AMERICAN BANKRUPTCY INSTITUTE

Annual Spring Meeting

Exporting Corporate Bankruptcies

CONCURRENT SESSION

Stephen D. Lerner, Moderator
Squire Patton Boggs; Cincinnati

Hon. Thomas M. Horan
U.S. Bankruptcy Court (D. Del.); Wilmington

Jennifer Jenkins
Mourant; Tortola, British Virgin Islands

Hon. Bruce A. Markell
Northwestern University School of Law; Chicago

Lawrence E. Young
AlixPartners, LLP; Houston

2024

GUIDE

mourant

Liquidation of foreign companies in the BVI

Last reviewed: April 2024

This note considers the framework for the appointment of liquidators over a foreign company in the British Virgin Islands (the **BVI**).

Legislative framework

Section 159(1)(b) of the BVI Insolvency Act, 2003 (as amended) (the **Act**) empowers the court to appoint an eligible insolvency practitioner as liquidator of a foreign company on an application under section 163 of the Act. Section 170 of the Act provides for the appointment of a provisional liquidator on such an application.

Section 163 of the Act provides that –

'(1) The Court may, on application by a person specified in section 162(2), appoint a liquidator of a foreign company under section 159(1) if the Court is satisfied that the company has a connection with the Virgin Islands and—

(a) the company is insolvent;

(b) the Court is of the opinion that it is just and equitable that a liquidator should be appointed;

(c) the Court is of the opinion that it is in the public interest for a liquidator to be appointed;

(d) the company is dissolved or has otherwise ceased to exist under or by virtue of the laws of the country in which it was last registered;

(e) the company has ceased to carry on business; or

(f) the company is carrying on business only for the purpose of winding up its affairs.

(2) For the purposes of subsection (1), a foreign company has a connection with the Virgin Islands only if—

(a) it has or appears to have assets in the Virgin Islands;

(b) it is carrying on, or has carried on, business in the Virgin Islands; or

(c) there is a reasonable prospect that the appointment of a liquidator of the company under this Part will benefit the creditors of the company.

(3) An application for the appointment of a liquidator of a foreign company may be made—

(a) notwithstanding that the company has been dissolved or has otherwise ceased to exist under or by virtue of the laws of any other country; and

(b) whether or not the company is or has been registered under Part IX of the Companies Act, 1885 or Part XI of the BVI Business Companies Act. (Amended by Act 16 of 2004)

...'

The provisions of Part VI of the Act, which provide for the liquidation of companies in the BVI, apply to the liquidation of a foreign company with such modifications and exclusions as set out in Schedule 3 of the Act.

Case law

The application of section 163 of the Act was considered by the Eastern Caribbean Supreme Court of Appeal in *KMG International NV v DP Holdings SA* (BVIHCMAP2017/0013).

The appeal arose out of an originating application filed by KMG International NV (**KMG**) for the appointment of liquidators of DP Holding SA (**DPH**), a company incorporated in Switzerland.

Following arbitration proceedings between the parties, the Netherlands Arbitration Institute made a partial final award against DPH of US$200 million in favour of the respondent KMG. DPH disputed the award and the full amount of the award remained outstanding. On 11 October 2016, KMG filed an originating application in the BVI under sections 159(1) and 163(1) of the Act for the appointment of liquidators of DPH.

Subsequent to the filing of the originating application, KMG applied *ex parte* for an order appointing provisional liquidators over DPH, as well as for permission to serve the originating application on DPH outside of the jurisdiction.

The BVI Commercial Court, by Wallbank J, granted both orders. DPH, in response, filed an application to set aside the permission to serve outside the jurisdiction and to set aside the appointment of the joint provisional liquidators (the **JPLs**). On 10 May 2017, Wallbank J discharged his previous order granting KMG permission to serve outside the jurisdiction but continued the appointment of the JPLs pending the determination of any appeal from his decision. KMG appealed against Wallbank J's order of 10 May 2017, refusing permission to serve out. DPH cross-appealed against Wallbank J's refusal to set aside the appointment of the JPLs. The Court of Appeal allowed the appeal and dismissed the cross-appeal.

Reversing Wallbank J's decision on service out of the jurisdiction, the Court of Appeal held that it was clear that KMG had established jurisdiction within the terms of section 163 of the Act.

The first limb of section 163(2) of the Act was met by establishing that there was a sufficient connection with the BVI as the evidence indicated that more than half of the assets of the company were held in BVI companies.

The Court of Appeal also held that the second limb of the test was satisfied in that DPH fell within the ambit of section 163(1)(a) of the Act as being insolvent in the sense of being at least cash insolvent.

The Court of Appeal held that Wallbank J failed to consider the likely delay to the start of the bankruptcy proceedings in Switzerland and did not give proper weight to the fact that the two principal assets of DPH were companies registered in the BVI, and that no substantial assets of DPH had been identified in Switzerland. Wallbank J further failed to consider that KMG was the most substantial of DPH's creditors on the evidence and wished to pursue a BVI liquidation. Wallbank J ought not to have treated recognition and assistance by a Swiss liquidator, in the absence of such an appointment or of bankruptcy proceedings, as the determinative factor in the exercise of his discretion under the permission application pursuant to section 163 of the Act.

The issue on the application for permission to serve out under section 163 goes to whether liquidation proceedings can fairly be conducted in the BVI. Critically, as the power to wind up a foreign company was granted by the legislature despite the place of incorporation of the company being outside the BVI, this power can only be exercised by a BVI court. It followed that Wallbank J ought to have found that the BVI was the more appropriate forum to deal with the insolvency of DPH and erred in setting aside his order of 11 October 2016 granting permission to serve out of the jurisdiction.

The Court of Appeal held that Wallbank J was correct in making an order for the appointment of the JPLs.

In *Donna Union Foundation v Svoboda Corporation* (BVIHC (COM) 230 of 2018), the BVI Commercial Court, by Adderely J, considered an application for the appointment of liquidators over a company that had redomiciled from the BVI to Anguilla.

In considering the provisions of section 163 of the Act, Adderely J referred to the Court of Appeal decision in *KMG International NV* that the Court must take into account the preference of the substantial creditors as to where they wish the liquidation of the foreign company to be pursued. Adderley J dismissed the objection that the winding up should not take place in the BVI. Adderley J held that it was appropriate to pursue the liquidation in the BVI, if only for the reason that the company's only known creditor wished to do so, which satisfied the requirement under section 163(2)(c) of the Act. However, Adderely J accepted that there were also other reasons which satisfied the connection required by section 163 of the Act, including that the company carried on the business as a family trustee in the BVI (163(2)(b)), and it had assets in the BVI (a claim against the former trustee for breach of trust in the BVI (163(2)(a)).

This article is being reproduced here with the permission of the *American Bankruptcy Law Journal*. The original version of this article appears in Volume 98 of the *American Bankruptcy Law Journal* and should be cited as Bruce A. Markell, *The International Two-Step: Recognizing Domestic Chapter 15 Reorganizations*, 98 AM. BANKR. L.J. 1 (2024).

THE INTERNATIONAL TWO-STEP: RECOGNIZING DOMESTIC CHAPTER 15 REORGANIZATIONS

Bruce A. Markell*

Synopsis

Chapter 11 has a history as the gold standard for corporate reorganizations. Although still relevant and vibrant, chapter 11 is facing increased competition from revised foreign laws that authorize reorganization tools not available in the United States, and at a cost that many think is far less than if the debtor chose chapter 11 as its reorganization regime.

The choice between domestic chapter 11 and foreign regimes may not be as stark as it might seem. The United States Bankruptcy Code contains provisions regarding recognition of foreign insolvency proceedings. In particular, chapter 15 of the United States Bankruptcy Code directs United States courts to "recognize" qualifying foreign insolvency proceedings. Recognition, in turn, is intended to give local effect to relief granted abroad, essentially deputizing United States courts as auxiliaries of foreign courts, empowered to enforce these foreign decrees. This enforcement takes place even if the foreign proceeding adversely affects domestic creditors and even if the foreign proceeding employed restructuring methods not generally permitted by United States law.

Now that other nations' laws may be more attractive to debtors, a conundrum arises: Should United States courts permit domestic debtors to restructure abroad and then use chapter 15 to enforce that foreign decree in the United States, thus serving the internationalist goals of chapter 15? Or should courts insist that domestic entities can only restructure locally, thus privileging the policies behind the remainder of the United States Bankruptcy Code? Although the latter might be the most natural policy to some (why allow local entities to evade local law by going abroad?), nothing in the United States Bankruptcy Code either excludes domestic entities from chapter 15 or requires domestic entities to use United States law to reorganize.

* Professor of Bankruptcy Law and Practice, and Edward Avery Harriman Lecturer in Law, Northwestern Pritzker School of Law. A much earlier and more limited version of this article is published as *Domestic Entities as Chapter 15 Debtors: A Possibility?*, BANKR. L. LETTER, July 2021. Since then, I have expanded greatly the arguments set forth in that article and was privileged to present it at the Cornell Law School while visiting there, and at the London School of Economics (for which I thank Professor Sarah Paterson for the invitation). I thank the participants at those presentations for their helpful comments, all of which made this a better article. I also wish to thank Kaitlan Donahue and Channah Klapper for their research assistance, and Dan Glosband for his encouragement and counsel. All errors which remain, however, are mine alone.

This article will explore how a United States company could utilize a foreign proceeding and enforce it in the United States in two steps. The first is to file an insolvency proceeding for an affiliate of the debtor which is properly situated in a jurisdiction that offers more favorable insolvency relief to a debtor and its affiliates, such as might be the case under United Kingdom, German, or Netherlands law. After confirming that plan, the next step would be for the foreign affiliate to file a chapter 15 proceeding in the United States, which would extend the relief obtained abroad to the corporate group.

Table of Contents

I. INTRODUCTION 1

II. THE SCLEROTIC STATE OF CHAPTER 11 REMEDIES AND THE RISE OF ALIEN RELIEF ..1

A. THE RISE OF ALTERNATIVES AND THE INCORPORATION OF "FAMILIAR RELIEF" 3
B. THE RISE OF COMPETING LEGISLATION 3
C. THE RISE OF "ALIEN RELIEF" 4
1. Alien Relief in the United Kingdom—CIGA 5
a. Partial Restructurings Under U.K. Schemes of Arrangement 5
b. Guarantor Relief Under U.K. Schemes of Arrangements 6
c. Cross Class Cramdown Under U.K. Schemes of Arrangement 6
2. Alien Relief Under Dutch Law—WHOA 7
3. Alien Relief under German Law— StaRUG 8

III. THE SPREAD OF ALIEN RELIEF: INSOLVENCY JURISDICTION BASED ON CONNECTIONS RATHER THAN PROPINQUITY 8

A. THE UNITED STATES STANDARD—PROPERTY 9
B. UK, DUTCH, AND GERMAN LAW STANDARDS 9
1. United Kingdom 10
2. Netherlands 10
3. Germany 11

IV. BRINGING ALIEN RELIEF HOME: THE INTERNATIONAL TWO-STEP 11

A. STEP ONE: COMMENCE A FOREIGN PROCEEDING 12
B. STEP TWO: FILE A CHAPTER 15 13
1. Chapter 15 and Model Law Basics 14
a. Basic Concepts: COMI, Universalism, Territorialism, Main and Nonmain Cases 14
b. Basic Procedure 16
2. Recognition Has Broad Consequences 17
a. Relief in a Main Proceeding 17
b. Relief in a Nonmain Proceeding 18
c. Relief Not Specified 18
3. United States Recognition of a Foreign Nonmain Proceeding Filed by a Domestic Entity 18
a. Foreign Representative? 20
b. Main or Nonmain? 20

V. BARRIERS TO RECOGNITION OF ALIEN RELIEF IN A CHAPTER 15 CASE 23

A. SECTION 1521(A)'S REQUIREMENTS 23
1. Chapter 15's Purposes 23
2. Protecting Assets of Creditor Interests 23
B. SECTION 1522 AND PROTECTION OF INDIVIDUAL CREDITOR INTERESTS 24
C. SECTION 1521(B) AND PROPERTY DISTRIBUTIONS 25
D. "ADDITIONAL ASSISTANCE" AND SECTION 1507(B) 26

E. SECTION 1521(C) AND RESTRICTION THAT NONMAIN RELIEF MUST RELATE TO ASSETS THAT SHOULD BE ADMINISTERED ELSEWHERE 26
F. SECTION 1506 AND "MANIFESTLY CONTRARY TO PUBLIC POLICY" 27
1. Recognition: Irrelevance of a Lack of Good Faith *28*
2. Relief: Section 1520(a)(1) and Stay Relief *29*
G. SECTION 305: SHOULD A COURT DISMISS OR ABSTAIN BECAUSE CHAPTER 15 RECOGNITION FOR A UNITED STATES COMPANY IS CONTRARY TO THE POLICIES OF CHAPTER 15? 30

VI. CONCLUSION 32

I. INTRODUCTION

For many years, chapter 11 of the United States Bankruptcy Code[1] was the gold standard for resolving financial distress. Its provisions attracted troubled companies large and small, and offered a path to reorganization.

Chapter 11 is still vibrant and relevant. But its preeminence has been challenged by recent changes in insolvency legislation around the world. From the United Kingdom to the Netherlands to Germany and beyond,[2] various countries are now offering alternatives to chapter 11, and these alternatives often contain new and different restructuring tools that are not universally available in the United States. These include devices such as nonconsensual third-party releases of affiliates,[3] and restructurings which cover only some, but not all, creditors.[4] Additionally, one of the defining characteristics of chapter 11, allowing debtors to force compliance with a plan not receiving unanimous approval (colloquially known as "cramdown"), now exists in multiple jurisdictions outside the United States.

The availability of these tools in foreign proceedings presents challenges and conundrums to advisors of troubled companies. Should chapter 11 be used, or are these new, foreign, procedures a better option? Indeed, if the troubled entity is organized or incorporated in the United States, are these foreign procedures even available? Are both types of procedures advisable or perhaps required?

I answer the first two questions with a resounding yes, and reserve judgment on the third. This article endeavors to explain why.

II. THE SCLEROTIC STATE OF CHAPTER 11 REMEDIES AND THE RISE OF ALIEN RELIEF

Since 1978, when Congress adopted the Code, United States courts have been busy interpreting and applying what initially was the global standard for best reorganization practices, namely chapter 11 of the Code.[5] During this period, United States courts have restructured trillions of dollars of debt in cases such as General Motors, Chrysler, Lehman Brothers, Pacific Gas & Electric, and Sears, some of the largest and best-known American companies.

Although the success of such cases garnered most of the headlines, concerns began to be raised that chapter 11, although still robust, was becoming too costly and time-consuming. Much

[1] 11 U.S.C. §§ 1101–1532. In this article, I refer to title 11 of the United States Code simply as the "Code."
[2] This article will focus on the United Kingdom, the Netherlands, and Germany in order to maintain focus. A truly global view would have included Singapore and various Caribbean jurisdictions such as the Cayman Islands and the British Virgin Islands. *See, e.g.*, Rachel Nicholson, et al., *Cross Border Jeopardy: A Comparative Analysis on Key Insolvency Topics Across Various Jurisdictions*, 31 NORTON J. BANKR. L. & PRAC. 690 (2022); Ilya Kokorin, et al., *Global Competition in Cross-Border Restructuring and Recognition of Centralized Group Solutions*, 56 TEX. INT'L L.J. 109 (2021).
[3] *See, e.g.*, *infra* notes 37–49 and accompanying text regarding third-party releases under United Kingdom and Dutch law.
[4] *See, e.g.*, Sarah Paterson and Adrian Walters, *Chapter 11's Inclusivity Problem*, 55 ARIZ. ST. L.J. 1227 (2023).
[5] 11 U.S.C. §§ 1101–1195. I refer to these provisions as "chapter 11" in this article.

like a sleek ship that loses its edge when barnacles attach to its hull, chapter 11 began to collect many different quirks and limitations. Some of these limitations are due to chapter 11's inherent power and lawyers' ingenuity in maximizing that power to hobble protections for small creditors and workers. This ingenuity, however, came at a price—chapter 11 has become increasingly more expensive. The Pacific Gas & Electric Company bankruptcy is an example: in the 19 months from petition to confirmation, the professionals charged more than a half a billion dollars in fees and expenses.[6] The chapter 11 process also slowed down; contentious chapter 11 cases have seemingly dragged on with many taking several years to conclude.[7]

Congress has generally been unmoved by these trends, and has seemingly put concerns about large-scale chapter 11 cases on the backburner.[8] Indeed, it took Congress five years to enact *technical* corrections to the 2005 bill that had made systemic changes to the Code.[9] This neglect

---

[6] Exhibit A to Motion of the Fee Examiner to (i) Approve Final Fees of Fee Examiner; (ii) Terminate Fee Examiner's Services; and (iii) Confirm Survival of Prior Orders, Dkt. No. 10272, at 7, *In re* PG&E Corp., Case No. 19-30088 (Bankr. N.D. Cal. Feb. 24, 2021). I was the fee examiner in that case.

The high cost of a chapter 11 case has not been lost on courts in foreign jurisdictions. For example, an English court recently observed:

> I have one more thing to say at the outset, which has troubled me throughout. I was horrified to discover that the Plan Company has spent around US$150 million on professional fees in negotiating with its secured creditors from December 2022 and then putting forward the Plan and taking it to this hearing. That is an enormous sum of money, even taking account of the fact that it includes the costs of the supporting creditors as well. The Group actually raised US$250 million of new money while the Plan was being negotiated, but that was principally to fund the professional fees for getting the Plan through. The witness from a member of the AHG, Mr[.] Richard Carona, said that he was deeply uncomfortable with this and *I agree with his comment that there seems to be something wrong with the restructuring industry, particularly in the US, where the costs appear to be out of control.* Obviously the fact that the Plan has been opposed has added to the costs, but it should have been apparent from an early stage that Reficar was not going to just accept an extinguishment of its debt. I think all I can say is that I hope there can be a better way to do these financial restructurings because costs of that magnitude could be a barrier to the sort of restructurings that Part 26A was meant to encourage.

In the Matter of CB&I UK Ltd, [2024] EWHC 398 (Ch) (Eng.) (emphasis added).

[7] These points were emphasized in a massive review of chapter 11 by the American Bankruptcy Institute:

> [A]necdotal evidence suggests that chapter 11 has become too expensive (particularly for small and medium-sized enterprises) and is no longer capable of achieving certain policy objectives such as stimulating economic growth, preserving jobs and tax bases at both the state and federal level, or helping to rehabilitate viable companies that cannot afford a chapter 11 reorganization. Some professionals suggest that more companies are liquidating or simply closing their doors without trying to rehabilitate under the federal bankruptcy laws. Commentators and professionals also suggest that companies are waiting too long to invoke the federal bankruptcy laws, which limits companies' restructuring alternatives and may lead to premature sales or liquidations.

American Bankruptcy Institute Commission to Study the Reform of Chapter 11: 2012–2014 Final Report and Recommendations, 23 AM. BANKR. INST. L. REV. 1, 12 (2015) (footnotes omitted).

[8] Congress finally provided some relief in 2019 for smaller businesses with the enactment of subchapter V of chapter 11. Small Business Reorganization Act of 2019, Pub. L. 116-54, § 2, 133 Stat. 1079. Even then, the scope of the revision was given a limited shelf life. Originally limited to debtors with no more than $2,566,050 in noncontingent and liquidated debt, Congress did expand the ceiling to $7,500,000 during the COVID pandemic, Pub. L. 116-136, Div. A, Title I, § 1113(a)(1), (5), 134 Stat. 310, 311 (Mar. 27, 2020). The increase was originally set to (and did) expire in 2022, but Congress eventually extended the increase to June 2024. Pub. L. 117-151, § 2(d), 136 Stat. 1298. (June 21, 2022).

[9] Bankruptcy Technical Corrections Act of 2010, Pub. L 111-327, 124 Stat 3557 (2010).

has led to chapter 11 losing its status as one of the only statutes providing for full scale reorganizations of large entities.

A. The Rise of Alternatives and the Incorporation of "Familiar Relief"

The foregoing concerns have intensified as other countries and groups revised and implemented their own restructuring regimes. A primary impetus of this blossoming of new regimes was the EU's 2019 Directive 2019/1023[10]—a document that has the force of law[11]—which required member countries to adopt minimum standards for business rescue. This article explores the effect on reorganization in the United States due to changes made in 2020 by three countries influenced by that directive: the Netherlands,[12] Germany,[13] and the United Kingdom.[14]

At first glance, these laws incorporate provisions and devices affording relief familiar to those conversant with chapter 11. Among these are some of the basic building blocks found in chapter 11 bankruptcy: stays of creditor actions;[15] postpetition priority financing;[16] tinkering with or outright rejection of unperformed contracts;[17] imposition of a plan on dissenting creditors[18] and dissenting classes of creditors;[19] and a discharge of debt.[20] In such cases, the similarity both in the relief afforded and the circumstances leading to the relief facilitate the acknowledgement and enforcement of the foreign relief.[21]

B. The Rise of Competing Legislation

As reaffirming as it is to chapter 11 to have other countries adopt versions of such familiar relief, the reform efforts did not stop there. Observing the creeping ossification of chapter 11, in 2019 the EU issued a directive requiring its member states to revise their insolvency laws to provide more reorganization-friendly schemes.[22] The Netherlands and Germany followed this

[10] Directive 2019/1023 of the European Parliament and of the Council—of 20 June 2019—on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), 2019 O.J. (L 172), 18–55 (EU) [hereinafter EU Directive]. The EU Directive is already subject to a proposed amendment. *Proposal for a Directive of the European Parliament and of the Council Harmonising Certain Aspects of Insolvency Law,* COM (2022) 702 final (Dec. 7, 2022).

[11] European Comm'n, Types of Law, https://commission.europa.eu/law/law-making-process/types-eu-law_en (last visited March 25, 2024).

[12] Wet Homologatie Onderhands Akkoord (2020), Stb. 2020, 414. The act has generally become known by its Dutch acronym "WHOA," and will be referred to by that acronym in this article.

[13] Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen [StaRUG] [Corporate Stabilization and Restructuring Act 2020], Dec. 22, 2020, BGBl. I S. 3256 (Ger.) [hereinafter StaRUG].

[14] Corporate Insolvency and Governance Act 2020 (c. 12) (UK) [hereinafter CIGA].

[15] 11 U.S.C. § 362.

[16] *Id.* at § 364. For a survey of efforts in other countries, see INSOL INT'L, COMPARATIVE REVIEW OF APPROACHES TO "RESCUE" OR "DEBTOR-IN-POSSESSION" (DIP) FINANCE IN RESTRUCTURING AND INSOLVENCY REGIMES (2022) and Nicholson, et al., *supra* note 2.

[17] 11 U.S.C. § 365.

[18] *Id.* at §§ 1129(a)(8), 1126.

[19] *Id.* at § 1129(b).

[20] *Id.* at § 1141.

[21] *See* U.N. COMM'N ON INT'L TRADE LAW, DIGEST OF CASE LAW ON THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY 66–67 (2021) [hereinafter UNCITRAL DIGEST].

[22] *See* EU Directive, *supra* note 10.

directive in 2020.[23] Although no longer part of the EU, the United Kingdom followed suit in 2020 by liberalizing its reorganization laws.[24]

C. The Rise of "Alien Relief"

Many of these legislative enactments anticipate relief that is not authorized, that is unknown, or that is disputed in chapter 11 practice. I refer to these types of relief as "alien relief;" that is, relief granted in a foreign insolvency that is not constantly cognizable under United States insolvency law.

One example is the contentious remedy of granting nonconsensual releases of debt to nondebtors. In the United States, there is strong policy against extending bankruptcy-type debt relief (such as the discharge) to entities that have not filed a bankruptcy case.[25] As an example, guarantors and others who might be co-liable for the debtor's debts generally receive no relief in a debtor's case.[26] If they want assistance, they generally need to file their own case.[27] But not all countries have such a restrictive view.

This device, among others, was recently examined in the European Union (EU).[28] This examination, driven by a series of studies done in connection with various EU Directives, required member countries to adopt minimum standards for reorganization by 2020.[29] Soon after issuance of the latest directive in 2019, many EU countries amended their insolvency laws, adopting new

---

[23] *See supra* notes 10 to 14.

[24] *See* CIGA, *supra* note 14.

[25] *See* 11 U.S.C. § 524(e); *see also generally* Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959; Ralph Brubaker, *Supreme Court Validates "Clarified" Manville Insurance Injunction: Channeling...and So Much More*!, BANKR. L. LETTER, August 2009.

[26] Like most unvarnished statements about bankruptcy, there are many exceptions. Some courts permit third party releases; others don't. *See In re* Avanti Commc'ns Group PLC., 582 B.R. 603, 606 (Bankr. S.D.N.Y. 2018) ("Third-party releases are often problematic in chapter 11 cases—seemingly prohibited entirely in some Circuits but permitted under limited circumstances in other Circuits. Courts must confront the issue whether bankruptcy courts have the power to grant such releases, and under what circumstances. Circuit courts in the Fifth, Ninth, Tenth and the District of Columbia Circuits have held that the Bankruptcy Code only permits a bankruptcy court to grant releases against a debtor, and prohibits third-party releases absent consent. . . . Circuit courts in the Second, Fourth, Sixth, Seventh and Eleventh Circuits have held that third-party releases may be given consensually and, in limited circumstances, may be approved without consent.").

[27] The Supreme Court recently granted *certiorari* on this issue in the *Purdue Pharma* case. In granting *certiorari*, the Court framed the issue as follows: "Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent." Harrington v. Purdue Pharma, L.P., 144 S. Ct. 44, 216 L. Ed. 2d 1300 (2023). Even if the Court permits some third-party nonconsensual releases, however, the exact scope of what and who can be released is likely not to be clarified anytime soon. The Circuit Courts of Appeal have created differing versions of the conditions under which releases may be issued.

[28] A good review of various jurisdictions treatment of third-party releases can be found in Ilya Kokorin, *Third-Party Releases in Insolvency of Multinational Enterprise Groups*, 18 EUR. CO. & FIN. L. REV. 107 (2021).

[29] EU Directive, *supra* note 10. This Directive was the product of many years of debate and study. *See* Christoph G. Paulus, *European and Europe's Efforts for Attractivity As A Restructuring Hub*, 56 TEX. INT'L L.J. 95, 98–99 (2021).

procedures and incorporating various forms of alien relief.[30] In addition, the United Kingdom, which had already embraced third-party relief in its schemes of arrangement, joined the trend, building on its already robust restructuring practice.[31]

The incorporation of alien relief into these diverse systems is shown by the following short survey of recent legislation in the United Kingdom, the Netherlands, and Germany.

1. Alien Relief in the United Kingdom—CIGA

In 2020, the United Kingdom enacted the Corporate Insolvency and Governance Act (CIGA).[32] CIGA blends some forms of alien relief previously found in United Kingdom legislation related to schemes of arrangement with modern reorganization devices. Previously, schemes of arrangements could affect only some of a debtor's creditors and could provide for nonconsensual third-party releases. But CIGA added what Americans would call "cramdown," by adding a new "Part 26A" proceeding under its insolvency laws. Each of these forms of alien relief is described below.

a. Partial Restructurings Under U.K. Schemes of Arrangement

The English scheme of arrangement began as a noninsolvency measure which enabled companies to restructure individual tranches of debt in which there were identical terms but disperse ownership, such as might be the case with public debt issuances.[33] The rights of individual holders of the debt differ only in the amount of debt held; the substantive terms—such an interest rate, maturities, covenants—are the same for all holders.

The English scheme has the advantage of speed, in that it typically requires only two court interventions: a convening hearing, conducted before a creditor vote, which tests the procedural and substantive appropriateness of the scheme; and a sanctioning hearing, conducted after voting, which confirms the terms of the scheme proposed.

Key to the scheme is that it need only to involve those creditors who are directly affected. Unlike chapter 11, for example, unaffected trade creditors or other classes of creditors whose debt was unchanged by the scheme, did not participate or even receive notice.[34]

Schemes, however, were and are consensual affairs. The key factor in a scheme was the legislative permission for a high majority of holders (set at 75%)[35] to bind minority holders to changes in terms, a feature not permitted in the United States by the Trust Indenture Act.[36]

---

[30] One significant consequence of the adoption by a member of the EU of a new insolvency law is that it will obtain almost automatic recognition in all other EU jurisdictions.
Singapore has also revised its laws in an attempt to attract international insolvency cases. *See* Casey Watters & Paul J. Omar, *The Evolution of Corporate Rescue in Singapore* 27 INSOLV. L.J. 18 (2019); Noel McCoy, *Will Singapore Become an International Centre of Debt Restructuring? A Comparative Analysis of Singapore's Bold Insolvency Reforms,* INSOL INT'L SPECIAL REPORT (2018).
[31] CIGA, *supra* note 14.
[32] *Id.* at § 49(1), sch. 9 ¶ 1.
[33] A brief history of the scheme arrangement is described in Kokorin, et al., *supra* note 2, at 123–34.
[34] *See* Paterson & Walters, *supra* note 4.
[35] Companies Act of 2006, § 901F (UK).
[36] Section 316(b) of the Trust Indenture Act of 1939 (the "TIA"), 15 U.S.C. § 77ppp(b). Section 316(b) requires unanimity to change essential terms.

b. Guarantor Relief Under U.K. Schemes of Arrangements

Jurisprudence regarding United Kingdom schemes permits third-party releases, and has for some time. As the UK High Court stated in *In re Haya Holdco 2 Plc*,[37] "[a] scheme can compromise a creditor's claim against a third party (i.e. a person other than the scheme company) where such a compromise is 'necessary in order to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors.'"[38]

The court explained its reasoning as follows:

> This principle is commonly invoked in the context of a scheme proposed by a borrower where other group companies have granted guarantees. Thus, if X is the borrower and Y is the guarantor, then X may propose a scheme to release the creditors' claims against both X (as borrower) and Y (as guarantor). Otherwise, the creditors would be entitled to sue Y under the guarantee, and Y would be entitled to claim the entire amount back from X in accordance with the guarantor's right of indemnity . . . . This "ricochet claim" would defeat the purpose of the scheme, since X would ultimately remain liable for the very amount that was purportedly released by the scheme.[39]

Some cases impose an even broader scope. In *Lecta Paper UK Ltd*,[40] for example, the release extended to "a large number of third parties, including directors, legal advisors, financial advisors and various other intermediaries."[41] These types of reorganizations have been recognized in cases under chapter 15.[42]

c. Cross Class Cramdown Under U.K. Schemes of Arrangement

CIGA altered the United Kingdom's laws to permit imposition of a scheme on a nonconsenting class in cases seeking to affect more than one class.[43] This is generally referred to as a "cross-class cramdown." It is now permitted under Part 26A of the Companies Act 2006 upon satisfaction of the following two "conditions":

> (3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)) . . . .[44]

---

[37] [2022] EWHC (Ch) 1079 (Eng.).
[38] *Id.* at [38]; *see also In re* Lehman Brothers International (Europe) (No 2) [2009] EWCA (Civ) 1161 [65] (Eng.); *In re* Codere Finance 2 (UK) Ltd [2020] EWHC (Ch) 2441 [138] (Eng.); *In re* APCOA Parking Holdings GmbH [2014] EWHC (Ch) 3849 [149] (Eng.); *In re* Magyar Telecom B.V. [2013] EWHC (Ch) 3800 [33] (Eng.).
[39] *In re* Haya Holdco 2 Plc [2022] EWHC (Ch) 1079 [39] (Eng.) (citations omitted).
[40] [2020] EWHC (Ch) 382 (Eng.).
[41] *Id.* at [22].
[42] *See, e.g.*, *In re* Avanti Communications Group PLC., 582 B.R. 603, 618 (Bankr. S.D.N.Y. 2018) ("The Court concludes that schemes of arrangements sanctioned under UK law that provide third-party non-debtor guarantor releases should be recognized and enforced under chapter 15 of the Bankruptcy Code.").
[43] CIGA, *supra* note 14, at sch. 9 ¶ 1. For an early discussion of this procedure, see, e.g., *In re* Deepocean 1 UK Ltd [2020] EWHC (Ch) 3549 (Eng.).
[44] Subsection (4) reads:

> (5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."[45]

Absent from these requirements is anything similar to chapter 11's absolute priority rule, although the "relevant alternative" requirement looks to be close to what American practitioners would call the "best interests" test.[46]

This cross-class cramdown gives a new look to schemes. Previously, courts confirmed plans only if approved by supermajorities of the affected class. Now courts have the power to change the terms of a dissenting class, which gives plan proponents significant powers to alter large swaths of debt, including classes of debts that actually oppose the plan.

What wasn't changed, however, was the ability to impose a scheme on less than all classes of creditors. Two or three bond issues could be affected, for example, without the need to restructure—or even notify—trade debt or tax debt.

2. Alien Relief Under Dutch Law—WHOA

In 2020, the Netherlands also adopted new restructuring laws.[47] Known generally under its acronym of "WHOA," the new law provides for a restructuring device similar to the United Kingdom's scheme of arrangement, which is to be implemented by a restructuring plan.

WHOA accomplishes this by providing that a restructuring plan "may also amend the rights of creditors against legal entities that form a group with the debtor . . . ."[48] Dutch law on the composition of a corporate group is functional rather than directive; the Dutch Civil Code defines a group as "an economic unit in which legal persons and commercial partnerships are organizationally interconnected. Group companies are legal persons and commercial partnerships interconnected to each other in one group."[49]

> (4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.

In the recent case of *In re* AGPS Bondco Plc, involving the German Adler Group, the UK Court of Appeal found that the "relevant alternative" was akin to a liquidation analysis. [2024] EWCA (Civ) 24.

[45] Companies Act of 2006, § 901G(3), (5) (UK).

[46] *See In re* AGPS Bondco Plc [2024] EWCA (Civ) 24. In *AGPS Bondco*, the UK Court of Appeal reversed a sanctioning of a scheme in which various classes of unsecured notes were classified separately and each given different treatment based on different trading prices for the notes. The court held that since the notes were all unsecured, they would have been lumped together in a liquidation and would have all received the same pro rata dividend.

[47] WHOA, *supra* note 12.

[48] *Id*. at art. 372(1).

[49] *Id*. at art. 24b BW. This definition is specifically incorporated into WHOA. *Id*. at art. 372.

This ability to modify rights against nondebtors, however, is subject to a provision that the plan provides for "payment of or security for the obligations of the debtor or obligations for which the legal entities are liable together with or alongside the debtor."[50]

3. Alien Relief under German Law— StaRUG

In 2020, Germany also amended its insolvency law in response to the EU Directive.[51] This new German law—colloquially known by its acronym "StaRUG"—allows a restructuring plan to affect claims against nondebtors. It provides that "[t]he restructuring plan may also modify rights of holders of restructuring claims owed to such holders under any liability assumed by an affiliate . . . as guarantor, joint debtor or otherwise, or held by such holders in assets of that affiliate (intragroup third-party security)."[52] As with the Dutch law, the statute provides that "any interference with such rights must be adequately compensated."[53]

Although the StaRUG jurisdictional provisions only permit entities with the "center of main interests" in Germany to file under the StaRUG, there is a method by which an "anchor" debtor with its COMI in Germany can bring in other members of the enterprise group.[54]

III. THE SPREAD OF ALIEN RELIEF: INSOLVENCY JURISDICTION BASED ON CONNECTIONS RATHER THAN PROPINQUITY

Alien relief is more than just an exotic curiosity. What happens abroad can affect what happens in the United States. The initial inclination is to think that the drafting and construction of domestic insolvency systems should reflect the norms and mores of the countries which enact them. Some countries favor creditors; some debtors. And it is thought that comity can accommodate these differences whenever insolvency systems interact.[55]

As indicated above, a new drive exists for insolvency change. Countries are increasingly viewing their insolvency systems not just as domestic legislation, but as prestige or revenue-

---

[50] *Id*. at art. 372(1)(a). In addition, the nondebtor members of the group must each be subject to jurisdiction in the Netherlands and each must either consent, or the debtor must have the approval of a court appointed restructuring expert. *Id.* at arts. 372(1)(c)–(d).

[51] StaRUG, *supra* note 13.

[52] *Id*. at art. 2(4).

[53] *Id.*

[54] Section 37(1) of StaRUG provides:

> At the request of a debtor that is a member of a group of companies within the meaning of section 3e InsO (group debtor), the restructuring court seised will declare that it has jurisdiction over restructuring matters of other debtors within the same group (subsequent group proceedings), provided that the debtor has filed a permitted request in the restructuring matter and the debtor is not obviously of subordinate significance for the group of companies as a whole.

StaRUG, *supra* note 13, at § 37(1).

[55] The Third Circuit recently revived the judicial doctrine of comity as a standard for recognition of a foreign insolvency proceeding. Vertiv, Inc. v. Wayne Burt PTE, Ltd., 92 F.4th 169 (3d Cir. 2024). In *Vertiv*, the Third Circuit expounded on what it called "adjudicatory comity" in recognition of a Singapore insolvency proceeding without giving chapter 15 much consideration. Relying primarily on cases decided before the adoption of chapter 15, the court stated it was "clarif[ying] the standard courts must apply when deciding whether to abstain from adjudicating a case in deference to what is essentially a pending foreign bankruptcy proceeding" and remanded the case to the district court to apply its guidance. *Id*. at 169.

enhancing measures, not unlike how some countries have constructed their taxation schemes.[56] Through a combination of jurisdictional grants that purport to extend a court's powers beyond physical borders, and providing statutory relief that is sought by troubled debtors, countries such as the United Kingdom, the Netherlands, and Germany have expanded the forms of relief that their courts may permissibly grant.

This expansion first relies on the legitimacy of asserting jurisdiction over the debtor or its property. In the United States, the connection chosen is the presence of tangible property in the jurisdiction.[57] This standard is manipulable, and many countries adopting alien relief have pivoted from property propinquity to less tangible "substantial connections" as a basis for jurisdiction.[58] Each of these approaches is considered below.

A. The United States Standard—Property

The United States has a simple and expansive basis for its insolvency jurisdiction. A United States bankruptcy court will assert worldwide jurisdiction over *all* property of a debtor if the debtor has *any* property in the United States.[59]

The property does not have to include operating assets. It can be manipulated. As an example, courts have held that payment of an unearned retainer to a United States law firm is sufficient to establish jurisdiction under § 109 of the Code.[60] In addition, some courts have found that a cause of action by a foreign debtor with a situs in New York satisfies the "property in the United States" eligibility requirement.[61]

Once property is situated in the United States, § 541 of the Code thereafter brings into the bankruptcy estate "all . . . property, wherever located and by whomever held."[62]

B. UK, Dutch, and German Law Standards

The fickle and somewhat arbitrary location of property standard has lead other countries to establish other means to assert jurisdiction. Many countries now accept a "substantial connection"

---

[56] This can be seen in the Dutch creation of an international commercial court, the Netherland Commercial Court. In 2019, the Netherlands established the Netherlands Commercial Court. Although based in Amsterdam, the court's website states that "[p]roceedings are in English. Judgments are in English." https://www.rechtspraak.nl/English/NCC/Pages/default.aspx. In describing the court, its website also states that the court "is built on a solid foundation: the reputation of the Dutch judiciary, which is ranked among the most efficient, reliable and transparent worldwide. And the Netherlands – and Amsterdam in particular – are a prime location for business, and a gateway to Europe." *Id*.

[57] 11 U.S.C. § 109.

[58] I explore this subject in more detail in *A Broad View of Venue Abroad*, 36 CAL. BANKR. L.J. ___ (2024) (forthcoming).

[59] Section 109(a) of the Code states: "Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, *or property in the United States*, or a municipality, may be a debtor under this title." 11 U.S.C. § 109(a) (emphasis added).

[60] *In re* B.C.I. Finances Pty Ltd, 583 B.R. 288, 293 (Bankr. S.D.N.Y. 2018); *In re* Avanti Commc'ns Group PLC, 582 B.R. 603, 610–11 (Bankr. S.D.N.Y. 2018).

[61] *See In re* Agro Santino, OOD, 653 B.R. 79, 88 (Bankr. S.D.N.Y. 2023); *In re* Berau Cap. Res. PTE Ltd., 540 B.R. 80, 82 (Bankr. S.D.N.Y. 2015); *In re* Octaviar Admin. Pty Ltd., 511 B.R. 361, 370 (Bankr. S.D.N.Y. 2014).

[62] 11 U.S.C. § 541(a).

to the forum state as a sufficient basis for asserting insolvency jurisdiction. Three relevant examples are statutes from the United Kingdom, the Netherlands, and Germany.

1. United Kingdom

The United Kingdom has a history of taking jurisdiction over all of a debtor's assets, wherever located, if there is a substantial connection between the United Kingdom and the assets, obligations, or locations of the debtor. For example, United Kingdom courts will take jurisdiction if the relevant contracts or obligations have chosen United Kingdom or British law as the governing law.[63]

But there are many grounds, established by court decision, for sufficient connections. As recently summarized:

> Among the criteria which were found to be enough to establish a sufficient connection to sanction a scheme are: English law governed debt of key finance contracts and principal activity of the debtor in England; English law governed contracts; English domicile of creditors holding >50% by value of claims; choice of English law and jurisdiction of English courts in the facilities agreement; purposeful alteration of the governing law and the jurisdiction clause in contracts to English law and English courts; and movement of operations to England and domicile of 18% of the scheme creditors in England.[64]

Indeed, United Kingdom courts have taken the position not only that choice of governing law is a sufficient basis for the exercise of jurisdiction, but also that it is exclusive. They refuse to recognize insolvency judgments from other countries that purport to affect debt governed by United Kingdom law.[65]

2. Netherlands

Under Dutch law, the choice of Dutch law is apparently also a basis for insolvency jurisdiction. Article 3.c of the Dutch Code of Civil Procedure reads as follows:

> Where legal proceedings are to be initiated by a petition of the petitioner or his solicitor and it concerns other legal proceedings then those meant in Article 4 and 5, Dutch courts have jurisdiction:
>
> . . .

[63] *See Re* Vietnam Shipbuilding Industry Group [2014] BCC 433, at [9]; *Re* Apcoa Parking Holdings GmbH [2015] BCC 142 (sanction hearing), at [219] to [256]; *Re* PJSC Commercial Bank "Privatbank" [2015] EWHC 3299 (Ch), at [16] to [19]; *Re* ColourOz Investment 2 LLC [2020] EWHC 2464 (Ch), at [18] to [20]; *Re* PGS ASA [2020] EWHC 3622 (Ch), at [60].

[64] Kokorin, et al., *supra* note 2, at 122 (footnotes omitted).

[65] This position traces back to Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux, [1890] QB 399 (Eng.). Under the so-called *Gibbs* rule, only an English court may discharge debt arising under English law, even if that debt has first been discharged in a foreign insolvency proceeding. *See* Varoon Sachdev, *Choice of Law in Insolvency Proceedings: How English Courts' Continued Reliance on the Gibbs Principle Threatens Universalism*, 93 AM. BANKR. L.J. 343 (2019).

> c. if the legal proceedings are otherwise sufficiently connected with the Dutch legal sphere.[66]

As noted recently, "a sufficient connection [under WHOA] may arise from a single group member having its COMI or an office in the Netherlands, from the presence of (substantial) assets of the debtor in the Netherlands, or if the debtor is liable for debts of another debtor over which the Dutch courts have jurisdiction."[67]

3. Germany

Germany has not adopted the broad "substantial connection" test, retaining a territorial basis for the jurisdiction of its courts. As noted in a recent article co-authored by a well-known German scholar:

> The StaRUG does not clarify which criteria or circumstances may be considered in deciding on the jurisdiction for non-public restructuring plans when they involve non-German debtors and creditors. Common German doctrine would suggest that the provision regulating territorial jurisdiction also determines international jurisdiction for German courts unless EU law is directly applicable. Under this approach, § 35 of StaRUG would restrict access to the German schemes only to businesses with a German COMI unless the Brussels I-bis prevails.[68]

IV. BRINGING ALIEN RELIEF HOME: THE INTERNATIONAL TWO-STEP

Alien relief did not arise in a vacuum. Insolvency professionals demanded these practices, and these countries delivered, all in the belief that they will result in faster and cheaper reorganizations.[69]

As a result, chapter 11 has lost some of its international sheen. The current use of chapter 15 hints at this. Many international restructurings now occur outside the United States, with chapter 15 being used after completion of the foreign proceeding to compel United States courts to implement the terms of that foreign restructuring. Or "parallel proceedings" in jurisdictions supporting alien relief are undertaken concurrently with a chapter 11 case. In using these methods, debtors get the laws they want, and are able to retain access to United States markets and protection from United States' litigation.

Chapter 15 anticipates and facilitates these practices. But here is the issue. If foreign insolvency laws are now more appealing to struggling companies, is it possible for a United States entity to restructure abroad and then file a chapter 15 here to recognize that restructuring? I believe that it is not only possible, but likely. If so, this permissiveness calls into question whether chapter 15 is antithetical to basic principles of United States bankruptcy law in general, and chapter 11 in particular.

---

[66] Art. 3, para. c. RV. *See* Resor, *The Act on the Confirmation of Private Plans*, available at https://www.resor.nl/wp-content/uploads/2020/03/WHOA_ENG.pdf.

[67] Kokorin, et al., *supra* note 2, at 126 (citing the Dutch Explanatory Memorandum to the Draft Act on Court Confirmation of Extrajudicial Restructuring Plans (2020) at 35).

[68] *Id.* at 128.

[69] Many of these practices were designed to cater to foreign interests. *See* note 56 *supra*.

These concerns raise a fundamental question. May a domestic United States company take advantage of chapter 15? Not only is it possible, I contend that it's inevitable,[70] through the use of what I call the "International Two Step."[71]

A. Step One: Commence a Foreign Proceeding

Step one is fairly simple. Commence an insolvency proceeding in a country with favorable alien relief. Stating this step is much easier than implementing it. Much planning will go into the benefits and detriments of a particular country's insolvency scheme.

But the enhanced and expansive measures of jurisdiction discussed above facilitate this decision. Using "substantial connections" as a jurisdictional basis expands the list of possible countries in which to file and from which to select possible relief.

There are, of course, practical limits to this choice. The relationship between the entity filing the foreign proceeding and the domestic debtor must meet certain requirements.

If the entity filing the foreign proceeding is the same as the domestic debtor (the same entity holds assets and has obligations in both the United States and the foreign country), then the debtor must have an "establishment" in the filing country in order for the two-step to work. This requirement stems from the structure of chapter 15, which requires classification of foreign proceedings as main or nonmain.[72] The Code defines "foreign nonmain proceedings" as "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an

[70] It is somewhat easy to make this assertion because United States courts, in several cases, have already recognized English Schemes of Arrangement and German StaRUG proceedings involving a United States entity. *See, e.g.*, *In re* Spark Networks SE, Case No. 23-11883-MFW (Bankr. D. Del. Dec. 14, 2023) (granting recognition to a German StaRUG proceeding in which a Delaware corporation's debt was adjusted); *In re* Syncreon Automotive U.K. Ltd., Case No. 1:19-BK-11702 (Bankr. D. Del. Sept. 11, 2019) (granting recognition to a UK Scheme of Arrangement in which a Delaware corporation's debts were adjusted). The earliest example of such recognition was likely *In re hibu, Inc.* No. 8-14-70323-reg (Bankr. E.D.N.Y. Feb. 27, 2014). Many thanks to Dan Glosband for pointing out *hibu*, and for his many, many helpful suggestions over the years. In addition, Singapore courts recently recognized, under the Model Law, a chapter 11 case filed by a Singapore company. *In re* CFG Peru Invest. Pte. Ltd., Case No.: HC/OS 665/2021 (Sing. High Ct. Sept. 21, 2021).

[71] This is a blatant appropriation of the current domestic practice known as the "Texas Two Step." The Texas Two Step consists of the use of a state law "divisive" merger statute to transfer to and segregate a company's liabilities in a separate affiliate (the first step), and then causes that affiliate to file a chapter 11 case, under which the debtor will file a plan obtaining a release of the entity initiating the merger (the second step). The chapter 11 is funded by a support agreement from the entity initiating the divisive merger. In this way, a company can—I believe illegitimately—separate its good assets from its liabilities, and usurp control and determination of the payment of the segregated liabilities. *See* Bruce A. Markell, *Two-Steps Forward; Three-Steps Back: Johnson & Johnson and the Texas Two-Step,* 31 INSOL. L.J. 126 (2023).

[72] This binary classification was solidified in *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., in which the court declined to recognize a foreign proceeding in which the debtor has neither its COMI in the United States nor an establishment in the jurisdiction in which the insolvency proceeding was pending. 374 B.R. 122, 130 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008).

establishment."[73] An "establishment," in turn "means any place of operations where the debtor carries out a nontransitory economic activity."[74]

If the entity filing the foreign proceeding is an affiliate or subsidiary of the domestic entity, the nature of the secondary liability of the domestic entity will be important. If the domestic entity has guaranteed or is otherwise contractually liable for the debts of the foreign affiliate, then the jurisdiction chosen for filing will need to embrace alien relief that incorporates third-party or affiliate guarantor relief. If the domestic entity is liable by operation of law—in the form of alter ego or successor liability or something else—the issue is not as clear in terms of the types of claims a foreign jurisdiction is able to affect. A full understanding of the insolvency law of the filing jurisdiction would be required.

B. Step Two: File a Chapter 15

The second step is the main focus of this article: filing a chapter 15 case to recognize the foreign insolvency proceeding involving the domestic debtor. In this sense, use of chapter 15[75] is somewhat novel; it was not part of the original 1978 Code. Congress added it in 2005,[76] by essentially adopting a 1997 model law originally drafted by UNCITRAL, the United Nations Commission on International Trade Law ("Model Law").[77]

The Model Law is an attempt, in insolvencies in which a debtor or its operations are in two or more countries, to increase creditor recoveries and debtor revivals by reducing the jumble of laws applicable to restructurings of such cross-border debtors. The primary tool for this simplification was the adoption of a "choice of law" approach to recognition, in which countries adopting the Model Law will "recognize" and then defer to the laws in qualifying foreign insolvency proceedings.

---

[73] 11 U.S.C. § 1502(5).

[74] *Id.* at § 1502(2). UNCITRAL's Model Law provision is substantially the same, and adds that the economic activity must be carried out "with human means and goods or services." U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, art. 2(f) (1997), available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency [hereinafter "Model Law"].

[75] 11 U.S.C. §§ 1501–1531.

[76] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 134–145, tit. VIII, § 801 (2005).

[77] Model Law, *supra* note 74. The legislative history of chapter 15 states that it "introduces chapter 15 to the Bankruptcy Code, which is the Model Law on Cross-Border Insolvency ('Model Law') promulgated by the United Nations Commission on International Trade Law ('UNCITRAL')." H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 106 (2005).

The United States was an early adopter of the Model Law, being the tenth country to adopt it. *See* Status: UNCITRAL Model Law on Cross-Border Insolvency (1997), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last visited March 25, 2024). At present, UNCITRAL lists 59 states comprising a total of 62 jurisdictions which have enacted the Model Law. *Id.* Adopters include common law countries such as Canada, Australia, and the United Kingdom. As well as civil law countries such as Mexico, Japan, and Brazil. *Id.* Actually, the true number of adoptions is 60. Kosovo adopted the text of the Model Law, but as the United Nations does not fully recognize Kosovo, the United Nations does not count its adoption in its tally. *See generally* Bruce A. Markell, *Small Business and Bankruptcy: The Kosovo Experiment*, 26 UNIV. MIAMI INT'L & COMP. L. REV. 255 (2020).

Recognition gives a representative from the foreign proceeding access to United States courts, and various rights to further the goals of the foreign proceeding.[78] This can include many things, from enjoining lawsuits against the debtor[79] to permitting the foreign representative to sell assets free and clear of any claims by United States entities,[80] and then sending the proceeds to the foreign country for distribution according to the rules of the foreign proceeding.[81]

1. Chapter 15 and Model Law Basics

Recognition is thus critical to the functioning of chapter 15. The types of relief described in the text of the Model Law are familiar to most insolvency systems. Stays of creditor action against the debtor, along with the authorization to sell and transfer assets, are staples of most insolvency systems.

To understand the international two-step, then, the basics of recognition must first be understood.

a. Basic Concepts: COMI, Universalism, Territorialism, Main and Nonmain Cases

As previously indicated, the Model Law, and hence chapter 15, does not lay down a substantive universal insolvency law. Rather, the Model Law incorporates a choice of law rule to point to a particular country's law for the governance and administration of a cross-border case.

The Model Law selects the law to be applied by establishing criteria which point to the country of the debtor's "center of main interests," colloquially known by its acronym COMI. As a result, a multi-national corporation headquartered and incorporated in Australia and which has filed an Australian insolvency proceeding will have Australian law govern the principal aspects of its insolvency, regardless of where legal proceedings are commenced (assuming all relevant countries have adopted the Model Law). So if an insolvency proceeding is commenced against a company with an Australian COMI in, say, Mexico—likely because the Australian company has assets in Mexico and has Mexican creditors—the Model Law would require Mexican courts to essentially look to Australian law, and defer to Australian courts, with respect to the company's insolvency. Actions against the company in Mexico would be stayed. Mexican creditors would file their claim in Australia. And Mexican-based assets could be sold and the proceeds sent from Mexico to Australia to pay all claims. The Australian case or proceeding would be referred to as a "foreign main proceeding,"[82] or a foreign proceeding pending in the debtor's COMI.

This approach has been called "universalism," from the sense that although there may be many different insolvency laws which potentially could apply to a financially distressed multi-national entity, the Model law would apply only one of those laws universally to a debtor's far-

[78] 11 U.S.C. §§ 1515–1517. Chapter 15 cases are not particularly numerous; during 2023, only 159 chapter 15 cases were filed. Table F-2—U.S. Bankruptcy Courts Statistical Tables For The Federal Judiciary, at n.1 (December 31, 2023), available at https://www.uscourts.gov/statistics/table/f-2/statistical-tables-federal-judiciary/2023/12/31 (last visited March 25, 2024).
[79] 11 U.S.C. §§ 1520(a)(1), 1521(a)(1).
[80] *Id.* at § 1520(a)(2). Chapter 15 incorporates the sale free and clear provisions of § 363 of the Code.
[81] *Id.* at § 1521(b).
[82] *Id.* at § 1502(4); Model Law, *supra* note 74, at art. 2(b). A "foreign proceeding" is defined in 11 U.S.C. § 101(23), and in the Model Law in article 2(a).

flung assets. This universalism is thought to be superior in terms of creditor recoveries and debtor survival than its opposite: territorialism.

Territorialism broadly refers to the situation in which insolvency relief and the applicable insolvency law is inextricably tied to asset location. To extend the example above, under a territorial regime, Mexican creditors would not be restricted from pursuing and realizing upon assets located in Mexico to satisfy their claims, regardless of the composition and location of the debtor's other assets and claims, and regardless of the pendency of an insolvency proceeding in any other country. An asset's location would determine the law that affects realization of that asset.

Given the diversity of insolvency regimes, territorialism imposes a cost in sorting out the different priorities and obligations in each location in which a debtor has assets. A secured claim may be a property interest in one location, but only a priority or not even recognized in another;[83] an unsecured claim may have priority in one location but not another;[84] or a claim in one jurisdiction might be held to be essentially an equity interest in another.[85] It also raises issues about (and costs regarding) how to determine asset location (think intangible assets such as intellectual property). Given the substantial potential for litigated disputes,[86] it was thought that these costs would be so high as to preclude efficient realization and reorganization.[87]

COMI, then, anchors the law to be applied to where the debtor principally operates, and where creditors and stakeholders would expect disputes to be resolved. COMI, however, is not the exclusive basis for recognition. The Model Law also compels courts to assist some insolvency proceedings commenced in countries that are not the debtor's COMI. These are termed "foreign nonmain proceedings." An example might be if the Australian company above also operated in Canada, and the Australian company decided it was advantageous to file a Companies' Creditors

[83] In the United Kingdom, for example, a small portion of certain after-arising floating charges must be shared with unsecured creditors. And although the United States recognizes an endless chain of proceeds interests so long as the interest is identified; some civil law countries do not recognize certain proceeds interests after the first disposition. Finally, the United States allows generic description of collateral and provisions that automatically grant security interests in collateral; other nations do not, and do not embrace expansive after-acquired property clauses. *See* Bruce A. Markell, *Infinite Jest: The Otiose Quest for Completeness in Validating Insolvency Judgments*, 93 CHI.-KENT L. REV. 751, 759–60 (2018).

[84] *See* Akers v. Deputy Comm'r of Taxation, [2014] FCAFC 57, which involved refusing to repatriate funds in Australia to a foreign main proceeding because that proceeding would not recognize the federal tax claim held by the Australian government.

[85] *See* Stonington Partners, Inc. v. Lernout & Hauspie Speech Prod. N.V., 310 F.3d 118 (3d Cir. 2002) (addressing differences between United States and Belgian law caused by the subordination provisions of § 510(b) of the Code).

[86] As Judge Kevin Gross noted in the *Nortel* bankruptcy:

> Territorial wrangling significantly diminishes value for stakeholders in a global insolvency involving a highly-integrated multinational enterprise whose assets are entangled, and ought not to be condoned or rewarded.

In re Nortel Networks, Inc., 532 B.R. 494, 531 (Bankr. D. Del. 2015).

The professional fees in *Nortel*, incurred mostly in sorting out different priorities among United States, Canadian, and United Kingdom law, exceeded $2 billion. Daniel Fisher, *Nortel Bankruptcy Fees Near $2 Billion As Creditors, Pensioners Fight Over Assets*, FORBES, Apr. 5, 2016, available at https://www.forbes.com/sites/danielfisher/2016/04/05/nortel-bankruptcy-fees-approach-2-billion-as-court-hears-arguments-over-assets/ (last visited March 25, 2024). Total recoveries in *Nortel* were around $7 billion. *Id.*

[87] *See, e.g.*, U.N. COMM'N ON INT'L TRADE LAW, GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS–BORDER INSOLVENCY ¶¶ 83–84 (2014) (discussing COMI concept) [hereinafter GUIDE TO ENACTMENT].

Arrangement Act (CCAA) proceeding to administer its Canadian assets.[88] The Canadian proceeding would, of course, have jurisdiction over the company's Canadian assets, but Canada would not be the company's COMI. In that case, the Canadian CCAA proceeding would be a foreign *nonmain* proceeding.

The distinction between main and nonmain foreign proceedings is significant. When a local court applies the Model Law, foreign main proceedings receive automatic relief upon recognition. Local lawsuits against the debtor are stopped, and the local courts recognize the representative from the main proceeding.

Relief in nonmain proceedings, by contrast, is discretionary, and "the court must be satisfied that the relief relates to assets that, under the law of [the adopting] State, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding."[89] The types of relief are not much different, but the representative from a nonmain proceeding has more to prove to obtain stays, as well as the ability to move assets. To continue the above example, if the representative in the CCAA proceeding wished to enforce some judgments in New York (where the Australian company did business), the Canadian representative could file a chapter 15 case and have the Canadian CCAA recognized as a foreign nonmain proceeding.

b. Basic Procedure

That analysis brings us back to recognition. Recognition was designed to be relatively easy. Under § 1515 of the Code,[90] which mirrors article 15 of the Model Law, all the foreign representative has to produce is

- "[E]vidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative,"[91] which can include a "certified copy of the decision commencing such foreign proceeding and appointing the foreign representative";[92] and
- A statement identifying all other foreign proceedings known to the foreign representative.[93]
- The documents must also be translated into English, but that's about it.[94]

Once these documents are produced, the court must decide whether the requirements of a foreign proceeding and foreign representative are met,[95] and whether the foreign proceeding is a main or nonmain proceeding (which involves a determination of the debtor's center of main interests).[96]

---

[88] Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.
[89] Model Law, *supra* note 74, at art. 21(3).
[90] 11 U.S.C. § 1515.
[91] *Id.* at § 1515(b)(3).
[92] *Id.* at § 1515(b)(1).
[93] *Id*. at § 1515(c).
[94] *Id.* at § 1515(d).
[95] *Id.* at § 1517(a)(2). The definitions of "foreign proceeding" and "foreign representative" are found in 11 U.S.C. § 101(23) and (24), respectively.
[96] 11 U.S.C. § 1517(a)(1).

2. Recognition Has Broad Consequences

Upon filing a chapter 15 petition, the foreign representative can ask for preliminary and provisional relief until recognition.[97] Such relief can include stays against the enforcement of judgments,[98] as well as the permission to take discovery.[99] At the pre-recognition stage, the relief is temporary, and is treated as if it were a request for an equitable injunction.[100]

Once recognition is granted, however, any provisional relief granted is terminated,[101] and the relief available turns on whether the foreign proceeding is classified as "main" or "nonmain."

a. Relief in a Main Proceeding

If the foreign proceeding is a main proceeding, § 1520 applies the following relief automatically, and without further request:

- The automatic stay of § 362 will apply to the debtor and the debtor's property in the United States;[102]
- The foreign representative obtains the ability to sell property under § 363, which includes the ability to sell property free and clear of any liens, claims or encumbrances;[103] and
- The foreign representative may operate the debtor's business in the United States within the limits provided by §§ 363 and 552.[104]

In addition, the court may grant the following relief on a discretionary basis:

- The foreign representative can initiate discovery;[105] and
- The foreign representative can be entrusted with the administration,[106] realization,[107] and distribution and repatriation of the debtor's assets to the foreign proceeding.[108]

These enumerated powers are not exclusive. In addition, a court may grant additional relief that would be available to a trustee if the case had been initially filed in the United States, except that the foreign representative may not access the avoiding powers of the Code (although presumably the foreign representative could bring an action based on the avoiding or other similar powers provided by the country from which the foreign proceeding emanates).[109]

---

[97] *Id.* at § 1519.
[98] *Id.* at § 1519(a)(1).
[99] Section 1519(a)(3) incorporates the relief set forth in § 1521(a)(4), which includes the ability to take discovery.
[100] 11 U.S.C. § 1519(e).
[101] *Id.* at § 1519(b).
[102] *Id.* at § 1520(a)(1).
[103] *Id*. at § 1520(a)(2).
[104] *Id*. at § 1520(a)(3).
[105] *Id*. at § 1521(a)(4).
[106] *Id*. at § 1521(a)(5).
[107] *Id*. at § 1521(a)(5).
[108] *Id*. at § 1521(b).
[109] *Id*. at § 1521(a)(7).

These additional discretionary powers are granted subject to treating the request as one for an equitable injunction.[110]

b. Relief in a Nonmain Proceeding

If the court finds the foreign proceeding to be nonmain, § 1521 permits but does not require the court to grant all the rights specified above.[111] This grant is, however, subject to treating the request as one for an equitable injunction.[112]

c. Relief Not Specified

But note what types of relief chapter 15 and the Model Law do *not* mention. There is no mention of a United States court honoring a discharge entered in the foreign main proceeding. The statute is silent as to whether there is automatic recognition of *non-money* judgments such as injunctions or declaratory judgments. Indeed, there is no mention of recognizing even a simple monetary judgment.[113]

Although these gaps are corrected somewhat by UNCITRAL's so-far unadopted Model Law on Recognition and Enforcement of Insolvency-Related Judgments,[114] there are "catch-alls" in the adopted 1997 Model Law that can be adapted to achieve realization of alien relief. Section 1521(a)(7) permits the court to grant "any additional relief that may be available to a trustee" other than avoiding powers actions. Section 1507 allows a court to provide "additional assistance" to a foreign representative.[115]

United States' courts have used these provisions to enforce alien relief. Courts have approved United Kingdom schemes of arrangement, even though they do not require participation of all creditors, and even though the recognized schemes include nonconsensual third party releases.[116] So long as such alien relief is not "manifestly contrary" to the United States' public policy,[117] courts in the United States appear to have been performing their role as an "auxiliary courtroom"[118] for the foreign proceeding, and enforcing foreign insolvency judgments containing alien relief.

3. United States Recognition of a Foreign Nonmain Proceeding Filed by a Domestic Entity

Against this developing background of recognizing alien relief, could an entity organized or based in the United States take advantage of these tools by filing abroad and then seeking

---

[110] *Id*. at § 1521(e).
[111] *Id*. at § 1521(a).
[112] *Id*. at § 1521(e).
[113] I have explored recognition of foreign money judgments in *Comity, Chapter 15, and the Enforcement of Foreign Country Money Judgments in the United States*, in ANNUAL REVIEW OF INSOLVENCY LAW 697 (Janis Sarra & Hon. Barbara Romaine, eds., 2016).
[114] U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS (2018), available at https://uncitral.un.org/en/texts/insolvency/modellaw/mlij.
[115] The United States has added significant conditions to the granting of "additional assistance" not found in the Model Law. *See* 11 U.S.C. § 1507(b).
[116] *See, e.g.*, *In re* Avanti Commc'ns Group PLC., 582 B.R. 603, 606 (Bankr. S.D.N.Y. 2018).
[117] This limitation comes from § 1506 which is discussed at notes 159 to 164 *infra*.
[118] H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 106 (2005) ("Cases brought under chapter 15 are intended to be ancillary to cases brought in a debtor's home country . . . .").

chapter 15 relief in the United States without filing a new chapter 11? In this section, I sketch out a potentially positive answer.

Initially, however, let me construct at least two likely candidates. One might be a financially-troubled United States entity with foreign operations that have a substantial connection to a country whose insolvency law contains the desired alien relief. This entity might have outstanding debt instruments governed by favored-country's law, or some of its securities could be traded on a favored-country's securities exchange.[119] Using the tenets of "substantial connection" jurisprudence, the foreign country would take jurisdiction of an insolvency proceeding filed by the United States entity.[120] It would then undertake to restructure all of that entity's debt.

Another possible candidate might be a financially-troubled domestic entity that may not have direct foreign operations in another country, but has guaranteed or is otherwise liable for the debt of a foreign affiliate located in, or with substantial connections to, a country with favorable alien relief.[121] The domestic firm would be financially viable at a lower level of debt were the guaranties or liability eliminated; its operations would not need to be radically changed to achieve a reliable cash flow.

In either case, the domestic entity would also have reasons, financial or operational, not to plunge the entire company into the fishbowl that is chapter 11.[122] Or it might be unable to legally affect its financial debt without affecting all its debt, including trade and other operational debt. For example, a domestic entity cannot, outside of bankruptcy, practically affect debt issued in compliance with the Trust Indenture Act, as that law requires 100% consent to change principal amount or maturities.[123]

For these types of situations, it would be appealing to restructure the debt related to the financial obligations only, reducing the financial (as opposed to operational) debt burden on the domestic operations without involving day-to-day creditors. The schemes of arrangement offered by the United Kingdom or the Netherlands have appeal in these circumstances, especially given those countries' broad bases for taking jurisdiction.

Add to this the need or desire to modify guaranties of the troubled debt at the same time the troubled debt is restructured—an especially pressing need in modern, multi-layered, global

---

[119] *See generally* Philip Wood, *Choice of Governing Law for Bonds*, 15 CAPITAL MARKETS L.J. 3 (2020).

[120] The small collection of cases of which I am familiar are collected in note 70.

[121] *See, e.g.*, *In re* Spark Networks SE, Case No. 23-11883-MFW (Bankr. D. Del. Dec. 14, 2023) (granting recognition to a German StaRUG proceeding in which a Delaware corporation's debt was adjusted by a German court).

[122] An example might be found in *Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Fin. Corp.,* in which the parties agreed that a bankruptcy filing would jeopardize their federal funding under 20 U.S.C. § 1002(a)(4)(A). 846 F.3d 1, 3 (2d Cir. 2017).

[123] Section 316(b) of the TIA provides as follows:

> Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder . . . .

TIA, *supra* note 36, at § 316(b).

restructurings. As shown above, the insolvency and restructuring laws of countries such as the United Kingdom and the Netherlands would generally permit that (subject to providing some compensating consideration).

As a result, the ability to restructure individual debt issues outside the United States might be attractive. But could domestic creditors simply ignore the foreign proceeding, and sue the debtor in the United States on the bonds purportedly restructured abroad?

That's where chapter 15 comes in. If the domestic creditor could qualify for chapter 15 protection, then a domestic court could stay lawsuits seeking enforcement.

But many steps and exceptions exist.

a. Foreign Representative?

To seek chapter 15 relief, there must be a foreign representative. Initially, it would seem odd to have a domestic entity qualify as a foreign representative. The full definition of foreign representative is:

> The term "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.[124]

Look closely: there's nothing in this definition that requires the representative to be foreign. Indeed, there is no citizenship requirement at all. The only requirement is that the representative's status be authorized in the foreign proceeding.[125] That can be easily achieved in the foreign court whose jurisprudence will accept jurisdiction over a non-domestic debtor.

b. Main or Nonmain?

In the two possible scenarios above, there could be different characterizations. In the scenario in which a foreign affiliate files a foreign proceeding, the foreign affiliate would likely be categorized as a foreign main proceeding even through its plan or scheme affects domestic debt. This is because the COMI of the foreign affiliate, almost by definition, would be the foreign jurisdiction, in large part because the presumption of § 1516 would weigh heavily in categorizing a foreign-registered entity as having its COMI in its country of registration. Of course, the traditional elements of COMI would affect the final determination, but the assumed existence of a substantial connection would likely also assist in the COMI determination.

In the scenario in which a domestic entity files a foreign proceeding based on substantial connections with the non-United States country, the foreign proceeding would most likely be characterized as a foreign nonmain proceeding. The reason is simple. A foreign main proceeding would require the debtor's center of main interests to be in the foreign country.[126] But by hypothesis, it is the same entity in both places, only one of which can be the entity's COMI. If the headquarters is in the United States, and it is incorporated or registered here, its COMI is likely

[124] 11 U.S.C. § 101(24).
[125] I am assuming that the restructuring systems described in text qualify under 11 U.S.C. § 101(23) as foreign proceedings.
[126] 11 U.S.C. § 1517(b)(1).

here as well.[127] Since there can only be one main proceeding under either chapter 15 or the Model Law, that would force categorization of any insolvency proceeding filed outside of the United States as a foreign nonmain proceeding.[128]

In re Silicon Valley Bank (Cayman Islands Branch)[129] illustrates this fact pattern. In that case, a United States bank had opened a branch in the Cayman Islands. The branch was not a separate entity; it was part of the bank itself. That branch was, however, subject to regulation by Cayman authorities. When the bank went into receivership in the United States, the Cayman authorities opened up insolvency proceedings in the Cayman Islands related to the branch. They then filed a chapter 15 case in the United States attempting to obtain a stay against regulators in the United States taking control of funds the Cayman authorities believed should be administered in the Cayman Islands. While recognizing that this might present an instance of a domestic entity seeking nonmain recognition, the court dismissed the attempt based on the debtor status as a bank —a type of debtor not permitted under the Code, including chapter 15.[130] Had the debtor been a permitted entity, such as a service firm such as an accounting or law firm, the outcome might have been different.

But many domestic entities do have operations elsewhere. Could a United States company commence one of the proceedings above and then seek to have that foreign proceeding recognized under chapter 15 as a foreign nonmain proceeding?

To be recognized as a foreign nonmain proceeding, the debtor must have "an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending."[131] An "establishment," in turn, is "any place of operations where the debtor carries out a nontransitory economic activity."[132] So if our debtor has a sales or manufacturing office in the chosen country, that will qualify.[133] What will likely not qualify is some intangible connection, such as simply supplying the source of governing law, or allowing a listing of a debt issue on a foreign exchange—such connections are not "economic activity" within the ambit of "establishment." As a result, if anything, the most likely categorization would be as a foreign nonmain proceeding.

---

[127] Unless operations shifted for business reasons over time, there is not much international attractiveness for a company based outside the United States to register or incorporate here—the United States is not a tax haven nor does it grant unique benefits to those companies that do register here.

[128] Singapore courts recently recognized, under Singapore's version of the Model Law, a chapter 11 case filed by a Singapore company. *In re* CFG Peru Invest. Pte. Ltd., Case No.: HC/OS 665/2021 (Sing. High Ct. Sept. 21, 2021). The debtor was a holding company whose only asset was a Chilean company, but the holding company had tapped the New York financial markets.

[129] 2024 WL 734735 (Bankr. S.D.N.Y. Feb. 22, 2024).

[130] Section 1501(c) of the Code states that "[Chapter 15] does not apply to— (1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b)." 11 U.S.C. § 1501(c)(1). As the court put it, "[i]n other words, Chapter 15 does not apply to entities that are ineligible for relief under section 109(b)." *Id.* at 10.

[131] 11 U.S.C. § 1517((b)(2).

[132] *Id.* at § 1502(2).

[133] *See* UNCITRAL DIGEST, *supra* note 21, at 8–10.

As the requirements for recognition are minimal, the foreign proceeding involving some of the debt of a United States company would initially qualify for chapter 15 protection.[134] But recognition is often not congruent with full relief, especially in nonmain proceedings in which all relief is discretionary,[135] and tested against the standards for the issuance of a common law injunction.[136]

This was the fact pattern (although not the analysis) in *Black Press Ltd*.[137] There, on January 15, 2024, a group of 12 companies engaged in newspaper publication in the United States and Canada filed 12 Canadian insolvency cases. Nine filers were entities organized in Canada; three were United States corporations. The Canadian proceedings were commenced to authorize a debtor in possession loan of US$5.5 million, and a sale of the group as a whole.[138] On January 25, the British Columbia Supreme Court approved a sale and investment solicitation process for the entire group.[139]

On the same day they commenced their Canadian proceedings, the group filed chapter 15 petitions in the United States.[140] The petitions sought foreign main proceeding recognition for all 12 entities, including the United States corporations.[141] In its papers, Black Press told the court that Chapter 15 recognition was "imperative to the success" of the sale process as it would protect the group and its assets within the United States from creditor actions, and that unified action would "halt piecemeal litigation and prevent a race to the courthouse by creditors" and level "the playing field" for the group, its creditors and other interest parties.[142] Apparently, no request for foreign nonmain recognition was made.[143]

The court granted the recognition request for the Canadian companies but denied it for the three domestic entities. It specifically found that the COMI for the United States companies was in the United States and thus they were not entitled to foreign main recognition. That was likely true; the domestic entities operated locally and were United States corporations. But it should have been irrelevant to the ultimate relief requested. The Canadian proceedings were related to the operations of the three American entities through financial ties and centralized management. There no doubt was intercompany debt as well. Had the debtors sought nonmain relief, the equities

[134] *See, e.g.*, *In re* Spark Networks SE, Case No. 23-11883-MFW (Bankr. D. Del. Dec. 14, 2023) (granting recognition to a German StaRUG proceeding in which a Delaware corporation's debt was adjusted).
[135] 11 U.S.C. § 1521(a).
[136] *Id.* at § 1521(e). An exception to the injunction standard exists for discovery requests, and for matters involving the administration or realization of assets. *Id.* Distribution of assets administered or realized is governed by subsection (b).
[137] Case 24-10044-MFW (Bankr. D. Del. Feb. 14, 2024).
[138] The debtors claimed they owed its secured creditors C$73.2 million (US$54.3 million) and had C$63.7 million (US$47.2 million) in unsecured debt.
[139] *Order Made After Application (Amended and Restated Initial Order)*, *In re* Black Press Ltd., Case No. S-240259, Vancouver Registry of the Supreme Court of British Columbia (Jan. 25, 2024).
[140] Dkt. No. 1, *In re* Black Press Ltd., Case 24-10044-MFW (Bankr. D. Del. Jan. 15, 2024).
[141] *Motion of the Foreign Representative for Chapter 15 Recognition and Final Relief*, Dkt. No. 10, *In re* Black Press Ltd., Case 24-10044-MFW (Bankr. D. Del. Jan. 15, 2024).
[142] *Memorandum of Law in Support of Motion of the Foreign Representative for Chapter 15 Recognition and Final Relief*, Dkt. No. 11, at 2–3, *In re* Black Press Ltd., Case 24-10044-MFW (Bankr. D. Del. Jan. 15, 2024).
[143] Neither the debtors' initial motion nor their proposed order uses the word "nonmain." *Motion of the Foreign Representative for Chapter 15 Recognition and Final Relief*, Dkt. No. 10, *In re* Black Press Ltd., Case 24-10044-MFW (Bankr. D. Del. Jan. 15, 2024).

would have augured well for discretionary relief under § 1521 instead of the mandatory relief sought under §1520.[144]

V. BARRIERS TO RECOGNITION OF ALIEN RELIEF IN A CHAPTER 15 CASE

Relief in a chapter 15 proceeding is not always automatic. Although relief in a nonmain proceeding is discretionary, even relief in main proceedings is subject to some limitations. These limitations obviously bear on the efficacy of the international two-step.

A. Section 1521(a)'s Requirements

The initial restriction is found in § 1521(a), the section specifying the types of relief available. It states:

> Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief . . . .[145]

Thus, the debtor must show that the relief is "necessary to effectuate the purpose of this chapter" and that it is necessary "to protect the assets of the debtor" or "the interests of the creditors."

1. Chapter 15's Purposes

The purposes of chapter 15 are numerous, and laid out in § 1501(a). These purposes include cooperation, promotion of certainty, fair and efficient administration of cases, protection and maximization of asset value, and facilitation of the rescue of financially troubled businesses.[146] Note that these goals stress operational values—ultimate restructuring and recovery—and are silent on the means, namely domestic or foreign, by which those goals are achieved.

As broad and far reaching as these goals are, it would not be much of a stretch for the hypothetical companies sketched above to satisfy these purposes. Indeed, the very reasons a domestic entity might seek foreign relief—faster, cheaper, more-targeted relief than available under chapter 11—would seem to directly implicate efficiency and certainty, as well as the maximization of asset value. In short, this element could be easily met.

2. Protecting Assets of Creditor Interests

Similarly, § 1521(a)'s second requirement will often be easy to establish. To the extent that foreign proceedings provide an alternate form of reorganization, it will be necessary to protect the assets pledged to achieve that reorganization. Disturbing the assets used to reorganize will also affect creditor interests in having the foreign reorganization implemented, and courts have

---

[144] In the court's order denying the relief sought, the text says that "the Canadian Proceedings are not foreign main *or foreign nonmain proceedings . . . .*" *Order Granting in Part and Denying in Part Motion for Recognition of Canadian Proceedings as Foreign Main Proceedings and Granting Related Relief*, Dkt. No. 73, at 4, *In re* Black Press Ltd., Case 24-10044-MFW (Bankr. D. Del. Feb. 14, 2024) (emphasis added). Unless transcripts of the hearings reveal discussion of recognition as a foreign nonmain proceeding, the italicized language is likely dicta.

[145] *Id.* at § 1521(a).

[146] *Id.* at § 1501(a)(1)–(5).

generally viewed the "interests of creditor" language as referring to the general overall interests of the creditor body, not the individual interests of discrete creditors.[147]

B. Section 1522 and Protection of Individual Creditor Interests

For any relief requested under § 1521(a), be it a stay of a lawsuit or some other restriction on a creditor's actions, § 1522 requires consideration of creditor interests. It provides that relief may be granted "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."[148]

One court has identified three basic principles governing what qualifies as sufficient protection: (i) the fair and just treatment of all creditors; (ii) the protection of domestic claimants against prejudice and inconvenience in the processing of claims in the foreign proceeding; and (iii) whether the distribution of proceeds of plan consideration in the foreign proceeding is substantially in accordance with United States law.[149]

Points (i) and (ii) seem easily met by the programs described above. Under the United Kingdom's, the Netherlands' and Germany's laws, international norms of reorganization are incorporated, and those norms are consistent with the relief available under United States law. It would be a stretch to hold that those systems are inconsistent with basic notions of due process or fairness of adjudication.

Point (iii), however, deserves some elaboration. Under the general theory of the Model Law, creditors should pursue their claims in the debtor's main proceeding. But as at least one hypothetical here assumes a nonmain proceeding, there will be no central claims resolution process in that case. Accordingly, the procedures in the foreign court applicable to those opposing the foreign court's relief will be critical. And not surprisingly, many of the new restructuring tools take into account the interests of creditors and the relief they will be accorded. Court hearings at which the creditors can object are built into each of the various procedures, and are typically applicable to all creditors, foreign and domestic. As a result, especially given the speed and access afforded by electronic communication, foreign creditors are generally able to raise whatever objections domestic creditors can raise, with reasonable additional cost.

[147] *See* UNCITRAL DIGEST, *supra* note 21, at 74–75 (2021).
[148] 11 U.S.C. § 1522(a). The Model Law uses the phrase "adequately protected," but the United States version was changed intentionally so as not to tie to notions of adequate protection found in § 361 of the Code. H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 115 (2005) ("The word 'adequately' in the Model Law, articles 21(2) and 22(1), has been changed to 'sufficiently' in sections 1521(b) and 1522(a) to avoid confusion with a very specialized legal term in United States bankruptcy, 'adequate protection.'").
[149] SNP Boat Service, S.A. v Hotel St. James, 483 B.R. 776, 786 (S.D. Fla. 2012); Atlas Shipping A/S, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009).

C. Section 1521(b) and Property Distributions

Often, a foreign proceeding will anticipate transferring domestic assets to the foreign court for distribution to all creditors. Such a transfer is within the ambit of chapter 15.[150] But it is subject to a significant restriction. Section 1521(b) says:

> Upon recognition of a foreign proceeding, whether main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, . . . provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.[151]

Here, the statute again invokes the "sufficient protection" standard. A good example of the application of this principle is *Akers v. Deputy Commissioner of Taxation*,[152] a 2014 decision of the Australian Federal Court.[153] There a debtor with a main proceeding pending in the Cayman Islands sought to send funds from Australia to the Caymans. The problem was that the funds were being held and controlled by Australian tax authorities pending resolution of a dispute over tax obligations arising from the debtor's Australian operations. The taxing authority sought to halt the repatriation of funds on the grounds that it would not be adequately protected in the main proceeding because of Cayman Islands precedent that foreign tax obligations would not be recognized. Thus, once the funds were transferred out of Australia, the taxing authority had no prospect of ever getting them back.

On appeal, the federal court held that given the loss of rights, the taxing authority could prevent the transfer of funds until such time as the tax liability of the Cayman Islands debtor was resolved.

Akers, however, was a tax case, and foreign tax debts are subject to special rules in many insolvency systems. With ordinary, nonpriority debts, however, the creditor's ability to participate in the claims resolution process in the main proceeding could be sufficient protection for a creditor's claim, especially if, as in the cases of the three countries surveyed here, the foreign legal systems embody the same or similar notions of fairness and due process as is recognized domestically.

---

[150] Section 1521(a)(5) allows for:

> [E]ntrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court.

11 U.S.C. § 1521(a)(5).

[151] *Id*. at § 1521(b).

[152] [2014] FCAFC 57.

[153] Foreign decisions interpreting Model Law provisions are relevant precedent in the United States. Section 1508 of the Code states:

> In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.

11 U.S.C. § 1508.

D. "Additional assistance" and Section 1507(b)

Section 1507 provides that, with some limitations, after recognition a court "may provide additional assistance to a foreign representative . . . ."[154] The relationship between the relief afforded in §§ 1519 through 1521 and the relief offered by § 1507 is currently unsettled.[155] Some courts look first to the former to see if the requested relief is specified there, and if it is, do not consider § 1507. Other courts appear to consider them together. The inquiry is muddled because of § 1521(a)(7), which permits courts to "grant[] any additional relief that may be available to a trustee."[156]

The issue is important, because although relief under § 1521 has no statutory preconditions, relief under § 1507 does. In a break from the Model Law, Congress added § 1507(b), a non-uniform subsection that requires the court to inquire as to whether the additional relief will "reasonably assure" the "just treatment" of all participants, protect against "prejudice and inconvenience in the processing of claims" in the foreign proceeding, prevent fraudulent dispositions of property, assure the "distribution of proceeds of the debtor's property substantially in accordance with" title 11's scheme of distribution, and provide an opportunity for a fresh start for an individual.[157]

Should a United States entity seek foreign relief, many of the concerns stated in § 1507(b) would not impede relief. This assumes, however, that a United States court will not characterize insolvency systems such as those found in the United Kingdom, the Netherlands, or Germany as being unfair, unjust, or fraudulent, a proposition that should be easily established.

E. Section 1521(c) and Restriction That Nonmain Relief Must Relate to Assets That Should Be Administered Elsewhere

Perhaps the largest impediment to the full enforcement of relief granted in a foreign nonmain proceeding would be § 1521(c). It provides that:

> (c) In granting relief under this section to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.[158]

It is unclear exactly how this subsection would apply to, say, recognition of an English Scheme of Arrangement or an approved Dutch plan under WHOA. The relief that would be requested would include, at a minimum, a request to stay collection of the debt under the terms applicable before it was restructured. In simpler terms, the debtor would ask the court to enjoin domestic creditors from suing on the original terms of the debt.

---

[154] *Id*. at § 1507(a).
[155] For relevant discussions, see *In re* Vitro S.A.B. de C.V., 701 F.3d 1031 (5th Cir. 2012) and *In re* Rede Energia S.A., 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014) ("the interplay between the relief available under sections 1507 and 1521 is far from clear . . .").
[156] 11 U.S.C. § 1521(a)(7). Excluded from this authorization is the standing to bring certain avoiding powers actions.
[157] *Id.* at § 1507(b)(1)–(5).
[158] *Id.* at § 1521(c).

Such a scenario does not fit neatly in within § 1521(c). A debt is not an asset of the debtor; it is an asset of the creditor. Thus there are no "assets" to be administered in the foreign proceeding (nor would the claims against the debtor be assets to be administered in any United States proceeding), unless one accepts the derivative argument that less debt means remaining creditors would receive a larger share of assets.

A possible argument is that all the debtor's assets are liable to pay the debtor's obligations regardless of where the debt is restructured. From that premise, a court might hold that assets of a United States company should be administered in the United States, and thus a stay would inappropriately favor a foreign restructuring to the extent it affects how the debtor manages or administers its assets in the United States. This likely proves too much. If taken to its logical conclusion, a court would only have the power to restructure debts in proportion to the assets present in the restructuring court's home country. That type of Balkanization runs contrary to the spirit, if not the letter, of the Model Law.

The same lack of relevance applies to the "information required" provision. Relief in the form of an injunction would not require any information other than the text of an order from the foreign court approving the reorganization. But the stay would not be necessary to obtain that information, as it would exist before the request for recognition.

F. Section 1506 and "manifestly contrary to public policy"

The last statutory hurdle might be found in § 1506. That section provides:

> Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.[159]

This is a high hurdle. The *Guide to Enactment* for the Model Law states that:

> The purpose of the expression 'manifestly', ... is to emphasize that public policy exceptions should be interpreted restrictively and that [the exception] is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.[160]

This reading was confirmed in the United States, both in the legislative history of chapter 15,[161] as well as by various courts.[162] So what qualifies? UNCITRAL has published a summary of the guidelines courts have used to interpret this section, as follows:

> (a) The mere fact of a conflict between foreign law and local law, absent other considerations, is insufficient to support the invocation of the public policy exception;

[159] *Id.* at § 1506.
[160] GUIDE TO ENACTMENT, *supra* note 87, at ¶ 89.
[161] H.R. Rep. No. 109–31(1), at 109 (2005) (The "word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States."), *reprinted in* U.S.C.C.A.N. 88, 172 (2005).
[162] *In re* ABC Learning Centres Ltd., 728 F.3d 301, 309 (3d Cir. 2013); *In re* Ephedra Prods. Liab. Litig., 349 B.R. 333, 336 (S.D.N.Y. 2006) (explaining why the exception is a narrow one).

> (b) Deference to a foreign proceeding should not be afforded in a recognition proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections;
>
> (c) An action should not be taken in a recognition proceeding where taking that action would frustrate the ability of the courts to administer the recognition proceeding and/or impinge severely on a local constitutional or statutory right, particularly if a party continues to enjoy the benefits of the recognition proceeding.[163]

These principles would not impinge on a nonmain proceeding involving a United States debtor, especially if the actions were in accord with the law of respected nations such as the United Kingdom, the Netherlands, or Germany. No question has been raised about the procedural fairness employed by these counties in their court systems, and the relief a United States company would seek—debt reduction, maturity extension, debt-for-equity exchanges—are tools recognized in the United States. Indeed, several courts have given relief to a United Kingdom scheme of arrangement that provided for third-party releases.[164]

1. Recognition: Irrelevance of a Lack of Good Faith

An objection might be raised that the process outlined in this article—filing a foreign proceeding for a domestic entity and then seeking to recognize that foreign proceeding through chapter 15—is bad faith, consisting of the intentional manipulation of the laws of several countries to achieve a result not sanctioned by any one of them.

Even were this true, it would likely be irrelevant. Although some courts interpreting the Model Law find bad faith to be a disqualification for recognition, United States courts have not. In several cases, courts interpreting § 1517 have found that Congress' use of "shall" with "recognize" indicates a mandatory action. This view is buttressed by the inclusion of only one exception—the public policy bar of § 1506. Thus unless the bad faith rises to the level of a scheme that "manifestly" violates some public policy of the United States, the bad faith found will not bar recognition.

And in most cases, bad faith itself is not manifestly violative of United States' public policy, which tends to look to procedural fairness, consistency, and an opportunity to be heard. A key example is the recent case of *In re Black Gold S.A.R.L.*[165] There, a European couple owned Black Gold, a Monaco company which dealt in petroleum products. Black Gold held a license to sell products manufactured by IPAC. Although Black Gold sold IPAC products, it also stole IPAC's trade secrets and customer list, and Black Gold's owners then began competing with IPAC through a separate company known as PXL.

---

[163] UNCITRAL DIGEST, *supra* note 21; *see also* Kristy Zander, *Application of the Public Policy Exception in the UNCITRAL Model Law on Cross Border Insolvency: Issues and Challenges 7* (INSOL Technical Paper Series No. 54, 2022), available at https://insol.azureedge.net/cmsstorage/insol/media/document-library/technical%20paper%20series/application-of-the-public-policy-exception-in-the-uncitral-model-law-on-cross-border-insolvency.pdf. Cases supporting this view include *In re* Qimonda AG Bankruptcy Litigation, 433 B.R. 547, 570 (E.D. Va. 2010) and *In re* ABC Learning Centres Ltd., 728 F3d 301, 309 (3d Cir. 2013).

[164] *In re* Avanti Commc'ns Group PLC, 582 B.R. 603 (Bankr. S.D.N.Y. 2018).

[165] 635 B.R. 517 (B.A.P. 9th Cir. 2022).

IPAC obtained a judgment against Black Gold for a little more than a million dollars. It then attempted to collect on it with little success. As part of the collection efforts, Black Gold commenced an insolvency proceeding in Monaco and then a chapter 15 proceeding in California, all in an effort to stay the litigation against Black Gold and its principals.

IPAC objected. It provided proof that Black Gold's owners were paying the Monaco trustee's attorney's fees, that the trustee's counsel also represented Black Gold in the action resulting in the million-dollar judgment, and that related counsel for Black Gold in the chapter 15 proceeding was representing the owners in litigation in Ohio. All of this, claimed IPAC, showed that the chapter 15 case was a sham designed to frustrate IPAC. The bankruptcy court agreed, and dismissed the case as a bad faith filing.

The Ninth Circuit Bankruptcy Appellate Panel reversed. It found that Congress' use of the word "shall" in § 1517(a) removed the court's discretion in determining recognition if the requirements in the three subparagraphs of § 1517(a) have been satisfied. In addition, the court stated that

> [T]he House Report discussion for § 1517 states that "[t]he decision to grant recognition *is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c)* of the Bankruptcy Code."[166]

With this background, the court found that since the Monegasque Proceeding met the requirements of § 1517(a), recognition was mandatory. The only possible exception was if recognition would violate the public policy provisions of § 1506. But the cases were against finding that bad faith manifestly violates United States public policy.[167] The court thus reversed and ordered recognition, while noting that recognition was not relief and that IPAC might have better luck seeking relief from the stay under § 1521 or abstention under § 305(a)(2).

2. Relief: Section 1520(a)(1) and Stay Relief

Black Gold hinted at one of the main flaws with domestic chapter 15 cases. Although many chapter 15 cases are filed to obtain a stay of actions in the United States, that power is not absolute. For foreign main proceedings, § 1520(a)(1) states:

> (a) Upon recognition of a foreign proceeding that is a foreign main proceeding—
> (1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States[168] . . . .

---

[166] *Id.* at 527 (quoting H.R. Rep. No. 109-31(I) 109th Cong., 1st Sess.113 (2005)) (emphasis in original quotation; not in quoted source).

[167] *In re* Manley Toys Ltd., 580 B.R. 632, 648 (Bankr. D.N.J. 2013), *aff'd*, 597 B.R. 578 (D.N.J. 2019); *In re* Creative Fin. Ltd., 543 B.R. 498, 515–16 (Bankr. S.D.N.Y. 2016); *In re* Millard, 501 B.R. 644, 653 (Bankr. S.D.N.Y. 2013).

[168] 11 U.S.C. § 1520(a)(1). The Model Law also incorporates local exceptions to stays. Article 20(2) states:

> The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to [refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay . . . .]

Model Law, *supra* note 74, at art. 20(2).

In foreign main proceedings then chapter 15 incorporates all the exceptions, statutory or otherwise, to the automatic stay of § 362. Criminal actions or regulatory actions, for example, are not stayed.

But there is a venerable strain of cases allowing stay relief for bad faith acts. These cases are typified by a focus on particular facts. As *Collier on Bankruptcy* states:

> Although particular cases are of little precedential value, a broad review reveals certain patterns and conduct that have in specific cases been characterized as bad faith. These include:
>
> (1) a perceived improper impact on nonbankruptcy rights;
> (2) a recent transfer of assets, i.e., the "new debtor syndrome" cases;
> (3) an inability to reorganize; and
> (4) unnecessary delay, i.e., serial filings.[169]

None of these affect a domestic chapter 15, except perhaps (1), the existence of an improper impact on nonbankruptcy rights. But chapter 15 itself is a policy choice, one under which Congress intentionally decided to affect domestic rights by deferring to foreign insolvency proceedings. It would thus be odd to argue that any impact on domestic rights by the absence of a chapter 11 was improper in light of a legitimate foreign proceeding.

G. Section 305: Should a Court Dismiss or Abstain Because Chapter 15 Recognition for a United States Company is Contrary to the Policies of Chapter 15?

Finally, there remains the policy question of whether technical compliance with chapter 15 is sufficient, or whether policy reasons exist to simply deny relief as outside the scope of chapter 15. As indicated above, the sparse requirements for recognition would not be difficult to meet if the foreign court had, or likely would, confirm a plan or scheme under its laws.

But several policy issues arise after recognition, but before relief in the form of ordering compliance with the foreign court's plan or procedures. First, in cases in which the United States company has only a foreign establishment, may a court recognize a foreign nonmain proceeding without a pending foreign main proceeding? Second, and related, may a United States entity bypass chapter 11 relief by resorting to the laws of another country, and then seek to enforce that foreign relief here not strictly as a matter of comity, but as a matter of statutory entitlement under chapter 15?

These concerns find voice in § 305 of the Code. That provision states:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
>
> . . .
>
> (2)(A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and
> (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.

[169] 3 Collier on Bankruptcy ¶ 362.07[7][a] (Henry Sommer & Richard Leven, eds., 16th ed. 2023).

> (b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.[170]

Both objections can be rebutted by implementation of this section. As to the first issue, the statute itself does not require a main proceeding to recognize a nonmain proceeding. In the broad scheme of things, this makes sense. A multi-national firm has to deal with many different sets of laws, only one of which is insolvency law. If a company headquartered in the United States has a problem with its operations in another country, it should be able to use the laws of that country to address any financial issues, and then have that proceeding respected elsewhere; that is one of the core goals of the Model Law. Section 1521(c) then allows a United States court to craft and limit any relief so that the "relief [in that nonmain proceeding] relates to assets . . . that should be administered in the foreign nonmain proceeding."[171] It would be wasteful to require commencement of a main proceeding in a place where it is not financially needed in order to authorize a nonmain proceeding in a place where it is.

The second issue may be less clear, and requires examination of the policies of the Model Law and chapter 15. Both statutes are at least partially aimed at overcoming the general reluctance of one country's courts to give effect to another country's insolvency law. Comity was traditionally the main tool to address the issue, but comity did not provide sufficient certainty.[172] The Model Law, and chapter 15 by extension, attempt to codify the level of recognition to be accorded to a foreign insolvency proceeding. If the proceeding is or was brought in the debtor's COMI, significant respect is given to foreign main proceedings under the notion that there should be one law governing any particular insolvency.

Foreign nonmain proceedings, however, are important as well. This is especially true in a world in which adoption of the Model Law is by no means universal. The Model Law gives respect and recognition to such proceedings, in part, as recognition that individual countries should be free to legislate their own insolvency solutions. There are limits though. These variances should not include structural prejudice against non-native creditors, and although the relief legislated need not be congruent with other countries, there is a baseline of public policy to be respected.

To achieve this balance, the Model Law and chapter 15 each contain many built-in protections for domestic creditors affected by foreign nonmain proceedings; these are explored above. This suggests that, within certain boundaries, recognition can be granted to nonmain proceedings in a way that balances the debtor's need to restructure with creditors' expectations. Indeed, Congress understood that a chapter 15 proceeding could take precedence over a subsequently-filed plenary chapter 11 by the same debtor, and that § 305 would be the vehicle to mediate any conflict.[173]

---

[170] 11 U.S.C. § 305.
[171] *Id.* at § 1521(c).
[172] GUIDE TO ENACTMENT, *supra* note 87, at ¶ 8, p. 21 ("Approaches based purely on the doctrine of comity or on exequatur do not provide the same degree of predictability and reliability as can be provided by specific legislation . . . .").
[173] H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 106 (2005) ("Even if a full [chapter 11] case is brought [after a chapter 15 is filed], the court may decide under section 305 to stay or dismiss the United States case under the other chapter and limit the United States' role to an ancillary case under this chapter.").

Recent trends have introduced at least two concerns. First, many countries have recently adopted or reaffirmed insolvency procedures that allow debtors to restructure only part of their debt (and some of that without majority consent)—think schemes of arrangement and bond issues. Second, this new wave of legislation often specifically incorporates relief controversial in the United States—think third-party releases.

This twofold problem has twin responses: a United States court could limit relief under §§ 1521(b), (c), and 1522 (and possibly 1507). A court could, for example, simply stay enforcement actions brought by holders of the restructured debt. But often the debtor's request is for more than a simple "hands off" injunction; it will seek relief beyond simple stays of actions to the requirement that creditors exchange their debt instruments for other debt instruments or equity shares. Even more complicated arrangements could be anticipated.

In such restructurings, a United States court will have to decide whether chapter 15 requires it to respect another nation's legislative decision to permit restructurings in that foreign nation by non-native debtors, as well as whether the sometimes alien relief afforded will be carried over to the United States. As set forth above, nothing in the Model Law explicitly prohibits this, leaving the court to decide whether such evasion of chapter 11 is "manifestly contrary to public policy."[174] As set forth above, that will be a difficult task, especially if the restructuring occurs in a country, such as the United Kingdom, known for the fairness of its procedure.

VI. CONCLUSION

In the past several years, many nations have each adopted insolvency regimes that permit non-native debtors to seek relief under these laws. These new laws often introduce or solidify what I call "alien relief;" that is, relief not available in the United States, including the ability to restructure only some of a debtor's financial obligations and the authorization of some forms of third-party releases. Other differences may emerge.

The combination of these factors creates incentives for a United States entity to take advantage of restructuring under these laws. The primary impediment to such a strategy, however, would be the doubt surrounding whether a United States court would respect that foreign restructuring. This article has tried to outline a strategy that would involve a domestic United States company invoking chapter 15 to enforce the terms of the foreign restructuring. Although a few cases have involved this dynamic, none have been seriously contested.[175] Whether the strategy suggested will work remains to be seen.

* * *

[174] 11 U.S.C. § 1506.
[175] *See supra* note 70 (collecting cases).

Faculty

Hon. Thomas M. Horan is U.S. Bankruptcy Judge for the District of Delware in Wilmington, appointed in 2023. He previously practiced law in Wilmington for 18 years, focusing on financial restructuring and bankruptcy litigation. Most recently, Judge Horan had been a member of the Bankruptcy, Insolvency and Restructuring group at Cozen O'Connor, a national firm headquartered in Philadelphia with a Wilmington office. He joined Cozen in a group-wide 2020 defection from Fox Rothschild, for which he had worked since its own 2018 merger with Wilmington-based Shaw Fishman Glantz & Towbin. Judge Horan's national practice included representing debtors and official unsecured creditor committees in complex chapter 11 proceedings, and he represented secured creditors and other parties in litigation. He also frequently provided opinion letters on commercial transactions and represented parties before the state's Court of Chancery and Superior Court. Last year, Judge Horan was named to *Lawdragon*'s list of the Top 500 U.S. bankruptcy and restructuring lawyers. He also serves on ABI's Board of Directors. Judge Horan received his B.A. in 1989 and his M.A. in 1992 from Fordham University, and his J.D. *cum laude* from St. John's University School of Law in 2002, where he was executive notes and comments editor for the *ABI Law Review*.

Jennifer Jenkins is a partner and member of Mourant's BVI Litigation team, based in Tortola, British Virgin Islands. She focuses on commercial fraud and insolvency, and she has experience with interim-relief applications, such as freezing orders, disclosure orders and contempt applications, and dealing with jurisdictional issues. Ms. Jenkins regularly handles director breach-of-duty claims and reviewable transactions in an insolvency context, as well as shareholder disputes. Prior to joining Mourant, she worked for Clifford Chance and then Memery Crystal in London. Ms. Jenkins is admitted to practice in the British Virgin Islands and in England in Wales, and she is a CEDR-accredited mediator. She is a member of the Chartered Institute of Arbitrators and the Commercial Fraud Lawyers Association, and she has been listed in the *Legal 500 Caribbean* for 2023 and 2024 for Dispute Resolution, and in the *Legal 500* for 2022. Ms. Jenkins received her LL.B. with honors in law and German from the University of Glasgow.

Stephen D. Lerner is a partner with Squire Patton Boggs and global chair of its Restructuring & Insolvency Practice Group in Cincinnati and New York. He has a national and cross-border restructuring practice in which he represents debtors, distressed businesses, committees of unsecured creditors, secured and unsecured creditors, equity interest-holders, boards of directors, indenture trustees and acquirers of troubled businesses in chapter 11 reorganization cases, chapter 15 cross-border cases, chapter 9 municipal restructurings and out-of-court restructurings throughout the U.S., Europe, the United Arab Emirates, South America and India. Most recently, Mr. Lerner served as the court-appointed examiner in the precedent-setting Purdue Pharma chapter 11 case in the Southern District of New York. In July 2022, the Ferrellgas restructuring team, which he led, was honored with the Turnaround of the Year (Large) Award by Global M&A Network. He also served as lead restructuring advisor to Dana Gas PJSC, the largest independent gas company in the Middle East, in its US$700 million Islamic financing restructuring, which was awarded the Middle East Restructuring of the Year in 2019 by the *International Financial Law Review*. The firm's U.S. restructuring team, which he led, was named 2020 USA Restructuring Firm of the Year – Middle Markets by Global M&A Network. In addition, he led his firm's representation of the American College of Bankruptcy in filing an

amicus brief with the U.S. Supreme Court in the significant *Stern*-related case of *Executive Benefits Insurance Agency v. Peter H. Arkison, Trustee of the Estate of Bellingham Insurance Agency, Inc.* Mr. Lerner has been a guest lecturer at Harvard Business School, the University of Michigan Law School and the University of Cincinnati Law School. He is admitted to practice before the U.S. Court of Appeals for the Sixth Circuit, the U.S. District Courts for the Eastern and Southern Districts of New York and Southern District of Ohio, and the U.S. Supreme Court. Mr. Lerner received his B.A. in 1982, his M.A. in 1982 and his J.D. in 1985 from the University of Pennsylvania.

Hon. Bruce A. Markell is the Professor of Bankruptcy Law and Practice and the Edward Avery Harriman Lecturer in Law at Northwestern University's Pritzker School of Law in Chicago. From 2013-15, he was the Jeffrey A. Stoops Professor of Law at Florida State University School of Law, and before that he was a U.S. Bankruptcy Judge for the District of Nevada, a position he had held since 2004. From 2006-13, Prof. Markell also was a member of the Bankruptcy Appellate Panel for the Ninth Circuit. After law school, he clerked for then-judge Anthony M. Kennedy on the U.S. Court of Appeals for the Ninth Circuit. Before taking the bench, he practiced bankruptcy and business law in Los Angeles for 10 years (where he was a partner at Sidley & Austin) and was a law professor for 14. He is the author of numerous articles on bankruptcy and commercial law, and a co-author of four law school casebooks. Prof. Markell has been a visiting professor at, among other schools, Peking University School of Law in Beijing and Harvard Law School. He contributes to *Collier on Bankruptcy*, and is a member of *Collier*'s editorial advisory board. He also is a conferee of the National Bankruptcy Conference, a Fellow of the American College of Bankruptcy, a founding member of the International Insolvency Institute, and a life member of the American Law Institute. Prof. Markell served as a commissioner for ABI's Commission on Consumer Bankruptcy, where he served as the chair of its Case Administration and the Estate Committee. He received the Commercial Law League of America's Lawrence King Award in 2022, and in 2016, he completed a project redrafting Kosovo's bankruptcy law. He has consulted with the International Monetary Fund on insolvency-related issues (having been part of the IMF's missions to Ireland, Bosnia, Montenegro, Serbia, Belarus, Georgia and Greece). Prof. Markell received his J.D. in 1980 from the University of California at Davis, where he was editor-in-chief of its law review and a recipient of the School of Law Medal.

Lawrence E. Young is a partner and managing director with AlixPartners, LLP in Houston and has led multinational companies through mergers, acquisitions, divestitures and restructuring crises. He has 25 years of experience in senior corporate management and has assisted companies around the world, including in Europe, South America and the Middle East in a variety of roles, including CEO, CFO and CRO. Previously, Mr. Young was a senior manager with Deloitte and a financial analyst with Chrysler Corp. He received his B.A. in economics and computational math in 1984 from DePauw University and his M.B.A. in accounting and finance from the University of Pennsylvania's Wharton School of Business.