

CURRENT DEVELOPMENTS  
IN INTERNATIONAL INSOLVENCY LAW

A UNITED STATES PERSPECTIVE

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### Background

In the words of an American scholar on international insolvency, “a wave of bankruptcy reform ... is sweeping around the world.” Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2278 (2000). As of the year 2000, the reforms included new insolvency laws in Argentina, Australia, Canada, China, Germany, Indonesia, Mexico, Russia, Singapore, Thailand, and most of Eastern Europe. Today the list would include new legislation in Japan and Korea, among other countries. Domestic legislation has been spurred in some cases by international organizations such as the World Bank, which has an ongoing Initiative on Insolvency Principles and Procedures; the International Monetary Fund (IMF), which published “Effective Insolvency Principles: Key Issues” in 1999; and the United Nations Commission on International Trade Law (UNCITRAL), which, at present, is nearing the completion of a compendium of principles for member states to consider in reforming insolvency laws. Most of the new legislation has involved corporate restructuring or corporate reorganization. Legislation providing for the liquidation of insolvent enterprises has long been in place in most countries, and aside from priorities that may differ under local law, liquidations are similar in most nations whose economies are based on a free-market system.

Only a few years ago some economists and legal commentators were stressing the inefficiencies and costs of reorganization and predicting the demise of Chapter 11. *See* Bradley

and Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043 (1992); responded to by Warren, *The Untenable Case for Repealing Chapter 11*, in 102 YALE L.J. 437 (1992) and by LoPucki, *Strange Visions in a Strange World: A Reply to Professors Bradley and Rosenzweig*, 91 MICH. L. REV. 79 (1992); *see also* Bowers, *Groping and Coping in the Shadow of Murphy=s Law: Bankruptcy Theory and the Elementary Economics of Failure*, 88 MICH. L. REV. 2097 (1990). We have come so far, in only a few years, that the IMF has publicly suggested the possibility of an international tribunal to oversee a form of reorganization for countries that are unable to repay sovereign debt. The proposal, announced in an address in December 2001 by Anne Krueger, First Deputy General Manager of the IMF, proposed a form of moratorium on debt-collection activity, the availability of financing that would take priority over existing debt, creditor approval of a plan, and a mechanism for binding minority dissident creditors B all familiar reorganization concepts. Since the initial proposal was made, Dr. Krueger has modified it to reduce the role of the IMF, which is often a creditor itself, and to increase the role of a creditors committee. N.Y. TIMES, April 2, 2002, at C2 - C4. *See also*, L. Rieffel, *Restructuring Sovereign Debt: The Case For Ad Hoc Machinery*, Brookings Inst. (2003).

Insolvency legislation, which involves who gets paid when there is not enough to go around, cuts to the quick and impinges on a most sensitive interest, the pocketbook. It has, therefore, often proved to be as difficult to develop new transnational insolvency principles as it has been to amend insolvency law domestically. As recently as 1987 two practitioners could write an article that correctly spoke of an “international void in the law of multinational bankruptcies.” *See* Gitlin and Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 BUSINESS LAWYER 307 (1987). The European Union, which had wrestled

successfully with incredibly complex issues of political and economic unification and reform, apparently found insolvency legislation among the most intractable matters.

But the tide is turning. There have been significant developments in the realm of international or transnational insolvencies, including not only principles to govern the insolvency of international or transnational enterprises, but also statutes providing for the enforcement in one jurisdiction of an order, judgment or decree entered in a foreign insolvency proceeding. The European Union Regulation on Insolvency Proceedings became effective in all but one country of the community in May 2002 after decades of effort. European Union: Convention on Insolvency Proceedings, Nov. 23, 1995, 35 I.L.M. 1223 (1996); Official Journal of European Communities 160 (2000). The UNCITRAL Model Law on Cross-Border Insolvency, U.N. Sales No. E. 99V.3, has been recommended for adoption by member states. The largest country to adopt the Model Law to date is Japan, but it is under active consideration in other nations and has been proposed as Chapter 15 of the United States Bankruptcy Code.<sup>1</sup> In addition to the Model Law, drafts of legislation or rules are being circulated on such topics as “Principles Governing Communications between Courts in Multinational Insolvency Cases” and “Expedited International Reorganization Procedures.”

Against this background, let us consider recent developments in the United States relating to international or transnational insolvency issues. At the outset, it is useful to review the three

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<sup>1</sup>Although a bill of which Chapter 15 is a part was passed in 2002 by both Houses of Congress, it has not become law; however, the new provisions codified in Chapter 15 are expected to become law eventually whether or not other, more controversial parts of recent bankruptcy legislation are adopted. The Model Law is also under serious consideration in Canada.

ways in which a “foreign representative” can appear in the U.S. courts to seek recognition of a foreign insolvency proceeding.

Direct Enforcement in the United States of the Orders, Judgments, and Decrees of Foreign Insolvency Courts.

It is generally assumed today that a foreign representative can appear in many Federal and State courts and pursue an affirmative cause of action in his own name. *See, e.g., Clarkson Co. v. Shaheen*, 716 F.2d 126, 127 (2d Cir. 1983), in which a Canadian trustee in bankruptcy sought damages against former principals of the debtor. Similarly, if the foreign debtor is sued in the U.S. courts, the representative can appear and ask the court to stay or dismiss the suit on the ground that a foreign insolvency proceeding is pending, the lawsuit interferes with that proceeding and the lawsuit should be stayed or dismissed on grounds of comity, providing for the recognition of the jurisdiction and rulings of a foreign court. *See, e.g., Cunard Steamship Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 460 (2d Cir. 1985), in which the U.S. courts vacated an attachment that Cunard had obtained against the U.S. assets of a Swedish debtor; the court found that the attachment had been obtained in direct contravention of the Swedish liquidation proceeding, that it interfered with the orderly disposition of the debtor=s assets, and that the Swedish proceeding was entitled to “comity” and recognition here. The Second Circuit reaffirmed the essential holding in *Cunard* in several subsequent cases, including *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999), and *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 714 (2d Cir. 1987) (same Swedish bankruptcy as in *Cunard*).

Two recent cases have applied the above principles. In *Ecoban Finance Ltd. v. Grupo*

*Acerero del Norte, S.A. de C.V.*, 108 F.Supp.2d 349 (S.D.N.Y. 2000), *aff'd*, 2 Fed. Appx. 80, 2001 WL 40895 (2d Cir. 2001), *cert. denied*, 534 U.S. 814 (2001), a New York holder brought suit on notes issued by a Mexican company that later filed reorganization or *suspension de pagos* proceedings in Mexico. The courts dismissed the New York suit on grounds of comity, finding that the Mexican proceedings were fair as written and that claims of bad faith by reason of potential delay were speculative and could be redressed by the Mexican courts. In *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 2004 WL 42268 (S.D.N.Y. 2004), the court cited *Ecoban* and dismissed, in favor of a Mexican proceeding, an action by a U.S. secured creditor seeking to obtain rights to an escrow fund located in the United States, governed by U.S. law. The court said, “the prudent exercise of discretion dictates dismissal of [the plaintiffs’] action so as to permit the [Mexican bankruptcy court] to resolve this dispute.” It is not certain whether this case will be appealed.

By contrast, in *International Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589 (5th Cir. 2003), the Circuit Court refused to grant comity to a Mexican proceeding. It did not find that the Mexican proceeding was unfair in principle but concluded that the record before the District Court did not sufficiently demonstrate that the defendant had received notice of a hearing at which the Mexican court entered the order on which plaintiff relied. The majority (with one judge dissenting) cited the principle that a foreign judgment will not be enforced in a U.S. court unless it was obtained by due process.

Although the foregoing cases all relied on comity to recognize (or refuse recognition to) a foreign proceeding, the *Cunard* court stressed that the preferred remedy would have been for the debtor to seek an order under the U.S. Bankruptcy Code § 304 enjoining the creditor from

pursuing its U.S. lawsuit. *In re Cunard*, 773 F.2d at 461. That brings us to § 304.

### Section 304

Section 304 of the U.S. Bankruptcy Code is the second major avenue by which a foreign debtor or its representative can appear in U.S. courts. Section 304 permits a foreign representative to commence a special proceeding in Bankruptcy Court seeking certain relief ancillary to a foreign insolvency proceeding, including an order staying all litigation against the foreign estate, vacating attachments and remitting property abroad for administration in the foreign case. The principles of § 304 are similar to those of the Model Law and the European Convention, to the extent that it contemplates a “non-main” proceeding which, to some extent, supports and complements a “main” proceeding elsewhere. In recent years, a proceeding under § 304 has been the remedy of choice for a foreign representative because of the remedies that are clearly available. Many of the principles of § 304 are incorporated in the UNCITRAL Model Law, and experience in the United States under § 304 is likely to be useful precedent after adoption of the Model Law.

Section 304 provides that the foreign representative of a company in liquidation or reorganization proceedings in another country may bring an ancillary or special proceeding in the U.S. Bankruptcy Court. Since the debtor in possession concept is rare outside of the United States, the foreign representative is usually a trustee or administrator, but a board of directors or other entity may constitute a foreign representative when the board has the responsibility of proposing and carrying out a plan or scheme of reorganization. *See, e.g., In re Board of Directors of Hopewell Int’l Ins. Ltd.*, 238 B.R. 25, 53-54 (Bankr. S.D.N.Y. 1999), *aff’d*, 275 B.R. 699 (S.D.N.Y. 2002); *see also In re Artimm*, 278 B.R. 832, 838-39 (Bankr. C.D. Cal. 2002). The

special proceeding does not open a full bankruptcy case. In U.S. bankruptcy terms, a U.S. estate is not created, and even if the case is a liquidation, a U.S. trustee is not appointed. Instead, the proponent of the proceeding is the foreign representative.

As noted, the foreign representative may seek broad relief in the U.S. Bankruptcy Court, most commonly an injunction to prevent any entity from interfering with or attaching the assets of the foreign debtor in the United States, and an order transmitting the assets to the foreign representative for administration in the foreign insolvency proceeding.<sup>2</sup> In considering whether to grant the foreign representative relief, the U.S. court must be “guided by what will best assure an economical and expeditious administration of such estate, consistent withB

- (1) just treatment of all holders of claims against or interest in such estate;
- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of such estate;
- (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by [the U.S. Bankruptcy Code; and]

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<sup>2</sup> In *In re Artimm*, the Court held that the stay under foreign law would be recognized as having extraterritorial reach in the United States, thereby obviating the need to enter another stay here. 278 B.R. at 841.

(5) comity.” 11 U.S.C. § 304(c).

The United States courts have been, in my view, receptive to the recognition and enforcement of foreign insolvency proceedings under § 304. The following are certain of the major issues that have arisen recently in proceedings under § 304.

#### Recent Issues under § 304.

The aspect of § 304 that has caused the most dispute is the requirement in subsection (c) that the Bankruptcy Court be guided by what will best assure an economical and expeditious administration of such estate, consistent with ...@ the five factors listed above. The requirement that relief be granted only if these factors are satisfied gives the opportunity for litigants to oppose a § 304 petition and has caused concern that the court has too much discretion to refuse to apply the law of a foreign jurisdiction. *See, e.g., Burman, Harmonization of International Bankruptcy Law: A United States Perspective*, 64 *FORD. L. REV.* 2543, 2549 (1996). It is noteworthy that the UNCITRAL Model Law does not contain these five factors and simply provides that AThe foreign proceeding shall be recognized: (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.@ The U.S. version of the Model Law, if adopted in its present form, would perpetuate these factors in part. Section 1517 of the amended Bankruptcy Code, as passed by the House on March 1, 2001 (H.R. 333) and by the Senate on March 15, 2001 (S. 420), provides that an order granting recognition Ashall be entered,@ after notice and a hearing, on substantially the same grounds as in the Model Law. After recognition, the foreign representative is entitled as of

right to certain specified relief, including a stay of all proceedings against the debtor and the debtor=s property in the United States, the right to operate the debtor=s business, and the right to sell and deal with property in the same manner as a trustee or DIP in the United States. 11 U.S.C. § 1520 (proposed). Upon application, further relief may be granted by the court, including Aany additional relief that may be available to a [U.S.] trustee@ or DIP, other than the power to set aside pre-petition transactions under the avoidance provisions of the Code.

In order to be entitled to this additional relief, however, the foreign representative must satisfy the § 304 factors, which make their reappearance in proposed § 1507, providing that Aadditional assistance@ may be provided if, Aconsistent with the principles of comity,@ such assistance will be consistent with the first four of the § 304 five factors quoted above. The fifth factor of § 304, comity, has been relegated to a more important status in the proposed § 1507, which separates comity from the other four factors, presumably giving effect to recent court decisions that have held that comity, while not determinative, may be the most important of the factors to consider in determining whether relief should be granted under § 304. *Bank of New York v. Treco (In re Treco)*, 240 F.3d 148, 156-57 (2d Cir. 2001) (A[A] court=s function under § 304 is to determine whether comity should be extended to the foreign proceeding in light of the other factors.@); *In re Culmer*, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982). In any event, the § 304 factors are retained in different form in the proposed law, and cases construing § 304 are likely to be relevant in the construction of the provisions of new Chapter 15, if and when they are adopted.

As noted above, in my view, the American courts have generally given the requirements of § 304(c) a liberal reading. In order to be entitled to recognition in the United States, a foreign

proceeding need not afford an American creditor the precise relief or recovery that it would be entitled to in a United States proceeding. *In re Treco*, 240 F.3d at 158-59; *In re Culmer*, 25 B.R. at 624. There are a few cases that demonstrated evident hostility to § 304; a notable early example is *Matter of Toga Mfg. Ltd.*, 28 B.R. 165 (Bankr. E.D. Mich. 1983), which refused to recognize a Canadian proceeding (despite its being a common law jurisdiction whose laws are frequently granted comity in U.S. cases), and which has been much criticized. See *In re Ionica PLC*, 241 B.R. 829, 838 (Bankr. S.D.N.Y. 1999). In another early case, *Interpool Ltd. v. Certain Freights of the M/V Venture Star*, 102 B.R. 373, 378-80 (D.N.J. 1988), the court refused to grant a 304 petition filed by an Australian liquidator on the ground that Australian law did not provide adequate notice to creditors and did not recognize the remedy of equitable subordination of claims. It should be noted that the *Interpool* court had to weigh recognition of a foreign liquidation against recognition of a competing Chapter 7 petition filed by U.S. creditors, and it chose to allow the Chapter 7 to go forward. *Id.* In any event, a more representative early case is *In re Culmer*, *supra*, 25 B.R. at 624, which granted comity to a Bahamian liquidation of a subsidiary of the notorious Banco Ambrosiano, transferred assets to the Bahamian liquidators, and authored the well-known statement that in a § 304 proceeding, the court is authorized to devise a remedy in Anear blank check fashion. @

Against this background we come to *Bank of New York v. Treco (In re Treco)*, 240 F.3d 148 (2d Cir. 2001), a decision by the United States Court of Appeals for the Second Circuit. In *Treco*, the liquidators of a Bahamian bank, the parent of a Tanzanian bank, brought a § 304 petition seeking to remit to the Bahamas funds held in the United States by a New York bank that claimed a right to the funds by virtue of a security interest and the common law right of setoff.

The lower courts held that even if the New York bank was a secured party, a decision that they did not have to reach, the security interest would continue after a transfer to the Bahamas and accordingly it was appropriate to remit the funds to the Bahamas for administration. The Court of Appeals vacated the transfer order, apparently influenced by two salient facts in the record: first, under American law, the New York bank=s security interest would not be charged with the costs of administration of the insolvency proceedings, whereas under Bahamian law the liquidators would be able to access all of the collateral to satisfy administration costs; and second, the Liquidators= fees were accruing at a premium rate fifty percent above their usual rates, had already consumed nearly \$8 million of the approximate \$10 million of receivables collected by the Liquidators, and were likely to increase to the point that they would consume all of the bank=s collateral and leave it with no recovery at all. The *Treco* court held, Aif [the Bank=s] claim is secured, turnover of these funds would be improper because of the extent to which the distribution of the proceeds of these funds in the Bahamian bankruptcy proceeding would not be >substantially in accordance with the order prescribed by the United States Bankruptcy Code.’ 11 U.S.C. § 304(c)(4).@ 240 F.3d at 160-61.

A more recent decision, *In re García Avila*, 296 B.R. 95 (Bankr. S.D.N.Y. 2003), considered the limits of *Treco*. There the representative of a Mexican operator of toll roads, a debtor in a Mexican bankruptcy proceeding, brought a § 304 proceeding to enjoin U.S. noteholders from enforcing a judgment they had obtained in the United States. The Bankruptcy Court found after a hearing that the Mexican bankruptcy case did not, for example, have a “best interests” test requiring that each creditor in a reorganization receive at least the same

distribution the creditor would receive in a liquidation and thus did not provide creditors with all of the protections inherent in the Bankruptcy Code. But it concluded the Mexican law was sufficiently close to the American law as to meet the requirements of § 304(c) and stated:

At bottom the [Objecting] Creditors argue that the Court should not grant comity because they may receive a smaller distribution on their unsecured claim in Mexico than they would receive on their unsecured claim under United States law. Section 304(c) does not, however, require an unsecured creditor to receive the same distribution in the foreign case and the hypothetical American bankruptcy ... the application of such a test would pose a significant obstacle to ever granting comity. 296 B.R. at 112.

The importance of *Treco* in the development of the American law of international insolvency remains to be seen. Even though the *Treco* court deemed itself bound to examine the other four factors of § 304(c), it recognized the importance of cooperation in international insolvencies and the primacy of the concept of comity, and it went out of its way to state, “We expect that the case specific analysis required by § 304 will in many or most cases support the granting of the requested relief.” 240 F.3d at 161.

In the future, if Chapter 15 is adopted, the § 304(c) factors will play a less central role, as these factors are expressly applicable only when additional assistance is sought under proposed § 1507. Under proposed §§ 1515, 1519, and 1504, basic relief can be granted upon the simple application for recognition of a foreign insolvency proceeding. But that does not mean

that *Treco* or similar cases will be irrelevant. Indeed, the factors that caused the court in *Treco* concern will continue to be relevant under other sections of the proposed Chapter. For example, under proposed Chapter 15, the turnover of a foreign debtor's assets located in the United States for distribution by the foreign representative will expressly be subject to the court being satisfied that the interests of creditors in the United States are sufficiently protected. 11 U.S.C. § 1521(b) (proposed). Moreover, under Chapter 15, the court will be entitled to order the funds remitted to another person, including an examiner, authorized by the court. 11 U.S.C. § 1521(c) (proposed). This would appear to give the court a mandate to consider whether to effect transmittal of the funds under U.S. procedures.<sup>3</sup>

It is obvious there are serious implications whenever a United States court, in effect, examines the bona fides of a foreign proceeding. On the other hand, U.S. courts asked to enforce the judgments of a foreign tribunal routinely review whether the foreign court acted with a minimum of due process. *See Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *In re Cunard*, 773 F.2d at 457. U.S. courts also consider whether the foreign court has attempted to enjoin proceedings in the United States in a manner that would improperly attempt to interfere with the jurisdiction of our courts. *See Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 937 (D.C. Cir. 1984); *see also In re Petition of Board of Directors of Hopewell Int'l Ins. Ltd.*, 272 B.R. 396 (Bankr. S.D.N.Y. 2002).<sup>4</sup> Insolvency regimes vary enormously, and foreign trustees and

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<sup>3</sup> In *In re Artimm*, the Bankruptcy Court, to protect U.S. creditors from the possible inconvenience of having to file claims in Italy, provided that they could file claims with the U.S. court and have the claims adjudicated there. 278 B.R. at 843.

<sup>4</sup> In *Hopewell*, a U.S. creditor had applied to the Bankruptcy Court for modification of a § 304 injunction entered in 1999. The court with jurisdiction over the main proceeding in

administrators seeking turnover of funds located in the United States should be sensitive to the fact that rules and actions that they accept as part of their system may appear unfair to courts and counsel familiar with a different system. At a minimum, counsel seeking a turnover of funds should consider providing a full explanation of the foreign system, especially as it is often misleading to focus on only one aspect of an insolvency regime without considering countervailing aspects as well. Even where the insolvency laws and legal systems are similar, as

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Bermuda then entered an order enjoining the U.S. creditor from attempting to vary or discharge the § 304 order. The U.S. court held that this order constituted an impermissible anti-suit injunction and an improper attempt on the part of the foreign court to interfere with the exercise of the U.S. court's jurisdiction and to carve out exclusive jurisdiction, that it would not be recognized and that sanctions would be awarded. After entry of this order, the Bermuda court vacated its order, the creditor went forward with its motion to modify the 1999 order. The bankruptcy court denied relief on the ground that the creditor had not demonstrated grounds to justify vacating or modifying the order. *In re Petition of Board of Directors of Hopewell Int'l Ins., Ltd.*, 281 B.R. 200 (Bankr. S.D.N.Y. 2002).

in Canada and the United States, the following language of a U.S. Bankruptcy Court, in its opinion overruling the objection of a Canadian receiver and ordering the modification of a § 304 order, should be kept in mind:

AGiven the realities of the situation, and given that it is the Receiver who is asking for the continuation of the present 15 month old injunction, the Court finds that it was incumbent on the Receiver to have come forward with something more than broad generalities or platitudes in support of the request that this Court either deny the Movants= relief entirely, or require the Movants to present themselves first to the Canadian Receivership Court on the subject. This the Receiver has not done.@ *In re YMB Magnex Int'l, Inc.* 249 B.R. 402, 410 (Bankr. E.D. Pa. 2000).

A second observation prompted by *Treco* is that the position of the secured creditor in an international insolvency dispute merits special attention. The *Treco* Court said that the matter before it was the first case that involved the rights of a secured creditor in a § 304 context, and it distinguished the well-known case, *In re Culmer, supra*, 25 B.R. 621, which ordered property of a Bahamian debtor transmitted abroad for administration in the Bahamas, on the ground that *Culmer* did not involve the rights of secured creditors. Although it is not clear from the written opinion, in *Culmer* at least some of the objecting creditors claimed to have a security interest in the property to be transmitted, and the debtor conceded that the security interest would continue in the Bahamas notwithstanding the transfer. *Culmer*, however, did not raise the issue whether the collateral was being rendered valueless by virtue of priority administrative claims. The concern of the U.S. courts that the value of U.S. property rights should be preserved in a foreign proceeding is also illustrated by *In re Koreag, Controle et Revision, S.A.*, 961 F.2d 341, 349-50 (2d Cir. 1992), *cert. denied*, 506 U.S. 865 (1992), which required the bankruptcy court to

determine the debtor=s interest in property under U.S. law before entering a turnover order.

*Treco* also illustrates that it is easier to obtain injunctive relief staying litigation in the United States against a foreign debtor than it is to obtain a turnover of funds. This is inherent in § 304 itself, which requires only that property be involved in the foreign proceeding in order for the court to enter a stay order. See *In re Manning*, 236 B.R. 14, 21-22 (BAP 9th Cir. 1999); *In re García Avila*, 296 B.R. at 105-106. In any event, the stay of litigation that the Bankruptcy Court ordered in the *Treco* case was apparently not contested or at least not the subject of an appeal. Under proposed Chapter 15 of the Bankruptcy Code, the court will be expressly authorized to direct emergency relief upon the filing of the petition, and upon recognition of a foreign main proceeding, an automatic stay as provided for in § 362 of the Bankruptcy Code for plenary bankruptcy filings will go into effect with respect to property of the debtor within the territorial jurisdiction of the United States. 11 U.S.C. § 1520(a) (proposed).

Several recent cases demonstrate the extent of the U.S. courts= receptivity to enter injunctions protecting assets under § 304; they also show that the success of the case, of course, depends on the specific facts. In a § 304 proceeding brought by Philippine Airlines, a U.S. Bankruptcy Court in San Francisco entered emergency relief and then, after a two-day trial, issued an injunction restraining U.S. creditors, including General Electric and Boeing Aircraft, from seizing or interfering with the airline=s planes flying to the United States. *In re Philippine Airlines*, No. 98-3-2705-TC, (Bankr. N.D. Cal. 1998) (available at [www.canb.uscourts.gov](http://www.canb.uscourts.gov)). Philippine Airlines had filed for rehabilitation before the Philippine Securities and Exchange Commission, and the U.S. court found that the Philippine proceeding provided creditors with

sufficient protection to be recognized in the United States, despite the fact that the statutory basis for Philippine rehabilitation law was unclear and the power given to the Philippine SEC uncertain. *Id.* The decision of the Court, which took expert testimony on Philippine law, is unreported, but it is described in Garfinkle, *Close Enough for Comity: Philippine Rehabilitation Law and Philippine Airlines Section 304 Proceeding*, AM. BANKR. INST. J., Feb. 18, 1999.

In another recent case from Asia, however, the court refused to grant recognition under § 304 to a reorganization proceeding in Taiwan. The foreign case was then in a preliminary stage, with an interim order entered but no final decree and no court-appointed reorganization supervisor to take charge of the reorganization. In granting a motion to dismiss the proceeding brought by a large U.S. creditor, the U.S. court was particularly concerned that the case was under the control of a son of the principal shareholder and member of the Board, that he was not appointed by the court, and that he did not owe a special duty to creditors. The Court said: A No fiduciary exists in Taiwan. No orderly distribution to creditors exists in Taiwan. Here, comity requires no recognition of the Taiwanese proceeding. @ *In re Master Home Furniture Co. Ltd.*, 261 B.R. 671, 680 (Bankr. C.D. Cal. 2001). *Master Home Furniture* should be contrasted with another case from Taiwan, *Haarhuis v. Kunnan Enters., Ltd.*, 177 F.3d 1007 (D.C. Cir. 1999), in which the Circuit Court on appeal affirmed orders of the Bankruptcy and District Courts that had recognized under § 304 a reorganization case in Taiwan that had proceeded beyond the preliminary stage. In *Haarhuis* three court-appointed reorganizers @ of a Taiwanese manufacturer of sports equipment appeared in support of the petition and, with extensive expert testimony on Taiwanese insolvency law from a professor, convinced the U.S. court to overrule

all the objections to the § 304 case.<sup>5</sup>

Like *Master Home Furniture* and *Haarhuis*, two recent cases from Peru indicate the importance of the specific facts submitted in support of a § 304 petition. In *In re Empresa de Transportes Aero del Peru, S.A.*, 263 B.R. 367 (S.D. Fla. 2001), the Bankruptcy Court entered a preliminary injunction in favor of a Peruvian airline to stay actions against it, on the request of its chief executive officer who affirmed that he had been appointed its representative under Peruvian law. When it later became uncertain whether the reorganization had failed and whether a trustee had been appointed in Peru, the Bankruptcy Court in Florida appointed an American fiduciary to handle the reorganization there. On appeal the District Court held that in order for the U.S. court to have jurisdiction, there had to be a foreign proceeding,<sup>6</sup> and it remanded to the Bankruptcy Court to determine what happened when the reorganization efforts failed, whether there was a foreign representative, and what the relevant provisions of Peruvian law were. *Id.* at 378. It did not accept the proposition that the Bankruptcy Court could effectively convert the case into a U.S. proceeding. By contrast, in *In re Petition of Caldas*, 274 B.R. 583 (Bankr. S.D.N.Y. 2002),

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<sup>5</sup> See also *In re Netia Holdings, S.A.*, 277 B.R. 571 (Bankr. S.D.N.Y. 2002), where the court held that a Polish proceeding was entitled to recognition even though a court supervisor had not yet been appointed to supervise the debtor's business, in light of the protections to creditors and the extent of court supervision available under Polish law. In a later decision in the same case, the Bankruptcy Court held that the foreign debtor had sufficiently demonstrated irreparable injury and a likelihood of success on the merits to be entitled to injunctive relief under § 304. *In re Netia Holdings, S.A.*, 278 B.R. 344 (Bankr. S.D.N.Y. 2002).

a § 304 petition was sustained where the petitioners were representatives of a Peruvian bank in intervention proceedings in Peru, appointed by the Superintendency of Banking and Insurance, and the applicable provisions of Peruvian law were fully explained to the court.

Several recent § 304 cases have also considered the extent to which a foreign representative may seek to avoid a transaction relying on foreign law and whether discovery is available to a foreign representative in connection with a § 304 proceeding. *In re Petition of Gross*, 278 B.R. 557 (Bankr. M.D. Fla. 2002), the court reaffirmed prior authority holding that in a § 304 case it is not necessary for the foreign debtor to have physical property in the District, that a petition may be brought to set aside a transaction based on foreign law and that discovery is appropriate. In *In re Hughes*, 281 B.R. 224 (Bankr. S.D.N.Y. 2002), the court also held that a foreign representative could have discovery to examine potential claims that the foreign debtor might have against an auditor and that the scope of the Rule 2004 examination was not limited by foreign law. In *In re Board of Directors of Hopewell Int'l Ins., Ltd.*, 258 B.R. 580 (Bankr. S.D.N.Y. 2001), by contrast, the court declined to allow the foreign representative to use Rule 2004 examinations in the country in connection with a matter being actually litigated in a foreign arbitration.

In recent years, corporations doing virtually all of their business in the United States have incorporated abroad in order to avail themselves of tax, regulatory or other benefits. *In re National Warranty Ins. Risk Retention Group*, 306 B.R. 614 (BAP 8th Cir. 2004), involved a product liability insurer formed under the U.S. Liability Risk Retention Act. Pursuant to that statute it was incorporated in the Cayman Islands but did virtually all of its business in the U.S., with its financial and hard assets in Lincoln, Nebraska. It filed liquidation proceedings in the

Caymans and brought a § 304 proceeding to prohibit customers from commencing or continuing contract and tort lawsuits against it in the United States (it had earlier, on the eve of liquidation, moved all of its funds to the Caymans). The Bankruptcy Appellate Panel affirmed an order of the Bankruptcy Court which found that the enterprise's domicile was in the Caymans, that the liquidators appointed there were foreign representatives entitled to invoke § 304, and that the Cayman liquidation proceedings were entitled to recognition under § 304.<sup>6</sup>

#### Plenary Concurrent Proceedings in the United States and Abroad.

As noted above, § 304 is frequently the remedy of choice for a foreign representative, as it provides a simplified, usually expeditious, and relatively inexpensive way to get relief in the American judicial system. An alternative is to file a full Chapter 11 reorganization case or Chapter 7 liquidation case.

A plenary proceeding will often be brought when the foreign representative needs to access a particular provision of U.S. bankruptcy law that is available in a plenary suit but not clearly available under § 304. Or if the representative needs to supplant an entrenched management or board of directors, the foreign representative may commence an involuntary case under § 303(b)(4) of the Bankruptcy Code. Trustees are rarely appointed in domestic Chapter 11 reorganization cases in the United States, and the debtor's board of directors and management normally take on most of the rights and duties of a trustee. 11 U.S.C. § 1106(a). A foreign representative appointed in the foreign case, who has effectively supplanted old management, has

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<sup>6</sup> Finally, a very recent decision found that § 316(b) of the Trust Indenture Act, which provides that the right of a holder of a security issued under a qualified indenture to receive payment of principal and interest on the security may not be impaired without consent, does not preclude the grant of relief under § 304 recognizing a foreign proceeding, where such recognition is otherwise appropriate. *In re Board of*

in some cases simply superceded management of the debtor to take on the role of Adebtor in possession@ under Chapter 11, without obtaining an appointed trustee in the United States.

The case of *In re Maxwell Communication Corp.*, 93 F.3d 1036 (2d Cir. 1996), an English holding company whose principal, Robert Maxwell, had died in mysterious circumstances under a cloud of fraud, is a well-known example. Maxwell=s sons, as his successors, filed a Chapter 11 case in the United States (where many of the company=s assets were located) in an apparent effort to keep their creditors at bay and/or retain control. They were unable to hold off their English creditors, however, and an administration proceeding was commenced in England and administrators were appointed. These administrators, who were partners of what is now PricewaterhouseCoopers, took control of the U.S. case and, in a protocol approved by the insolvency courts in both England and the U.S. were recognized as the governance of the debtor and entitled to act as debtor in possession in the United States. The U.S. court had previously appointed an examiner to recommend a way forward and possibly to negotiate a cross-border agreement or protocol. Eventually, the U.S. court and the English court approved similar plans (a plan of reorganization in the U.S. and a scheme of arrangement in England) that paid priority creditors in both jurisdictions and then provided for one distribution to general unsecured creditors, whether in the U.S. or in England.

There are unresolved questions as to the availability in a § 304 proceeding of certain provisions of the Code, such as the power to sell property provided by § 363 of the Bankruptcy Code, the power to reject contracts in § 365, and the power to avoid preferences and fraudulent conveyances in §§ 547 and 548. Chapter 15, if adopted, would answer some of these questions.

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*Dirs. of Multicanal S.A.*, 307 B.R. 384 (Bankr. S.D.N.Y. 2004). A notice of appeal has been filed.

It would automatically grant the foreign representative the right to sell property under § 363 (*see* proposed § 1520(a)(2) and (3)). It would also give the court authority to permit the foreign representative to obtain “any additional relief that may be available to” a U.S. trustee or debtor in possession exercising the powers of a trustee B except for the power to exercise avoidance powers. 11 U.S.C. § 1521(a)(7) (proposed). But the new law would seemingly not interfere with the holding of several § 304 cases that have concluded that even if a foreign representative cannot access the U.S. Bankruptcy Code avoidance powers through § 304, they can sue here to set aside transfers voidable under their own laws. *See Metzeler v. Bouchard Transp., Inc. (In re Metzeler)*, 78 B.R. 674, 679-80 (Bankr. S.D.N.Y. 1987); *Petition of Gross*, 278 B.R. at 560-61, discussed above.<sup>7</sup> In any event, in light of the foregoing authority, it would be wise for a foreign representative who wished to sue under the U.S. avoidance laws to commence a full rather than an ancillary proceeding.<sup>8</sup> *See also In re Axona Int’l Credit & Commerce, Ltd.*, 88 B.R. 597 (Bankr.

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<sup>7</sup> *See also In re Grandote Country Club Company, Ltd.*, 252 F.3d 1146 (10th Cir. 2001), where the trustee of a Japanese entity in bankruptcy brought a § 304 proceeding to set aside, as a fraudulent transfer under Japanese law, a tax sale conveyance of real estate in Colorado. The court did not question that the Japanese trustee could seek to avoid the transfers in question under principles of Japanese law, but it found that Colorado law should apply. (“Most importantly, the fact that the only asset at issue is real property favors application of local law.” 252 F.3d at 1150.) It also concluded, applying Colorado law, that there was no fraudulent transfer of the property by virtue of the issuance of the tax deeds and that the price paid at the tax sale was reasonably equivalent value.

<sup>8</sup> The U.S. avoidance statutes may not apply even in a full Chapter 11 case, however, where choice of law principles and/or comity require the application of foreign law to transactions sought to be avoided. In *In re Maxwell Communication Corp.*, 93 F.3d at 1036, there were joint proceedings pending in the U.S. and the U.K., and the court held that the challenged transfers could not be set aside under U.S. law because they were between a U.K. corporation and U.K. financial institutions and had little or no connection to the United States.

S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991).

Several recent cases illustrate some of the issues that can arise when joint cases are filed in the U.S. and in a foreign jurisdiction. *Underwood v. Hilliard (In re Rimsat)*, 98 F.3d 956 (7th Cir. 1996), involved a corporation formed under the laws of the Federation of St. Christopher and Nevis, a Caribbean nation part of the British commonwealth, to provide satellite communications with nations in the South Pacific. A dissident director and shareholder obtained from the High Court of Nevis (i) an order appointing him receiver and (ii) an injunction against the company filing a bankruptcy case in the United States. Two weeks later, creditors in the United States petitioned the company into an involuntary proceeding under the Bankruptcy Code, and a U.S. trustee was appointed. Thereafter, the receiver had the court in Nevis add to his duties those of adjusting and paying the company=s debts. In litigation between the U.S. trustee and the receiver, the U.S. Court of Appeals found that the U.S. courts did not have to grant comity to the foreign proceeding, particularly as its purpose was “to defeat, the [U.S.] bankruptcy proceeding B strategic conduct that is not to be encouraged.” 98 F.3d at 962. Even more broadly, the court held: “Comity is a doctrine of adjustment, not a mandate for inaction. In the case of parallel inconsistent proceedings in domestic and foreign courts, one must yield; there is no presumption that it is the domestic; and the bankruptcy judge did not abuse his discretion in deciding that the receivership proceeding in Nevis should be the one.” 98 F.3d at 963.

Notwithstanding the Court=s refusal to defer to a foreign proceeding in *Rimsat*, another U.S. Circuit Court of Appeals more recently deferred to the court of a Caribbean nation in *In re Commodore Int’l, Ltd.*, 262 F.3d 96 (2d Cir. 2001). In *Commodore* parallel proceedings were

pending before the Supreme Court of the Bahamas and the New York Bankruptcy Court, and the liquidators in the Bahamas were jointly administering the U.S. case pursuant to a protocol worked out with the U.S. creditors committee. The liquidators initially consented to the committee bringing suit in the United States against the company's former officers and directors, but after the defendants moved to dismiss the suit on grounds of international comity, among others, the liquidators filed suit in the Bahamas and claimed that their suit divested the committee of jurisdiction to continue. The appellate court's decision, affirming the lower courts, turned primarily on a question of U.S. law: When can a committee sue on a debtor's behalf under the Bankruptcy Code? The Court held that the committee could not assert that power under the circumstances of the case. Nevertheless, the court found that it was perhaps of equal (if not greater) moment that, since the Liquidators first consented to the Creditors' Committee's suit, the [Bahamian] Court held that under Bahamian law, the Liquidators erred in so consenting." *Commodore*, 262 F.3d 100 n.3 (citing 231 B.R. 175, 180 (Bankr. S.D.N.Y. 1999)). The U.S. Court of Appeals continued: "given that Commodore's bankruptcy is being jointly administered by both the Bahamian Court and the Bankruptcy Court, we doubt that permitting the Creditors' Committee to proceed on the basis of consent provided in violation of Bahamian law (as interpreted by the Bahamian Court) would be beneficial to the resolution of the joint proceedings." 262 F.3d at 100, n. 3 (citation omitted).

In any case in which parallel proceedings are pending in the courts of two nations, the possibilities of conflict are always present. In several major U.S. cases, agreements have been reached between the parties in control of the two cases: for example, between a trustee or an

administrator in the non-U.S. jurisdiction and the U.S. debtor in possession, or (as in *Commodore*) between (i) the trustees who acted as trustees in the Bahamas and debtor in possession in the United States and (ii) a creditors committee which acted as representative of the creditors in the United States. These agreements, called protocols, may cover many issues, including the governance of the debtor, the scope of authority of the respective representative parties in the various courts, and (within limits) the authority of the respective courts. Protocols have of course been frequently used in cross-border cases involving Canada and the United States, and have become fairly routine. In the recent case involving 360 Networks, the U.S. court declined to enter the protocol as a “first day” order on the ground that the creditors committee should be able to review and provide comments on the order, but it was thereafter entered on notice to the Committee without substantial change. *See In re 360 Networks (USA), Inc.*, Case No. 01-B-13721 (ALG) (Bankr. S.D.N.Y.) (order dated August 29, 2001).

The filing of a concurrent insolvency case in two jurisdictions, nevertheless, always raises the possibility of conflict, and there should always be a sound reason for undertaking such risks. The very recent case of *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V.*, 310 F.3d 118 (3d Cir. 2002), is a good example. In *Lernout & Hauspie*, a company said to be headquartered in both Massachusetts and Belgium found itself in plenary insolvency proceedings in Belgium and the United States. The principal antagonist in the U.S. was a U.S. entity, Stonington Partners, that had sold the debtor most of the stock of a company that became the debtor=s subsidiary. In the United States, Stonington=s claim would be subordinated to the claims of general unsecured creditors under § 510(b) because it was based on rescission of an agreement to buy or sell securities. Belgian law provided for no such subordination and the

Belgian court refused to confirm a plan for the debtor because it subordinated Stonington=s claim.

At the request of the debtor in the United States, the Bankruptcy Court then found that there was a “true conflict” between U.S. law and Belgian law, that U.S. law should have primacy because (among other things) of Stonington=s U.S. nationality and the fact that the securities transaction took place in the United States, and it enjoined Stonington from further prosecution of the issue of the priority and treatment of its claim in the Belgian proceeding under Belgian law. The District Court, on appeal, demonstrated some concern about the evidence supporting injunctive relief, but affirmed. 268 B.R. 395 (D. Del. 2001). The Circuit Court on further appeal reversed, finding that there was insufficient basis for the U.S. court to purport to enjoin creditors from protecting their interest in connection with a valid foreign proceeding. Rather than direct specific relief, however, the Court remanded and recommended that the Bankruptcy Court and the Belgian Court confer on a way to proceed cooperatively.<sup>9</sup>

A further chapter in the *Lernout & Hauspie* case played out on remand when the Delaware court considered confirmation of the U.S. plan. *In re Lernout & Hauspie Speech Products, N.V.*, 301 B.R. 651 (Bankr. D. Del. 2003), *aff'd*, 2004 WL 728172 (D. Del. 2004). It proved impossible to effect any court-to-court communication, as the U.S. Court of Appeals had contemplated; the Belgian curators appointed to oversee the proceedings there advised debtor’s counsel and the committee in the U.S. “unequivocally this will not work.” Separate plans were

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<sup>9</sup> None of the U.S. courts in *Lernout & Hauspie* considered the implications of § 508 of the Bankruptcy Code, which contemplates that a creditor=s recovery may be different in parallel proceedings pending in two jurisdictions and provides principles to equalize them in the U.S. distribution.

then proposed in the U.S. and in Belgium. Both plans provided that creditors could participate in both cases; if creditors filed in the Chapter 11 case, the claim would be treated under the Bankruptcy Code; if they filed in the Belgian case, the claim would be treated under Belgian law. But the bulk of the assets from sales were held in the U.S., with only a fraction in Belgium, and there was testimony at the confirmation hearing that a fair allocation of proceeds between the estates, based on (among other things) location of operations, would allocate more than three-fourths of the proceeds to the United States. The Bankruptcy Court confirmed a plan that proposed to pay over from the U.S. to the Belgian estate an amount so as to provide the Belgian estate with somewhat more than one-fourth of all funds, a sum that had been increased in order to cover the very large priority claims in Belgium (including tax and employee claims that were required to be paid under Belgian law). The U.S. case then proceeded to distribute the remaining proceeds under U.S. law. The result was once again entirely negative for Stonington: it was subordinated to general unsecured claims under U.S. law and recovered nothing in the Chapter 11 plan; in Belgium, where it was not subordinated, only priority creditors could be paid and the unsecured creditor class, with Stonington participating, received nothing. Stonington's appeal, premised on the alleged bad faith of the Debtor, failed in the District Court.

The provision of the Bankruptcy Code, subordinating claims relating to the purchase or sale of securities, at issue in *Lernout & Hauspie*, was also the subject of contention in the insolvency proceedings involving Philip Services, one of a group of companies headquartered in Canada but with probably a majority of its business in the United States. Most of the subsidiaries filed only in one jurisdiction, but the top companies in the corporate chain filed both in Delaware and Ontario. Certain Canadian creditors objected to the adoption by the Canadian court of a

plan, proposed for adoption in Delaware, that would subordinate their claims in accordance with U.S., but not Canadian law. Justice Blair of the Ontario Superior Court stated:

The extension of comity as between Courts in cross-border insolvency situations, and cooperation generally in such matters, are matters of great importance, to be sure, in order to facilitate the successful and orderly implementation of insolvency arrangements in such circumstances. Nothing I have said in these Reasons is intended to counter that ethic. However, comity and international co-operation do not mean that one Court must cede its authority and jurisdiction over its own process or over the application of the substantive laws of its own jurisdiction, whenever any kind of differences between the two jurisdictions may arise.

*Menegon v. Philip Services Corp.*, 11 C.B.R. (4th) 262, 39 C.P.C. (4th) 287 (Ontario Super. Ct. 1999) at 48. The Court concluded that the Canadian Plan was flawed because it sought to exclude Canadian claimants from participation by providing that their claims against the debtor would be governed by the U.S. plan and U.S. law, without even affording the claimants the right to vote.

In contrast to *Philip Services*, there have been many cases where cooperation between the U.S. and foreign courts has resulted in an effective and efficient reorganization. A well-known example is the case of *In re Maxwell Communication Corp.*, described above. One of the best known and earliest cases showed the way by the adoption of a protocol that provided a basis for cross border cooperation between the estates and the courts. *See In re Everfresh Beverages, Inc.*, No. 32-077978 (Ont. Gen. Div.), which was pending before Mr. Justice Farley in Toronto and Judge Gallet in New York City (Nos. 95-B-45405-06) (Bankr. S.D.N.Y. 1995). Ultimately a

single distribution to creditors from both estates was worked out. The position of the secured creditors was stronger in Canada, as a general security agreement covered all of the company's Canadian assets, but the company ultimately adopted and the creditors accepted by a wide vote a reorganizational plan in Canada that provided that Canadian creditors would accept a proportionate share of the distribution available in the United States. *See* analysis in Leonard, *The International Scene: The Increasing International Cooperation in Cross-border Cases*, 1999 ABI J. LEXIS 40 (1999).

More recent cases indicate that cross-border cooperation and joint hearings are becoming almost routine. In the insolvency of *Solv-Ex Corporation*, courts in Albuquerque, New Mexico, in the United States and Calgary, Alberta in Canada approved a protocol whereby both courts held joint hearings to approve a sale of assets. *See* discussion in Dargan, *The Emergence of Mechanisms for Cross-Border Insolvencies in Canadian Law*, 17 CONN. J. INTL. L. 107, 122 (2001). More recently, in the joint case of *Livent, Inc.*, which operated theatres in Canada and the United States, the two courts held a hearing by closed-circuit satellite television regarding the sale of assets in both nations to a single purchaser, and entered complementary orders approving the sale. *Id.* at 122-23.

In a few cases the U.S. courts have avoided conflict by dismissing the U.S. case. In *In re Ionica PLC*, 241 B.R. 829 (Bankr. S.D.N.Y. 1999), joint administrators appointed by an English Court filed a proceeding in the U.S. for the sole purpose of asserting claims of equitable subordination and substantive consolidation, remedies unavailable under English law. The debtor company had raised money in the United States, but its only U.S. assets were pledged to an indenture trustee for bondholders. The *Ionica* court held that in light of the nature of the

company=s assets in the U.S., the fact that English law was consistent with American concepts of fairness and due process, and the specific circumstances present, it would grant comity to the English proceeding and let the matter proceed exclusively in the English court. The court acted pursuant to § 305 of the Bankruptcy Code, which specifically permits the court to suspend or dismiss proceedings in a case if a Aforeign proceeding@ is pending and the factors set forth in § 304(c) of the Code, quoted above, Awarrant such dismissal or suspension.@ More recently, in *In re Cenargo Int'l, PLC*, 294 B.R. 571 (Bankr. S.D.N.Y. 2003), an English shipping company filed under Chapter 11 in the United States in part to counter a likely involuntary filing by U.S. noteholders. The company was later placed into administration proceedings in England by a principal creditor who had earlier participated in the U.S. case. Although the reported decision principally involved the question whether the creditor had thereby violated the American stay, the court noted that the proper venue for the case was the United Kingdom, the place of its main business and the only jurisdiction with effective control over its assets and most of its creditors, and the jurisdiction that, most parties agreed, would most efficiently and effectively be able to reorganize its affairs. The court accordingly held against the U.S. creditors committee, which filed the one remaining objection to abstention, and suspended proceedings under § 305(a)(2) of the Bankruptcy Code.

A well-known case where joint proceedings were filed in both the United States and Japan involved Maruko, Inc., which was in the business of developing commercial properties throughout the world. *See In re Maruko, Inc.*, 200 B.R. 876 (Bankr. S.D. Cal. 1996). Maruko commenced a reorganization case in August 1991 in Japan with respect to its properties there, and a Chapter 11 case in the United States two months later with respect to its properties in the

U.S. and the rest of the world. Difficult and contentious issues arose as to the coordination of the two proceedings, including the treatment in the United States plan of certain Japanese creditors against whom Maruko apparently had asserted claims in Japan. Although the opinion of the U.S. Bankruptcy Court dealt primarily with the construction of Maruko's plan, the facts illustrate the problems that often arise when the same entity files concurrent proceedings in two jurisdictions.

Joint proceedings involving the same entity brought in more than one jurisdiction have been relatively rare. They have been used in the past in filings by Canadian and U.S. debtors doing business in both jurisdictions, where it has been necessary to obtain a stay of creditor action in both countries. However, the U.S. courts now commonly recognize and grant comity to Canadian proceedings and stay actions taken in the United States in derogation of an insolvency filing in Canada. *See, e.g., Badalament, Inc. v. Mel-O-Ripe Banana Brands, Ltd.*, 265 B.R. 732, 736-38 (E.D. Mich. 2001)(recognizing the Canadian stay and stating, "courts have consistently extended comity to Canadian bankruptcy proceedings."); *Banyan Licensing, Inc. v. Orthosupport Int'l, Inc.*, 2002 U.S. Dist. LEXIS 17341 (N.D. Ohio 2002)("American courts routinely extend comity to the actions and judgments of Canadian bankruptcy courts on the basis that creditors, including American creditors, will be treated fairly and with due process."); *see also United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F.Supp.2d 198 (S.D.N.Y. 2002), where syndicators of newspaper features brought a diversity action against a marketing agent and two of its officers, alleging conversion of funds; the action was discontinued against the corporation as a consequence of its bankruptcy filing in Canada and certain of the claims against the individuals were dismissed for reasons of pleading under U.S. law, but the motion to have the court decline jurisdiction altogether in the interests of international comity

was generally denied.

“Foreign” Proceedings Filed only in the United States.

Where a foreign proceeding is not pending, however, even a minuscule amount of U.S. property may be sufficient to sustain jurisdiction in the U.S. courts under § 109 of the Bankruptcy Code, which requires that an entity filing a bankruptcy petition in the U.S. reside, have a domicile or a place of business in the U.S., or have Aproperty in the United States.@ In *In re Global Ocean Carriers, Ltd.*, 251 B.R. 31 (Bankr. D. Del. 2000), a shipping company headquartered in Greece and 15 of its subsidiaries, some located in Singapore and some having borrowed or guaranteed loans from Hong Kong banks, filed petitions in Delaware. The bulk of the creditors were U.S. noteholders, and they apparently supported jurisdiction in the U.S. In overruling a motion to dismiss for lack of jurisdiction brought by a small creditor and minority shareholders, the U.S. court held that a few thousand dollars in a bank account was a sufficient predicate for U.S. jurisdiction, notwithstanding that the debtor had removed more than \$4 million from an account in the U.S. to Greece shortly before defaulting on the notes. *See also In re Iglesias*, 226 B.R. 721, 722-23 (Bankr. S.D. Fla. 1998), which held that an Argentinian citizen who had a bank account of about \$500 in Florida could file a bankruptcy case there because he had “property” in the United States. Nevertheless, there is ample power under the Bankruptcy Code to dismiss procedurally where the U.S. presence of the debtor is too tenuous or is sought for ulterior purposes and a U.S. proceeding creates unfairness or hardship on creditors. In *In re Head*, 223 B.R. 648 (Bankr. W.D.N.Y. 1998), the Court dismissed as filed in bad faith petitions by debtors residing in Canada, where there was virtually no nexus to the United States and the debtors were principally attempting to avoid contractual liability to Lloyd’s of London.

*In re Aerovias Nacionales de Colombia S.A. Avianca*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003), involved Chapter 11 filings by the principal airline of the Republic of Colombia and its wholly-owned U.S. subsidiary. U.S. creditors moved to dismiss the cases under §§ 305 and 1112(b) of the Bankruptcy Code, contending that the U.S. court should not hear a case involving an enterprise that had not filed a proceeding in its “home jurisdiction” but had its principal place of business, as well as a majority of its employees and creditors, abroad. The court found that Avianca had substantial property in the U.S., making it clearly eligible for relief here under § 109, and that the presence in this country of the lessors of virtually all of its aircraft made a U.S. filing a virtual necessity. It also concluded that the presence in the U.S. of these important creditors, as well as the willingness of the airline’s major Colombian creditors to participate in and respect the U.S. proceedings, made reorganization in the U.S. a reasonable possibility. The Court accordingly concluded that there were not grounds to dismiss or suspend the case under § 305 and that it was premature to consider relief under § 1112(b) of the Bankruptcy Code. It also declined to support a principle expounded by the movants that the U.S. court should require a foreign debtor to file in its “home court” and then proceed here under § 304, finding that § 304 was never intended to be an exclusive remedy, that the debtor had provided convincing reasons why it had not filed in Colombia and that it could do so if necessary at a later date.

Concurrent Proceedings Brought by Affiliates.

As noted above, joint proceedings brought in multiple jurisdictions by the same entities are becoming relatively rare. Much more common are filings by affiliated companies in their respective jurisdictions. There may be a U.S. parent corporation, and its U.S. subsidiaries that file in the U.S., and foreign subsidiaries that file in the foreign jurisdiction; or a foreign parent

and its foreign subsidiaries that file abroad, with the U.S. subsidiaries filing in the United States. Two recent cases involving such filings are *In re 360 Networks (USA), Inc., et al.*, Case No. 01-B-13721 (ALG) (Bankr. S.D.N.Y.), where 22 U.S. members of a corporate group headquartered in Canada filed in the United States, the Canadian members of the group filed in British Columbia and one holding company filed jointly; and *In re Loews Cineplex Entertainment, et al.*, Case No. 01-B-40346 (ALG) (Bankr. S.D.N.Y.), where approximately 237 members of a corporate group headquartered in the United States filed in New York and six Canadian affiliates filed in Ontario. In both cases there were very few companies in joint proceedings, relatively little cross border involvement came before the U.S. court, and most of the activity in the U.S. cases proceeded primarily in accordance with U.S. law. The Plans in the U.S. and Canada were, however, coordinated and both companies reorganized as a group.

The most common issue to arise where members of a corporate group file in their respective jurisdictions of incorporation involves the cash flow of the enterprise. Prior to the filing, the group may have been funded from one central bank account or source of funds, and the joint business may require the international flow of funds to continue. In a U.S. case, the issue of cash flow will likely arise on the first day of the case, when the debtor often seeks a first day order from the court permitting the maintenance of its prior cash management system. A court will likely be more willing to permit the debtor to transmit funds to subsidiaries in bankruptcy proceedings pending in its own court than to permit the U.S. company to fund debtors in foreign proceedings. Another issue involves intercompany claims and financing that prior to the petition may have been provided on a company-wide basis, disregarding international borders. Can that financing scheme be continued? What provisions, if any, should be

established with respect to the governance of U.S. subsidiaries, where the parent is in a separate proceeding in a foreign nation? Are claims or causes of action available that should be pursued by the U.S. company against the parent, or vice versa? The recent U.S. case of *In re RSL COM U.S.A., Inc. and RSL COM Primecall, Inc.*, Case No. 01-B-11457 (ALG) (Bankr. S.D.N.Y.), involved the U.S. subsidiaries of a U.K. company (in arrangement proceedings in England), which was itself the subsidiary of a parent in insolvency proceedings in the Bahamas. Before the filing, the U.S. board was reconstituted to contain only independent directors, and the U.S. company functioned independently as the debtor in possession, seeking discovery from the U.K. parent and the Bermuda “grandparent.” The Bermuda company also had property in the United States, and it brought a separate § 304 proceeding through separate counsel in order to pursue its interests.

A frequent issue is whether U.S. debtors may be substantively consolidated with foreign affiliates. According to a recent article, there have been more than 20 cases in Canada in which consolidation orders have been entered. Ziegel, *Corporate Groups and Cross-Border Insolvencies: A Canada-United States Perspective*, 7 *FORDHAM J. CORP. & FIN. L.* 367, 383 (2002). In the well-known case involving the Bramlea group of companies, the Canadian court approved (without objection) a prepackaged plan of arrangement under the CCAA that consolidated U.S. creditors with Canadian creditors, pooled all funds, consolidated all corporations into one proceeding and made a single order imposing a global stay of proceedings. *Id.* at 384-86. The U.S. plan of reorganization in the cases involving Loews Theatres substantively consolidated 236 U.S. companies and provided for one distribution to creditors of the U.S. parent and for one single distribution to creditors of all subsidiaries, eliminating all

guarantees. The six Canadian affiliates were not consolidated, but the U.S. plan provided that a creditor could not recover anything in the U.S. if it received a distribution in the Canadian cases in respect of the same debt. The provision was not objected to. *See* First Amended Plan of Reorganization for Loews Cineplex Entertainment, *et al.*, dated January 14, 2002, at section 11.9.

There are relatively few reported decisions involving inter-company claims, although such claims are frequently dealt with in U.S. plans of reorganization, very often by eliminating them. In *360 Networks*, mentioned above, the U.S. plan wrote off more than \$3 billion of intercompany claims. Recently, in *In re ABC-NACO, Inc.*, 294 B.R. 832 (Bankr. N.D. Ill. 2003), the court considered the allowability of a claim filed by the receiver of a wholly-owned Canadian subsidiary of one of the debtors. The debtors opposed the request and sought to offset the payment with amounts the subsidiary owed to the debtor. The court determined on a preliminary basis that the receiver had standing to assert the claim on an administrative basis and that the claim should be determined by the court.

#### Effect on Foreign Creditors of U.S. Bankruptcy Cases.

It should go without saying that foreign creditors and parties in interest can appear in U.S. bankruptcy cases without being discriminated against. Indeed, until recently, foreign creditors had in some cases received preferred treatment. For example, in cases involving shipping companies (such as U.S. Lines and Waterman Steamship) and airlines (such as Pan Am and Continental), where assets of the U.S. debtor were sailing or flying to foreign jurisdictions, the debtors received permission from the Bankruptcy Court to pay some or all of its foreign creditors, so that its assets would not be seized abroad. *See, e.g., In re Pan American Corp.*, 91-B-10080 through 91-B-010087 (CB) (Bankr. S.D.N.Y.) (Order dated Jan. 8, 1991); *In re*

*Avianca*, 303 B.R. at 6.<sup>10</sup>

On the other hand, the principle that foreign creditors are not discriminated against was the subject of litigation in a recent mass tort insolvency. *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002), *cert. denied*, 537 U.S. 816 (2002), involved thousands of tort claims arising out of the debtor=s sale of material for breast implants. After years of negotiations among tort claimants, commercial creditors and others, a third proposed plan of reorganization was presented to the Bankruptcy Court for confirmation. The plan provided that foreign creditors would receive a smaller distribution per injury from a \$2.35 billion fund than American creditors, on the basis of evidence that foreign tort plaintiffs routinely receive a smaller average recovery in

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<sup>10</sup> The recent decision of the Seventh Circuit in *In re Kmart Corp.*, 359 F.3d 866, 869 (7th Cir. 2004), stated in passing that it would treat the Bankruptcy Court’s “first-day” order authorizing immediate satisfaction of the prepetition claims of international vendors in the same fashion as the more general domestic “critical vendors” order. But there is no indication that the parties brought to the Court’s attention the particular issues raised by the existence of foreign creditors. In any event, the Court’s decision leaves open the possibility of specific findings under § 363(b) that would justify a critical vendors order, and it could be argued that such findings would be more easily made with respect to foreign vendors than domestic vendors.

their courts than U.S. plaintiffs receive in the U.S. Both U.S. and foreign creditors could refuse the settlement and demand a trial of their case, but if they accepted the settlement, the amount differed. In a very recent decision, the U.S. Court of Appeals for the Sixth Circuit affirmed the part of the plan that provided for disparate recoveries. It found that the Bankruptcy Court had Abroad discretion to determine proper classification according to the factual circumstances of each individual case<sup>6</sup> and that the decision was supported by substantial evidence justifying separate treatment of foreign and U.S. creditors. *Id.* at 661.

A separate issue is whether a lawsuit can be filed in U.S. Bankruptcy Court against a foreign entity—for example, on a preference claim. In *Liebmann v. French (In re French)*, 303 B.R. 774 (Bankr. D. Md. 2003), the debtor transferred property located in the Bahamas to her son for no consideration within 12 months of her Chapter 7 petition. She argued that the fraudulent transfer provisions of the Bankruptcy Code could not apply to property located outside the U.S., citing principles of international comity and the presumption that U.S. legislation does not apply abroad, which the Bankruptcy and District Courts had relied on in the *Maxwell* case (along with comity) to hold that U.S. law would not be applied to allegedly preferential transfers that took place in England between an English corporation and English banks. *In re Maxwell Communication Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd* 186 B.R. 807 (S.D.N.Y. 1995), *aff'd* [only on comity grounds], 93 F.3d 1036 (2d Cir. 1996). The Court in *In re French* held that Congress intended that the provisions of the Bankruptcy Code relevant there would be applied abroad, that such application was appropriate in the instant situation and that the U.S. court had “primary jurisdiction” in any event because there was no insolvency proceeding involving the property pending in the Bahamas. *See also Interbulk, Ltd. v. Louis Dreyfus Corp.*

*(In re Interbulk, Ltd.)*, 240 B.R. 195 (Bankr. S.D.N.Y. 1999).

Whether the U.S. court can exercise personal jurisdiction over a foreign creditor defendant depends upon that defendant=s level of contact with the debtor and the effect of its actions on the debtor=s estate. In *Williams v. Law Society of Hong Kong (In re Williams)*, 264 B.R. 234, 242 (Bankr. D. Conn. 2001), for example, a Hong Kong entity that had mailed a debtor (and former partner of the firm) a demand for payment, at a location in the United States to which he relocated from Hong Kong, did not have sufficient minimum contacts with the United States to be subject to the personal jurisdiction of the court in an adversary proceeding. On the other hand, foreign products liability claimants who had not filed proofs of claim and had not chosen to participate in the debtor=s plan confirmation process were, nevertheless, found to be subject to the bankruptcy court=s personal jurisdiction and the channeling injunction entered upon confirmation of the plan, by virtue of their commencement of litigation in Canada against the debtor which threatened to have a significant impact on the debtor=s U.S. estate. *In re Chile Power Supply Co.*, 264 B.R. 533 (Bankr. W.D. Mo. 2001) (AI need only find that the Defendants performed an act in Canada that has an effect on [the Debtor] in the United States in order to find that the Defendants are personally subject to the jurisdiction of this Court.@).

A recent decision regarding the extraterritorial effect of the automatic stay involved the Chapter 11 proceedings of Paolo Gucci, who apparently owned the Gucci store in Rome. *In re Gucci*, 2004 U.S. Dist. LEXIS 7972 (S.D.N.Y. 2004). During the Chapter 11 case a creditor obtained an arbitral award in Switzerland against Gucci, domesticated the award in Italy, and obtained a lien against the store in Rome. The District Court affirmed an order of the Bankruptcy

Court finding that the Bankruptcy Court had jurisdiction, that the judicial procedures in Switzerland and Italy were taken in violation of the automatic stay and that principles of international comity did not require abstention or recognition in the United States of the actions of the Italian court in granting the lien. The Court did, however, remand for a determination whether Gucci's Chapter 11 trustee was guilty of laches in permitting the arbitration proceeding to continue without any effort to intervene or stop it.

Mareva Injunction Not Available in the U.S. Federal Courts or in the Courts of New York State.

Finally, it should be noted that both the U.S. Supreme Court in *Grupo Mexicano de Desarrollo S.A., v. Alliance Bond Fund Inc.*, 527 U.S. 308 (1999), and the highest court in New York State, in *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y. 2d 541, 729 N.E.2d 683, 708 N.Y.S. 2d 26 (2000), both recently held that an unsecured creditor suing to collect a debt in the U.S. is not entitled to preliminary injunctive relief to prevent the debtor's dissipation of assets prior to judgment. The fact that the defendant in *Grupo Mexicano* had issued debt to U.S. creditors, had agreed to U.S. jurisdiction and was allegedly dissipating its most significant asset while preferring its Mexican creditors was insufficient, according to the Supreme Court, to justify the use of an implied remedy akin to the *Mareva* injunction available under English law. 527 U.S. at 330-33. Both the Supreme Court and the highest New York Court held that it was for the legislature to create such a remedy. *Grupo Mexicano*, 527 U.S. at 333; 94 N.Y. 2d at 551. The New York Court held, A widespread use of this remedy would drastically unbalance existing creditors' and debtors' rights under the present Federal and State statutory and decisional schemes, and substantially interfere with the sovereignty and debtor/creditor/bankruptcy laws of,

and the rights of interested domiciliaries in, foreign countries.@ *Id.* Ironically, the same entity that successfully avoided the imposition of a Mareva injunction in the New York case became the first Russian entity to obtain recognition, under § 304, of a Russian insolvency proceeding. *See In re Petition of the “Agency for Restructuring of Credit Organizations,” as Foreign Representative of Rossiyskiy Kredit Bank*, Case No. 00-13504 (Bankr. S.D.N.Y.) (Permanent Injunction and Order Pursuant to 11 U.S.C. § 304, entered October 11, 2000).

Although the remedy of a Mareva injunction may not be available, a debtor in a bankruptcy case in the U.S. may be compelled to repatriate funds held in a foreign trust, and a debtor or its representative can be imprisoned for contempt for failure to obey the court=s order. *See In re Lawrence*, 279 F.3d 1294 (11th Cir. 2002), citing cases in which the courts imprisoned individuals for long periods to attempt to coerce them to repatriate funds.

### Conclusion

While the developments of the recent past in international insolvency law are striking, the law is still developing and will continue to develop. Experience in the United States may be useful in the effort to bridge the differences between systems, improve communication and understanding regarding the practices of different countries and, ultimately, better the administration of cross-border insolvency proceedings.

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