

## CROSS-BORDER BANKRUPTCY DEVELOPMENTS: THE MOVEMENT TOWARDS UNIVERSALITY IN THE UNITED STATES

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Recently, there have been a number of significant decisions by the United States bankruptcy courts addressing cross-border bankruptcy issues.<sup>1</sup> At first glance, these cases appear to address novel issues or even suggest a new approach to cross-border issues. It is clear, however, that these recent decisions are not novel but rather are consistent with United States judicial history and policy.

It is well established that one of the fundamental goals of bankruptcy proceedings in general and in particular, the United States Bankruptcy Code (the “Bankruptcy Code”),<sup>2</sup> is the centralization of disputes involving a debtor.<sup>3</sup> Thus United States bankruptcy courts are provided with extensive jurisdiction over a debtor and its property<sup>4</sup> and are authorized to assist in the administration of a proceeding pending in a foreign country. In light of the goal to centralize disputes in one forum, United States courts generally defer to the laws of the foreign country governing a debtor’s bankruptcy, liquidation, or restructuring proceedings and tend to allow foreign entities to be debtors in United States plenary proceedings under the Bankruptcy Code.

Somewhat surprisingly, as recently as 1988, United States law regarding the treatment of cross-border bankruptcies was characterized as “underdeveloped and inconsistent at best.”<sup>5</sup> Consistency, however, has developed as universality in one form or another, as will be discussed in Part I, has emerged as the guiding principle of United States law in the context of cross-border bankruptcy issues. This Article will then analyze certain recent decisions that have addressed significant cross-border issues in Part II. Finally, Part III discusses the latest step towards universality reflected by the enactment of chapter 15 of the Bankruptcy Code.<sup>6</sup>

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## PART I

*Universality is the Guiding Principle of United States Laws in the Context of Cross-Border Bankruptcy Issues*

Clearly, the laws of one nation cannot be imposed upon another without some waiver of sovereignty or consent by the other nation.<sup>7</sup> This fundamental rule forms the underlying basis of what has come to be known as “comity.”<sup>8</sup> “The starting point for any discussion of the doctrine of international comity is *Hilton v. Guyot*.”<sup>9</sup> In *Hilton*, the United States Supreme Court noted that laws of every nation are limited by their own sovereignty and cannot extend beyond its jurisdiction.<sup>10</sup>

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the *recognition* which one nation allows within its territory to the legislative, executive, or judicial act of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.<sup>11</sup>

Comity is a reflection of the principle “that courts of one nation ought to respect the authority of another nation to legislate over, command and adjudicate issues concerning its own . . . citizens.”<sup>12</sup>

Two competing doctrines for addressing cross-border bankruptcy issues have emerged from comity in the United States: universality and territoriality.<sup>13</sup> Historically, United States courts adopted the territorial approach.<sup>14</sup> “Under the ‘territoriality’ approach, or the ‘Grab Rule,’ the court in each jurisdiction where the debtor has assets distributes the assets located in that jurisdiction pursuant to local rules.”<sup>15</sup> This approach is based upon fear—fear of the unknown, fear of the laws of other countries and their effect on the citizens of the United States, and a nation’s inherent tendency to protect its sovereignty.<sup>16</sup>

“Under the universality approach, a primary insolvency proceeding is instituted in the debtor’s domiciliary country, and ancillary courts in other jurisdictions—typically in jurisdictions where the debtor has assets—defer to the foreign proceeding and in effect collaborate to facilitate the *centralized* liquidation of the debtor’s estate according to the rules of the debtor’s home country.”<sup>17</sup> The benefits of universality are obvious—it “enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion.”<sup>18</sup> Gradually, United States’ courts have moved toward adopting the universality approach.

The first step toward universality appears to have been made by the United States Supreme Court in *Canada Southern Railway Co. v. Gebhard*.<sup>19</sup> The Canada Southern Railway Co. (the “Railway”) was a Canadian corporation created to “build and work a railway in” Canada.<sup>20</sup> The Rail-

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way's financial condition deteriorated and rather than cease its operations, the railway proposed a scheme of arrangement under Canadian law to adjust its debt obligations. The requisite majority of creditors agreed to the scheme of arrangement that was subsequently approved and sanctioned by the Canadian legislature. Upon sanction, the Railway's scheme of arrangement became binding on all holders of certain bonds.

A number of the Railway's bondholders that did not vote or voted against the scheme of arrangement were citizens of the United States. Rather than acquiesce to the adjustment of their rights under the terms of the scheme of arrangement, these creditors commenced a lawsuit in the United States against the Railway for recovery of the amounts due to them under the bonds. The Circuit Court of the United States Court for the Southern District of New York issued judgments against the Railway. Ultimately, the United States Supreme Court reversed the lower court's decision and granted recognition to the Railway's scheme of arrangement.

The United States Supreme Court's decision in *Gebhard* stands for three fundamental principles that continue to prevail in the United States. First, a corporation is subject to the laws of the country in which it is incorporated.<sup>21</sup> Second, one who knowingly does business with a foreign company does so with the understanding that its relationship may be altered by the laws of the company's home country.<sup>22</sup> Finally, foreign debt restructuring, insolvency, and bankruptcy proceedings are entitled to comity and will be granted recognition in the United States, unless such recognition would conflict with the public policy or laws of the United States.<sup>23</sup> Comity does not dictate that the foreign laws be identical to United States laws.<sup>24</sup> On the contrary, the foreign laws can be different and still be recognized.<sup>25</sup> It is only where the difference rises to the level of being "repugnant" to the laws of the United States that a court should not extend comity.<sup>26</sup> The refusal or failure to recognize such proceedings that would not otherwise violate the laws, policy, or Constitution of the United States would unfairly hamper the ability of a foreign debtor to address its debts and prejudice creditors.<sup>27</sup> Thus United States courts embrace the policy of centralizing disputes in one forum by deferring to proceedings pending in a foreign nation.<sup>28</sup>

It is unlikely that the United States will adopt universality in its absolute form and require United States courts to recognize the laws of every other country.<sup>29</sup> Although theoretically ideal, absolute universality would be inconsistent with the principle that recognition is only appropriate where such recognition would not be repugnant to the public policy and laws of the United States. Concerns stemming from the lack of flexibility of absolute universality and the need to ensure that the public policy and laws of the United States are not violated are reflected in section 304 of

the Bankruptcy Code, which has been described as “a step toward the universality approach.”<sup>30</sup>

Under section 304, a foreign representative<sup>31</sup> may commence an ancillary proceeding to assist the foreign proceeding.<sup>32</sup> Section 304 provides that a foreign representative may request injunctive relief, turnover, or “other appropriate relief” in connection with a foreign proceeding.<sup>33</sup> However, relief under section 304 is not automatic.<sup>34</sup> On the contrary, before relief is granted under section 304, a foreign representative must demonstrate that such relief would:

assure an economical and expeditious administration of such estate, consistent with—

- (1) just treatment of all holders of claims against or interests in such estate;
- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent disposition of property of such estate;
- (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by [the Bankruptcy Code];
- (5) comity; and
- (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.<sup>35</sup>

Given that section 304 does not require an extension of comity to all foreign proceedings or foreign countries, section 304 ancillary proceedings have been characterized as a “modified” form of universality.<sup>36</sup>

Whether comity should be extended and foreign laws recognized is easier addressed by asking under what circumstances should comity not be extended. United States courts will generally conclude that comity should be extended under section 304 to foreign laws and orders provided that “comity does not prejudice the rights of U.S. citizens or violate domestic foreign policy.”<sup>37</sup> As such, comity under section 304 is similar to common-law comity. Moreover, comity will be withheld if its extension would effectuate a result that is “contrary or prejudicial to the interests of the nation called upon to extend its effects.”<sup>38</sup> Such cases are rare and an extension of comity is generally preferred by the United States courts.<sup>39</sup>

PART II

*Recent Cross-Border Bankruptcy Cases*

Foreign debtors and representatives must decide what steps, if any, should be taken to protect a debtor's estate in the United States. Generally, a foreign debtor or representative has three options: (i) do nothing in the United States; (ii) commence a concurrent plenary proceeding under the Bankruptcy Code; or (iii) commence an ancillary proceeding under section 304 of the Bankruptcy Code.<sup>40</sup>

The first alternative is the best option if the foreign entity lacks any contact with the United States and has no need for intervention by United States courts. However, if the foreign entity has assets or is subject to litigation in the United States, then the first alternative loses all appeal. Failing to act could result in the seizure or attachment of valuable assets in the United States or unfavorable judgments that could subsequently be recognized in its home country. While a foreign moratorium enjoining collection efforts against the foreign entity may theoretically extend beyond the borders of the foreign country, unless granted recognition in the United States, such moratorium will have limited application against creditors not subject to the laws of the foreign country.<sup>41</sup>

The second alternative is not available to a foreign entity unless it qualifies as a debtor under section 109 of the Bankruptcy Code.<sup>42</sup> Even when the foreign entity does qualify under section 109, it must consider the added burdens associated with filing a concurrent proceeding under the Bankruptcy Code. These burdens include, but are not limited to, increased costs, administrative obligations, the complications of coordinating multiple plenary proceedings, and the risk of conflicting decisions among jurisdictions. While, in theory, a number of these concerns can be alleviated with agreements between the courts among the various jurisdiction (i.e., protocols), such agreements may not be feasible.<sup>43</sup>

The third alternative stems from the principle of universality and its preference that there be a primary proceeding pending in one country and ancillary ones in other jurisdiction. In the United States, an ancillary proceeding is commenced by the filing of a petition under section 304.<sup>44</sup> An ancillary proceeding under section 304 is not a "full blown" bankruptcy case.<sup>45</sup> Rather, ancillary proceedings assist in the centralization of the administration of the debtor's estate without the expense and burdens associated with a plenary case.<sup>46</sup> Moreover, a debtor in an ancillary case is not subject to the same requirements as a debtor in a plenary proceeding, including the requirements of section 109.<sup>47</sup>

Relief, including recognition of a foreign proceeding, under section 304, however, is not automatic.<sup>48</sup> A prerequisite to any relief under sec-

tion 304 is a “foreign proceeding” as defined under section 101 of the Bankruptcy Code.<sup>49</sup> Thus whether a proceeding qualifies as a foreign proceeding is the most important issue considered by a court in determining whether to grant relief under section 304.

*A. Is the proceeding pending in a foreign country eligible for recognition?*

The Bankruptcy Code defines a “foreign proceeding” as a:

proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor’s domicile, residence, principal place of business or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.<sup>50</sup>

This definition has been interpreted broadly and to refer to any “foreign judicial or administrative process whose end it is to liquidate the foreign estate, adjust its debts or effectuate its reorganization.”<sup>51</sup> In determining whether there is a foreign proceeding, some courts have adopted the following three part test:

- (1) the proceeding must entail an administrative or judicial process involving insolvency or reorganization;
- (2) it must be conducted for the purpose of liquidating an estate, adjusting its debts or effecting its reorganization; and
- (3) it must be pending in a foreign country where the debtor maintains its residence, domicile, [or] principal place of business.<sup>52</sup>

Ultimately, the level of court supervision or court access available to creditors has generally proved to be the most important factor in determining whether a proceeding pending in a foreign country qualifies as a foreign proceeding under the Bankruptcy Code.<sup>53</sup> Thus where the law of the foreign country fails to provide any court supervision or creditors with access to the foreign courts, a United States court would likely conclude that there is no foreign proceeding and refuse to grant recognition or other relief under section 304.<sup>54</sup> On the other hand, if creditors have a right to request court intervention or if a court is actively involved or supervising the bankruptcy, insolvency, or debt restructuring proceeding and the laws of the foreign country are not repugnant to United States laws or policy, then a United States court would generally conclude that such a proceeding qualifies as a foreign proceeding under the Bankruptcy Code.<sup>55</sup> Recently, United States courts have addressed whether an *acuerdo preventivo extrajudicial* (“APE”) under Argentine law and a scheme of transfer under the law of the United Kingdom qualify as foreign proceedings. The United States courts concluded that an APE qual-

ifies as a foreign proceeding while a scheme of transfer under English law does not.

*Acuredo Preventivo Extrajudicial*

In the section 304 ancillary proceeding of Multicanal S.A., the United States Bankruptcy Court addressed the issue of whether an APE qualifies as a foreign proceeding for purposes of section 304. An APE has been described as “a privately negotiated debt restructuring, supported by a qualified majority of a debtor’s creditors, that is submitted to an Argentine court for judicial approval.”<sup>56</sup> An APE is generally viewed as being similar to a prepackaged plan under the Bankruptcy Code.<sup>57</sup>

Multicanal proposed its APE to restructure certain outstanding debt, including certain notes issued under an indenture governed by the Trust Indenture Act of 1939 (“TIA”). In response, the Argentinean Recovery Company LLC (“ARC”), a holder of certain notes owned by WRH Partners Global Securities, L.P. (“WRH” and together with ARC, “Huff”), commenced two lawsuits in the Supreme Court of the State of New York seeking (i) a judgment for the outstanding amounts due under the notes and (ii) declaratory and injunctive relief enjoining Multicanal from restructuring the notes in an APE. Subsequently, Multicanal commenced an ancillary proceeding under section 304 seeking (i) an injunction enjoining ARC from continuing with its lawsuits against Multicanal and (ii) an order granting recognition to its APE in the United States.

ARC requested, among other things, the dismissal of Multicanal’s section 304 on the basis that the TIA prevents the impairment of its rights under an APE.<sup>58</sup> In *In re Board of Directors of Multicanal S.A.* (“Multicanal I”),<sup>59</sup> the court noted that it needed to address this initial hurdle before it could properly address the recognition of an APE under section 304.<sup>60</sup> Although it is clear that United States bankruptcy laws can alter the rights of parties,<sup>61</sup> ARC asserted that rights under TIA could be altered by foreign bankruptcy laws “only in the event the foreign proceeding were identical to a proceeding under U.S. law.”<sup>62</sup> Noting that the United States Supreme Court had previously rejected a similar argument in *Gebhard*, the court concluded that foreign law can under certain circumstances alter rights under the TIA.<sup>63</sup> Rights under the TIA are not so sacrosanct such that a foreign restructuring involving notes issued under a qualified indenture could never be recognized under section 304 unless the bankruptcy laws were identical to those of the United States.<sup>64</sup> Accordingly, In *Multicanal I*, the court denied ARC’s motion to dismiss, while reserving its decision on whether the APE was entitled to recognition under section 304.<sup>65</sup>

After securing the requisite majority votes under Argentine law, Multicanal sought an order from the Argentine court confirming Multicanal's APE.<sup>66</sup> The Argentine court overruled five of the six objections filed against the APE and confirmed the APE "as having satisfied the requirements of Argentine law."<sup>67</sup> The Argentine court addressed the remaining objection by requiring that Multicanal provide certain dissenting and abstaining creditors with a "thirty day period to elect a form of consideration under the [APE], thus granting them the same rights given to those who had voted in favor of the APE."<sup>68</sup> In *In re Board of Directors of Multicanal S.A.* ("Multicanal II"),<sup>69</sup> the court considered Multicanal's request for recognition of its Argentine court approved APE under section 304. Huff opposed recognition on the basis that Multicanal's APE was "prejudicial and unfair to U.S. creditors" and lacked the requisite judicial oversight.<sup>70</sup> According to Huff, Multicanal's APE did not qualify as a foreign proceeding under the Bankruptcy Code.

The court concluded that section 304 requires an analysis of the foreign law as applied to the facts of the case rather than an analysis of the foreign law in the abstract and thus the lack of a "detailed statutory framework" in Argentina was not "fatal" to the recognition of the APE.<sup>71</sup> The court concluded that, provided the foreign court acted fair in the proceeding, the vagueness of the foreign law would not require that the United States court refrain from granting recognition. In addition, the court concluded that the foreign court must not be involved at every stage for the proceeding to qualify as a foreign proceeding under the Bankruptcy Code. To require otherwise would be inconsistent with United States law as the lack of judicial oversight complained of was similar to that which is permitted under United States law.<sup>72</sup> Accordingly, the court rejected Huff's contentions.

Finding that (i) the APE was very similar to a U.S. prepackaged chapter 11 case<sup>73</sup> and (ii) nothing in the APE is "fundamentally inconsistent" with chapter 11,<sup>74</sup> the court concluded that the APE "is the type of reorganization proceeding that, in principle, is subject to recognition under §304."<sup>75</sup> However, recognition under section 304 was not automatic simply because the APE was entitled to recognition.<sup>76</sup> The court still had to perform an analysis of the 304(c) factors and make a determination that relief under section 304 would be consistent therewith.<sup>77</sup> Ultimately, by order dated January 6, 2005, the court granted recognition to the APE in the United States.<sup>78</sup>

#### *Schemes of Transfer*

In the decision of *In re Rose*,<sup>79</sup> the United States Bankruptcy Court for the Southern District of New York was again asked to consider whether a

certain process pending abroad qualified as a foreign proceeding under the Bankruptcy Code. In particular, the court was asked whether a solvent scheme of transfer (“Transfer Scheme”) under Part VII of the United Kingdom Financial Services and Markets Act 2000 (“FSMA”) was eligible for recognition under section 304 of the Bankruptcy Code.<sup>80</sup>

The Transfer Scheme effectuated a transfer of certain businesses of 12 insurance companies into one.<sup>81</sup> By order dated May 12, 2004, the High Court of Justice in England (the “High Court”) sanctioned the Transfer Scheme.<sup>82</sup> David R. Rose, as Director of the Legal Entity Closedown Project for Aviva plc, requested an order under section 304 granting recognition of the Transfer Scheme to eliminate the need to maintain multiple trust funds in the United States<sup>83</sup> and to ensure that creditors would not continue pursuing claims against the transferor companies but rather against the transferee company.<sup>84</sup> While the Transfer Scheme did provide for a kind of corporate restructuring, the court concluded that, unlike an APE, it was not “the type of reorganization proceeding that, in principle, is subject to recognition.”<sup>85</sup>

Parsing through the definition of foreign proceeding, the court noted that the definition includes the phrase “effecting a reorganization.”<sup>86</sup> Given that reorganization is not defined, the court considered its plain meaning as well as the context in which it was used in interpreting the definition of a foreign proceeding.<sup>87</sup> “The meaning of a particular section in a statute should be understood in context with and by reference to the whole statute, by appreciating how sections relate to one another.”<sup>88</sup> Thus reorganization should not be isolated from “liquidation,” “adjusting debts,” and “discharge” but rather read together to be understood that reorganization refers to proceedings with similar characteristics as a liquidation or debt adjudication proceeding.<sup>89</sup> When properly read together with the legislative history of section 304, it is clear that a foreign proceeding refers to proceedings similar to bankruptcy, liquidation or chapter 11 reorganizations. Reorganization in the section 304 context, however, does not refer to a corporate reorganization or a merger.<sup>90</sup> Given that the Transfer Scheme lacked the characteristics of a reorganization in the bankruptcy context<sup>91</sup> and was in effect a merger, the court held that it did not qualify as a foreign proceeding under section 304.<sup>92</sup>

*B. Is a Foreign Entity eligible for Plenary Relief Under Chapter 11?*

A major issue facing every potential debtor is where to file.<sup>93</sup> Under a universality approach, the answer to the question appears to be fairly simple—file in the “home” court. However, where is the home court may be a tougher question. Is it the place where the debtor is domiciled or incorporated? Is it where the debtor’s creditors are domiciled or incor-

porated? Is it the debtor's principal place of business or assets? In a case involving a debtor with connections to multiple nations, more than one country may qualify as the "home" court. The decision where to file would ideally be based upon a careful analysis of the laws of the different nations and the availability of ancillary relief in the countries in which plenary relief is not sought.

Before reaching the decision as to where to file, a debtor must first conclude whether it is eligible to file in a particular jurisdiction. In the United States, the eligibility requirements for a debtor are set forth in section 109 of the Bankruptcy Code.<sup>94</sup> Generally, courts have interpreted section 109 broadly and as only requiring some property in the United States.<sup>95</sup> In two recent cases, courts have concluded, consistent with previous decisions, that a foreign entity need only property in the United States to qualify as a debtor under the Bankruptcy Code.

In addressing the ability of the leading Colombian airline to reorganize under chapter 11 of the Bankruptcy Code, the United States Bankruptcy Court for the Southern District of New York concluded that it qualified as a debtor under the Bankruptcy Code and that its chapter 11 case could proceed notwithstanding the objection of certain creditors.<sup>96</sup> Aerovias Nacionales de Colombia S.A. Avianca ("Avianca"), a publicly traded corporation organized under the laws of Colombia that provides passenger and cargo airline service internationally and within Colombia, voluntarily sought relief under chapter 11 of the Bankruptcy Code.<sup>97</sup> Avianca had offices and employees in the United States and flew from hubs located in Miami and New York and thus, at any given time, Avianca's leased aircraft were in the United States.<sup>98</sup> In addition, approximately 24% of Avianca's international air service was between Colombia and the United States.<sup>99</sup>

Certain creditors requested dismissal of the chapter 11 case<sup>100</sup> and alleged that Avianca had improperly engaged in forum shopping by filing for relief in the United States.<sup>101</sup> In response Avianca asserted<sup>102</sup> that while Avianca could seek protection under Law 550, such a proceeding would not provide effective relief because the debtors' largest creditors are subject to the jurisdiction of the United States and were not subject to and would likely not submit to Colombia's jurisdiction.<sup>103</sup>

Before addressing the merits of the substantive arguments underlying the motions to dismiss, the court analyzed the eligibility of Avianca to be a debtor under section 109(a) of the Bankruptcy Code. After noting that nothing prevents a foreign entity from seeking relief under the Bankruptcy Code,<sup>104</sup> the court concluded that "there is no question that Avianca, which has substantial property in the United States, is eligible to file a Chapter 11 petition."<sup>105</sup> Moreover, the difficulty the court may have

in exercising jurisdiction over parties outside the United States and in implementing the plan does not require a court to conclude that a foreign entity is not eligible for plenary relief under the Bankruptcy Code.<sup>106</sup> Nothing requires international enterprises to file in their principal place of business or in their “center of main interests.”<sup>107</sup>

Finding that Avianca qualified as a debtor and that it was appropriate to assert jurisdiction, the court addressed the remaining assertions raised in the motions to dismiss. Once the eligibility requirement is satisfied, a court can then look at other factors to determine whether the chapter 11 case should be allowed to proceed.<sup>108</sup> Ultimately, the court denied the motions to dismiss and held that Avianca’s Chapter 11 as the movant failed to satisfy either section 305<sup>109</sup> or 1112<sup>110</sup> of the Bankruptcy Code, notwithstanding the allegation that “Avianca would never be able to effectuate a plan because it could not prevent its Colombian creditors from taking action against its interests or from imposing improper conditions on its reorganization to the prejudice of creditors in the United States.”<sup>111</sup> While it may prove to be challenging to reorganize under the Bankruptcy Code, the court concluded that Avianca was entitled to attempt to effectuate a plan of reorganization.<sup>112</sup> Ultimately, the court confirmed Avianca’s chapter 11 plan.

When faced with the same issue in the chapter 11 case of the Yukos Oil Company (“Yukos”), the Bankruptcy Court for the Southern District of Texas concluded that the chapter 11 case should be dismissed. At first glance, the *Yukos* court appears to have deviated from the trend of liberally allowing foreign debtors to seek relief under the Bankruptcy Code. However, it did not. On the contrary, the *Yukos* court reinforced the principle that foreign debtors were eligible for relief under chapter 11. However, an entity is not entitled to relief under chapter 11 simply because it is eligible to be a debtor.

Based upon its assets, the chapter 11 filing by Yukos, a Russian holding company with 200 subsidiaries, substantially all of which were Russian companies, was the largest bankruptcy case ever filed in the United States. Although substantially all of the assets of Yukos and its business operations were located in Russia,<sup>113</sup> the court concluded that the presence of a bank account was sufficient to qualify Yukos as a debtor under the Bankruptcy Code.<sup>114</sup>

In making its conclusions, the *Yukos* court noted that the United States bankruptcy courts have “comprehensive jurisdiction” over bankruptcy cases. Such jurisdiction extends beyond the borders of the United States. In addition, there is nothing that prevents a bankruptcy court from administering the assets of a foreign debtor or supervising its bankruptcy.<sup>115</sup> Regardless of this broad or comprehensive grant of jurisdic-

tion, the court properly concluded that before the chapter 11 case would be allowed to proceed, the court had to determine that Yukos was eligible to be a debtor under section 109 of the Bankruptcy Code.

The *Yukos* court summarily dismissed the assertion that because Yukos did not have a place of business or property in the United States, Yukos was not an eligible debtor under the Bankruptcy Code.<sup>116</sup> Provided Yukos had property in the United States, it would qualify as a debtor. Contrary to the assertions of the parties seeking the dismissal of Yukos's chapter 11 case, the court held there is no requirement that a debtor have a certain level of property or business in the United States.<sup>117</sup> "Nominal" assets would be sufficient to qualify a foreign entity as a debtor under the Bankruptcy Code. The court concluded that the funds transferred to Yukos's bank account in the United States within 90 minutes of the bankruptcy filing<sup>118</sup> were sufficient to qualify Yukos as a debtor under the Bankruptcy Code.

As in the *Avianca* case, after concluding that Yukos qualified as a debtor, the court had to determine whether its chapter 11 case should be dismissed.<sup>119</sup> Notwithstanding that a foreign entity is an eligible debtor under section 109 of the Bankruptcy Code, the bankruptcy court may still exercise its discretion and dismiss a foreign debtor's chapter 11 case under sections 305 and 1112 of the Bankruptcy Code.<sup>120</sup> In *Yukos*, the court concluded that "cause" sufficient to justify the dismissal of Yukos's chapter 11 case existed under section 1112 of the Bankruptcy Code.<sup>121</sup> Several key facts led the court to this conclusion. First, it was clear that "without the cooperation of the Russian government," reorganization would not be possible.<sup>122</sup> Second, the court lacked jurisdiction over key players.<sup>123</sup> Third, Yukos's reorganization would depend on the interpretation of foreign laws, which the bankruptcy court was not "uniquely qualified to perform."<sup>124</sup> Finally, and most importantly, Yukos is an extremely large corporation with overwhelming connections to Russia, whose reorganization would have an "impact on the *entirety* of the Russian economy."<sup>125</sup> While, none of these factors standing alone would have been sufficient to justify dismissal,<sup>126</sup> this last factor distinguished the Yukos case from similar cases and may have ultimately led the court to its decision to dismiss the chapter 11 case.<sup>127</sup>

Following past decisions concluding that foreign entities are eligible to be debtors under the Bankruptcy Code, the United States District Court for the Southern District of New York has reversed a bankruptcy court's decision dismissing an involuntary petition filed against a Brazilian holding company.<sup>128</sup> The bankruptcy court dismissed the involuntary petition because, among other things, "Globopar could not qualify as an involuntary debtor-in-possession."<sup>129</sup> However, "[t]his conclusion is

based on a misreading of the [Bankruptcy] Code.”<sup>130</sup> Section 109 does not require a foreign debtor to reside or have a “place of business” within the United States but rather a foreign entity need only have nominal property in the United States for it to be an eligible debtor.<sup>131</sup> Globopar possibly had such and therefore its case should not have been dismissed to lack of eligibility.<sup>132</sup>

Moreover, the lack of personal jurisdiction over the foreign entity does not bar it from being a debtor under the Bankruptcy Code.<sup>133</sup> A bankruptcy court has extensive jurisdiction over the debtor and its property “wherever located and by whomever held,”<sup>134</sup> regardless of the involuntary nature of the bankruptcy proceeding.<sup>135</sup> By virtue of this extensive jurisdiction over both the debtor in personam and over its res, a bankruptcy court “may assert extraterritorial jurisdiction over the person of the [alleged debtor] and affect rights to the [alleged debtor’s] property located outside of the court’s jurisdiction if the exercise of that jurisdiction otherwise complies with statutory and due process requirements.”<sup>136</sup> The fact that Globopar would not cooperate in the bankruptcy process did not prevent the bankruptcy court from asserting its jurisdiction.<sup>137</sup> Ultimately, the higher court did not conclude that Globopar qualified as a debtor but rather remanded the issue to the bankruptcy court. Moreover, even if it is ultimately concluded that Globopar is eligible to be a debtor under section 109 of the Bankruptcy Code, the bankruptcy court must apply the appropriate standard and determine whether an order for relief should be entered against Globopar.<sup>138</sup>

While the *Yukos* court dismissed the chapter 11 case of a foreign entity, the *Yukos* decision is unique and is limited by its facts. It should not be read as providing for a per se rule that foreign entities are not eligible for relief under the Bankruptcy Code. On the contrary, a foreign entity with nominal property in the United States should qualify as a debtor under the Bankruptcy Code. Only where a foreign entity lacks any connection to or property in the United States should a court dismiss the case for a lack of eligibility. Ultimately, a court may decide to dismiss such a bankruptcy case under section 305 or 1112 of the Bankruptcy Code, however, that is true of any other case and is not a function of the debtor being a foreign entity.

### PART III

#### CHAPTER 15—ANOTHER STEP TOWARDS UNIVERSALITY

On April 20, 2005, President George W. Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “Reform Act”) into law.<sup>139</sup> Although the Reform Act is primarily focused on con-

sumer-related bankruptcy issues, it includes a new chapter 15 to the Bankruptcy Code based upon the United Nations Commission for International Trade Law (“UNCITRAL”) Model Law on Cross-Border Insolvency (the “Model Law”).<sup>140</sup> This new chapter 15 replaces section 304 and governs ancillary proceedings in the United States.<sup>141</sup> Unlike section 304, however, chapter 15 is intended to be the “exclusive door to ancillary assistance to foreign proceedings.”<sup>142</sup>

Following the judicial trend of interpreting the definition of a foreign proceeding under section 304 broadly, the Reform Act adopts an even broader definition of a foreign proceeding. The Reform Act defines a “foreign proceeding” as “a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.”<sup>143</sup> Under this definition, “interim proceedings” are expressly included as foreign proceedings. Moreover, the definition includes the phrase “adjustment of debt,” which is similar to “adjusting debts” in the prior definition and should be interpreted broadly.<sup>144</sup> Unlike the prior definition of foreign proceeding, there is no requirement that the debtor have its domicile, residence, principal place of business, or principal assets in the foreign country.<sup>145</sup> As such, more proceedings would apparently qualify as a foreign proceeding under the new definition.<sup>146</sup>

Unlike under section 304, a court need not consider the so-called section 304(c) factors<sup>147</sup> in determining whether to grant relief under chapter 15. <sup>148</sup> Reflecting the movement towards universality, recognition<sup>149</sup> would automatically be granted to a foreign proceeding under chapter 15, subject to the limitation set forth in section 1506.<sup>150</sup> Thus, in the spirit of *Gebhard*, recognition remains subject to some discretion.<sup>151</sup>

Section 1506 provides that “[n]othing in [chapter 15] 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.”<sup>152</sup> Thus a court may exercise its discretion and refuse to recognize a foreign proceeding under chapter 15 where such recognition would be contrary to the “most fundamental policies of the United States.”<sup>153</sup> Clearly, by limiting a court’s discretion to granting recognition, the United States has taken another step toward absolute universality.

Recognition of a foreign proceeding may have immediate and significant effects depending on the type of foreign proceeding being recognized. Upon recognition of a foreign main proceeding, a foreign debtor and its property located in the United States will have the protections of the automatic stay and section 363 and will apply to a transfer of interest

of the debtor in property located in the United States. This extension of automatic and immediate benefits upon recognition of a foreign main proceeding reflects the United States policy of universality. In the case of a foreign nonmain proceeding, there is no such automatic relief upon recognition. Rather, relief will be subject to section 1521.

A court may grant “appropriater relief” under section 1521 in connection with a foreign main proceeding and a foreign nonmain proceeding, however, such relief is not automatic or immediate.<sup>154</sup> Such “appropriate relief,” may be granted only if it is “necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor, or the interests of the creditors.”<sup>155</sup> To grant relief under section 1521 in connection with a foreign nonmain proceeding, a “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.”<sup>156</sup> Failure to satisfy this standard would presumably result in the refusal to grant appropriate relief under chapter 15. Pursuant to section 1519, “where relief is urgently needed to protect the assets of the debtor or the interests of the creditors,” a court may grant provisional relief, including temporary restraining orders.<sup>157</sup> Neither section, however, requires an analysis of the section 304(c) factors.<sup>158</sup> The presumably reduced standards for granting relief under chapter 15 also signal a step towards universality.

### *Conclusion*

Although the Model Law “now offers the best prospect for international cooperation,” few countries have adopted it.<sup>159</sup> The United States has taken a major leap toward universality with the enactment of the Reform Act and the addition of chapter 15 to the Bankruptcy Code.<sup>160</sup> While this may seem to reflect a significant change in United States policy, it is merely another step toward absolute universality. Until the United States makes the final step and eliminates the courts discretion to refrain from granting relief or recognition under chapter 15, there will be situations where a United States court refuses to grant recognition or relief, because to do so would be “manifestly contrary to public policy.” Although unlikely, there always remains the possibility that the United States may at some point return to territorialism. History can always repeat itself.

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1. For ease of reference, the phrase “cross-border bankruptcy,” as used throughout this Article, is not limited to exclusively “bankruptcy” cases but rather refers to a multitude of different types of cross-border proceedings, including cross-border bankruptcy, insolvency, debt-restructuring cases or proceedings, and similar types of proceedings.

2. 11 U.S.C.A. §§ 101, et seq.

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3. See *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989, 136 L.R.R.M. (BNA) 2065, Bankr. L. Rep. (CCH) P 73747, 118 Lab. Cas. (CCH) P 10548 (2d Cir. 1990) (“The Bankruptcy Code ‘provides for centralized jurisdiction and administration of the debtor, its estate and its reorganization in the Bankruptcy Court. . .’”).

4. *In re Simon*, 153 F.3d 991, 33 Bankr. Ct. Dec. (CRR) 141, Bankr. L. Rep. (CCH) P 77783 (9th Cir. 1998). The filing of a bankruptcy petition under 11 U.S.C.A. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C.A. § 541(a). With certain exceptions, the estate is comprised of the debtor’s legal or equitable interests in property ‘*wherever located and by whomever held.*’ The district court in which the bankruptcy case is commenced obtains exclusive *in rem* jurisdiction over all of the property in the estate. *In re Simon*, 153 F.3d 991, 33 Bankr. Ct. Dec. (CRR) 141, Bankr. L. Rep. (CCH) P 77783 (9th Cir. 1998) (emphasis in original) (citations omitted). *Infra* notes 132 to 135 and accompanying text.

5. “Transnational insolvency cases have been rarely submitted for formal adjudication in US courts [and] the law in this complex field remains underdeveloped and inconsistent at best.” *Overseas Inns S.A. P.A. v. U.S.*, 685 F. Supp. 968, 971, 88-1 U.S. Tax Cas. (CCH) P 9347, 62 A.F.T.R.2d 88-5182 (N.D. Tex. 1988) (alteration in original) (quoting *Morales & Deutsch, Bankruptcy Code Section 304 and US Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 Bus. Law 1573, 1575 (1984)).

6. *Infra* note 139 and accompanying text.

7. *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 3 S. Ct. 363, 27 L. Ed. 1020 (1883) (“That the laws of a country have no extra-territorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country.”). *In re McTague*, 198 B.R. 428, 430, 29 Bankr. Ct. Dec. (CRR) 560 (Bankr. W.D. N.Y. 1996) (“Although it may be true that orders of this Court have ‘extraterritorial effect,’ it is fundamental that those orders can be enforced in a foreign nation only to the extent that the foreign nation grants those orders ‘full faith and credit’ as a matter of comity, treaty or convention.”).

8. “The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call ‘the comity of nations.’ Although the phrase has been often criticized, no satisfactory substitute has been suggested.” *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S. Ct. 139, 40 L. Ed. 95 (1895).

9. *Cornfeld v. Investors Overseas Services, Ltd.*, 471 F. Supp. 1255, 1258-59 (S.D. N.Y. 1979), *aff’d*, 614 F.2d 1286 (2d Cir. 1979). See, e.g., *International Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589 (5th Cir. 2003); *In re Maxwell Communication Corp. plc by Homan*, 93 F.3d 1036, 29 Bankr. Ct. Dec. (CRR) 788 (2d Cir. 1996).

10. *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S. Ct. 139, 40 L. Ed. 95 (1895) (“No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.”).

11. *Hilton v. Guyot*, 159 U.S. 113, 163-164, 16 S. Ct. 139, 40 L. Ed. 95 (1895) (emphasis added).

12. *In re Board of Directors of Hopewell Intern. Ins. Ltd.*, 238 B.R. 25, 66, 34 Bankr. Ct. Dec. (CRR) 1273 (Bankr. S.D. N.Y. 1999), *order aff’d*, 275 B.R. 699, 48 Collier Bankr. Cas. 2d (MB) 362 (S.D. N.Y. 2002). Although seemingly straightforward, courts have defined comity differently. Comity is a recognition, a rule of practice, convenience, and expediency; it does not achieve the force of imperative or obligation, but rather constitutes “a nation’s expression of understanding which demonstrates due regard both to international duty and convenience and the rights of persons protected by its own laws.” Comity “summarizes in a brief word a complex and elusive concept—the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum.” *Overseas*

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Inns S.A. PA. v. U.S., 685 F. Supp. 968, 971, 88-1 U.S. Tax Cas. (CCH) P 9347, 62 A.F.T.R.2d 88-5182 (N.D. Tex. 1988) (citations omitted).

13. Overseas Inns S.A. PA. v. U.S., 685 F. Supp. 968, 971, 88-1 U.S. Tax Cas. (CCH) P 9347, 62 A.F.T.R.2d 88-5182 (N.D. Tex. 1988) (“Two contrasting doctrines have emerged regarding the recognition of foreign bankruptcy decisions: the universality theory and the territoriality theory.”). “A third approach called contractualism, in which a corporation may specify in its charter the jurisdiction that will administer its bankruptcy, has been advocated in academic literature.” *In re Treco*, 240 F.3d 148, 153 n. 2, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001).

14. See, e.g., *Harrison v. Sterry*, 9 U.S. 289, 3 L. Ed. 104, 1809 WL 1641 (1809) (“The bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States.”); *Ogden v. Saunders*, 25 U.S. 213, 6 L. Ed. 606, 1827 WL 3055 (1827) (holding that a discharge in bankruptcy rendered by a foreign court is not a defense against a creditor who is a citizen of the United States unless the creditor first consented to the foreign court’s jurisdiction over his claim.).

15. *In re Treco*, 240 F.3d 148, 153, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001). “[C]ourts relying on a territoriality approach emphasize the rights of local creditors and follow the strict rule of sovereignty. Under a strict application of this theory, each nation conducts its own bankruptcy proceeding with respect to the assets located within its jurisdiction and disregards any parallel proceedings in foreign jurisdictions.” *In re Thornhill Global Deposit Fund, Ltd.*, 245 B.R. 1, 15 n.16 (Bankr. D. Mass. 2000), subsequently aff’d, 247 F.3d 328 (1st Cir. 2001).

16. “Historically, the bankruptcy laws of our country have been hostile towards claims asserted by foreign trustees in bankruptcy against alleged estate property located in the United States.” *Matter of Toga Mfg. Ltd.*, 28 B.R. 165, 167, 10 Bankr. Ct. Dec. (CRR) 378 (Bankr. E.D. Mich. 1983).

17. *In re Treco*, 240 F.3d 148, 153, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001) (emphasis added) (citations omitted). “Courts using the universality approach favor a single, unified distribution of the debtor’s assets from one central forum. The courts defer to a single jurisdiction which retains the primary duty to resolve the debtor’s financial difficulties and coordinates the actions in other jurisdictions in aid of the centralized proceeding.” *In re Thornhill Global Deposit Fund, Ltd.*, 245 B.R. 1, 15 n.16 (Bankr. D. Mass. 2000), subsequently aff’d, 247 F.3d 328 (1st Cir. 2001). See Thomas C. Baxter, Jr., *Two Cheers for Territoriality: An Essay on International Bank Insolvency Law*, 78 Am. Bankr. L. J. 57 (Winter 2004) (“Under universal insolvency, one jurisdiction distributes assets to claimants or runs the reorganization. The rest collect assets, coordinate claims processing and share information with the principal jurisdiction, and enforce moratoria.”).

18. *Cunard S.S. Co. Ltd. v. Salen Reefer Services AB*, 773 F.2d 452, 458, Bankr. L. Rep. (CCH) P 70762, 1986 A.M.C. 163, 2 Fed. R. Serv. 3d 1288 (2d Cir. 1985).

19. 109 US 527 (1883); Richard E. Coulson, *Choice of Law in United States Cross-Border Insolvencies*, 32 *Denv. J. Int’l L & Pol’y* 275, 285 (Spring 2004) (“A big step in the direction of the universality principle, which argues there should be a single proceeding with equal treatment of the same class of creditors, was taken in *Canada Southern Railway Co. v. Gebhard*.”).

20. *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 538, 3 S. Ct. 363, 27 L. Ed. 1020 (1883).

21. *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 536-537, 3 S. Ct. 363, 27 L. Ed. 1020 (1883). A corporation ‘must dwell in the place of its creation, and cannot migrate to another sovereignty,’ though it may do business in all places where its charter allows and the local laws do not forbid. But wherever it goes for business it carries its charter, as that is the law of its existence, and the charter is the same abroad that it is at home. Whatever

disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 537, 3 S. Ct. 363, 27 L. Ed. 1020 (1883) (citations omitted).

22. *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 537-538, 3 S. Ct. 363, 27 L. Ed. 1020 (1883). Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligation of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the corporation and effect of their contracts with corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 537-538, 3 S. Ct. 363, 27 L. Ed. 1020 (1883).

23. *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 539, 3 S. Ct. 363, 27 L. Ed. 1020 (1883). It is in entire harmony with the spirit of bankrupt laws, the binding force of which, upon those who are subject to the jurisdiction, is recognized by all civilized nations. It is not in conflict with the Constitution of the United States, which, although prohibiting States from passing laws impairing the obligation of contracts, allows congress 'to establish . . . uniform laws on the subject of bankruptcy throughout the United States. *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 539, 3 S. Ct. 363, 27 L. Ed. 1020 (1883) (omission in original).

24. *In re Board of Directors of Multicanal S.A.*, 314 B.R. 486, 509 (Bankr. S.D. N.Y. 2004) ("[T]he issue before the Court is not whether Multicanal followed all of the procedures for solicitation and voting that would apply in a Chapter 11 case"). See *In re Board of Directors of Multicanal S.A.*, 314 B.R. 486, 506 (Bankr. S.D. N.Y. 2004) ("There is no requirement that a foreign proceeding incorporate the conditions to confirmation set forth in §1129 of the US Bankruptcy Code."); *In re Board of Directors of Hopewell Intern. Ins. Ltd.*, 238 B.R. 25, 68, 34 Bankr. Ct. Dec. (CRR) 1273 (Bankr. S.D. N.Y. 1999), order aff'd, 275 B.R. 699, 48 Collier Bankr. Cas. 2d (MB) 362 (S.D. N.Y. 2002) ("Comity does not require that the foreign law be a mirror image of our own.").

25. See, e.g., *In re Board of Directors of Multicanal S.A.*, 314 B.R. 486 (Bankr. S.D. N.Y. 2004).

26. *Petition of Brierley*, 145 B.R. 151, 166, 23 Bankr. Ct. Dec. (CRR) 429, 27 Collier Bankr. Cas. 2d (MB) 828 (Bankr. S.D. N.Y. 1992) ("Nothing dictates that the foreign law be a carbon copy of our law; rather, the [foreign law] must not be repugnant to American laws and policies, which it is manifestly not."); *In re Board of Directors of Hopewell Intern. Ins. Ltd.*, 238 B.R. 25, 66, 34 Bankr. Ct. Dec. (CRR) 1273 (Bankr. S.D. N.Y. 1999), order aff'd, 275 B.R. 699, 48 Collier Bankr. Cas. 2d (MB) 362 (S.D. N.Y. 2002) ("Comity should therefore be accorded to orders and decisions of a foreign court as well as to foreign statutes as long as 'it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated.'").

27. *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 539, 3 S. Ct. 363, 27 L. Ed. 1020 (1883). Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at

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home, should be recognized in other countries. *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 539, 3 S. Ct. 363, 27 L. Ed. 1020 (1883).

28. See note 39.

29. See *In re Treco*, 240 F.3d 148, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001).

30. *In re Treco*, 240 F.3d 148, 154, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001). As will be discussed in Part III, chapter 15 of the Bankruptcy Code provides the same assurance that recognition will not violate United States policy or law.

31. Under the Bankruptcy Code, a “foreign representative” is defined as “a duly selected trustee, administrator, or other representative of an estate in a foreign proceeding.” 11 U.S.C.A. § 101(24). Foreign representative has been interpreted broadly and includes both entities appointed by the court supervising the foreign proceeding as well as those not. *In re Board of Directors of Hopewell Intern. Ins. Ltd.*, 238 B.R. 25, 53, 34 Bankr. Ct. Dec. (CRR) 1273 (Bankr. S.D. N.Y. 1999), order aff’d, 275 B.R. 699, 48 Collier Bankr. Cas. 2d (MB) 362 (S.D. N.Y. 2002) (“[A]bsolutely nothing in the statute requires the foreign representative to be appointed by a court.”). As such, a foreign representative is a function of a foreign proceeding.

32. Section 304 has evolved into the preferred method to assist a main foreign proceeding, however, it is not the exclusive method. *Cunard S.S. Co. Ltd. v. Salen Reefer Services AB*, 773 F.2d 452, 455, Bankr. L. Rep. (CCH) P 70762, 1986 A.M.C. 163, 2 Fed. R. Serv. 3d 1288 (2d Cir. 1985) (“We do not find in the statute or in the legislative history a clear congressional mandate, either express or implied, that section 304 was to be the exclusive remedy for a foreign bankrupt.”).

33. Section 304(b) of the Bankruptcy Code provides as follows:

Subject to the provisions of subsection (c) of this section if a party in interest does not timely controvert the petition, or after trial, the court may:

(1) enjoin the commencement or continuation of:

(A) any action against:

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative, or

(3) order other appropriate relief.

11 U.S.C.A. § 304(b).

34. See, e.g., *In re MMG LLC*, 256 B.R. 544, 549, 45 Collier Bankr. Cas. 2d (MB) 491 (Bankr. S.D. N.Y. 2000) (“A section 304 proceeding is not, however, a full blown bankruptcy.”). Section 304 does not give rise to an automatic stay enjoining acts against a debtor or the authority for the foreign representative to assert claims that a trustee could in a plenary case under the Bankruptcy Code. See, e.g., *In re A. Tarricone, Inc.*, 80 B.R. 21, 23, 16 Bankr. Ct. Dec. (CRR) 669 (Bankr. S.D. N.Y. 1987) (noting foreign representative “is not a trustee in bankruptcy appointed under the Bankruptcy Code . . . Had Congress desired to vest a foreign representative with those domestic powers, it would have said so directly.”); *In re Gee*, 53 B.R. 891, 896, 13 Bankr. Ct. Dec. (CRR) 757, Bankr. L. Rep. (CCH) P 70824 (Bankr. S.D. N.Y. 1985) (“A case under section 304 is not a full-scale bankruptcy case with an automatic stay prohibiting dismemberment of assets by vigilant creditors or with avoiding powers given to a fiduciary.”).

35. 11 U.S.C.A. § 304(c). In re Thornhill Global Deposit Fund, Ltd., 245 B.R. 1, 13 (Bankr. D. Mass. 2000), subsequently aff'd, 247 F.3d 328 (1st Cir. 2001) (“The determination of the appropriate ancillary relief depends on the collective degree to which the criteria of section 304(c) are satisfied). Thus, some courts give equal weight to each of the 304(c) factors. Others courts have noted that comity is “the ultimate consideration in determining whether to provide relief under § 304.” In re Treco, 240 F.3d 148, 156, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001); In re Koreag, Controle et Revision S.A., 130 B.R. 705, 712, 21 Bankr. Ct. Dec. (CRR) 1701, 25 Collier Bankr. Cas. 2d (MB) 653 (Bankr. S.D. N.Y. 1991), vacated on other grounds, 961 F.2d 341, 26 Collier Bankr. Cas. 2d (MB) 1200, Bankr. L. Rep. (CCH) P 74552, 17 U.C.C. Rep. Serv. 2d 1036 (2d Cir. 1992) (“Comity is inevitably the more significant factor since the other factors (except for the sixth element dealing with the fresh start theory) are inherently taken into account when considering comity.”). These courts, however, have noted that under certain circumstances, the other 304(c) factors can override comity. In re Treco, 240 F.3d 148, 156, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001).

36. In re Petition of Garcia Avila, 296 B.R. 95, 107, 41 Bankr. Ct. Dec. (CRR) 177 (Bankr. S.D. N.Y. 2003) (“Section 304(c) reflects modified ‘universality,’ requiring the court to weigh the enumerated factors before deferring to the foreign court.”). “Section 304 does not implement pure universality, however. The statute expressly directs courts to consider several factors before deferring to the foreign court and granting relief in support of foreign proceedings.” In re Treco, 240 F.3d 148, 154, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001).

37. In re Thornhill Global Deposit Fund, Ltd., 245 B.R. 1, 16 (Bankr. D. Mass. 2000), subsequently aff'd, 247 F.3d 328 (1st Cir. 2001) (citations omitted). In re Treco, 240 F.3d 148, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001) (“The principle of comity has never meant categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States.”). Whether comity should be extended is not necessarily the same question as whether relief under section 304 should be granted. Relief under section 304 is subject to an analysis of section 304(c), which while it includes comity is not dictated by a comity analysis. See *supra* notes 34 and 35 and accompanying text.

38. In re Thornhill Global Deposit Fund, Ltd., 245 B.R. 1, 44 (Bankr. D. Mass. 2000), subsequently aff'd, 247 F.3d 328 (1st Cir. 2001) (citations omitted).

39. See, e.g., Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999) (“We have repeatedly noted the importance of extending comity to foreign bankruptcy proceedings. Since ‘the equitable and orderly distribution of a debtor’s property requires assembling all claims against the limited assets in a single proceeding,’ American courts regularly defer to such actions.”) (citations omitted). “The decision whether or not to extend comity is generally a matter of discretion.” JP Morgan Chase Bank v. Altos Hornos De Mexico, S.A. De C.V., 2004 WL 42268 (S.D. N.Y. 2004), aff'd, 412 F.3d 418, Bankr. L. Rep. (CCH) P 80309 (2d Cir. 2005). Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999).

40. In addition to these three alternatives, a foreign debtor/representative may seek relief under common law principles of comity. *Cunard S.S. Co. Ltd. v. Salen Reefer Services AB*, 773 F.2d 452, 456, Bankr. L. Rep. (CCH) P 70762, 1986 A.M.C. 163, 2 Fed. R. Serv. 3d 1288 (2d Cir. 1985). As a result of the enactment of section 304 and the developing case law, the act of a foreign debtor/representative seeking relief under common law principles of comity is rarely undertaken. See Honorable Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, 877 PLI/Comm 1025, 1033 (April 2005) (“In recent years, a proceeding under § 304 has been the remedy of choice for a foreign representative because of the remedies that are clearly available.”). A foreign representative may also commence an involuntary case against the debtor under section 303.

41. See *supra* note 7 and accompanying text.

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42. “This section [section 109] specifies eligibility to be a debtor under the bankruptcy laws.” H. Rep. No. 595, 95th Cong., 1st Sess. 318, reprinted in 1978 U.S.C.C.A.N. 5963, 6275. note 94.

43. *In re Lernout & Hauspie Speech Products, N.V.*, 301 B.R. 651, 658 (Bankr. D. Del. 2003), order aff’d, 308 B.R. 672, 42 Bankr. Ct. Dec. (CRR) 225 (D. Del. 2004) (noting that while “actual dialog” between the two courts was attempted it failed do to the fact that “such a protocol could not be adopted by a Belgian Court because to do so would be violative of Belgian ‘public order.’”) (citation omitted). See, generally, Robin E. Phelan & Scott W. Everett, *Over There: Select Issues in International Debtor-Creditor Relations*, in Am. Bankr. Inst. Ann. Spring Meeting Meeting Educ. Materials (West Group 1999).

44. 11 U.S.C.A. § 304(a) (“A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.”) “In enacting section 304. . . Congress provided a mechanism for the courts in this country to aid foreign courts and accommodate the increasing number of foreign insolvency proceedings having extraterritorial effects within the United States.” *In re Rubin*, 160 B.R. 269, 274, 24 Bankr. Ct. Dec. (CRR) 1365, Bankr. L. Rep. (CCH) P 75506 (Bankr. S.D. N.Y. 1993) (citing *In re Gee*, 53 B.R. 891, 896, 13 Bankr. Ct. Dec. (CRR) 757, Bankr. L. Rep. (CCH) P 70824 (Bankr. S.D. N.Y. 1985)).

45. In enacting section 304, Congress envisioned a proceeding in the United State, “which does not commence a full bankruptcy case, in order to administer assets located in this country, to prevent dismemberment by local creditors of assets located here, or for other appropriate relief.” S. Rep. No. 989, 95th Cong., 2d Sess. 35 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5821; see *Matter of Axona Intern. Credit & Commerce Ltd.*, 88 B.R. 597, 606, 17 Bankr. Ct. Dec. (CRR) 1179, 19 Collier Bankr. Cas. 2d (MB) 257 (Bankr. S.D. N.Y. 1988), decision aff’d, 115 B.R. 442 (S.D. N.Y. 1990) (noting that proceeding under section 304 is “a limited one, designed to function in aid of proceeding in a foreign Court”). *Supra* note 34.

46. “Section 304 implicitly acknowledges that centralizing an insolvency proceeding will frequently provide the optimal result for a debtor and its creditors alike by preventing certain creditors from gaining an advantage over others by virtue of differing judicial systems. A single primary proceeding also minimizes the time, expense and administrative burdens of managing full cases in multiple proceedings.” *In re Board of Directors of Multicanal S.A.*, 314 B.R. 486, 521 (Bankr. S.D. N.Y. 2004) (citation omitted).

47. *In re Goerg*, 844 F.2d 1562, 1568, 17 Bankr. Ct. Dec. (CRR) 1251, 18 Collier Bankr. Cas. 2d (MB) 1125, Bankr. L. Rep. (CCH) P 72299 (11th Cir. 1988) (“[W]e conclude that the debtor in a section 304 proceeding need not qualify as a ‘debtor’ under the Code’s definition of that term. Rather, the debtor need only be properly subject, under applicable foreign law, to a proceeding commenced ‘for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.’); *In re Gee*, 53 B.R. 891, 900, 13 Bankr. Ct. Dec. (CRR) 757, Bankr. L. Rep. (CCH) P 70824 (Bankr. S.D. N.Y. 1985) (“[S]ince a 304 case is one which does not administer an estate as such but simply aids a foreign bankruptcy, there is little reason to exclude a debtor ineligible for chapter 11 relief from being the subject of a case under section 304.”). See *supra* notes 33 and 44, and accompanying text.

48. Notes 34 and 35 and accompanying text.

49. “A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.” 11 U.S.C.A. § 304(a) (emphasis added). “There are thus two statutory prerequisites to a § 304 case, a foreign proceeding and a foreign representative.” *In re Board of Directors of Multicanal S.A.*, 314 B.R. 486, 501 (Bankr. S.D. N.Y. 2004) (citations omitted). Absent a foreign proceeding, relief cannot be granted under section 304. See *In re Rose*, 318 B.R. 771, 776, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004) (“Because the court determines that this matter is

not a foreign proceeding under Code § 304(a), the court must dismiss the [§ 304] Petition, even if [the Petitioner] can satisfy every element of § 304(c).”)

50. 11 U.S.C.A. § 101(23).

51. *In re Board of Directors of Hopewell Intern. Ins. Ltd.*, 238 B.R. 25, 49, 34 Bankr. Ct. Dec. (CRR) 1273 (Bankr. S.D. N.Y. 1999), order aff'd, 275 B.R. 699, 48 Collier Bankr. Cas. 2d (MB) 362 (S.D. N.Y. 2002) (citation omitted). Absent from the definition is the requirement that the debtor be a foreign entity. See *Petition of Shavit*, 197 B.R. 763, 767-768, 29 Bankr. Ct. Dec. (CRR) 429 (Bankr. S.D. N.Y. 1996) (“[T]he foreign liquidation of an American company, whose principal place of business or principal assets exist in the foreign state, can qualify as a ‘foreign proceeding’ for purposes of federal bankruptcy law.”).

52. *In re Netia Holdings S.A.*, 277 B.R. 571, 581 (Bankr. S.D. N.Y. 2002) (citing *In re MMG LLC*, 256 B.R. 544, 549, 45 Collier Bankr. Cas. 2d (MB) 491 (Bankr. S.D. N.Y. 2000)).

53. The key factor a court needs to look at “is the amount of judicial involvement and supervision or, conversely, the degree of access to the [foreign] court available at various stages to creditors so that they may voice any objections they may have.” *In re Board of Directors of Hopewell Intern. Ins. Ltd.*, 238 B.R. 25, 66, 34 Bankr. Ct. Dec. (CRR) 1273 (Bankr. S.D. N.Y. 1999), order aff'd, 275 B.R. 699, 48 Collier Bankr. Cas. 2d (MB) 362 (S.D. N.Y. 2002) (citations omitted).

54. See, e.g. *In re Board of Directors of Hopewell Intern. Ins. Ltd.*, 238 B.R. 25, 34 Bankr. Ct. Dec. (CRR) 1273 (Bankr. S.D. N.Y. 1999), order aff'd, 275 B.R. 699, 48 Collier Bankr. Cas. 2d (MB) 362 (S.D. N.Y. 2002) (concluding that scheme of arrangement qualified as foreign proceeding); *Petition of Ward*, 201 B.R. 357 (Bankr. S.D. N.Y. 1996), corrected, (Oct. 10, 1996) (finding that a Zambian voluntary liquidation qualified as a foreign proceeding); *Petition of Tam*, 170 B.R. 838, 25 Bankr. Ct. Dec. (CRR) 1635 (Bankr. S.D. N.Y. 1994) (concluding that a Cayman Islands’ voluntary winding-up was not foreign proceeding because the liquidation was being conducted without the oversight of any governmental agency, instrumentality or authority and the creditors had no right to be heard).

55. See e.g. *In re Board of Directors of Hopewell Intern. Ins. Ltd.*, 238 B.R. 25, 49-50, 34 Bankr. Ct. Dec. (CRR) 1273 (Bankr. S.D. N.Y. 1999), order aff'd, 275 B.R. 699, 48 Collier Bankr. Cas. 2d (MB) 362 (S.D. N.Y. 2002); ); *Petition of Ward*, 201 B.R. 357 (Bankr. S.D. N.Y. 1996), corrected, (Oct. 10, 1996). After concluding that the foreign process qualifies as a foreign proceeding a court must still determine whether relief is appropriate upon analysis of the section 304(c) factors. *Supra* notes 34 and 35 and accompanying text. For example, United States courts have found the following proceedings to qualify for relief under section 304: provisional liquidation, liquidation, administration and schemes of arrangement. See, e.g., *Petition of Singer*, 205 B.R. 355 (S.D. N.Y. 1997) (permitting grant of section 304 relief to provisional liquidators); *In re Lines*, 81 B.R. 267, 18 Collier Bankr. Cas. 2d (MB) 108 (Bankr. S.D. N.Y. 1988) (granting section 304 relief to provisional liquidation pending in Bermuda); *In re Rubin*, 160 B.R. 269, 274, 24 Bankr. Ct. Dec. (CRR) 1365, Bankr. L. Rep. (CCH) P 75506 (Bankr. S.D. N.Y. 1993) (granting partial relief under section 304 to liquidation pending in Israel); *Vesta Fire Ins. Corp. v. New Cap Reinsurance Corp., Ltd.*, 244 B.R. 209 (S.D. N.Y. 2000), judgment aff'd, 238 F.3d 186 (2d Cir. 2001), as amended, (May 1, 2001) (permitting section 304 relief to administrator in Australian insolvency proceeding); *Petition of Brierley*, 145 B.R. 151, 23 Bankr. Ct. Dec. (CRR) 429, 27 Collier Bankr. Cas. 2d (MB) 828 (Bankr. S.D. N.Y. 1992) (granting section 304 relief to administrator appointed by the High Court of Justice in England); *In re Board of Directors of Hopewell Intern. Ins. Ltd.*, 238 B.R. 25, 68, 34 Bankr. Ct. Dec. (CRR) 1273 (Bankr. S.D. N.Y. 1999), order aff'd, 275 B.R. 699, 48 Collier Bankr. Cas. 2d (MB) 362 (S.D. N.Y. 2002) (granting section 304 relief to stand alone solvent scheme of arrangement); *Allstate Ins. Co. v. Hughes*, 174 B.R. 884 (S.D. N.Y. 1994) (affirming grant of section 304 relief enforcing scheme of arrangement).

56. *In re Board of Directors of Multicanal S.A.*, 314 B.R. 486, 493 (Bankr. S.D. N.Y. 2004).

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57. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 504 (Bankr. S.D. N.Y. 2004) (“the APE bears a strong resemblance to US prepackaged plans of reorganization”). See In re Cablevision S.A., 315 B.R. 818, 819-820 (S.D. N.Y. 2004) (“According to Cablevision, an APE proceeding is similar to a prepackaged (or prearranged) case under the Bankruptcy Code.”).

58. “ARC asserted, as it had in the State court actions, that its rights as the holder of Notes issued under an indenture qualified under the TIA could not, as a matter of law, be impaired or affected by a foreign insolvency case and that, in effect, the § 304 proceeding was a nullity as to it.” In re Board of Directors of Multicanal S.A., 307 B.R. 384, 387 (Bankr. S.D. N.Y. 2004). In addition to seeking dismissal of the section 304 proceeding, “ARC and two affiliates also filed an involuntary Chapter 11 petition in this Court against Multicanal.” In re Board of Directors of Multicanal S.A., 307 B.R. 384, 387 n. 1 (Bankr. S.D. N.Y. 2004).

59. In re Board of Directors of Multicanal S.A., 307 B.R. 384 (Bankr. S.D. N.Y. 2004).

60. In re Board of Directors of Multicanal S.A., 307 B.R. 384, 387 (Bankr. S.D. N.Y. 2004).

61. In re Board of Directors of Multicanal S.A., 307 B.R. 384, 388 (Bankr. S.D. N.Y. 2004) (“ARC nevertheless conceded, as it must, that the rights of holders to principal and interest on bonds issued under a TIA-qualified indenture can be impaired by bankruptcy proceedings.”). See Matter of Pease, 195 B.R. 431, 434, 35 Collier Bankr. Cas. 2d (MB) 1408 (Bankr. D. Neb. 1996) (“The Bankruptcy Code substantively alters the rights and remedies of both debtors and creditors in a most fundamental way.”).

62. In re Board of Directors of Multicanal S.A., 307 B.R. 384, 388 (Bankr. S.D. N.Y. 2004). “ARC argues that even if these ‘rights’ can be impaired by a filing under the US Bankruptcy Code, they cannot be affected by a proceeding under foreign law (unless perhaps if that proceeding is identical to a US proceeding.” In re Board of Directors of Multicanal S.A., 307 B.R. 384, 389 (Bankr. S.D. N.Y. 2004).

63. In re Board of Directors of Multicanal S.A., 307 B.R. 384, 390 (Bankr. S.D. N.Y. 2004) (“[I]f foreign law can under certain circumstances trump the US Constitution and preclude bondholders from enforcing their contractual rights, as Gebhard holds, there is no basis for adopting the principle espoused by ARC, that foreign law can under no circumstances override § 316(b) of the [TIA]”).

64. In re Board of Directors of Multicanal S.A., 307 B.R. 384, 389-393 (Bankr. S.D. N.Y. 2004).

65. In re Board of Directors of Multicanal S.A., 307 B.R. 384, 391 (Bankr. S.D. N.Y. 2004) (“Suffice it to say that the issue for further determination is whether the APE is entitled to recognition under § 304 . . .”).

66. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 499 (Bankr. S.D. N.Y. 2004).

67. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 499 (Bankr. S.D. N.Y. 2004).

68. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 499 (Bankr. S.D. N.Y. 2004).

69. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 499 (Bankr. S.D. N.Y. 2004).

70. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 499 (Bankr. S.D. N.Y. 2004). First, Huff argues that the APE is a form of private insolvency regime not subject to adequate judicial control and not entitled to recognition under the general standards of § 304(c). Second, Huff contends that the vote taken in favor of the APE was coerced and unfair, and that a lack of judicial oversight (among other things) led Multicanal to engage in abusive practices that created an atmosphere of coercion and intimidation. Third, Huff alleges that Multicanal discriminated against US retail investors in its restructuring. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 499 (Bankr. S.D. N.Y. 2004). “Huff attacks the APE in principle as providing uncontrolled discretion to a debtor and as having too truncated a statutory underpinning. Huff’s basic contention is that judicial oversight is

inadequate. . .” In re Board of Directors of Multicanal S.A., 314 B.R. 486, 499 (Bankr. S.D. N.Y. 2004).

71. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 504 (Bankr. S.D. N.Y. 2004).

72. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 505 (Bankr. S.D. N.Y. 2004). In a US Prepack, the debtor negotiates a restructuring agreement and solicits acceptances prior to the Chapter 11 filing. There is thus no oversight by a court during the period when the debtor formulates a plan, prepares and disseminates disclosure materials and solicits votes. Similarly, the APE provides for the negotiation of a restructuring and the solicitation of votes prior to filing a restructuring plan with the Argentine courts for confirmation. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 505 (Bankr. S.D. N.Y. 2004).

73. “As for the alleged lack of judicial oversight during the period of solicitation and voting, the APE bears a strong resemblance to US prepackaged plans of reorganization (“Prepacks”), which in one form or another have been an established means of restructuring in the United States for many years.” In re Board of Directors of Multicanal S.A., 314 B.R. 486, 504 (Bankr. S.D. N.Y. 2004) (citation omitted).

74. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 507 (Bankr. S.D. N.Y. 2004).

75. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 509 (Bankr. S.D. N.Y. 2004).

76. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 501 (Bankr. S.D. N.Y. 2004) (“Once the prerequisites are established, § 304(c) provides ‘guidelines’ for the exercise of the Court’s discretion in determining whether to grant relief.”).

77. In analyzing the section 304(c) factors, the court expressed two concerns. First, while the court did not take issue with the majority of methods employed by Multicanal in dealing with Huff, the court was concerned that Multicanal may have improperly intimidated Huff by filing criminal charges against Huff. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 516 (Bankr. S.D. N.Y. 2004). Thus, the Court requested justification for the filing of criminal charges by a director of Multicanal against Huff in Argentina. If the criminal allegations were found to be unfounded by the court, it may, in turn, refuse to extend recognition to the APE under section 304. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 516 (Bankr. S.D. N.Y. 2004). While the court had no interest or desire to police the criminal courts of Argentina, it would not give tacit approval to acts which would “do violence” to fundamental policies of the United States In re Board of Directors of Multicanal S.A., 314 B.R. 486, 516 (Bankr. S.D. N.Y. 2004) (“This Court has no authority or desire to review the actions of a criminal court in Argentina.”). Second, the court agreed with Huff that Multicanal’s APE discriminated against US retail holders of notes in that they were excluded from certain options and were only offered cash. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 517 (Bankr. S.D. N.Y. 2004). There is also not much doubt on the record that by being compelled to take the Cash Option, the US retail holders received worse treatment than the other Noteholders, at least after the proposals were amended in July 2003. Whereas the securities options were significantly improved through the amendment to the initial APE proposal . . . the Cash Option remained at 30 percent and was only marginally improved by the addition of 2% interest from the date of approval of the APE through the date of distribution to Noteholders.

In re Board of Directors of Multicanal S.A., 314 B.R. 486, 517 (Bankr. S.D. N.Y. 2004). Multicanal did not deny that different treatment was given to United States retail holders. It argued, however, that such treatment was a result of the United States securities laws and justified. Noting that “[a] foreign proceeding cannot discriminate against United States creditors and expect recognition under § 304,” the court conditioned recognition of Multicanal’s APE on Multicanal proposing an acceptable cure for the discrimination against the United States retail noteholders. The court refused to simply deny recognition of the APE. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 519 (Bankr. S.D. N.Y. 2004) (“Huff would deny recognition to the APE altogether. This is not called for under the

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circumstances, especially as there are less drastic alternatives that Multicanal apparently could still adopt as an amendment to the APE.”). The court refused to impose a solution, but rather left it for Multicanal to propose one to address the discrimination. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 520 (Bankr. S.D. N.Y. 2004) (“This Court will not in the first instance direct a remedy without hearing from the parties, but the discrimination must be eliminated before final relief is entered herein.”). The court found Multicanal’s solution and explanation of the criminal charges acceptable.

78. In addition, the court dismissed the involuntary petition file against Multicanal by ARC and two affiliates. See *supra* note 57. While there was foreign proceeding pending, the factors set forth in section 304(c) did not justify dismissal of the involuntary petition under section 305(a)(2). In re Board of Directors of Multicanal S.A., 314 B.R. 486, 520 (Bankr. S.D. N.Y. 2004). Moreover, the interests of creditors and Multicanal would not be “better served” and thus, dismissal under section 305(a)(1) was not appropriate. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 521-522 (Bankr. S.D. N.Y. 2004). The court further concluded that “[t]he inability of this Court to force the rehabilitation of this debtor over its objection provides a further reason for dismissal of the involuntary proceeding.” In re Board of Directors of Multicanal S.A., 314 B.R. 486, 523 (Bankr. S.D. N.Y. 2004) (citation omitted). “In the instant case, the economical and expeditious administration of the foreign estate is best served by proceeding with its § 304 petition and dismissing the involuntary Chapter 11 petition.” In re Board of Directors of Multicanal S.A., 314 B.R. 486, 521 (Bankr. S.D. N.Y. 2004). The United States District Court for the Southern District of New York would later criticize this last point in a decision issued in an unrelated case. *Infra* note 137.

79. In re Rose, 318 B.R. 771, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004).

80. In re Rose, 318 B.R. 771, 772-773, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004). A solvent scheme of transfer under Part VII of the FSMA should not be confused with a solvent scheme of arrangement under U.K. law. It is well established that schemes of arrangement, including solvent ones, under U.K. law are entitled to recognition under section 304. See, e.g., In re Board of Directors of Hopewell Intern. Ins. Ltd., 238 B.R. 25, 34 Bankr. Ct. Dec. (CRR) 1273 (Bankr. S.D. N.Y. 1999), order *aff’d*, 275 B.R. 699, 48 Collier Bankr. Cas. 2d (MB) 362 (S.D. N.Y. 2002) (affirming grant of section 304 relief enforcing scheme of arrangement).

81. In re Rose, 318 B.R. 771, 773, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004) (“The Transfer Scheme proposes to effect a corporate restructuring by shifting the majority of assets and liabilities of twelve of the Corporations into the thirteenth Corporation.”). The Transfer Scheme effects a restructuring of their businesses and their balance sheets in order to consolidate their administration of policies. The Transfer Scheme proposes to restructure the Corporations by transferring the general insurance liabilities of twelve Corporations to Ocean Marine as well as by transferring to Ocean Marine (1) the Corporations’ rights in respect of all reinsurance coverage relating to the transferred liabilities and (2) a deed of mutual guarantee (the “DMG”) to which each of the UK regulated insurance companies with the [parent] group are party. In re Rose, 318 B.R. 771, 773, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004).

82. In re Rose, 318 B.R. 771, 773, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004). “The UK sanctioned Transfer Scheme is to become effective on December 30, 2004 or such earlier date as the High Court may approve.” In re Rose, 318 B.R. 771, 772-773, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004).

83. In re Rose, 318 B.R. 771, 773-774, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004) (Bankr. S.D.N.Y. 2004) (“If these transfers occur, the United States regulations requiring [transferor companies] to maintain trust funds in this country would no longer apply and [transferor companies] would be able to reclaim a legal interest in those trusts. . .”). “Ocean Marine, having assumed the transferor Corporations’ surplus lines obligations and itself

having surplus lines authority in the United States, would continue to maintain a trust fund in the United States sufficient to satisfy the United States' regulatory requirements relating to its surplus lines obligations (which, post transfer would include liabilities currently held by [transferor companies].” In re Rose, 318 B.R. 771, 777, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004).

84. In re Rose, 318 B.R. 771, 776, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004) (noting the petitioner was seeking an injunction against “potential lawsuits in the United States”).

85. In re Board of Directors of Multicanal S.A., 314 B.R. 486, 509 (Bankr. S.D. N.Y. 2004).

86. In re Rose, 318 B.R. 771, 774, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004).

87. “When interpreting a statute, however, the court must first look to the plain meaning of the particular statutory language at issue, as well as the language and design of the statute as a whole.” In re Rose, 318 B.R. 771, 774, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313, 10 Int'l Trade Re. (BNA) 1065, 6 U.S.P.Q.2d (BNA) 1897, 1988-1 Trade Cas. (CCH) P 68018 (1988)).

88. In re Rose, 318 B.R. 771, 774, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004). “The Court must also review the statute pursuant to the reasonable interpretation ‘mandated by its grammatical structure.’” In re Rose, 318 B.R. 771, 774, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004) (quoting *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) P 72575, 89-1 U.S. Tax Cas. (CCH) P 9179, 63 A.F.T.R.2d 89-652 (1989)).

89. In re Rose, 318 B.R. 771, 775, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004).

90. In re Rose, 318 B.R. 771, 775, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004). The reorganization of a corporation in bankruptcy, however, is a different concept. As “commonly understood, [it] is distinguishable from a consolidation or merger. It is not ordinarily the combination of existing corporations, but is simply the completion by proper agreements and legal proceedings, of a business plan or scheme for winding up the affairs of, or foreclosing mortgages upon the property of insolvent corporations, and the property and business of the distressed one.” In re Rose, 318 B.R. 771, 775, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004) (citations omitted). Thus, to qualify as a foreign proceeding under the Bankruptcy Code, a reorganization must have the characteristics of other types of bankruptcy or similar types of proceedings. The court was clear, however, that insolvency is not a prerequisite to relief under section 304. “It has long been the case that solvent debtors may file bankruptcy cases and voluntarily surrender their assets.” In re Rose, 318 B.R. 771, 775, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004) (citations omitted). See generally In re Board of Directors of Hopewell Intern. Ins. Ltd., 238 B.R. 25, 34 Bankr. Ct. Dec. (CRR) 1273 (Bankr. S.D. N.Y. 1999), order aff'd, 275 B.R. 699, 48 Collier Bankr. Cas. 2d (MB) 362 (S.D. N.Y. 2002); In re Integrated Telecom Express, Inc., 384 F.3d 108, 121, 43 Bankr. Ct. Dec. (CRR) 175, Bankr. L. Rep. (CCH) P 80168 (3d Cir. 2004), cert. denied, 125 S. Ct. 2542 (U.S. 2005) (“To be sure, a debtor need not be insolvent before filing for bankruptcy protection.”) (citation omitted).

91. Unlike, for example a scheme of arrangement under the laws of the United Kingdom or an APE, the AVIVA Scheme of Transfer was not a debt adjustment or reorganization proceeding. It was not “the type of reorganization proceeding that, in principle, is subject to recognition.” See In re Board of Directors of Multicanal S.A., 314 B.R. 486, 501 (Bankr. S.D. N.Y. 2004) (“Multicanal’s APE is clearly a judicial ‘proceeding . . . for the purpose of . . . adjusting debts . . . or effecting a reorganization.’”).

92. In re Rose, 318 B.R. 771, 776, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004). While the court it was the only one with the authority to issue a nationwide injunction, it refused to do so in connection with the Transfer Scheme. In re Rose, 318 B.R. 771, 776, 44

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Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004) (“The court understands that this is the only court with the authority to issue a United States nationwide injunction.”). Moreover, the court was not persuaded that the lack of an injunction would have a detrimental effect on the companies. Such an injunction would have been beyond the scope of its jurisdiction. *In re Rose*, 318 B.R. 771, 776, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004). (“This court does not have the authority to enter any order, no matter what the ramifications to the Corporations, which exceeds the scope and jurisdiction of the statute that it is interpreting.”). “Mr. Rose is asking the court to do what it cannot—to enter an order allowing him to use the bankruptcy law to enjoin potential lawsuits in the United States so he can effect a corporate financial restructuring of a group of foreign insurance companies unrelated to any foreign insolvency proceeding.” *In re Rose*, 318 B.R. 771, 776, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004). Nor would the court have been persuaded to issue an injunction under section 304 if it had concluded that section 304 (c) had been satisfied. *In re Rose*, 318 B.R. 771, 776, 44 Bankr. Ct. Dec. (CRR) 19 (Bankr. S.D. N.Y. 2004) (“Because the court determines that this matter is not a foreign proceeding under Code § 304(a), the court must dismiss the Petition, even if Mr. Rose can satisfy every element of § 304(c).”). Subsequently, in an unreported case, another bankruptcy court recognized a Part VII transfer under section 304. *In re Catherine Geraldine Regan, a Foreign Representative of Riverstone Insurance (UK) Limited and Sphere Drake Insurance Limited*, Case no. 05-12678 (Bankr. S.D.N.Y. July 26, 2005). In the Order Granting Full Force and Effect to UK Scheme dated July 26, 2005, the court stated that its order had no “precedential value.”

93. In cases involving a debtor with connections only to the United States., that decision is generally between different states and based upon an understanding of the law in those states on the issues of importance to the debtor. While the Constitution provides that Congress has the power to establish “uniform Laws on the subject of Bankruptcies throughout the United States,” in practice there are many differences between among the bankruptcy courts in their interpretation.

94. Section 109 of the Bankruptcy Code sets forth the eligibility requirement for a debtor. Section 109 provides, in pertinent part, that “Notwithstanding any other provision of this section, only a person that resides of 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.A. §109(a). “Section 109 is a rule governing eligibility for relief.” 2 Collier on Bankruptcy ¶109.02[2], 109-6 (15th ed. rev. 2003). “For a debtor to be eligible for relief under the Code, the debtor must have a domicile, residence, place of business or property in the United States.” 2 Collier on Bankruptcy ¶109.02[2], 109-7 (15th ed. rev. 2003).

95. “[A] foreign debtor with property in the United States would be eligible for relief under the Code, and the court would have jurisdiction.” 2 Collier on Bankruptcy ¶109.02[2], 109-7 (15th ed. rev. 2003). See, e.g., *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000) (“Thus, we conclude that the bank accounts constitute property in the United States for purposes of eligibility under section 109 of the Bankruptcy Code, regardless of how much money was actually in them on the petition date.”); *In re McTague*, 198 B.R. 428, 429, 29 Bankr. Ct. Dec. (CRR) 560 (Bankr. W.D. N.Y. 1996) (holding that “\$194 in a bank account rises to the level of ‘property in the United States’” for purposes of section 109 and that “the language of §109(a) is clear, and the Court does not have discretion to look behind the language and declare that the quantity of property in the United States will be decisive of eligibility to be a debtor under the Code.”).

96. *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 3 (Bankr. S.D. N.Y. 2003).

97. *Avianca, Inc.*, a wholly owned subsidiary of Avianca, also filed a voluntary petition under chapter 11 of the Bankruptcy Code. The court noted that the eligibility of Avianca, Inc. a corporation organized under the laws of the State of New York., to be a debtor under the Bankruptcy Code was “not subject to dispute.” *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 9 (Bankr. S.D. N.Y. 2003).

98. *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 3-4 (Bankr. S.D. N.Y. 2003).

99. *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 4 (Bankr. S.D. N.Y. 2003).

100. “On April 11, 2003, Pegasus Aviation, Inc. filed an Emergency Motion to Dismiss the Debtors’ Chapter 11 cases, and a few days later Ansett Worldwide filed a similar motion.” *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 7 (Bankr. S.D. N.Y. 2003). A number of creditors joined the motions, however, subsequently the Debtors reached agreements with Pegasus and Ansett, who, in turn, withdrew their motions to dismiss. *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 7 (Bankr. S.D. N.Y. 2003). After the withdrawal, the Debtors to address the joinders sent notice to all creditors to “show cause as to why the pending motions to dismiss should not be marked settled or denied.” *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 7 (Bankr. S.D. N.Y. 2003). Given that United Aerospace responded and continued the prosecution of the motions, the court concluded that it needed to make a decision on the initial motions to dismiss notwithstanding the settlement with the initial movants. *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 7 (Bankr. S.D. N.Y. 2003).

101. The court summarized the assertions as follows: “The movants seek dismissal under §305(a) of the Bankruptcy Code, arguing that it would not be in the ‘best interests’ of the Debtors or their creditors to allow this case to proceed, and that Avianca should be compelled to file in Colombia. The movants argue that Avianca’s choice of forum creates delay and uncertainty for all creditors (but especially for those in the United States), demonstrates bad faith, and allow depletion of the airline’s assets by its foreign creditors, who may either receive voluntary payments from the Debtors in satisfaction of prepetition debts, or, being beyond this Court’s effective jurisdiction, can ultimately collect upon their outstanding debts free of the restraint of US law. The movants further argue, citing § 1112(b) of the Bankruptcy Code, that the Debtors will never be able to confirm an effective plan of reorganization when a majority of their creditors are not subject to this Court’s effective jurisdiction and there is no parallel proceeding in Colombia. The relief proposed by the movants is that Avianca’s case be dismissed and that it be directed to seek protection under Colombia’s reorganization law, Law 550 of 1999 (“Law 550”).” *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 7-8 (Bankr. S.D. N.Y. 2003).

102. Several parties in interest, including the Official Committee of Unsecured Creditors, as well as Avianca filed oppositions to the motions to dismiss. *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 8 (Bankr. S.D. N.Y. 2003).

103. *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 8 (Bankr. S.D. N.Y. 2003).

104. *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 9 (Bankr. S.D. N.Y. 2003). See *infra* note 115 and accompanying text.

105. *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 9 (Bankr. S.D. N.Y. 2003). In addition, the court noted that “[t]he presence of property in a jurisdiction has been the traditional predicate for a bankruptcy filing.” *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 12 (Bankr. S.D. N.Y. 2003).

106. “Nevertheless, debtors frequently conclude workouts with their creditors without exerting direct judicial power over their creditors by means of a court filing. A flat rule that a foreign debtor could not maintain a proceeding in this Court without a parallel proceeding abroad would unduly constrict the ability of debtors to reorganize outside of a formal filing, which is usually encouraged.” *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 17 (Bankr. S.D. N.Y. 2003) (citation omitted).

107. *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 17-18 (Bankr. S.D. N.Y. 2003) (“In an ideal or even in an orderly world, governing law might require a filing in one jurisdiction, presumably the jurisdiction where an international enterprise had its principal place of business or ‘center of main interests.’”).

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108. “Today, especially in a reorganization the presence of creditors in a jurisdiction, the power of a court to exert judicial power over them, and the willingness of other creditors to submit to the jurisdiction of the court, is often a more important factor than the presence of assets, provided that the § 109 standards are met.” In re Aerovias Nacionales de Colombia S.A., 303 B.R. 1, 13 (Bankr. S.D. N.Y. 2003).

109. Section 305(a) provides as follows:

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:

- (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or
- (2)(A) there is pending a foreign proceeding; and  
(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

11 U.S.C.A. § 305(a).

110. Section 1112(b) of the Bankruptcy Code provides as follows:

Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including—

- (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan;
- (3) unreasonable delay by the debtor that is prejudicial to creditors;
- (4) failure to propose a plan under section 1121 of this title within any time fixed by the court;
- (5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;
- (6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;
- (7) inability to effectuate substantial confirmation of a confirmed plan;
- (8) material default by the debtor with respect to a confirmed plan;
- (9) termination of a plan by reason of the occurrence of a condition specified in the plan; or
- (10) nonpayment of any fees or charges required under chapter 123 of title 28.

11 U.S.C.A. § 1112(b). In addition to sections 305 and 1112, the movants asserted that section 304 justified dismissal. The court, however, disagreed. “As beneficial as § 304 may be, there is nothing in the Bankruptcy Code to suggest that foreign entities cannot open a full proceeding or that a § 304 ancillary case is a preferred alternative for a foreign enterprise.” In re Aerovias Nacionales de Colombia S.A., 303 B.R. 1, 15 (Bankr. S.D. N.Y. 2003). Moreover, there is no certainty that a proceeding under Law 550 would qualify as a foreign proceeding or that the section 304 (c) factors would be satisfied in connection with such a proceeding. In re Aerovias Nacionales de Colombia S.A., 303 B.R. 1, 15-16 (Bankr. S.D. N.Y. 2003).

111. In re Aerovias Nacionales de Colombia S.A., 303 B.R. 1, 16 (Bankr. S.D. N.Y. 2003).

112. In re Aerovias Nacionales de Colombia S.A., 303 B.R. 1, 17 (Bankr. S.D. N.Y. 2003).

113. The Chief Financial Officer of Yukos “testified that substantially all of the affiliates and subsidiaries of Yukos are Russian companies, that substantially all of the assets of the

affiliates and subsidiaries are in Russia, and that Yukos and its subsidiaries and affiliates have approximately 100,000 employees, nearly all of who live and work in Russia.” In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005).

114. In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005).

115. “The courts have noted that there is ‘virtually no formal barrier’ to having federal courts adjudicate foreign debtors’ bankruptcy proceedings.” In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (citations omitted).

116. “[T]he court need not address fully whether the activities of Misamore are sufficient to establish a ‘place of business’ in the United States. The use of the disjunctive in Section 109 indicates alternative and requires that the alternatives be treated separately.” In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (citing In re Affiliated Food Stores, Inc. Group Ben. Trust, 134 B.R. 215, 22 Bankr. Ct. Dec. (CRR) 433, 26 Collier Bankr. Cas. 2d (MB) 104 (Bankr. N.D. Tex. 1991), citing *Quindlen v. Prudential Ins. Co. of America*, 482 F.2d 876 (5th Cir. 1973)).

117. “Several courts have held that nominal amounts of property located in the United States enable a foreign corporation to qualify as a debtor under Section 109(a) of the Bankruptcy Code.” In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (emphasis added).

118. See In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (“Misamore testified that, on December 14, 2004 at 1:30 p.m., approximately \$480,000 . . . was transferred . . . to Yukos USA’s account at Southwest Bank of Texas. The petition in the instant case was filed on December 14, 2004, at 3:06 p.m.”). Moreover, the court was not concerned that the funds were transferred to the United States simply to qualify Yukos as a debtor. ., In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (“The funds which created jurisdiction in this court were transferred to banks in the United States less than one week prior to the filing of the petition, and were transferred for the primary purpose of attempting to create jurisdiction in the United States Bankruptcy Court.”).

119. In re Aerovias Nacionales de Colombia S.A., 303 B.R. 1, 9 (Bankr. S.D. N.Y. 2003) (“Notwithstanding the very broad eligibility standards set forth in §109 of the Bankruptcy Code, a court has ample authority to dismiss a case that is not properly brought in this country.”).

120. “[W]here a debtor has property in the United States, the United States courts may exercise discretion as to whether to administer the property or to defer to foreign courts.” In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (citing *Banque de Financement, S. A. v. First Nat. Bank of Boston*, 568 F.2d 911 (2d Cir. 1977)).

121. In the Yukos case, the creditor that requested dismissal of the chapter 11 case asserted that dismissal was appropriated under, among other things, (i) forum non conveniens, (ii) principles of comity and (iii) act of state doctrine. In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005). The court in relatively short order declined to apply these theories to a request for dismissal of a chapter 11 case. In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (“However, with respect to bankruptcy cases (as opposed to proceedings arising under or related to bankruptcy cases), Congress has statutorily prescribed exclusive jurisdiction and venue. This court declines to extend either *Fairchild Aircraft* or *Xacur* to conclude that the doctrine of forum non conveniens requires dismissal of a voluntary bankruptcy case.”); In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (“This court has found no authority for the proposition that in a case in which a foreign entity voluntarily avails itself of the United States Bankruptcy Court as a forum, comity requires the dismissal of the case.”); In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (“Although the acts of the Russian government doubtless have a significant impact upon the efforts of Yukos to reorganize itself financially, the filing and conduct of this Chapter 11 case does not in itself require that this court sit in judgment on those acts. The court concludes that the act of state doctrine does not form an independent basis requiring dismissal of the instant

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case.”). Sections 305 and 1112 of the Bankruptcy Code will dictate whether dismissal of a chapter 11 case of a foreign debtor is appropriate. In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (“The procedural mechanisms for such a determination include Sections 304 and 1112 of the Bankruptcy Code.”).

122. The Russian government’s lack of desire to participate in the chapter 11 process was highly publicized. See, e.g., Michelle Bates Deakin, *Lawyers & Rubles: What’s John Pappalardo, A Boston Lawyer, Doing in a Squalid Moscow Courtroom for the Russian Trial of the Century?*, *The Boston Globe*, Feb. 20, 2005, at 24; *Rosneft Takes Control of Yukos OUL Unit; Other Developments*, *Fact on File World News Digest (Russia)*, Dec. 31, 2004, at 1067F2; Nelli Sharushkina, *Putin Throws Weight Behind Rosneft Deal*, *The Oil Daily*, Dec. 27, 2004, No. 247, Vol 54 at ITEM04358001. “The vast majority of the business and financial activities of Yukos continue to occur in Russia. Such activities require the continued participation of the Russian government, in its role as the regulator of production of petroleum products from Russian lands, as well as its role as the central taxing authority of the Russian Federation.” In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005).

123. In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (“[I]t is not clear that this court can obtain personal jurisdiction of the pertinent parties sufficient to grant much relief sought in the instant case.”).

124. In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005).

125. In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (emphasis added) (“The sheer size of Yukos, and correspondingly, its impact on the entirety of the Russian economy, weighs heavily in favor of allowing resolution in a forum in which participation of the Russian government is assured.”).

126. In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005) (“The court concludes, based on the totality of the circumstances, that the instant Chapter 11 case should be dismissed.”).

127. “While there is precedent for maintenance of a bankruptcy case in the United States by corporations domiciled outside the United States, none of those precedents cover a corporation which is a central part of the economy of the nation in which the corporation was created.” In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005).

128. In re Globo Comunicacoes e Participacoes S.A., 317 B.R. 235 (S.D. N.Y. 2004).

129. In re Globo Comunicacoes e Participacoes S.A., 317 B.R. 235, 249 (S.D. N.Y. 2004).

130. In re Globo Comunicacoes e Participacoes S.A., 317 B.R. 235, 249 (S.D. N.Y. 2004).

131. In re Globo Comunicacoes e Participacoes S.A., 317 B.R. 235, 249 (S.D. N.Y. 2004) (“For a foreign corporation to qualify as a debtor under Section 109, courts have required only nominal amounts of property to be located in the United States, and have noted that there is ‘virtually no formal barrier’ to having federal courts adjudicate foreign debtors’ bankruptcy proceedings.”).

132. “While Globopar may not be considered to reside or have a domicile within the United States, and while [a wholly owned Delaware subsidiary] may not be considered a ‘place of business’ within the United States, Globopar’s ownership of [the wholly owned Delaware subsidiary] and the bank account would, if substantiated through sufficient fact finding procedures, clearly establish Globopar’s eligibility to serve as a debtor under Section 109.” In re Globo Comunicacoes e Participacoes S.A., 317 B.R. 235, 249 (S.D. N.Y. 2004).

133. The district court was somewhat troubled that the bankruptcy court reached this conclusion in short fashion. In re Globo Comunicacoes e Participacoes S.A., 317 B.R. 235, 250 (S.D. N.Y. 2004) (“The court reached this conclusion without engaging in any sustained analysis regarding its ability to subject Globopar to personal jurisdiction in matters related to the Petition, and without evaluating whether it could in fact grant effective, if not per-

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fect, relief to creditors notwithstanding the apparent hostility of Brazilian law to foreign bankruptcy proceedings concerning Brazilian companies.”).

134. *In re Globo Comunicacoes e Participacoes S.A.*, 317 B.R. 235, 250 (S.D. N.Y. 2004) (discussing 28 U.S.C.A. § 1334(e) and definition of property of the estate set forth in section 541 of the Bankruptcy Code).

135. As the court stated:

Such exercise of extraterritorial jurisdiction over a debtor’s assets, even absent the consent of that debtor, is inconsistent with constitutional Due Process standards where the bankruptcy court has established its authority to assert in personam jurisdiction over the debtor and thereby take control over the worldwide res of the debtor’s estate. Congress intended bankruptcy courts, under the supervision of the federal district courts, to exercise the full extent of in personam and in rem jurisdiction over the debtor and its bankruptcy estate in order to facilitate efficient and effective distribution of those assets. *In re Globo Comunicacoes e Participacoes S.A.*, 317 B.R. 235, 250 (S.D. N.Y. 2004).

136. *In re Globo Comunicacoes e Participacoes S.A.*, 317 B.R. 235, 251-252 (S.D. N.Y. 2004) (citations omitted).

137. “Globopar’s cooperation would be desirable, but it is not mandated; otherwise the Bankruptcy Code would contain no provision for involuntary bankruptcy petitions.” *In re Globo Comunicacoes e Participacoes S.A.*, 317 B.R. 235, 253 (S.D. N.Y. 2004) (emphasis in original). The court took this opportunity to criticize *Multicanal II* to the extent it held that a court should abstain from hearing an involuntary petition where the debtor is an uncooperative foreign entity. *In re Globo Comunicacoes e Participacoes S.A.*, 317 B.R. 235, 252-253 (S.D. N.Y. 2004). See *supra* note 78.

138. See *In re Globo Comunicacoes e Participacoes S.A.*, 317 B.R. 235, 249 (S.D. N.Y. 2004) (noting that “further evidentiary proceedings” may be necessary to conclude that relief under section 303 of the Bankruptcy Code is appropriate).

139. The Reform Act will become effective on October 17, 2005 and the new chapter 15 will apply to cases filed on or after that date.

140. Section 1501 provides as follows:

The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—

(1) cooperation between—

(A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and

(B) the courts and other competent authorities of foreign countries involve in cross-border insolvency cases’

(2) greater legal certainty for trade and investment;

(3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;

(4) protection and maximization of the value of the debtor’s assets; and

(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

11 U.S.C.A. § 1501.

141. Chapter 15 will apply to ancillary cases filed on or after October 17, 2005. *Supra* note 139. The applicability of chapter 15 is significantly broader than section 304, which only addressed ancillary proceedings in the United States. But see Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 Am. Bankr.

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L.J. 115, 177 (Spring 2002) (noting that “[i]n recommending adoption of the Model Law, the National Bankruptcy Review Commission observed that the Model Law would not represent a significant change from current US law.”). In addition to ancillary proceedings, chapter 15 applies to (i) “assistance is sought in a foreign country in connection with a case under this title” (ii) concurrent proceedings, and (iii) “creditors or other interested parties in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under this title.” See 11 U.S.C.A. § 1501(b).

142. “Subsections (b)(2), (b)(3), and (c) make it clear that chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings. The goal is to concentrate control of these questions in one court. That goal is important in a Federal system like that of the United States with many different courts, state and federal, that may have pending actions involving the debtor or the debtor’s property.” H.R. Rep. No. 109-31, pt. 1 (2005) (discussing section 1509). But see *supra* note 40.

143. 11 U.S.C.A § 101(24) (as amended). “Foreign court” is defined as “a judicial or other authority competent to control or supervise a foreign proceeding.” 11 U.S.C.A. § 1502(3). Thus the new definition of foreign proceeding should like the definition under section 304 cover administrative and similar types of proceedings. In addition, the definition of foreign representative has been expanded to “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.” 11 U.S.C.A. § 101(23) (as amended). Like the current definition, a foreign representative is a function of there being a foreign petition. “The definition is broader on its face than the existing definition of ‘foreign representative,’ but it is consistent with the liberal interpretation that the bankruptcy courts have give the term in § 304 proceedings, particularly to cover the foreign equivalent of a debtor in possession.” Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 Am. Bankr. L.J. 115, 180 (Spring 2002) (footnote omitted).

144. “This addition emphasizes that the scope of the Model Law and chapter 15 is not limited to proceedings involving only debtors which are technically insolvent, but broadly includes all proceedings involving debtors in severe financial distress, so long as those proceedings also meet the other criteria of section 101(24).” H.R. Rep. No. 109-31, pt. 1 (2005) (discussing section 101(24)).

For purposes of chapter 15, “debtor” refers to “an entity that is the subject of a foreign proceeding.” 11 U.S.C.A. § 1502(1). Thus, an entity generally need not qualify as a debtor in a US plenary case to be debtor in a case under chapter 15. However, certain entities which are not eligible for plenary relief are also precluded from being the subject of a chapter 15 case. 11 U.S.C.A. § 1501(c). The definition of debtor does not refer to section 109. Thus, subject to the exclusions set forth in section 1501(c), an entity need not qualify as a debtor under the Bankruptcy Code. This is consistent with current law under section 304. *Supra* note 47 and accompanying text. “Section 1501 contains an exception to section 109(b) exclusions so that foreign proceedings of foreign insurance companies are eligible for recognition and relief under chapter 15 as they had been under section 304.” H.R. Rep. No. 109-31, pt. 1 (2005) (discussing section 1501).

145. See note 154.

146. In addition to being broader, foreign proceeding can now be subdivided into (i) foreign nonmain proceeding and (ii) foreign main proceeding. A “foreign main proceeding” refers to a foreign proceeding pending in the country where “the debtor has the center of its main interests.” 11 U.S.C.A. § 1502(4). While the Reform Act fails to define “center of its main interests, it includes a rebuttable presumption that “the debtor’s registered office, or habitual residence in the case of an individual.” Thus, what currently qualifies as a foreign proceeding for purposes of section 304 should qualify as a foreign main proceeding under

chapter 15. 11 U.S.C.A. § 1516 . A “foreign nonmain proceeding” refers to a foreign proceeding pending in a country where the debtor has an establishment.” 11 U.S.C.A. § 1502(5). “Establishment” means “any place of operations where the debtor carries out a nontransitory economic activity.” 11 U.S.C.A. § 1502(2). It is not yet clear what would qualify as nontransitory economic activity.

147. Notes 34 and 35 and accompanying text.

148. For the most part, the section 304(c) factors will generally not play a role in a proceeding under chapter 15. “In order to be entitled to this additional relief [under chapter 15], however, the foreign representative must satisfy the § 304 factors, which make their reappearance in proposed § 1507, providing that ‘additional assistance’ may be provided if, ‘consistent with the principles of comity,’ such assistance will be consistent with the first four of the five factors in [§ 304 (c)]. The fifth factor of § 304, comity, has been relegated to a more important status in proposed § 1507, which separates comity from the other four factors, presumably giving effect to recent court decisions that have held that comity, while not determinative, may be the most important of the factors to consider in determining whether relief should be granted under § 304.” Honorable Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, 877 PLI/Comm 1025, 1038 (April 2005). It is unclear what would qualify as “additional assistance” under section 1507. The intent of this section is “to permit the further development of international cooperation begun under section 304, but is not to be the basis for denying or limiting relief otherwise available under [chapter 15].” H.R. Rep. No. 109-31, pt. 1 (2005) (discussing section 1507).

149. Recognition is defined as “the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under [chapter 15].” 11 U.S.C.A. § 1502(7).

150. 11 U.S.C.A. § 1517. Section 1517 provides, in pertinent part, as follows:

Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—

- (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
- (2) the foreign representative applying for recognition is a person or body; and
- (3) the petition meets the requirements of section 1515.

11 U.S.C.A. § 1517. See Honorable Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, 877 PLI/Comm 1025, 1033 (April 2005); Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 Am. Bankr. L.J. 115, 185 (Spring 2002) (“Section 1517(a) makes recognition of a foreign proceeding mandatory if the foreign proceeding and foreign representative meet the definitional requirements of the Code and if the filing requirements of § 1515 are met.”).

151. Notes 23-28 and accompanying text.

152. 11 U.S.C.A. § 1506.

153. The legislative history of section 1506 reads as follows: “This provision follows the Model Law article 5 exactly, is standard in UNCITRAL texts, and has been narrowly interpreted on a consistent basis in courts around the world. The word ‘manifestly’ in international usage restricts the public policy exception to the most fundamental policies of the United States.” H.R. Rep. No. 109-31, pt. 1 (2005) (discussing section 1506).

154. Bear in mind that what would qualify as a foreign nonmain proceeding under chapter 15 would generally not qualify as a foreign proceeding under section 304. See supra 49-54 and accompanying text. The requirement that a foreign proceeding be “pending in a foreign country where the debtor maintains its residence, domicile, [or] principal place of business” was to exclude ancillary proceedings from the purview of foreign proceeding. In

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re Netia Holdings S.A., 277 B.R. 571, 581 (Bankr. S.D. N.Y. 2002) (alteration in original). “An ancillary proceeding pending in a foreign jurisdiction may thus be excluded from the definition of a foreign proceeding.” 2 Collier on Bankruptcy ¶101-23, 101-87 (15th ed rev. 2004).

155. 11 U.S.C.A. § 1521. This section appears to be as broad as section 304(b)(3), pursuant to which a bankruptcy court is authorized to “order other appropriate relief.” 11 U.S.C.A. § 304(b)(3); see 2 Collier on Bankruptcy ¶304.07, 304-25 (15th ed. rev. 2004) (“Section 304(b)(3) should be read expansively, consistent with the prerogative granted bankruptcy courts under section 304 to mold appropriate relief ‘in near blank check fashion.’”). Section 1521 “does not expand or reduce the scope of relief currently available in ancillary cases under sections 105 and 304.” H.R. Rep. No. 109-31, pt. 1 (2005) (discussing section 1521). Upon recognition of a foreign main proceeding or foreign nonmain proceeding, a court may also “entrust the distribution of all or part of the debtor’s assets located in the United States to the foreign representative . . . provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.” U.S.C.A. § 1521(b).

156. 11 U.S.C.A. § 1521.

157. 11 U.S.C.A. § 1519. “This section does not expand or reduce the scope of section 105 as determined by cases under section 105.” H.R. Rep. No. 109-31, pt. 1 (2005) (discussing section 1519).

158. Note 148.

159. Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 Am. Bankr. L.J. 115, 177 (Spring 2002). “Legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been adopted in Eritrea, Japan (2000), Mexico (2000), Poland, Romania (2003), South Africa (2000), and within Serbia and Montenegro, Montenegro (2002).” <http://www.uncitral.org/en-index.htm>. See Honorable Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, 877 PLI/Comm 1025, 1033 (April 2005) (“The largest country to adopt the Model Law to date is Japan (with some modifications), but it is under active consideration in other nations . . .”).

160. “The title ‘ancillary’ in the title of this section and in the title of this chapter emphasizes the United States policy in favor of a general rule that countries other than the home country of the debtor, where a main proceeding would be brought, should usually act through ancillary proceedings in aid of the main proceedings, in preference to a system of full bankruptcies (often called ‘secondary’ proceedings) in each state where assets are found.” H.R. Rep. No. 109-31, pt. 1 (2005) (discussing section 1504).