable judicial systems").

main proceeding would be opened in the debtor "home jurisdiction" and all assets, irrespective of their actual location, would be subject to that proceeding and their distribution would be governed by the laws of the jurisdiction in question.

Third, by reducing the number of proceedings, universalism can also reduce administrative costs. The argument is that having a single universal proceeding mitigates transaction costs, also avoiding duplication of efforts (by courts, lawyers, debtors, creditors and other stakeholders) and leading to economies of scale.

Fourth, universalism facilitates reorganizations and can increase liquidation value. The reason for this is that creditors would not have incentives to engage in local races to grab assets in several jurisdictions. Moreover, there would be no conflicts or inconsistencies between decisions of different courts or conflicts between applicable laws. The same applies to timing issues (*e.g.*, a court in a jurisdiction taking longer than other courts to reach decisions), which would also be avoided. This would facilitate, for example, sales of going concerns, as well as the approval of reorganization plans in general, which often involve several conditions and steps.

Lastly, universalism promotes fairness because it avoids inconsistent results across jurisdictions.[49] For example, all employees of the same company would be entitled to the same level of priority in distributions regardless of their location because the proceeding would be governed by a single bankruptcy regime.

On the other hand, the universalist approach also has significant drawbacks, which may explain why—despite strong academic support—that model has not been implemented by policymakers around the world. An important academic criticism is that this model would erode

[49] *See, e.g.*, Lucian A. Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 778 (1999) ("[R]eduction in costs associated with a single adjudication and distribution of the bankrupt entity's assets and the increased fairness of such a proceeding").

national sovereignty.[50] That is, the fact that under universalism only one court has the power to administer an insolvency proceeding under its own law prevents the remaining jurisdictions—where the debtor also has presence and affects stakeholders—to have a say in important policy matters, such as environment, public safety and tax, among others.

Furthermore, many contend that, for political reasons, universalism is difficult—if not impossible—to implement in full, because it can only be achieved if all nations agree to adopt it without significant restrictions. The problem is that countries individually have incentives to adopt territorialist rules in order to, for example, preserve their sovereignty.[51] Accordingly, due to political issues, universalism is, at best, a distant reality.

Given the disadvantages of territorialism and the implementation challenges associated with universalism, hybrid approaches to multinational insolvencies have been developed and implemented in several jurisdictions. These models are referred to as "hybrid" because they

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50 *See, e.g.*, John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89, 90 (2006-2007) (claiming that "universalism can only work if countries relax their exercise of national sovereignty. Universalism requires countries to cede authority over fundamental social choices"). *See also* John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests,"* 104 MICH. L. REV. 1899, 1906 (2006) (stating that "it can be fairly said that strong concern exists that universalism's broad-sweeping application of one law to worldwide financial failure has the potential to subjugate 'local interests' and that "[t]he protection of local creditors and local policies is the most common justification for denying the effects of [universalist] foreign bankruptcy proceedings"). Even strong supporters of this approach acknowledge this problem. *See, e.g.*, Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2298 (2000) (noting that "there is one argument against complete universalism even in the long term: that a single international law would give insufficient play to domestic policies in each nation").

51 *See, e.g.*, Gerard McCormack, *Universalism in Insolvency Proceedings and the Common Law*, 32 OXFORD J. OF LEGAL STUD. 325, 328 (2012) (observing that "the advantages of universalism can be realized fully only if all states practice it. If one State has universalist pretensions whereas another state practices territorialism, then jurisdictional conflicts will arise and the national interests of the universalist state may be compromised." *See also* Lucian A. Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J. L. & ECON. 775, 780 (1999) (emphasizing that "territorialism is inefficient and reduces global welfare, but each country, acting individually, has an incentive to adopt a territorialist regime. This highlights the need for a reciprocity requirement or, ideally, international treaties on the subject").

combine universalist and territorialist features.[52] Thus, they fall within the wide spectrum between these two ideals.

Modified universalism is among the most common forms of hybrid approaches.[53] Under this model, jurisdictions make an *ex-ante* commitment to fully cooperate when it comes to transnational insolvencies.[54] In contrast to a pure form of universalism, this modified version allows the co-existence of concomitant bankruptcy proceedings in multiple jurisdictions. Nonetheless, a particular court is recognized as being in charge of administering the main proceedings, whereas the remaining courts serve ancillary functions.[55] Under modified universalism, the laws of the jurisdiction where the main proceeding is taking place can produce extraterritorial effects subject to a discretionary review of local courts.[56]

Going back to the hypothetical of the Canadian company is helpful to better understand this model. Assume that the same Canadian corporation referred to above becomes insolvent,

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52 For an illustration of this point, *see* John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests,"* 104 MICH. L. REV. 1899, 1919 (2006) (noting that "some modified universalist regimes, when articulating standards by which local judges should determine whether to defer to universalist cooperation or to insist upon territorialist resolution, expressly do consider the distributional payout accorded local creditors under the foreign bankruptcy laws as a legitimate criterion to gauge the propriety of cooperation").

53 For example, as discussed in more detail in section 2.2, the Model Law (and as a consequence Chapter 15) is a practical example of the application of modified universalism in a real context. About that matter, *see* Jay L. Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 716 (2005) (emphasizing that "the Model Law, adopted in the United States Bankruptcy Code under Chapter 15, embodies the modified universalist approach").

54 *See* Andrew B. Dawson, The Problem of Local Methods in Cross-Border Insolvencies, 12 Berkeley Bus. L.J. 45, 53 (2015; Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2300-01 (2000) (arguing that modified universalism is "an interim or transitional solution" while it is not possible to implement full universalism).

55 *See also* Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2301 (2000) (noting that "modified universalism takes a worldwide perspective, seeking solutions that come as close as possible to the ideal of a single-court, single-law resolution").

56 *See, e.g.*, Jay L. Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 517 (1991). (noting that [Modified universalism] accepts the central premise of universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts discretion to evaluate the fairness of the home-country procedures and to protect the interests of local creditors"). *See also* John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests,"* 104 MICH. L. REV. 1899, 1919 (2006) (observing that "modified universalism replaces the 'must' of deference to the home country's bankruptcy laws under the choice-of-law protocol with a 'may'").

but now in the context of modified universalism. In that case, it would still file for bankruptcy in Canada (*i.e.*, its "home country" because the firm is managed from there), which would be the main insolvency proceeding (rather than the sole one). It would also have to file nonmain bankruptcy petitions in the four remaining jurisdictions. Provided that all the applicable requirements are met, the courts in charge of the nonmain global proceedings would recognize the main proceeding and enforce the decisions taken by the Canadian court under the bankruptcy laws of Canada domestically, subject to their discretionary review (*e.g.*, to address important public-policy matters).

Another common hybrid form is cooperative territorialism.[57] Under this approach, each country exercises jurisdiction over the assets located within its territory and each proceeding is governed by a different set of substantive and procedural rules (*i.e.*, the local rules). Nonetheless, whenever useful, courts may agree to cooperate in specific cases (*e.g.*, to coordinate a joint sale of assets).

As discussed in this subsection, the theoretical framework of cross-border bankruptcies has been characterized, to a large extent, by the extended debate between universalists and territorialists. The concepts and arguments outlined above will be useful to put the empirical analysis that follows into context and because the findings of this research contribute to a better understanding of where the U.S. system stands in the spectrum between the two paradigmatic models. Furthermore, the empirical findings enable testing of whether some of the theoretical arguments put forward in the debate referred to above hold true in the U.S. context.

[57] For a detailed explanation of this approach, *see* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999).

2.2 Chapter 15: Overview

This section describes features of Chapter 15 that are relevant to the empirical analysis that follows. The purpose is to provide a general overview of the topic instead of discussing in detail its specificities.[58]

Although it resulted from a series of efforts to render cross-border insolvencies more predictable and expedited, the wording of Chapter 15 is often vague and contains broad standards, leaving significant discretion to U.S. bankruptcy courts.[59] For example, one of the core principles behind Chapter 15 is equal treatment to all creditors whether domestic or foreign.[60] Thus, the general understanding is that the treatment of foreign creditors is an issue for domestic regulation.[61]

Chapter 15 proceedings involve two main stages. First, the representative of the foreign debtor applies before U.S. bankruptcy court for the recognition of the insolvency proceeding initiated abroad. At least in theory and especially in comparison to relief-related matters, bankruptcy courts do not have significant discretion to decide whether or not to recognize foreign proceedings.[62] That decision has to be made based on objective criteria.[63]

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58 For that purpose, *see generally*, *e.g.*, Peter M. Gilhuly, Kimberly A. Posin, Adam E. Malatesta, *Bankruptcy Without Borders: A Comprehensive Guide to the First Decade of Chapter 15*, 24 AM. BANKR. INST. L. REV. 47.

59 *See, e.g.*, JAY L. WESTBROOK ET AL., A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS (World Bank Publications 2010), p. 250 (noting that "The Model Law contains necessarily only partial and rather abstract provisions. This is the inescapable consequence of its global approach. Therefore, it is self-evident that it cannot go too deeply into details and that important features are just left aside. However, this may add some attractiveness to it since it leaves interest countries much space to fill the gaps individually").

60 *See* 11 U.S. Code § 1513 (access of foreign creditors to a case under this title).

61 *See* JAY L. WESTBROOK ET AL., A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS (World Bank Publications 2010), p. 228.

62 *See* Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency*, 87 AM. BANKR. L.J. 247, 251 (2013) (observing that "recognition should ordinarily follow quickly and by formula, leaving the specific level of deference and cooperation with the main proceeding in the hands of each local court. At the same time, the law specifically imposes a duty to cooperate with the foreign court to the maximum extent possible. The key object of the Model Law and Chapter 15 was to make recognition of the foreign proceeding—especially the foreign main proceeding—as fast and certain as

Section 1517(b) provides that foreign proceedings *shall*[64] be recognized "as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests (COMI);[65] or a foreign nonmain proceeding if the debtor has an establishment . . . in the foreign country where the proceeding is pending."[66] The goal of the Model Law was to establish recognition as a first (gatekeeping)[67] step that would operate as quickly[68] and predictably as

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possible, thus ensuring a stay that would secure the debtor's property all over the world against creditors and insiders"). *See also* Andrew B. Dawson, *The Problem of Local Methods in Cross-Border Insolvencies*, 12 BERKELEY BUS. L.J. 45, 54 (2015) (claiming that this is a simple and "nearly automatic step." In Professor Dawson's words, the "recognition step represents a universalist-type approach to cross-border insolvency, as it establishes a nearly automatic grant of recognition for foreign proceedings, thus creating a choice-of-forum mechanism. "Nearly automatic" in the sense that the determination of the debtor's center of main interests may, in some cases, require judicial determination"). *See also* Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT'L L. 819, 842-2 (2007) (concurring that under the Model Law, recognition is close to automatic). Similarly, although courts have claimed that this is not a "rubber-stamp exercise" (*see In re Gold & Honey, Ltd.*, 410 BR 357, 366 (Bankr. EDNY 2009)), recognition is regarded as a "formulaic [step] . . . turn[ing] on the strict application of objective criteria" (*see In re Ashapura Minechem Ltd*, 2011 WL 5855475, (Bankr. S.D.N.Y. 2011)).

63 Given the scope and purposes of this article, the standards for recognition of foreign main and nonmain proceedings will not be discussed in detail. In short, to properly commence Chapter 15 cases in the United States, foreign representatives must demonstrate that each of the requirements for recognition set forth in section 1517(a) are met. 11 U.S. Code § 1513 ("Subject to section 1506 [*i.e.*, the public policy exception], a foreign proceeding must be recognized if the following requirements are met: (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of section 1515"). In addition, the Second Circuit has held that foreign representatives must also satisfy the debtor eligibility requirements set forth in section 109(a) of the Bankruptcy Code. *See Drawbridge Special Opportunities Fund LP* v. *Barnet (In re Barnet)*, 737 F.3d 238, 247–51 (2d Cir. 2013). U.S. Bankruptcy Code, 11 U.S.C. § 109(a) ("[o]nly a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor" under the Code.")

64 *See In re Oi Brasil Holdings Cooperatief U.A. (In re Oi Brasil), 578 B.R. 169,* 199 (citing *Weinstein* v. *Albright*, 261 F.3d 127, 137–38 (2d Cir. 2001) (when a statute uses both "may" and "shall," the normal inference is that each is used in its usual sense, the one being permissive and the other mandatory).

65 U.S. bankruptcy courts make COMI inquiries for each debtor entity rather than for collective corporate groups. *See In re Oi Brasil* 578 B.R. at 206. Cross-border insolvencies involving enterprise groups or groups of companies can involve complex issues, including concerning the determination of the COMI of each entity involved. For an analysis of these issues and reform proposals, *see generally* Samuel L. Bufford, *Coordination of Insolvency Cases for International Enterprise Groups: A Proposal*, 86 AM. BANKR. L.J. 685 (2012).

66 11 U.S. Code § 1517(b). There is, however, a limited exception to this rule: courts shall not grant recognition if doing so would be manifestly contrary to the public policy of the U.S., which is rarely used in the U.S. *See Rede Energia S.A.*, 515 B.R. 69, 92 (Bankr. S.D.N.Y. 2014) (noting that "the public policy exception is clearly drafted in narrow terms and the few reported cases that have analyzed [section] 1506 at length recognize that it is to be applied sparingly." (quoting *In re Toft*, 453 B.R. 186, 193 (Bankr. S.D.N.Y. 2011)).

67 *See* Andrew B. Dawson, *The Problem of Local Methods in Cross-Border Insolvencies*, 12 BERKELEY BUS. L.J. 45, 54 (2015) (emphasizing that this "first step is a gatekeeper one: the court must determine whether it should recognize the foreign proceeding").

possible. Thus, it is possible to say that recognition is a universalist feature of Chapter 15 since it creates a choice main forum mechanism and allows determining *ex-ante* which jurisdiction is responsible for administering the main proceeding.

Speed and certainty are of particular importance in the context of recognition of foreign main proceedings.[69] For that reason, certain relief automatically follows orders granting recognition to foreign main proceedings.[70] This nondiscretionary and immediate relief is related to crucial and urgent matters in insolvency proceedings. For example, automatic effects of recognition orders include: the automatic stay, the right of the foreign representative to operate the business and the application of the rules defining adequate protection for the interests of creditors, as well as the provisions regarding the use, sale or lease of the debtor's property.[71] These effects are not, however, immutable. Legislative history indicates, for example, that the "effects of recognition (found in Section 1520 and including an automatic stay) are subject to modification under Section 362(d), made applicable by Section 1520(2), which permits relief from the automatic stay of Section 1520 for cause."[72]

Because, similarly to domestic insolvencies, multinational bankruptcies tend to be time-sensitive, Chapter 15 allows foreign representatives to request provisional relief while a petition

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68 *See* U.S. Bankruptcy Code, 11 U.S.C. § 1517(c) ("A petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time. Entry of an order recognizing a foreign proceeding constitutes recognition under this chapter").

69 *See* JAY L. WESTBROOK ET AL., A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS (World Bank Publications 2010), p. 242 (noting that "[o]ne of the most important benefits of the approach of provisions permitting rapid recognition is that they enable a very rapid activation of a moratorium or stay against debtor and creditor activity – that is, a freeze that protects all concerned until the court can learn the facts").

70 Under Chapter 15, the court should recognize a foreign proceeding as "main" if filed where the debtor has its center of main interests. Alternatively, it should recognize a foreign proceeding as "nonmain" if the other jurisdiction is where the debtor carries on non-transitory economic activity. *See* U.S. Bankruptcy Code, 11 U.S.C. § 1517(b)(1) & (2).

71 *See* U.S. Bankruptcy Code, 11 U.S.C. § 1520 (effects of recognition of a foreign main proceeding).

72 *See* H.R. Rep. No. 109-031, at 113 (2005).

for recognition is still pending.[73] For that purpose, foreign representatives must demonstrate that the requested relief (i) is urgently needed to protect the assets of the debtor or the interests of the creditors and (ii) if the interests of the creditors[74] and other interested entities, including the debtor, are sufficiently protected.[75] Provisional relief may include, for example, staying execution against the debtor's assets, as well as entrusting the administration or realization of all or part of the assets located in the U.S. to the foreign representative or another person authorized by the court.

If the court recognizes a foreign proceeding (whether main or nonmain), it may also grant discretionary relief.[76] Thus, the second main stage of Chapter 15 proceedings involves giving effect to foreign insolvency proceedings in the U.S.[77] At this point, courts have wide discretion to grant, on a case-by-case basis, the relief that they consider appropriate.[78] As a consequence, it

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73 *See* U.S. Bankruptcy Code, 11 U.S.C. § 1519.

74 *See In re SPhinX, Ltd.*, 351 B.R. 103, 113 (Bankr. S.D.N.Y. 2006) (noting that courts are directed to focus on the interests of all creditors and not just U.S. creditors).

75 *See In re Sivec Srl*, 476 B.R. 310, 323 (Bankr. E.D. Okla. 2012) ("To ensure a party's interests are 'sufficiently protected,' the Bankruptcy Court should balance the relief sought by the foreign representative against the interests of those affected by the relief, without unduly favoring one group of creditors over another").

76 Regarding the origins of relief under Chapter 15, *see* Lauren L. Peacock, A Tale of Two Courts: The Novel Cross-Border Bankruptcy Trial (2015), 23 AM. BANKR. INST. L. REV. 543, 551 (noting that "although codified in 2005, the relief and additional assistance provisions of chapter 15 embrace age-old principles of international comity. In that vein, chapter 15 continues a long history of American courts recognizing the need to extend comity to foreign bankruptcy proceedings. *See also In re Fairfield Sentry Ltd*., 484 B.R. 615, 627 (Bankr. S.D.N.Y. 2013) (noting "[c]hapter 15 emanates from and was designed around this central concept of comity, as evidenced by its primary purpose and deferential framework for international judicial cooperation").

77 U.S. Bankruptcy Code, 11 U.S.C. §§ 1507 and 1521. *In re Vitro S.A.B. de C.V.*), 701 F.3d 1031, 1054 (5th Cir. 2012) ("[t]he relationship between § 1507 and § 1521 is not entirely clear"). For the same proposition, *see also In re Toft*, 453 B.R. 186, 190 (Bankr. S.D.N.Y. 2011)) and *In re Atlas*, 404 B.R. at 741. For the distinction of these two provisions, *see* Lauren L. Peacock, *A Tale of Two Courts: The Novel Cross-Border Bankruptcy Trial* (2015), 23 AM. BANKR. INST. L. REV. 543, 553 (explaining that "section 1507 specifically provides for "relief not otherwise available under the U.S. Bankruptcy Code or United States law. […] Put simply, section 1507 empowers a U.S. court to provide assistance in an international case that would not be available in a purely domestic one").

78 *See In re Atlas Shipping A/S*, 404 B.R. 726 (S.D.N.Y. 2009) ("while recognition of the foreign proceeding turns on the objective criteria under § 1517, relief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity"). *See also Ad Hoc Group of Vitro Noteholders* v. *Vitro S.A.B. de C.V.* (*In re Vitro S.A.B. de C.V.*), 701 F.3d 1031, 1053 (5th Cir. 2012) ("Chapter 15 provides courts with broad, flexible rules to fashion relief appropriate for effectuating its objectives in accordance with comity"). For the same proposition, *see also In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389

is possible to say that this stage may potentially include a territorialist component in Chapter 15, as local courts may, for example, discretionarily decide not to enforce foreign decisions domestically.[79]

Discretionary relief is often essential to protect the value of the foreign debtor's assets and creditors' interests. For example, courts may entrust the distribution of all or part of the debtor's assets located in the U.S. to the foreign representative or another person authorized by the court.[80] U.S. courts may also grant any additional relief that may be available to trustees under the U.S. Bankruptcy Code, except for relief under the avoidance powers under the code.[81]

Chapter 15 provides three main statutory grounds that allow courts to deny discretionary relief. These grounds are wide given that they are, for the most part, based on broad standards. First, under Section 1506, courts can refuse to take any actions that "would be manifestly contrary to the public policy of the U.S."[82] Second, pursuant to Section 1507, in determining whether to provide additional assistance, courts should consider if their decisions will be consistent with the principle of comity and with several policy goals.[83] Third, Section 1522(a)

B.R. 325, 333 (S.D.N.Y. 2008) (noting post-recognition assistance is "largely discretionary and turns on subjective factors that embody principles of comity"). *See also* Lauren L. Peacock, *A Tale of Two Courts: The Novel Cross-Border Bankruptcy Trial* (2015), 23 AM. BANKR. INST. L. REV. 543, 550 (stating that "beyond mere coordination and cooperation, Chapter 15 also grants U.S. Bankruptcy Courts broad flexibility to grant relief and additional assistance to recognized foreign debtors").

79 *See* Andrew B. Dawson, *The Problem of Local Methods in Cross-Border Insolvencies*, 12 BERKELEY BUS. L.J. 45, 54-5 (2015) (claiming that "while the recognition stage reflects a pre-commitment to universalism on a procedural level, the cooperation stage balances universalism and territorialism. […] Some of this cooperation is automatic, while the treatment of local assets remains in the U.S. court's discretion"). *See also* Guide at ¶ 196 (clarifying that the Model Law's Article 22 (Section 1522 in the U.S. Bankruptcy Code) reflects the idea "that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief" and "[i]n many cases, the affected creditors will be 'local creditors").

80 U.S. Bankruptcy Code, 11 U.S.C. § 1521(a)(5).

81 U.S. Bankruptcy Code, 11 U.S.C. § 1521(a)(7).

82 As noted above, this provision also applies to recognition orders.

83 *See* Section 1507(b) ("(1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the

guides courts to grant relief under Section 1521(a) "only if the interests of the creditors and other interested parties, including the debtor, are sufficiently protected."

2.3 Prior Empirical Evidence

Some empirical studies have examined Chapter 15 cases focusing primarily on issues related to the recognition of foreign proceedings.[84] For example, Professor Westbrook reviewed 591 cases filed between October 2005 (*i.e.*, the month when Chapter 15 became effective) and January 2012 and found that: (i) recognition has been granted in the overwhelming majority of cases; (ii) locating the debtor's COMI is a significant question, but of limited practical importance; and (iii) U.S. bankruptcy courts are less willing to recognize proceedings as main when they are based in jurisdictions where the debtor has weak contacts prior to the filing of the main case (*i.e.*, letter-box jurisdictions).[85] Similarly, Professor Dawson examined Chapter 15 cases filed between 2005 and 2008. He concluded that the COMI requirement reduced forum shopping due to the rejection of haven filings, contrary to the concerns of scholars who argued that it would promote opportunistic forum shopping.[86] The high rate of recognition orders observed by these scholars[87] is unsurprising given that, as mentioned above, this first step was

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debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns").

84 *See, e.g.*, Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency*, 87 AM. BANKR. L.J. 247, 255 (2013) (noting that more than 92% of the cases filed as of January 31, 2012 received the recognition they requested) and Andrew B. Dawson, *Offshore Bankruptcies*, NEB. L. REV. 317 (2009) (also claiming that U.S. courts grant recognition in the vast majority of Chapter 15 cases). For a study challenging this position, *see* Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases*, 29 WIS. INT'L L.J. 110 (2011).

85 Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency*, 87 AM. BANKR. L.J. 247, 268 (2013).

86 *See, generally*, Andrew B. Dawson, *Offshore Bankruptcies*, 88 NEB. L. REV. 317 (2009).

87 *See* Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency*, 87 AM. BANKR. L.J. 247, 254 (2013) (noting that "*the courts granted some form of recognition in about 96% of the cases filed*"). *See also* Jeremy Leong, *Is Chapter 15 Universalist or*

designed to be simple and "nearly automatic,"[88] requiring courts to apply a relatively simple test without significant room for discretion.

Yet, to date, no systematic comprehensive empirical work has examined in detail how U.S. bankruptcy courts have exercised discretion when deciding relief in cross-border insolvencies.[89] Leong focused on a specific point related to relief. He examined 94 Chapter 15 cases filed between October 2005 and June 2009 and found that entrustment orders had taken place in only 9% of cases. He also observed that U.S. bankruptcy courts often do not simply turn over assets based in the country to foreign administrations. Instead, they frequently conditioned the entrustment of assets on the foreign court's compromise to apply U.S. law in its own jurisdiction or to otherwise protect U.S. creditors. Based on these findings, Leong claimed that, in practice, the U.S. has failed to adhere to modified universalism and was hypocritical in claiming to have done so.[90] Nonetheless, Leong's research focuses on a relatively short period of time and concentrates exclusively on one type of relief (*i.e.*, entrustment).[91] As described in detail below, in several Chapter 15 cases, entrustment is either not a central issue or is not an issue at all. In fact, frequently, foreign representatives commence chapter 15 cases for other purposes, including to consummate plans of reorganization and to be subject to the automatic

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Territorialist? Empirical Evidence from United States Bankruptcy Court Cases, 29 WIS. INT'L L.J. 110 (2011) (acknowledging that in the U.S., courts almost always granted recognition of some kind to foreign petitions).

88 *See* footnote 62.

89 *See, e.g.*, Alan Van Praag, Robert K. Gross, and Edward W. Floyd, *Post-Recognition Conferences and Relief Present New Avenues for Protecting Creditors' Rights in a Chapter 15 Case*, 7 INSOLVENCY & RESTRUCTURING INT'L 29, 29 (2013) (noting that "*much less focus has been given to emerging developments in Chapter 15 case law and practice favoring the rights of creditors in their efforts to obtain recourse against property in the U.S.*")

90 Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases*, 29 WIS. INT'L L.J. 110 (2011). For a conceptual and methodological critique of that study, *see generally* Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency*, 87 AM. BANKR. L.J. 247 (2013).

91 Professor Westbrook criticized that narrow approach. *See* Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency*, 87 AM. BANKR. L.J. 247, 260 (2013) (claiming that "after reviewing a majority of these Chapter 15 filings, it seems clear that after the initial litigation, the matter often resolves, one way or another, without further court action, so that turnover may or may not have been demanded or obtained subsequent to the initial clash").

stay protection in the United States. The scope of Leong's research is, therefore, narrow both in terms of time frame and analytical scope. Accordingly, much about the practice of Chapter 15 cases has not been the subject of systematic research to this date.

3. RESEARCH DESIGN

3.1 Target Population and Sampling

This paper assesses how U.S. bankruptcy courts have decided discretionary relief requests in Chapter 15 proceedings. The initial population of this study consisted of 1,313 cases, all available at Bloomberg Law, a platform that extracts information from the Public Access to Court Electronic Records (PACER).[92] These comprise all Chapter 15 cases filed between October 2005 (the month when Chapter 15 became effective) and December 31, 2018. Within the scope of this paper is the analysis of opinions, orders and pleadings filed by representatives of foreign proceedings and creditors with U.S. bankruptcy courts.

After preliminary coding, proceedings concerning individual (personal) bankruptcies were excluded from the dataset for not being within the scope of this study. Of the initial pool of cases analyzed, a total of 494 were selected. Of these cases, 144 were proceedings classified as "lead cases" of bankruptcies involving corporate groups, whereas there were 350 proceedings involving single entities (*i.e.*, stand-alone cases).[93]

Cases were classified as "group insolvencies" if an order for joint administration was granted.[94] Consolidating group cases is sensible from an analytical perspective because, for the

[92] PACER contains electronic copies of all documents filed in bankruptcy cases.

[93] The remaining 819 cases involved either non-lead cases of proceedings involving corporate groups or individual cross-border insolvencies. These cases were excluded from the sample of cases analyzed for the purposes of this research.

[94] This approach captures the vast majority, although not all, of group insolvencies. There are few false negatives, such as, for example, proceedings of entities of the same group filed at different moments. An example would

most part, decisions taken at the level of the lead case typically also apply to, or are repeated at the level of, non-lead ones. The analysis of court dockets confirms that conclusion. Conversely, treating group insolvencies as "stand-alone" cases could introduce noise in the empirical findings because that would give more weight to proceedings of that sort. In fact, it is not uncommon for group cases to involve more than 10 individual proceedings, all very similar in terms of both factual background and legal outcomes.[95]

Not all cases within the target population have been analyzed; only those filed between 2010 and 2015 were selected for analysis. As a result, 212 cases were ultimately preselected for review. Cases within this narrower group are relatively recent and were decided after courts had accumulated experience with the new regulatory framework (*i.e.*, approximately five years after the enactment of Chapter 15). More recent proceedings were not selected for review because several of these cases are still active, which could compromise empirical findings.

Out of the original 212 proceedings, 137 were selected for analysis through a random sampling process. This approach provides a confidence interval of five with the confidence level of 95%.

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be the restructuring of Lehman Brothers entities, where several separately administrated proceedings were commenced. *See Lehman Brothers Finance AG, in Liquidation*, Case No. 09-10583 (Bankr. S.D.N.Y. 2009); *Lehman Brothers Bankhaus AG (in Insolvenz) and Lehman Brothers Holdings Inc.*, Case No. 09-12704 (Bankr. S.D.N.Y. 2009); *Lehman Brothers Australia Limited*, Case No. 12-10063 (Bankr. S.D.N.Y. 2012); and *Lehman Brothers International (Europe)*, Case No. 18-11470 (Bankr. S.D.N.Y. 2018). This approach also does not capture parallel insolvency proceedings in multiple jurisdictions in the context of cross-border insolvency disputes. That occurred, for example, in *OAS Finance Limited (in provisional liquidation)*, Case No. 15-11304 (Bankr. S.D.N.Y. 2015); and *Oi Brasil Holdings Coöperatief U.A.*, Case No. 17-11888 (Bankr. S.D.N.Y. 2015), where dissenting noteholders commenced parallel insolvency proceedings and attempted to recognize these proceedings in the United States as foreign main proceedings.

[95] For these reasons, this is not the first empirical study focused on Chapter 15 that consolidates group cases. For other studies that only coded lead cases in administratively consolidated groups, *see, e.g.*, Andrew B. Dawson, *Offshore Bankruptcies*, 88 NEB. L. REV. (2009); and Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases*, 29 WIS. INT'L L.J. 110 (2011).

During the coding process, eight of these 137 cases were excluded from the analyzed sample because they did not meet all the criteria for inclusion in this study. In particular, four cases were excluded because they were dismissed—either pursuant to unilateral requests made by foreign representatives or in connection with settlements—before the U.S. bankruptcy courts determined whether the foreign proceeding should be recognized in the United States. Two cases were excluded because they involved issues exclusively related to change of venue (*i.e.*, a strictly procedural matter that is not relevant for this research). One case was excluded because it involved a consumer bankruptcy, which, as mentioned above, is not part of the scope of this paper. One case was excluded because it was heard and decided by a district court and not by a bankruptcy court. As a consequence, the empirical assessments below derive from the analysis of the dockets of 129 Chapter 15 cases (the "Coded Cases").

3.2 Hypotheses

This research attempts to fill a gap in cross-border bankruptcy literature by answering descriptive questions concerning discretionary relief in Chapter 15 cases.[96] Through content analysis of 129 randomly selected cases, this paper describes how Chapter 15 discretionary relief has been operating in practice and provides insights as to whether certain specific factors (*i.e.*, adoption of the Model Law and objections by U.S. creditors) are likely to impact court decisions concerning discretionary relief.

This paper provides an account of (i) how U.S. bankruptcy courts have decided motions for discretionary relief and (ii) how foreign representatives have used Chapter 15 proceedings. Such information is not currently available and is valuable to assess where the U.S. bankruptcy

[96] Decisions of district courts or courts of appeals are not within the scope of this paper.

system stands with respect to the academic debate concerning cross-border insolvency regulation.

3.3 Coding

The selected cases have been examined based on the coding matrix stated in Appendix 1. The dependent variable of this paper is whether the U.S. bankruptcy courts granted discretionary relief requested by foreign representatives. The independent variables include the jurisdiction where the foreign proceeding was commenced, the venue and creditor objections (*i.e.*, "no," "yes by at least one U.S. creditor" and "yes by only non-U.S. creditors").

Before going through the empirical findings, some preliminary observations with respect to coding are necessary. First, the types of relief were classified into 33 different categories, which are all listed in the coding matrix.[97] Second, "home jurisdictions" were coded as indicated by the foreign representative based on the location where the foreign proceeding was commenced. In group cases, the home jurisdiction was that of the company indicated in the lead case.[98]

Third, not only cases that have been closed were coded. That is, proceedings not subject to final decrees were also analyzed for the purposes of this study, as that approach meaningfully increases the target population without significantly compromising results. In total, 90 (69.77%) of the 129 analyzed cases had been closed before December 31, 2018. The average time to close a case was 958.88 days (31.52 months) and the median was 831.50 days (27.33 months). It is

[97] Given the purposes and scope of this paper, procedural relief was not coded. Furthermore, this paper considers only relief requests filed by debtors. As a consequence, relief requested by creditors (*e.g.*, to lift the stay) are not within the scope of this research.

[98] It is possible although not likely that more jurisdictions are involved in group cases (*e.g.*, companies within the same group but with foreign proceedings in different jurisdictions). The "home jurisdictions" of non-lead cases were not coded for the purposes of this research.

possible that future developments in these ongoing cases might moderately impact the findings of this work. As mentioned above, in order to minimize potential distortions, cases commenced after December 31, 2015 were excluded from the sample.

Fourth, cases where objections were withdrawn before relief orders were issued (*e.g.*, due to settlements) were not computed as "contentious cases." Cases were classified as "contentious" if creditors filed either objections or motions (*e.g.*, to lift the automatic stay). Fifth, in some cases, it was not possible to analyze all documents referred to in the dockets because some of them had been filed under seal. These proceedings were not excluded from the sample, however, because few documents have been filed confidentially and that factor should not have a meaningful impact on the findings of this research. Sixth, cases involving exclusively procedural issues (*e.g.*, proceedings that have been remanded) were excluded from the sample because they contain no substantive evidence relevant to this study.[99]

Seventh, parallel litigation in the United States was only coded if these disputes were expressly mentioned in court orders or decisions. Although there might be false negatives, this should not be a source of concern since U.S. bankruptcy courts have not made reference to these disputes, which suggests that they are not likely to have had an important impact on discretionary relief decisions.

Eighth, the field "industry" was coded based on one of the following author-created categories: manufacturing, finance, shipping/maritime, investment/holding, oil and gas, technology, insurance, energy, mining, banking and other. These categories are not formal industry codes, and information necessary to make that classification was based primarily on verified petitions for recognition.

[99] *See, e.g., Vitro, S.A.B. de C.V.*, Case No. 10-16619 (Bankr. S.D.N.Y. 2010).

Ninth, restrictions, limitations or conditions to relief—whether provisional or permanent—were coded as "qualifications." The concept includes limitations of procedural (*e.g.*, conditioning the disposition of assets located in the U.S. to prior judicial approval and periodic reporting) and substantive (*e.g.*, depositing funds in escrow accounts and lifting the stay to specific creditors) nature. Because the focus of this study was on relief requested by foreign representatives, decisions granting creditor relief (*e.g.*, to lift the automatic stay) were coded as "qualifications" because, as a general rule, they restricted or conditioned relief granted to foreign representatives. Strictly procedural qualifications (*e.g.*, conditions for conducting discovery) were not coded for not being relevant to the present research questions.

Tenth, cases involving injunctions and temporary restraining orders (TROs) were coded as "provisional relief." This category encompasses cases involving provisional relief specifically under Section 1519 of the U.S. Bankruptcy Code and other types of interim orders granted by U.S. bankruptcy courts.

Eleventh, cases classified as involving restructurings and liquidations were based on the content of the petitions for recognition and relief filed by foreign representatives. Cases originally commenced as "restructurings" that were later converted into liquidations were categorized under the latter category. Finally, given the nature and scope of this paper, relief orders of strictly procedural nature (*e.g.*, substitution of foreign representatives) were not coded.

Twelfth, only one judge was coded for each case. However, in some cases, there were reassignments for different reasons, most frequently retirement of the judge. Coding reflects the name of the last judge indicated in the court docket.

4. EMPIRICAL EVIDENCE

This part provides descriptive statistics regarding key features of Chapter 15 cases. Its primary goal is to provide an empirical account of how discretionary relief operates in practice. Preliminarily, attention will be paid to evidence concerning all 494 cases that were filed up to December 31, 2018. Subsequently, the focus will shift to the analysis of the 129 Coded Cases.

As Figure 1 below evidences, there were significantly more Chapter 15 filings in the years of 2009 (59 petitions) and 2016 (54 petitions). The 2008 global financial crisis presumably was the main cause for the spike in petitions in the following year, whereas it is unclear which factors have contributed to the high number of filings in 2016. As Figure 2 below indicates, the same pattern did not apply to Chapter 7 and 11 filings, where it is not possible to observe a similar trend. In addition, data suggests that there has not been constant or meaningful growth in the rate of Chapter 15 filings in the United States.

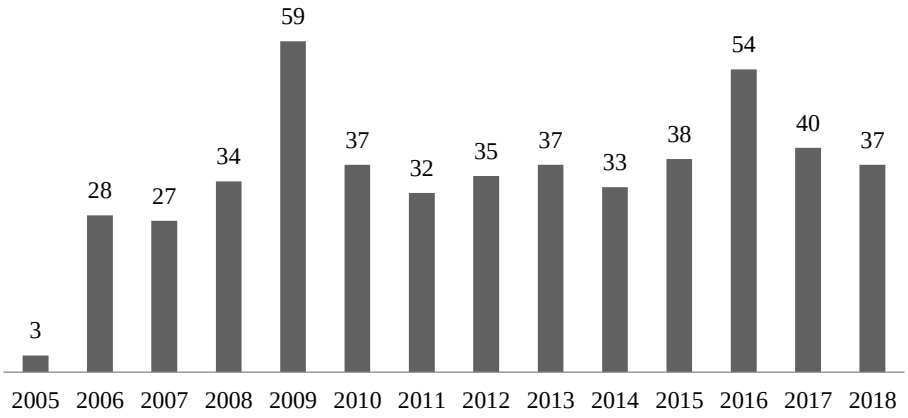

FIGURE 1: CHAPTER 15 ADJUSTED FILINGS PER YEAR

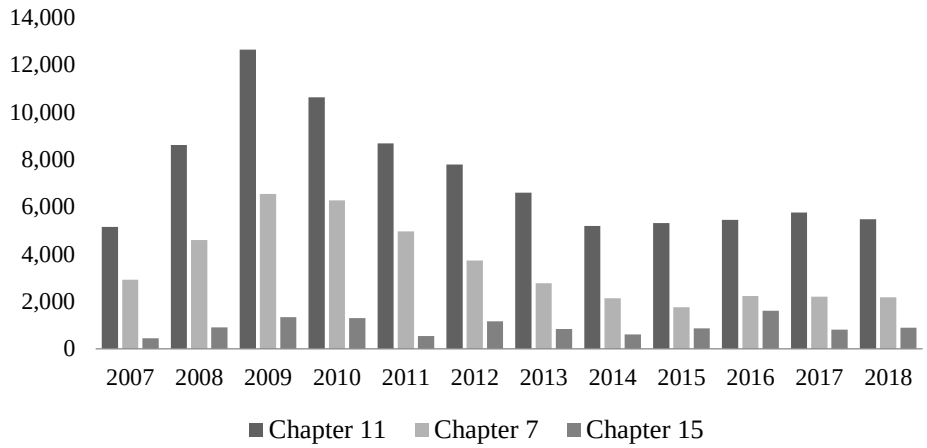

FIGURE 2: COMMERCIAL BANKRUPTCY FILINGS PER YEAR IN THE U.S.

Source: American Bankruptcy Institute – Bankruptcy Statistics.[100] For illustration purposes, the number of Chapter 15 filings was multiplied by 10 and the number of Chapter 7 filings was divided by 10. These figures take into account the aggregate number of filings and was not adjusted based on whether cases involved groups of companies or stand-alone proceedings.

As Figure 3 below indicates, there is considerable diversity with respect to the jurisdictions of foreign proceedings. Only 11 jurisdictions accounted for 10 or more cases, and the most recurrent jurisdictions were Canada (134 cases), England (56 cases), the Cayman Islands (37 cases), Brazil (31 cases), Germany (22 cases) and Australia (22 cases). As discussed below, the significant diversity of jurisdictions is relevant in light of the findings of this research. Even though insolvency regimes meaningfully differ in terms of strength, predictability and approaches to cross-border bankruptcies, legal outcomes did not appear to be significantly affected by the jurisdiction of the foreign proceedings. In fact, the empirical evidence. In fact,

[100] Statistics from the Administrative Office of the U.S. Courts, AMERICAN BANKRUPTCY INSTITUTE – BANKRUPTCY STATISTICS, http://www.abi.org/newsroom/bankruptcy-statistics (last visited March 30, 2019). Date regarding Chapter 15 filings considers lead and non-lead cases, which explains the differences between figures 1 and 2.

the data suggests that U.S. bankruptcy courts have been adopting a generally cooperative approach in cross-border insolvency cases irrespective of the features of the regimes involved.

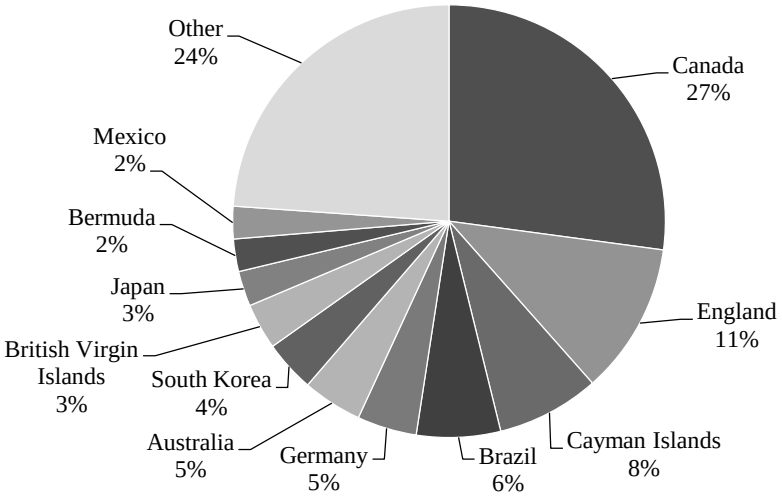

FIGURE 3: JURISDICTION OF FOREIGN PROCEEDING

Figure 4 below confirms the existence of significant venue concentration, which is also observed with respect to Chapter 7 and 11 cases.[101] Together, the U.S. Bankruptcy Courts for the Southern District of New York (224 cases), Delaware (66 cases) and the Southern District of Florida (41 cases) account for two-thirds of cases within the target population. This factor helps explain the relative homogeneity in the approach to cross-border bankruptcies identified in this study.

[101] For example, data obtained in the UCLA-LoPucki Bankruptcy Research Database (BRD) indicates that the two most demanded venues in the U.S. are Delaware (36.6%) and S.D.N.Y (19.5%). *See* UCLA-LOPUCKI BANKRUPTCY RESEARCH DATABASE, http://lopucki.law.ucla.edu/design_a_study.asp?OutputVariable=DistFiled (last visited March 30, 2019). It is worth noting that BRD contains data on more than 1,000 large public companies that have filed bankruptcy cases since October 1, 1979. Hence, these figures refer only to this specific type of insolvency. Nonetheless, it is possible to claim that the S.D.N.Y has a stronger international dimension than does Delaware.

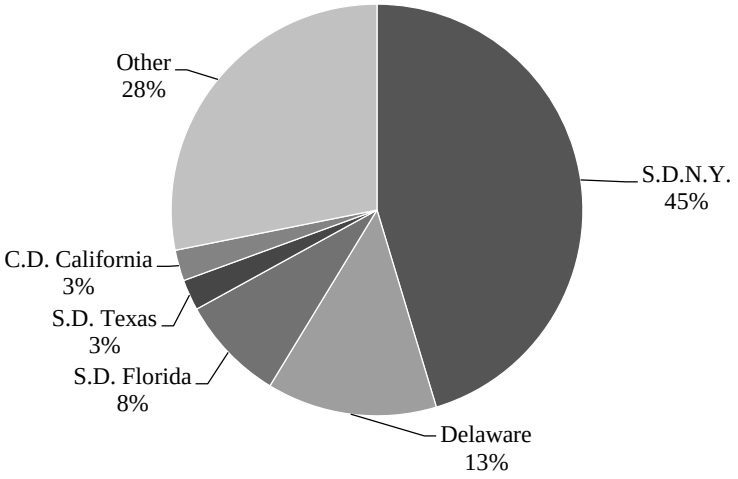

FIGURE 4: VENUE

As shown in Figure 5 below, there is considerable diversity with respect to judges assigned to Chapter 15 cases. Only nine judges were assigned to 15 or more cases. The judges in charge of most Chapter 15 cases were Stuart M. Bernstein (36 cases), Martin Glenn (35 cases), Shelley C. Chapman (24 cases), Robert E. Gerber (20 cases) and Sean H. Lane (19 cases), all from the Southern District of New York.

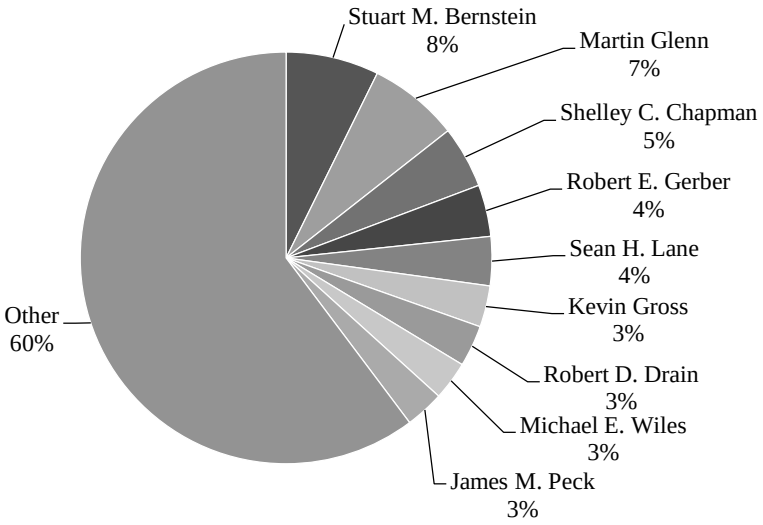

FIGURE 5: JUDGES

After making general remarks regarding all 494 cases filed before December 31, 2018, the focus of the analysis now shifts to the 129 Coded Cases.

There were more foreign liquidation proceedings than restructurings. Specifically, 78 (60.47%) Coded Cases concerned liquidations while the remaining 51 (39.53%) cases involved restructurings. This figure suggests that foreign debtors have been using Chapter 15 proceedings for both purposes at high rates, although liquidations tend to be more common.[102] Of the 129 Coded Cases, 81 (62.79%) were voluntary insolvency proceedings, 47 (36.43%) were involuntary and one (0.78%) is unknown.

As Figure 6 below illustrates, there is significant diversity of affected industries. Chapter 15 has not, therefore, been used predominantly in certain sectors.[103] As expected, the more represented industries are those where it is common for debtors to have assets (*e.g.*, banking, finance and investment debtors) or litigation (*e.g.*, manufacturing and technology debtors) in the United States. Also, as explained below, there is no evidence to support the view that patterns can be seen in decisions of U.S. bankruptcy courts depending on the industries affected.

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[102] This figure can be compared with domestic insolvencies. In the U.S., the breakdown between Chapter 7 (liquidation) and 11 (reorganization) is approximately 75% and 25%, respectively. *See* Bankruptcy Statistics and Trends, AACER BANKRUPTCY CASE SEARCH AND MONITORING, https://www.epiqglobal.com/en-us/experience/restructuring-bankruptcy/aacer-court-data-and-process-automation/services/bankruptcy-statistics-trends (last visited March 30, 2019).

[103] It is interesting to compare this breakdown with that of industries filing for bankruptcy in general, which is significantly different. Data obtained from the BRD indicates that the five most frequent industries for bankruptcies involving large public companies are: communications (8.1%), oil and gas (7.2%), business services (4.3%), depository institutions (4.2%), electronic and other electrical equipment and components (3.4%) and electric, gas and sanitary services (3.4%). *See* UCLA-LOPUCKI BANKRUPTCY RESEARCH DATABASE, http://lopucki.law.ucla.edu/design_a_study.asp?OutputVariable=SICMajGroup (last visited March 30, 2019).

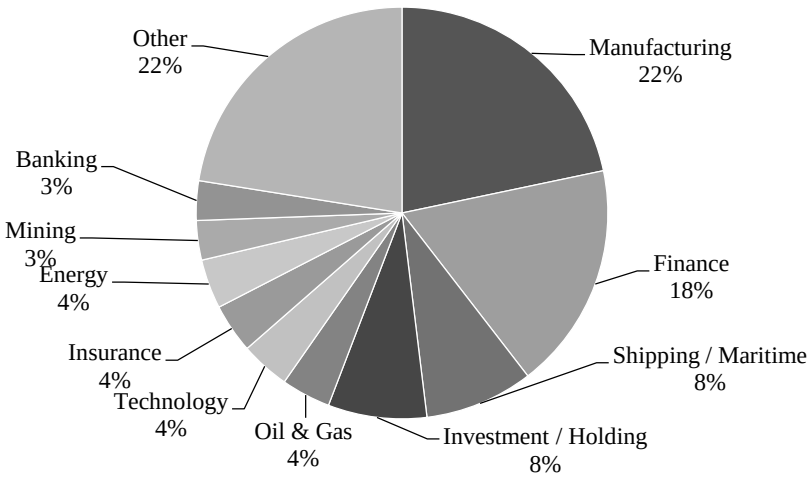

FIGURE 6: FOREIGN DEBTORS' INDUSTRIES

Parties have appealed from decisions of bankruptcy courts in only 13 Code Cases (10.08%). In only two of these cases certain decisions were vacated or reversed.[104] In the remaining Coded Cases, decisions were affirmed, appeals were dismissed or the parties have settled. The data evidences, therefore, that appeals are fairly uncommon in Chapter 15 cases.

Most of the Coded Cases involved preexisting litigation in the United States. In 66 cases (51.16%) there were express references to ongoing litigation in the country. This figure suggests that Chapter 15 cases are often used to stay disputes. That explains, for example, why in certain cases, debtors without assets in the United States commence Chapter 15 cases. This figure also suggests that foreign debtors often use Chapter 15 cases as shields. As discussed below, the relatively high incidence of proceedings where foreign representatives requested no relief in

[104] *See Krys* v. *Farnum Place, LLC (In re Fairfield Sentry Ltd.)*, 768 F.3d 239 (2d Cir. 2014); *Drawbridge Special Opportunities Fund LP* v. *Katherine Elizabeth Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013).

addition to relief that automatically follows recognition of foreign main proceedings[105]—and include the automatic stay protection—also corroborates this conclusion.

Bankruptcy courts granted provisional relief in 60 cases (46.51 (the "Provisional Relief Cases"). The most common type of provisional relief awarded was to stay actions against foreign debtors pending a decision on the recognition petition. This kind of relief was present in every case where provisional relief was granted. Bankruptcy courts also provisionally entrusted to foreign representatives the administration of assets located in the U.S. in 23 cases (38.33% of the Provisional Relief Cases) and the realization of those assets in 16 proceedings (26.67% of the Provisional Relief Cases). Table 1 below summarizes the provisional relief granted in the Coded Cases. In only one case (0.78% of the Coded Cases), provisional relief was denied.[106] In 16 cases (26.67% of the Provisional Relief Cases), courts imposed qualifications to provisional relief orders (*e.g.*, lifting the automatic stay with respect to certain creditors or restricting the power of foreign representatives to dispose of U.S. assets).[107]

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105 *See* U.S. Bankruptcy Code, 11 U.S.C. § 1520 (effects of recognition of a foreign main proceeding).

106 *See Schreiber & Keilwerth Musikinstrumente*, Court Minutes, Case No. 10-31134 [Docket No. 22] (Bankr. N.D. Ind. 2010). In that case, the court denied the provisional relief requested "for the reasons stated in open court." Because an opinion has not been issued and the transcript of the hearing was not made public, it was not possible to identify the grounds for denial.

107 Often, the qualifications were consensual. For example, in several cases, foreign representatives agreed that certain actions in the United States should continue and not be stayed.

Provisional Relief Granted	**Cases**	**%**[108]
Stay of actions	60	100.00
Entrustment of administration of U.S. assets	23	38.33
Entrustment of realization of U.S. assets	16	26.67
Preservation of contracts	9	15.00
Authorization to examine witnesses/discovery-related relief	7	11.67
Full force and effect to foreign court orders	5	8.33
Debtor-in-possession financing	3	5.00
Sale of assets	2	3.33
Authorization to pay certain debt	2	3.33
Cash management system	1	1.67
Relief available under Section 1520 of the U.S. Bankruptcy Code, but on a provisional basis	1	1.67

TABLE 1: PROVISIONAL RELIEF GRANTED

Consistent with prior empirical studies that have focused on the recognition of foreign bankruptcy proceedings,[109] the analysis of the Coded Cases confirms that recognition is a straightforward and fairly predictable step even if "not a rubber stamp exercise."[110] With only one exception (which corresponds to 0.78% of the Coded Cases), bankruptcy courts recognized foreign proceedings and these decisions were taken, as a general rule, within a relatively short time frame. The average time between filing and the recognition order was 52.40 days, whereas the median was 37 days (in the Southern District of New York, the average was 53.55 days and the median was 40 days, while in the District of Delaware, the average was 43.89 days and the median was 34 days).

[108] Percentage of the Provisional Relief Cases.

[109] *See* part 2.3, *supra*.

[110] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 126 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008) (noting that "recognition under section 1517 is not to be rubber-stamped by the courts. This Court must make an independent determination as to whether the foreign proceeding meets the definitional requirements of sections 1502 and 1517 of the Bankruptcy Code").

The only case where a petition for recognition was denied was *In re Creative Fin. Ltd.*,[111] where the Bankruptcy Court for the Southern District of New York concluded that the foreign representative "failed to meet the requirements of section 1517(a)(1) of the Code, by reason of his inability to show sufficient activity in the BVI to cause the Debtors' COMI to shift from Spain, Dubai or the U.K. to the BVI or to show even an establishment in the BVI."[112] In that case, recognition was denied as a main and a nonmain proceeding.[113]

Of the 128 foreign proceedings recognized (the "Relief Cases"), only two (1.55% of the Coded Cases) were recognized as foreign nonmain proceedings, both of which involved schemes of arrangement under English law.[114] The remaining 126 cases were recognized as main proceedings. This means that, in the vast majority of cases, courts found that the foreign proceeding was pending in the jurisdiction where the debtor had its COMI.[115] This evidence, together with the high rate of recognitions of foreign proceedings, supports the claim that

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111 543 B.R. 498 (Bankr. S.D.N.Y. 2016). It is worth mentioning, however, that in *Drawbridge Special Opportunities Fund LP* v. *Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013), the Court of Appeals for the Second Circuit vacated and remanded an order entered by the U.S. Bankruptcy Court for the Southern District of New York because it held that Section 109(a) of the Bankruptcy Code, which requires debtors to have property in the United States, applies to debtors in foreign main proceedings under Chapter 15. On remand, the bankruptcy court granted the petition for recognition and held that a retainer that foreign representatives deposited on a debtor's behalf in a client trust account to secure representation by a United States law firm itself qualified as a United States asset of foreign debtor. *See In re: Octaviar Administration Pty Ltd.*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014).

112 *Id.* at 526.

113 *Creative Finance* is an extraordinary case. There, the court noted that the commencement of the foreign proceeding (liquidation in the BVI) was a step to "thwart enforcement of a $5 million judgment against the Debtors that Marex won in the courts of England—and the most blatant effort to hinder, delay and defraud a creditor this Court has ever seen." *Id.* at 502. The court clarified that denial of recognition was not based on the public policy exception of Section 1506 of the Bankruptcy Court. *Id.* at 516. ("It does not seem right to find a violation of U.S. public policy when U.S. debtors sometimes engage in the same or similar bad faith … under U.S. law"). Instead, the foreign proceeding was not recognized on narrower grounds, because liquidator failed to prove that the debtors' COMI was located in the BVI.

114 *See Zodiac Pool Solutions SAS*, Case No. 14-11818 (Bankr. D. Del. 2014); *Hibu Inc.*, Case No. 14-70323 (Bankr. E.D.N.Y. 2014).

115 *See* U.S. Bankruptcy Code, 11 U.S.C. § 1517(b)(1).

concerns about forum shopping and manipulation of COMI, although relevant, is of limited practical importance.[116]

The analysis of orders deciding motions for discretionary relief strengthens the argument that U.S. bankruptcy courts are generally cooperative with, and deferential to, decisions made in foreign insolvency proceedings. In only six Relief Cases (4.69%) there were orders denying discretionary relief. As discussed below, in only three of these six cases, relief was denied on substantive grounds. In the remaining cases, bankruptcy courts did not issue opinions and denied relief without prejudice either on procedural grounds or on the ground that the relief requested was overbroad or outside the scope of Chapter 15.

The first Coded Case where a bankruptcy court denied discretionary relief was *In re Vitro, S.A.B. de C.V.* v. *ACP Master, Ltd. (In re Vitro, S.A.B. de C.V.)*,[117] which involved a Mexican company that applied for an order giving full force and effect in the United States to a Mexican court order approving and enforcing a Mexican reorganization plan (*concurso*). Noteholders objected to the foreign representatives' request on several grounds, including that the plan was unfair and manifestly contrary to the public policy of the United States, as well as that the Mexican proceedings lacked transparency, efficiency and impartiality.

The Bankruptcy Court for the Northern District of Texas declined to enforce the plan on narrower grounds.[118] Two decisive factors that led to that decision were that (i) over 50% of all claims that voted in favor of the plan were held by intercompany debt holders (insiders) and

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116 For that claim, *see* Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency*, 87 AM. BANKR. L.J. 247, 268 (2013) (emphasizing that "recognition has been granted in the overwhelming majority of cases; the much-discussed difficulty in locating the debtor's center of main interests (COMI) is a significant question, but of limited practical importance").

117 473 B.R. 117 (Bankr. N.D. Tex. 2012), *aff'd*. 701 F.3d 1031 (5th Cir. 2012).

118 That decision was affirmed by the U.S. Court of Appeals for the Fifth Circuit, which held that the bankruptcy did not abuse its discretion in declining to grant comity and enforce the Mexican court order that approved the Mexican plan. *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1042 (5th Cir. 2012).

(ii) the approved plan included non-consensual third-party releases (in favor of nondebtor affiliates). The court held that the *concurso* should not be enforced in the United States because it "neither sufficiently protects the interests of creditors in the United States, nor does it provide an appropriate balance between the interests of creditors and Vitro SAB and its non-debtor subsidiaries."[119] The court also found that Vitro's plan violated Section 1506 of the U.S. Bankruptcy Code (*i.e.*, public policy exception) because "the protection of third-party claims in a bankruptcy case is a fundamental policy of the United States" given that the "Concurso Approval Order does not simply modify such claims against non-debtors, they are extinguished."[120]

Vitro is, however, an extraordinary case in that it involved several "bad facts," including, for example, insider voting, violations of the absolute priority rule, voting classifications that pooled creditors with adverse interests, and "death-trap" provisions.[121] As a result, the U.S. Bankruptcy Court for the Southern District of New York later distinguished *Vitro* in *In re Avanti Commc'ns Grp* on the basis that the debtor's scheme had "near unanimous support (all creditors that voted cast votes in favor of the Scheme), and that support does not rely on votes by insiders."[122]

In re Ir. Bank Resolution Corp. Ltd.[123] was the second Coded Case where a bankruptcy court denied discretionary relief. There, the Bankruptcy Court for the District of Delaware denied relief requested by foreign representatives that sought an order directing Yahoo to turnover email communications from a third party. The court found that the foreign

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119 *Id.* at 132.
120 *Id.*
121 *See In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603, 618 (Bankr. S.D.N.Y. 2018) (noting"Vitro had a number of very troubling facts that the Fifth Circuit concluded supported the bankruptcy court's exercise of discretion in refusing to enforce the plan approved by the Mexican court"). In fact, on appeal, the Fifth Circuit distinguished *Vitro* from other cases allowing third-party releases, including *In re Metcalfe & Mansfield Alt. Inv.*, 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010).
122 *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603, 618 (Bankr. S.D.N.Y. 2018).
123 559 B.R. 627 (Bankr. D. Del. 2016).

representatives failed to present sufficient evidence demonstrating that the contents of a Yahoo account were part of the debtor's property or related to the debtor's property or financial affairs.[124] The court also held that the foreign representatives had not met their burden of proof under the turnover provisions of the U.S. Bankruptcy Code. In addition, the court concluded that the Stored Communication Act[125] prohibited, under the circumstances of that case, the disclosure of information from a private email account without the actual user's consent.[126]

In *Fairfield Sentry Ltd.,*[127] the Bankruptcy Court for the Southern District of New York denied without prejudice a motion from the foreign representative to approve assignment of claims pursuant to Sections 363(b)(1) and 1520(a)(2) of the U.S. Bankruptcy Court.[128] The court reasoned that "it is not possible to conclude that the 'sale' of the Management Claims, standing alone, is a good business decision without considering the rest of the bargain in the context of a motion to approve the Settlement Agreement."[129] The court, therefore, concluded that the motion was "denied without prejudice to the Liquidators' right to seek approval of the Settlement Agreement if they deem it necessary and appropriate."[130]

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124 *Id.* at 638.
125 18 U.S.C. §§ 2701, *et seq*.
126 559 B.R. 632 (Bankr. D. Del. 2016).
127 *See In re Fairfield Sentry Ltd*., 2010 WL 6892739 (Bankr. S.D.N.Y., Nov. 22, 2016).
128 In a previous opinion in the *Fairfield* case, the bankruptcy court held that "a Section 363 review is not warranted under section 1520(a)(2) of the [Bankruptcy] Code" and noted that "[s]uch finding is consonant with the origins of Chapter 15 and the notion of comity, a central tenet therein." *In re Fairfield Sentry Ltd.*, 484 B.R. 615, 622 (Bankr. S.D.N.Y. 2013), *aff'd, Krys* v. *Farnum Place, LLC (In re Fairfield Sentry Ltd.)*, No. 13 Civ. 1524 (AKH) (S.D.N.Y. July 3, 2013), *rev'd*, 768 F.3d 239 (2d Cir. 2014). That decision was affirmed by the District Court and reversed by the Court of Appeals for the Second Circuit, which concluded that "the sale of the SIPA Claim is a transfer of an interest of the debtor in property within the territorial jurisdiction of the United States within the meaning of 11 U.S.C. § 1520(a)(2)" (internal quotations omitted); *In re Fairfield Sentry Ltd.*, 768 F.3d 239, 246 (2d Cir. 2014). The Court of Appeals clarified that "the language of the statute makes it plain that the bankruptcy court was required to conduct a section 363 review. Deference to the BVI Court was not required." *Id.* It also noted that "it is not apparent at all that the BVI Court even expects or desires deference in this instance. The BVI Court expressly declined to rule on whether the Trade Confirmation required approval under section 363." *Id.*
129 *See In re Fairfield Sentry Ltd.*, 2010 WL 6892739, at 4 (Bankr. S.D.N.Y., Nov. 22, 2016).
130 *Id.* at 5.

The fourth case is *C-Motech Co., Ltd*,[131] which involved a company in reorganization in South Korea. In its Chapter 15 petition, the foreign representative made broad relief requests. In addition to seeking the entrustment of the administration of all its assets within the United States, the foreign representative of *C-Motech* generically applied for an order recognizing orders of the South Korean bankruptcy court, "including, without limitation, the order approving the rehabilitation plan and other orders relating to the administration of claims and interests in *C-Motech* and its assets."

While the Bankruptcy Court for the Southern District of California recognized the South Korean court's order approving the debtor's reorganization plan, it nevertheless denied without prejudice the broad request for the recognition of all other orders of the foreign court as well as the petition for the entrustment of all assets within the U.S. The bankruptcy court noted that *C-Motech* had not provided sufficient information about the foreign court orders that it intended to enforce in the U.S. Arguably, the reason for denial of relief in this case was more likely the vagueness and over broadness of the debtor's requests. The foreign representative did not appeal the bankruptcy court's decision.

The fifth case is *Pantech Co., Ltd.*,[132] where the foreign representative of a South Korean reorganization proceeding applied for a broad, permanent injunction to enjoin any person or entity from commencing or continuing any action or legal proceeding against the foreign debtor and one of a non-debtor subsidiary. Objecting creditors, which included AT&T, Inc., objected on the grounds that the requested relief was overboard.[133]

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131 Case No. 14-04891 (Bankr. S.D. Cal. 2014). The court did not issue an opinion in connection with this case.
132 Case No. 14-70482 (Bankr. N.D. Ga. 2014).
133 *See id.*, Order Granting Recognition and Relief in Aid of a Foreign Main Proceeding [Docket No. 39]. The court did not issue an opinion in connection with this case.

At the recognition hearing, the foreign representative noted that it was "seeking significantly scaled down relief from . . . what was requested in the initial petition" [134] and the Bankruptcy Court for the Northern District of Georgia held that "all other and further relief requested in the [foreign representative's] Application [was] denied without prejudice to the right of the [foreign representative] or Debtor to seek such relief by subsequently filing a motion or adversary proceeding with the Court, as appropriate."[135] Accordingly, the reasons for denying relief were also not substantive because the foreign representative agreed to narrow down the scope of its initial request and only sought relief that is automatically granted upon the recognition of a foreign main proceeding pursuant to Section 1520 of the Bankruptcy Code.

Chembulk New York Pte. Ltd[136] is the sixth case where discretionary relief was denied. There, while the Bankruptcy Court for the Southern District of New York entered an order recognizing a foreign main proceeding in Singapore, it denied certain relief that the foreign representative had sought.[137] The relief denied included (i) authorization to examine witnesses, take evidence, seek production of documents and deliver information concerning the foreign debtors and (ii) the entrustment to the foreign representative of the administration or realization of all or part of the assets of the foreign debtors in the United States. Because the court did not issue an opinion in this case and the transcript of the recognition hearing is not available, it was not possible to identify the court's reasoning to deny the requested relief.

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134 *See id.*, Transcript of Recognition Hearing [Docket No. 43] at 11. The court did not issue an opinion in connection with this case.

135 *Pantech Co., Ltd.*, Order Granting Recognition and Relief in Aid of a Foreign Main Proceeding, Case No. 14-70482 [Docket No. 39] (Bankr. N.D. Ga. 2014). The court did not issue an opinion in connection with this case.

136 Case No. 12-11007 (Bankr. S.D.N.Y. 2012).

137 *See id.*, Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief [Docket No. 28], at 10-11.

As indicated in Table 2 below, the most common types of relief granted were the entrustment of the administration and the realization of assets located in the United States (52.34% and 47.66% of the Relief Cases, respectively). There was a significant number of cases (22 proceedings, 17.19% of the Relief Cases) where the only relief granted was relief that automatically follows orders recognizing foreign main proceedings under Section 1520 of the U.S. Bankruptcy Code.[138] In 67 cases (52.34% of the Relief Cases), foreign representatives filed more than one motion seeking discretionary relief. In the remaining 61 Relief Cases (47.66%), requests for relief were made only at one point, concomitantly with the Chapter 15 petition for recognition of the foreign proceeding.

[138] *See* U.S. Bankruptcy Code, 11 U.S.C. § 1520 (effects of recognition of a foreign main proceeding).

Relief	**Cases**	**%**[139]
Entrustment of administration of U.S. assets[140]	67	52.34
Entrustment of realization of U.S. assets	64	47.66
Authorization to examine witnesses/discovery-related relief[141]	42	32.81
Entrustment of distribution of U.S. assets	31	24.22
Enforcement of plans of reorganization	30	23.44
Sale or transfer of assets/assignment of rights	28	21.88
Approval or enforcement of settlement agreements	24	18.75
Only automatic relief upon recognition of foreign main proceedings	22	17.19
Enforcement of other agreements or orders	15	11.72
Relief related to debtor-in-possession financing	8	6.25
Authorization to distribute or transfer resources from sales of assets	7	5.47
Order preserving contracts	7	5.47
Assumption, rejection or assignment of executory contracts	7	5.47
Turnover of information or records	5	3.91
Approval of claims procedures and processes	4	3.13
Authorization to commence adversary proceedings	3	2.24
Order staying actions against third parties	2	1.56
Disapproval of transactions	1	0.78
Injunction regarding registration as "foreign business"	1	0.78
Cash management system	1	0.78
Authorization to pay prepetition labor claims	1	0.78
Authorization to pay taxes	1	0.78
Approval of break-up fee	1	0.78
Authorization to execute agreements	1	0.78
Approval of sale process	1	0.78
Order vacating attachments	1	0.78
Authorization to abandon assets	1	0.78
Authorization to acquire assets	1	0.78
Tolling of claims	1	0.78

TABLE 2: RELIEF GRANTED

[139] Percentage of the 128 Relief Cases.

[140] Foreign representatives often seem not to be using the term "entrustment" with rigor or consistency. As a consequence, it is frequently difficult to understand the rationale for motions seeking the entrustment of the administration, realization or distributions of assets.

[141] In several cases, foreign representatives filed a generic application for authorization to examine witnesses, take evidence and delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities pursuant to Section 1521(a)(4) of the U.S. Bankruptcy Code. This does not mean, however, that these cases actually involved discovery.

As expected, qualifications were significantly more frequent than decisions denying discretionary relief. In 48 cases (37.50% of the Relief Cases), courts qualified, restricted or conditioned the relief granted to the foreign representative. Both substantive (*e.g.*, requiring the use of escrow accounts) and procedural (*e.g.*, subjecting certain actions to court approval) qualifications were coded. As indicated in Table 3 below, the most common type of qualification was relief from, or modification of, the stay. In the remaining 80 Relief Cases (62.50%), no qualifications were made. Because in three of these cases, bankruptcy courts denied some relief requested by the foreign representative, in 77 cases (60.15%) courts granted all the relief requested without qualifications.

Qualification	**Cases**	**%**[142]
Creditors, proceedings or claims relieved from, or not subject to, stay	38	29.69
Disposition of proceeds subject to court approval or other requirements or limits (*e.g.*, notice and hearing/settlement)	6	4.69
Periodic reporting	4	3.13
Minimum balance in account/escrow account	4	3.13
Adequate protection to secured lenders	4	3.13
Limits regarding discovery	3	2.34
Disposition of assets subject to court approval	2	1.56
Power to reassess sufficient protection to local creditors	1	0.78
Distribution of funds subject to administration by foreign court	1	0.78
Commencement of proceedings abroad	1	0.78
Non-impairment of tax claims	1	0.78

TABLE 3: QUALIFICATIONS TO RELIEF GRANTED

The data also shows that less than half of the proceedings within the sample were expressly contentious. In 61 Coded Cases (47.66%), parties filed objections or motions. For the most part, local parties and authorities objected relief sought by foreign representatives. Out of the 60 contested Coded Cases, 54 (90%) included objections by U.S. parties or authorities and

[142] Percentage of the 128 cases in the sample that reached the relief stage.

six involved objections brought only by foreign creditors. Interestingly, it was not possible to identify a clear pattern that would suggest that objections by U.S. parties or authorities substantially increased the likelihood of qualifications. Although the five contentious cases where courts have denied granting relief involved U.S. parties' objections,[143] Table 4 below shows that, in relative terms, bankruptcy courts imposed more qualifications in cases where only foreign creditors brought objections. That is, there were qualifications in four of the six cases with only foreign parties' objections, as opposed to 30 of the 54 cases where there were also objections by U.S. parties or authorities.

	U.S. Party Objections		**Non-U.S. Party Objections**		**Total Objections**	
Qualification	**#**	**%**	**#**	**%**	**#**	**%**
Yes	30	55.56%	4	66.67%	34	56.67%
No	24	44.44%	2	33.33%	26	43.33%
Total	54	100%	6	100%	60	100%

TABLE 4: OBJECTIONS AND QUALIFICATIONS

Two general concluding remarks are warranted. First, objecting creditors have often argued that the requested relief violated U.S. public policies.[144] Nonetheless, the analysis of court orders demonstrates that bankruptcy courts tend not to be easily persuaded by that argument. As noted above, in only one case (*Vitro*)), there was a finding that the relief requested was manifestly contrary to the public policy of the U.S. This finding is consistent with the predominant view that the public policy exception should be narrowly construed.[145] Second, in

[143] *Chembulk New York Pte Ltd*, Case No. 12-11007 (Bankr. S.D.N.Y. 2012), was not classified as a contentious case because no objections were filed.

[144] *See* 11 U.S. Code § 1506 (public policy exception).

[145] *See In re Toft*, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011) (noting that courts that "have considered the public policy exception codified in § 1506 have uniformly read it narrowly and applied it sparingly, consistent with the statutory command that the action in question be 'manifestly' contrary to U.S. public policy").

only one case[146] did a bankruptcy court make express reference to the fact that the home jurisdiction (Australia) had also adopted the Model Law. That is, solely in that one case has a court expressly considered the adoption of the Model Law as a factor in its legal analysis. In fact, jurisdictions that did not adopt the Model Law did not experience a higher rate of denials of relief, which confirms that this is not an element that is likely to impact legal outcomes.

4.1 Implications[147]

The empirical evidence showed that U.S. bankruptcy courts generally adopted a cooperative approach in Chapter 15 cases. In very few instances (4.69% of the 128 Relief Cases), courts denied motions for discretionary relief. In the vast majority of the Relief Cases (95.31%), courts granted the requested relief, and in 37.50% of these cases, there were qualifications (most often lifting the stay). In addition, in 60.15% of the Relief Cases, courts granted the relief requested without qualifications. These figures suggest that, in the vast majority of cases, U.S. bankruptcy courts (i) deferred to decisions made in foreign proceedings and (ii) did not use broad standards (*e.g.*, the public policy exception or sufficient creditor protection) to deny discretionary relief.

Are there other factors that could explain the low rate of decisions denying relief? It could be argued that creditors and parties in interest would anticipate the U.S. courts' deference to foreign proceedings and refrain from objecting to relief sought by foreign representatives in the first place. Nevertheless, no evidence was found supporting the existence of this potential

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146 *ABC Learning Centres Limited n/k/a ZYX Learning Ce*, Case No. 10-11711 (Bankr. D. Del. May 26, 2010), memorandum order dated January 21, 2011.

147 While the findings summarized in this paper point out clear and robust trends (*e.g.*, low rate of denial of motions for discretionary relief and high rate of recognition of foreign proceedings), this analysis of implications is subject to certain limitations. In particular, the findings herein should be interpreted in light of (i) the confidence interval (5) and confidence level (95%) of this research and (ii) the fact that only Chapter 15 cases filed between 2010 and 2015 were coded.

ex-ante effect. This hypothesis should, however, be tested by future research through, for example, qualitative methods (*e.g.*, interviews with foreign representatives and practitioners).

The findings above also provide some insights as to how Chapter 15 proceedings have been used in the U.S. There was a large cluster of cases—22 proceedings, or 17.19% of the Relief Cases—that were limited to the mandatory relief that automatically follows the recognition of foreign main proceedings.[148] This evidence suggests that Chapter 15 cases are often commenced primarily to stay litigation in the United States and to ensure that the foreign representative had powers to act in the country.[149]

The empirical evidence described in the preceding section challenges important hypotheses concerning the practice of Chapter 15. The first is the claim that U.S. bankruptcy courts engage in legal protectionism, being more likely to deny discretionary relief in cases where U.S. creditors or authorities object than when only non-U.S. creditors bring objections. Given the significantly low incidence of denials of relief reported above, this hypothesis appears to be false.[150] Furthermore, as mentioned in the preceding section, empirical evidence (counterintuitively) indicates that U.S. courts were more likely to impose qualifications in cases where only foreign parties object to relief motions than in those cases where U.S. parties objected. The legal protectionism hypothesis would predict the opposite outcome. In fact, in

[148] *See* U.S. Bankruptcy Code, 11 U.S.C. § 1520 (effects of recognition of a foreign main proceeding).

[149] This finding confirms Westbrook's view that "many Chapter 15 petitions seem to be focused on freezing United States litigation." Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency*, 87 AM. BANKR. L.J. 247, 261 (2013).

[150] Nevertheless, to refute the legal protectionism hypothesis, it would be necessary to expand the scope of this paper to include qualitative research methods.

certain cases, bankruptcy courts expressly emphasized the importance of equal treatment to creditors, no matter their location.[151]

Accordingly, the findings above diverge from Leong's conclusion as to where the U.S. cross-border bankruptcy regime actually stands in the spectrum between territorialism and universalism. In particular, empirical evidence does not support the claim that, between the years 2010 and 2015, the U.S. failed to adhere to modified universalism.

While it could be argued that the difference in findings could be explained by the fact that the two studies focused on different periods,[152] this explanation is not likely to be correct given (i) how robust the trends identified in the previous section were and (ii) the fact that there is no evidence in literature suggesting a drastic shift in the approach of U.S. bankruptcy courts to Chapter 15 cases after June 2009.

A probably more plausible explanation is methodological. First, this paper focused not only on relief motions and orders concerning entrustment, but it also took into account all sorts of relief requests. Moreover, the criteria that Leong used to define "entrustment requests" is questionable, as he considered any request for relief under Sections 1519 and 1521 as "entrustment requests."[153] Also, Leong appears to have coded as "denial" all cases where there was no judicial order authorizing the turnover of assets. That approach leads to a problem of

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151 *See, e.g.*, *ABC Learning Centres Limited n/k/a ZYX Learning Ce*, Case No. 10-11711 (Bankr. D. Del. May 26, 2010), memorandum order dated January 21, 2011 (where the court noted that "under Article 13 of the Model Law, foreign creditors have the same rights in an insolvency proceeding as creditors from the country in which the proceeding is located. RCS [a creditor based in the U.S.] asks the Court to give it greater rights than native Australian creditors, which the Court will not do. Were the Court to permit removal of assets from the purview of the foreign main proceeding, it would undermine the spirit and intent of the Model Law, U.S. law (Chapter 15), and Australian law (Cross-Border Insolvency Act 2008)").

152 While this paper focused on the period from 2010 to 2015, Leong's work centered on the first four years that followed the enactment of Chapter 15 (from October 2005 through June 2009).

153 For a more detailed critique of Leong's methodology, *see* Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency*, 87 AM. BANKR. L.J. 247, 260-61 (2013).

false positives, because, in practice, turnover of assets may occur even in the absence of demands and specific court orders. In addition, in several types of cases—particularly in restructurings—turnover of assets might not be necessary. Regarding this methodological issue, Professor Westbrook has already noted that "after reviewing a majority of these Chapter 15 filings, it seems clear that after the initial litigation the matter often resolves . . . without further court action, so that turnover may or may not have been demanded or obtained subsequent to the initial clash."[154] Finally, Leong does not appear to have considered proceedings where the debtor's main purpose was to stop litigation in the United States, which, as mentioned above, accounts for a significant percentage of the Chapter 15 cases.

The findings above also suggest that U.S. bankruptcy courts are *not* more likely to grant relief in cases where the foreign debtor's COMI is located in jurisdictions that have adopted the Model Law. As mentioned above, this factor was only expressly considered in one of the cases examined. Furthermore, the rate of relief is significantly high irrespective of the jurisdiction (and, therefore, the applicable bankruptcy regime) in which the debtor's COMI is located. As a consequence, reciprocity—with respect to the adoption of the Model Law—is likely to have little, if any, impact on the likelihood of denial of relief.

The findings presented above provide additional support to the claim that the United States has adopted a truly modified universalist insolvency regime with respect to cross-border insolvencies. In particular, empirical evidence confirms that recognition generally is a quick and straightforward step and that in the vast majority of cases, foreign proceedings are recognized as main proceedings without disputes with respect to the location of the debtor's COMI. More importantly, there is a similar pattern with respect to relief, which is an area where bankruptcy

[154] *Id.*

courts have broad discretion to decide. The empirical findings suggest that U.S. bankruptcy courts generally adopt a cooperative approach, granting the relief that foreign representatives seek and deferring to foreign courts.

Do these implications give reason for concern? How do they relate to the concerns that territorialists frequently raise? Although the universalist and the modified universalist approaches might generate legal uncertainties, empirical evidence suggests that those uncertainties have not materialized in the Chapter 15. In fact, both recognition (narrow discretion) and relief (broad discretion) decisions appear to be consistent, expedited and predictable (*i.e.*, courts grant both recognition and relief in the vast majority of cases, deferring to foreign courts and to requests that foreign representatives make). The review of court decisions does not suggest that bankruptcy judges are applying broad standards (*e.g.*, public policy exception) arbitrarily and unpredictably. Instead, U.S. courts have been generally reluctant to deny Chapter 15 relief.

Do U.S. bankruptcy courts adequately protect local stakeholders? In particular, does the deference to foreign proceedings harm vulnerable stakeholders based in the United States (*e.g.*, non-adjusting and small creditors)? Deference to foreign proceedings could be detrimental to certain creditors because it could arguably hinder certain U.S. public policies and increase transaction costs (*e.g.*, it might be too costly or complex for certain creditors to be represented abroad). There is, however, reason to think that this concern may be overstated because discussions regarding non-adjusting and small creditors were not frequent in the 129 Coded Cases. Although it is difficult to provide a definitive answer to this complex question, Chapter 15 provides significant discretion for bankruptcy courts to safeguard the interests of these parties. For example, small creditors generally can bring objections before U.S. courts and do not

necessarily need to be represented abroad to be heard. Moreover, as mentioned above, courts may discretionarily deny relief if the interests of the creditors are insufficiently protected. The public policy exception, although usually narrowly construed, also allows U.S. courts to protect the interests of non-adjusting creditors, among others. There is no evidence suggesting that these tools have not been properly used. In fact, Chapter 15 cases involving these creditors appear to be exceptional, which could explain why few discussions regarding their interests have been identified in the Coded Cases. That is, a plausible explanation could be that, in practice, there are few cases in which courts need to step in and actively protect the interests of stakeholders such as non-adjusting and small local creditors. However, more definitive answers to these questions require additional research through, for example, qualitative methods (*e.g.*, interviews with foreign representatives, practitioners and bankruptcy judges).

Similarly, the reported empirical findings might lead to the concern that Chapter 15 contributes to eroding U.S. sovereignty. Again, there is little evidence to support the claim that deference to foreign proceedings has been detrimental to U.S. policies or autonomy. As mentioned above, a more plausible account would be that cases that effectively require U.S. bankruptcy courts to be more interventionist are exceptional. The standards set forth in Chapter 15 (*e.g.*, violation of public policy and sufficient protection of creditors) provide local courts with sufficient leeway to exercise their discretion to the extent necessary to address extraordinary issues that may have broad negative implications. U.S. courts appear to be exercising discretion appropriately, not unreasonably interfering with foreign proceedings.

What are the positive implications of the findings of this paper? Generally, the deference of U.S. bankruptcy courts to foreign proceedings promotes the main benefits associated with universalism. For example, it enhances symmetry between legal proceedings and the debtor's

economic activities. In other words, it reduces frictions between bankruptcy regulation and economic reality. This symmetry facilitates corporate rescues as well as maximizing creditor recoveries, as it promotes procedural speed and coordination in the decision-making processes. In addition, the U.S. courts' non-interventionist approach reduces direct costs of insolvency proceedings. Deference to foreign proceedings often avoids duplication of efforts and transaction costs in multiple jurisdictions, as well as unnecessary re-litigation of issues. Another benefit to that approach is that it mitigates incentives for U.S. creditors to behave opportunistically and extract rents by (credibly) threatening to bring objections before U.S. bankruptcy courts. In addition, the U.S. courts' approach has been predictable, which is of great importance for cross-border bankruptcies.

5. CONCLUSION

This paper focused on the practice of discretionary relief under Chapter 15. It described, in particular, how U.S. bankruptcy courts decided discretionary relief motions and assessed how foreign representatives have relied on U.S. bankruptcy courts to protect, reorganize or liquidate non-U.S. businesses.

The empirical evidence above shows that U.S. bankruptcy courts very infrequently deny recognition to foreign insolvency proceedings and, in the great majority of cases, grant discretionary relief to foreign representatives. The analysis of Chapter 15 cases also confirms that courts typically do not rely on broad standards to deny relief requests and are generally deferential to foreign proceedings.

The findings of this paper suggest that U.S. bankruptcy courts have been successful in establishing a predictable and efficient system for implementing cross-border restructurings and

liquidations in the United States. These findings also suggest that the concern that U.S. courts overprotect U.S. creditors at the expense of other stakeholders (*e.g.*, foreign debtors, creditors and regulators) is likely overstated. The opposite concern also appears to be without merit because the empirical evidence does not support the claim that the deferential approach of U.S. courts in Chapter 15 cases erodes national sovereignty or leaves U.S. parties unprotected. The findings of this research further support the view that U.S. courts have been successful in establishing a pragmatic and efficient modified universalist regime. When it comes to Chapter 15 cases, the deferential approach of U.S. courts makes a positive difference because it promotes economic efficiencies and facilitates cross-border restructurings and liquidations.

APPENDIX

CODING MATRIX

Variable Description	Variable Type	Values
Date of filing	Numeric	Month and day and year when the case was filed
Venue	Categorical	Venue
Jurisdiction of foreign proceeding	Categorical	Name of country where the foreign proceeding was commenced
Name of judge	Categorical	Name
Stand-alone case	Binary	"0" – Yes "1" – No
Transferred case	Binary	"0" – Yes "1" – No
Case closed	Binary	"0" – Yes "1" – No
Date of last docket update	Numeric	Month and day and year when the case was last updated
Type of proceeding	Binary	"0" – Foreign *main* proceeding "1" – Foreign *nonmain* proceeding
Voluntary petition	Binary	"0" – Yes (voluntary) "1" – No (involuntary)
Nature of foreign proceeding	Categorical	"0" – Restructuring "1" – Liquidation "2" – Unknown
Industry	Categorical	Name of industry

Appeal	Binary	"0" – Yes "1" – No
Litigation pending in the U.S.	Binary	"0" – Yes "1" – No
Target population	Binary	"1" – If case is within the research population "0" – If case is not within the research population
Recognition	Binary	"0" – Granted "1" – Not granted
Date of recognition	Numeric	Month and day and year when the case was recognized
Provisional relief	Categorical	"0" – Granted "1" – Not granted "2" – Not requested
Types of provisional relief involved	Categorical	"0" – Stay "1" – Preservation of contracts "2" – Entrustment of administration of U.S. assets "3" – Entrustment of realization of U.S. assets "4" – Authorization to examine witnesses/discovery-related relief "5" – Sale of assets "6" – Full force and effect to foreign court orders "7" – DIP financing "8" – Authorization to pay debt "9" – Cash management system

		"10" – Relief available under Section 1520 of the U.S. Bankruptcy Code, but on a provisional basis
Qualification to provisional relief	Binary	"0" – Yes "1" – No
Discretionary relief granted (Dependent variable)	Binary	"0" – Yes "1" – No
Types of discretionary relief involved	Categorical	"1" – Entrustment of administration of U.S. assets "2" – Entrustment of realization of U.S. assets "3" – Authorization to examine witnesses/discovery-related relief "4" – Entrustment of distribution of U.S. assets "5" – Enforcement of plans of reorganization "6" – Sale or transfer of assets/assignment of rights "7" – Approval or enforcement of settlement agreements "8" – Only automatic relief upon recognition of foreign main proceedings "9" – Enforcement of other agreements or orders "10" – Relief related to debtor-in-possession financing "11" – Authorization to distribute or transfer resources from sales of assets "12" – Order preserving contracts "13" – Assumption, rejection or assignment of executory contracts

		"14" – Turnover of information or records "15" – Approval of claims procedures and processes "16" – Authorization to commence adversary proceedings "17" – Order staying actions against third parties "18" – Disapproval of transactions "19" – Injunction regarding registration as "foreign business" "20" – Cash management system "21" – Authorization to pay prepetition labor claims "22" – Authorization to pay taxes "23" – Approval of break-up fee "24" – Authorization to execute agreements "25" – Approval of sale process "26" – Order vacating attachments "27" – Authorization to abandon assets "28" – Authorization to acquire assets "29" – Tolling of claims
Types of relief denied	Categorical	Relief denied
Grounds for denying relief	Categorical	Description of grounds for denying relief
Multiple motions for relief	Binary	"0" – Yes "1" – No
Qualification to relief	Binary	"0" – Yes "1" – No
Type of qualification	Categorical	"1" – Creditors, proceedings or claims relieved from, or not subject to, stay

		"2" – Periodic reporting "3" – Disposition of proceeds subject to court approval or other requirements or limits (*e.g.*, notice and hearing/settlement) "4" – Minimum balance in account/escrow account "5" – Power to reassess sufficient protection to local creditors "6" – Disposition of assets subject to court approval "7" – Distribution of funds subject to administration by foreign court "8" – Commencement of proceedings abroad "9" – Adequate protection to secured lenders "10" – Non-impairment of tax claims "11" – Limits regarding discovery
Creditor objection	Binary	"0" – Yes "1" – No
Objecting creditor	Categorical	"0" – No "1" – Yes, including U.S. creditor "2" – Yes, not including U.S. creditor
Settlement	Binary	"0" – Yes "1" – No