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Beneath the Surface of BAPCPA Article

*503 CHAPTER 15 AND DISCHARGE

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INTRODUCTION

The assignment in this issue of the American Bankruptcy Institute Law Review is to follow the recent adoption of chapter 15 of the Bankruptcy Code with a discussion of some issue related to its provisions that has not been much discussed until now. In this article, we will address a complex issue that has not been addressed in section 304 or chapter 15: recognition in the United States of a foreign discharge. Before the corporate lawyers turn to the next article, let me emphasize that this article is primarily about the corporate discharge in a reorganization case. True reorganization cases have recently become the second wave of multinational filings under section 304 and will swell in number under chapter 15. [FN1] The chapter 11 discharge, and its equivalent in other jurisdictions, is at the core of the reorganization process. Thus, the cross-border effect of the discharge is a question of rising importance for both individual debtors and reorganized companies. Because we have no appellate authority concerning individual discharge, [FN2] the corporate discharge is the central subject of this article. We will first consider the present state of United States law as to recognition of foreign discharges and then list and briefly consider a whole series of questions that remain to be addressed, an agenda for research.

Neither section 304, which has been repealed by the 2005 amendments, nor our new chapter 15 addresses these issues. [FN3] Section 304 was a breakthrough when it was adopted in 1978, putting the United States among the most advanced countries in the world in providing deference toward foreign proceedings and active *504 cooperation with those proceedings. [FN4] Chapter 15 is an advance on that process for several reasons, including the fact that it drops the section 304(c) requirements for cooperative relief and the fact that it conforms American law to that of the other countries adopting a statute based on the Model Law on Cross-Border Insolvency. [FN5] But many more steps remain before we have a sensible, efficient regime for bankruptcy law in a globalizing world. Among the important issues not addressed by either section 304 or chapter 15 is the extent to which a discharge in Country A will be given effect in Country B, although some of the provisions of chapter 15

cast light on the problem. Here we focus primarily on the effect the United States courts will give to a discharge or equivalent relief rendered in a foreign court which has jurisdiction of the "main" proceeding involving a particular debtor. [FN6] The only source of American authority at present is found in the Principles promulgated by the American Law Institute ("ALI"). [FN7]

This article offers many more questions than it answers. My defenses are the tight scheduling for this issue of the Law Review and the fact that a lack of authority makes it foolhardy to go too far without more litigated cases. I try here to set the table for consideration of these problems, to provide useful background, and to begin to frame an analysis that carries us beyond the first stage that has been achieved in the ALI Principles.

I. EXISTING LAW

A. U.S. Recognition of Foreign Discharges

It must be said that there is little authority in the United States or elsewhere as to the effect in the United States of a foreign bankruptcy discharge. One reason is that discharge for natural persons was a form of relief limited to very few countries ***505** until very recently. [FN8] Similarly, reorganization in the modern sense [FN9] is a relatively new idea, not found in most countries before the Nineties, [FN10] so few corporate discharges have been granted elsewhere. [FN11] There are only a handful of arguably relevant cases in United States jurisprudence. There are no modern cases involving the discharge of individuals by foreign courts and only a few concerning corporate debtors. The discussion that follows describes the available authorities.

In any system that contemplates restructuring of debts and continuation of a business as a going concern, it is necessary to recapitalize the assets of the business. In practice, recapitalization almost certainly includes insulating the assets from the pre-existing liabilities of the debtor, whether or not those liabilities are considered converted into new obligations going forward. No purchaser, new investor, or credit granter (for example, a lender or supplier) is likely to advance new value unless the business upon exiting the reorganization procedure has sharply defined financial obligations and is protected from any other obligations that arose prior to the recapitalization. Only in that way can those providing new value be able to evaluate the prospects of the business and the risk of their making advances to it.

The process of insulating assets from prior liabilities can be achieved in a number of ways. The three most common are discharge of prior debts, abatement of prior debts under a reorganization contract, and a sale free and clear of liens and other liabilities. The third method is highly interesting and employed in a number of countries, including the United States, [FN12] but discussion of the cross-border effect of such sales exceeds the territory I can cover in this article. [FN13] The first and second methods are variations on a single theme. I generally mean to include both when I ***506** use the word "discharge," although we will also consider the important differences between them.

Upon confirmation of a corporate chapter 11 plan, section 1141 of the Bankruptcy Code discharges all debts except certain tax debts. [FN14] Because "debt" is defined as "liability on a claim" [FN15] and "claim" is defined very broadly, the effect of this discharge is sweeping. [FN16] As a matter of due process, caselaw adds an exception for creditors who did not receive notice of the proceeding or did not have a meaningful opportunity to participate. [FN17] With those exceptions, a

purchaser, investor, or lender to an emerging chapter 11 debtor can be highly confident that the debtor will have no financial obligations remaining from its troubled past beyond those set forth in its reorganization plan.

An abatement approach is followed in some countries, notably Canada under the Bankruptcy and Insolvency Act ("BIA"). The results are substantially similar to ours because an approved plan is treated as an enforceable contract, even against those who dissented from adoption of the plan. [FN18] The major difference between the American discharge and the Canadian approach results from the latter's conceptualization of the plan in contract terms. A failure of performance under a BIA reorganization plan may cause the original debts to revive, [FN19] while the chapter 11 discharge eliminates the debts regardless of performance under the plan. [FN20] Under both systems, however, a company that performs under its reorganization plan will ***507** have put its prior debts behind it. Therefore, both approaches raise similar issues concerning recognition and enforcement in other jurisdictions. [FN21]

The reorganization discharge will block enforcement of pre-bankruptcy debts in the country in which the discharge was granted. For example, in the United States section 524 of the Bankruptcy Code imposes a statutory injunction that effectively forbids even an attempt to enforce such pre-bankruptcy obligations, a prohibition enforceable by contempt proceedings. When the reorganized debtor is a multinational company (or the assets being sold are found in multiple countries), it becomes crucial to know if similar protection will be available in the other jurisdictions in which the business operates. That point was made by the United States Supreme Court in the most important of the American cases, Canada Southern Ry. Co. v. Gebhard. [FN22]

> Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character legalized at home, should be recognized in other countries. [FN23]

Gebhard involved Canadian railroad bonds held by citizens of New York and payable in New York City. The railroad defaulted, so a committee of stakeholders proposed a scheme of arrangement that offered new bonds with reduced terms, but with the addition of a guarantee from a United States railroad. The scheme was approved by large majorities of the holders of each issue of bonds and was thereafter enacted into law by the Canadian Parliament. The New York bondholders sued on their original bonds in New York and the company defended by asserting that the scheme of arrangement had redefined its obligations and was binding upon the Americans as well. The United States Supreme Court validated the defense with only Justice Harlan dissenting. [FN24]

***508** At the heart of the court's decision was the idea that persons who buy the securities of a foreign corporation should know they are subject to that corporation's laws in a number of respects. Although the United States had no national bankruptcy laws at the time, [FN25] the Court explicitly wrote in terms of a bankruptcy discharge, saying "anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere." [FN26] As the earlier quotation suggests, two key points justified the result. First, practical necessity required some mechanism for binding holdouts and that necessity transcended national borders. Second, parties entering into these international transactions should expect and understand that

they were not lending money to the corner grocer, so to speak. Thus, their reasonable expectations should include the possibility that the laws of the issuer's home country might affect their legal rights. [FN27]

If Gebhard had been decided in 1983 rather than 100 years earlier, one could say with complete confidence that the United States will recognize and enforce a discharge granted in a debtor corporation's home country, with some caveats of the sort that usually attend recognition of foreign judgments. [FN28] Even though it is long in the tooth, it represents potent authority for the idea that the United States is well inclined to enforce a foreign home-country discharge in a reorganization case.

The closest that the United States courts have come to this issue in more recent years are two foreign insurance-company cases and a proceeding involving an Argentinian cable company. The two insurance cases were Allstate Insurance Co. v. Hughes [FN29] and In re Board of Directors of Hopewell International Insurance Ltd. [FN30] In both cases, a British insurance group had obtained approval for a scheme of arrangement [FN31] in both the United Kingdom and Bermuda, the home countries for the ***509** companies in the group. [FN32] In each, a creditor had certain claims against the group companies and those claims were subject to arbitration under their contracts with the debtor. [FN33] The scheme of arrangement imposed special requirements on the claimants, including a provision that forced them to follow certain procedures that varied the arbitration rights they had in their original contracts. [FN34] The liquidators applied for enforcement of the schemes in the United States, including injunctive provisions barring any arbitration against the group companies except as provided in the scheme. [FN35] Allstate had voted against the scheme in its case, [FN36] while there was a dispute as to whether the objecting creditor in Hopewell had voted in favor of the scheme or had abstained. [FN37] The bankruptcy court in each case issued the requested injunction against conduct of arbitration as contemplated in the original contract. [FN38]

In Allstate, the district court affirmed, holding that the bankruptcy court injunction did not impermissively conflict with the Federal Arbitration Act's mandate that arbitration agreements be enforced. [FN39] Unlike Gebhard, the opinion rests entirely on comparisons between the procedure under the scheme and procedures in United States bankruptcy cases. Concluding that the two systems were similar in their requirements, the court found no basis for refusing to enforce the procedural limitations imposed on Allstate. Although the court did not speak in terms of "discharge," its order must be understood to be the equivalent of the recognition and enforcement of a discharge, albeit on a limited scale, because the injunction significantly limited the procedural rights ordinarily available to Allstate under United States law. Yet the court did not even cite Gebhard.

***510** The second opinion, by Chief Judge Brozman in Hopewell, is more cogent and more helpful. The court cited Gebhard and rested its grant of enforcement of the scheme in the United States on two grounds: necessity and counterparty acquiescence. It enforced the foreign arrangement because such enforcement is necessary if reorganization plans of that sort are to be successful. Implicit in the opinion is the premise explicit in Gebhard, that the success of such procedures is an important goal, commanding respect and deference in other jurisdictions. Judge Brozman also emphasized that the objectant was actively involved in the foreign proceedings and was seeking now to undo what it had previously accepted. [FN40] Finally, like the court in Allstate, she had the advantage denied to the Gebhard judges of comparing the scheme to a United States reorganization, making it difficult to argue that it violated public policy or imposed strange foreign ways upon an innocent American corporation abroad.

The most recent case involves an Argentinian proceeding called an "APE," [FN41] which the court noted is much like a United States pre-pack, involving a privately negotiated reorganization followed by judicial confirmation. [FN42] In In re Board of Directors of Multicanal, the bankruptcy court went through a careful analysis of the fairness of the Argentinian proceeding in light of some of the requirements of section 304 [FN43] and then issued an order permanently enjoining "all creditors of Multicanal from taking any actions in the United States, which includes suits or proceedings in any forum, which would impede administration of the APE." [FN44] The district court affirmed in all respects, except as to a concern that the APE would ***511** discriminate against United States noteholders. [FN45] The discrimination claim related to approval of the distribution to the United States parties under certain technical requirements of our securities laws. The case was remanded for further exploration of this United States law problem, but the overall result was to approve the bankruptcy court's injunctive order.

Once again, it would be hard to distinguish the Multicanal injunction from the section 524 discharge injunction, so we must conclude that it effectively granted a discharge. Yet both courts spoke entirely in terms of section 304 relief without ever mentioning the word discharge. In effect, they assumed that a case entitled to relief under section 304 could be entitled to discharge enforcement, but then proceeded to use the section 304 caselaw to determine if the foreign reorganization was worthy of enforcement (discharge) in the United States. [FN46]

Although chapter 15 grants some relief automatically, [FN47] the enforcement of a foreign discharge will be governed by the court's discretion as it was under section 304. [FN48] Unlike section 304, however, chapter 15 has no specific factor list comparable to section 304(c). Instead, the court's discretion is constrained by the requirement that creditors (including but not limited to United States creditors) were "sufficiently protected" in the foreign proceeding. [FN49] On that basis, it seems likely that the section 304 cases just discussed will be general guides to the exercise of discretion in enforcing discharges under chapter 15, but probably no more than that.

These cases represent all the reported United States decisions concerning the corporate discharge. [FN50] It is important to note that each of them involved what ***512** chapter 15 and the EU Insolvency Regulation [FN51] call a "main" proceeding, which is a proceeding brought in the debtor's home jurisdiction, where is located its center of main interests ("COMI"). [FN52]

B. Outbound Comparisons

Given the paucity of authority dealing with United States enforcement of foreign discharges, it is useful to turn the telescope around and peer at our enforcement of our discharge as to conduct outside the United States. The Golden Rule is a way to test United States international-law doctrine, checking to see how far we are prepared to go in expanding the impact of our own rules abroad. If we claim a certain global effect for our discharges, we should presumably feel a bit awkward in denying those effects to discharges granted by other legal systems, if those systems meet our usual standards of fairness. [FN53]

Two cases have dealt with the impact of a United States discharge on a creditor's subsequent conduct outside the United States. Both found personal jurisdiction over the creditor by virtue of its participation in the United States bankruptcy case. One involved an individual debtor following a liquidation in

chapter 7. [FN54] The other was part of an opinion approving the enforcement provisions of a chapter 11 plan of reorganization. [FN55] In both cases, the court held that a discharge injunction binds a creditor subject to the personal jurisdiction of the bankruptcy court through participation in the case, even as to collection actions outside the United States. [FN56]

On the other hand, we do not yet have a case where all of the following elements are present:

a) the United States case granting the discharge was a main proceeding; [FN57]

***513** b) the debtor seeks to enforce the discharge as to conduct of a creditor outside the United States;

c) the creditor did not participate in the United States case; and

d) the creditor was subject to personal jurisdiction in the United States. [FN58]

By analogy with the automatic stay cases, [FN59] our courts might well assert that the person's conduct is subject to the stay anywhere in the world once we have jurisdiction over that person, even if the jurisdiction arises from a "generally doing business" contact unrelated to the bankruptcy as such. On that basis, it is reasonably probable that the United States courts will impose sanctions on creditors who attempt to collect outside the United States debts discharged in a main proceeding in our country.

Going still further, we have the case of the United States discharge in a main proceeding where element (d) above is not present. Obviously, we could not enforce the discharge directly in other countries. Would we nonetheless hope or expect that other jurisdictions would recognize our discharge and enforce it? It seems fairly clear the answer is "yes," given our consistent recognition of foreign discharges and our commitment to universalism in bankruptcy matters. [FN60] It is true that only in Gebhard have we gone so far as to enforce a foreign discharge against a non-participant creditor not found to be subject personally to the jurisdiction of the foreign court, but Gebhard is potent precedent to show to a foreign court, demonstrating that the United States would enforce a foreign discharge even on those facts. [FN61]

That result--enforcement without participation or personal jurisdiction--can fairly be justified on the basis of in rem jurisdiction. Bankruptcy is traditionally called an in rem proceeding as to property and we have very recent precedent in the Supreme Court that the discharge also operates in rem, which arguably gives it worldwide effect. [FN62] Thus, we could reasonably ask for an equivalent response from other courts.

***514** We have just one reported case where the foreign court has been asked to enforce a United States corporate discharge. [FN63] In the Butte case, a Canadian court effectively enforced against Canadian tort claimants the discharge granted to Dow Corning in the American bankruptcy court. Like the courts in Multicanal, the Court did not use the word "discharge." It based its holding on comity and "common sense" in light of the number of tort claims against the debtor and other practical considerations. It engaged in a fairly detailed review of the fairness of the procedure and the results in the United States case before deciding to enforce, noting the similarities between chapter 11 and the equivalent procedures in Canadian law. Although its review would not map perfectly onto the Multicanal analysis, the opinions had the same overall tenor. [FN64]

On the other hand, a recent trial court judgment in England stated in dictum

that a United States chapter 11 "compromise" will not be enforced there except through the mechanism of an English proceeding following English procedures. In the English branch of the Federal Mogul case, in the course of responding to a request for instructions from the local administrators of the Mogul group of companies, the court stated "[t]hose creditors whose claims are governed by English law will not, as a matter of English law, be bound by a compromise contained in a Plan confirmed under Chapter 11." [FN65]

C. ALI Principles

The ALI's Transnational Insolvency Project has adopted a set of Principles for use by bench and bar in business bankruptcies involving two or more of the ***515** NAFTA countries. [FN66] Although developed for NAFTA cases, they are explicitly intended to be useful in non-NAFTA proceedings as well. [FN67] Two of those principles address the enforcement of reorganization plans adopted in a foreign main proceeding. [FN68] Principle 26 states:

> Where a Plan of Reorganization is adopted in a main proceeding in any NAFTA country and there is no parallel proceeding pending within the NAFTA region, that Plan should be final and binding upon the debtor and upon every creditor who participates in any way in the main proceeding. For this purpose, participation includes i) filing a claim; ii) voting; or iii) accepting a distribution of money or property under a Plan. [FN69]

The reference to a "parallel proceeding" means a second full bankruptcy case pending in one of the other NAFTA countries, rather than an ancillary proceeding of the sort contemplated by chapter 15. [FN70] Absent such a proceeding, Principle 26 would make a reorganization plan binding on any party that participates in the proceeding or accepts its fruits. This result seems to track pretty closely the results in the insurance cases and in the outbound United States cases. The cases and the Principles also have in common that they address foreign main proceedings only.

A second Principle in the ALI NAFTA Principles goes considerably farther. It would bind to a reorganization plan unsecured creditors who did not participate in the bankruptcy proceeding in the foreign jurisdiction. Principle 27 provides:

> Where a Plan of Reorganization is adopted in a main proceeding in any NAFTA country and there was no parallel proceeding within the NAFTA region, that Plan should also be final and binding as to the claims against the debtor of every unsecured creditor (a) who was given adequate individual notice of the case and (b) who would be considered within the jurisdiction of the courts in ordinary commercial matters under the law of the country of the main proceeding, with respect to the type of claims asserted by that creditor. [FN71]

***516** As noted above, no United States case has gone so far except Gebhard. In the modern American cases there was participation by the objectant in the foreign proceeding. Butte, a Canadian case, is the only modern case I have seen that explicitly held it would enforce a foreign discharge even absent the objectant's participation. There, however, the court also conducted a thorough review of the procedural and substantive fairness of the foreign proceeding, while the ALI rule requires only that the foreign creditor a) get proper notice of the case so as to permit participation; and b) have a sufficient presence in the country of the main proceeding as to be reasonably subject to personal jurisdiction there. There is no mention of an additional fairness inquiry.

The more limited requirements of the Principles could be attributed to the fact it is primarily addressed to application within NAFTA, among three nations with the

closest ties of history, population, and economics. But the difference between Butte and Principle 27 highlights an important issue: to what extent will the United States courts examine the fairness of a foreign proceeding before deciding whether to enforce a plan of reorganization?

Gebhard is the one case that has enforced without a specific finding of fairness in procedure or result, consistent with Principle 27. The key to Gebhard is the argument that a creditor who chooses to extend credit to a company resident in country X assumes the risk of country X's judicial system with regard to insolvency. The court in Gebhard came close to saying that, although obviously it is an easier thing to say when X = Canada. Yet Gebhard may go farther than Principle 27, because it is not clear that in Gebhard the New York bondholders had sufficient presence in Canada to satisfy the jurisdictional test in Principle 27 or that they had notice and an opportunity to be heard. [FN72]

The requirements in Principle 27 are based squarely on the traditional United States rule for the recognition of judgments, itself originating in another venerable Nineteenth Century opinion, Hilton v. Guyot. [FN73] United States courts will generally enforce a foreign judgment without examining the merits if the defendant had notice and an opportunity to be heard and had sufficient contact with the foreign jurisdiction to satisfy our notion of due process. [FN74] It is not clear why enforcement of ***517** that particular type of judgment that grants a discharge should require more, although the traditional rule applies only to money judgments. It may be that the substantive review found in Multicanal is a mere incident of the section 304 approach to the problem, to be replaced by application of traditional judgment enforcement rules. Those rules are themselves based on a general idea of procedural fairness that may suffice. On the other hand, the requirement that creditors be "sufficiently protected" under section 1522(a) of chapter 15 may generate a substantive fairness review as well.

II. QUESTIONS TO BE ANSWERED

Our brief review of existing law and authority makes it clear that many questions about the enforcement of a foreign corporate discharge remain to be addressed. Here we will mention just a few of the most important, including those already introduced.

A. What Law Applies to the Remedy?

In deciding to aid a foreign bankruptcy proceeding and enforce its results, a fundamental question at every point is whether to give a foreign ruling those effects that the law of the foreign proceeding applies within its home jurisdiction or those effects that the equivalent ruling would have in the United States under our law. A classic example is the bankruptcy stay. Under the EU Regulation, recognition of a main proceeding leads to application in the other EU states of the stay rules of the main proceeding, not the local stay rules in each recognizing state. [FN75] By contrast, the Model Law on Cross Border Insolvency, [FN76] on which chapter 15 is based, applies the rules of the local, recognizing country's stay.

A similar set of issues exists as to the discharge. The question is whether the United States will apply the discharge rules of the foreign jurisdiction or our own. If a tort victim's claim is not discharged under the foreign law, would we exempt it from our chapter 15 injunction even though it would be discharged under the ***518** Bankruptcy Code? In a case involving an individual, if a fraud claim would be discharged under the foreign law but not under our law, will we discharge it?

B. Res Judicata versus Chapter 15

Is there room to argue that a foreign discharge should be recognized as res judicata because it constitutes an in rem judgment, as the United States discharge has recently been held to be? [FN77] Or does chapter 15 necessarily pre-empt the field as the sole basis for enforcement of a foreign discharge? [FN78] If res judicata remains as an independent ground, then the sufficient-protection requirement of section 1522 may not control and arguably no fairness inquiry is required. If that were true, the only questions would be the classic judgment enforcement issues: did the creditor get a fair opportunity to be heard and was there proper jurisdiction?

C. Personal versus Corporate Discharges

Should different standards be applied to the discharge of natural and legal persons on the grounds that United States law draws a fundamental distinction in denying the discharge to natural persons for an ever-growing list of reasons, but grants a virtually unlimited discharge to corporations and other legal persons? [FN79] For example, if Americans have been defrauded by a Ruritanian con man, should his company be able to discharge their claims and continue to do business in the United States, while he personally should remain obligated to pay with regard to any assets within the reach of our courts? This question is one that could be addressed as a subdivision of the choice-of-law question or as a matter of public policy.

D. Public Policy

Even if the foreign discharge is measured by the law of the main jurisdiction, should certain results be barred by public policy? Chapter 15 contemplates such an exception to recognition, but states it very narrowly. [FN80] Even if we are prepared to ***519** enforce foreign discharges that we would not grant ourselves, are there limits? What about civil liability for a cold-blooded murder? Of course, we would be prepared to free a corporation from such a debt under chapter 11, so can we really claim that it is "manifestly contrary" to our public policy to enforce such a discharge?

CONCLUSION

Under section 304 our focus has been primarily upon the opening stages of a foreign case, offering respite against creditor attempts to collect in the United States and occasionally turning over assets to a foreign proceeding. Recently, we have begun to see cases that address the question of discharge of legal persons, although the courts have not articulated the issues in terms of a discharge. Even now we have no appellate cases relating to the enforcement of a foreign discharge of a natural person.

This discussion has laid out what little authority we have in the cases and in the ALI Principles and outlined a few of the major questions that have not been addressed. There is much work to be done, in the academy and in the courts, with respect to each of them. No set of issues will be more important to global cooperation in multinational bankruptcies and few will be as difficult.

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[FN1]. The first wave consisted of liquidation cases. See, e.g., Bank of New York v. Treco (In re Treco), 240 F.3d 148, 163 (2d Cir. 2001) (vacating district court's decision to grant section 304 petition); In re Culmer, 25 B.R. 621, 634 (Bankr. S.D.N.Y. 1982) (granting section 304 petition in proceeding ancillary to liquidation in Bahamas).

[FN2]. Professor Grossman has written a very helpful and extensively researched article on the international effects of the discharge, with an emphasis on the discharge of natural persons. See generally Andrew Grossman, Conflict of Laws in the Discharge of Debts in Bankruptcy, 5 INT. INSOL. REV. 1 (1996). He cites and discusses some United States cases, but neither he nor I have found cases above the trial level in this country. See, e.g., Bank of Buffalo v. Vesterfelt, 232 N.Y.S.2d 783, 784-86 (Sup. Ct. 1962) (sustaining U.S. garnishment of discharged Canadian debtor by creditor who did not participate in Canadian proceeding).

[FN3]. See 11 U.S.C. § 304 (2000) (providing for ancillary proceedings to foreign insolvency proceedings), repealed by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Pub. L. No. 109-8, § 802(d), 119 Stat. 23. 146 (2005) [hereinafter BAPCPA]; BAPCPA § 801 (adding chapter 15 to the Bankruptcy Code).

[FN4]. See generally AM. LAW INST., INTERNATIONAL STATEMENT OF UNITED STATES BANKRUPTCY LAW 82 (2003) [hereinafter INTERNATIONAL STATEMENT]; see also Douglass G. Boshkoff, United States Judicial Assistance in Cross-Border Insolvencies, 36 INT'L & COMP. L.Q. 729, 739 (1987) (noting section 304 "will represent a significant advance only if uncertainties in practice and statutory language are resolved in a manner consistent with international co-operation."); Richard A. Gitlin & Evan D. Flaschen, The International Void in the Law of Multinational Bankruptcies, 42 BUS. LAW. 307, 318 (1987) (stating section 304 "provide[s] a mechanism for the courts in this country to aid foreign courts and accommodate the increasing number of foreign insolvency proceedings having extraterritorial effects within the United States."); Stefan A. Riesenfeld, Transnational Bankruptcies in the Late Eighties: A Tale of Evolution and Atavism, in COMPARATIVE AND PRIVATE INTERNATIONAL LAW 409, 428 (David S. Clark ed., 1990) (concluding section 304 "offer[s] sufficient guarantees for a fair, equitable, and efficient distribution" in transnational bankruptcies.).

[FN5]. See Jay L. Westbrook, Chapter 15 at Last, 79 AM. BANKR. L.J. 713, 726 (2005) (describing chapter 15's adoption of Model Law and recognition of foreign proceedings without reference to criteria like those that were in section 304(c)); see also UNCITRAL MODEL LAW ON CROSS BORDER INSOLVENCY (1997).

[FN6]. See BAPCPA § 801 (to be codified at 11 U.S.C. § 1502(4)) (amending "'foreign main proceeding' [to] mean[] a foreign proceeding pending in the country where the debtor has the center of its main interests.")

[FN7]. See generally AM. LAW INST., PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES (2003) [hereinafter PRINCIPLES OF COOPERATION].

[FN8]. See Jason J. Kilborn, The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States, 24 NW. J. INT'L L. & BUS. 257, 264-65 (2004) (explaining lack of discharge for bankrupt individuals in Germany); Jay L. Westbrook, Local Legal Culture and the Fear of Abuse, 6 AM. BANKR. INST. L. REV. 25, 31 (1998) (noting very few countries in Europe gave individuals right to discharge before last decade). I am not aware of any reported case in the United States that has considered the effect in the United States of a foreign discharge of a natural person other than the cases cited

by Professor Grossman, supra note 2.

[FN9]. In this phrase, I oppose reorganization in the modern sense to the old idea of "compositions" that were adopted in many countries in the late 19th Century, but seem to have languished mostly unused because of rigid rules and unrealistic underlying premises. See, e.g., Manfred Balz, Market Conformity of Insolvency Proceedings: Policy Issues of the German Insolvency Law, 23 BROOK. J. INT'L. L. 167, 172 (1997) (citing Germany's composition statute); Klaus Kamlah, The New German Insolvency Act: Insolvenzordnung, 70 AM. BANKR. L.J. 417, 417-20 (1996) (explaining Germany's idea of compositions).

[FN10]. See Jay L. Westbrook, A Global Solution to Multinational Default, 98 MICH. L. REV. 2276, 2278-79 (2000) (discussing countries that have recently changed their bankruptcy laws).

[FN11]. There would seem to be little reason to discharge a legal person following a liquidation that eliminates all of its assets. Following that logic, the Bankruptcy Code limits discharge after liquidation to natural persons. See 11 U.S.C. § 727(a)(1) (2000) (stating "[t]he court shall grant the debtor a discharge, unless ... the debtor is not an individual.").

[FN12]. See id. § 363(f) (indicating "[t]he trustee may sell property ... free and clear of any interest in such property of an entity other than real estate ...."); see also Scott D. Cousins, Chapter 11 Asset Sales, 27 DEL. J. CORP. L. 835, 838-39 (2002) (elaborating on debtor's capacity to sell its assets).

[FN13]. Roughly, the question would be the extent to which the assets move free of liens and free of the successor liability doctrines found in many jurisdictions.

[FN14]. See BAPCPA § 708 (to be codified at 11 U.S.C. § 1141(d)(6)) ("[T]he confirmation of a plan does not discharge of debtor that is a corporation from ... a tax or customs duty to which the debtor made a fraudulent return ... [or] willfully attempted in any manner to evade or to defeat such tax or customs duty.").

[FN15]. 11 U.S.C. § 101(12) (2000).

[FN16]. See 11 U.S.C. § 101(5) (2000):

> The term "claim" means ... right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or ... right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Id.

[FN17]. See generally Katherine M. Anand, Note, Demanding Due Process: The Constitutionality of the § 524 Channeling Injunction and Trust Mechanisms That Effectively Discharge Asbestos Claims in Chapter 11 Reorganization, 80 NOTRE DAME L. REV. 1187, 1199-1202 (2005) (noting persons are bound by outcome of judicial proceedings only if they have been afforded due process).

[FN18]. See AM. LAW INST., TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF CANADIAN BANKRUPTCY LAW 49 (2003).

[FN19]. See id.

[FN20]. See, e.g., Nathan F. Coco, An Examination of Successor Liability in Post Bankruptcy Context, 22 J. CORP. L. 345, 349 (1997) (explaining "debtor is discharged of all debts arising before confirmation, whether or not a proof of claim was filed."). There has long been some debate as to whether the debts are actually extinguished or merely rendered unenforceable, but we will not rehearse it here because it rarely, if ever, matters.

[FN21]. However, the conditionality of the Canadian approach raises a choice-of-law question as to the effects of recognition in the United States.

[FN22]. 109 U.S. 527 (1883).

[FN23]. Id. at 539.

[FN24]. The majority did not cite the leading cases stating that a foreign discharge does not have effect in the United States. See M'Millan v. M'Neill, 17 U.S. 209, 212 (1819) ("[A] discharge under a foreign law, was no bar to an action on a contract made in this country."); Ogden v. Saunders, 25 U.S. 213, 255 (1827) (stating "a discharge under the bankrupt laws of one government, does not affect contracts made or to be executed under another ...."). The dissent cited only Ogden, along with Story's Commentaries. See Gebhard, 109 U.S. at 544-45 (Harlan, J., dissenting) (citing Ogden and JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834)). The statement was merely dictum in Ogden, but was a holding in M'Millan, where the court gives the back of its hand to an English discharge, but without supporting authority. See also Bank of Buffalo v. Vesterfelt, 232 N.Y.S.2d 783, 785 (Sup. Ct. 1962) (holding Canadian bankruptcy had no effect on contract entered into in New York).

[FN25]. Congress had enacted and then repealed no fewer than three bankruptcy laws since the Constitutional authorization, the acts of 1800, 1841, and 1864. Only in 1898 did our legal ancestors finally succeed in adopting a lasting bankruptcy law. See David A. Skeel, DEBT'S DOMINION:A HISTORY OF BANKRUPTCY LAW IN AMERICA 23-25 (2001) (discussing Congress' inability to enact permanent bankruptcy law prior to 1898); see generally Charles Warren, BANKRUPTCY IN UNITED STATES HISTORY (1935).

[FN26]. Gebhard, 109 U.S. at 538.

[FN27]. Justice Harlan's dissent was vigorous, but somewhat unfocused. Parts seem to turn on a choice-of-law analysis, citing Story for a highly territorial choice-of-law rule that always applies the place of performance of the contract to the discharge of the debt, a view decisively rejected by the rest of the Court. See id. at 545 (Harlan, J., dissenting) (stating if contract is "to be performed in another place than where made, the rule is, in conformity with the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance."'). At other points, he focuses more on the legislative nature of the discharge, which denied the bondholders the day in court to which he believed they were entitled. See id. at 542-43 (Harlan, J., dissenting) (noting United States is prohibited from depriving persons or corporations of property without due process of law).

[FN28]. See Hilton v. Guyot, 159 U.S. 113, 136 (1895) (holding judgment of court of foreign country would be given conclusive effect if foreign court was "as effective as our own in securing justice to the litigants.").

[FN29]. 174 B.R. 884 (S.D.N.Y. 1994).

[FN30]. 238 B.R. 25 (Bankr. S.D.N.Y. 1999), aff'd, 275 B.R. 699 (S.D.N.Y. 2002).

[FN31]. A scheme of arrangement bears a fairly strong resemblance to a chapter 11 plan of reorganization in its purpose and effect. See, e.g., Maxwell Communication Corp. v. Societe General PLC (In re Maxwell Communication Corp.), 170 B.R. 800, 802-03 (Bankr. S.D.N.Y. 1994), aff'd, 186 B.R. 807 (S.D.N.Y. 1995), aff'd, 93 F.3d 1036 (2d Cir. 1996) (explaining similar operation of debtor's plan and scheme); see generally ROY GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW (2005). The result of creditor approval, unless overturned by an application to the court, is a discharge of any liabilities to creditors beyond those set forth in the scheme. See IAN F. FLETCHER, THE LAW OF INSOLVENCY 441 (3d ed. 2002) (asserting "[t]he approval of a voluntary arrangement imports a statutory protection for the corporate debtor from its creditors, and can result in a discharge of debtor's liability towards them.").

[FN32]. See Hopewell, 238 B.R. at 41 (explaining court's sanctioning of scheme of arrangement); Allstate, 174 B.R. at 884 (discussing creditor's approval of scheme of arrangement).

[FN33]. See Hopewell, 238 B.R. at 31 (noting reinsurance contract provided right to arbitrate under Minnesota law); Allstate, 174 B.R. at 886 (noting "the reinsurance contracts contained an arbitration clause requiring that all disputes be submitted to arbitration.").

[FN34]. See Hopewell, 238 B.R. at 38 (recognizing scheme provided for arbitration governed by laws of Bermuda); Allstate, 174 B.R. at 887 (explaining "[u]nder the Scheme, creditors are enjoined from instituting litigations or arbitrations against the ... [debtors] until after they comply with certain procedures designed to establish a claim.").

[FN35]. See Hopewell, 238 B.R. at 32 (describing injunctive relief sought by debtor); Allstate, 174 B.R. at 887 (stating liquidators applied to bankruptcy court for injunctive relief enforcing scheme).

[FN36]. See Allstate, 174 B.R. at 886 (noting Allstate had voted against the scheme for each debtor).

[FN37]. See Hopewell, 238 B.R. at 40 (explaining although creditor may have marked paper ballot to reflect abstention, vote was taken by show of hands).

[FN38]. See Hopewell, 238 B.R. at 68 (granting permanent injunction); Allstate, 174 B.R. at 891 (affirming bankruptcy court's issuance of permanent injunction).

[FN39]. See Allstate, 174 B.R. at 891 (holding provisions of scheme do not violate Convention or Federal Arbitration Act); see generally Jay L. Westbrook, The Coming Encounter: International Arbitration and Bankruptcy, 67 MINN. L. REV. 595 (1983).

[FN40]. Apparently there had been a legal change that the objectant had not anticipated, which now made arbitration in Bermuda under Bermuda law less attractive. See Hopewell, 238 B.R. at 66 (explaining after voting in favor of scheme, court changed its views on clause similar to one in reinsurance contract). But, the court noted elegantly, "regret is no substitute for prejudice, and prejudice there is none." Id. at 66.

[FN41]. Acuerdo Preventivo Extrajudicial ("APE").

[FN42]. See In re Bd. of Dirs. of Multicanal S.A., 314 B.R. 486, 505 (Bankr. S.D.N.Y. 2004), aff'd in part, 331 B.R. 537 (S.D.N.Y. 2005) (describing U.S. pre-pack as when debtor negotiates restructuring agreement and solicits acceptances prior to chapter 11 filing).

[FN43]. As is typically the case, the court's analysis tracked the objections raised by the objectant, a Mr. Huff. Some of those objections were raised as challenges to the APE as not a "foreign proceeding" at all under the then-current definition, but in effect Mr. Huff argued that section 304(c) factors were not satisfied. The overall discussion could be structured as a section 304 factor analysis, with an emphasis on comity and with some factors not discussed. See 11 U.S.C. § 304 (2000). The factors to be considered under section 304 are:

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

Id.

[FN44]. Multicanal, 331 B.R. at 543.

[FN45]. See id. at 543 (affirming "the bankruptcy court in all respects except the effectiveness of Multicanal's proposed cure.").

[FN46]. Although the objectant in Multicanal had participated very actively in the Argentinian proceedings, the courts could not rely on acquiescence as they had in the insurance cases because the objectant had objected every step of the way.

[FN47]. A stay under section 362 of the Bankruptcy Code issues automatically upon recognition. See BAPCPA § 801 (to be codified at 11 U.S.C. § 1520) (stating "[u]pon recognition of a foreign proceeding that is a foreign main proceeding ... [section] 362 appl[ies] with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States."). Chapter 15 introduces the idea of "recognition" into the Bankruptcy Code for the first time, although it is the usual rubric for enforcement of judgments. Section 304 did not speak of recognition, but merely of the pre-conditions for the granting of relief. See Westbrook, supra note 5, at 717 ("Section 304 of the Code provided for relief only in cooperation with main proceedings. Chapter 15 changed that by permitting some limited cooperation with non-main bankruptcies, but most of its focus is on foreign main proceedings.").

[FN48]. See BAPCPA § 801 (to be codified at 11 U.S.C. § 1521) (noting court may grant "appropriate relief.").

[FN49]. See id. (to be codified at 11 U.S.C. § 1522(a)) (providing "court may grant relief ... only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.").

[FN50]. One other recent case was reported. See generally In re Regan, No. 05-12678, 2005 WL 2138734, at * 1 (Bankr. S.D.N.Y.) (involving bankruptcy of foreign insurance company). However, the opinion consists of no more than the court's order with some whereas clauses reciting that all had been done by consent and that the

order was not to serve as a precedent. See generally id. The subject matter was yet another United Kingdom insurance scheme, although it is interesting that the scheme was dependent upon approval by the United States courts. There is more of interest there, but we must return to it another time.

[FN51]. See Council Regulation 1346/2000, 2000 O.J. (L 160) 1 ("This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests.").

[FN52]. BAPCPA § 801 (to be codified at 11 U.S.C. § 1502(4)) (defining foreign main proceeding as "a foreign proceeding in the country where the debtor has the center of its main interests.").

[FN53]. Otherwise, we would be in the position of many national legal systems that until recently demanded universal effect for their bankruptcy proceedings, while denying it to those in other countries. See CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS 99 (Ian F. Fletcher ed., 1990).

[FN54]. See Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon), 153 F.3d 991, 994, 997 (9th Cir. 1998) (holding discharge injunction issued to individual in United States enjoined creditor in Hong Kong).

[FN55]. See In re Dow Corning, 287 B.R. 396, 412 (E.D. Mich. 2002) (holding discharge applied to those Australian claimants who participated in the bankruptcy action).

[FN56]. In the Dow Corning case, the injunction extended to the non-debtor Australian subsidiary of Dow. See id. at 412 (noting injunction applies to Australian Claimants such as Dow's subsidiary).

[FN57]. We do not have a reported case granting a discharge in a non-main proceeding in the United States and it would be inconsistent with the dominant commitment to universalism to give such a discharge more than territorial effect, if that.

[FN58]. I ignore timing for lack of space to discuss it, but it is interesting to wonder if the discharge's in rem effect extends to creditors who are not subject to personal jurisdiction in the United States at the time of the discharge, but become subject to that jurisdiction thereafter.

[FN59]. See INTERNATIONAL STATEMENT, supra note 4, at 76.

[FN60]. See generally id.; Lynn LoPucki, Global and Out of Control?, 79 AM. BANKR. L.J. 79 (2005) (deploring United States commitment to universalism, but conceding it does exist). For a discussion of universalism, see generally PRINCIPLES OF COOPERATION, supra note 7, at 8 (discussing universalism in international bankruptcy).

[FN61]. See infra text accompanying notes 73-74 (reviewing recognition of foreign judgments in United States).

[FN62]. See Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004) (finding discharge of debt in bankruptcy proceeding to be in rem proceeding); see also Westbrook, supra note 10, at 2284-87 (noting all theorists agree that bankruptcy proceedings are in rem proceedings).

[FN63]. See generally Roberts v. Picture Butte Municipal Hosp., [1999] 64 Alta. L.R.3d 31 (recognizing United States bankruptcy proceeding and enforcing its plan against Plaintiffs residing in Canada). There is also a German case that was well ahead of its time in enforcing a Swiss reorganization result. See generally Christoph G. Paulus, A New German Decision on International Insolvency Law, 41 AM. J. COMP. L. 667, 669-74 (1993) (discussing German decision BGHZ 294, 92). But cf. Menegon v. Philip Services Corp., 11 C.B.R. (4th) 262, 49 (Ontario Super. Ct. 1999) (finding no order of United States court to which comity could extend).

[FN64]. The Canadian court also noted that the plaintiff had filed a claim in the Dow Corning United States bankruptcy and could be held bound for that reason alone, but expressly declined to limit its holding to that ground. See Butte, 64 Alta. L.R.3d at 24 (stating plaintiffs filed proofs of claim and thus attorned to jurisdiction of United States Bankruptcy Court).

[FN65]. In re T & N Ltd., 2005 P. 1, 121 available at 2004 W.L. 2495805. The court further stated that:

> I find it very difficult to envisage a case where the court would sanction a scheme of arrangement, or not interfere with a CVA, which was an alternative to a winding-up but which was likely to result in creditors, or some of them, receiving less than they would in a winding up of the company, assuming that the return in a winding-up would in reality be achieved and within an acceptable timescale.

Id. at 82. That statement in combination with the one quoted in text could be construed to mean that English priorities would control in every case involving an English creditor, which would virtually end multinational cooperation in this area of the law.

[FN66]. See generally PRINCIPLES OF COOPERATION, supra note 7 (analyzing relationships and cooperation in insolvency situations among NAFTA countries).

[FN67]. See id. at 7-8 (noting principles and procedures can be applied by NAFTA countries in proceeding with non-NAFTA jurisdictions).

[FN68]. See id. at 86-91 (reviewing Procedural Principles 26 and 27).

[FN69]. Id. at 86-87. This is the same case presented at supra notes 57- 58.

[FN70]. See PRINCIPLES OF COOPERATION, supra note 7, at 9 ("[A] 'parallel' proceeding is a full bankruptcy under domestic law. The court in a parallel proceeding administers the debtor's local assets in parallel with the administration in the main proceeding.").

[FN71]. Id. at 88.

[FN72]. As noted above, their lack of opportunity to be heard was one of the two bases for Justice Harlan's dissent. See supra note 27.

[FN73]. 159 U.S. 113, 202 (1895) ("[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction ... [that] is likely to secure an impartial administration of justice ... the merits of the case should not be tried afresh ...."); see Unif, Foreign Money-Judgments Recognition Act § 4, 13 U.L.A. 58-59 (2002) ("A foreign judgment is not conclusive if ... the judgment was rendered under as system which does not provide impartial tribunals or procedures compatible with the requirements of due process of the law ....").

[FN74]. See Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971).

> [If] the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear an formal record, the judgment [will usually be enforced] ....

Id. at 440. Somportex is the touchstone modem case.

[FN75]. See Council Regulation 1346/2000, art. 17, 2000 O.J. (L 160) 8 ("The judgment opening the proceedings [shall] ... produce the same effects in any other Member State as under this law of the state of the opening of proceedings ...."); see, e.g., Manfred Balz, The European Union Convention on Insolvency Proceedings, 70 AM. BANKR. L.J. 485, 514 (1996) (noting recognition means "that the proceedings will produce the same effects in other Member states as in the opening State."). There are various exceptions to this general rule. For example, the opening of a local insolvency proceeding imposes the local rules instead.

[FN76]. UNCITRAL MODEL LAW ON CROSS BORDER INSOLVENCY ch. 3, art. 20 (1997) (stating stay against execution of debtor's assets is subject to "law of the enacting State.").

[FN77]. See Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004) (finding discharge of debt by bankruptcy court to be in rem proceeding).

[FN78]. One argument in favor of chapter 15 as controlling is that judgment enforcement conventions, which regularize application of res judicata across international borders, routinely except bankruptcy proceedings, presumably because they are thought to involve importantly different sorts of problems than ordinary civil litigation. See, e.g., Council Regulation No. 44/2001, art. 1 ("The Regulation shall not apply to: ... bankruptcy [proceedings] ....").

[FN79]. See 11 U.S.C. § 1141(d)(1)(a) (2000) (discharging debtor from debts arising before confirmation of plan); BAPCPA § 321 (to be codified at 11 U.S.C. § 1141(d)(2)) ("A discharge under this chapter does not discharge a debtor who is an individual ....").

[FN80]. See BAPCPA § 801 (to be codified at 11 U.S.C § 1506) (providing for public policy exception); Andre J. Berends, UNCITRAL Model Law on Cross-Border Insolvency, 6 TUL. J. INT'L & COMP. L. 415, 425 (1998) ("The Model Law Preserves the possibility of excluding or limiting any action in favor of the foreign proceeding ... on the basis of overriding public policy considerations ....").

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