A TALE OF TWO COURTS: THE NOVEL CROSS-BORDER BANKRUPTCY TRIAL

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INTRODUCTION

In today's world of multinational enterprises with legal entities located in different countries, it is increasingly common for bankruptcy proceedings to be administered in the United States concurrently with "insolvency" proceedings abroad. When that occurs, conflicts may arise.

Chapter 15 was added to title 11 of the United States Code (the "U.S. Bankruptcy Code") as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 to provide mechanisms for dealing with such cross-border insolvencies.[1] Chapter 15, however, does not answer all of the questions that cross-border insolvencies raise.[2] To bridge that gap, chapter 15 enables and, where possible, mandates coordination between U.S. and foreign courts in line with the principles of comity and the goal of efficiently administering estate assets in each country.[3]

On April 3, 2013, the Honorable Kevin Gross of the United States Bankruptcy Court for the District of Delaware and Justice Morawetz of the Ontario Superior

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[1] *See* 11 U.S.C. § 1501 (2006). Chapter 15 incorporates the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency ("Model Law"), which was enacted to address the "increasing incidence of cross-border insolvencies that follow continuing globalization of trade and investment." 8 COLLIER ON BANKRUPTCY, ¶ 1501.01, at 1501-3 (Alan N. Resnick & Henry J. Sommer eds.,16th ed. rev. 2014). *See* Jaffé v. Samsung Elecs. Co., 737 F.3d 14, 31 (4th Cir. 2013) (noting "the importance of Chapter 15 to a global economy, in which businesses needing bankruptcy protection increasingly have assets in various countries"). For a detailed history of chapter 15, see Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 718–20 (2005).

[2] Notably, neither chapter 15 nor the Model Law provides for a central bankruptcy proceeding of a global company that has separate legal entities in different countries; instead, under these regimes, separate proceedings will likely be commenced in the various jurisdictions where the affiliates are organized. *See* 11 U.S.C. §§ 1501–1532; *see also* Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 152 (2005) (explaining that under the Model Law "a different court potentially will control the bankruptcy of each entity in a corporate group" when each entity is based in a separate country). Although commentators have critiqued chapter 15 and the Model Law for lack of a mechanism to deal with integrated multinational corporations in one consolidated case or venue, this Article takes chapter 15 and the Model Law as is. For views on suggested modifications of the Model Law and chapter 15 to deal with global corporations, see Robert W. Miller, *Economic Integration: An American Solution to the Multinational Enterprise Group Conundrum*, 11 RICH. J. GLOBAL L. & BUS. 185 (2012); Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J. 105 (2005).

[3] *See* 11 U.S.C. §§ 1525–27 (mandating maximum cooperation between U.S. and foreign courts); *see also id.* § 1501.

Court of Justice took that cooperation to new heights in the *Nortel* cases by authorizing a landmark, coordinated cross-border trial to resolve competing claims to the same property.[4] Two years after these groundbreaking decisions and one year after commencement of the first coordinated, cross-border trial, the two sovereign courts issued their decisions allocating that property.[5] Once again breaking new ground, the decisions are consistent.[6]

A. Short Background of the Nortel *Cases*

The *Nortel* cases involve three separate "main" insolvency proceedings: Nortel's U.S. subsidiary and affiliates filed in Delaware under chapter 11, the Canadian parent and affiliates filed in Ontario under the Companies' Creditors Arrangement Act, and the affiliates from Europe, the Middle East, and Africa ("EMEA") sought orders from the High Court of England and Wales and were placed into administration under the control of joint administrators in the United Kingdom.[7] Thereafter, Nortel's U.S., Canadian, and EMEA debtors began the process to sell Nortel's businesses and intellectual property.[8] But each estate claimed a stake in the operations that comprised the global Nortel brand. How could three sets of Nortel debtors, each subject to separate insolvency proceedings, sell their globally integrated assets without an agreement on how the proceeds would be divided?

To answer this question, the Nortel debtors and key parties in interest agreed that they would sell the Nortel businesses and intellectual property *first*, and negotiate in good faith on how to allocate those sale proceeds *later*.[9] In the meantime, the sale proceeds would be placed in escrow to be dispersed upon either a consensual agreement on an allocation of the proceeds or certain to-be-determined "dispute resolver(s)" issuing a decision under a to-be-negotiated protocol.[10]

The business and intellectual property sales raised approximately $9.0 billion (of which approximately $7.3 billion remains in the so-called "lockbox"),[11] but the Nortel parties could not agree on how to allocate the escrowed funds *or* on a

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[4] *See In re* Nortel Networks, Inc., No. 09-10138, 2013 WL 1385271 (Bankr. D. Del. Apr. 3, 2013), *aff'd* 737 F.3d 265 (3d Cir. 2013); *see also* Nortel Networks Corp. (Re), 09-CL-7950, 2013 ONSC 1757 (Can. Ont. Sup. Ct. J. Apr. 3, 2013) (permitting a joint hearing between Canadian and U.S. courts).

[5] *In re* Nortel Networks, Inc., No. 09-10138, 2015 WL 2374351 (Bankr. D. Del. May 12, 2015); Nortel Networks Corp. (Re), 09-CL-7950, 2015 ONSC 2987 (Can. Ont. Sup. Ct. J. May 12, 2015). Justice Newbould of the Superior Court of Justice of Ontario presided over the cross-border trial and issued the Canadian decision. *See id.* at ¶ 8; *see also In re Nortel*, 2015 WL 2374351, at *2.

[6] *See In re Nortel*, 2015 WL 2374351, at *2, *47; *Nortel Networks Corp. (Re)*, 2015 ONSC 2987, ¶ 10.

[7] *See In re Nortel*, 2013 WL 1385271, at *1.

[8] *See id*. at *2.

[9] *See id*. Both the Delaware and the Ontario courts approved this agreement. *See id.*

[10] *See id*. at *2–3.

[11] *See In re Nortel*, 2015 WL 2374351, at *21–22 (noting approximately $7.3 billion of sale proceeds are to be allocated); *see id.* at *48, *51 (referring to the "Lockbox" that houses the sale proceeds); *Nortel Networks Corp. (Re)*, 2015 ONSC 2987, at ¶ 210 (stating task is to allocate the $7.3 billion in the "lockbox").

protocol governing an allocation process.[12] Reaching an impasse, Nortel's U.S. and Canadian debtors petitioned the Delaware and Ontario courts to intervene and allocate the funds in a joint, cross-border hearing; Nortel's EMEA administrators objected and cross-moved to compel arbitration, which the U.S. and Canadian debtors opposed.[13]

In a seminal April 2013 ruling, the Delaware bankruptcy court held that it could—in simultaneous coordination with the Ontario court—hold a joint evidentiary trial to determine how to divide the sale proceeds among the Nortel debtors.[14] The Ontario court issued a companion decision on the same day.[15] The courts came to this conclusion over objections from Nortel's EMEA administrators that such a trial would pose logistical and legal challenges, namely the possibility that the two courts could come to conflicting results over a single pool of funds.[16]

On December 6, 2013, the U.S. Court of Appeals for the Third Circuit denied the EMEA administrators' appeal of the novel joint proceeding.[17] Finding the appeal premature, the Third Circuit held that any "challenge to the joint hearing and its procedures would more appropriately follow the hearing[.]"[18]

The first contested cross-border insolvency trial commenced on May 12, 2014, which continued for six weeks.[19] It was an event of massive proportions: the Delaware and Ontario courts simultaneously heard testimony of tens of witnesses and admitted into evidence over 2,000 exhibits and designations from numerous depositions.[20] The parties submitted post-trial briefs and proposed findings of fact

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[12] *See In re Nortel*, 2013 WL 1385271, at *2.

[13] *See id.* at *2–3.

[14] *See id.* at *4–5 (asserting both jurisdictions have already worked together on the issue and agreements between the Nortel parties clearly state the U.S. Court and Canadian Court are the proper "look to" jurisdictions for resolution of issues in regards to allocation); *see also* Tom Hals, *U.S., Canadian Courts Begin Unusual Trial Over Nortel Billions*, REUTERS (May 12, 2014), http://www.reuters.com/article/2014/05/12/nortel-bankruptcy-trial-idUSL1N0NY0W520140512 ("U.S. and Canadian courts occasionally hold joint bankruptcy hearings, but a full-blown trial with scores of witnesses has never been attempted, according to legal experts."). The courts also ruled that the Nortel debtors did not agree to arbitrate. *See In re Nortel*, 2013 WL 138271, at *5.

[15] Nortel Networks Corp. (Re), 09-CL-7950, 2013 O.N.S.C. 1757 (Can. Ont. Sup. Ct. J. Apr. 3, 2013).

[16] *See In re Nortel*, 2013 WL 1385271, at *4; *Nortel Networks Corp. (Re)*, 2013 ONSC 1757, ¶¶ 35–37. Subsequently, the U.S. and Canadian courts entered an "'Allocation Protocol', which governed the trial on allocation." *In re Nortel*, 2015 WL 2374351, at *3 (referencing Order Entering Allocation Protocol, dated May 17, 2013 [DI 10565]).

[17] *See In re* Nortel Networks Inc., 737 F.3d 265, 273 (3d Cir. 2013).

[18] *See id.* at 267, 273 ("[T]he Bankruptcy Court has not yet held a hearing to allocate the funds, so review would be premature."). The Court of Appeal for Ontario also affirmed the Ontario court's ruling. Nortel Networks Corp. (Re), M42415, 2013 ONCA 427, ¶ 5 (Can. Ont. C.A. June 20, 2013).

[19] Amended Order re: Allocation Trial Protocol at ¶¶ 2–3, 5, *In re* Nortel Networks, Inc., Nos. 09-10138, 09-10164 (Bankr. D. Del. Mar. 21, 2014), ECF No. 13208; *see also* Hals, *supra* note 14 (discussing length of trial and unusualness of a joint trial in these circumstances).

[20] *See In re Nortel*, 2015 WL 2374351, at *2; *see also* Nortel Networks Corp. (Re), 09-CL-7950, 2015 ONSC 2987, ¶ 8 (Can. Ont. Sup. Ct. J. May 12, 2015) (noting a joint hearing was held in Toronto and Wilmington electronically so that lawyers and witnesses could and did appear in the respective courtrooms and communicate using "state of the art telecommunications services").

and conclusions of law exceeding 1,000 pages.[21] Two full days of closing arguments were made in September 2014.[22] After much deliberation and cross-border consultation and scouring the mammoth record, the Delaware and Ontario courts issued their separate, but consistent, decisions exactly one year from the trial's commencement, allocating the funds in the proverbial "lockbox" pro rata.[23]

B. The Cross-Border Trial: A New Tool in International Insolvency Disputes

The novel *Nortel* trial provides a new mechanism for international bankruptcy courts to deal with cross-border disputes. But it also raises a host questions:

- What is the basis for a U.S. bankruptcy court to oversee a simultaneous cross-border trial over the same property? Is there any guiding precedent?
- What are the legal and practical limits to such a proceeding?
- Is it likely that a trial that is run by two independent sovereign courts will bring about a conclusive result? Can two courts do so efficiently?
- Will consistent decisions only lead to inconsistent appellate rulings?
- How does such a proceeding stack up to alternative mechanisms? When is a cross-border trial likely to be most effective?

This Article addresses these questions.[24] Section I explores the statutory authority in the U.S. Bankruptcy Code and the long history of international cooperation that gives a U.S. court the power and flexibility to conduct a cross-

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[21] *In re Nortel*, 2015 WL 2374351, at *2.

[22] *See id.*; *see also* Scheduling Order re: Allocation Post-Trial Briefing and Oral Argument at 2–3, *In re* Nortel Networks, Inc., No. 09-10138 (Bankr. D. Del. June 30, 2014), ECF No. 13909; Minute Entry at 2–3, *In re* Nortel Networks, Inc., Nos. 09-10138, 09-10164 (Bankr. D. Del. June 27, 2014), ECF Nos. 13902, 588, respectively.

[23] *See In re Nortel*, 2015 WL 2374351, at *2, *41–42, *45; *Nortel Networks Corp. (Re)*, 2015 ONSC 2987, ¶ 258. The May 12, 2015 *Nortel* decisions allocated, but did not distribute, the funds. *In re Nortel*, 2015 WL 2374351, at *45, *51.

[24] This Article provides no opinion on the soundness of the U.S. and Canadian courts' allocation rulings in the *Nortel* cases, but instead focuses on the innovative road they took to get there. For preliminary questions on the merits of the *Nortel* rulings, see the U.S. debtors' and certain creditors' motions for reconsideration. U.S. Debtors' Motion for Clarification and/or Reconsideration of the May 12, 2015 Allocation Trial Opinion and Order, *In re* Nortel Networks Inc., No. 09-10138 (May 26, 2015), ECF No. 15611 (noting U.S. debtors disagree with the legal basis and "supposedly equitable nature" of the pro rata allocation approach, but only seek clarification and/or reconsideration of certain rulings and ambiguities between the Delaware and Ontario courts' allocation decisions); *see also* Ad Hoc Group of Bondholders' Motion for Reconsideration of Opinion and Order Allocating Proceeds from Asset Sales of Nortel Networks, Inc., its Affiliates and Subsidiaries, *In re* Nortel Networks Inc., No. 09-10138 (May 26, 2015), ECF No. 15612 (seeking clarification and modification of the limit of the bondholders' claims to enforce their guarantees); Motion of Law Debenture Trust Company of New York, as Indenture Trustee for the NNCC Notes, Pursuant to Fed. R. Civ. P. 52(b), 59(e), and 60 for Partial Reconsideration of the Court's Order and Allocation of Trial Opinion, *In re* Nortel Networks Inc., No. 09-10138 (May 26, 2015), ECF No. 15615 (seeking clarification that each debtor will be entitled to a separate and distinct allocation). Broad comment from practitioners and academics alike are sure to follow.

border insolvency trial. Section II examines a hypothetical cross-border trial to scrutinize its legal and practical limits and, based upon those limits, predicts when a cross-border trial may be an effective tool. Section III examines whether a trial overseen by two courts is likely to bring about a single and binding result and examines alternatives to solving complex international insolvency disputes to assess how the cross-border trial measures up to other potential solutions.

Finally, this Article concludes that, with the lessons learned from *In re Nortel Networks Inc.*, debtors and courts may use a coordinated cross-border trial or evidentiary hearing to bridge the gap in challenging transnational disputes among international affiliates. The U.S. Bankruptcy Code and the long history of international cooperation and coordination that predates chapter 15 make such cross-border proceedings possible in the United States, and the adoption of the Model Law on Cross-Border Insolvency in foreign countries with complementary insolvency regimes makes a cross-border proceeding possible abroad. Of course, like any global challenge, there is no "one-size-fits-all" solution. It is unlikely that a cross-border trial between the United States and China, for instance, will come to pass in the near future for a host of reasons. But a cross-border trial with a foreign country that shares our legal traditions, language, and time zones—as is the case with Canada—has the potential to develop into a useful and efficient tool to avoid the inefficiencies of duplicative litigation in cross-border insolvency cases when more conventional approaches fail.

I. THE POWER TO PRESIDE OVER A CROSS-BORDER INSOLVENCY TRIAL

Although the *Nortel* cross-border trial is groundbreaking, U.S. bankruptcy courts have long coordinated with, and even deferred and entrusted funds to, foreign courts in the case of cross-border insolvencies. U.S. bankruptcy courts may draw upon the same authority and precedent in holding a cross-border trial over contested issues.

A. History of Cross-Border Communication and Coordination

In line with the broad power to issue "any order, process, or judgment that is necessary" under section 105 of the U.S. Bankruptcy Code,[25] U.S. bankruptcy courts have a rich history of communicating and coordinating with foreign courts in related insolvency proceedings.

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[25] 11 U.S.C. § 105(a) (2012); Casse v. Key Bank Nat'l Ass'n (*In re* Casse), 198 F.3d 327, 336 (2d Cir. 1999) ("11 U.S.C. § 105 'is an omnibus provision phrased in such general terms as to be the basis for a broad exercise of power in the administration of a bankruptcy case. The basic purpose of section 105 is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction[.]'"(citation omitted)). *See also In re Nortel*, 2015 WL 2374351, at *45 (relying on section 105(a) as authority for the pro rata allocation of sale proceeds among the Nortel estates).

Maxwell Communication Corp. v. Societe Generale (*In re Maxwell Communication Corp.*)[26] is the pre-chapter 15 exemplar for how U.S. and foreign courts can work together in dual cross-border insolvency proceedings.[27] In *Maxwell*, the U.S. and U.K. courts supervising the insolvency of Maxwell Communication Corporation in their relative jurisdictions authorized the U.S. and U.K. parties, respectively, to coordinate under a protocol approved by both courts.[28] Under that protocol, the courts approved "perhaps the first world-wide plan of orderly liquidation[.]"[29] The U.S. Court of Appeals for the Second Circuit attributed the success of the parallel English and American proceedings in *Maxwell* "in large measure to the cooperation between the two courts" and suggested that "bankruptcy courts may best be able to effectuate the purposes of the bankruptcy law by cooperating with foreign courts on a case-by-case basis."[30]

After *Maxwell*, lower courts followed suit by encouraging and approving such agreements, referred to as "cross-border protocols," that coordinate and harmonize proceedings pending simultaneously in U.S. and foreign courts.[31]

Persuaded by the success of such cross-border coordination, the U.S. Court of Appeals for the Third Circuit in *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V.*, strongly urged the bankruptcy court to initiate contact with the Belgium court to attempt to overcome a conflict regarding the priority of certain claims.[32] In so urging, the Third Circuit proclaimed, while not required, "there is *no reason* that a court cannot" communicate with another court to coordinate transnational proceedings, which could "be advantageous to the orderly administration of justice."[33]

In 2005, Congress officially blessed such coordination between U.S. and foreign courts in promulgating chapter 15.[34] Chapter 15's enumerated purpose is "to

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[26] 93 F.3d 1036 (2d Cir. 1996).

[27] *Id. See* Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V., 310 F.3d 118, 132 (3d Cir. 2002), *as amended* (Nov. 12, 2002) (calling *Maxwell* a "poster" case for cooperation).

[28] *In re Maxwell*, 93 F.3d at 1042.

[29] *Id.* (quoting Jay Lawrence Westbrook, *The Lessons of* Maxwell Communication, 64 FORDHAM L. REV. 2531, 2535 (1996)).

[30] *Id.* at 1053.

[31] *See, e.g., In re* Fed.-Mogul Global, Inc., No. 01-10578, 2002 WL 34946156, at *1 (Bankr. D. Del. Feb. 7, 2002) (approving cross-border insolvency protocol allowing coordination between U.S. and English courts under section 105(a)); *In re* Commodore Int'l, Ltd., 242 B.R. 243, 256 (Bankr. S.D.N.Y. 1999) ("[T]he Protocol was devised and implemented for the purpose of coordinating the U.S. and Bahamian insolvency proceedings, which we recognized are entitled to deference in accordance with the framework established therein."); *In re* Ionica PLC, 241 B.R. 829, 835 (Bankr. S.D.N.Y. 1999) ("*At the Court's insistence*, Ionica moved for approval of a cross-border protocol [pursuant to section 105(a) of the U.S. Bankruptcy Code] to coordinate and harmonize the plenary proceedings pending in London and New York.") (emphasis added); *see also* Elizabeth Warren & Jay L. Westbrook, *Court-to-Court Negotiation*, 22 AM. BANKR. INST. J., Nov. 2003, at 28 ("Protocols have become enormously important in cross-border cases.").

[32] *Stonington Partners*, 310 F.3d at 133.

[33] *See id.* (emphasis added).

[34] *See* 11 U.S.C. §§ 1501(a), 1525–27 (2006); *see also* H.R. REP. NO. 109-31, pt. 1, at 117 (2005) ("United States bankruptcy courts already engage in most of the forms of cooperation described here, but they now have explicit statutory authorization for acts like the approval of protocols of the sort used in cases.").

provide effective mechanisms for dealing with cases of cross-border insolvency[.]"[35]

Exceeding mere allowance, chapter 15 demands that a U.S. court "*shall cooperate to the maximum extent possible* with a foreign court"[36] through "*any appropriate means*."[37] Chapter 15's coordination provisions apply to plenary bankruptcy cases irrespective of whether a foreign proceeding has received formal chapter 15 "recognition"[38] and cover direct, private court-to-court communications without the parties being present.[39]

Following the "maximum" cooperation directive, parties have continued to enter into, and courts have approved, numerous cross-border protocols.[40] Such

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[35] 11 U.S.C. § 1501(a)(1); *see also* Condor Ins. Ltd. v. Petroquest Res., Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 329 (5th Cir. 2010) ("Chapter 15 was intended to facilitate cooperation between U.S. courts and foreign bankruptcy proceedings[.]"); H.R. REP. NO. 109–31, at 105, 249 (stating the new chapter 15 is intended to "encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases" and "to provide for the fair and efficient administration of cross-border insolvencies").

[36] 11 U.S.C. § 1525(a) (emphasis added).

[37] *Id.* § 1527 (emphasis added); *see In re* Artimm, S.r.L., 335 B.R. 149, 159 (Bankr. C.D. Cal. 2005) ("One of the most important changes introduced by chapter 15 is a mandate that the court cooperate 'to the maximum extent possible' with a foreign court or representative, either directly or through any domestic trustee."). Section 1527 of the U.S. Bankruptcy Code provides a non-exhaustive list of permissible forms of cooperation, including, *inter alia*, "approval or implementation of agreements concerning the coordination of proceedings;" and "coordination of concurrent proceedings regarding the same debtor." 11 U.S.C. § 1527(4)–(5).

[38] *See* 11 U.S.C. §§ 1525–1527; *In re* Awal Bank, BSC, 455 B.R. 73, 81–82 (Bankr. S.D.N.Y. 2011) ("Even if there is no order of recognition, § 1525 provides that a court in a plenary case in the United States 'shall cooperate to the maximum extent possible with a foreign court or a foreign representative[.]'" (citing section 1525 of the U.S. Bankruptcy Code)). "Recognition" occurs upon the entry of an order granting recognition of a foreign main or foreign non-main proceeding under chapter 15, and is granted pursuant to the guidelines in section 1517(b). *See* 11 U.S.C. §§ 1507, 1517(b). Recognition automatically triggers the application of certain protections under the U.S. Bankruptcy Code and affords the recognized foreign representative access to and cooperation from the U.S. court. *See id.* §§ 1509, 1520. Recognition is usually granted when requested. *See* Jay Lawrence Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency*, 87 AM. BANKR. L.J. 247, 268 (2013) (finding in reviewing every chapter 15 case filed through January 30, 2012 that "[r]ecognition has been granted in the overwhelming majority of cases"); Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases*, 29 WIS. INT'L L.J. 110, 123–24 (2011) (finding that, out of the ninety-four chapter 15 cases filed from October 17, 2005 to June 8, 2009, recognition of a main or non-main proceeding was granted in eighty-eight cases).

[39] *See In re* ABC Learning Centres Ltd., 728 F.3d 301, 306 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (2014) ("Chapter 15 also encourages communication and cooperation with foreign courts, and authorizes our courts to communicate directly with foreign courts."); *In re* SPhinX, Ltd., 351 B.R. 103, 113 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007) ("Chapter 15 also provides flexibility by acknowledging the possibility of a concurrent plenary case under other chapters of the [U.S.] Bankruptcy Code . . . providing for cooperation and direct communication between the bankruptcy court and foreign courts[.]"); *In re* Tri-Cont'l Exch. Ltd., 349 B.R. 627, 640 (Bankr. E.D. Cal. 2006) ("Chapter 15 provides sufficient procedures for cooperation and communication between this court and the Eastern Caribbean Supreme Court.").

[40] *See, e.g.*, Order Approving Cross-Border Court-to-Court Protocol, *In re* Nortel Networks, Inc., No. 09-10138 (Bankr. D. Del. Jan. 15, 2009), ECF No. 54; Order Approving the Proposed Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies, *In re* Lehman Bros. Holdings Inc., No. 08-13555 (Bankr. S.D.N.Y. June 17, 2009), ECF No. 4020. A number of cross-border protocols are available on the

protocols have facilitated coordination between U.S. and foreign insolvencies of the same debtor, related debtors, and groups of debtor-affiliates, including by live video and telephonic hearings held in both courts. For example, before the unprecedented *Nortel* trial commenced, the Nortel debtors conducted dozens of parallel U.S.-Canadian hearings, most notably in connection with the sales that generated approximately $9.0 billion.[41] The Nortel cross-border protocol expressly allowed the two courts to confer *absent* the parties to determine whether they could reach consistent decisions.[42] Likewise, other U.S. bankruptcy courts have held joint hearings and conferred with Canadian courts prior to approving joint plans of reorganization pursuant to similar protocols that have become standard in recent years.[43]

While "novel," *Nortel*'s coordinated cross-border trial over the same res thus expands on a history of international cooperation that began well before chapter 15. This history and the U.S. Bankruptcy Code's broad coordination mandate provide the necessary backbone for such a proceeding.

B. International Comity and Cross-Border Relief and Assistance

Beyond mere coordination and cooperation, chapter 15 also grants U.S. bankruptcy courts broad flexibility to grant relief and additional assistance to recognized foreign debtors.[44]

International Insolvency Institute's website, at http://www.iiiglobal.org/component/jdownloads/viewcategory/573.html.

[41] *See* Nortel Networks Corp. (Re), 09-CL-7950, 2013 ONSC 1757, ¶ 38 (Can. Ont. Sup. Ct. J. Apr. 3, 2013) (noting multiple joint or parallel hearings of the U.S. and Canadian courts on multiple matters, "most notably applications for approval of sales process and for approval of sales"); *see also* Order Amending the Cross-Border Court-to-Court Protocol at ¶ 12, *In re* Nortel Networks, Inc., No. 09-10138 (Bankr. D. Del. June 29, 2009), ECF No. 990 (providing that the U.S. and Canadian court may conduct joint hearings, after which the U.S. and Canadian court can communicate to "determin[e] whether consistent rulings can be made by both Courts" and to "coordinat[e] the terms upon of [sic] the Courts' respective rulings").

[42] *See In re* Nortel Networks, Inc., No. 09-10138, 2015 WL 2374351, at *27 (Bankr. D. Del. May 12, 2015) (explaining "parties contemplated and agreed that it would be appropriate and necessary for the U.S. and Canadian Court to confer" in the cross-border protocol entered at the commencement of the *Nortel* cases); Nortel Networks Corp. (Re), 09-CL-7950, 2015 ONSC 2987, ¶¶ 5–7 (Can. Ont. Sup. Ct. J. May 12, 2015) (explaining cross-border protocol, which provided for the "harmonization and coordination of the administration of the two Courts" in Canada and the United States throughout the pendency of the *Nortel* cases).

[43] *See, e.g.*, *Quebecor World Restructuring Blessed by Canadian and U.S. Courts*, PAPERMONEY (Jul. 2, 2009), http://www.globalpapermoney.org/quebecor-world-restructuring-blessed-by-canadian-and-u-s-courts-cms-3725; *see also Nortel Networks Corp. (Re)*, 2015 ONSC 2987, ¶ 5 ("This type of [cross-border] protocol has become standard in the last number of years to govern the administration of cross-border insolvency proceedings.").

[44] Chapter 15 cases are "ancillary" cases that are commenced by a foreign representative who seeks the U.S. bankruptcy court's aid in its foreign insolvency proceedings. *See* 11 U.S.C. § 1501(b) (2012); COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 1501.01, at 1501-4 ("Chapter 15 cases are generally intended to be supplementary to cases brought in the debtor's home country."); *see also In re* Fairfield Sentry Ltd., 458 B.R. 665, 676 (S.D.N.Y. 2011) ("[T]he causes of action asserted here [under Chapter 15] are not created by Chapter 15; they are asserted in a Chapter 15 case designed to provide *ancillary* assistance to a foreign tribunal."). In this capacity, recognized foreign representatives may require relief or assistance. Also, if there

Although codified in 2005, the relief and additional assistance provisions of chapter 15 embrace age-old principles of international comity.[45] In that vein, chapter 15 continues a long history of American courts recognizing the need to extend comity to foreign bankruptcy proceedings.[46]

As defined in the often-cited 1895 U.S. Supreme Court case *Hilton v. Guyot*,[47] comity 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 acts 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.[48]

Among courts, international comity "may be viewed as a discretionary act of deference . . . to decline to exercise [the domestic court's] jurisdiction in a case properly adjudicated in a foreign state[.]"[49] It has also been termed a "doctrine of adjustment" because, in the case of parallel inconsistent proceedings, "there is no presumption that it is the domestic" that must yield to the foreign.[50] In some cases

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are concurrent plenary proceedings under other chapters of the U.S. Bankruptcy Code, chapter 15 permits the recognized foreign representative to participate.

[45] *See, e.g.*, Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. De C.V. (*In re* Vitro S.A.B. de C.V.), 701 F.3d 1031, 1053 (5th Cir. 2012) ("Chapter 15 provides courts with broad, flexible rules to fashion relief appropriate for effectuating its objectives in accordance with comity."); *In re* Fairfield Sentry Ltd., 484 B.R. 615, 627 (Bankr. S.D.N.Y. 2013) (noting "[c]hapter 15 emanates from and was designed around this central concept of comity, as evidenced by its primary purpose and deferential framework for international judicial cooperation") (citing chapter 15 provisions); *In re* Atlas Shipping A/S, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009) ("[C]hapter 15 specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief."); *In re* Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (S.D.N.Y. 2008) ("[R]elief [under §§ 1507, 1521 and 1525 of the U.S. Bankruptcy Code] is largely discretionary and turns on subjective factors that embody principles of comity.").

[46] *See, e.g.*, *In re Atlas*, 404 B.R. at 733 (citing Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713 (2d Cir. 1987)); *see also In re* Int'l Banking Corp. B.S.C., 439 B.R. 614, 624 (Bankr. S.D.N.Y. 2010) ("The Second Circuit has frequently underscored the importance of judicial deference to foreign bankruptcy proceedings.").

[47] 159 U.S. 113 (1895).

[48] *Id.* at 163–64 (invoking principles of comity in addressing whether foreign judgment is conclusive in the United States). *Hilton* was an insolvency case.

[49] Maxwell Commc'n Corp. v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036, 1047 (2d Cir. 1996); *see also* JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005) ("[T]he doctrine is not an imperative obligation of courts but rather is a discretionary rule of 'practice, convenience, and expediency.'" (quoting Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997))).

[50] Underwood v. Hilliard (*In re* Rimsat, Ltd.), 98 F.3d 956, 963 (7th Cir. 1996).

deference must be withheld "to avoid the violation of the laws, public policies, or rights of the citizens of the United States."[51]

In accordance with these roots, the post-recognition relief and assistance that U.S. courts may grant under chapter 15 is broad, but not unlimited.

Section 1521 of the U.S. Bankruptcy Code provides that a court may "grant any appropriate relief" to effect the purposes of the chapter and to protect the assets of the foreign debtor or the interests of its creditors,[52] provided that "the creditors and other interested entities, including the [foreign] debtor, are sufficiently protected."[53] Such relief may include a range of things—from staying proceedings against the foreign debtor;[54] to ordering discovery of foreign assets;[55] to entrusting the administration or realization of all of a foreign debtor's assets within the United States to the foreign representative or foreign court.[56] Entrusting assets to a foreign representative or court, however, requires "that the court is satisfied that the interests of *creditors in the United States* are sufficiently protected."[57]

A U.S. court may also provide "additional assistance" under section 1507 of the U.S. Bankruptcy Code to a recognized foreign representative "consistent with the principles of comity" so long as that assistance comports with the principles of fairness in the statute.[58] This requires assuring that claim holders in the United States are protected against prejudice and inconvenience.[59] Although "[t]he relationship between § 1507 and § 1521 is not entirely clear[,]"[60] section 1507 specifically provides for "relief not otherwise available under the [U.S.] Bankruptcy Code or United States law."[61] Put simply, section 1507 empowers a U.S. court to

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[51] Bank of N.Y. & JPCL Leasing Corp. v. Treco (*In re* Treco), 240 F.3d 148, 157 (2d Cir. 2001); *see also Pravin Banker*, 109 F.3d at 854 (stating comity should not be extended "when doing so would be contrary to policies or prejudicial to the interests of the United States"); Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir. 1985) ("Comity will be granted . . . if . . . the laws and public policy of the forum state and the rights of its residents will not be violated.").

[52] 11 U.S.C. § 1521(a) (2012).

[53] *Id.* § 1522(a); *see In re* Atlas Shipping A/S, 404 B.R. 726, 739 (Bankr. S.D.N.Y. 2009) (calling relief under section 1521 "exceedingly broad," but noting U.S. Bankruptcy Code does require that the court conclude that creditors are "sufficiently protected"). A "debtor" in chapter 15 is an entity that is subject to a foreign proceeding. 11 U.S.C. § 1502(1).

[54] 11 U.S.C. § 1521(a)(1)–(2).

[55] *Id.* § 1521(a)(4); *In re* Millennium Global Emerging Credit Master Fund Ltd., 471 B.R. 342, 348 (Bankr. S.D.N.Y. 2012) (ordering third-party discovery of foreign assets under section 1521(a)(4)); *see also id.* at 347 (noting "one of the main purposes of chapter 15 is to assist a foreign representative in the administration of the foreign estate which . . . militate[s] in favor of granting a foreign representative broad discovery rights using the full scope of [Federal Rule of Bankruptcy Procedure] 2004" (citation omitted)).

[56] 11 U.S.C. § 1521(a)(5).

[57] *See id.* § 1521(b) (emphasis added); *see also In re Atlas*, 404 B.R. at 741 (noting entrustment requires that the court conclude that domestic creditors are "sufficiently protected").

[58] 11 U.S.C. § 1507(b).

[59] *See id.*

[60] *See* Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (*In re* Vitro S.A.B. de C.V.), 701 F.3d 1031, 1054 (5th Cir. 2012) (quoting *In re* Toft, 453 B.R. 186, 190 (Bankr. S.D.N.Y. 2011)); *see also In re Atlas*, 404 B.R. at 741.

[61] *See In re Vitro*, 701 F.3d at 1062; *In re* Artimm, S.r.L., 335 B.R. 149, 160 n.11 (Bankr. C.D. Cal. 2005); *see also In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333

provide assistance in an international case that would not be available in a purely domestic one.

Together, the relief and additional assistance provisions of chapter 15, available after chapter 15 recognition, provide a U.S. bankruptcy court with broad powers to administer and fashion relief in coordination with, and to minimize conflicts between, U.S. and foreign proceedings.[62] These are precisely the tools and flexibility that a U.S. court requires to preside over a cross-border trial.

C. Chapter 15's Public Policy Exception Does Not Bar Coordinated, Cross-Border Trials

A court may decline to grant relief or assistance under chapter 15 that is "manifestly contrary" to U.S. public policy.[63] A mere coordinated cross-border trial, without more, does not run afoul of this territorial protection.

Courts invoke the narrow public policy exception "only under exceptional circumstances concerning matters of fundamental importance for the United States."[64] In essence, "[t]he public policy exception applies 'where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections' or where recognition 'would severely impinge upon a U.S. constitutional or statutory right.'"[65] For example, U.S. courts have refused to

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(S.D.N.Y. 2008) (noting post-recognition assistance is "largely discretionary and turns on subjective factors that embody principles of comity").

[62] *See In re Vitro*, 701 F.3d at 1044 ("Chapter 15 provides for a broad range of relief." (citing sections 1520, 1521, and 1507 of the Bankruptcy Code)); *In re* SPhinX, Ltd., 351 B.R. 103, 114 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007) ("Chapter 15 does . . . provide the court with flexibility and a directive to minimize such conflicts [between the domestic court and foreign jurisdictions] if possible in the interests of the debtor and its creditors."); *In re* Tri-Cont'l Exch. Ltd., 349 B.R. 627, 638 (Bankr. E.D. Cal. 2006) (finding, after examining sections 1521, 1522, and 1506 of the U.S. Bankruptcy Code, that "the court has ample tools for dealing with the manner in which a chapter 15 case is administered").

[63] 11 U.S.C. § 1506 (2012); *see In re* ABC Learning Centres Ltd., 728 F.3d 301, 309 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (2014) (explaining that "'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States'" (quoting H.R. REP. NO. 109-31(1), at 109 (2005))).

[64] *In re Vitro*, 701 F.3d at 1069 (quoting Lavie v. Ran (*In re* Ran), 607 F.3d 1017, 1021 (5th Cir. 2010)); *see also In re* Ephedra Prods. Liab. Litig., 349 B.R. 333, 336 (S.D.N.Y. 2006) (explaining why the exception is narrow); *see generally* Scott C. Mund, *11 U.S.C. 1506: U.S. Courts Keep a Tight Rein on the Public Policy Exception, but the Potential to Undermine International Cooperation in Insolvency Proceedings Remains*, 28 WIS. INT'L L.J. 325 (2010).

[65] *In re ABC Learning Centres*, 728 F.3d at 309 (citations omitted); *see, e.g.*, *In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) ("The key determination required by this Court is whether the procedures used in [the Canadian proceeding] meet our fundamental standards of fairness."); *In re* Qimonda AG Bankr. Litig., 433 B.R. 547, 568–69 (E.D. Va. 2010) (stating when applying the public policy exception, courts ask "(i) whether the foreign proceeding was procedurally unfair; and (ii) whether the application of foreign law or the recognition of the foreign main proceeding under Chapter 15 would 'severely impinge the value and import' of a U.S. statutory or constitutional right"); *see also* Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 714 (2d Cir. 1987) ("[C]ourts will recognize foreign bankruptcy proceedings provided the foreign laws comport with due process and fairly treat claims of local creditors.").

recognize foreign insolvency orders that violated the automatic stay,[66] infringed upon fundamental U.S. privacy law,[67] canceled U.S. patent licenses,[68] failed to prioritize secured creditors,[69] and granted non-consensual discharge of non-debtors.[70]

But nothing requires that the relief or additional assistance granted be identical to that available in the United States.[71] In granting relief under chapter 15 (and its predecessor section 304 of the U.S. Bankruptcy Code),[72] U.S. courts have at times disregarded both U.S. law and procedure. For instance, courts have enforced claims

[66] *See, e.g., In re* Gold & Honey, Ltd., 410 B.R. 357, 371–72 (Bankr. E.D.N.Y. 2009) (finding Israeli insolvency proceeding manifestly contrary to public policy because receivership initiated in Israel seeking to seize U.S. assets after chapter 11 proceeding violated U.S. court's automatic stay order).

[67] *See, e.g., In re* Toft, 453 B.R. 186, 196–98 (Bankr. S.D.N.Y. 2011) (finding that German ex parte "Mail Interception Order" giving foreign representative permission to secretly intercept debtor's emails without notice to debtor, in violation of U.S. privacy law and subject to U.S. criminal liability, invoked public policy exception).

[68] *See, e.g., In re* Qimonda AG, 462 B.R. 165, 182, 185 (Bankr. E.D. Va. 2011) (holding that deferring to German law, to the extent it allows cancellation of U.S. patent licenses thereby invalidating section 356(n), would (1) not result in the interests of the creditors being "sufficiently protected" under section 1522(a); and (2) would "severely impinge" the important statutory protection provided to licensees of U.S. patents, thereby undermining a fundamental U.S. public policy promoting technological innovation and running afoul of section 1506).

[69] *See, e.g.*, Bank of N.Y. & JCPL Leasing Corp. v. Treco (*In re* Treco), 240 F.3d 148, 159–61 (2d Cir. 2001) (reversing turnover of assets under section 304 to a Bahamian liquidation proceeding because Bahamian law prioritized administrative expenses over secured creditors where large administrative expenses threatened to destroy secured creditors' claim); Overseas Inns S.A. P.A. v. United States, 911 F.2d 1146, 1147, 1151 (5th Cir. 1999) (comity was not granted to Luxembourg bankruptcy plan that treated IRS as general, rather than priority, creditor); *see also In re* Int'l Banking Corp. B.S.C., 439 B.R. 614, 627 (Bankr. S.D.N.Y. 2010) ("Chapter 15 grants secured creditors . . . the same protections that they would enjoy in a plenary bankruptcy case" and thus, the recognized foreign "[a]dministrator cannot use their cash collateral without either [the secured creditors'] consent or an order [from U.S. bankruptcy court.]").

[70] *See, e.g.*, Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (*In re* Vitro S.A.B. de C.V.), 701 F.3d 1031, 1069 (5th Cir. 2012) (affirming bankruptcy court's determination that non-consensual discharge of non-debtor guarantors under Mexican plan of distribution was not substantially in accordance with U.S. relief and thus invalid under section 1506).

[71] *See, e.g., id.* at 1044 ("In considering whether to grant relief [under chapter 15], it is not necessary that the result achieved in the foreign bankruptcy proceeding be identical to that which would be had in the United States . . . . [T]hey merely must not be repugnant to our laws and policies." (quoting Schimmelpennick v. Byrne (*In re* Schimmelpennick), 183 F.3d 347, 364–65 (5th Cir. 1999))); *see also In re* Sivec SRL, 476 B.R. 310, 324 (Bankr. E.D. Okla. 2012) ("The fact that priority rules and treatment of claims may not be identical is insufficient to deny a request for comity."); *In re* Qimonda AG, 462 B.R. at 183 (noting all reported decisions "agreed that 'the fact that application of foreign law leads to a different result than application for U.S. law is, without more, insufficient to support § 1506 protection'" (quoting *In re* Qimonda AG Bankr. Litig., 433 B.R. 547, 568 (E.D. Va. 2010))).

[72] Chapter 15 replaced 11 U.S.C. § 304, which previously provided the statutory framework for cases filed in the United States that are ancillary to insolvency proceedings filed in foreign countries. "Congress intended that case law under section 304 apply unless contradicted by Chapter 15." Tacon v. Petroquest Res., Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 328 (5th Cir. 2010) (citing legislative history); *see also In re* Iida, 337 B.R. 243, 256 (B.A.P. 9th Cir. 2007) ("Although the case law developed under § 304 no longer directly controls chapter 15 cases, it continues to inform our determinations to some extent."); *In re* Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 109 (Bankr. S.D.N.Y. 2012) ("[T]he Court should read Chapter 15 consistent with prior law under section 304." (citation and quotation marks omitted)).

processes that did not provide for a jury trial,[73] applied foreign avoidance law that resulted in different distributions than in the United States,[74] and honored orders and stays of proceedings not necessarily available domestically.[75]

As courts have recognized, "the application of comity very often has the effect of overriding domestic legal doctrines or rules . . . . [And if t]he purpose of comity is to coordinate efforts with a parallel foreign proceeding; that may involve overriding domestic legal doctrines."[76] In other words, if comity never abridged domestic law, it would have no meaning at all.

As U.S. courts tolerate some deviation from the norm in the name of comity, a mere cross-border proceeding—where the U.S. court maintains an active role—does not invoke chapter 15's public policy exception. The proceeding alone neither per se prejudices U.S. creditors; nor is it destined to be so unfair or impartial as to manifestly violate U.S. law. To the contrary, when a U.S. court sits alongside a foreign one, that court will presumably treat U.S. creditors similarly to how they would be treated in a purely domestic case.[77]

If the presiding court does not, the offending party may seek recourse after, and if, a fundamental line is "manifestly" crossed. As the Third Circuit noted in the *Nortel* cases, a decision on the U.S.-Canada cross-border trial in the abstract, when the courts had not "yet held a hearing to allocate the funds," would "be premature."[78] Now that the *Nortel* trial has finished and the U.S. and Canadian courts have issued their decisions allocating the remaining $7.3 billion of sale proceeds pro rata, it remains to be seen if any parties will invoke the public policy

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[73] *See, e.g., In re* Ephedra Prods. Liab. Litig., 349 B.R. 333, 335, 337 (S.D.N.Y. 2006) (enforcing Canadian order for mandatory mediation denying claimants jury trial over public policy objection where the procedure "affords claimants a fair and impartial proceeding").

[74] *See, e.g.*, Maxwell Commc'n Corp. v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036, 1050 (2d Cir. 1996) (invoking comity to apply U.K. and not U.S. avoidance law for transfers that England had a primary interest, even though distribution under U.K. rule resulted in different outcome and debtor filed for creditor protection in both forums).

[75] *See In re* Metcalfe & Mansfield Alt. Inv., 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010) (enforcing Canadian order including non-debtor release and injunction provisions in the United States due to principles of comity "even if those provisions could not be entered in a plenary chapter 11 case"); *see also In re* Sino-Forest Corp., 501 B.R. 655, 666 (Bankr. S.D.N.Y. 2013) (enforcing Canadian order approving settlement that included third-party release and injunction over public policy exception objection); Collins v. Oilsands Quest Inc., 484 B.R. 593, 597 (S.D.N.Y. 2012) (affirming bankruptcy court's deference to Canadian order staying proceedings against officers and directors even though U.S. court may not have granted stay).

[76] *See In re* Atlas Shipping A/S, 404 B.R. 726, 737–38 (Bankr. S.D.N.Y. 2009) (citing cases); *see also* Ackermann v. Levine, 788 F.2d 830, 842 (2d Cir. 1986) ("We [Americans] are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." (quoting Loucks v. Standard Oil Co. of N.Y., 224 N.Y. 99, 110–11 (1918))).

[77] *See* Leong, *supra* note 38, at 137–38 (finding in reviewing chapter 15 dockets that "U.S. courts in international bankruptcy cases continue to act territorially"); LoPucki, *supra* note 2, 151–52 (arguing "[c]ourts and countries care more about what happens within their borders than what happens outside of their borders").

[78] *In re* Nortel Networks, Inc., 737 F.3d 265, 267 (3d Cir. 2013).

exception to challenge the actual proceedings that occurred (or the decisions that followed).[79]

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In sum, even with chapter 15's public policy exception, the U.S. Bankruptcy Code provides sufficient authority for a U.S. court to oversee a cross-border insolvency trial. Considering that authority, and with the *Nortel* cases as the trailblazer, the cross-border trial is a now a tool that practitioners and courts may utilize in future transnational cases. But when will such a proceeding be possible?

II. WHEN IT IS POSSIBLE: REQUIREMENTS AND LIMITS FOR A COORDINATED, CROSS-BORDER PROCEEDING

Although the authority for a cross-border insolvency trial exists, there are certain legal and practical limits that courts and debtors must consider when embarking on a cross-border path. At base, any court overseeing such a trial will need to ensure that U.S. policy and U.S. creditors are sufficiently protected throughout the process. To be effective, both courts will require jurisdiction over the parties and property at issue. To be practical, the cross-border partner will likely have a legal system and insolvency regime that is similar to the United States.

A. A Cross-Border Trial May Not Prejudice U.S. Citizens or Violate Domestic Public Policy

In practice, some deviations from U.S. law and procedure may be required so that a coordinated, cross-border trial can commence. For instance, a U.S. court may apply foreign law or modify certain procedures so that the U.S. and foreign court may operate in tandem. In the *Nortel* trial, which was conducted simultaneously using closed-circuit video before both the Ontario and the Delaware courts, the witnesses were questioned and cross-examined under the rules determined by the two courts.[80] Where adjustments are made, the U.S. court overseeing the cross-border trial must ensure that it does not prejudice U.S. creditors or manifestly violate domestic public policy.[81] Fortunately, bankruptcy courts have afforded such

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[79] Any critique of the *merits* of the decisions must be differentiated from any critique of the road the parties took to get the U.S. and Canadian courts there. Put slightly differently, merely because some disagree with the ultimate result in the *Nortel* cases—a subject that is outside the scope of this Article—does not take away from the great feat the Nortel parties and Delaware and Ontario courts completed in presiding over the first coordinated, cross-border trial or the lessons that can be learned from that ground-breaking adventure.

[80] *See* Order Entering Allocation Protocol, *In re* Nortel Networks, Inc., No. 09-10138 (May 17, 2013), ECF No. 10565, at Ex. 1, ¶ 4(e) ("The U.S. and Canadian Courts shall determine . . . the rules governing the joint hearing on the merits[.]").

[81] *See* 11 U.S.C. §§ 1506, 1507(b)(4), 1521(b), 1522(a) (2012); *see also* Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (*In re* Vitro S.A.B. de C.V.), 701 F.3d 1031, 1054 (5th Cir. 2012) ("Chapter 15 does impose certain requirements and considerations that act as a brake or limitation on comity[.]").

protections in accommodating foreign insolvency proceedings since the late 1800s[82] and are well-equipped to continue to do so in presiding over cross-border trials.

B. Both Courts Need Jurisdiction Over the Assets and the Parties

A cross-border proceeding necessarily requires that both the U.S. and foreign courts have jurisdiction over the relevant property and parties at issue. Without jurisdiction, any decision may be void or impossible to enforce.[83] This is no small order in an international matter.

There are a number of ways that the courts may obtain jurisdiction over the parties and property. In the *Nortel* cases, for example, the U.S., Canadian, and EMEA debtors consented to the jurisdiction of both the Delaware and Ontario courts by entering into certain post-petition agreements related to the global sales.[84] In *Maxwell*, the debtor submitted to each of the two jurisdictions when it filed for creditor protection in both the United States and the United Kingdom.[85] In other cases, the foreign representatives may have sought recognition under chapter 15, which provides for limited jurisdiction over the representatives in the chapter 15 case and related actions[86] and jurisdiction over the foreign debtors' assets in the United States.[87] A court may also determine that it has jurisdiction over the parties due to their presence in the jurisdiction or participation in the cases.[88]

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[82] *See In re* Iida, 337 B.R. 243, 253 (B.A.P. 9th Cir. 2007) ("At least since the Nineteenth Century, principles of 'comity' or accommodation of foreign proceedings have provided the method by which foreign bankruptcies have been recognized in American jurisprudence." (citing Can. S. Ry. Co. v. Gebhard, 109 U.S. 527, 539 (1883))); *In re* Ephedra Prods. Liab. Litig., 349 B.R. 333, 336 (S.D.N.Y. 2006) ("Determining what foreign procedures are 'manifestly contrary to the public policy of the United States' [under the then new section 1506] is . . . familiar territory to federal courts, who have long had to confront similar issues when determining whether or not to enforce foreign judgments rendered on the basis of foreign proceedings that were plainly fair but that did not include some commonplace American practice."); *In re* Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 113 (Bankr. S.D.N.Y. 2012) (noting bankruptcy courts' discretion to grant or deny comity is "consistent with over a hundred years of comity precedent").

[83] *See In re* Metcalfe & Mansfield Alt. Inv., 421 B.R. 685, 699 (Bankr. S.D.N.Y. 2010) ("In deciding whether to enforce a foreign judgment, a court in the United States may scrutinize the basis for the assertion of jurisdiction by the foreign court . . . . If the rendering court did not have jurisdiction over the defendant under the laws of its own state, the judgment is void and will not be recognized or enforced in any other state."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. c (2014) ("The most common ground for refusal to recognize or enforce a foreign judgment is lack of jurisdiction to adjudicate in respect of the judgment debtor."); *see also* Republic of Arg. v. NML Capital, Ltd., 134 S. Ct. 2250, 2257 (2014) ("Our courts generally lack authority in the first place to execute against property in other countries[.]").

[84] *See In re* Nortel Networks, Inc., 09-10138, 2013 WL 1385271, at *3–4 (Bankr. D. Del. Apr. 3, 2013) (finding debtors from the EMEA region submitted to the court's jurisdiction in entering certain post-petition agreements, including Interim Funding and Settlement Agreement and escrow agreements, and by filing claims against the U.S. debtors in the chapter 11 case).

[85] *See* Maxwell Commc'n Corp. v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036, 1041 (2d Cir. 1996).

[86] *See* 11 U.S.C. § 1510 (2012) ("The sole fact that a foreign representative files a petition under section 1515 does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose").

[87] COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1502.01[8], 1501-5 (distinguishing "ancillary cases under chapter 15 from cases under other chapters where the United States asserts insolvency jurisdiction over

In principle, however, a U.S. bankruptcy court overseeing a plenary case exercises in rem jurisdiction over any and all assets of the debtor wherever they are located in the world.[89] With global jurisdiction, a U.S. court may resolve disputes over what assets belong to a U.S. debtor that has instituted a plenary case even if those assets lie outside U.S. boundaries. But in reality, a decision by a U.S. court over U.S. debtor assets located abroad may not be enforceable in the foreign court or against foreign creditors unless the foreign parties are also before the U.S. court.[90] Indeed, "[t]oday, 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[.]"[91] Because debtors and creditors may be found all over the globe in a transnational case, jurisdiction is likely to be an important factor in assessing whether a cross-border proceeding is possible.

C. The Language Barrier, Distance in Space and Time, and Other Practical Considerations

A cross-border trial conducted by two separate, sovereign courts in two different countries will also face practical challenges.

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property outside its territorial limits"); *see In re* Fairfield Sentry Ltd., 458 B.R. 665, 679 (S.D.N.Y. 2011) ("Chapter 15 ancillary cases assert only territorial jurisdiction over a [foreign] debtor's assets located here [in the United States]."); *see also id.* (noting that all of the provisions of chapter 15 dealing with relief as to assets are limited to U.S. assets, citing sections 1520, 1521(a)(5), and 1528).

[88] *See In re Nortel*, 2013 WL 1385271, at *4–5 (finding that foreign representatives' filing of claims against U.S. debtors in the plenary case was also basis for court's jurisdiction over them); *see also* 11 U.S.C. § 1513(a) ("Foreign creditors have the same rights of access regarding the commencement of, and participation in, a case under this title as domestic creditors.").

[89] 11 U.S.C. § 541(a); Sec. Investor Prot. Corp. v. Madoff Inv. Sec. LLC (*In re* Madoff Inv. Sec. LLC), 474 B.R. 76, 81 (S.D.N.Y. 2012) ("Under § 541(a) of the [U.S.] Bankruptcy Code, commencement of a bankruptcy action creates a worldwide estate of all of the legal or equitable interests, 'wherever located,' held by the debtor at the time of that commencement."); *In re Fairfield Sentry*, 458 B.R. at 679 ("[P]lenary cases in the United States assert universal jurisdiction over a debtor's assets[.]"); *see also* Cent. Valley Cmty. Coll. v. Katz, 546 U.S. 356, 369 (2006) ("Bankruptcy jurisdiction . . . is principally *in rem* jurisdiction.").

[90] *See, e.g., In re* Globo Comunicacoes e Participacoes S.A., 317 B.R. 235, 253 (S.D.N.Y. 2004) (noting, despite in rem jurisdiction over foreign debtor's assets located in the United States, "potential lack of cooperation from [foreign debtor], foreign creditors, and Brazilian courts would certainly stand as a significant impediment to the orderly administration of Globopar's bankruptcy estate" where there was no indication that the U.S. bankruptcy court would be able to obtain the cooperation of foreign creditors not subject to the bankruptcy court's jurisdiction); *see also, e.g., In re* SPhinX, Ltd., 351 B.R. 103, 119 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007) (noting, in determining foreign debtor's center of main interest, that "[m]ost, if not all, of the creditors and investors are located outside of the Cayman Islands; absent their consent or another undisclosed basis for jurisdiction over them, the Cayman Court would have to rely on orders of other courts to bind them").

[91] *In re* Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1, 13 (Bankr. S.D.N.Y. 2003) (considering that foreign company's "principal creditors" are located in the United States and participation of foreign creditors in U.S. proceedings as "one of the most significant factors" in support of U.S. chapter 11 filing).

For instance, U.S. courts have granted foreign recognition to Australian insolvency proceedings and turned over funds to Australian courts for distribution.[92] But a real-time cross-border evidentiary proceeding between the United States and Australia could prove difficult due to the at least twelve-hour time difference. A prolonged six-week trial like in the *Nortel* cases may be nearly impossible. Likewise, U.S. courts have granted comity to Italian and Dutch insolvency proceedings,[93] but a coordinated cross-border trial would be lengthy and expensive due to the language barrier.[94] Different languages may also bar seamless communication between courts, without which coordination may prove difficult. Other foreign courts may operate on different schedules or suffer from severe backlogs such that real-time coordination would not be possible at all. For example, insolvency proceedings in India can take up to a decade to be administered.[95]

Further, some judicial systems or insolvency regimes may be so different than our own that a single coordinated proceeding would inevitably run afoul of the public policy exception.[96]

On the other hand, the opportunities for a cross-border insolvency trial increase when a jurisdiction's legal system is similar to ours. This is a natural extension of the maxim that "[w]hen [a] foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in

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[92] *See, e.g.*, *In re* ABC Learning Centres Ltd., 728 F.3d 301, 314 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (2014) (recognizing and deferring to Australian proceedings and accompanying orders); Allstate Life Ins. Co. v. Linter Grp. Ltd., 994 F.2d 996, 1000 (2d Cir. 1993) (affirming dismissal of actions against the Linter companies in recognition of the liquidation proceedings in Australia).

[93] *See, e.g.*, *In re* Artimm, S.r.L., 335 B.R. 149, 166 (Bankr. C.D. Cal. 2005) (approving settlement and directing funds to be turned over to the Tribunale Civile in Rome for administration and distribution under section 304); Schimmelpenninck v. Byrne (*In re* Schimmelpenninck), 183 F.3d 347, 365 (5th Cir. 1999) (finding Dutch proceedings distributed assets in manner "substantially in accordance with Title 11" under section 304, chapter 15's predecessor).

[94] *See* Bufford, *supra* note 2, at 111 (noting costs and inefficiencies associated with translation in multiple insolvency cases in several countries). There may also be technology limitations. For instance, the Delaware and Ontario courts conducted the *Nortel* cross-border trial via encrypted closed-circuit video cameras. The availability and quality of such technology may also inform a court's decision whether to institute a cross-border trial to resolve disputes.

[95] *See* Rohit Sachdev, Note, *Comparing the Legal Foundations of Foreign Direct Investment in India and China: Law and the Rule of Law in the Indian Foreign Direct Investment Context*, 2006 COLUM. BUS. L. REV. 167, 199 (2006) (attributing lengthy delays to "institutional inefficiencies and backlog"); *see also In re* Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 112, 117 (Bankr. S.D.N.Y. 2012) (staying proceedings to permit decision of Mexican district court under section 1522 to decide ownership issue "if it chooses to do so in a timely fashion"). *Compare* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 756–57 (1999) (stating there are delays in commencing insolvency cases in multiple jurisdictions), *with* Bufford, *supra* note 2, at 116–17 (countering LoPucki, arguing there are no delays in commencing EU-wide proceedings).

[96] *See* Allan L. Gropper, *The Arbitration of Cross-Border Insolvencies*, 86 AM. BANKR. L.J. 201, 215–20 (2012) (finding in examining foreign insolvency regimes that "[o]ne problem is the absence of a credible reorganization law in many, if not most, nations").

those foreign proceedings."[97] This opportunity increases further if the common law country has overlapping times zones and shares our language and culture.[98] To illustrate, in his epilogue to his allocation decision, Justice Newbould of the Ontario Court thanked Delaware Judge Gross for his "courtesies and good humor" and noted that without the "good relationship and trust" developed between the two jurists, the cross-border trial and the consistent conclusion would not have been possible.[99] Shared humor and other intangibles may further benefit future cross-border coordination.

As the *Nortel* cases showcase, Canada is a prime candidate for cross-border trials on disputed issues.[100] United States courts have noted repeatedly, "[t]he [United States] and Canada share the same common law traditions and fundamental principles of law" and "Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process."[101] In the past, this overlap has allowed U.S. courts to readily enforce Canadian insolvency-related orders in the United States even where the result would not necessarily be available domestically.[102] In the future, it may provide a framework for more U.S.-

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[97] *In re* Metcalfe & Mansfield Alt. Inv., 421 B.R. 685, 698 (Bankr. S.D.N.Y. 2010) (citation omitted).

[98] The opportunity for cross-border hearings may further increase as more jurisdictions adopt legislation based upon the UNCITRAL Model Law on Cross-Border Insolvency which, like chapter 15, provides foreign courts with flexibility to communicate and coordinate with other foreign courts.

[99] *See* Nortel Networks Corp. (Re), 09-CL-7950, 2015 ONSC 2987, ¶ 263 (Can. Ont. Sup. Ct. J. May 12, 2015).

[100] This is not to say there will not be practical challenges in a U.S.-Canadian cross-border proceeding, a fact that the Delaware bankruptcy court in *Nortel* has recognized. *See In re* Nortel Networks, Inc., No. 09-10138, 2013 WL 1385271, at *4 (Bankr. D. Del. Apr. 3, 2013) ("The Joint Administrators are correct that the Court will confront practical and logistical difficulties. There is, indeed, the possibility that . . . trial at two distant locations may present challenges.").

[101] *In re Metcalfe*, 421 B.R. at 698; *see also, e.g.*, Collins v. Oilsands Quest Inc., 484 B.R. 593, 597 (S.D.N.Y. 2012) ("It is clear that the Canadian proceedings have been fair and impartial, and that the Canadian proceedings have afforded creditors a full and fair opportunity to be heard in a manner that is fully consistent with this country's standards of due process."); Cornfeld v. Investors Overseas Servs., Ltd., 471 F. Supp. 1255, 1259 (S.D.N.Y. 1979), *aff'd*, 614 F.2d 1286 (2d Cir. 1979) ("It is 'well-settled' in New York that the judgments of the Canadian courts are to be given effect under principles of comity. Trustees in bankruptcy appointed by Canadian courts have been recognized in actions commenced in the United States. More importantly, Canada is 'a sister common law jurisdiction with procedures akin to our own,' and thus there need be no concern over the adequacy of the procedural safeguards of Canadian proceedings." (internal citations omitted)). Additionally, in Companies' Creditors Arrangement Act proceedings, Canadian courts are also similarly empowered as bankruptcy courts in the United States to issue orders that are "just in the circumstances" and to "fill in gaps" not covered by the Act. *See Nortel Networks Corp. (Re)*, 2015 ONSC 2987, ¶¶ 205–06.

[102] *See, e.g.*, *In re Metcalfe*, 421 B.R. at 698–99 (recognizing and enforcing third-party non-debtor release that was litigated in Canada even though same may not be granted in U.S. court); *In re* Sino-Forest Corp., 501 B.R. 655, 665–66 (Bankr. S.D.N.Y. 2013) (following *In re Metcalfe* in recognizing similar Canadian order); *Oilsands Quest Inc.*, 484 B.R. at 597 (affirming bankruptcy court's deference to Canadian order staying proceedings against officers and directors even though U.S. court may not have granted stay); *see also* Can. S. Ry. Co. v. Gebhard, 109 U.S. 527, 539 (1883) (enforcing Canadian bankruptcy scheme that would have been unconstitutional impairment of contract if enacted by U.S. Congress in name of "international comity"); United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002) ("There is no question that bankruptcy proceedings in Canada—a 'sister common law jurisdiction with procedures akin to our own'—are entitled to comity[.]").

Canadian cross-border trials and evidentiary hearings. This is unsurprising considering there are more chapter 15 proceedings with our neighbor to the north than any other country.[103]

III. EFFICACY AND EFFICIENCY: CAN A CROSS-BORDER TRIAL DELIVER A SINGLE, BINDING RESULT?

A cross-border bankruptcy trial will not be ideal every situation. But like other international cases, there is no catchall solution to international insolvency conflicts. In the *Nortel* cases, the U.S. and Canadian courts moved forward with a coordinated, cross-border trial after other avenues failed. Before any future parties or courts choose to follow in these footsteps, they will necessarily assess whether such a trial is likely to deliver a single conclusive result and, if so, whether it is likely that path will be as efficient as other available, and imperfect, alternatives.

A. The Worst of Times: Irreconcilable, Inconsistent Decisions

Assume a U.S. and foreign court convene a coordinated, cross-border proceeding to resolve a dispute over the same property. There is no guarantee that the two courts overseeing that hypothetical proceeding—each separate and sovereign in its own right—will agree on the ultimate outcome.[104] This is an age-old crux of international law. As the U.S. Supreme Court articulated in 1895, "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."[105] The Delaware bankruptcy court in *Nortel* acknowledged this inevitability before proceeding with the cross-border trial: "There is, indeed, the possibility that the Court and the Canadian Court will arrive at different allocations[.]"[106] Although that did not happen, divergence is still possible should any of the parties appeal in either forum and the appellate courts are not as like-minded.[107]

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[103] *See* Westbrook, *supra* note 38, at 253 (noting nearly half of the chapter 15 cases filed through January 30, 2012 are Canadian); *see also* Sandra Abitan & Marc Wasserman, *Chapter 15 Helps Canadian Companies Push the Envelope in Cross Border Restructurings*, 27 J. CORP. RENEWAL 10, 11 (2014) ("Canada has . . . been the source of more Chapter 15 filings than other jurisdiction.").

[104] *See, e.g.*, Gordon & Breach Sci. Publishers S.A, STBS, Ltd. v. Am. Inst. of Physics, 905 F. Supp. 169, 178–79 (S.D.N.Y. 1995) ("It is well-established that United States courts are not *obliged* to recognize judgments rendered by a foreign state, but may *choose t*o give res judicata effect to foreign judgments on the basis of comity . . . . [I]t is primarily principles of fairness and reasonableness that should guide domestic courts in their preclusion determinations."); *In re Metcalfe*, 421 B.R. at 699 n.4 ("Foreign judgments are treated differently from the decisions of other State courts. In the case of foreign judgments, *res judicata* is discretionary."); *see also supra* Section I(B).

[105] Hilton v. Guyot, 159 U.S. 113, 163 (1895).

[106] *In re* Nortel Networks, Inc., No. 09-10138, 2013 WL 1385271, at *4 (Bankr. D. Del. Apr. 3, 2013). Despite this possibility, the Third Circuit declined to rule upon the joint hearing before it occurred. *See In re* Nortel Networks, Inc., 737 F.3d 265, 273 (3d Cir. 2013).

[107] *See In re* Nortel Networks, Inc., No. 09-10138, 2015 WL 2374351, at *27 (Bankr. D. Del. May 12, 2015) (noting that although the courts' approaches differed, they agreed on the result and both desired to

Returning to a hypothetical cross-border trial, if the two courts ultimately disagree, the U.S. bankruptcy court has two choices. One: adopt its own ruling. Two: enforce the conflicting foreign insolvency court's order. But realistically a U.S. court that presided side-by-side a foreign court and arrived at a different result is unlikely to disregard the time and resources it invested to reach that decision and adopt a foreign one. For a complex matter, that investment might be significant—the *Nortel* trial began after a year of extensive coordinated pre-trial discovery and continued for over six weeks, involving numerous witnesses and over 2,000 exhibits and deposition designations.[108]

Moreover, were a U.S. court to abandon its decision, it would also abandon the U.S. interests it sought out to protect. Any cross-border trial will necessarily have a substantial connection to the United States. Otherwise the U.S. court would have employed comity and deferred to the foreign one at the outset.[109] Unless substantial ties to another jurisdiction make themselves known during the trial, it is unlikely that the trial court will reconsider (or that a higher court will reverse that decision on appeal).

Absent deference, the next step may be concurrent, appellate litigation with no foreseeable end. As the mediator in the *Nortel* cases warned, "[t]here is no single jurisdiction with ultimate, final authority in this matter; no final court of appeal or supreme court with the power to issue a decision that conclusively determines the outcome of [the cross-border] litigation."[110] Despite the consistent *Nortel* allocation decisions, this is still a risk if the parties appeal. This paints a dim picture of a cross-border trial as an international insolvency tool.

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avoid the "travesty" of reaching conflicting decisions); *see also id.* at *52 (acknowledging that an appeal may "prolong the hardship and deplete the remaining assets"); Nortel Networks Corp. (Re), 09-CL-7950, 2015 ONSC 2987, ¶ 208 (Can. Ont. Sup. Ct. J. May 12, 2015) (noting a "global solution in this unprecedented situation is required"). The U.S. debtors group and certain creditors filed motions for reconsideration of the Delaware court's allocation decision on May 26, 2015.

[108] *See In re Nortel*, 2015 WL 2374351, at *2; *see also* Jamie Santo, *Nortel Units Seek Delay Of Trial In $7.5B Cash Row*, LAW360 (Aug. 19, 2013, 8:39 PM), http://www.law360.com/articles/465897/nortel-units-seek-delay-of-trial-in-7-5b-cash-row (discussing delay due to large discovery volume).

[109] *See, e.g.*, *In re* Atlas Shipping A/S, 404 B.R. 726, 741 (Bankr. S.D.N.Y. 2009) (granting relief to Atlas' foreign representative to turnover funds where "there are no U.S. claimants" and "[the domestic creditors'] claims have no connection to the United States, other than . . . garnishing Atlas' funds in banks in New York"); *In re* Artimm, S.r.L., 335 B.R. 149, 165–66 (Bankr. C.D. Cal. 2005) (rejecting objection from former-debtor executive to the turnover of funds to Italian trustee for administration in Rome where she "is not a local U.S. creditor who should be given special protection by this [U.S.] court" but instead "[h]er relationship to the debtor has Italian origins and strong Italian ties"); *see also* Maxwell Commc'n Corp. v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036, 1054–55 (2d Cir. 1996) ("[I]n this unique case involving cooperative parallel bankruptcy proceedings . . . the doctrine of international comity precludes application of the American avoidance law to transfers *in which England's interest has primacy*." (emphasis added)).

[110] *See* Marc Abrams, *Transactional Aspects of Cross-Border Restructurings*, ABI ANNUAL SPRING MEETING 903, 911 n.28 (2013) (citing Opening Remarks of the Mediator, The Honourable Warren K. Winkler, Chief Justice of Ontario, on April 24, 2012 (April 24, 2012)); *see also* Gropper, *supra* note 96, at 204 ("Conflicting decisions from the courts involved in a multinational enterprise's insolvency cannot be readily resolved, as there is no international court with jurisdiction over insolvency matters.").

But all is not lost if the two courts disagree. Even inconsistent results may increase the chance of settlement. After a cross-border trial or hearing, the parties will have actual decision points—which will presumably issue around the same time—to take to the negotiation table.[111] This may prove particularly useful in a heated international proceeding where even basic principles of ownership and governing law are at issue.[112] Even if the two courts issue different edicts, the parties may be able to meet in the middle or better assess the costs and risks of continuing to litigate in multiple forums.

B. The Best of Times: A Single Result

There is also the possibility that the two courts could agree.

Coordinated pre-trial discovery, briefing, and a simultaneous hearing or trial would present both the U.S. and foreign court with the same evidence and argument at the same time. Depending on how the hearing or trial is conducted, this may be true even if different rules of evidence apply. For instance, in the *Nortel* trial, the parties were on the same pre-trial discovery schedule and presented their arguments and evidence to both the U.S. and Canadian courts on the same schedule during the trial.[113] This shared body of information may increase the likelihood of the two courts reaching consistent decisions, thereby avoiding protracted litigation and appeals in multiple jurisdictions. If possible, the courts themselves will likely be motivated to avoid such a disastrous result. In the *Nortel* cases, the U.S. bankruptcy court readily admitted that "avoid[ing] the travesty of reaching contrary results which would lead to further and potentially greater uncertainty and delay" was a driving force in leading the two courts to reach consistent decisions.[114]

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[111] *See* Gropper, *supra* note 96, at 219–20 (noting that "[e]ffective negotiation over the terms of a restructuring . . . requires the existence of a known law and a court system that will treat creditors equitably if the negotiations fail" and where an impartial court system is absent, the resulting "absence of clarity can reduce the incentives to compromise and result in a loss of value to the detriment of all parties").

[112] *See id.* For example, as demonstrated in the pre-trial briefs filed in both the U.S. and Canadian courts, the Nortel parties did not agree on what law or principle governs ownership of or entitlement to the Nortel sale proceeds. *See* Pre-Trial Brief, *In re* Nortel Networks, Inc., No. 09-10138 (Bankr. D. Del. May 11–12, 2014), ECF Nos. 13550–53, 13556; *see also In re Nortel*, 2015 WL 2374351, at *28 (chiding the parties for their vastly divergent, self-serving allocation positions where "[t]here is no uniform code or international treaty or binding agreement which governs how Nortel is to allocate the Sales Proceeds between the various insolvency estates or subsidiaries spread across the globe"); *Nortel Networks Corp. (Re)*, 2015 ONSC 2987, ¶¶ 10, 256 (noting the evidence and positions on allocation varied dramatically by party).

[113] *Compare* Order Amending Litigation Schedule in Joint Cross-Border Proceedings to Determine Allocation of Asset Sale Proceeds and Certain Claims, at Schedule A, *In re* Nortel Networks, Inc., No. 09-10138 (Bankr. D. Del. Nov. 27, 2013), ECF No. 12522-1 (setting forth amended litigation timetable, discovery plan, and deposition protocol), *with* Order (Amendments to Litigation Timetable, Discovery Plan and Deposition Protocol), Nortel Networks Corp. (Re), 09-CL-7590, 2013 ONSC 1757 (Can. Ont. Sup. Ct. J. Dec. 3, 2013) (entering identical Schedule A). *See also* Amended Order re: Allocation Trial Protocol, at ¶¶ 1–3, *In re* Nortel Networks, Inc., Nos. 09-10138, 09-10164 (Bankr. D. Del. Mar. 21, 2014), ECF Nos. 13208, 521, respectively (amending order regarding trial protocol, noting that Canadian Court would enter companion order by endorsement).

[114] *In re Nortel*, 2015 WL 2374351, at *27; *see also Nortel Networks Corp. (Re)*, 2015 ONSC 2987, ¶ 10 ("These insolvency proceedings have now lasted over six years at unimaginable expense and they should if

Moreover, two courts overseeing a cross-border hearing or trial in this manner could avoid duplication and maximize efficiencies.[115] Having the parties present on the same schedule avoids the waste that is associated with litigating the same issue between the same parties in two separate forums.[116] As the Court of Appeal for Ontario stated in rejecting the EMEA administrators' attempt to appeal the joint Ontario-Delaware *Nortel* trial, "[c]ooperation and communication between the two courts in accordance with the relevant [cross-border] protocols . . . is a sensible and effective response to a significant interjurisdictional case."[117]

Additionally, to the extent choice-of-law issues arise, "it would be valuable [for the U.S. and foreign courts] to communicate regarding the policies animating a certain law so as to be better able to perform a choice-of-law analysis."[118] This may even obviate the need to retain foreign law experts, which would save valuable estate resources for distribution to creditors.[119] And as time passes and the *Nortel* cases can be studied, further efficiencies may be discovered.

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at all possible come to a final resolution. It is in all the parties' interests for that to occur. Consistent decisions that we both agree with will facilitate such a resolution.").

[115] Although employing two different laws, a coordinated court-to-court proceeding has similar benefits to procedural consolidation in the United States—namely, it saves time and money without compromising corporate separateness or national sovereignty. *See* Miller, *supra* note 2, at 217.

[116] *See, e.g.*, Olivier v. Merritt Dredging Co., 979 F.2d 827, 834 (11th Cir. 1992) ("[A] requirement that Olivier sue in both Louisiana and South Carolina would pose an unnecessary waste of precious judicial resources."); *In re* Van Bible, No. 09-06721, 2012 WL 3201883, at *11 (Bankr. D.P.R. Aug. 3, 2012) ("Requiring the parties to litigate and the courts to determine the same facts in two different forums, simultaneously, would be an unnecessary waste of both the parties' and the courts' limited resources."); Slaughter v. Fred Weber, Inc., No. 06-CV-503-DRH, 2007 WL 2010432, at *1 (S.D. Ill. July 6, 2007) ("It would be a waste of scarce judicial resources to litigate this present action, which no one denies is essentially identical, in two different forums."); *In re* Butcher, 46 B.R. 109, 113 (Bankr. N.D. Ga. 1985) ("Neither convenience nor justice would be served by litigating the contract dispute in two different courts[.]"); *see also* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952) ("Why, under the circumstances, should there be two litigations where one will suffice? We can find no adequate reason."); Research Corp. v. Radio Corp. of Am., 181 F. Supp. 709, 711 (D. Del. 1960) ("There is no sound reason why litigation between the same parties and embracing common issues be prosecuted simultaneously. Not only is an economic hardship imposed upon the parties, but litigation in two tribunals at the same time is a luxury not compatible with the efficient administration of justice."). Of course, unlike a cross-border proceeding, a domestic litigation in a single forum avoids differing outcomes. *See In re* Semcrude, L.P., 442 B.R. 258, 271 (Bankr. D. Del. 2010) ("The goal of this [first forum] rule is to avoid differing outcomes on the same issue by two sister courts, thereby minimizing duplicative litigation in different fora, and saving judicial resources.") (internal quotation marks and citation omitted).

[117] Nortel Networks Corp. (Re), M42415, 2013 ONCA 427, ¶ 5 (Can. Ont. C.A. June 20, 2013).

[118] *See* Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V., 310 F.3d 118, 133 (3d Cir. 2002), *as amended* (Nov. 12, 2002) (arguing, although not mandated by precedent, "communication from one court to the other regarding cooperation or the drafting of a protocol could be advantageous to the orderly administration of justice").

[119] *See id.* It should be noted that a cross-border trial may also present the opportunity for the parties to litigate matters that would otherwise be set in stone in a run of the mill single-forum proceeding—e.g., the rules of procedure or evidence. Fighting out such matters before two courts may increase costs and reduce efficiencies. Nortel's representatives have certainly received criticism for the costs incurred in preparing for the first cross-border trial. *See Nortel Networks Corp. (Re)*, 2015 ONSC 2987, ¶ 208 (noting costs have exceeded $1 billion in the *Nortel* cases); Peg Brickley, *Canadian Judge Criticizes Nortel Lawyers for 'Shocking' Fees: Judge Calls Tactics in Fight Over $7.3 Billion Raised in Sale of Nortel Businesses 'Huge Waste of Money*,' WALL ST. J. (May 8, 2014, 3:53 PM),

Finally, the effort of overseeing any pre-trial discovery or briefing on a coordinated basis will likely require that both courts work in tandem and employ comity *before* reaching an ultimate decision. When the parties could not agree in the *Nortel* cases, the U.S. and Canadian courts successfully coordinated pre-trial discovery, scheduling, and trial procedures.[120] Such coordination and cooperation may lay the foundation for consistent decisions at the end of the day—as in the *Nortel* cases—or enable the courts to corral the parties toward a settlement.

In *Maxwell*, the "parallel proceedings in the English and American courts . . . resulted in a high level of international cooperation and a significant degree of harmonization of the laws of the two countries[,]" which ultimately paved the way for the parties to agree to a plan despite the differences in the two countries bankruptcy laws.[121] Similarly, court-to-court coordination before and during a cross-border trial may increase the chance that the parties-in-interest end on the same proverbial page.[122] These possibilities may provide a radiant glimmer of hope in a global clash with no clear solution.

C. The Superlative Degree of Comparison: Other Alternatives to Solving Transnational Insolvency Disputes

Although there is no single, perfect solution to international insolvency disputes, some will be better than others. To assess whether a cross-border insolvency trial may be an effective tool, one must examine the other options available.

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http://www.wsj.com/news/articles/SB10001424052702304655304579550104164391532?KEYWORDS=peg+brickley&mg=reno64-wsj; *see also* Peg Brickley, *Dividing Up the Nortel Networks Pot: Talks May Be Under Way*: *The Long-running Trial over Nortel's Billions Winds to a Close Next Week*, WALL ST. J. (June 20, 2014, 1:48 PM), http://online.wsj.com/articles/nortel-networks-billions-talks-may-be-near-on-dividing-it-up-1403286498 [hereinafter *Dividing Up the Nortel Networks Pot*] ("Except for bankruptcy professionals who have raked in well over $1 billion in fees in Nortel's case, creditors won't be paid until there is a determination on how to divide the money[.]"). International parties may, however, fight over which country's rules of procedure and evidence apply even if they are proceeding in two separate forums.

[120] The U.S. and Canadian courts entered companion orders on or about May 16, 2013, which were amended on or about August 27, 2013 and November 27, 2013, setting forth the litigation timetable, discovery plan, and deposition protocol for *Nortel*'s joint cross-border trial. *See* Order Amending Litigation Schedule in Joint Cross-Border Proceedings to Determine Allocation of Asset Sale Proceeds and Certain Claims, at Schedule A, *In re* Nortel Networks, Inc., No. 09-10138 (Bankr. D. Del. Nov. 27, 2013), ECF No. 12522-1; Order (Amendments to Litigation Timetable, Discovery Plan and Deposition Protocol); *see also* Nortel Networks Corp. (Re), 2013 ONSC 1757 (Can. Ont. S.C.J. Dec. 3, 2013) (entering identical Schedule A); *see also* Amended Order re Allocation Trial Protocol, *In re* Nortel Networks, Inc., Nos. 09-10138, 09-10164, at 1 n.2 (Bankr. D. Del. Mar. 21, 2014), ECF Nos. 13208, 521, respectively (entering corrected schedule noting that Canadian Court would enter companion order by endorsement).

[121] Maxwell Commc'n Corp. v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036, 1053 (2d Cir. 1996).

[122] *See In re* Nortel Networks, Inc., No. 09-10138, 2015 WL 2374351, at *52 (Bankr. D. Del. May 12, 2015) (recognizing that one possibility is that parties may "utilize the Courts' rulings to [consensually] resolve any remaining differences" among themselves).

1. Is the Best Offense a Good Defense?

In the face of an international insolvency dispute, a debtor could first attempt to preemptively present the issue to a court in the United States. For example, a U.S. debtor could seek a declaratory judgment that certain assets rightfully belong to the U.S. debtor and not its foreign affiliate under local law.[123] A swift U.S. decision may provide the certainty or leverage a debtor needs to quickly and efficiently administer its estate.

But litigating ownership (or any other pivotal issue) could be an expensive and time-consuming preliminary step, especially if the property is intangible or if the organization was globally integrated pre-petition. Both were true in *Nortel*,[124] and, as of the submission of this Article, the fight over those assets has been going on for almost six years.[125]

Costs may also increase if the U.S. debtor's foreign affiliates have entered insolvency proceedings in other jurisdictions and those foreign courts are asked to take up the very same issues abroad.[126] This could lead the parties to race to judgment—wastefully litigating the same issues in multiple forums—with the risk of conflicting results because the second-in-time court is not required to respect the first-in-time "foreign" decision.[127] In the United States, these duplicative post-

[123] *See, e.g.*, JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 425 (2d Cir. 2005) ("Property interests have an independent legal source, antecedent to the distributive rules of bankruptcy administration, that determines in the first interest the claimant parties in particular property. It logically follows that before a particular property may be turned over pursuant to § 304(b)(2) [the predecessor to chapter 15], a [United States] bankruptcy court should apply local law to determine whether the debtor has a valid ownership interest in that property[.]"(citing Koreag, Controle et Revision S.A. v. Refco f/x Assocs., Inc. (*In re* Koreag, Controle et Revision S.A.), 961 F.2d 341, 349 (2d Cir. 1992))); *In re* Artimm, S.r.L, 335 B.R. 149, 163 (Bankr. C.D. Cal. 2005) ("If there is a bona fide dispute as to the [foreign] debtor's interest in property, the bankruptcy court must make a preliminary determination as to the [foreign] debtor's property interest prior to authorizing turnover[.]").

[124] Declaration of John Doolittle, Vice President of Nortel Networks Inc. in Support of Chapter 11 Petitions and First Day Motions at ¶¶ 7–10, 26–42, *In re* Nortel Networks, Inc., No. 09-10138 (Bankr. D. Del. Jan. 14, 2009), ECF No. 3.

[125] *See In re* Nortel Networks, Inc., No. 09-10138, 2013 WL 1385271, at *2 (Bankr. D. Del. Apr. 3, 2013) (explaining that the parties engaged in lengthy negotiations and two rounds of mediation under the June 2009 Interim Funding and Settlement Agreement before litigating before the U.S. and Canadian courts); *see also* Nortel Networks Corp. (Re), 09-CL-7950, 2013 ONSC 1757, ¶ 6 (Can. Ont. S.C.J. Apr. 3, 2013) (noting, in ordering a joint cross-border trial that "[t]he sad reality for all creditors is that four years have passed from when Nortel filed for [creditor protection in Canada]"). At the time of submission of this Article, the U.S. Court had not yet ruled on the certain parties' motions for reconsideration. *See supra* note 24.

[126] *See* Miller, *supra* note 2, at 236 (concluding that "duplicative proceedings and lost value currently plague [Multinational Enterprise Group] bankruptcies"); *see also supra* note 116 (cases citing the inefficiency of duplicative litigation).

[127] *See supra* note 104 (noting U.S. courts are not obligated to respect foreign judgments, but may choose to do so on the basis of comity). For instance, a second-in-time U.S. court disregarded a first-in-time U.S. decision in the *Lehman* cases. After a court in England validated a contractual provision, a U.S. court declared the same provision unenforceable despite the "difficult position" the decision placed the defendant "in light of the contrary determination of the English Courts[.]" *In re* Lehman Bros. Holdings Inc., 422 B.R. 407, 423 (Bankr. S.D.N.Y. 2010).

petition litigation costs would incur administrative expenses that are entitled to priority under the U.S. Bankruptcy Code.[128]

Finally, litigating disputes among affiliate debtors may not be in the best interest of the corporate group if each of the affiliates seeks to sell their global property under section 363 of the U.S. Bankruptcy Code or the foreign equivalent. Expending estate resources to break up an integrated, international enterprise may not be a value-generating option if a global sale is expected to bring a higher price than selling the business in parts.[129] Such litigation may also target or overemphasize the company's weaknesses, which could, in turn, decrease the value of the assets in the global marketplace or delay a section 363 sale to the detriment of the estate.[130]

In the end, a U.S. litigation strategy has the potential to decrease the value of estate assets and spur litigation in multiple courts and may be no more likely to lead to a single and final decision than a concurrent, coordinated cross-border proceeding.

2. The Parties Can Agree To Arbitrate (If They Can Agree On Anything At All)

The parties to an international insolvency may choose to submit disputes to binding arbitration. This is the course that the Honorable Judge Gropper of the United States Bankruptcy Court for the Southern District of New York advocates, in part because a single decision by a panel of independent arbitrators is the only way to bind international estates, thereby avoiding inconsistent results and the inevitable protracted litigation that will follow.[131]

But arbitration is a creature of contract.[132] Without a meeting of the minds, a U.S. bankruptcy court may not force the parties to arbitrate.[133] And, even if the

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[128] *See* 11 U.S.C. §§ 503(b)(4), 507(2) (2012). On the other hand, legal fees may also be substantial in a complex cross-border proceeding, as was the case in *Nortel*. *See Dividing up the Nortel Networks Pot*, *supra* note 119 (noting that bankruptcy professionals "have raked in well over $1 billion in fees in Nortel's case").

[129] *See* LoPucki, *supra* note 2, at 162 ("If the assets of the multinational would bring a higher price if sold together, it will be in the interests of the administrators to sell them together and split the additional proceeds among them."); *see also* Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 465 (1991) (arguing it "is not unrealistic" that "[s]ale of divisions across national lines as going concerns will [have greater value]," in part "because of trademarks that have greater value on a worldwide basis").

[130] *Cf.* Jacob A. Kling, *Rethinking 363 Sales*, 17 STAN. J.L. BUS. & FIN. 258, 262–63 (2012) (explaining that fast section 363 sales benefit a debtor's estate because, among other things, they decrease administrative expenses).

[131] *See* Gropper, *supra* note 96, at 222–42 ("In disputes among affiliates in insolvency proceedings in different nations, [arbitration] would supply a cross-border decision-maker that does not exist today."); *id.* at 222 (noting arbitration can "avoid the costs and uncertainties of duplicative parallel insolvency proceedings and extended litigation in multiple courts"). *But see* Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183, 220 (2007) (concluding that "disputes over the enforceability of arbitration clauses in bankruptcy have resulted in extensive, time-consuming, and expensive court litigation").

[132] *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties

many parties to an international insolvency conflict agree to arbitrate post-petition, Federal Rule of Bankruptcy Procedure 9019 requires that the U.S. court approve that agreement.[134] Depending on the nature of the issue, it is possible that a U.S. bankruptcy court may find that ceding authority to independent arbitrators who are not bound to adhere to *any* country's bankruptcy laws would jeopardize the objectives of the U.S. Bankruptcy Code and refuse to send the matter to arbitration.[135]

Further, agreeing to submit to binding arbitration—to governing rules, who will sit on the panel, where it will take place—will necessarily take time. The Nortel debtors negotiated for over a year without reaching an agreement to arbitrate.[136] In the world of section 363 sales, such a delay could decrease the going concern value of the business, especially if the assets are likely to depreciate quickly.[137]

While international arbitration may be a road to a single and final decision, it is only possible when the parties *and* the U.S. court (and perhaps the foreign one as well) can agree it is the proper course. Moreover, it may not be ideal where a quick

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have agreed to submit to arbitration."); 9 U.S.C. § 2 (2012) (providing for validity and enforcement of agreements to arbitrate); *see also* Gropper, *supra* note 96, at 229 (concluding "arbitration can coexist with traditional bankruptcy principles if the arbitration proceeding affects only parties who have agreed to the process").

[133] *See, e.g.*, *In re* Nortel Networks, Inc., 737 F.3d 265, 270–72 (3d Cir. 2013) (affirming bankruptcy court's order denying motion to compel arbitration where the parties did not promise to arbitrate); McDonald v. Rodriguez, 184 B.R. 514, 518 (S.D. Tex. 1995) (finding that, despite "broad equitable powers" of the bankruptcy court, "the arbitration award approved by the bankruptcy court significantly exceeded the essence of the underlying contract which created the arbitration proceeding" and reversed the order confirming award).

[134] *See* FED. R. BANKR. P. 9019(c); *see also In re Nortel Networks*, 737 F.3d at 272 (noting in dicta that looking to extrinsic evidence to infer an agreement to arbitrate is problematic post-petition because "[i]f the parties' agreements could be discerned only by consulting extrinsic evidence, then a bankruptcy court might unknowingly use its Rule 9019 power to 'approve' or 'authorize' a contract with hidden promises"). Additionally, "[c]ourt approval would likely be required under some other systems, whereas in others consent by the estate administrator might provide an adequate basis for the arbitration proceeding." Gropper, *supra* note 96, at 229.

[135] A bankruptcy court may override a pre-petition agreement to arbitrate where it would cause the U.S. Bankruptcy Code to "'inherently conflict' with the Arbitration Act or that arbitration of the claim would 'necessarily jeopardize' the objectives of the [U.S.] Bankruptcy Code." *See* MBNA Am. Bank v. Hill, 436 F.3d 104, 108 (2d Cir. 2006); Mintze v. Am. Gen. Fin. Servs., Inc. (*In re* Mintz), 434 F.3d 222, 231 (3d Cir. 2006) (noting potential conflicts between arbitration and Bankruptcy Code); *see also, e.g.*, *In re* U.S. Lines, Inc., 197 F.3d 631, 641 (2d Cir. 1999) (finding where proceedings "are integral to the bankruptcy court's ability to preserve and equitably distribute the Trust's assets . . . [i]t was within the bankruptcy court's discretion to refuse to refer" the matter to arbitration). For a discussion of the enforceability of arbitration in bankruptcy, *see generally* Resnick, *supra* note 131.

[136] *In re* Nortel Networks, Inc., No. 09-10138, 2013 WL 1385271, at *2–5 (Bankr. D. Del. Apr. 3, 2013) (noting that Nortel parties engaged in lengthy discussions and two rounds of mediation but "could not agree on a protocol which would govern the allocation process" and they did not agree to arbitrate).

[137] *See* Kling, *supra* note 130, at 262–63 (explaining that fast section 363 sales benefit a debtor's estate because, among other things, they allow the debtor to take advantage of real-time business opportunities and avoid depreciation of assets). *But see* Gropper, *supra* note 96, at 222 (proffering arbitration as a solution to cross-border insolvency, granted in part because where consent is reached it can "save significant going concern value").

sale of the global assets is contemplated. Accordingly, arbitration will not be the optimal solution for all conflicted international insolvencies.

CONCLUSION

When members of a multinational enterprise seek creditor protection, insolvency proceedings may commence in various jurisdictions over the globe. In such cases, conflicts are sure to arise. When they do, there may not be a straightforward fix.

Nortel teaches that coming to an agreement in a transnational case—even agreement to submit international disputes to arbitration—may not be easy or possible. International law teaches that multiple litigations in different countries cannot guarantee a single, final result. Common sense teaches that multiple trials on the same issue in different jurisdictions are inefficient and wasteful. Bankruptcy law teaches us to be flexible and creative. With all of those lessons, what are courts overseeing such stubborn international insolvencies to do?

The debtors and the Delaware and Ontario courts discovered in *Nortel* that another tool is required. As the Third Circuit observed: "Bankruptcy courts confront fluid legal and business problems. Consequently, bankruptcy courts must work with the parties before them to apply the bankruptcy framework to the demands and idiosyncrasies of each case. The Bankruptcy Court and the parties did just that when . . . they collaborated on a cross-border protocol[,]"[138] and the courts ordered the parties to participate in a cross-border trial. Two years later, after cross-border coordination of Herculean proportions, the Delaware and Ontario courts did so again when they issued *consistent* decisions. As the Ontario Court stated: "A global solution in this unprecedented situation is required and perforce, as this situation has not been faced before, it will by its nature involve innovation."[139]

Now that that the precedent has been set, parties and bankruptcy courts may too determine that a cross-border trial to address a disputed issue is likely to be more efficient or productive than pure deference to, or defiance of, a foreign court. The U.S. Bankruptcy Code and over a hundred of years of international cooperation give U.S. bankruptcy courts that flexibility. Similar legal regimes in other countries give our sister nations the same.

Although a coordinated, cross-border trial will face unique logistical challenges—for example, the parties will have to craft procedures and bend rules to contour to the cross-border animal—it *can* lead to a single unanimous result. Presenting the same arguments and evidence to two courts on a single schedule increases the chance that international courts or parties will end on the same page. Having a coordinated cross-border case also eliminates the waste of litigating the same issue in multiple forums. Even two inconsistent decisions may provide the

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[138] *In re Nortel Networks*, 737 F.3d at 271–72.

[139] Nortel Networks Corp. (Re), 09-CL-7950, 2015 ONSC 2987, ¶ 208 (Can. Ont. Sup. Ct. J. May 12, 2015).

necessary spark to get otherwise unwilling (and even recalcitrant) parties to the negotiation table. And now that the *Nortel* trial has run its course, efficiencies may be copied, pitfalls avoided. For instance, in the future, related transnational debtors and creditors could agree to submit certain types of disputes to the two courts administering the insolvency cases (and to general procedures governing that process) in a cross-border protocol, thereby reducing litigation over the cross-border trial itself.

The *Nortel* case, like *Maxwell* that preceded it, is a pioneering international precedent. Future debtors and courts may learn from and build upon that example in employing coordinated court-to-court trials to bridge challenging cross-border insolvencies in the years to come.