ENFORCING PREPACKAGED RESTRUCTURINGS OF FOREIGN DEBTORS UNDER THE U.S. BANKRUPTCY CODE

KURT A. MAYR*

INTRODUCTION

The U.S. capital markets are a rich resource not only for U.S. based enterprises, but also for non-U.S. enterprises whose principal assets and operations are located outside of the United States. The decision to raise capital from U.S. investors is a relatively simple one. However, when circumstances later require a non-U.S. entity ("foreign debtor") to restructure its financial obligations to U.S. investors, the decisions become more difficult. Protecting a foreign debtor's assets outside of the United States, while at the same time restructuring its liabilities in a manner that will bind its U.S. investors, presents complex cross-border insolvency issues that too often result in multi-jurisdictional, lengthy, risky and expensive bankruptcy and litigation proceedings.

The success of these restructurings invariably depends upon the foreign debtor's ability to enforce its restructuring in the United States because of, among other things, (a) the presence of material assets in the United States, (b) the presence of significant creditors in the United States, (c) the foreign debtor's need to obtain the cooperation and assistance of U.S. based parties to consummate the restructuring in the most efficient manner (who might be hesitant if they faced the risk of litigation by disgruntled investors), and (d) the foreign debtor's desire for legal finality so that it may do business in the United States and/or access the U.S. capital markets in the future without the risk of being sued by U.S. investors opposed to its restructuring.

Where a foreign debtor's restructuring is necessitated primarily by the debtor's financial debt (e.g., debt owed to investors in debt securities and/or bank loans, as opposed to debt arising from ordinary trade credit or financial fraud), the most efficient bankruptcy option may be to pursue an expedited consensual debt-restructuring proceeding. The United States Bankruptcy Code ("Bankruptcy Code")[1] specifically provides for this through a "prepackaged" reorganization

---

* The author is a member of the Financial Restructuring Group of Bingham McCutchen LLP. He has represented debtors, official committees, creditors, acquirors and other parties in a variety of complex reorganizations. Before joining Bingham McCutchen LLP, the author was a member of teams that advised Edelnor S.A. and Multicanal S.A. with respect to their prepackaged restructurings which are discussed in this article. Further information regarding the author can be found at www.bingham.com, and he can be contacted at kurt.mayr@bingham.com. The author thanks and acknowledges his colleagues Evan Flaschen and Kelly Koyama for their support and consultation in connection with this article.

[1] 11 U.S.C. §§ 101–1532 (2006). This article focuses upon judicial/court-approved restructuring alternatives for a foreign debtor. A foreign debtor may also address its financial restructuring needs through various out-of-court alternatives, including, among others, refinancings of obligations with existing or new investors, exchange offers, tender offers and consent solicitations with respect to debt securities, and various merger/acquisition strategies. *See generally* BUSINESS WORKOUTS MANUAL §§ 26:1–15 (Donald Lee Rome, Matthew W. Kavanaugh & Randye B. Soref eds., 2d ed. 2005) (discussing complexities of crossborder

proceeding ("U.S. prepack"), where the debtor negotiates a restructuring plan with major financial creditors and obtains the requisite consents of such creditors before commencement of a chapter 11 proceeding. In cases where the debtor obtains a high percentage of consents from impaired creditors, U.S. prepacks can proceed quickly to court confirmation of a restructuring plan in little more than one month.

Recognizing the U.S. prepack model's efficiency, the International Monetary Fund ("IMF") and the United Nations Commission on International Trade Law ("UNCITRAL") have adopted official positions encouraging countries to incorporate expedited reorganization procedures as an essential component of a sound insolvency law regime. Heeding this advice, a few countries have recently adopted expedited bankruptcy procedures akin to the U.S. prepack. In addition, other countries that have not yet adopted a "prepack model," nonetheless have reorganization procedures that can be streamlined to facilitate rehabilitations of troubled businesses. Where available, a foreign debtor may be able to pursue a consensual restructuring under such foreign insolvency regimes to achieve efficiencies similar to a U.S. prepack and then, if necessary, seek to have the effect of such a "foreign prepack proceeding" enforced in the United States pursuant to an ancillary case under the new chapter 15 of the Bankruptcy Code (which recently replaced "ancillary proceedings" under former section 304). A successful ancillary case "recognizes" the effects of the debtor's foreign proceeding in the United States, thereby binding U.S. investors who might not otherwise be subject to the jurisdiction of the foreign insolvency proceeding.

This Article discusses these prepackaged restructuring options available to foreign debtors in need of U.S. enforcement of their restructurings, and highlights recent jurisprudential developments involving foreign debtor restructurings and the changes brought about by the 2005 amendments to the Bankruptcy Code.[2] Part I discusses considerations relevant to a foreign debtor's ability to implement a restructuring of its financial debt through a U.S. prepack, including threshold issues

---

restructuring and considering practicalities of out-of-court workouts under such circumstances); CHAPTER 11 THEORY AND PRACTICE: A GUIDE TO REORGANIZATION § 33.01 (James F. Queenan, Jr., Philip J. Hendel & Ingrid M. Hillinger eds., 1994) (confronting inadequacies of relying solely on laws of several countries in solving multinational liquidations); Richard M. Cieri, M. Natasha Labovitz & Jessica Basil, *Restructuring Bond Debt in the Global Marketplace*, *in* PLC CROSS-BORDER RESTRUCTURING AND INSOLVENCY HANDBOOK 33 (2004-05), *available at* http://media.gibsondunn.com/fstore/documents/pubs/Restructuring_Bond_Debt.pdf (commenting upon benefits of out-of-court restructuring, which include lower costs, ease in managing case, and less unfavorable publicity). A discussion of these out-of-court restructuring strategies is beyond the scope of this Article.

[2] The United States Congress significantly amended the Bankruptcy Code pursuant to The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter, the "2005 Bankruptcy Amendments"), which went into effect on October 17, 2005. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.). *See generally* 2 COLLIER ON BANKRUPTCY ¶ 1.02 [5] (Alan N. Resnick et al. eds., 15th ed. rev. 2006) [hereinafter COLLIER (15th ed.)] (referring specifically to National Bankruptcy Review Commission's report as origin of 2005 amendments); WILLIAM HOUSTON BROWN & LAWRENCE R. AHERN III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS 2d (2006) (addressing 2005 amendments to Bankruptcy Code and detailing their effects on both procedural and substantive bankruptcy issues in comparison to pre-amendment Code).

of bankruptcy jurisdiction and abstention principles that a court could use to refuse to exercise such jurisdiction over a foreign debtor, as well as an overview of the U.S. prepack procedure and relevant U.S. securities laws issues. Part II discusses ancillary cases and considerations relevant to a foreign debtor's ability to obtain enforcement and recognition of a consensual restructuring of its financial debt achieved in a foreign streamlined bankruptcy proceeding. Part III briefly addresses the possibility of implementing an expedited restructuring through concurrent proceedings in both the United States and the debtor's home country.

I. PLENARY PREPACKAGED BANKRUPTCY PROCEEDINGS EXCLUSIVELY IN THE UNITED STATES

A foreign debtor may avail itself of U.S. bankruptcy jurisdiction based upon the presence of *de minimus* property or a place where it conducts some (even minor) business in the United States. Based upon this simple nexus to the United States—and assuming there is no basis for the bankruptcy court to abstain from exercising jurisdiction—a foreign debtor may commence a plenary bankruptcy proceeding under either the reorganization (chapter 11) or the liquidation provisions (chapter 7) of the Bankruptcy Code. Chapter 11 offers foreign debtors the chance to reorganize their affairs pursuant to a flexible and predictable court-supervised process that may be more attractive than the alternatives available under the insolvency laws of the foreign debtor's home jurisdiction. It may also offer advantages not available in an ancillary case, such as an exemption from the U.S. securities laws and certain powers to avoid prior transactions or subordinate claims for the benefit of its creditors. Most importantly for purposes of this Article, chapter 11 provides a well-established procedure to implement a prepackaged chapter 11 reorganization that will bind the foreign debtor's U.S. creditors and other stakeholders who may be subject to the jurisdiction of the U.S. bankruptcy court.

The following discusses the basic principles related to the exercise of such bankruptcy jurisdiction and how it can be invoked to accomplish an efficient prepackaged restructuring of a foreign debtor's financial debt.

A. Bankruptcy Jurisdiction

Before a bankruptcy case may be heard, the court must have jurisdiction to hear the case. The United States District Courts are vested with original and exclusive jurisdiction over cases under chapters 7 and 11, as well as related civil proceedings in such cases.[3] This jurisdiction extends to property of the debtor's estate wherever

[3] *See* 28 U.S.C. § 1334 (2000) (providing district courts with original and exclusive jurisdiction of all cases under title 11); Hong Kong & Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 996–97 (9th Cir. 1988) (construing Bankruptcy Code as having extraterritorial effect with respect to certain actions taken against bankruptcy estate and to enforcement of discharge); Lykes Bros. S.S. Co. v. Hanseatic Marine Serv., (*In re* Lykes Bros. S.S. Co.), 207 B.R. 282, 287 (Bankr. M.D. Fla. 1997) ("[Bankruptcy courts have] exclusive and extraterritorial jurisdiction over . . . bankruptcy estate[s]."). What is commonly referred to as

located[4] and includes the power to hear all cases filed under chapter 7 or 11 and to make determinations regarding the proceedings therein, with certain limited exceptions.[5]

The bankruptcy courts, which were created by Congress in 1984, hear all bankruptcy cases, since all district courts have referred the day-to-day administration of chapter 7 and 11 cases and much of the trial responsibility that arises in such cases to the bankruptcy courts.[6] Although the district courts have the power to withdraw the reference of and to hear any part or all of any bankruptcy case or civil proceeding arising at *any time* during a bankruptcy case,[7] they rarely withdraw the reference and are only *required* to do so in limited circumstances.[8]

If a foreign proceeding has not yet been commenced or the foreign debtor desires to file concurrent plenary proceedings both in the United States and abroad, a foreign entity may, if certain conditions are met, commence a plenary case under chapter 7 (liquidation proceedings) or chapter 11 (reorganization proceedings) of

---

the "case" is the entire bankruptcy proceeding that adjudicates the whole financial relationship between a debtor and all of its creditors and other interest holders. The term "proceeding" is a subset of the case—a civil dispute that deals with particular legal issues and often involves the debtor and a specific individual creditor. Each bankruptcy "case" may involve many "proceedings." *See* Caldor Corp. v. Ozer Group (*In re* Caldor Corp.), 303 F.3d 161, 168 (2d Cir. 2002) ("'[C]ase' is a term of art in the bankruptcy context . . . [meaning] an 'umbrella litigation often covering numerous actions that are related only by the debtor's status as a litigant.'" (citation omitted)); Berge v. Sweet (*In re* Berge), 37 B.R. 705, 706 (Bankr. Wis. 1983) ("A bankruptcy 'case' commences with the filing of a petition . . . and may include a number of adversary proceedings . . . and 'contested matters' . . . ."); 2 COLLIER (15th ed.), *supra* note 2,¶ 301.03 (noting distinction between "case" and "proceeding" and defining latter as litigated matter arising during administration of estate); 1 COLLIER (15th ed.), *supra* note 2, ¶ 3.01 [3] (employing metaphor of "umbrella" when referring to "case" under title 11 because it encompasses all proceedings which follow filing of bankruptcy petition). A chapter 11 case ends when it is closed under section 350(a) of the Bankruptcy Code. *See* 11 U.S.C. § 350(a) (2006) (instructing court to close case after estate has been fully administered and the trustee has been discharged).

[4] 11 U.S.C. § 541 (2006) (defining property of bankruptcy estate broadly).

[5] Exceptions to a bankruptcy court's jurisdiction include personal injury claims and wrongful death claims. 28 U.S.C. § 157 (2000) (instructing district court to order personal injury tort and wrongful death claims to be tried in district court).

[6] 28 U.S.C. § 151 (2000) (designating bankruptcy court as constituting units of district court).

[7] *See* 28 U.S.C. § 157(d) (2000) (permitting district courts to withdraw any proceeding referred under section 157 for cause shown and in particular circumstances); *see also* 1 COLLIER (15th ed.), *supra* note 2, ¶ 3.04 (discussing circumstances under which district courts may employ discretion to withdraw reference).

[8] Such instances arise when "the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d) (2000). District courts and bankruptcy courts have the power, and indeed the duty, to determine their own jurisdiction. James C. Hill & Thomas E. Baker, *Dam Federal Jurisdiction*, 32 EMORY L.J. 3, 6–7 (1983) (quoting Edgar v. Mite Corp., 457 U.S. 624, 653 (1982)) ("Before a federal court exercises any governmental power, it has a duty to determine its own jurisdiction to act."). Such jurisdictional determinations can be made either upon the court's own motion or upon the timely motion of a party. 28 U.S.C. § 157(d) (2000) (granting district court power to withdraw any case or proceeding referred under section 157 on its own motion or that of any party). Such motion, either by the court or by a party, must be made with cause. *Id.* (requiring "cause shown" before district court may withdraw upon motion).

the Bankruptcy Code.[9] Such a case may be commenced either voluntarily by the foreign entity itself[10] or involuntarily by the entity's creditors or foreign representative.[11]

To qualify for relief under chapter 11, a debtor must meet the criteria set forth in section 109(a) of the Bankruptcy Code, which enumerates the eligibility requirements of a "debtor" under the Bankruptcy Code.[12] Section 109(a) provides,

---

[9] Courts have rejected the argument that section 304 of the Bankruptcy Code somehow implies a duty that foreign debtors must avail themselves of the bankruptcy laws in their home country before they can commence plenary bankruptcy proceedings in the United States. *See In re* Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1, 14–15 (Bankr. S.D.N.Y. 2003) (rejecting argument under section 304 that Colombian company's chapter 11 proceeding should be dismissed because debtor did not commence bankruptcy proceedings in Colombia); Tim Lyster, *Recent Decisions:* Aerovias Nacionales de Colombia S.A. Avianca and Avianca, Inc., 17 N.Y. INT'L L. REV. 211, 215 (2004) (arguing section 304 does not necessarily require debtor to file proceeding outside of United States first). Chapter 15 is an independent alternative for relief from a plenary proceeding. *See* 11 U.S.C. § 1511 (2006) (providing foreign representative may, upon recognition, commence voluntary or involuntary chapter 11 or 7 case); Evelyn H. Biery, Jason L. Boland & John D. Cornwell, *A Look at Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 47 B.C. L. REV. 23, 56 (2005) ("[U]pon recognition, a foreign representative may commence an involuntary case under section 303 or a voluntary case under section 301 or 302 if the foreign proceeding is a foreign main proceeding."); Lesley Salafia, Comment, *Cross-Border Insolvency Law in the United States and Its Application to Multinational Corporate Groups*, 21 CONN. J. INT'L L. 297, 320 (2006) (recognizing chapter 15 supplements foreign proceedings but also allows for commencement of plenary case).

[10] 11 U.S.C. § 301(a) (2006) ("A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter."). *See generally* Evans v. Hancock, Rothert & Bunshoft (*In re* Evans), 177 B.R. 193, 195 (Bankr. S.D.N.Y. 1995) (recognizing foreign entity could have filed voluntary petition under section 301); *In re* Alpern, 191 B.R. 107, 109 (N.D. Ill. 1995) (acknowledging section 301 is relevant section for voluntary petition for bankruptcy).

[11] 11 U.S.C. § 303 (2006) ("An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person . . . that may be a debtor under the chapter under which such case is commenced."). A creditor-initiated involuntary filing must be made by three or more qualifying creditors holding an aggregate of claims that must be at least $12,300.00 of unsecured debt. *Id.* If the debtor has fewer than twelve eligible creditors, however, an involuntary filing can be made by as few as one qualifying creditor, although that creditor must still meet the minimum amount threshold. *See* 11 U.S.C. § 303(b) (2006) (declaring involuntary case commenced against debtor depends on number of holders and aggregate amounts). A "qualifying creditor" is not defined, although section 303(b) provides that the only entities that can commence an involuntary case are those holding claims (or an indenture trustee representing the holders of such claims) that (i) are not contingent as to liability and (ii) are not subject to a bona fide dispute. *Id.* Upon "recognition" of a foreign proceeding in a chapter 15 case, the foreign representative has the power to initiate a voluntary or an involuntary chapter 11 case regarding the foreign debtor. 11 U.S.C. § 1511 (2006). Section 303(h) provides that a court will order relief against the debtor if the petition is not timely controverted (the time limit is fixed by the Rules of Bankruptcy Procedure) and only if the debtor is generally unable to pay its debts as they mature, or if a custodian was appointed during the 120-day period preceding the filing of the petition. 11 U.S.C. § 303(h) (2006); *see* 2 COLLIER (15th ed.), *supra* note 2, ¶ 303.14[1][b] (enumerating—as well as citing cases which support—considerations contemplated by courts when deciding whether). A foreign debtor is generally presumed not to be paying its debts as they become due when a foreign proceeding regarding such debtor has been recognized in a chapter 15 case. 11 U.S.C. § 1531 (2006); 8 COLLIER (15th ed.), *supra* note 2, ¶ 1531.01 (describing rebuttable presumption of debtor's insolvency under § 303); Salafia, *supra* note 9, at 323 (noting presumption only applies to involuntary cases under the Bankruptcy Code).

[12] *See* 11 U.S.C. § 109(a) (2006). Section 109 is "a rule of eligibility only. It means even though the court has jurisdiction over the subject matter . . . and over the person by the fact that the case is voluntary . . . the

in relevant part, that "only a person that *resides* or has a *domicile*, a *place of business*, or *property* in the United States . . . may be a debtor under this title."[13] "Person" is defined in the Bankruptcy Code to include (i) individuals, (ii) partnerships, and (iii) corporations, but in most situations, not a governmental unit.[14] A debtor voluntarily seeking relief under the Bankruptcy Code bears the burden of proving eligibility. The eligibility requirements examine the potential debtor's circumstances as of the date the bankruptcy petition is filed.[15]

Thus, a foreign debtor with substantially all of its assets and operations outside of the United States may qualify as an eligible chapter 7 or chapter 11 debtor if it has some property or a place of business in the United States. Each of these potential bases for eligibility is considered below.[16]

---

provisions of the Bankruptcy Code do not apply to that person." Bank of Am., N.T. & S.A. v. World of English, N.V., 23 B.R. 1015, 1020 (N.D. Ga. 1982); 2 COLLIER (15th ed.), *supra* note 2, ¶ 109.01[2] ("Section 109 is not characterized in terms of venue or jurisdiction by the statute itself, and it is clear that it is not jurisdictional. Section 109 is a rule governing eligibility for relief.").

[13] 11 U.S.C. § 109(a) (2006) (emphasis added). Additionally, section 109(b) *excludes* certain entities that would otherwise satisfy section 109(a) from being eligible as a debtor. 11 U.S.C. § 109(b) (2006). For example, section 109(b) renders, *inter alia*, foreign insurance companies, banks, savings banks, cooperative banks, savings and loan associations, building and loan associations, homestead associations or credit unions, *engaged in such business* in the United States ineligible for chapter 11 relief. *Id.* Railroads are excluded from chapter 7 relief, but may be debtors under chapter 11. *Id.*; *see In re* Eureka S. R.R., 177 B.R. 323, 324 (Bankr. N.D. Cal. 1995) (granting conversion of debtor's chapter 11 case to chapter 7 case because debtor was no longer a railroad); 2 COLLIER (15th ed.), *supra* note 2, ¶ 109.05[3] ("Although excluded from chapter 7 relief, a railroad may be a debtor under chapter 11."). Moreover, stockbrokers and commodity brokers do not qualify for chapter 11 relief, although they may be liquidated under chapter 7. 11 U.S.C. § 109(d) (2006); *see* Toibb v. Radloff, 501 U.S. 157, 161 (1991) (attributing exclusion of chapter 11 relief from stockbrokers and commodity brokers to Congress' intent to "restrict recourse to the avenues of bankruptcy relief"); Walter A. Effross, *Grammarians at the Gate: The Rehnquist Court's Evolving "Plain Meaning" Approach to Bankruptcy Jurisprudence*, 23 SETON HALL L. REV. 1636, 1670 (1993) (recognizing Bankruptcy Code prevents stockbrokers and commodity brokers from qualifying as debtors under chapter 11). In certain instances, an independent classification or determination by the bankruptcy court will have to be made to determine whether a debtor falls within these exclusions. *See, e.g.*, Selcke v. Medcare HMO, 147 B.R. 895, 899 (N.D. Ill. 1992) (deciding section 109(b) should be construed narrowly to determine that it "does not by its terms exclude HMOs").

[14] 11 U.S.C. § 101(41) (2006) (indicating which entities qualify as "persons" under Bankruptcy Code and which do not); 2 COLLIER (15th ed.), *supra* note 2, ¶ 101.41 (proposing governmental units were excluded "to avoid problems that might result if a municipality were incorporated, and thus legally a corporation as well as a governmental unit").

[15] *See In re* Global Ocean Carriers Ltd., 251 B.R. 31, 37 (Bankr. D. Del. 2000) ("The test for eligibility is as of the date the bankruptcy petition is filed."); *In re* Axona Int'l Credit & Commerce Ltd., 88 B.R. 597, 614–15 (Bankr. S.D.N.Y 1988), *aff'd*, 115 B.R. 442 (Bankr. S.D.N.Y. 1990) (holding debtor satisfied eligibility requirements "by the presence of [debtor's] bank account, as well as other property interests, in the United States at the time the [section] 304(b)(4) petition was filed"); *see also* 11 U.S.C. § 109(e) (2006) (requiring individual to satisfy eligibility requirements "on the date of the filing of the petition" to be debtor under chapter 13). When a group of affiliated entities file for bankruptcy, the parent and each subsidiary and affiliate must independently satisfy section 109's eligibility requirements. *See* 11 U.S.C. § 109(a) (2006) (specifying singular "person" must satisfy requirements to be debtor); *In re Global Ocean*, 251 B.R. at 37 (explaining parent and subsidiary must each meet eligibility requirements (citing *Bank of Am.*, 23 B.R. at 1019–21)).

[16] A debtor may commence a chapter 11 case in the district court for the district where, during the 180 days immediately preceding such commencement of the case (or a longer period of such 180 days than any other district), the debtor (i) was domiciled (in the case of a corporation, domicile is generally held to be its

1. "Place of Business" in the United States

To qualify as having a "place of business in the United States," the potential debtor must maintain a *physical location* in the United States where the debtor conducts business.[17] Generally, the mere fact of having some business in the United States or being present in the United States while doing business in the United States will not satisfy section 109.[18] However, the United States location need not be the debtor's principal place of business,[19] and compliance with applicable state or federal laws regulating business entities, such as filing tax returns, registering to do business in a particular state, or applying and obtaining business or operating

---

state of incorporation, which will not be relevant in the case of a foreign debtor), (ii) maintained a residence, (iii) maintained its principal place of business in the United States, or (iv) maintained its principal assets in the United States. *See* 28 U.S.C. § 1408 (2000) (providing venue provisions for cases under title 11). The reference to "principal" place of business or assets refers only to the principal location of business or assets of that portion of the debtor's business or assets that are maintained within the United States, irrespective of any place of business or location of assets that the debtor may maintain outside of the United States. *See, e.g.*, Commonwealth of Puerto Rico v. Commonwealth Oil Refining Co. (*In re* Commonwealth Oil Refining Co.), 596 F.2d 1239, 1246 (5th Cir. 1979) (concluding Texas was company's principal place of business even though much of manufacturing and sales were in Puerto Rico); *In re* Paper I. Partners, L.P., 283 B.R. 661, 672 (Bankr. S.D.N.Y. 2002) (explaining partnership needs only place of business in United States to qualify as debtor under section 109); *In re* Brierley, 145 B.R. 151, 161 (Bankr. S.D.N.Y. 1992) (concluding English corporation had place of business in United States because, among other reasons, it hired accountant in New York to act on behalf of joint administrators). Additionally, a debtor may (but is not required to) file a chapter 11 case in the district in which one (or more) of its affiliates already (or concurrently) has a title 11 case pending. *See* Haas v. Gerstel, 134 F.2d 803, 804 (5th Cir. 1943) (determining debtor could file chapter 11 in either the district where she was domiciled or the district where pending bankruptcy petition was filed against her affiliate).

[17] *See In re Paper I Partners*, 283 B.R. at 673 (stating under section 109, "the requirement is for *a place of business*, rather than *doing busines*s . . . ."); *In re* Head, 223 B.R. 648, 651–52 (Bankr. W.D.N.Y. 1998) (finding sufficiency in "doing business" for purposes of fulfilling requirements of section 109 both improperly interprets statute as well as declines to follow Congressional intent, believing it should rather be equated with property ownership); *In re Brierley*, 145 B.R. at 161 (concluding English corporation had place of business in United States where its New York accountant performed accounting services for the corporation).

[18] *See In re Paper I Partners*, 283 B.R. at 73 (stating debtor must have place of business in United States and not just perform business in United States); *In re Global Ocean*, 251 B.R. at 37 ("Having some business in the United States (and even being physically present in the United States for 30% of the year) is insufficient to constitute having a place of business in the United States."); *In re Head*, 223 B.R. at 651–52 ("No amount of doing business in the United States will, of itself, provide a basis for eligibility under [section] 109."). However, in a recent unreported decision regarding the section 109 eligibility of a Bermudan company with all of its assets and operations located in Estonia, the court held that the "place of business" requirement was satisfied based upon the fact that the foreign debtor had negotiated contracts in the United States. *See* Transcript of Hearing at 181; *In re* Galvex Captial, LLC, (No. 06-10082) (Bankr. S.D.N.Y. March 1, 2006) (concluding debtors had place of business in United States through, among other things, performing contract-formation functions in their New York office).

[19] *See In re Paper I Partners*, 283 B.R. at 672 ("The Court does not need to decide, and does not decide, whether the [debtor's] *principal* place of business is in the United States, because that is not what section 109 requires."); *In re Brierley*, 145 B.R. at 158–62 (holding foreign debtor had "place of business" by virtue of accountant's continuous presence and employment and substantial activities conducted in New York by foreign debtor, "notwithstanding that its premises are contained within the larger premises of [the accountant's firm]").

licenses for the place of business, is not necessary for purposes of section 109.[20] At least one case has indicated that the debtor itself need not conduct business at the location in the United States, so long as business is conducted there on the debtor's behalf.[21] It should be noted, however, that at least one court has suggested, in dicta, that the "place of business" should involve "substantive business" and not merely "administrative" matters.[22]

2. "Property" in the United States

Even without a place of business in the United States, a foreign entity may nonetheless qualify as a "debtor" by virtue of owning property located in the United States.[23] The following, either on their own or in conjunction with other things, have been found to satisfy section 109's "property" criteria: (i) bank accounts,[24] (ii)

---

[20] *See In re* Spanish Cay Co., 161 B.R. 715, 721 (Bankr. S.D. Fla. 1993) (concluding debtor had place of business in Florida even though debtor did not (i) file tax returns, (ii) register to do business in Florida, and (iii) register for appropriate business license for its Florida offices); *In re Brierley*, 145 B.R. at 161 (granting New York jurisdiction over debtor incorporated in England).

[21] *See In re* Carnera, 6 F. Supp. 267, 268–69 (S.D.N.Y. 1933) (holding foreign debtor had place of business in United States because debtor's manager maintained files, negotiated contracts and paid trainers in New York hotel); *see also* N.Y. Credit Men's Adjustment Bureau, Inc. v. C.I.T. Corp. (*In re* Mimshell Fabrics, Ltd.), 491 F.2d 21, 23 (2d Cir. 1974) (finding debtor had second place of business at another company office even though there was no indication debtor was ever physically present at that office).

[22] *In re Paper I Partners*, 238 B.R. at 673–74 (finding alleged debtors had place of business in New York from which it conducted substantive, not just administrative, business).

[23] 11 U.S.C. 109(a) (2006) (stating debtor possessing property in United States qualifies for bankruptcy under title 11); *see* GMAM Inv. Funds Trust v. Globo Communicacoes e Participacoes S.A. (*In re* Globo Communicacoes E Participacoes S.A.), 317 B.R. 235, 239 (Bankr. S.D.N.Y. 2004) ("For a foreign corporation to qualify under Section 109, courts have required only nominal amounts of property to be located in the United States, and have noted that there is 'virtually no formal barrier' to having federal courts adjudicate foreing debtors bankruptcy proceedings."); Erin K. Healy, Note, *All's Fair in Love and Bankruptcy? Analysis of the Property Requirement for Section 109 Eligibility and its Effect on Foreign Debtors Filing in U.S. Bankruptcy Courts*, 12 AM. BANKR. INST. L. REV. 535, 535–36 (2004) ("The plain language of section 109 permits a debtor—with no home, contacts or business in the United States—to utilize the Bankruptcy Code to protect assets, reject contracts, or avoid preferential transfers, as long as the debtor owns 'property' in the United States."). The "property" basis for U.S. bankruptcy jurisdiction has long historical roots, including under section 2(a)(1) of the former Bankruptcy Act, which permitted filings by persons "who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction [in the U.S.]." 11 U.S.C. § 11 (1976) (current version at 11 U.S.C. § 109(a) (2006)); 2 COLLIER (15th ed.), *supra* note 2, ¶ 109.LH ("Section 109, as originally enacted in 1978, was based in part on Section 2a(1) of the former Bankruptcy Act."); *see also In re* Neidecker, 82 F.2d 263, 264 (2d Cir. 1936) (explaining jurisdiction granted to bankruptcy courts under section 2 of former Bankruptcy Act); *In re* Berthoud, 231 F. 529, 532 (S.D.N.Y. 1916) (holding "residence or domicile or the locus of the principal place of business is immaterial if there is property within the United States" under section 2 of former Bankruptcy Act).

[24] *See In re* Yukos Oil Co., 321 B.R. 396, 406–07 (Bankr. S.D. Tex. 2005) (upholding eligibility under section 109 where corporate debtor maintained deposits at bank within United States); *In re* Global Ocean Carriers Ltd., 251 B.R. 31, 38–39 (Bankr. D. Del. 2000) (finding bank accounts within United States to constitute "property" within meaning of section 109, "regardless of how much money was actually in them on the petition date"); *In re Spanish Cay*, 161 B.R. at 722 (acknowledging United States bank accounts as "property" under section 109); Bank of Am., N.T. & S.A. v. World of English, N.V., 23 B.R. 1015, 1019–23 (N.D. Ga. 1982) (concluding bank accounts in California constitute "property" under section 109).

originals of the debtors' books and records, where the debtor would not expect the return of the documents to another country,[25] (iii) the unearned portion of retainers paid to the debtor's bankruptcy counsel that were held in escrow in the United States by the debtor's bankruptcy counsel,[26] (iv) marketing and advertising materials,[27] (vi) equipment,[28] and (vii) accounts receivable owed to the foreign debtor by a party that is located in the United States.[29]

Bank accounts are the most common form of property relied upon to establish eligibility as a debtor. Bank accounts are deemed to be located at the situs of the bank, and bankruptcy courts have been willing to entertain chapter 11 cases brought by foreign debtors where the only nexus to the United States is a clearing account or bank account.[30] The amount in the account is generally irrelevant because the language of section 109 on its face does not impose a minimum value

---

[25] *See In re Paper I Partners*, 283 B.R. at 674 ("[O]riginal business documents are property of the estate for the purposes of section 109."); *In re Global Ocean*, 251 B.R. at 37–38 (finding *copies* of debtor's business documents, books and records, of which debtor did not expect return of, not to qualify as "property of the Debtors for purposes of establishing eligibility to file bankruptcy in the United States"); *see also* Marc Solomon, *Foreign Companies and Affiliates under § 109: The Benefits and Risks of "Manufactured" Eligibility*, AM. BANKR. INST. J., Sept. 2004, at 26 (suggesting locating original business documents of foreign affiliates with U.S. parent company will fulfill "property" requirement of section 109).

[26] *See In re Global Ocean*, 251 B.R. at 39 (classifying debtors' interest in escrow funds which were paid to counsel on behalf of all debtors as "property" under section 109); *see also* Healy, *supra* note 23, at 545–46 ("[A] retainer for U.S. attorneys with some balance remaining has been held to be property of the debtor for the purposes of eligibility [under section 109(a)] . . . ."); Solomon, *supra* note 25, at 58 ("[C]ourts have found that the unused retainer paid to bankruptcy counsel in anticipation of filing for bankruptcy constitutes sufficient property to meet the criteria under [section] 109.").

[27] *See In re Spanish Cay*, 161 B.R. at 721–22 (concluding section 109(a) satisfied where debtor owns marketing and advertising materials, as well as equipment on houseboat and bank account, located in United States); *see also* Healy, *supra* note 23, at 545–46 & n.60 (including advertising and marketing materials within "certain classes of documents [that] have been considered property sufficient to gain access to the Code" (citing *In re Spanish Cay*, 161 B.R. at 721–22)).

[28] *See In re Spanish Cay*, 161 B.R. at 721–22 (including equipment as "property" within meaning of section 109). *But see In re Global Ocean*, 251 B.R. at 37–38 (refusing to treat foreign debtor's marine vessels as "property" because merely having used some of such vessels to visit United States ports is insufficient under section 109).

[29] *See In re* World of English, N.V., 16 B.R. 817, 819 (N.D. Ga. 1982) (concluding since account debtors of alleged debtors are located in United States, situs of these accounts is in United States and therefore constitute "property in the United States" under section 109); *see also* Transcript of Hearing at 180–82, *In re* Galvex Captial, LLC, (No. 06-10082) (Bankr. S.D.N.Y. March 1, 2006) (concluding "property" requirement of section 109 satisfied based upon potential claims against former director who resided in United States); David Costa Levenson, LLM Thesis, *Proposal for Reform of Choice of Avoidance Law in the Context of International Bankruptcies from a U.S. Perspective*, 10 AM. BANKR. INST. L. REV. 291, 316–17 (2002) (noting in one case, "property recoverable under U.S. avoidance provisions (sections 547, 548) qualified as property under section 109(a).").

[30] *See In re* Yukos Oil Co., 321 B.R. 396, 406–07 (Bankr. S.D. Tex. 2005) (upholding jurisdiction under section 109 based solely upon debtor's interest in its wholly-owned subsidiary's bank account); *see also In re* Cenargo Int'l, PLC, 294 B.R. 571, 603 (Bankr. S.D.N.Y. 2003) (acknowledging debtor is eligible for chapter 11 relief because he had bank account and stocks in United States); Bank of Am., N.T. & S.A. v. World of English, N.V., 23 B.R. 1015, 1023 (Bankr. N.D. Ga. 1982) (concluding bank account located in United States satisfied property requirement to declare bankruptcy under section 109).

requirement.[31] Therefore, courts generally do not examine the quantity (or monetary value) of the debtor's property in the United States when determining eligibility under section 109.[32] However, a mere claim or expectation to property (e.g., the excess distribution, if any, of a trust fund) generally does not constitute "property in the United States" for purposes of section 109, because such a claim or expectation is a mere contingency and not an actual property interest.[33]

Although it has not been the specific holding of any reported decision regarding the extent of a potential debtor's "property" within the United States necessary to satisfy section 109, courts have suggested that a debtor cannot open a bank account or place property in the United States solely to manufacture bankruptcy jurisdiction, and that "attention must be paid to the circumstances under which the property has

---

[31] *See In re Global Ocean*, 251 B.R. at 39 ("[W]e conclude that the bank accounts constitute property in the United States for purposes of eligibility under section 109 of the Bankruptcy Code, regardless of how much money was actually in them on the petition date."); *In re* McTague, 198 B.R. 428, 431–32 (Bankr. W.D.NY. 1996) (finding $194 in bank account qualifies debtor under section 109 to file chapter 7 case); Solomon, *supra* note 25, at 26 (stating there is no minimum value requirement to satisfy the ownership of property provision under section 109).

[32] *See In re Yukos*, 321 B.R. at 406–07 (indicating several courts have held nominal amounts of property situated in United States sufficient to qualify foreign corporation as debtor under section 109(a)); GMAM Inv. Funds Trust v. Globo Communicacoes e Participacoes S.A. (*In re* Globo Communicacoes E Participacoes S.A.), 317 B.R. 235, 249 (Bankr. S.D.N.Y. 2004) (noting courts have required only nominal amounts of property to be situated in United States for foreign corporation to qualify as debtor under section 109); *In re* Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1, 8–9 (Bankr. S.D.N.Y. 2003) (noting courts have "construed the 'property' requirement with respect to foreign corporations and individuals [and] have found the eligibility requirement satisfied by even a minimal amount of property located in the United States."); *In re* Iglesias, 226 B.R. 721, 722–23 (Bankr. S.D. Fla. 1998) (finding $522.00 in bank account is "property" under section 109 sufficient to establish eligibility as debtor); *In re McTague*, 198 B.R. at 432 (finding section 109 "seems to have such a plain meaning as to leave the Court no discretion to consider whether it was the intent of Congress to permit someone to obtain a bankruptcy discharge solely on the basis of having a dollar, a dime or a peppercorn located in the United States."); Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, 15 J. BANKR. L. & PRAC. 145, 169 (2006) ("[E]ven a miniscule amount of U.S. property may be sufficient to sustain jurisdiction in the U.S. courts under [section] 109 of the Bankruptcy Code . . . ."). *But see In re* Kava Bowl, 41 B.R. 244, 246–47 (Bankr. D. Haw. 1984) (finding section 109 not met where putative debtor kept accounting records, some cash in bank accounts, and collection of some accounts receivable in Hawaii). However, the quantum of property of the foreign debtor in the United States will be a significant factor relevant to whether a court will abstain from exercising jurisdiction even where section 109 has been satisfied. *See In re* Bd. of Dirs. of Multicanal S.A., 314 B.R. 486, 523 (Bankr. S.D.N.Y. 2004) (dismissing involuntary petition under section 305 abstention power where foreign debtor had only $9,500 in bank accounts in the United States and therefore United States reorganization was likely objectively futile). *But see Globo Comunicacoes*, 317 B.R. at 254 ("These considerations, however, should not by themselves prevent a federal court from exercising the full measure of authority granted to it by the Constitution and by Congress to enforce federal bankruptcy law."). For a further discussion of abstention, see also *infra* Part I.B.1.

[33] *See In re* Paper I Partners, L.P., 283 B.R. 661, 674 (Bankr. S.D.N.Y. 2002) ("[P]roperty in the United States must be real and cannot be 'some type of remote or inchoate claim against property in the United States' . . . ." (quoting *In re* Head, 223 B.R. 648, 652 (Bankr. W.D.N.Y. 1998))); *see also In re Head*, 223 B.R. at 652 (claim to trust fund is located wherever claimant resides, "not where the trust fund resides, even if the claims may only be *asserted* in the place where the trust fund resides."). *But see In re Yukos*, 321 B.R. at 407 (finding debtor's beneficial interest in funds purportedly transferred to account of affiliate and held on debtor's behalf to be "property in the United States" to support bankruptcy jurisdiction).

arrived [in the United States] or left [the United States]."[34] Aside from these statements, however, there is no formal barrier to a foreign entity commencing a case under chapter 11 if it has *some* property in the United States.[35]

Finally, it bears noting that a foreign entity filing for relief under the Bankruptcy Code is not forced to wait until it is insolvent before filing under chapter 11. Although not specifically addressed by section 109, a voluntary chapter 11 debtor is not required to be insolvent to be eligible for relief.[36] However, many courts will

---

[34] *In re McTague*, 198 B.R. at 432; *see In re Head*, 223 B.R. at 652 ("To make the record clear, if these Debtors were to continue to assert eligibility by virtue of having acquired U.S. mailing addresses and opening small bank accounts in the U.S., then this Court would directly hold that one cannot so manufacture eligibility . . . ."); *Bank of Am*., 23 B.R. at 1023 (finding since "there [was] no evidence that the bank account was transferred from Japan to California merely to create jurisdiction for a future bankruptcy proceeding involving debtors" debtors satisfied eligibility requirements of section 109). In the *Yukos* case, the court did not address the issue of "manufactured" jurisdiction in connection with its conclusion that bank accounts in the United States satisfied section 109 jurisdiction; but in abstaining from exercising such jurisdiction pursuant to section 1112(b) of the Bankruptcy Code (discussed more fully *infra* Part I.B.2), the court specifically cited (as a reason to dismiss the bankruptcy) the fact that such bank account was established in the United States less than one week before the bankruptcy filing and that it was primarily established for the purpose of creating bankruptcy jurisdiction. *In re Yukos*, 321 B.R. at 410–11 (analyzing cause for dismissal).

[35] *See* 2 COLLIER (15th ed.), *supra* note 2, ¶ 109.02[3] (discussing various types of property recognized by bankruptcy courts); *In re Globo Comunicacoes*, 317 B.R. at 249 (stating there is "virtually no formal barrier" for foreign debtors to file bankruptcy as long as they have some property in United States). In addition to subject matter jurisdiction discussed above, a court must have personal jurisdiction over the debtor to hear its case, which requires proof that (i) proper service of process has been effected or that the debtor waives any defects in services; (ii) the debtor has engaged in conduct establishing minimum contacts with the United States; and (iii) the exercise of jurisdiction over the debtor is fair and reasonable. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–21 (1945) (establishing personal jurisdiction under due process of U.S. Constitution). Generally, personal jurisdiction is only an issue in an involuntary bankruptcy proceeding. *See Globo Comnicacoes*, 317 B.R. at 252 (indicating when bankruptcy court is not able to exercise personal jurisdiction over debtor in involuntary bankruptcy case, it may exercise in rem jurisdiction only over debtor's assets within court's jurisdiction). In a voluntary case, the debtor consents to the bankruptcy court's personal jurisdiction. *See* Estrada v. Ahrens, 296 F.2d 690, 694 (5th Cir. 1961) ("[T]he act of the plaintiffs in bringing suit automatically establishes consent to jurisdiction."); Am. Export Group Int'l Services, Inc. v. Zueblin (*In re* Am. Export Group Int'l Services, Inc.), 167 B.R. 311, 313 (Bankr. D.C. 1994) ("A party who files a complaint is viewed as having submitted to personal jurisdiction in that forum."). Moreover, the jurisdictional requirements of a "case or controversy" under article III of the U.S. Constitution similarly apply to bankruptcy proceedings even where section 109 is satisfied. *See* Wolff v. Cash 4 Titles, 351 F.3d 1348, 1353 (11th Cir. 2003) (quoting Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102–04 (1998)) (explaining satisfying constitutional requirements of standing contains three requirements including injury in fact which is concrete and actual or imminent harm, causation with fairly traceable connection, and redressibility with likelihood relief for alleged injury); *In re Yukos*, 321 B.R. at 406 (citing Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950)) (requiring entity commencing bankruptcy petition to have standing to sue); *In re* McCartney, 336 B.R. 588, 592 (Bankr. M.D. Ga. 2006) (dismissing movant's motion because movant could not show he sustained actual or imminent harm).

[36] *See* 2 COLLIER (15th ed.), *supra* note 2, ¶ 109.03[2] (remarking legislative attempts to set minimum debt requirement were unsuccessful because it would be unnecessary burden on debtors); s*ee also In re* Beck Rumbaugh Assocs. Inc., 49 B.R. 920, 921–22 (Bankr. E.D. Pa. 1985) (rejecting movant's argument to dismiss bankruptcy case because of insolvency); Robert J. Keach, *Solvent Debtors and Myths of Good Faith and Fiduciary Duty*, AM. BANKR. INST. J., Dec.–Jan. 2005, at 36 (discussing absence of insolvency prerequisite to filing of chapter 11 case). By contrast, insolvency is a factor considered in an involuntary chapter 11 case because an order for relief granting the involuntary petition will not be issued where "the debtor is generally not paying such debtor's [undisputed] debts as they become due . . . ." 11 U.S.C. § 303(h)(1) (2006); *see* Liberty Tool, & Mfg. v. Vortex Fishing Sys. (*In re* Vortex Fishing Sys.), 277 F.3d 1057,

examine whether the debtor commenced its bankruptcy proceeding "in good faith" and may dismiss a bankruptcy commenced by a debtor that is not experiencing some level of "financial difficulty" (although less than insolvency).[37] By contrast, an ancillary case under chapter 15 is available only where there is a "foreign proceeding" pending, and the bankruptcy laws of other countries often only apply where the debtor is, in fact, insolvent.

B. Abstention from Exercising Bankruptcy Jurisdiction

Even if a bankruptcy court determines that it has jurisdiction over a case and the putative debtor is qualified under section 109 to commence a plenary bankruptcy case under the Bankruptcy Code, the bankruptcy court, either on its own or on motion by a party, may nevertheless abstain from exercising jurisdiction over an otherwise proper bankruptcy case pursuant to sections 305[38] and 1112(b)[39] of the Bankruptcy Code.

1072 (9th Cir. 2001) (upholding bankruptcy court's decision not to grant relief for involuntary petition because there was sufficient evidence alleging debtor was making its payments as they became due); *In re* Taylor, 75 B.R. 682, 683 (Bankr. N.D. Ill. 1987) ("The theory supporting the first requirement for involuntary bankruptcy (the debtor general is not paying his debts) is simple . . . . When the debtor cannot pay his or her debts, bankruptcy should be an available alternative for creditors.").

[37] *See* 11 U.S.C. § 303(h) (1) (2006); NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (*In re* Integrated Telecom Express, Inc.), 384 F.3d 108, 129 (3d Cir. 2004) (holding chapter 11 filing to be in bad faith where debtor was fully solvent and not experiencing any financial distress); *In re* SGL Carbon Corp., 200 F.3d 154, 164 (3d Cir. 1999) (ruling bankruptcy petition not filed in "good faith" where putative debtor experienced no financial difficulty at time of filing nor any significant managerial distraction); Baker v. Latham Sparrowbush Assocs. (*In re* Cohoes Indus. Terminal, Inc.), 931 F.2d 222, 228 (2d Cir. 1991) ("Although a debtor need not be *in extremis*…it must, at least, face such financial difficulty that, if it did not file at that time, it could anticipate the need to file in the future"); *In re* Coastal Cable T.V., Inc., 709 F.2d 762, 764 (1st Cir. 1983) (stating although Bankruptcy Code does not require insolvency, putative debtor must at least owe debts); s*ee also In re* Purpura, 170 B.R. 202, 207 (Bankr. E.D.N.Y. 1994) (finding debtor's solvency and financial condition "negate[d] any legitimate reorganization purpose" and ordering bad-faith dismissal).

[38] 11 U.S.C. § 305 (2006) ("The court, after notice and a hearing, may dismiss a case under this title . . . ."); s*ee In re* NRG Energy, Inc., 294 B.R. 71, 79 (Bankr. D. Minn. 2003) (stating bankruptcy courts have authority over all "cases under the Bankruptcy Code and all civil proceedings arising in them . . . [u]nder [section] 305(a), however, the bankruptcy court may decline to exercise that jurisdiction, relegating a debtor and its creditors to the governance of non-bankruptcy law"); *In re* Duratech Indus., 241 B.R. 283, 287 (E.D.N.Y. 1999) (noting bankruptcy court's significant discretion to dismiss or suspend cases under 11 U.S.C. § 305); *In re* Coram Graphic Arts, 11 B.R. 641, 645–46 (Bankr. E.D.N.Y. 1981) (holding chapter 11 proceedings can be dismissed *sua sponte* as per sections 105, 305 and 1112(b) of Bankruptcy Code).

[39] 11 U.S.C. § 1112(b); *see In re Yukos*, 321 B.R. at 410 (stating court can dismiss case for enumerated reasons in 1112(b)(4) and for any other reason court deems sufficient); Blumenberg v. Yihye (*In re* Blumenburg), 263 B.R. 704, 712 (Bankr. E.D.N.Y. 2001) ("It is well-settled law in this circuit that under section 1112(b) of the Bankruptcy Code, a bankruptcy court may *sua sponte* dismiss as a bad faith filing a chapter 11 petition . . . ."); *In re Coram Graphic Arts*, 11 B.R. at 646 (holding, as per sections 105, 305 and 1112(b) of Bankruptcy Code, chapter 11 proceedings can be dismissed *sua sponte*).

1. Abstention Under Section 305

Section 305(a) of the Bankruptcy Code recognizes that there are situations where it would be proper for the bankruptcy court, in response to a motion or *sua sponte*, to abstain from exercising otherwise proper bankruptcy jurisdiction and authorizes courts to suspend or dismiss bankruptcy cases where appropriate.[40] A bankruptcy court's decision to abstain from hearing a case is made on a case-by-case basis—examining the facts of the individual case—and rests within the Court's sound discretion. Because such suspension or dismissal pursuant to section 305 is subject to extremely limited appellate review,[41] it is generally recognized that suspension or dismissal pursuant to section 305 is a power that should be exercised only under extraordinary circumstances.[42]

---

[40] 11 U.S.C. 305(a) (2006). Section 305(a) states:

> The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
>
> (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or
>
> (2) (A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and
>
> (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.

Id.; *see also In re Duratech Indus.*, 241 B.R. at 287 (stating bankruptcy courts have significant discretion to dismiss or suspend cases under section 305 of Bankruptcy Code); *In re* Axona Int'l Credit & Comm., Ltd., 88 B.R. 597, 608 (Bankr. S.D.N.Y. 1988) (citing authority to dismiss or suspend proceedings pending foreign court's decision in same matter granted by section 305(a)). *See generally In re NRG Energy*, 294 B.R. at 86 (holding "[c]onsiderations of cost, efficiency, latitude in action, and likelihood of better outcome all support [the] conclusion" that courts abstain from exercising bankruptcy jurisdiction pursuant to section 305(a) in this matter).

[41] 11 U.S.C. § 305(c) (2006) ("An order under subsection (a) . . . dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals . . . or by the Supreme Court of the United States under section 1254 of title 28."); *see also In re* Axona Int'l Credit & Comm., Ltd., 924 F.2d 31, 35 (2d Cir. 1991) ("The enactment of this section [305(c)] has thus limited non-reviewability to the court of appeals and the Supreme Court and, by implication, left intact the possibility of district court review of [section] 305(a) decisions when made by the bankruptcy court."); Goerg v. Parungao (*In re* Goerg), 930 F.2d 1563, 1566 (11th Cir. 1991) ("By omitting any reference to the district courts in the amendment, Congress limited only the jurisdiction of the Court of Appeals and the Supreme Court to review a bankruptcy court's section 305 order, but not the jurisdiction of the district court to review such an order."); *In re* Andy Frain Servs., 798 F.2d 1113, 1123 (7th Cir. 1986) (stating Seventh Circuit has no jurisdiction to review lower court's refusal to dismiss bankruptcy case).

[42] *See* GMAM Inv. Funds Trust v. Globo Communicacoes e Participacoes S.A. (*In re* Globo Communicacoes E Participacoes S.A.), 317 B.R. 235, 255 (Bankr. S.D.N.Y. 2004) ("Courts that have construed [s]ection 305(a)(1) are in general agreement that abstention in a properly filed bankruptcy case is an extraordinary remedy . . . ."); *In re* Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1, 9 (Bankr. S.D.N.Y. 2003) (noting section 305 dismissal is "extraordinary relief"); *see also* Barnett v. Edwards (*In re* Edwards), 214 B.R. 613, 620 (B.A.P. 9th Cir. 1997) ("Abstention under [section] 305 in a properly filed bankruptcy case is an extraordinary remedy . . . .").

a. Abstention Under Section 305(a)(1)

Section 305(a)(1) of the Bankruptcy Code provides that the court may dismiss or suspend a case if "the interests of creditors *and* the debtor would be better served by such dismissal or suspension . . . ."[43] Therefore, abstention under this section is warranted only if it will serve the best interests of *both* the debtor and its creditors.[44] Abstention is not appropriate where it would serve the interests of only one creditor to the detriment of the debtor and/or all other creditors.

Although the Bankruptcy Code does not establish criteria or guidelines in determining when abstention would be appropriate under section 305(a)(1), courts generally weigh a number of factors in determining whether abstention would "better serve" the interests of the debtor and creditors, including: (i) judicial economy and efficiency of administration; (ii) whether another forum is available to protect the interests of both parties; (iii) whether federal/U.S. bankruptcy proceedings are necessary to reach a just and equitable solution; (iv) whether there is an alternative means of achieving an equitable distribution of assets; (v) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement that better serves all interests in the case; (vi) whether a non-federal/non-U.S. insolvency action has proceeded so far that it would be costly and time consuming to start afresh with a federal/U.S. bankruptcy process; and (vii) the purpose for which bankruptcy jurisdiction has been sought.[45] Courts generally give the first factor the most weight.[46]

---

[43] 11 U.S.C. § 305(a) (2006) (emphasis added); *see In re* Uno Broadcasting Corp., 167 B.R. 189, 200 (Bankr. D. Ariz. 1994) (denying motion for abstention because it would not benefit all creditors); *In re* Colonial Ford, Inc., 24 B.R. 1014, 1023 (Bankr. D. Utah 1982) (holding out-of-court settlement was more beneficial to both creditors and debtor than bankruptcy proceedings); *see also Edwards*, 214 B.R. at 620 ("[D]ismissal is appropriate under [section] 305 only in those instances where the court finds that both creditors and the debtor will be better served by abstention or dismissal.").

[44] *See Globo Comunicacoes*, 317 B.R. at 255 (quoting *In re* RAI Mktg. Services, Inc., 20 B.R. 943, 945–46 (Bankr. D. Kan. 1982)) (finding "both 'creditors and the debtor' [must] be 'better served' by a dismissal"); *In re Avianca*, 303 B.R. at 9 ("The test under [section] 305(a)(1), however, is whether 'both the 'creditors and the debtor' would be better served by a dismissal.'" (quoting Eastman v. Eastman (*In re* Eastman), 188 B.R. 621, 624–25 (B.A.P. 9th Cir. 1995))). *See generally In re* Martin-Trigona, 35 B.R. 596, 598–601 (Bankr. S.D.N.Y. 1983) (analyzing Congress' intent in enacting section 305).

[45] *See Globo Comunicacoes*, 317 B.R. at 255–56 (discussing relevant factors under section 305(a)(1)); *In re* Bd. of Dirs. of Multicanal S.A., 314 B.R. 486, 521–23 (Bankr. S.D.N.Y. 2004) (dismissing involuntary chapter 11 petition against Argentine debtor under section 305(a)(1) and discussing relevant factors); *In re* Paper I Partners, 283 B.R. 661, 678 (Bankr. S.D.N.Y. 2002) (enumerating factors considered in section 305(a) dismissal); *In re* 801 S. Wells St. Ltd. P'ship, 192 B.R. 718, 723 (Bankr. N.D. Ill. 1996) (listing criteria in determining "whether abstention would 'better serve' the interests of the debtor and creditors"); *In re* RCM Global Long Term Capital Appreciation Fund, Ltd., 200 B.R. 514, 524–26 (Bankr. S.D.N.Y. 1996) (describing factors courts use to determine whether to dismiss or abstain from hearing bankruptcy case under section 305(a)).

[46] *See In re Avianca*, 303 B.R. at 11 n.12 (remarking "the court shall be guided by what will best assure an economical and expeditious administration of [an] estate" in examining if abstention is appropriate); *In re Paper I Partners*, 283 B.R. at 679 (labeling "economy and efficiency of administration" as "primary consideration" when considering section 305(a) abstention); *In re RCM Global*, 200 B.R. at 524–25 (deciding whether or not court should dismiss or abstain from hearing bankruptcy case by considering,

The most common fact patterns in which section 305(a)(1) is invoked include: (i) where hold-out creditors commence an involuntary case during an out-of-court workout to extract more favorable terms; (ii) where there is an absence of a true bankruptcy purpose (such as debt adjustment, breathing spell from creditors or need for discharge and fresh start), especially in those instances where an involuntary petition was filed by a creditor to obtain a disproportionate advantage over other creditors; (iii) where a chapter 11 bankruptcy proceeding would be duplicative and wasteful of a state law or foreign liquidation proceeding already in place; and (iv) where the bankruptcy case constitutes a two-party dispute between the debtor and a single creditor, such as the case where all but one creditor of a debtor have agreed to defer collection of their debts from the debtor.[47]

Section 305(a)(1)'s applicability has arisen in three recent cases involving foreign debtor restructurings. Two of these cases involved the restructurings of bond debt of foreign debtors with nominal assets in the United States, where U.S.

---

among other factors, whether it would be efficient to proceed); *In re 801 S. Wells St.*, 192 B.R. at 723 (highlighting "economy and efficiency of administration" as first factor analyzed for section 305(a) abstention); *In re* Grigoli, 151 B.R. 314, 320 (Bankr. E.D.N.Y. 1993) (specifying "economy and efficiency of administration" as factor utilized in determining if case may be dismissed under section 305(a)); *In re* Wine and Spirits Specialties of Kansas City, Inc., 142 B.R. 345, 347 (Bankr. W.D. Miss. 1992) (allowing court to abstain when outside liquidation will "best serve the interests of both the creditors and the alleged debtor"); *In re* Trina Assocs., 128 B.R. 858, 867–69 (Bankr. E.D.N.Y. 1991) (examining "economy and efficiency of administration" in determining whether case should be dismissed under section 305(a)); *In re* Fitzgerald Group, 38 B.R. 16, 18 (Bankr. S.D.N.Y. 1983) (stipulating "[i]n evaluating the interests of the creditors and the debtor, primary consideration should be given to the efficiency and economy of administration."); Cassco Machining, Inc. v. Rimpull Corp. (*In re* Rimpull), 26 B.R. 267, 272 (Bankr. W.D. Miss. 1982) (finding vast majority of creditors accepted and supported out-of-court arrangement and small minority wanted bankruptcy as important factors in "paradigm" case for dismissal); *In re* Artists' Outlet, Inc., 25 B.R. 231, 234 (Bankr. D. Mass. 1982) (noting because clear majority of creditors were satisfied with out-of-court arrangement, no benefit existed for retaining jurisdiction); *In re* Bioline Labs., Inc., 9 B.R. 1013, 1019–23 (Bankr. E.D.N.Y. 1981) (noting support of majority (60%) of creditors for "out of court settlement" as key factor in deciding to dismiss); *In re* Luftek, Inc., 6 B.R. 539, 548 (Bankr. E.D.N.Y. 1980) (stating "acquiescence in the alleged debtor's motion [to dismiss] by a substantial body of creditors holding a substantial part of its debt" was key factor in dismissing under section 305(a)(1)); S. REP. NO. 95-989, at 35–36 (1978) (noting less expensive out-of-court workouts may better serve interests in case); H.R. REP. NO. 95-595, at 325 (1977) (indicating less expensive out-of-court workouts may better serve interests in case).

[47] *See Globo Comunicacoes*, 317 B.R. at 255 ("The statutory language and legislative history [of section 305(a)(1)] also demonstrate that Congress intended not to allow dissident creditors to use involuntary bankruptcy as a weapon against other creditors and the debtor when the debtor is seeking to pursue a voluntary reorganization with the cooperation of the vast majority of creditors."); *In re Multicanal*, 314 B.R. at 521–23 (observing since "Multicanal's APE is a 'foreign proceeding,'" court may dismiss involuntary petition); *In re Avianca*, 303 B.R. at 9 n.11 ("The legislative history of [section] 305(a)(1) indicates that Congress had in mind a debtor undertaking a voluntary out-of-court restructuring and an involuntary case then being 'commenced by a few recalcitrant creditors to provide a basis for future threats to extract full payment.'" (citation omitted)); *In re* Rookery Bay, Ltd., 190 B.R. 949, 951 (Bankr. M.D. Fla. 1995) (granting abstention where judgment creditor filed involuntary case); *In re Wine and Spirits Specialties of Kansas City*, 142 B.R. at 347 (dismissing case where creditors commenced involuntary case to extract more favorable terms from debtor); *In re* Nahas, 95 B.R. 387, 388 (Bankr. W.D. Pa. 1989) (permitting abstention where need for bankruptcy relief could disappear upon state court resolution); 2 COLLIER (15th ed.), *supra* note 2, ¶ 305.02 (laying out elements courts consider when determining if abstention is appropriate (citing Grogan v. Garner, 498 U.S. 279, 286 (1991)).

bondholders opposed to the restructuring commenced involuntary chapter 11 proceedings against such foreign debtors. The first case, *In re Board of Directors of Multicanal S.A.*,[48] involved more than $500 million of bonds issued by an Argentine cable television company that were the subject of a restructuring proceeding in Argentina known as an *accuerdo preventivo extrajudicial* (or "APE" pronounced "ah-pay"), which is akin to a U.S. prepack. A holder of a significant amount of the bonds subject to the APE sought to challenge the APE proceeding in the United States by first suing in state court for an injunction and damages, and then subsequently filing an involuntary chapter 11 proceeding against Multicanal after Multicanal sought ancillary relief under section 304 in response to the holder's state court action. Multicanal's principle assets and operations were located in Latin America and its only asset in the United States at the time of the bankruptcy filing was $9,500 in bank accounts. The bankruptcy court dismissed the involuntary proceeding under section 305(a)(1) because the interests of the debtor and its creditors would be better served by dismissing an involuntary petition brought by a recalcitrant creditor to interfere with a restructuring in a foreign court that enjoyed the support of most of the debtor's other creditors.[49] In addition, the court noted the "objective futility" of attempting to exercise jurisdiction to reorganize the Argentine company with "virtually no property in the United States" in an involuntary chapter 11 proceeding.[50]

The second case, *GMAM Investment Funds Trust v. Globo Communicacoes e Participacoes S.A. (In re Globo Communicacoes E Participacoes S.A.)*,[51] involved similar circumstances. There, affiliates of the petitioning creditor in the *Multicanal* case similarly brought an involuntary bankruptcy petition against a Brazilian cable television company (with its principal assets and operations in Latin American and only nominal assets in the United States) in opposition to the direction that the company's restructuring negotiations had taken with other bondholders. Unlike Multicanal, Globo was not the subject of any pending bankruptcy proceeding in Brazil or anywhere else at the time of the filing. In an oral ruling based upon a limited record, the bankruptcy court dismissed the involuntary petition, among other things, because the court concluded that it was an abuse of bankruptcy jurisdiction to file an involuntary petition against a foreign debtor with minimal assets in the United States, particularly where there was evidence that the courts of the foreign debtor's home country would not enforce or respect orders issued in any such involuntary chapter 11 proceeding.[52] On appeal, the district court reversed on the

---

[48] 314 B.R. 486 (Bankr. S.D.N.Y 2004).

[49] *Id.* at 521–23.

[50] *Id.* at 523 ("[W]here the debtor is steadfastly opposed to a U.S. [c]hapter 11 case, where there are assets worth only $9,500 over which the Court could assume jurisdiction, and where the principals of the debtor have no nexus to the United States . . . 'objective futility' is sufficiently show.").

[51] 317 B.R. 235 (Bankr. S.D.N.Y. 2004).

[52] *See id.* at 244 (stating main reasons for bankruptcy court's decision to dismiss to be improper relief sought by appellants, it could not force Globo to be involuntary debtor-in-possession, lack of jurisdiction based on insufficient assets, and hostility of Brazilian government to recognize judgments made in foreign bankruptcy proceedings rendering court managed restructuring impossible). *See generally In re* Multicanal,

basis that it was error to dismiss the case for lack of jurisdiction on an insufficient evidentiary record. However, the district court provided guidance for the consideration of issues on remand, including an instruction that dismissal under section 305(a)(1) should be considered.[53] Indeed, the court observed that it appeared that "it was very likely" that dismissal under that section was warranted because it had been brought by a single disgruntled minority holder of the debtor's bonds to oppose an out-of-court restructuring that could enable the debtor to avoid inconsistent judgments in the United States and Brazil and the time and expense of bankruptcy litigation.[54]

The third case, *In re Aerovias Nacionales de Colombia S.A. Avianca* (*In re Avianca*), [55] involved the voluntary chapter 11 proceeding filed by a Colombian airline with the majority of its assets, operations and employees located in Latin America but with substantial assets and operations in the United States as well. In addition, many of Avianca's significant financial creditors (aircraft lessors and holders of its bonds) were located in the United States.[56] Like *Globo*, no bankruptcy or insolvency proceeding had been commenced in Colombia or anywhere outside of the United States.[57] After the company had garnered substantial support from most of its creditors for its chapter 11 restructuring, one dissident aircraft-lessor creditor sought dismissal of the case under section 305(a)(1) and an order directing Avianca to file for bankruptcy protection in its home country, Colombia. The bankruptcy court denied the motion finding that the chapter 11 proceeding served the best interests of the foreign debtor and its creditors because (i) there was no showing that a Columbian bankruptcy proceeding would have had effective jurisdiction over many of the aircraft lessors who were located in the United States, (ii) the Columbian bankruptcy proceeding did not have any provisions that would permit the debtor to reject its lease or cure defaults under its aircraft leases, the resolution of which was essential to any successful reorganization, and (iii) despite certain risks to the effectiveness of a chapter 11 reorganization, under the circumstances of the case, Colombian parties-in-interest had generally cooperated with the reorganization process. The court also noted that (i) many of the U.S. creditors,

---

314 B.R. at 523 (dismissing involuntary proceeding for, among other reasons, inability of court to force rehabilitation of debtor over its objection); *In re* Int'l Administrative Servs, Inc., 211 B.R. 88, 93 (Bankr. M.D. Fla. 1997) (declaring if no in personam jurisdiction exists, court has no power to rule on property located outside United States without help of foreign courts).

[53] *Globo Comunicacoes*, 317 B.R. at 254–55 (noting dismissal under section 305(a)(1) should be considered if both creditor and debtor would benefit from dismissal). *See generally* Eastman v. Eastman (*In re* Eastman), 188 B.R. 621, 625 (B.A.P. 9th Cir. 1995) ("[T]he test [under section 305(a)] is whether both the debtor and the creditors would be 'better served' by a dismissal."); H.R. REP. NO. 95-595, at 325 (1977) (providing court may dismiss under section 305 if interests of creditors and debtor would be better served by dismissal).

[54] *Globo Comunicacoes*, 317 B.R. at 255.

[55] 303 B.R. 1 (Bankr. S.D.N.Y. 2003).

[56] Though the debtor airline was principally based in Columbia it serviced two airports within the U.S., constituting approximately 24% of its international service. Additionally, Avianca maintained substantial business relationships with U.S. based companies and employed 28 workers within the U.S. *Id.* at 3–4.

[57] *Id.* at 12 (recognizing lack of foreign bankruptcy proceeding).

including the indenture trustee for Avianca's bonds, had elected to adjudicate their claims in the chapter 11 proceeding and had not sought to bring their claims in Colombia, and (ii) no creditor had initiated a bankruptcy or insolvency proceeding in Colombia.[58]

b. Abstention Under Section 305(a)(2)

Section 305(a)(2) of the Bankruptcy Code provides that the court may dismiss or suspend a case if a chapter 15 petition has been granted with respect to a "foreign proceeding" and such dismissal or suspension would best serve the purposes of new chapter 15.[59] Generally speaking, a foreign proceeding is broadly defined to include any judicial or administrative proceeding (including interim proceedings) in a foreign debtor's home country "under a law relating to insolvency or adjustment of debt" where the foreign debtor's affairs and assets are subject to "control or supervision by the foreign court for the purpose of reorganization or liquidation."[60] As described more fully *infra*, chapter 15 and former section 304(c) set forth specific criteria for granting comity to such foreign proceedings and recognizing and enforcing their results in the United States.[61]

Two recent cases have ruled upon motions to dismiss plenary U.S. bankruptcy proceedings regarding foreign debtors under section 305(a)(2). In the *Multicanal* case, in addition to dismissing under section 305(a)(1) as discussed above, the bankruptcy court also determined that dismissal of the involuntary petition was alternatively appropriate because the Argentine APE proceeding was a "foreign proceeding" akin to a U.S. prepack that satisfied the factors set forth in former

---

[58] *Id.* at 10.

[59] *See* 11 U.S.C. §305(a)(2) (2006) (listing requirements for when court, after notice and hearing, may dismiss case or suspend all proceedings in case under title 11). *See generally In re* Cenargo Int'l, PLC, 294 B.R. 571, 592–93 (Bankr. S.D.N.Y. 2003) (granting motion to suspend cases under section 305(a)(2) pending foreign proceedings). Prior to the 2005 Bankruptcy Amendments, which replaced former section 304 with chapter 15, section 305(a)(2) provided for dismissal or suspension where a "foreign proceeding" was pending with respect to the debtor as long as the factors set forth under former section 304(c) warranted such suspension or dismissal (though the foreign debtor was not technically required to file a section 304 petition to obtain such relief). *See* 11 U.S.C. § 304(c) (2000), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802(d)(3), 119 Stat. 146. As discussed *infra* Part II, "recognition" under chapter 15 imposes a less onerous burden. *See generally* United States v. J.A. Jones Constr. Group, L.L.C., 333 B.R. 637, 638–39 (Bankr. E.D.N.Y. 2005) (discussing petitions for recognition); Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 726 (2005) ("[A] major change is that recognition is granted to a foreign main proceeding without reference to criteria like those formerly set forth in [section] 304(c).").

[60] 11 U.S.C. § 101(23) (2006). If there is a foreign insolvency proceeding pending regarding the same debtor, the "foreign representative" of such foreign insolvency proceeding has statutory standing to seek section 305(a)(2) dismissal of the U.S. proceeding. *See* 11 U.S.C. § 305(b) (2006) (permitting foreign representatives to seek dismissal or suspension under section 305(a)(2)). The "foreign representative" may appear in a U.S. court for this limited purpose without being subjected to the jurisdiction of any other U.S. court for any other purpose. 11 U.S.C. § 306 (2006) (providing for limited appearance in bankruptcy court by foreign representative).

[61] *See infra* Part II (discussing criteria for granting comity to foreign proceedings under section 304(c)).

section 304(c).[62] By contrast, in *In re Avianca*, the bankruptcy court refused to dismiss the foreign debtor's voluntary chapter 11 proceeding under section 305(a)(2) because, *inter alia*, there was no "pending" foreign proceeding to defer to and Avianca had substantial connections to the United States (e.g., the presence of mobile assets, operations and creditors).[63] Particularly important as factors strongly supporting the continuation of the U.S. reorganization proceedings were the presence of Avianca's "key" creditors in the United States (who were therefore subject to the power of the court's jurisdiction) and the cooperation of Avianca's other creditors located outside of the United States.[64]

By its terms, section 305(a)(2) dismissal is only applicable where a "foreign proceeding" has been commenced and is pending.[65] Accordingly, it should only become relevant to a voluntary chapter 11 reorganization of a foreign debtor, if, at any time during such U.S. proceeding, a foreign proceeding is commenced by or against the debtor and a party-in-interest raises section 305(a)(2) in the United States. It is therefore important to manage the U.S. bankruptcy case carefully to avoid impairing the rights of trade creditors and others who might act impulsively to commence conflicting proceedings in a foreign jurisdiction.[66] For the reasons discussed *infra* Part 1(B)(1)(ii)(3), a U.S. prepack offers the foreign debtor substantial flexibility to manage this risk by virtue of, among other things, the speed with which such a case proceeds and by permitting the debtor to narrowly tailor its

---

[62] *In re* Bd. of Dirs. of Multicanal S.A., 314 B.R. 486, 521 (Bankr. S.D.N.Y. 2004) (noting Argentine proceeding was "foreign proceeding" and satisfied factors set forth in section 304(c)).

[63] *In re Avianca*, 303 B.R. at 11–13 (holding dismissal was inappropriate because there lacked pending foreign proceeding and foreign debtor had significant connections to United States); *see* Lyster, *supra* note 9, at 215 (examining court's recognition of lack of foreign proceedings and presence of assets in U.S. when refusing to dismiss foreign debtor's voluntary chapter 11 proceeding in *In re Avianca*).

[64] *In re Avianca*, 303 B.R. at 13 ("The fact that many of Avianca's principal creditors are in this country, and the willingness of major Columbian parties in interest to participate in the proceedings, is one of the most significant factors supporting the filing here.").

[65] 11 U.S.C. § 305(a)(2)(A) (2006) (requiring foreign proceeding for dismissal to be granted); *see* GMAM Inv. Funds Trust v. Globo Communicacoes e Participacoes S.A. (*In re* Globo Communicacoes E Participacoes S.A.), 317 B.R. 235, 253 n.13 (Bankr. S.D.N.Y. 2004) (noting section 305(a)(2) is not relevant because no foreign proceeding had yet been commenced regarding foreign debtor subject to involuntary chapter 11 filing); *In re Avianca*, 303 B.R. at 12 (refusing to dismiss under section 305(a)(2), in part, because there lacked pending foreign proceeding). *But see In re* Spanish Cay, 161 B.R. 715, 724 (Bankr. S.D. Fla. 1993) (dismissing, pursuant to section 305(a)(2), involuntary chapter 11 proceeding commenced by owners of foreign debtor in order to permit secured creditor to initiate foreign liquidation proceeding out of interest for judicial economy and notwithstanding absence of "pending" foreign proceeding at time of such dismissal).

[66] *See generally* 11 U.S.C. § 305(a)(2) (2006) (requiring foreign proceeding as grounds for dismissal). As a practical matter, it should be noted that dismissal pursuant to section 305(a)(2) can only be granted after giving notice to the debtors, creditors, and other parties-in-interest pursuant to rule 1017(d) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), which in the case of foreign debtors may often be supplemented by some form of publication notice pursuant to rule 2002(l) of the Bankruptcy Rules. *See* FED. R. BANKR. P. 1017(d) (2006) (requiring notice prior to dismissal or suspension); Villareal v. Laughlin (*In re* Villarreal), 304 B.R. 882, 885–86 (B.A.P. 8th Cir. 2004) (acknowledging Federal Rules of Bankruptcy Procedure require reasonable notice and opportunity for hearing and service); *see also In re* Hourani, 180 B.R. 58, 68 (Bankr. S.D.N.Y. 1995) ("Bankruptcy Rule 2002(1) allows the court to order notice by publication only when mailing is impracticable or as a supplement to notice by mail.").

restructuring to the debt of sophisticated financial investors and thereby leave all other claims unimpaired (including trade debt and employee wages and benefits, which are often paid in the ordinary course of business during the reorganization), which then reduces the risk that such unimpaired creditors would commence a proceeding in the debtor's home country.

2. Abstention/Dismissal Under Section 1112(b) of the Bankruptcy Code

Section 1112(b) provides that "on request of a party in interest, and after notice and a hearing . . . [the] court *shall* convert [a chapter 11 case] to a case under chapter 7 or dismiss a case under [chapter 11], whichever is in the best interests of creditors and the estate, *if the movant establishes cause*."[67] The 2005 Bankruptcy Amendments significantly modified section 1112(b) by, among other things, (i) making dismissal or conversion upon a showing of "cause" mandatory rather than permissive,[68] (ii) expanding the illustrative statutory list of circumstances that

---

[67] 11 U.S.C. § 1112(b) (2006) (emphasis added). The movant has the burden of producing evidence that there is "cause" to dismiss the debtor's bankruptcy petition if the motion is opposed. *See* Faflich Assoc. v. Court Living Corp. (*In re* Court Living Corp.), No. 96 CIV.965 JSM, 1996 WL 527333, at *2 (S.D.N.Y. Sep 16, 1996) ("[plaintiff], as moving party, bears the burden of proving cause for conversion [or dismissal] by a preponderance of the evidence."); *In re* Lizeric Realty Corp., 188 B.R. 499, 503 (Bankr. S.D.N.Y. 1995) (noting moving party must prove, by preponderance of evidence, cause for relief under section 1112(b)). If the movant demonstrates "cause," the debtor must show "unusual circumstances" establishing that dismissal or conversion is not warranted. 11 U.S.C. § 1112(b) (2006); *see In re* 3 Ram, Inc.**,** 343 B.R. 113, 117 (Bankr .E.D. Pa. 2006) ("Absent unusual circumstances that establish that conversion or dismissal is not in the best interests of creditors and the estate, on request of a party in interest, the court *shall* convert or dismiss if the movant establishes 'cause.'"); Richard C. Maxwell & B. Webb King, *Bankruptcy Law*, 40 U. RICH. L. REV 53, 88 (2005) (noting section 1112(b)(2) empowers court to deny motion to dismiss chapter 11 proceeding but must find unusual circumstances when such relief is not in best interest of creditors and estate). The debtor itself qualifies as a "party-in-interest" and may move to dismiss its own case, and the court may act *sua sponte* in dismissing the case pursuant to section 1112(b). *See In re* Abijoe Realty Corp., 943 F.2d 121, 124–25 (1st Cir. 1991) (emphasizing debtor may be party in interest under section 1109); Johnston v. Jem Dev. Co. (*In re* Johnston), 149 B.R. 158, 161 (B.A.P. 9th Cir. 1992) (asserting under section 1109 debtor may be party in interest); 7 COLLIER (15th ed.), *supra* note 2, 1112.04[9][b] ("[This] issue . . . has generated a split of authority . . . whether a court, acting on it own motion, may convert or dismiss a chapter 11 case. The better view is that . . . the court may do so . . . only if necessary to enforce a court order or rule, or in order to prevent abuse of process.").

[68] 11 U.S.C. § 1112(b) (2006) (mandating court "*shall* convert . . . or dismiss [a chapter 11 case] . . . if the movant establishes cause" (emphasis added)). Prior to the 2005 Bankruptcy Amendments, section 1112(b) provided that the court "*may* convert . . . or dismiss [a chapter 11 case] . . . for cause." 11 U.S.C. § 1112(b) (2000), *amended by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 442(a), 119 Stat. 115. As a practical matter, courts retain some discretion even where "cause" has been shown in light of the fact that the statute permits courts to refrain from dismissing where "unusual circumstances . . . establish that the requested conversion or dismissal is not in the best interests of creditors and the estate." 11 U.S.C. § 1112(b)(1) (2006) (providing when case under chapter 11 may be dismissed); *In re* Baumgartner, 57 B.R. 513, 515 (Bankr. N.D. Ohio 1986) (noting determination of cause for dismissal of chapter 11 petition is within court's discretion); 9A AM. JUR. 2D *Bankruptcy* § 1182 (2006) ("[D]etermination of cause for conversion or dismissal is a matter of discretion with the court.").

constitute "cause,"[69] and (iii) imposing strict expedited deadlines for court resolution of section 1112(b) motions.[70]

Dismissal "for cause" focuses on the *objective* nature of the debtor's case because the main purpose behind section 1112(b) is to maintain the integrity of the chapter 11 process and "to weed out unlikely reorganization prospects even though the debtor's intentions may be strictly honorable."[71] However, courts may also examine the debtor's *subjective* intentions to prevent "abuse of the bankruptcy process, or the rights of others, involv[ing] conduct or situations only peripherally related to the economic interplay between the debtor and the creditor community,"[72] and dismiss bankruptcy cases pursuant to section 1112(b) for bad faith in the commencement and/or prosecution of the case, in addition to the enumerated basis of section 1112(b).[73]

---

[69] 11 U.S.C. § 1112(b)(4) (2006) (providing examples of cause for dismissal or conversion under chapter 7). As amended, section 1112(b) defines "cause" to include numerous circumstances, including (i) a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation," (ii) "gross mismanagement of the estate," (iii) "unauthorized use of cash collateral," (iv) "failure to comply" with any court order, and (v) "failure to file a disclosure statement" or confirm a plan within the statutory deadlines. 11 U.S.C. 1112(b)(4) (2006). This list is illustrative and courts are afforded a great deal of flexibility to dismiss a chapter 11 petition "for reasons that are not specifically enumerated in [section 1112(b)], provided that these reasons are sufficient to demonstrate the existence of cause." 7 COLLIER (15th ed.), *supra* note 2, ¶ 1112.04[1] (citing H. R. 595. 95th Cong., 1st Sess. 406 (1977)) (explaining scope and limits of court's discretion under section 1112(b)); *see* 11 U.S.C. § 102(3) (2006) (use of terms "'includes' and 'including' [in Bankruptcy Code] are not limiting."); *In re* Great Am. Pyramid Joint Venture, 144 B.R. 780, 790 (Bankr. W.D. Tenn. 1992) (stating cause for dismissal is not limited to factors listed in section 1112(b)).

[70] 11 U.S.C. § 1112(b)(3) (2006) (requiring court to commence hearing on section 1112(b) motion within 30 days and to decide such motion within 15 days after "commencement" of such hearing); *see* Thomas E. Carlson & Jennifer Frasier Hayes, *The Small Business Provisions of the 2005 Bankruptcy Amendments*, 79 AM. BANKR. L.J. 645, 676 (2005) ("New [section] 1112(b)(3) generally requires the court to commence the hearing on a motion to dismiss or convert within thirty days of filing, and to decide the motion within fifteen days after the hearing.").

[71] 7 COLLIER (15th ed.), *supra* note 2, ¶ 1112.07[1]; *see* Ali M. M. Mojdehi & Janet Dean Gertz, *The Implicit "Good Faith" Requirement in Chapter 11 Liquidations: A Rule in Search of A Rationale?*, 14 AM. BANKR. INST. L. REV. 143, 150 (2006) ("Courts generally look to factors such as whether there is a business to save, jobs to preserve, and whether there is truly any chance of emerging from the reorganization process to continue as a viable business.").

[72] 7 COLLIER (15th ed.), *supra* note 2, ¶ 1112.07[1] (quoting *In re* Victory Constr. Co., Inc., 9 B.R. 549, 559 (Bankr. C.D. Cal. 1981), *vacated*, 37 B.R. 222 (B.A.P. 9th Cir. 1984)); *see In re* Syndicom Corp., 268 B.R. 26, 49 (Bankr. S.D.N.Y. 2001) (noting for purposes of section 1112, "neither malice nor actual fraud is required to find a lack of good faith"); *In re* RCM Global Long Term Capital Appreciation Fund, Ltd., 200 B.R. 514, 520 (Bankr. S.D.N.Y. 1996) (stating in Second Circuit, "a petition will be dismissed if both objective futility of the reorganization process and subjective bad faith in filing the petition are found").

[73] *See* 7 COLLIER (15th ed.), *supra* note 2, ¶ 1112.07 (Although "no provision of the [Bankruptcy] Code expressly authorizes a court to dismiss a case [upon bad faith or lack of good faith] . . . the requirement of good faith has been held to be an implicit condition to the filing and maintenance of a bankruptcy case for over a century."); *see also* Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (*In re* Little Creek Dev. Co.), 779 F.2d 1068, 1071 (5th Cir. 1986) ("Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings."); H. Miles Cohn, *Good Faith and the Single-Asset Debtor*, 62 AM. BANKR. L.J. 131, 132 (1998) ("Although [c]hapters XI, XII and XIII [of the Bankruptcy Code] contained no 'good faith' filing requirement, 'this 'gap' was filled by the courts.'"). Courts have also held that section 303 of the

Because no single factor is determinative of bad faith, the court will examine the facts and circumstances of each case in light of several established guidelines or indicia. It is the totality of circumstances, rather than any single factor, that will determine whether bad faith exists.[74] Certain circumstantial factors are sometimes used to identify "bad-faith" filings, including whether (i) the debtor has only one asset; (ii) the debtor has few unsecured creditors whose claims are small in relation to the claims of the secured creditors; (iii) the debtor has few employees; (iv) the property is the subject of a foreclosure action as a result of arrearages; (v) the timing of the filing evidences an intent to delay or frustrate the legitimate efforts of

---

Bankruptcy Code provides a separate basis to dismiss an *involuntary* bankruptcy proceeding that was commenced in "bad faith." *See* 11 U.S.C. § 303(i) (2006) ("[T]he court may grant judgment . . . against any petitioner that filed the petition in bad faith . . . ."); *In re* WLB-RSK Venture, 296 B.R. 509, 513 (Bankr. C.D. Cal. 2003) (dismissing involuntary petition because it was filed in bad faith). Numerous additional grounds may be raised to dismiss an involuntary U.S. bankruptcy filed against a foreign debtor that are not addressed at length herein, including failure to satisfy the requirements to file an involuntary proceeding set forth in section 303 of the Bankruptcy Code and rule 1003 of the Bankruptcy Rules, as well as other general doctrines such as lack of personal jurisdiction, comity and forum non-conveniens. *See* 11 U.S.C. § 303 (2006) (requiring, among other things, three "qualified" petitioning creditors (i.e., creditors who did not acquire claims for purpose of commencing involuntary proceeding) holding undisputed claims of at least $11,625 in aggregate, and showing debtor was not generally paying its undisputed debts as they become due); 11 U.S.C. § 305(a)(2) (2006) (providing for comity based dismissal if a pending foreign proceeding satisfies section 304(c) factors); FED. R. BANKR. P. 1003 (requiring certification that petitioning creditor did not acquire debt for purpose of commencing bankruptcy and providing evidence of claim); GMAM Inv. Funds Trust v. Globo Communicacoes e Participacoes S.A. (*In re* Globo Communicacoes E Participacoes S.A.), 317 B.R. 235, 254–60 (Bankr. S.D.N.Y. 2004) (instructing court on remand to consider defenses to involuntary petition concerning personal jurisdiction and forum non-conveniens).

[74] *See, e.g.*, *In re* Silberkraus, 253 B.R. 890, 902 (Bankr. C.D. Cal. 2000) ("Findings of lack of good faith in proceedings depends [sic] on the totality of the facts and circumstances surrounding the particular case . . . [and] 'on a conglomerate of factors rather than on any single datum.'" (citation omitted)); 9281 Shore Rd. Owners Corp. v. Seminole Realty Co. (*In re* 9281 Shore Rd. Owners Corp.), 187 B.R. 837, 848 (Bankr. E.D.N.Y. 1995) (noting there is "no particular test" for determining whether petition was filed in bad faith, and "courts may consider any factors which evidence an intent to abuse the judicial process and the purposes of reorganization"); *In re* Trina Assocs., 128 B.R. 858, 872 (Bankr. E.D.N.Y. 1991) (rejecting any bright line rule in favor of looking at facts and circumstances of each case in determining whether cause to dismiss under section 1112(b) exists); Farley v. Coffee Cupboard Inc. (*In re* Coffee Cupboard, Inc.), 119 B.R. 14, 17 (Bankr. E.D.N.Y. 1990) ("The lack of good faith in maintaining the case must rest on the totality of the circumstances."); *In re* HBA East, Inc., 87 B.R. 248, 259 (Bankr. E.D.N.Y. 1988) ("No single factor is determinative of the issue of good faith, but rather the bankruptcy courts must examine the facts and circumstances of each case in light of several established guidelines or indicia."). Flexibility is essential because "[b]ad faith is not a concept that lends itself to precise definition" and dismissals for bad faith have "long been the policing mechanism for [b]ankruptcy [c]ourts to make certain that those who invoke the reorganization or rehabilitation provisions of the bankruptcy law do so only to accomplish the aims and objectives of bankruptcy reorganization philosophy and for no other purpose." *In re Syndicom Corp.*, 268 B.R. at 49 (quoting *In re* Island Helicopters, Inc., 211 B.R. 453, 462 (Bankr. E.D.N.Y. 1997)); *see* NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (*In re* Integrated Telecom Express, Inc.), 384 F.3d 108, 119 (3d Cir. 2004) ("Requirement [sic] of good faith prevents abuse of the bankruptcy process by debtors whose overriding motive is to delay creditors without benefiting them in any way." (quoting *In re* SGL Carbon Corp., 200 F.3d 154, 161–62 (3d Cir. 1999) (citation omitted)); Carolin Corp. v. Miller, 886 F.2d 693, 698 (4th Cir. 1989) ("[A] good faith standard protects the jurisdictional integrity of the bankruptcy courts by rendering their powerful equitable weapons (i.e., avoidance of liens, discharge of debts, marshalling and turnover of assets) available only to those debtors and creditors with 'clean hands.'" (quoting *In re Little Creek Dev.*, 779 F.2d at 1072)).

the debtor's secured creditors to enforce their rights, (vi) the bankruptcy is a mere litigation tactic, (vii) the bankruptcy is, in reality, a two-party dispute between the debtor and another party, and (viii) whether the debtor actually suffered from any financial difficulty.[75]

Courts have invoked section 1112(b) to dismiss voluntary U.S. bankruptcy proceedings filed by foreign debtors. For example, *In re Head*[76] involved a chapter 11 petition filed by a Canadian foreign debtor with only an interest in a condominium in the United States. The foreign debtor filed the proceeding to avoid contractual insurance liability and forum selection obligations to Lloyds of London. The bankruptcy court dismissed the chapter 11 proceeding under section 1112(b) because it concluded that the foreign debtor attempted to use U.S. bankruptcy jurisdiction in a manner that was not "fundamentally fair" (although the court did not find "bad faith") to its creditors based upon a tenuous jurisdictional nexus to the United States.[77] The facts of that case were particularly egregious and involved a clear attempt by the foreign debtor to file bankruptcy as a mere litigation tactic because it viewed a U.S. bankruptcy proceeding as a more advantageous forum to resolve its two-party dispute with Lloyds of London than English courts.[78] *In re Head* has been interpreted as authority that "bankruptcy court[s] ha[ve] ample power to dismiss" bankruptcy proceedings initiated by foreign debtors who manipulated their place of filing for the purpose of gaining "perceived legal advantage" in their debt restructuring.[79]

Perhaps more well known is *In re Yukos Oil Company*,[80] the recent decision dismissing the voluntary chapter 11 petition filed by Yukos Oil Company under section 1112(b). Yukos is a massive Russian energy company, organized under Russian law, with virtually all of its assets (the most significant of which are oil and

---

[75] *See* C-TC 9th Ave. P'ship v. Norton Co. (*In re* C-TC 9th Ave. P'ship), 113 F.3d 1304, 1309–11 (2d Cir. 1997) ("[A] [c]hapter 11 filing 'may be deemed frivolous if it is clear that on the filing date there was no reasonable likelihood that the debtor would reorganize and no reasonable probability that it would eventually emerge from bankruptcy proceedings.'" (quoting Baker v. Latham Sparrowbush Assoc. (*In re* Cohoes Indus. Terminal, Inc.), 931 F.2d 222, 227 (2d Cir. 1991))); *see also In re Integrated Telecom Express*, 384 F.3d at 112 (finding bad faith filing where debtor was fully solvent entity not experiencing any financial distress); *In re SGL Carbon Corp*., 200 F.3d at 156 (demonstrating bankruptcy petition not filed in "good faith" where putative debtor experienced no financial difficulty at time of filing nor any significant managerial distraction); *In re* Century/ML Cable Venture, 294 B.R. 9, 34–35 (Bankr. S.D.N.Y. 2003) (identifying eight factors which may be indicative of bad faith filing).

[76] 223 B.R. 648 (Bankr. W.D.N.Y. 1998).

[77] *Id.* at 653–54.

[78] *Id.*

[79] *In re* Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1, 13 (Bankr. S.D.N.Y. 2003); *see Increasing International Cooperation in Cross-border Cases*, AM. BANKR. INST. J., Apr. 1999, at 27 (commenting on recent judicial trend discouraging chapter 11 filings in "jurisdictions of convenience," particularly between U.S. and Canada (citing *In re Head*, 223 B.R. at 648)); Solomon, *supra* note 25, at 58 (noting some courts have indicated foreign debtors may not create eligibility by opening small bank accounts in U.S. or acquiring U.S. mailing addresses solely for bankruptcy jurisdiction purposes (citing *In re Head*, 223 B.R. at 652)).

[80] 321 B.R. 396 (Bankr. S.D. Tex. 2005).

gas deposits in Russian soil), operations and employees in Russia.[81] Yukos had no assets in the United States other than certain interests that it claimed to have in funds transferred into an account held by a subsidiary that it created on the same day it filed its chapter 11 petition in Texas.[82] Yukos filed the chapter 11 proceeding a mere days before an auction at which the Russian government was to sell Yukos' interests in its most valuable subsidiary to satisfy $27.5 billion of disputed tax assessments allegedly owed to the Russian government.[83] While the bankruptcy court held that Yukos' interests in the funds held in its subsidiary's account satisfied the jurisdictional requirements of section 109, it nonetheless dismissed the case under section 1112(b) based upon the "totality of the circumstances" including: (1) the "property" to support jurisdiction was transferred to the United States for the purpose of creating jurisdiction less than one week before the Petition Date; (2) Yukos' proposed plan of reorganization was not, in essence, a financial reorganization, but rather a challenge to the actions of the Russian government and a forum to litigate other causes of actions that Yukos believes it holds; (3) Yukos has commenced proceedings in several other forums and sought to replace such forums (and otherwise applicable foreign and international law) with the U.S. bankruptcy court (which is not uniquely qualified to determine Yukos' various disputes) and U.S. law; (4) the Court's personal jurisdiction over many pertinent parties to Yukos' disputes was questionable; (5) the vast majority of Yukos' business operations are in Russia; (6) any reorganization of Yukos would require the cooperation of the Russian government; and (7) the sheer size of Yukos' operations and its importance to the Russian economy favor permitting resolution of the disputes presented by Yukos in a forum where the Russian government will participate.[84]

By contrast, in *In re Avianca*, the bankruptcy court denied a motion to dismiss Avianca's voluntary chapter 11 petition pursuant to section 1112(b) for reasons similar to those underlying its denial of the dismissal request under section 305(a)(1) discussed above.[85] The court flatly rejected the proposition that a foreign debtor must commence a parallel proceeding in its home country simply based upon the speculative allegation that it may not be able to effectuate a chapter 11 plan of reorganization with respect to creditors in the foreign debtor's home country that are

---

[81] *Id.* at 399.

[82] *Id.* at 400.

[83] *Id.* at 401.

[84] *Id.* at 410–11. Russian insolvency proceedings were commenced regarding Yukos, which subsequently resulted in the commencement of a chapter 15 case by the foreign representative of such Russian insolvency proceedings and is pending in the United States Bankruptcy Court for the Southern District of New York under Case Number 06-10775-RDD. Kurt A. Mayr, *A Tale of Two Proceedings: "Turnabout is Fair Play" in the Yukos U.S. Bankruptcy Cases*, AM. BANKR. INST. J., July–Aug. 2006, at 24–25, 67–69 (analyzing Yukos U.S. chapter 11 and chapter 15 bankruptcy cases).

[85] *In re* Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1, 17–18 (Bankr. S.D.N.Y. 2003) (explaining reasoning behind denial of motion to dismiss); *see supra* notes 18–19 and accompanying text (discussing court's section 305(a)(1) analysis).

not clearly subject to the U.S. court's jurisdiction.[86] The bankruptcy court again emphasized that no difficulties had arisen with respect to such issues in the case at that stage. The Court advised that, if any such problems were to arise, the foreign debtor could then consider whether concurrent proceedings might be necessary to effectuate its reorganization, or whether applying certain provisions of Colombian law in the chapter 11 plan of reorganization may be necessary to enhance enforceability of the plan in Colombia.[87]

3. Prepackaged Chapter 11 Proceedings

As the foregoing illustrates, foreign debtors may initiate a plenary chapter 11 proceeding based upon as little as a bank account in the United States to seek protection under the Bankruptcy Code. However, the breadth of this access to U.S. bankruptcy jurisdiction is tempered by the discretionary abstention powers of the bankruptcy courts. Perhaps the most significant abstention concern for foreign debtor bankruptcies relates to the effectiveness of the U.S. bankruptcy proceeding upon creditors and other parties-in-interest who are located entirely outside of the United States and therefore might not be subject to the bankruptcy court's jurisdiction. As the *Avianca* case plainly illustrates, these issues involve a delicate balancing act that will depend upon the circumstances of each case, but most importantly upon the cooperativeness and consent of those outside the bankruptcy court's jurisdiction.

In *Avianca*, a traditional non-prepackaged chapter 11 reorganization without a parallel Colombian bankruptcy proceeding was feasible because many of the foreign debtor's dissenting creditors were subject to the bankruptcy court's jurisdiction and the foreign debtor had successfully negotiated and structured its bankruptcy proceeding to meet the needs of parties located outside of the United States. For example, the foreign debtor had obtained a standstill agreement with its affected Colombian creditors, and those creditors had actively participated in and supported the chapter 11 case.[88] In addition, the foreign debtor had obtained authority from the bankruptcy court to pay, in the ordinary course of its business, small pre-petition claims (claims under $7,000) by non-U.S. creditors and to pay the pre-petition claims of certain critical Colombian vendors in the ordinary course of business.[89] As a result, the pre-petition claims of this universe of creditors (who were outside the U.S. court's jurisdiction) were essentially excluded from the

---

[86] *In re Avianca*, 303 B.R. at 17.

[87] *Id.*

[88] *Id.* at 14; *see* Lyster, *supra* note 9, at 214–15 (remarking Avianca's chapter 11 filing appeared favorable to most of its creditors and creditors did not exploit chapter 11 process); Howard Seife, *Bankruptcy for Bankers*, 121 BANKING L.J. 341, 347 (2004) (reaffirming Avianca received effective standstill from Colombian creditors without formal filing and indicating major creditors actively participated in U.S. bankruptcy matters).

[89] *In re Avianca*, 303 B.R. at 10. As the Court noted, such relief is not uncommon in other large domestic chapter 11 cases. *Id.*

chapter 11 process, thereby limiting the risk that such creditors would take action in opposition to the reorganization outside of the United States. The bankruptcy court recognized, however, that opposition by parties outside of its jurisdiction could undermine the feasibility of the chapter 11 restructuring, but suggested that if such a situation arose it could be addressed at that time, potentially by commencing a concurrent Colombian proceeding that could be coordinated with the U.S. bankruptcy proceeding.[90]

A "prepackaged" chapter 11 proceeding is an alternative structure that can be successfully employed to manage these risks in foreign-debtor initiated U.S. bankruptcy proceedings. In a prepackaged bankruptcy, the potential debtor negotiates a mutually acceptable plan of reorganization with some of its creditors (often financial creditors such as banks or bondholders) prior to filing for bankruptcy.[91] In a "pure" prepackaged bankruptcy, the debtor will prepare and disseminate a disclosure statement and ballots and obtain the requisite votes approving the plan before filing for bankruptcy.[92] The debtor only needs to solicit

---

[90] *Id.* at 16–17.

[91] *See* 11 U.S.C. § 1126(b)(1) (2006) (contemplating solicitation of votes upon chapter 11 plan of reorganization before commencement of chapter 11 case); *In re* Bd. of Dirs. of Multicanal S.A., 314 B.R. 486, 505 (Bankr. S.D.N.Y. 2004) (stating U.S. prepackaged bankruptcies allow debtors to develop reorganization plans and solicit acceptance of said plans prior to chapter 11 filing provided certain requirements fulfilled); *In re* Bd. of Dirs. of Hopewell Int'l Ins. Ltd., 238 B.R. 25, 52 (Bankr. S.D.N.Y. 1999) (explaining prepackaged bankruptcies involve devising reorganization plan and seeking votes prior to filing chapter 11); *In re* Colonial Ford, Inc., 24 B.R. 1014, 1017 (Bankr. D. Utah 1982) (indicating acceptance of reorganization plans agreed to prior to filing chapter 11); *Order M-203 Procedural Guidelines for Prepackaged Chapter 11 Cases in the U.S. Bankruptcy Court for the Southern District of New York*, III.A (McKinney's New York Rules of the Court Federal 2006) [hereinafter *Guidelines*] (contemplating scheduling motion to be filed upon commencement with disclosure of pre-petition creditor vote results). Prepackaged bankruptcies are a well-established restructuring device which has existed in the United States for decades. *See In re Multicanal*, 314 B.R. at 504 (citing Campbell v. Alleghany Corp., 75 F.2d 947 (4th Cir. 1935)) (stating United States has long recognized prepackaged bankruptcies as way of restructuring); Josef S. Athanas, *Expediting the Administration of the Estate in Chapter 11: The Case for Obtaining a Court-Approved Combined Plan and Disclosure Hearing*, 8 J. BANKR. L. & PRAC. 103, 115 (1999) (suggesting long history of prepackaged bankruptcies in chapter 11 cases). For a good discussion of prepackaged bankruptcies, see *generally* N. SAGGESE & A. RANNEY-MARINELLI, A PRACTICAL GUIDE TO OUT-OF-COURT RESTRUCTURINGS AND PREPACKAGED PLANS OF REORGANIZATION (Aspen Publishers, Inc. 2000) (1993) and Corrinne Ball & Reginald A. Greene, *Strategies in "Prepackaged" Bankruptcies and Implication of Security Laws*, 827 PLI/COMM. 201 (2001). As discussed more fully *infra* note 122, other countries have adopted similar streamlined restructuring regimes that may be employed by a foreign debtor under foreign law and potentially recognized in the United States under chapter 15 of the Bankruptcy Code. *See infra* note 122 (pointing to several international organizations encouraging foreign countries to adopt rehabilitation methods similar to prepackaged reorganizations); Salafia, *supra* note 9, at 316–17 (explaining chapter 15 seeks to enhance recognition of foreign bankruptcy proceedings and lists as objective cooperation in reorganizing unstable companies).

[92] *In re Multicanal*, 314 B.R. at 504–05 (explaining filers of prepackaged bankruptcy plans may provide court with previously solicited acceptances provided solicitation complied with relevant laws and rules or, in absence of laws or rules, acceptance was obtained after disclosure of sufficient information); *Guidelines*, *supra* note 91, at III.A (compelling debtors to solicit all required votes on prepackaged bankruptcy plan and to indicate attainment of necessary acceptances prior to filing scheduling motion); Saggese, *supra* note 91, § 4.01[A] ("In a prepackaged plan, the prospective debtor negotiates and solicits acceptances of its plan of reorganization prior to the commencement of its [c]hapter 11 case."). In other hybrid approaches (so-called

acceptances from creditors who are "impaired" by the terms of the plan of reorganization and does not need to solicit (i) creditors who are "unimpaired" (who are assumed to accept the plan)[93] or (ii) creditors who are proposed to receive nothing under the plan (who are presumed to vote against the plan).[94] Thus, where the debtor seeks only to restructure its financial debt (e.g., bonds) and leave other creditors unimpaired, the debtor need only solicit the impaired financial creditors. There is no bankruptcy court oversight during the period in which the debtor formulates and negotiates its plan of reorganization and solicits acceptances of such plan from its affected creditors.[95] However, the debtor's solicitation is subject to applicable non-bankruptcy law, which, in the case of reorganizations of existing securities, or offerings of new securities under the plan of reorganization, will require compliance with applicable U.S. securities laws.[96]

"pre-negotiated" or "pre-arranged" chapter 11 proceedings), the debtor may negotiate all or part of the plan of reorganization and obtain the support of a significant number of its creditors before filing for chapter 11 protection, but not officially commence the solicitation of votes on such plan until after filing for bankruptcy protection. *See* Ball & Greene, *supra* note 91, at 245–47 (examining pre-arranged bankruptcy plans, "lock-up agreements," in which creditors agree to support confirmation of debtors' reorganization plans at time of voting); Kurt A. Mayr, *Unlocking the Lockup: The Revival of Plan Support Agreements Under New § 1125(g) of the Bankruptcy Code*, 15 J. BANKR. L. & PRAC. (forthcoming Dec. 2006) (discussing prenegotiated chapter 11 cases and plan support agreements).

[93] *See* 11 U.S.C. § 1126(f) (2006) (deeming "a class that is not impaired" as accepting plan); *see also In re* E.S. Bankest, L.C., 321 B.R. 590, 595 (Bankr. S.D. Fla. 2005) (stating unimpaired creditors are not entitled to vote on reorganization plan under section 1126(f)); *In re* River Vill. Assocs., 181 B.R. 795, 806 (Bankr. E.D. Pa. 1995) (noting Bankruptcy Court found unimpaired creditors deemed to have accepted plan without voting under section 1126(f)).

[94] *See* 11 U.S.C. § 1126(g) (2006) (declaring class not to "receive or retain any property under plan" presumed to reject plan); *see also In re* PWS Holding Corp., 228 F.3d 224, 231–232 (3d Cir. 2000) (acknowledging holders without interest deemed to reject reorganization plans); *In re* Snyders Drug Stores, Inc., 307 B.R. 889, 894 (Bankr. N.D. Ohio 2004) (providing classes receiving nothing assumed to reject reorganization plans).

[95] 11 U.S.C. § 1126(b) (2006) (contemplating pre-petition solicitation); *see In re Multicanal*, 314 B.R. at 505 (providing no court oversight while debtor develops reorganization plan and solicits acceptances from creditors); *In re Hopewell*, 238 B.R. at 52 (suggesting debtors devise reorganization plan and solicit acceptances prior to judicial involvement).

[96] 11 U.S.C. § 1126(b) (2006) (contemplating solicitation of plan acceptances or rejections must be in compliance with relevant non-bankruptcy laws, rules and regulations for disclosure); *In re* Pioneer Finance Corp., 246 B.R. 626, 630 (Bankr. D. Nev. 2000) (explaining prepackaged bankruptcies require disclosure at time of solicitation to comply with relevant non-bankruptcy laws, rules or regulations); Athanas, *supra* note 91, at 114 (providing prepackaged bankruptcy plans are only confirmed if disclosure statements conformed with relevant non-bankruptcy laws). As discussed more fully *infra* note 117, there is some risk that the exemption from the registration requirement of the U.S. securities laws for securities offered under a plan of reorganization provided by section 1145 of the Bankruptcy Code may not apply to the *solicitation* that occurs *before* the commencement of the bankruptcy case. However, section 1145 likely applies to the *issuance* of securities under a prepackaged plan of reorganization confirmed by the Bankruptcy Court. 11 U.S.C. § 1145(a) (2006) (authorizing exemption from registration requirements for securities offered or sold as part of bankruptcy reorganization plan). Accordingly, the foreign debtor will likely seek to have its pre-petition solicitation qualify for an exemption from the registration requirements of the U.S. securities laws or register the solicitation with the SEC. *See infra* note 117.

Court supervision of the restructuring process does not commence until the debtor files a chapter 11 petition.[97] At the time that such petition is filed, the debtor also files its plan of reorganization, disclosure statement, and evidence that it has obtained the requisite votes to confirm its plan of reorganization, and requests the court to schedule a hearing (typically approximately one month from petition date) to consider approval of the solicitation process and confirmation of the plan. In many cases, this court oversight consists of two hearings before the bankruptcy court: (1) a "first day" hearing on the day that the chapter 11 petition is filed, and (2) the confirmation hearing to approve the plan and solicitation.[98] The "in court" process for an unconstested prepack typically can be as little as one month, though it has been as short as two days in one recent case.[99]

In a prepackaged bankruptcy, the debtor becomes a "debtor-in-possession" under the Bankruptcy Code and existing management continues in possession and administration of the debtor's property and business.[100] As a debtor-in-possession, the debtor and its management owe legal duties to creditors and parties-in-interest.[101] The debtor is permitted to conduct its business in the ordinary course,

---

[97] *In re Multicanal*, 314 B.R. at 505 ("Once a case is filed, U.S. courts exercise supervisory and oversight powers in a U.S. Prepack . . . ."); *In re Hopewell*, 238 B.R. at 52 (suggesting court's involvement in prepackaged bankruptcies begins once petition is filed); Richard E. Mendales, *We Can Work it Out: The Interaction of Bankruptcy and Securities Regulation in the Workout Context*, 46 RUTGERS L. REV. 1213, 1286 (1994) (indicating court's involvement in prepackaged bankruptcies begins with filing of chapter 11 petition).

[98] *See In re Hopewell*, 238 B.R. at 52 (explaining after bankruptcy petition is filed, court becomes acquainted with reorganization plan and then later convenes to consider authorization of disclosure statement and plan); Guidelines, *supra* note 91, at III (contemplating scheduling of confirmation hearing not more than 90 days after petition date); *Out-of-Court Workouts, Prepacks and Pre-arranged Cases: A Primer*, AM. BANKR. INST. J., Apr. 2005, at 16 (noting in prepackaged bankruptcies, once petition is filed debtor just needs court to retroactively approve disclosure statement and confirmation of plan).

[99] *In re* Blue Bird Body Co., which is pending in United States Bankruptcy Court for District of Nevada, filed a chapter 11 petition and a plan of reorganization on January 26, 2006, and the court entered an order confirming the plan and approving the prepackaged solicitation process on January 27, 2006. *See In re* Blue Bird Body Co., Case No. 06-50026-GWZ (Bankr. D. Nev. 2006), docket Nos. 1 & 4 (petition and plan) and 27 (confirmation order).

[100] 11 U.S.C. § 1107 (2006) (providing rights, powers, and duties of debtor-in-possession); *In re Multicanal*, 314 B.R. at 505 (explaining in U.S. prepack, "debtor continues in possession of its property and operates its business"). In the case of a contested prepackaged proceeding, the opposing creditor could seek to appoint a trustee to take over management, but such appointment is unlikely absent extraordinary circumstances wherein a supermajority of the debtor's affected creditors maintain their support for the reorganization. 11 U.S.C. § 1104 (2006) (permitting appointment of trustee); *see* Courtney C. Carter, *Saving Face in Southeast Asia: The Implementation of Prepackaged Plans of Reorganization in Thailand, Malaysia, and Indonesia*, 17 BANK. DEV. J. 295, 299 (2000) (noting rules regarding appointment of examiner and/or trustee are not usually invoked in context of prepack).

[101] 11 U.S.C. § 1107 (2006) (requiring debtor-in-possession to perform all functions and duties of trustee serving in chapter 11 case); *In re* Kingston Square Assocs., 214 B.R. 713, 735 (Bankr. S.D.N.Y. 1997) (noting debtors' fiduciary duties include general creditors when corporation approaches or reaches insolvency); *In re* Bellevue Place Assocs., 171 B.R. 615, 623 (Bankr. N.D. Ill. 1994) (stating section 1107 imposes fiduciary duties upon management of debtor-in-possession); Official Committee of Unsecured Creditors of RSL Com PrimeCall, Inc. v. Beckoff (*In re* RSL Com Primecall, Inc.), No. 01-11457, 2003 WL 22989669, at *7–8 (Bankr. S.D.N.Y. Dec. 11, 2003) ("[T]he directors owe fiduciary duties to the entire 'community of interests' of those involved with the corporation, including creditors." (quoting Credit

but must seek prior court approval to perform any transactions outside the ordinary course of the debtor's business and to make payments on any debts that arose before the debtor filed for bankruptcy during the pendency of its bankruptcy case (i.e., the period before the court confirms the plan).[102]

Prepackaged bankruptcies can greatly reduce the length and cost of the bankruptcy case and provide greater certainty as to the outcome to the debtor, the parties-in-interest and the market generally.[103] Prepackaged bankruptcies afford debtors greater flexibility than out-of-court restructurings (e.g., tender offers and exchange offers in the case of bond debt) because they empower the debtor to bind dissenting and non-voting creditors to the restructuring terms accepted by the majority of voting creditors in their class required for approval of the plan of

---

Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns. Corp., CIV.A.12150, 1991 WL 277613, at *34 n.55 (Del. C. Dec. 30, 1991))).

[102] 11 U.S.C. § 363 (2006) (requiring court approval of transactions outside ordinary course of debtor's business); *In re* Structurlite Plastics Corp., 86 B.R 922, 932 (Bankr. S.D. Ohio 1988) ("Selective re-payment of pre-petition debt . . . is violative of the automatic stay imposed by 11 U.S.C. § 362(a) and, if tolerated, would negate the fundamental principle of equality of treatment among similarly situated creditors."). Although not expressly stated in the Bankruptcy Code, it is universally accepted that the automatic stay in section 362 of the Bankruptcy Code and the nature of a chapter 11 proceeding generally prohibit a debtor from paying pre-petition debts other than those under terms of a confirmed plan of reorganization or pursuant to court authorization. *See* Michelle L. Miller, *The Fox vs. the Hedgehog: Why Purely Emotional Damages Should Be Recoverable Under 11 U.S.C. § 362(h)*, 4 DEPAUL BUS. & COM. L.J. 497, 499–500 (2006) (discussing how automatic stay operates as statutory injunction). *See generally* 11 U.S.C. § 362(a) (2006) (listing instances wherein petitions filed under sections 301, 302, or 303 of Code invoke automatic stay); Rafael Efrat, *The Case for Limited Enforceability of a Pre-Petition Waiver of the Automatic Stay*, 32 SAN DIEGO L. REV. 1133 (1995) (analyzing courts' rational regarding whether or not to enforce pre-petition waivers of automatic stays). As noted *infra*, due to streamlined nature of prepackaged bankruptcies, courts frequently grant debtors authority to pay certain pre-petition claims, including unaffected claims (i.e., "unimpaired") under a plan of reorganization.

[103] *See* Saggese, *supra* note 91, § 4.03[B] (discussing advantages and efficiencies of prepackaged chapter 11 proceeding including reduced cost, shorter proceeding, diminished adverse effects of proceeding upon debtor's business, and increased certainty of result); Ball & Greene, *supra* note 91, at 207 ("A prepackaged bankruptcy potentially can greatly reduce amount of time spent in bankruptcy because the principal remaining task is the approval of the disclosure statement and confirmation of the plan of reorganization."); International Monetary Fund, Legal Dept., *Orderly & Effective Insolvency Procedures*, 73 (1999) (noting prepackaged plans provide ability to bind dissenting creditors and "provides [debtors] certainty with respect to retention and control of the enterprise and, overall, minimizes the disruption of the business"); UNCITRAL, Legislative Guide on Insolvency Law, 239 (United Nations 2005) (noting expedited reorganizations overcome hold-out problems in out-of-court workouts and permit debtors to avoid "the costs, delays and procedural and legal requirements often associated with full reorganization proceedings"). The International Insolvency Institute's Committee on Expedited International Reorganization Procedures has specifically noted efficiencies of prepackaged/expedited reorganization proceedings. *See* International Insolvency Institute, *Expedited International Reorganization Procedures Based Upon Portions of UNCITRAL's Insolvency Legislative Guide* (2d Annual Int'l Insolvency Conference June 2002) (recommending adoption of expedited reorganization procedures to facilitate benefits of out-of-court reorganizations because they are "cost effective, efficient tools for rescue of financially troubled businesses"); *see also Proposed Framework For Expedited Insolvency Procedures To Facilitate Cross-Border Restructurings*, http://www.iiiglobal.org/international/projects/framework.pdf [hereinafter *Proposed Framework*] (suggesting use of expedited reorganization procedures).

reorganization under the Bankruptcy Code.[104] In addition, a bankruptcy restructuring can be "crammed down" over the objection of non-consenting classes of claim or interest holders under certain circumstances where such parties' consent would be required in an out-of-court restructuring.[105] In a traditional (non-prepackaged/pre-negotiated) bankruptcy, no prior agreement regarding the reorganization terms is reached, and such negotiations actually occur after the bankruptcy filing, which may consume significant time and resources.

Prepackaged plans can be structured to minimize the extent to which creditors (particularly ordinary course employees and trade creditors) will have their rights impaired. Such plans often include an agreement to compromise the claims of large financial creditors (such as banks and bondholders), but leave the claims of all other creditors unimpaired to be paid in full under the restructuring.[106] As a result, a claims reconciliation process (the process in a traditional chapter 11 proceeding where creditors file claims in the bankruptcy which are then disputed, if warranted,

---

[104] *See* International Monetary Fund, Legal Dept., *supra* note 103, at 73 (noting one benefit of expedited reorganizations is ability to bind hold-out creditors); UNCITRAL, *supra* note 103, at 238–39 (discussing benefits of expedited reorganizations); International Insolvency Institute, *supra* note 103, at 1 (analyzing benefits of expedited reorganizations); *Proposed Framework*, *supra* note 103, at 2–3 (stating expedited reorganizations provide ability to bind hold-out creditors). A class of creditors is deemed to have accepted a plan of reorganization if a group of creditors in such class—holding two-thirds of the total value and one-half of the number of such claims—votes to accept the plan. *See* 11 U.S.C. § 1126 (2006) ("A class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors . . . ."). In the context of out-of-court restructuring, the ability to bind dissenting creditors can be constrained by applicable non-bankruptcy law. For example, in the case of bond debt, indentures often include contractual provisions protecting dissenting creditors and precluding a "majority action" to consent to restructuring that would alter the dissenting holder's right to sue for, among other things, principal and interest owed on such holder's bond. Indeed, in the case of bonds issued under indenture and qualified under the Trust Indenture Act of 1939 ("TIA"), such indentures are presumed as matter of law to prohibit such "majority action." *See* 15 U.S.C. § 77ppp(b) (2000) ("[T]he right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, . . . shall not be impaired or affected without the consent of such holder."); *see* Saggese, *supra* note 91, § 4.01[A] (noting prepackaged bankruptcy permits debtor "to effectuate a financial restructuring with levels of acceptance generally lower than those required in exchange offers"). As discussed more fully *infra*, TIA's "majority action" restriction is inapplicable to in-court restructurings under chapter 11 or chapter 15 of the Bankruptcy Code.

[105] 11 U.S.C. § 1129(b) (2006) (providing circumstances wherein court shall confirm plan). For example, existing equity-interest holders frequently have their interests impaired, if not extinguished, under prepackaged plans that convert all or part of creditor claims into equity when a reorganized debtor emerges from chapter 11. *See* Justin R. Kaufman, Comment, *Halting the Enron Train Wreck: Using the Bankruptcy Code to Rescue Retirement Plans*, 76 TEMP. L. REV. 595, 608 n.109 (2003) ("Although the rule that creditors' claims are superior to equity holders' interests in bankruptcy is not made explicit in the Code, it is implicit in the 'cramdown' provisions of 11 U.S.C. § 1129(b).").

[106] *See* Saggese, *supra* note 91, § 4.01 (noting prepackaged plans are "most likely to succeed if a company's problems flow mainly from a highly leveraged capital structure" and discussing importance of and strategies for paying debtor's other ordinary course liabilities); UNCITRAL, *supra* note 103, at 239–40 (encouraging countries to adopt prepackaged or "expedited" reorganization procedures, particularly for reorganizations that affect discrete classes of creditors such as lenders, bondholders, equity holders and other non-institutional creditors with considerable stakes in foreign debtor); *Proposed Framework*, *supra* note 103, at 4 (proposing model statute for expedited reorganization procedure focused upon "borrowed money indebtedness (institutional and public, whether secured or unsecured) and other similar financial obligations [that can] be adjusted by . . . a vote").

by the debtor) is not necessary because the debtor typically admits its liability to the class of financial debt affected by the plan (e.g., admits that it owes the outstanding principal and interest on its bonds) and agrees to pay all other claims that are unimpaired by the bankruptcy in the ordinary course of the debtor's business.[107] In addition, debtors may obtain court authorization to pay the claims of unimpaired creditors and other "critical vendors" in the ordinary course of business during the pendency of the bankruptcy proceeding.[108] As a result, the plan and the chapter 11 proceedings can be structured to permit the debtor to leave unimpaired and pay the claims of the debtor's trade creditors and employees and thereby substantially diminish the risk that such parties would challenge the U.S. prepack proceeding. In such circumstances, the bankruptcy court is presented with a voluntary and consensual plan that has already been agreed to by a supermajority of the foreign debtor's affected creditors and is less likely to reach parties over whom the court lacks jurisdiction or who may be able to avoid enforcement of its orders. Where available, the foreign debtor could potentially seek assistance similar to ancillary relief under the laws of its own country and others (particularly where such country has adopted the UNCITRAL model law as has the United States in new chapter 15) to aid the U.S. prepack and bind parties that may be outside the reach of the U.S. bankruptcy court's jurisdiction.

The prepackaged chapter 11 proceedings of Empresa Eléctrica Del Norte Grande S.A. ("Edelnor") and Chivor S.A. in the United States Bankruptcy Court for

---

[107] *See In re* Bd. of Dirs. of Multicanal S.A., 314 B.R. 486, 506 (Bankr. S.D.N.Y. 2004) (stating "there is no need for a claims administration or reconciliation process" in many U.S. prepacks); *see also* United Artists Theatre Co. v. Walton (*In re* United Artists Theatre Co.), 315 F.3d 217, 224 n.5 (3d Cir. 2003) (comparing "[p]renegotiated" bankruptcies with typical chapter 11 cases); Republic Health Corp. v. Coral Gables, Ltd. (*In re* REPH Acquisition Co.), 134 B.R. 194, 196 n.1 (N.D. Tex. 1991) (highlighting timeliness of "prepackaged" plans); *Guidelines*, *supra* note 91, VI.C.13–18 (contemplating motions to authorize debtor to pay numerous pre-petition obligations in ordinary course, including employee wages & benefits, unimpaired claims under the prepackaged plan, customer claims and warranties, and payments under key executory contract obligations); *Guidelines*, *supra* note 91, IX.A&B (contemplating no bar date will be established for filing claims in prepackaged chapter 11 unless requested by debtor).

[108] *See In re Multicanal*, 314 B.R. at 506 (noting unaffected creditors "are generally paid on confirmation of a plan or in the ordinary course of the debtor's business"); Joshua A. Ehrenfeld, *Quieting the Rebellion: Eliminating Payment of Prepetition Debts Prior to Chapter 11 Reorganizations*, 70 U. CHI. L. REV. 621, 635 n.92 (2003) (discussing how pre-petition "payments are unnecessary in prepackaged reorganization"); *Guidelines*, *supra* note 91, IV.C.13–18 (examining motions to authorize debtor to pay various pre-petition claims). The recent decision restricting the payment of "critical vendors" issued by the Seventh Circuit Court of Appeals in *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004), appears to indicate that its decision, which focused primarily upon domestic "critical vendors" in a case involving a domestic debtor, would equally apply to foreign creditors. *See generally* G. Ray Warner & Monica L. Loftin, *Seventh Circuit Casts Doubt on Common Practice of Paying Critical Vendors in Bankruptcy Cases*, GREENBERG TRAURIG ALERT, March 2004 (analyzing effects of *Kmart* decision). However, it does not appear that the unique issues presented by foreign creditors were actively litigated and that the case did not involve a foreign-debtor initiated proceeding. *See In re Kmart*, 359 F.3d at 866; *see also In re* Tropical Sportswear Int'l Corp., 320 B.R. 15, 20 (Bankr. M.D. Fla. 2005) (indicating court's reliance on failure of movant to make any evidentiary showing in *Kmart*). Moreover, the 2005 Bankruptcy Amendments provide statutory "administrative claim" priority to vendors who sold goods to the debtor within 20 days before commencement of the chapter 11 proceeding. *See* 11 U.S.C. § 503(b)(9) (2006).

the Southern District of New York, illustrate the effectiveness of such a strategy.[109] Edelnor, a power company with all of its operations in Chile, restructured $340 million of participation certificate debt (which was substantially similar to unsecured bonds) in a prepackaged bankruptcy proceeding where the plan was confirmed approximately one month after commencement of the proceedings.

Edelnor's restructuring did not impair any other creditors or equity interest holders but permitted the company to substantially reduce the financial burden of the participation certificates to permit the company to return to profitability. The success of Edelnor's restructuring was driven in large part by the overwhelming support of the holders of its affected debt (98% of the outstanding principal amount of such debt voted to accept the plan). In addition, the risk of a rogue creditor taking action in Chile inconsistent with the U.S. proceeding was tempered by the fact that holders of the participation certificates did not have individual standing to bring suit on such debt in Chilean courts. Moreover, by leaving general trade creditors unimpaired and obtaining authority to pay such creditors in the ordinary course of business, such creditors did not object to or take any action inconsistent with the U.S. bankruptcy proceeding.[110]

The Chivor reorganization similarly focused upon a discrete class of financial creditors without impairing the general trade creditors of a Colombian power concern, and was successfully consummated in a matter of months. Chivor's prepack restructured approximately $330 million of secured bank debt and enjoyed 100% support by all banks that actually voted upon its chapter 11 plan.[111] Like Edelnor, Chivor sought and obtained approval to pay its pre-petition debts other than the secured bank debt being restructured in the ordinary course during the pendency of its bankruptcy.[112] The court confirmed Chivor's plan of reorganization approximately five weeks after commencement of the case.

In addition to providing foreign debtors with the ability to bind dissenting or non-participating holders of their bonds, prepackaged bankruptcies offer several other advantages. First, the discharge, release, exculpation and injunction, and other provisions of the confirmed plan of reorganization provide many of the non-debtor/third parties participating in the restructuring with protection against legal

---

[109] There are no published decisions in these uncontested and prepackaged chapter 11 proceedings. However, the court filings in these cases can be found on the docket of the United States Bankruptcy Court for the Southern District of New York (electronic docket website: https://ecf.nysb.uscourts.gov/cgi-bin/login.pl) under *In re Edelnor S.A.*, Case No. 02-14530 (ALG) and *In re Chivor, S.A. E.S.P.*, Case No. 02-13291 (BRL). The disclosure statement filed in these cases, which provides significant detail regarding these reorganizations, can be found at Docket No. 15 on the *Edelnor* docket and Docket No. 2 on the *Chivor* docket.

[110] The motions and orders relating to this relief can be found on the *Edelnor* docket at Docket Nos. 4, 5, 6, 18, 19 & 20.

[111] Two holders of approximately 10% of the overall bank debt had opposed the restructuring and did not cast votes regarding Chivor's prepackaged chapter 11 plan. *In re Chivor*, No. 02-13291 (BRL), 2002 WL 32773533 (Bankr. S.D.N.Y. Aug. 9, 2002).

[112] The motions and orders relating to this relief can be found on the *Chivor* docket at Docket Nos. 8, 10, 13, 26, 29 & 30.

action by dissenting creditors in the United States. As a result, numerous third parties whose cooperation is necessary for the most efficient closing of a bond debt restructuring will obtain certainty that their participation will not unreasonably expose them to liability. For example, the indenture trustee for existing bonds will be able to assist the debtor in communicating with bondholders, making distributions under the plan to such bondholders and ultimately canceling any global notes evidencing the existing bonds subject to the restructuring. Similarly, The Depositary Trust Company and the foreign debtor's exchange agent will be able to facilitate consummation of the restructuring to affect bonds that have been tendered in connection with the solicitation without fear of exposing themselves to liability. Such protection may also extend to the foreign debtor's officers, directors, and advisors, as well as other parties engaged in the process leading to consummation of the confirmed plan of reorganization.

Second, section 1145 of the Bankruptcy Code provides an exemption from the registration requirements of the U.S. securities laws for the issuance of new securities under the prepackaged plan of reorganization.[113] The section 1145 exemption provides a clear safe harbor for the actual issuance of the new securities under the confirmed prepackaged plan and therefore adds an element of certainty to the transaction. However, there is some risk that the section 1145 exemption may not apply to the pre-petition solicitation that occurs in a prepackaged chapter 11 case. At least one member of the United States Securities and Exchange Commission ("SEC") staff has implied that the section 1145 exemption does not apply *before* the debtor commences a chapter 11 proceeding and therefore, in the case of a prepackaged bankruptcy, the dissemination of a disclosure statement and solicitation of votes before filing a chapter 11 petition constitutes an offer and sale of securities that must either be registered under the U.S. securities laws or qualify for another registration exemption.[114] As a result, foreign debtors may determine

---

[113] 11 U.S.C. § 1145 (2006); *see In re* Kenilworth Sys. Corp., 55 B.R. 60, 62 (Bankr. E.D.N.Y. 1985) (finding section 1145 was intended to give both debtors and creditors of debtors' estates exemptions from securities laws); NORTON BANKRUPTCY LAW AND PRACTICE 2d Rule 4003 (William L. Norton, Jr. ed., 2005-2006) (describing procedures regarding exemptions). The exemption is subject to certain limitations, including an exception for securities that are issues to an "underwriter" as defined in section 1145(b). *See* 11 U.S.C. § 1145(b) (2006) (defining "underwriter"); *In re* Standard Oil & Exploration of Del., Inc., 136 B.R. 141, 148–50 (Bankr. W.D.Mich. 1992) (exploring meaning of "underwriter" under Bankruptcy Code); *In re Kenilworth*, 55 B.R. at 62 (stating term "underwriter" is defined in section 1145(b) as an entity which "purchases a claim or interest for the purpose of receiving securities under a plan with a view to distribute those securities").

[114] *See* Abigail Arms, *Current Issues and Rulemaking Projects*, 939 PLI/CORP 747, 870–71 (1996). There, the author states:

> Issuers soliciting approval of prepackaged bankruptcy plans are engaged in an offer and sale of securities. Under these plans, security holders, in electing whether to accept a new or different security in exchange for their existing security, are making a new investment decision. Consequently, these transactions are subject to registration under the Securities Act, absent an available exemption, such as Section 3(a)(9) exchange offer exemption or the private offering exemption of Section 4(2).

that the safest course is to ensure that the pre-commencement solicitation of U.S. creditors is either registered with the SEC or qualifies for a registration exemption other than section 1145. Alternatively, in order for a solicitation to be covered by section 1145, the foreign enterprise could pursue a "pre-negotiated" chapter 11 proceeding where significant creditors (typically QIBs and non-US persons) agree to the general terms of the reorganization plan before commencement of the chapter 11 case, but actual solicitation of creditors does not occur until after commencement of the case.[115]

While the foregoing benefits of a prepackaged chapter 11 proceeding are substantial, they are not unaccompanied by risk. Most notably, the chapter 11 proceeding provides a forum for dissenting creditors to object to confirmation of the plan of reorganization and other relief (i.e., authority to pay trade creditor or unimpaired claims) sought by the foreign debtor. Non-frivolous objections can seriously impact the efficiency of the prepackaged proceeding. For example, objections to confirmation or to approval of the disclosure statement and solicitation process can raise complex litigation issues under the Bankruptcy Code that may delay the confirmation process and result in extensive hearings or a trial. Additionally, the Bankruptcy Rules provide such objecting parties with broad discovery rights that may result in extensive documentary discovery and depositions that may add, even if performed on an expedited basis, significant delay and expense to the proceeding.[116] Foreign debtors are typically not accustomed to U.S.

Id.; *see* Saggese, *supra* note 91, § 4.40[D] (noting SEC position that section 1145 is not available to prepack solicitation because it exempts only "a security of the debtor" and issuer is not technically "debtor" until chapter 11 proceedings have commenced). For an argument against this interpretation, see Ball & Greene, *supra* note 91, at 216 and Saggese, *supra* note 91, § 4.40[D], which notes that the SEC's view is hyper-technical and inconsistent with prior SEC guidelines regarding the scope of section 1145's statutory predecessor under section 393(a) of Bankruptcy Act. The National Bankruptcy Review Commission, which was established by Congress to examine and recommend changes to the Bankruptcy Code, has recommended that Congress expressly amend section 1145 to extend the bankruptcy exemption to certain pre-petition solicitations in connection with prepackaged chapter 11 plans of reorganization. *See Bankruptcy: The Next Twenty Years*, G COLLIER (15th ed.), *supra* note 2, § 2.4.; *cf.* James J. White, The Virtue of Speed in Bankruptcy Proceedings, Statement Before the National Bankruptcy Review Commission 6 (May 14, 1997) (suggesting goal of chapter 11 should be expedition of process to benefit both secured and unsecured creditors).

[115] *See* United Artists Theatre Co. v. Walton, 315 F.3d 217, 224 n.5 (3d Cir. 2003) (highlighting differences between prenegotiated bankruptcies, prepackaged bankruptcies, and typical chapter 11 bankruptcies); *Bankruptcy: The Next Twenty Years*, G COLLIER (15th ed.), *supra* note 2, § 2.4.17 ("The lack of an exemption for [pre-petition] solicitation [in a prepack] can be a significant impediment, which might lead a debtor to initiate a traditional chapter 11 case instead, or to pursue a 'pre-negotiated' plan in which most of the negotiation–but not the solicitation–takes place prior to filing."); Ball & Greene, *supra* note 91, at 245–47 (discussing prenegotiated chapter 11 cases).

[116] For example, Bankruptcy Rule 2004 provides that all parties-in-interest to a chapter 11 case may request the bankruptcy court to order extremely broad examination "of any entity" relating to the debtor's restructuring. FED. R. BANKR. P. 2004 ("On motion of any party in interest, the court may order the examination of any entity."). In addition, Bankruptcy Rule 9014 provides that various other rules that incorporate discovery procedures under the Federal Rules of Civil Procedure (*e.g.*, FED. R. BANKR. P. 7026 & 7037) apply in the case of "contested matters," which are essentially any disputed matter in a bankruptcy case that is not governed by another specific bankruptcy procedure (such as an adversary proceeding). FED. R. BANKR. P. 9014 ("Except as otherwise provided in this rule, and unless the court directs otherwise, the

style discovery, which is further complicated by the fact that many witnesses and documents are likely to be located outside of the United States in the foreign debtor's home country, causing language issues (which may require extensive use of translators) and the need for expedition to facilitate the restructuring. Where the prepackaged plan proposes to eliminate or substantially impair existing equity interests, there is a risk that the bankruptcy court may appoint an official committee of equity holders, whose expenses (including attorney fees) in resisting the prepackaged plan would then be paid by the foreign debtor's estate.[117] While these risks can be managed by carefully structuring the plan of reorganization and the chapter 11 proceeding to conform to the Bankruptcy Code's requirements, they cannot be eliminated (particularly where the debt being restructured includes securities that can be purchased by opportunistic and litigious investors) and are inherent to any proceeding.

In addition, the prepackaged bankruptcy proceeding's efficiency is subject to the omnipresent risk that a dissenting creditor or equity holder outside the bankruptcy court's jurisdiction could commence legal proceedings against the foreign debtor in its home country or elsewhere outside of the United States. The commencement of concurrent insolvency proceedings against the foreign debtor will trigger the need to coordinate proceedings in the debtor's home country with those in the United States, which may delay confirmation of the prepackaged plan.[118] In the worst case, compliance with the requirements of the concurrent

---

following rules shall apply: . . . 7026, 7028-7037 . . . ."). Rule 9014 and its related discovery rights apply to confirmation objections. FED. R. BANKR. P. 3020(b)(1).

[117] *See* 11 U.S.C. 1102(a)(2)(2006) ("[T]he court may order the appointment of additional committees of equity security holders if necessary . . . ."); Saggese, *supra* note 91, § 4.01[A], n.17 (discussing appointment of equity committee in *In re AM Int'l, Inc.*, Case No. 93-582 (Bankr. D. Del.)); *In re* Oneida Ltd., Case No. 06-10489-ALG, Memorandum of Opinion and Order on Motion for Appointment of Equity Committee (Bankr. S.D.N.Y. 2006), *available at* http://www.nysb.uscourts.gov/opinions/alg/147842_209_opinion.pdf (explaining circumstances under which an equity committee is permissible). Typically, such equity committees will challenge the debtor's valuation of its enterprise by claiming that the prepackaged plan undervalues the debtor and therefore improperly provides insufficient distributions to existing equity holders. This type of a challenge can result in a lengthy and expensive confirmation hearing. *See In re* Williams Commc'ns. Group, Inc., 281 B.R. 216, 223 (Bankr. S.D.N.Y. 2002) (deciding appointment of equity committee would cause delay in case); *In re* Kalvar Microfilm, 195 B.R. 599, 601 (Bankr. D. Del. 1996) (remarking additional costs would undoubtedly result from formation of official equity committee); Albero v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 68 B.R. 155, 164 (Bankr. S.D.N.Y. 1986) (finding appointment of official committees would delay confirmation of plan).

[118] *See In re* Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1, 16–17 (Bankr. S.D.N.Y. 2003) (discussing potential coordination of U.S. chapter 11 with Colombian insolvency proceeding); Official Comm. of Unsecured Creditors v. Transpacific Corp. (*In re* Commodore Int'l, Ltd.), 242 B.R. 243, 256 (Bankr. S.D.N.Y. 1999) (stating protocol was devised and implemented to coordinate U.S. and Bahamian insolvency proceedings); Shinichiro Abe, *Recent Developments of Insolvency Laws and Cross-Border Practices in the United States and Japan*, 10 AM. BANKR. INST. L. REV. 47, 72 (2002) (noting three general approaches address coordination of cross-border insolvency cases including tacit cooperation guided by comity, use of protocols, and by treaty). For a further discussion of concurrent bankruptcy proceedings see *infra* Part III. Subchapters IV and V of new chapter 15 of the Bankruptcy Code include specific guidelines that promote coordination between concurrent insolvency proceedings. *See* 11 U.S.C §§ 1525–32 (2006) (codifying statutes dealing with cooperation with foreign representatives and coordinating concurrent proceedings).

foreign proceeding may be irreconcilable with the U.S. prepack,[119] or may cause the need for a resolicitation of acceptances for the plan if foreign insolvency law imposes an adverse change under the plan of reorganization with respect to any impaired creditor.[120]

II. ANCILLARY CASES—NEW CHAPTER 15 AND FORMER SECTION 304

The insolvency laws of some other countries also offer streamlined procedures for the expeditious and largely consensual restructuring of financial debt. Some of these procedures, like Argentina's *acuerdo preventive extrajudicial* ("APE") and Brazil's new *Recuperação Extrajudicial*, are modeled after and akin to the U.S. prepack by providing for a pre-petition solicitation of creditors followed by an expedited reorganization proceeding to obtain court confirmation.[121] The adoption of these expedited reorganization procedures is an emerging trend in international insolvency law that has been endorsed by international organizations, including the International Monetary Fund and UNCITRAL, both of which have adopted official

---

[119] For example, the foreign insolvency law may impose priorities fundamentally inconsistent with the U.S. Bankruptcy Code. *See* Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V., 310 F.3d 118, 131–33 (3d Cir. 2002) (discussing conflicts regarding subordination powers of U.S. law and insolvency law of foreign debtor's home country); Maxwell Commc'n Corp. v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036, 1049–53 (2d Cir. 1996) (examining conflicts of avoidance under U.S. law and insolvency law of foreign debtor's home country); Jacob S. Ziegel, *Corporate Groups and Crossborder Insolvencies: A Canada-United States Perspective*, 7 FORDHAM J. CORP. & FIN. LAW 367, 382–88 (2001) (discussing conflicts between U.S. and Canadian bankruptcy law regarding substantive consolidation); *see also* Bank of N.Y. v. Treco (*In re* Treco), 240 F.3d 148, 158–60 (2d Cir. 2000) (denying section 304 relief to proceeding that subordinated secured claims to other claims given statutory priority under foreign law because "security interests have been recognized as property rights protected by our Constitution's prohibition against takings without just compensation").

[120] *See* FED. R. BANKR. P. 3019 (permitting pre-confirmation modifications to plan already accepted by creditors where "proposed modification does not adversely change the treatment" of any party who has not consented to such modification in writing); *In re* Dow Corning Corp. 237 B.R. 374, 378 (Bankr. E.D. Mich. 1999) (acknowledging anyone who voted to accept previous plan will be deemed to have accepted modified plan if modified plan does not adversely change treatment of creditor's claim); Frank R. Kennedy & Gerald K. Smith, *Postconfirmation Issues: The Effects of Confirmation and Postconfirmation Proceedings*, 44 S.C. L. REV. 621, 721 (1993) (interpreting rule 3019 to address modification of accepted plan before confirmation in which court can allow modification).

[121] *See In re* Bd. of Dirs. of Multicanal S.A., 314 B.R. 486, 504 n.8 (Bankr. S.D.N.Y. 2004) (noting France and Mexico have forms of prepacks); *see also* CGSH memo *re* France (mandate ad hoc). For a discussion regarding the similarities between the APE and U.S. prepacks, see *In re Multicanal*, 314 B.R. at 504–06, which concludes that Argentina's APE bears a strong resemblance to U.S. prepackaged plans, and *In re* Bd. of Dirs. of Telecom Argentina, No. 05-17811 (BRL), 2006 WL 686867, at *23–27 (Bankr. S.D.N.Y. Feb. 24, 2006), which states that APE procedures coincide with U.S. law. For a discussion of Brazil's new procedure, see Christopher Jarvinen & Luiz Fernando Valente de Paiva, *The New Bankruptcy and Restructuring Law in Brazil*, 888 PLI/28th Annual Current Developments in Bankruptcy & Reorganizations Vol. II, 33, 44–49 (2006); Fabio Celli, *Brazil Overhauls Bankruptcy Law*, LEGAL WEEK GLOBAL, Oct. 3, 2005; and Standard & Poor's, *New Brazil Bankruptcy Law Likely to Improve Recovery Prospects for Creditors, But Challenges Remain*, RATINGSDIRECT (2005), http://www.securitization.net/pdf/sp/BrazilianLaw_5Jul05.pdf.

policies encouraging countries to incorporate expedited reorganization procedures similar to the U.S. prepack into their insolvency laws.[122]

Even without such modifications to establish a new prepack procedure, the insolvency laws of many countries already provide flexible procedures similar to a "prepackaged" or "prenegotiated" chapter 11 proceeding that foreign debtors can use to implement an expedited reorganization. For example, the U.K. "scheme of arrangement" procedure, which exists in some form in numerous jurisdictions, provides a mechanism to obtain expeditious court approval of consensual reorganization plans.[123] Canada's CCAA reorganization procedure can similarly be

---

[122] In 2005, UNCITRAL issued its "Legislative Guide on Insolvency Law," which is intended to assist national authorities and legislative bodies to establish "efficient and effective legal framework to address the financial difficulty of debtors." UNCITRAL, *supra* note 103. Recognizing the efficiencies inherent to prepackaged reorganizations, UNCITRAL specifically advised countries to adopt expedited reorganization proceedings and provided guidelines for such adoption. *Id.* at 238–47. The International Monetary Fund similarly concluded that, "[t]o enhance the efficiency of the rehabilitation process, the law should allow for the approval by the court of rehabilitation plans that have been voted upon (or, at a minimum, negotiated) before commencement of the rehabilitation proceeding." International Monetary Fund, *supra* note 103, at 73. The G10 Contact Group on Legal and Institutional Underpinnings of the International Financial System has also concluded that prepackaged reorganizations are an essential element of insolvency law reform to provide international financial stability. Contact Group on Legal and Institutional Underpinnings of the International Financial System, *Insolvency Arrangements and Contract Enforceability*, 46, 50 (Sept. 2002), http://www.bis.org/publ/gten06.pdf (discussing prepackaged reorganizations role in an international insolvency setting). Finally, the International Insolvency Institute's Committee on Expedited International Reorganization Procedures has called for a model statute regarding expedited reorganization proceedings. International Insolvency Institute, *supra* note 103; *see Proposed Framework*, *supra* note 103 (offering support to voluntary out-of-court restructurings on an international basis).

[123] A scheme of arrangement is:

> [A] procedure provided for under section 425 of the Companies Act [that] . . . may be used by a company in financial difficulties to reach a binding compromise with creditors. It is similar to a "pre-packaged" [c]hapter 11, in that the agreement is negotiated out of court, with a court hearing at the end to sanction the pre-agreed deal.

David Frauman, Carolyn Conner & Marc Bennett, *Comparing Insolvency Regimes in the U.S. and European Union: The Transatlantic Perspective*, THE AMERICAS RESTRUCTURING AND INSOLVENCY GUIDE 2004/2005, at 52 [hereinafter *Frauman & Conner*]. One court has found schemes of arrangement to be similar to a U.S. prepack. *See In re* Bd. of Dirs. of Hopewell, 238 B.R. 25, 50–53 (Bankr. S.D.N.Y. 1999) (granting section 304 relief to Bermudan scheme of arrangement and noting its similarities to U.S. prepack). Like a pre-negotiated chapter 11 plan, the debtor negotiates a financial restructuring with a discrete class or classes of creditors under a scheme of arrangement and then files the scheme with a court together with a request that the court schedule a creditor vote. *See id.* at 52–53 (describing creditor/debtor negotiation process under scheme of arrangement). If the requisite number of creditors (50% in amount and 75% in number of each affected class) approves the scheme, it is then submitted for court approval, which, if granted, binds all affected creditors (including dissenters). *See Id.* at 58 (noting statutory effect of scheme binds all creditors, regardless of whether or not they voted in its favor); *Frauman & Conner*, *supra*, at 114 (noting U.K. courts have been willing to grant expedited consideration of schemes of arrangement). Other countries have scheme of arrangement procedures that can be similarly used. *See, e.g., Frauman & Conner*, *supra*, at 37 (noting in Bermuda "it is not impossible for a debtor to negotiate with their significant creditors and devise a restructuring plan which can be incorporated into a scheme . . . ."); *id.* at 67 (noting Cayman law permits expedited scheme of arrangement proceedings); THE AMERICAS RESTRUCTURING AND INSOLVENCY GUIDE 2004/2005 at 301–02 (discussing Bermuda's scheme of arrangement procedure); *id.* at 319 (discussing Cayman scheme of arrangement procedure); 2 COLLIER INTERNATIONAL BUSINESS

used to efficiently implement a consensual plan.[124] In addition, the insolvency laws of Austria, Colombia, France, Germany, Italy, Japan, Mexico and Scotland also offer some ability to implement an expedited reorganization proceeding.[125]

Depending upon the circumstances, a foreign debtor may find it preferable to avail itself of the streamlined restructuring procedure in its home country and seek recognition and enforcement of that foreign proceeding in the United States. Historically, section 304 of the Bankruptcy Code has provided foreign debtors with the procedural mechanism to obtain such recognition in the United States.[126] The 2005 Bankruptcy Amendments repealed section 304 and replaced it with new chapter 15 of the Bankruptcy Code, which provides an even more comprehensive regime that can be invoked in aid of a foreign restructuring proceeding.[127]

INSOLVENCY GUIDE ¶¶ 14.04[1][b], 23B.10, 27.10[1] (Richard F. Broude & Theodore L. Freedman et al. eds., 2005) (discussing Australia, Hong Kong, and Ireland's scheme of arrangement procedure).

[124] Canada's reorganization procedures are similarly flexible enough to permit expedited reorganizations based upon reorganization plans agreed to pre-petition. *See* Press Pub., Ltd. v. Matol Botanical Int'l, Ltd., 37 P.3d 1121, 1124 (Utah 2001) (referring to Canadian bankruptcy court's reorganization procedures); *Frauman & Conner*, *supra* note 123, at 61 ("With sufficient advance planning and creditor consultation and support, 'prepackaged reorganizations' can be accommodated in both BIA and CCAA plans."); Ziegel, *supra* note 119, at 384 (discussing "prepackaged plan of arrangement under the CCAA" of Bramalea companies).

[125] *See Frauman & Conner*, *supra* note 123, at 15 (Austria's "Settlement and Recomposition Act . . . may be 'prepackaged' or structured within certain limitations"); *id.* at 84 (noting "totally or partially prepackaged reorganization" is possible under Colombian insolvency law); *id.* at 153 (noting German debtors may agree upon terms of plan with main creditors to be filed upon commencement of self-administration reorganization proceeding); *id.* at 183 (noting that under new Italian procedure debtor can submit a composition plan already agreed to by at least 60% of its creditors for court approval as long as such plan does not impair other creditors); *id.* at 195–96 (noting two expedited Japanese reorganization procedures); *id.* at 224 (noting that Mexican law does not prohibit "the execution of a corporate reorganization agreement with the creditors before filing the request of a bankruptcy."); *id.* at 264 (noting through Scotland's "mechanism of receivership it is possible to have a pre-packaged reorganisation."); Patrick E. Mears & Hideyuki Sakai, *Pacific Overtures: Acquistions of Financially Distressed Company Assets in Japan*, ABI web posted article at 6 (October 1, 2004) (discussing Japanese prepackaged reorganization proceedings); Cleary Gottlieb Steen & Hamilton LLP, Alert Memo (2005), http://www.cgsh.com/files/tbl_s5096AlertMemoranda%5CFile Upload5741%5C293%5C62-2005.pdf (discussing 2006 amendments to French insolvency law and procedures for court approval of pre-negotiated reorganization plans pursuant to *mandat ad hoc*and *procédure de concilitation*); 2 COLLIER INTERNATIONAL BUSINESS INSOLVENCY ¶ 23A.04 (2005) (Richard F. Broude & Theodore L. Freedman et al. eds., 2005) (discussing flexible reorganization procedures under Greek insolvency law).

[126] For a comprehensive discussion of section 304, see Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, 863 PLI/COMM, 815, 822–835 (2004), which illustrates the procedural mechanisms that enable foreign companies in reorganization to bring ancillary or special proceedings in the U.S.; Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 115 (2002), which analogizes section 304 functions as "a portal through which foreign bankruptcy law can flow into the United States"); and Melissa S. Rimel, Comment, *American Recognition of International Insolvency Proceedings: Deciphering Section 304(c)*, 9 BANKR. DEV. J. 453, 455–56 (1992), which discusses various factors that courts must consider under section 304 in connection with a foreign trustee's request for relief.

[127] *See* 11 U.S.C. §§ 1501–32 (2006) (regulating ancillary and other cross-border cases). Chapter 15 is based upon the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission for International Trade Law ("UNCITRAL"), which has been adopted in varying forms in several other countries including, Eritrea, Japan, Mexico, Poland, Romania, South Africa and Serbia and Montenegro. *See* Susan Jaffe Roberts et al., *International Secured Transactions and Insolvency*, 40 INT'L LAW. 381, 382 (2006) ("The enactment of chapter 15 represents the long-awaited adoption of the UNCITRAL Model Law

Like former section 304, new chapter 15 allows a "foreign representative"[128] to commence an ancillary case in the United States in aid of a plenary insolvency case located outside of the United States. An ancillary case facilitates preservation of the debtor's assets in the United States in aid of the foreign plenary insolvency case, and is instituted when an insolvency proceeding outside of the United States has already commenced and the debtor does not want to initiate concurrent plenary proceedings in the United States. The broad ranging equitable authority granted under chapter 15 (like former section 304) can be exercised to issue injunctive relief in the United States to facilitate the foreign debtor's restructuring by, among other things, implementing a stay of creditor actions against the foreign debtor and its property in the United States, giving effect to the discharge of debt granted in the foreign proceeding, and facilitating an efficient administration of the foreign estate by protecting third parties who cooperate or participate in the restructuring implemented by the foreign proceeding from actions by creditors in the United States.[129]

---

on Cross-Border Insolvency (Model Law) in the United States."); Salafia, *supra* note 9, at 316 n.153 ("Legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been adopted in Eritrea, Japan (2000), Mexico (2000), Poland, Romania (2003), South Africa (2000), Montenegro (2002) and British Virgin Islands (2005).").

[128] "Foreign representative" is defined in the Bankruptcy Code as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24) (2006).

[129] Ancillary proceedings have not historically been the only line of defense that a foreign debtor may invoke to protect its restructuring against legal attacks in the United States. Foreign debtors have also defended against such actions by asserting other traditional defenses in lawsuits brought against them by parties resisting their foreign restructuring. Chief among these defenses is the well established doctrine of international comity, which courts may invoke to dismiss a U.S. lawsuit in deference to the judicial or administrative processes of another sovereign, even where important U.S. statutes are at issue. *See* Can. Ry. Co. v. Gebhard, 109 U.S. 527, 537–39 (1883) (deferring to Canadian insolvency proceeding to dismiss suit brought by U.S. bondholders); Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 247 (2d Cir. 1999) (noting "the particular need to extend comity to foreign bankruptcy proceedings"); Allstate Life Ins., Co. v. Linter Group Ltd., 994 F.2d 996, 998−1000 (2d Cir. 1993) (dismissing bondholders federal securities fraud action to grant comity to Australian insolvency proceeding); Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 459 (2d Cir. 1985) (vacating attachment of assets in United States and dismissing action to require arbitration and deferring to foreign insolvency proceeding); Smith v. Dominion Bridge Corp., 33 Bankr. Ct. Dec. (LRP) 1263, 1265 (1999) ("The plaintiffs argue that the United States has an overriding public policy interest in enforcing its securities laws; however, deference may be given to foreign bankruptcy proceedings notwithstanding that the plaintiffs in this Court are Americans and the claims are based on the securities laws of this country."); Lindner Fund, Inc. v. Polly Peck Int'l PLC, 143 B.R. 807, 808–11 (Bankr. S.D.N.Y. 1992) (dismissing federal securities fraud actions against debtor in United Kingdom reorganization proceedings based on general principals of comity). New chapter 15 seeks to centralize the issue of granting comity to foreign insolvency proceedings in the bankruptcy courts by authorizing the foreign representative to enforce an order granting recognition under chapter 15 in any other court in the United States. *See* 11 U.S.C. § 1509(b)–(c) (2006) (granting right of direct access); United States v. J.A. Jones Const. Group, LLC, 333 B.R. 637, 639 (Bankr. E.D.N.Y. 2005) (denying foreign debtor's motion to stay civil litigation based on principles of comity because foreign debtor had not commenced a chapter 15 case in bankruptcy court and stating "[i]n the absence of recognition under chapter 15, this Court has no authority to consider [foreign debtor]'s request for a stay"). Similarly, a denial of chapter 15 relief will preclude a foreign representative from obtaining relief based upon comity in any other court in the United

At least three Argentine companies (Multicanal S.A., Telecom Argentina S.A. and Cablevision S.A.) have sought judicial recognition of their prepackaged APE restructurings in the United States through ancillary relief under the Bankruptcy Code.[130] Similarly, foreign debtors have also reorganized through schemes of arrangement and then sought recognition of such restructurings in the United States.[131]

A. Obtaining Chapter 15 Ancillary Relief

To obtain ancillary relief, a "foreign representative" must commence an ancillary proceeding by filing a verified petition seeking recognition of a "foreign proceeding" currently pending with respect to the foreign debtor outside of the United States.[132] The petition must include (i) a decision commencing such foreign proceeding and appointing the foreign representative, (ii) a certificate of the foreign court affirming the existence of the foreign proceeding and the foreign representative's appointment, or (iii) in the absence of either of the forgoing, such

---

States. *See* 11 U.S.C. § 1509(d) (2006) ("If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States."). The legislative history indicates that Congress intended these provisions to "make it clear that chapter 15 is . . . the exclusive door to ancillary assistance to foreign proceedings." H.R. REP. NO. 109-31, at 110 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 173 (noting Congress intended to depart from prior practice where courts granted comity outside of section 304 proceeding context). *See generally J.A. Jones Construction Group*, 333 B.R. at 638 (describing when provisions of chapter 15 are applicable); Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, The Ali Principles, and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 23 (2002) ("[Section] 1509 centralizes the process of recognition of foreign proceedings in the bankruptcy courts.").

[130] *In re* Bd. of Dirs. of Telecom Argentina S.A., No. 05-17811(BRL), 2006 WL 686867, at *1 (Bankr. S.D.N.Y. Feb. 24, 2006) (giving judicial recognition to APE restructuring); *In re* Bd. of Dirs. of Multicanal S.A., 314 B.R. 486, 491 (Bankr. S.D.N.Y. 2004) (describing attempt for judicial recognition of APE restructuring); *In re* Cablevision S.A., 315 B.R. 818, 819 (Bankr. S.D.N.Y. 2004) (examining Argentinian cable company's attempt to gain judicial recognition of its APE restructuring).

[131] *See In re* Netia Holdings S.A., 277 B.R. 571, 573 (Bankr. S.D.N.Y. 2002) (allowing request for section 304 relief by Polish company); *In re* Bd. of Dirs. of Hopewell Int'l Ins. Ltd., 238 B.R. 25, 50–52 (Bankr. S.D.N.Y. 1999) (granting section 304 relief to Bermudan scheme of arrangement and noting its similarities to U.S. prepack); *In re* Brierley, 145 B.R. 151, 167 (Bankr. S.D.N.Y. 1992) ("section 304(c)(4) does not command that the distributive scheme wholly replicate ours. What it directs the court to consider is whether that scheme is 'substantially in accordance' with that which we employ. And it is."). Indeed, the first reported chapter 15 opinion granted recognition to a U.K. scheme of arrangement. *See In re* Petition of Lloyd, No. 05-60100 (BRL), 2005 WL 3764946, at *1, (Bankr. S.D.N.Y. Dec. 7, 2005) (permitting recognition to solvent scheme of arrangement of U.K. insurance company).

[132] 11 U.S.C. § 1515(a) (2006) ("A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition."). Bankruptcy Rule 1008 requires that all petitions filed be "verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746." FED. R. BANKR. P. 1008. In addition, Bankruptcy Rule 1010 provides that the court will issue a summons that the foreign representative must serve upon "any entity against whom provisional relief is sought under section 1519 of the Code and on any other parties as the court may direct." FED. R. BANKR. P. 1010. In addition, section 1514 imposes new notice requirements applicable in ancillary cases, particularly with respect to parties without a known address in the United States. 11 U.S.C. § 1514 (2006).

other satisfactory evidence to establish the existence of the foreign proceeding and the foreign representative.[133] Courts are entitled to presume the authenticity of the documents attached to the petition and are directed, "after notice and a hearing" to decide the issue of whether to recognize the foreign proceeding "at the earliest possible time."[134] Unlike the procedure under section 304, which could require an extensive process to obtain recognition, chapter 15 reduces the process to obtain the automatic statutory relief (which focuses upon the protection and use of the foreign debtor's U.S. assets) to a streamlined documentary process unless it is challenged by a party-in-interest.[135] Additional proceedings are required to obtain relief beyond the "automatic" statutory relief.[136]

Upon the filing of the chapter 15 petition, courts are empowered to grant provisional relief pending a determination regarding final relief, including, among other things, (i) staying actions against the foreign debtor's property, (ii) entrusting administration or realization of the foreign debtor's assets to the foreign representative or other court appointed party to preserve the value of assets, (iii) suspending the right to transfer, encumber or dispose of the foreign debtor's assets, and (iv) providing for discovery concerning the foreign debtor's assets, affairs, rights, liabilities or obligations.[137] To obtain such relief, the foreign representative must satisfy the procedural and substantive requirements generally applicable to injunctions, which will require a showing that (i) the foreign representative has a probability of success on the merits of its petition seeking recognition of the foreign proceeding, or (ii) sufficiently serious questions on the merits and a balance of hardships tipping in favor of the foreign representative.[138] Some courts may also

---

[133] 11 U.S.C. § 1515(b) (2006) (listing required documentation which must accompany petition for recognition under section 1515).

[134] 11 U.S.C. § 1517(a), (c) (2006) (describing requirements for order granting recognition).

[135] *See* 11 U.S.C. § 1520 (2006) (providing automatic relief upon recognition); Westbrook, *supra* note 129, at 14 ("Articles 15-17 of the Model law [(sections 1515 & 1517 of the Bankruptcy Code)] are designed to make the recognition process as simple, fast and inexpensive as possible . . . . Thus, recognition can be reduced to a simple documentary process unless challenged.").

[136] 11 U.S.C. §§ 1507, 1521(a) (2006) (providing statutory authority for supplemental relief beyond automatic relief provided for under section 1520); *see In re* Ephedra Prods. Liab. Litig., Nos. 04 MD 1598 (JSR), 06 Civ. 538 (JSR), 06 Civ. 539 (JSR), 2006 WL 2338092, at *1 (Bankr. S.D.N.Y., Aug. 11, 2006) (noting additional relief available under chapter 15); *In re* Artimm, S.r.L., 335 B.R. 149, 159–60 (Bankr. C.D. Cal. 2005) (stating other relief is available under chapter 15). For a further discussion of such supplemental relief, see *infra* note 145.

[137] 11 U.S.C. § 1519 (2006); *see* Biery, *supra* note 9, at 53 ("[C]ourt may, at the request of the foreign representative, grant certain enumerated forms of provisional relief to protect the assets of the debtor or the interests of the creditors.").

[138] *See In re* Netia Holdings S.A., 278 B.R 344, 352 (Bankr. S.D.N.Y. 2002) (discussing what moving parties must show to prevail on motion for preliminary injunction); *see also* Adelphia Commc'ns. Corp. v. Rigas (*In re* Adelphia Commc'ns. Corp.), 323 B.R. 345, 373 (Bankr. S.D.N.Y. 2005) ("[S]tandards for issuance of a preliminary injunction in this Circuit are well known."); NWL Holdings v. Eden Ctr. (*In re* Ames Dep't Stores), 317 B.R. 260, 273 (Bankr. S.D.N.Y. 2004) (recognizing practice of issuing preliminary injunctions in their circuit as "well known").

require a showing of irreparable injury if the injunction is denied, though this requirement has not been strictly applied in ancillary proceedings.[139]

To obtain recognition, the foreign representative must establish that (i) the foreign proceeding is a "foreign main proceeding" or a "foreign nonmain proceeding" within the meaning of section 1502 of the Bankruptcy Code, (ii) the foreign representative is "a person or body," and (iii) the petition meets the requirements of section 1515 above (i.e., it attached the appropriate evidence of foreign proceeding and foreign representative's existence).[140] This showing is a relaxed standard that does not require the broader showing required under former section 304 that the foreign proceeding satisfied the factors set forth under former section 304(c).[141]

Unlike section 304, which left the scope of relief to be granted largely undefined and in the discretion of the court, chapter 15 provides a significant amount of automatic statutory relief upon entry of an order recognizing a foreign proceeding. First, upon recognition, the automatic stay of section 362 applies to protect the foreign debtor's assets in the United States.[142] Second, the foreign representative is authorized to operate the foreign debtor's business (and transfer its assets) in the United States with similar powers to a trustee/debtor-in-possession.[143]

---

[139] *In re* Avila, 296 B.R. 95, 114 (Bankr. S.D.N.Y. 2003) ("[T]he need to show irreparable harm has not been uniformly applied in [section] 304 cases . . . ."); *In re* Rukavina, 227 B.R. 234, 242 (Bankr. S.D.N.Y. 1998) ("[Section] 304 does not mention irreparable harm as a predicate for the issuance of an injunction."); 2 COLLIER (15th ed.), *supra* note 2, ¶ 304.05 at 304–21 ("[S]ection 304 does not specify irreparable harm as a predicate to the issuance of an injunction . . . .").

[140] *See* 11 U.S.C. § 1502 (2006) (defining "foreign main proceeding" as "foreign proceeding pending in the country where the debtor has the center of its main interests" and "foreign nonmain proceeding" as "foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment"); 11 U.S.C. § 1515(b)(1) (2006) (documenting "a petition for recognition" could be accompanied by "certified copy of the decision commencing such foreign proceeding and appointing the foreign representative."); 11 U.S.C. § 1517 (2006) (stating terms required to obtain order granting recognition).

[141] *See* H.R. REP. NO. 109-31, pt. 1, at 113 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 175 ("The decision to grant recognition is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c) of the Bankruptcy Code."); *see also* Gropper, *supra* note 126, at 828 (indicating under chapter 15 "the 304(c) factors will play a less central role, as these factors are expressly applicable only when 'additional assistance' is sought under proposed [section] 1507").

[142] *See* 11 U.S.C. § 1520(a)(1) (2006) (providing section 362 applies to debtor's property within "territorial jurisdiction of the United States"). Other automatic stay related provisions also automatically apply. United States v. J.A. Jones Const. Group, LLC, 333 B.R. 637, 638 (Bankr. E.D.N.Y. 2005) ("Once a foreign bankruptcy proceeding is recognized, a wide range of relief available under American bankruptcy law immediately becomes applicable . . . ."). For example, section 361 applies to provide creditors with adequate protection rights, as well as the right to seek relief from the automatic stay under section 362(d). 11 U.S.C. § 1520(a)(1) (2006) ("[S]ections 361 . . . apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States . . . ."). In addition, various statutory exceptions to the automatic stay also automatically apply in chapter 15 cases. *See* 11 U.S.C. § 103(a) (2006) (providing automatic stay exceptions under sections 555–557 and sections 559–562 apply in chapter 15 cases).

[143] 11 U.S.C. § 1520(a)(3) (2006) ("[F]oreign representative may operate the debtor's business and may exercise the rights and powers of a trustee . . . ."); *see In re* Artimm, 335 B.R. 149, 159 (Bankr. C.D. Cal. 2005) ("[U]nless the court orders otherwise, the foreign representative may operate the debtor's business . . . ."); Westbrook, *supra* note 59, at 723 (stressing foreign representative's wide range of relief, which includes operation of debtor's business under section 363).

Notably, the conduct of such business is subject to the restraints under section 363 of the Bankruptcy Code (i.e., court approval of transactions outside the ordinary course is required) and improper post-petition transfers can be avoided under section 549.[144]

In addition to this automatic relief, chapter 15 provides two statutory sources that authorize courts to grant a broad range of supplemental relief to promote chapter 15's purposes. First, section 1521 authorizes courts to grant other "appropriate relief" including: (i) staying actions or proceedings against the foreign debtor or its assets, rights, obligations or liabilities, (ii) staying execution against the foreign debtor's assets, (iii) suspending the right to transfer, encumber or dispose of the foreign debtor's assets, (iv) granting discovery regarding the foreign debtor's affairs and assets, (v) entrusting the administration or realization of the foreign debtor's assets in the United States to the foreign representative or another person, and (vi) granting relief available to a trustee/debtor-in-possession other than relief related to the avoidance powers under the U.S. Bankruptcy Code.[145] To obtain such relief, the foreign representative must satisfy the standards and procedures generally applicable to injunctions and show that such relief is "necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors."[146]

The second statutory source of supplemental relief is section 1507, which authorizes a court to grant "additional assistance" where, consistent with principles of comity, such assistance will reasonably assure (i) just treatment of stakeholders, (ii) protection of U.S. creditors against prejudice and inconvenience in processing their claims, (iii) prevention of fraudulent and preferential transfers, and (iv) distributions substantially in accordance with the order prescribed in the Bankruptcy Code.[147] The Bankruptcy Code does not define what the term "additional

---

[144] 11 U.S.C. § 1520 (a)(2) (2006) ("[S]ections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate . . . ."); 11 U.S.C. § 1520 (a)(3) (2006) ("[U]nless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552 . . . .").

[145] 11 U.S.C. § 1521(a) (2006) (permitting various modes of relief which courts may grant upon request of foreign representatives); *see In re Artimm*, 335 B.R. at 159 ("In addition to the automatic effects of the recognition of a foreign main proceeding provided by [section] 1520, [section] 1521 authorizes a number of other modes of relief that the court may grant upon the request of the foreign representative."); 8 COLLIER (15th ed.), *supra* note 2, ¶ 1521.01 ("Section 1521(a) of the Bankruptcy Code catalogs the relief available to a foreign representative after recognition of a foreign proceeding and closely tracks Article 21 of the Model Law. The relief under section 1521 is discretionary and most of it is consistent with relief regularly granted in domestic cases under other chapters of the Bankruptcy Code.").

[146] 11 U.S.C. § 1521(a) (2006); *see* 8 COLLIER (15th ed.), *supra* note 2, ¶ 1521.01 ("The section 1521(a) list is preceded by the qualifier that the relief must be necessary to effectuate the purpose of chapter 15 and to protect the assets of the debtor or the interests of creditors.").

[147] 11 U.S.C. § 1507 (b) (2006). If appropriate, the court may also consider whether the foreign proceeding provides "individuals" with an opportunity for a fresh start. *Id.* § 1507(b)(5). These factors are substantially similar to the criteria previously required for the granting of ancillary relief under former section 304(c). *See* 11 U.S.C. § 304(c) (2006) (providing similar factors to those in section 1507(b)). The only major change to the former section 304 standard is the exclusion of comity as a specific factor to clear up confusion that had

assistance" means, but this provision is understood to import all of the relief that was previously determined to be available under former section 304 of the Bankruptcy Code, which courts had interpreted to provide virtually "blank check" authority to craft relief in aid of a foreign insolvency proceeding.[148]

The filing of an ancillary case empowers the foreign representative to discover, find and marshal assets in the United States and coordinate the disposition of such assets with the main foreign proceeding, thereby avoiding piecemeal seizure by creditors without the expense normally incurred in a plenary bankruptcy in the United States.[149] As under former section 304, the foreign debtor and its foreign representative do not need to satisfy the requirements (discussed *supra*) necessary to qualify as a debtor in a plenary bankruptcy case in the United States, unless they are certain entities specifically excluded by section 109, such as railroads, foreign banks and stockbrokers.[150] Indeed, the foreign debtor need not even have property or a place of business in the United States to commence a chapter 15 case.[151] Therefore, subject to certain limited exceptions, an entity is eligible for relief under chapter 15 so long as it qualifies for and has instituted insolvency or debt adjustment proceedings under the laws of a jurisdiction outside of the United States.

---

resulted from section 304(c) mention of comity in the introductory language of section 304(c) and as a specific section 304(c) factor. *See generally* H.R. REP. No.109–31, at 18 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 104 (establishing new forms of bankruptcy relief for transnational insolvencies intended to promote international comity and greater certainty).

[148] *See In re* Culmer, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982) (holding under section 304 courts were "free to mold appropriate relief in near blank check fashion"); H.R. REP. No. 109–31, at 109 ("[Section 1507] is intended to permit the further development of international cooperation begun under section 304, but is not to be the basis for denying or limiting relief otherwise available under this chapter."); Westbrook, *supra* note 129, at 21 (indicating chapter 15 imported authority under former section 304 jurisprudence to extent it increases power of assistance under chapter 15).

[149] Notably, however, the avoidance powers (i.e., the power to unwind fraudulent and preferential transfers) under the U.S. Bankruptcy Code are not extended to the foreign representative in an ancillary case. *See* 11 U.S.C. § 1521(a)(7) (2006) (excluding all powers granted under sections 522, 544, 545, 547, 548, 550 and 724(a) from powers that may be granted as chapter 15 relief).

[150] *See* 11 U.S.C. § 1502(1) (2006) (defining "debtor" for purposes of chapter 15 simply as "an entity that is the subject of a foreign proceeding"); 11 U.S.C. § 1501(c)(1)–(3) (2006) (excluding railroads, foreign banks, stockbrokers and other entities and individuals from chapter 15 eligibility); *see also* Agency for Deposit Ins., Rehabilitation, Bankr. and Liquidation of Banks v. Superintendent of Banks of State of N.Y. (*In re* Agency for Deposit Ins.), 310 B.R. 793, 795 (Bankr. S.D.N.Y. 2004) (noting foreign bank not qualified under section 109 was eligible for section 304 relief); *In re* Brierley, 145 B.R. 151, 160 (Bankr. S.D.N.Y. 1992) (holding section 304 debtor need not meet requirements to be debtor in plenary proceedings); Universal Casualty & Surety Co. v. Gee (*In re* Gee), 53 B.R. 891, 900 (Bankr. S.D.N.Y. 1985) ("[S]ince a [section] 304 case is one which does not administer an estate as such but simply aids a foreign bankruptcy, there is little reason to exclude a debtor ineligible for chapter 11 relief from being the subject of a case under section 304.").

[151] *See* 28 U.S.C. § 1410(2) (2006) (providing for venue of chapter 15 case where "the debtor does not have a place of business or assets in the United States.").

B. Contesting a Chapter 15 Petition

Any party-in-interest may contest a chapter 15 petition by filing and serving objections in the manner prescribed by rule 12 of the Federal Rules of Civil Procedure within twenty days after service of the summons.[152] Such objections essentially proceed in a manner similar to most federal civil litigation: the chapter 15 petition serves like a complaint to which the objecting party may respond by filing a motion to dismiss and/or an answer.[153] However, such litigation is focused narrowly upon the chapter 15 relief requested and the objecting party may not assert any claims against the chapter 15 petitioner "except for the purpose of defeating the petition."[154] If the case is not dismissed or settled, it may proceed like ordinary litigation, including discovery, summary judgment and, in appropriate cases, an evidentiary hearing on the merits.[155] Typically, such litigation will occur on an expedited basis, driven by the circumstances and chapter 15's express mandate that the court must decide the chapter 15 petition "at the earliest possible time."[156]

Chapter 15 provides numerous grounds to contest an ancillary proceeding a few of which are discussed below. First, a party may challenge whether the three basic elements for recognition have been met (e.g., whether the petition establishes the existence of a "foreign proceeding" and a "foreign representative"). The statute

---

[152] FED. R. BANKR. P. 1011(a)–(b) (2006); *see In re* Shapiro, 128 B.R. 328, 331 (Bankr. E.D.N.Y. 1991) (noting Bankruptcy Rule 1011(b) requires defenses or objections to involuntary petition be filed and served within 20 days of service of summons).

[153] FED. R. BANKR. P. 1011 (b)–(e). No other pleadings are permitted except that the court may permit a reply to an answer. *Id.* Bankruptcy Rule 1018 provides that litigation relating to contested petitions for ancillary relief proceeds much like an adversary proceeding in a U.S. bankruptcy case by invoking many of the procedural rules provided for in Part VII of the Bankruptcy Rules, which govern adversary proceeding litigation. FED. R. BANKR. P. 1018.

[154] FED. R. BANKR. P. 1011 (d).

[155] FED. R. BANKR. P. 1018 (rendering discovery rules and summary judgment rules applicable to contested ancillary proceeding). Section 304(b) had been interpreted by some courts to permit section 304 injunctive relief in a contested proceeding only "after trial." 11 U.S.C. § 304(b) (2006), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802(d)(3), 119 Stat. 146; *see In re* Bd. of Dirs. of Multicanal, S.A., 307 B.R. 384, 387 (Bankr. S.D.N.Y. 2004) (declining parties' invitation to rule as matter of law on section 304 petition and observing statute "itself states [that such determination] should be made, if timely controverted, 'after trial.'" (quoting 11 U.S.C. § 304(b) (2000))). However, chapter 15 expressly requires only "notice and a hearing." 11 U.S.C. § 1517(a) (2006) ("[A]fter notice and a hearing, an order recognizing a foreign proceeding shall be entered if . . . ."). Moreover, Bankruptcy Rule 1018 expressly renders Bankruptcy Rule 7056 applicable to contested chapter 15 petitions, which courts have applied authority to resolve matters on summary judgment without a traditional trial where appropriate. *See In re* Hourani, 180 B.R. 58, 63–64 (Bankr. S.D.N.Y. 1995) (considering summary judgment motion by foreign representative in section 304 proceeding, and stating summary judgment is appropriate when there is no genuine issue as to any material fact); Stuart A. Krause et al., *Relief Under Section 304 of The Bankruptcy Code: Clarifying the Principal Role of Comity In Transnational Insolvencies*, 64 FORDHAM L. REV. 2591, 2596 (1996) ("[A] threshold summary judgment determination often arises shortly after a [section] 304 petition is contested.").

[156] 11 U.S.C. § 1517(c) (2006) ("A petition for recognition of a foreign proceeding shall be decided upon at the earliest time. Entry of an order recognizing a foreign proceeding constitutes recognition under this chapter.").

directs courts to presume that many of these elements are present, but a party may challenge that presumption.[157]

Second, even where recognition has been granted, a party may still seek relief from the automatic stay to allow it to take action against the foreign debtor or its property.[158] Similarly, a party may seek modification or termination of any interim or supplemental chapter 15 relief granted by a court at any time.[159]

Third, while not a defense to "recognition" and its automatic consequences under section 1520, parties may challenge any provisional (under section 1519) or supplemental relief (under section 1521) to the extent that "the interests of creditors and other interested entities, including the debtor, are [not] sufficiently protected."[160] What exactly this means will be defined by the jurisprudence that will develop regarding chapter 15.

Fourth, a creditor may challenge chapter 15 relief on public policy grounds. Chapter 15 expressly provides that courts may not take or refuse to take "action [that] would be manifestly contrary to the public policy of the United States."[161] While this exception may seem generous at first blush, it is clear that Congress intended this exception to be narrowly applied to the "most fundamental policies of the United States."[162] Based upon the jurisprudence under section 304, it seems clear that manifest public-policy considerations would likely include objections based upon violations of U.S. principles of "due process."[163] It would also likely

---

[157] *See* 11 U.S.C. § 1516 (2006) (setting forth presumptions).

[158] 11 U.S.C. § 362(d) (2006) ("On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section . . . .").

[159] 11 U.S.C. §§ 1517(d), 1522(c) (2006) ("The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist . . . ."). However, in so doing the Court must "give due weight to possible prejudice to parties that have relied upon the order granting recognition." *Id.* § 1517(d); *see In re* Petition of Lloyd, No. 05−60100 (BRL), 2005 WL 3764946, at *2 (Bankr. S.D.N.Y. Dec. 7, 2005) (granting debtor relief under section 1517 after finding that such relief would not cause hardship to creditors or to other parties); Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 186 (2002) (noting courts have found limited basis to deny recognition under section 1517 to foreign proceedings).

[160] *See* 11 U.S.C. § 1522(a) (2006). Section 1522(a) does not refer to additional relief under section 1507. *Id.* ("The court may grant relief under section 1519 or 1521 . . . ."). However, given that relief under section 1507 is expressly subject to "the specific limitations stated elsewhere in [chapter 15]," the limitation set forth in section 1522(a) would apply to section 1507 relief (though section 1522(a)'s principle is largely already covered by the section 1507 factors). 11 U.S.C. § 1507(a) (2006); *see* Lynn P. Harrison, III and Jerrold L. Bregman, *Chapter 15 of the U.S. Bankruptcy Code: A Hands-on Guide to the New World Order of Ancillary and Cross-border Cases*, 14 J. BANKR. L. & P. 3, 8−9 (2005) (stating section 1507 is "subject to the limitations of the Bankruptcy Code and other relevant U.S. laws").

[161] 11 U.S.C. § 1506 (2006).

[162] H.R. REP. NO. 109−31, at 109 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 172.

[163] *See In re* Bd. of Dirs. of Multicanal S.A., 314 B.R. 486, 503 (Bankr. S.D.N.Y. 2004) ("The key issue [to recognition] is one of due process and the public policy of the forum."); Ecoban Fin. Ltd. v. Grupo Acerero del Norte, S.A. de C.V., 108 F. Supp. 2d 349, 352−53 (S.D.N.Y. 2000) (emphasizing fundamental importance of due process); *In re* Paperleras Reunidas, S.A., 92 B.R. 584, 590−91 (Bankr. E.D.N.Y. 1988) (denying section 304 relief based upon lack of due process); *see also* Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 714 (2d Cir. 1987) ("Under general principles of comity as well as the specific provisions of section 304, federal courts will recognize foreign bankruptcy proceedings provided the foreign

include any foreign proceeding that would impair property interests in a manner that amounted to an unconstitutional taking.[164] It may also extend to issues under the U.S. securities laws, which have also been raised, with varying degrees of success, to challenge recognition of foreign insolvency proceedings in the past. For example, in the *Multicanal* case, the courts found that the foreign debtor's APE restructuring satisfied all requirements for recognition in the United States (subject to the implementation of a cure to remedy the treatment of certain creditors) but nonetheless required extensive additional proceedings to determine whether the cure (which involved the issuance of securities in the United States) could be implemented in a manner consistent with the registration requirement of the U.S. securities laws.[165]

Other attempts to raise "public policy" grounds to challenge recognition of a foreign proceeding under section 304 have been less successful. For example, in *In re Multicanal*,[166] the objecting creditor claimed that the APE could not be recognized because the foreign proceeding allegedly violated the bondholder's

---

laws comport with due process and fairly treat the claims of local creditors."). One court has observed that if a creditor had to fear criminal prosecution in the forum of the foreign proceeding based upon such creditor's opposition to the foreign debtor's restructuring proposal, such proceeding should not be recognized in the Untied States. *In re Multicanal.*, 314 B.R. at 516 ("[I]f a U.S. creditor had to fear that it would face criminal prosecution in the issuer's courts as a consequence of its opposition to a foreign proceeding . . . the foreign proceeding would not necessarily be entitled to receive recognition in the courts of the United States.").

[164] *See* Bank of N.Y. v. Treco (*In re* Treco), 240 F.3d 148, 158−60 (2d Cir. 2001) (denying section 304 relief to proceeding that subordinated secured claims because "security interests have been recognized as property rights protected by our Constitution's prohibition against takings without just compensation"); *cf.* 11 U.S.C. § 1532 (2006) (protecting secured creditor and in rem claims in payment priority applicable to concurrent proceedings).

[165] *See* Argentinean Recovery Co. LLC v. Bd of Dirs. of Multicanal S.A., 331 B.R. 537, 539 (Bankr. S.D.N.Y. 2005) (remanding section 304 proceeding to bankruptcy court for further proceedings regarding compliance with U.S. securities laws), *aff'd in part, remanded to* 340 B.R. 154 (Bankr. S.D.N.Y. 2006); *see also In re* Cablevision, S.A., 315 B.R. 818, 821 (Bankr. S.D.N.Y. 2004) (noting bondholder's claim that section 304 petition should be denied because of alleged violations of U.S. tender offer rules). On remand, the bankruptcy court overseeing Multicanal S.A.'s section 304 proceeding held that its section 304 jurisdiction could be used to hold a "fairness hearing" to determine whether the securities issued under the APE reorganization plan qualified for the section 3(a)(10) exemption from the registration requirement of the U.S. securities laws. *Multicanal*, 340 B.R. at 179−80 (stating "Mulitticanal cannot claim [section] 3(a)(10) exemption as a matter of law at this time, but as the District Court judge suggested, a [section] 3(a)(10) exemption might nonetheless be available after a 'fairness hearing' conducted on notice."). Other courts have rejected claims that comity should be denied to a foreign insolvency proceeding because the creditor would be forced to assert its purported U.S. securities law claim against the foreign debtor in the foreign proceeding in order to receive a distribution in the foreign proceeding. *See* Allstate Life Ins., Co. v. Linter Group Ltd., 994 F.2d 996, 998−1000 (2d Cir. 1993) (dismissing bondholder's federal securities fraud action to grant comity to Australian insolvency proceeding where claim could be asserted in Australian proceeding); Lindner Fund, Inc. v. Polly Peck Int'l PLC, 143 B.R. 807 (Bankr. S.D.N.Y. 1992) (dismissing federal securities fraud actions against debtor in United Kingdom reorganization proceedings based on general principals of comity where claim could be asserted in U.K. proceeding). As discussed *infra* note 183–184 and accompanying text, U.S. securities laws issues can complicate a cross-border restructuring that involves U.S. investors; however, the broad discretionary powers under sections 1507 and 1521 may provide courts with the power to overcome such U.S. securities laws complications.

[166] 307 B.R. 384 (Bankr. S.D.N.Y. 2004).

federal rights under section 316(b) of the Trust Indenture Act of 1939 ("TIA").[167] Section 316(b) of the TIA provides, among other things, that an indenture qualified under the TIA cannot contain any provision that would permit impairment of a bondholder's right to sue for principal and interest without such bondholder's consent.[168] Under Argentine insolvency law, like U.S. bankruptcy law, Multicanal's APE restructuring (once approved by the requisite majority of creditors and the Argentine court) was binding upon all creditors, including non-consenting creditors. The bondholder argued that the section 304 relief of enforcing such restructuring in the United States would violate the public policy behind TIA section 316(b). The bankruptcy court (and the District Court on appeal) rejected this argument, finding that section 316(b) regulated only the types of contractual provisions that could be included in an indenture to affect an out-of-court restructuring and did not in any way regulate the types of judicial proceedings in which bondholder rights could be impaired, even in a non-consensual manner. Instead, the court determined that Congress regulates the types of judicial proceedings that can affect bondholder rights pursuant to separate legislation, including chapter 11 and section 304 (now chapter 15) of the Bankruptcy Code.[169]

---

[167] *Id.* at 386–38; *see In re* Bd. of Dirs. of Telecom Argentina S.A., No. 05-17811(BRL), 2006 WL 686867, at *27–29, (Bankr. S.D.N.Y. Feb. 24, 2006) (rejecting argument that TIA section 316(b) precluded section 304 relief for APE restructuring of $3.3 billion of debt). A bondholder advanced a similar argument in opposition to the section 304 petition filed by Cablevision S.A., another Argentine cable television company seeking to restructure bond debt pursuant to an APE proceeding. *See In re Cablevision*, 315 B.R. at 819–20.

[168] 15 U.S.C. § 77ppp(b) (2000). Section 316(b) of the TIA provides in relevant part:

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

Id.; see, e.g., UPIC & Co. v. Kinder-Care Learning Ctrs. Inc., 793 F. Supp. 448, 452–453 (S.D.N.Y. 1992); Friedman v. Chesapeake Ohio Ry. Co., 261 F. Supp. 728, 731 (D.C. N.Y. 1966) (stating plaintiff's summary judgment argument was precluded because Trust Indenture Act of 1939 prohibits any limitation on bondholder's right to sue for principal interest without bondholder's consent).

[169] *In re Multicanal*, 307 B.R. at 390–92. Of course, innumerable chapter 11 proceedings have restructured bond debt that was issued pursuant to indentures qualified under the TIA with less than unanimous consent of such bondholders. In addition, outside the bankruptcy context, courts have approved settlements that have impaired bondholder rights to principal and interest. *See* Croyden Assocs. v. Alleco Inc., 969 F.2d 675, 676–77 (8th Cir. 1992) (noting lower court approved settlement of bondholder class action restructuring indenture debt that was binding on all bondholders); Centerre Trust Co. v. Jackson Saw Mill Co., 736 S.W.2d 486, 494–95 (Mo. Ct. App. 1987) (noting trustee-initiated class action settlement restructuring all claims under indenture and binding all noteholders did not violate indenture clause prohibiting actions affecting bondholder rights to principal and interest); Kemper Investors Life Ins. Co. v. Las Colinas Corp., No. 88 C 9162 (N.D. Ill. June 29, 1988) (deciding approval of class action settlement binding on all noteholders to satisfy principal and interest owing under indenture did not violate TIA section 316(b)); MBank Dallas Nat'l Ass'n v. LaBarge Inc., Case No. 86 C 9583 (N.D. Ill. Jan. 2, 1987) (stating settlement of indenture trustee-initiated class action binding on all noteholders without unanimous consent did not violate TIA section 316(b) because noteholders had "not been deprived of their right to sue for payment of principal and interest within the meaning of Section 316(b) of the Trust Indenture Act.").

Creditors have also unsuccessfully claimed that ancillary relief should be denied to the extent that it would force a creditor to present its claim in the foreign insolvency proceeding and thereby impair a creditor's right to arbitration in violation of the strong public policy favoring arbitration underlying the Federal Arbitration Act.[170] Finally, to the extent that the petition seeks "additional assistance" under section 1507, a party may contest whether the factors set forth in that section have been satisfied to justify such relief.[171]

In addition to the forgoing substantive bases to resist an ancillary proceeding, objecting parties may also employ different procedural strategies. For example, objecting parties may seek to withdraw the reference of the matter to have the case decided by a United States District Court.[172] In doing so, the party may seek to have the chapter 15 petition considered in a forum where it may be able to assert affirmative claims against the foreign debtor if ancillary relief is denied. For example, in the *Cablevision*[173] case, the section 304 petition was brought to protect the debtor against a lawsuit that the dissenting bondholder brought in the District Court seeking an injunction based upon claims that the restructuring violated section 316(b) of the TIA and U.S. securities laws. The dissenting creditor persuaded the District Court to withdraw the reference of the section 304

---

[170] *See* Vesta Fire Ins. Corp. v. New Cap Reinsurance Corp., 244 B.R. 209, 217 (Bankr. S.D.N.Y. 2000) (noting FAA does not bar application of regular section 304 standards to determine whether to give recognition to foreign proceeding with respect to the liquidation of claims); *In re* Bd. of Dirs. of Hopewell Int'l Ins. Ltd., 238 B.R. 25, 63–64 (Bankr. S.D.N.Y. 1999) (rejecting claim of unfettered entitlement to arbitration under FAA and observing "bankruptcy sometimes causes changes in contractual rights necessary to benefit the estate as a whole" and "the admittedly strong policy favoring arbitration is not as sacrosanct as [creditors] urge."), *aff'd*, 275 B.R. 699 (Bankr. S.D.N.Y. 2002); *In re* Springer-Penguin, Inc., 74 B.R. 879, 884 (Bankr. S.D.N.Y. 1987) ("Generally, bankruptcy jurisdiction is favored rather than allowing claims against a debtor to be determined in arbitration proceedings, even when the bankruptcy case is in a foreign country and the arbitration proceeding is pending in this country . . . ."); *see also* Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB, 773 F.2d 452, 459 (2d Cir. 1985) (noting "while the strong public policy in favor of arbitration is well recognized, the public interest in the fair and efficient distribution of assets in a bankruptcy is also significant.") (citations omitted).

[171] *See supra* note 135 and accompanying text (discussing section 1507 factors).

[172] *See* Grant Thornton Int'l v. Parmalat Finanziaria SpA (*In re* Parmalat Finanziaria SpA), 320 B.R. 46, 50 (S.D.N.Y. 2005) (finding permissive withdrawal of section 304 case from bankruptcy court where it would promote "judicial efficiency" to coordinate section 304 litigation with separate related litigation pending before District Court); *In re Cablevision*, 315 B.R. at 821 (finding mandatory withdrawal of section 304 case from bankruptcy court where claims asserted required court to "substantially and materially" consider non-Bankruptcy Code federal statutes); *In re* White Motor Corp, 42 B.R. 693, 698–99 (Bankr. N.D. Ohio 1984) (discussing withdrawal under 28 U.S.C. § 157(d)). Withdrawal of the reference is mandatory where "resolution of the proceeding requires consideration of both [the Bankruptcy Code] and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d) (2006); *see* Barnett v. Stern, 909 F.2d 973, 981 n.12 (7th Cir. 1990) (explaining section 157(d) and its possible application to proceeding). *See generally* Erich D. Anderson, Comment, *Closing the Escape Hatch in the Mandatory Withdrawal Provision of 28 U.S.C. §157(d)*, 36 UCLA L. REV. 417, 417–46 (1988) (discussing mandatory withdrawal under 28 U.S.C. § 157(d)). The District Court may also exercise its discretion permissively to withdraw the reference for good "cause" shown. 28 U.S.C. § 157(d) (2000); *see* Andrew S. Atkin, Note, *Permissive Withdrawal of Bankruptcy Proceedings Under 28 U.S.C. Section 157(d)*, 11 BANKR. DEV. J. 447, 447 (1994) (discussing permissive withdrawal).

[173] 315 B.R. at 820.

proceeding to permit the District Court to consider the section 304 issues and the bondholder's affirmative non-bankruptcy law claims (which claims the bondholder could not assert in a pure ancillary proceeding because of the prohibition in Bankruptcy Rule 1011(d) against asserting claims other than to defeat recognition).[174]

Objecting creditors may also, as was done in *Multicanal*, file an involuntary chapter 11 petition against the foreign debtor arguing that ancillary relief should be denied and plenary U.S. bankruptcy proceedings should control the foreign debtor's reorganization, either unilaterally or concurrently with the foreign proceeding in the debtor's home country. However, chapter 15 has limited the effectiveness of this strategy after "recognition" of the foreign main proceeding by restricting the effect of a plenary proceeding under the U.S. Bankruptcy Code to "the assets of the [foreign] debtor that are within the territorial jurisdiction of the United States" and assets outside of the United States that "are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under [chapter 15]."[175] In addition, chapter 15 directs U.S. courts to cooperate and coordinate with the foreign proceeding, a statutory mandate at odds with a creditor strategy to obstruct a foreign proceeding through an involuntary filing in the United States.[176]

Both of these procedural strategies engraft additional layers of litigation (by adding new substantive issues and potentially additional discovery) regarding the

---

[174] *Id.* at 821. *See generally* FED. R. BANKR. P. 1011(d) (stating counterclaim against petitioning creditor may not be asserted in responding papers "except for the purpose of defeating the petition"). To assert any claims against the foreign debtor, the court must have jurisdiction over the foreign debtor for such claims. *See* 2 COLLIER (15th ed.), *supra* note 2, ¶ 109.01[2] ("For a debtor to be eligible for relief under the Code, the debtor must have a domicile, residence, place of business or property in the United States."). Chapter 15 makes it clear that the foreign debtor and its representative are not deemed to consent to jurisdiction for such claims that go beyond the issues presented in the chapter 15 case. 11 U.S.C. § 1510 (2006) ("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.").

[175] 11 U.S.C. § 1528 (2006). Chapter 15 provides a rebuttable presumption that a foreign debtor subject to a foreign main proceeding is not generally paying its debts as they become due within the meaning of section 303, thereby satisfying a main element for filing an involuntary petition against such foreign debtor. *See* 11 U.S.C. § 1531 (2006) ("In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under section 303, proof that the debtor is generally not paying its debts as such debts become due."); Paul J. Keenan, *Chapter 15: A New Chapter to Meet the Growing Need to Regulate Cross-Border Insolvencies*, 15 NORTON BANKR. L. & PRAC., 191, 212 (2006) (reiterating foreign main proceeding is proof that debtor is generally not paying debts as they become due for the purpose of commencing a proceeding under section 303).

[176] *See* 11 U.S.C. § 1529 (2006) ("If a foreign proceeding and a case under another chapter of this title are pending concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527 . . . ."); 11 U.S.C. §§ 1525–1527 (2006) (discussing multiple forms of cooperation, including direct communication between court, trustee and foreign courts or representatives); *see also In re* Artimm, S.r.L., 335 B.R. 149, 159 (Bankr. C.D. Cal. 2005) (suggesting significant change 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"). A foreign representative may also attempt to mitigate this risk by seeking an injunction against the filing of an involuntary petition against the foreign debtor in the provisional and permanent chapter 15 injunctions. Whether such relief will be granted is unclear. *See* 11 U.S.C. § 1520(c) (2006) (stating automatic stay triggered by recognition does not affect the right of "an entity to file a petition commencing a case under this title").

foreign debtor's restructuring, which may involve additional risk, expense and delay.

As the foregoing illustrates, if the insolvency laws of the foreign debtor's home country provide a streamlined procedure to restructure its obligations, the debtor may seek to enforce the legal effect of such a restructuring (including the discharge of indebtedness granted in the foreign proceedings) in the United States through a chapter 15 case. Chapter 15 provides significant automatic statutory protection for the foreign debtor's restructuring (primarily through invocation of the automatic stay) as well as broad authority for courts to craft supplemental injunctive relief to enforce and implement the restructuring in the United States. Ancillary relief is particularly helpful where there are any significant holdout creditors that are subject to the jurisdiction of a U.S. bankruptcy court but who may not be subject to the jurisdiction of the foreign proceeding. Absent such relief, the foreign debtor would face significant risk doing business in the United States or seeking to access the U.S. capital markets in the future due to the threat of possible legal action by such holdouts against the foreign debtor and its U.S. assets.

In addition, ancillary relief may also provide third parties whose assistance is needed to efficiently implement the debtor's restructuring with comfort that they will not be exposed to claims by creditors and other stakeholders based solely upon their good faith cooperation in the debtor's restructuring. For example, as in the *Multicanal* case, the foreign debtor may seek an order that provides injunctive relief to protect (i) financial, legal and other advisors to the debtor regarding the restructuring, (ii) the indenture trustee for bonds issued by the debtor that are the subject of the restructuring, which often is a U.S. entity or an entity with substantial connections to the U.S., (iii) the Depositary Trust Company, through which bonds are held and traded and whose assistance is typically required, among other things, to communicate with bondholders/investors and to make distributions to bondholders/investors under the restructuring plan, (iv) exchange agents, solicitation agents and information agents hired by the debtor in connection with the restructuring, and (v) potentially other parties who could be exposed to claims related to the restructuring, including the debtors officers and directors and other investors. Similarly, Telecom Argentina S.A. obtained section 304 relief in support of its APE restructuring specifically because the indenture trustee demanded such protection before it would fully implement the restructuring due to threats of legal action by a holdout bondholder.[177] Absent such protection, these parties may refuse to assist the foreign debtor's efforts to consummate its restructuring because of what they perceive to be legal risks posed by holdout opposition.

A chapter 15 case may also provide the foreign debtor with the ability, if necessary, to obtain an expeditious judicial ruling that the securities to be issued under the foreign reorganization plan are exempt from the registration requirement

---

[177] *See In re* Bd. of Dirs. of Telecom Argentina S.A., No. 05-17811(BRL), 2006 WL 686867, at *10–11 (Bankr. S.D.N.Y. Feb. 24. 2006) (granting section 304 relief in support of APE restructuring).

of the U.S. securities laws.[178] As the *Multicanal* case illustrates, the U.S. securities laws can impose a substantial obstacle to the successful implementation of foreign reorganization proceedings that involve the solicitation and issuance of new securities to U.S. investors, even where the foreign reorganization otherwise deserves recognition under the U.S. Bankruptcy Code and principles of international comity.[179] As noted above, section 1145 of the Bankruptcy Code automatically exempts securities issued under chapter 11 reorganization plans. However, because section 1145 is limited by its terms to the "offer or sale [of securities] under a plan," it may be viewed, standing alone, as being limited to securities issued under a chapter 11 plan.[180] As a result, foreign debtors seeking to implement a foreign reorganization that involves U.S. creditors and investors have historically been forced to rely upon another U.S. securities law exemption or register the new securities with the SEC before launching the solicitation of creditors and other stakeholders for its reorganization plan. However, the three non-section 1145 registration exemptions commonly relied upon in the cross-border restructuring context each have their own limitations that may render them infeasible.[181] Moreover, SEC registration can be an expensive and time consuming

---

[178] For a discussion regarding how a chapter 15 case can provide foreign debtors with the ability to obtain a judicial determination regarding such U.S. securities laws issues, see Kurt A. Mayr, *Using Chapter 15 to Overcome U.S. Securities Law Impediments to Effective Ancillary Relief in Cross-Border Reorganizations*, 15 NORTON BANKR. L. & PRAC. 4 ART. 2 (2006).

[179] *See id.* (discussing U.S. securities law complications for cross-border reorganizations); Alan L. Gropper, *Memorandum on the Impact of the United States Securities Laws on the Restructuring of Non-U.S. Debt*, http://www.iiiglobal.org/country/usa/Impact_of_the_United_States_Gropper.pdf, at 1 (2003) [hereinafter, *Impact of U.S. Securities Laws*] (noting, before chapter 15, "the restrictions of the U.S. securities laws often impose burdens that may, in some cases, make a restructuring [of debt issued by a foreign enterprise] impossible. The U.S. securities laws may also make it impossible to restructure non-U.S. debt even in a foreign insolvency proceeding, forcing debtors to consider a filing in the United States that would otherwise be unnecessary").

[180] *See Impact of U.S. Securities Laws*, *supra* note 179, at 9 (noting if securities issued in "foreign proceeding" do not qualify for non-section 1145 registration exemption, foreign debtor may be forced to register its exchange offer or "may be compelled to file a proceeding in the United States in order to avail itself of the securities law exemption in [section] 1145 of the Bankruptcy Code"). In the chapter 15 context, the securities offered under a reorganization "plan" governed by the insolvency law of the foreign proceeding might not be viewed as a "plan" for purposes of the Bankruptcy Code and section 1145. *Cf.* Argentinean Recovery Co. LLC v. Bd of Dirs. of Multicanal S.A., 331 B.R. 537, 546 (Bankr. S.D.N.Y. 2005) (noting securities issued under Argentine plan of reorganization were issued in case under Argentine law, and therefore not being issued in "a case under Title 11" notwithstanding pendency of section 304 proceeding under title 11).

[181] These three exemptions are (1) the single issuer exchange offer exemption of section 3(a)(9) of the Securities Act of 1933 (the "Act"), 15 U.S.C. § 77c(a)(9) (2006); (2) the "fairness" hearing exchange exemption of section 3(a)(10) of the Act, 15 U.S.C. § 77c(a)(10) (2006); and (3) the "private placement" exemption of section 4(2) of the Act and Rule 144A and/or Regulation D issued by the SEC related thereto. *See* Ball & Greene, *supra* note 91, at 228–239 (discussing these exemptions with respect to pre-petition solicitation in prepackaged bankruptcies). The section 3(a)(9) exemption is limited to exchanges of securities issued by the same issuer and therefore it is not broad enough to encompass the reorganization of a foreign debtor that involves securities issued by an affiliate or successor to the debtor as is permitted by section 1145. *See* Ball & Greene, *supra* note 91, at 231–38 (discussing requirements of section 3(a)(9) exemption); *Impact of U.S. Securities Laws*, *supra* note 179, at 2–3 (finding exemption is "only available . . . when the initial issuer and the issuer of the new securities are the same entity . . . [and] would not apply where the new

process that simply may not be feasible for a foreign debtor faced with an urgent need to implement its restructuring in an expedited manner.[182]

Fortunately, the broad discretionary powers under chapter 15 can be used to ameliorate the adverse affect that strict enforcement of the registration requirement of the U.S. securities laws can have on cross-border reorganizations. For example, the most recent *Multicanal* decision indicates that courts should be able to use their powers under sections 1507 and 1521 to hold an expeditious hearing to determine whether the securities to be issued in a foreign reorganization should be exempt

---

security is issued by an affiliate of or successor to the original issuer (for example, after some foreign insolvency case)"). In addition, section 3(a)(9) prohibits the payment of any "commission or other remuneration . . . for soliciting [the] exchange." 15 U.S.C. § 77c(a)(9) (2006). This limitation renders the exemption unavailable as a practical matter for any foreign debtor who needs the assistance of an investment bank or other entity to promote its exchange offer. *See Impact of U.S. Securities Laws*, *supra* note 179, at 3–5 (noting "requirement that no commission or other remuneration be paid 'for soliciting such exchange,' which most significantly defines the limits of a [section] 3(a)(9) exchange offer, and often precludes its use"). The section 3(a)(10) exemption requires terms of exchange involving foreign debtor's securities must be "approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue in such exchange shall have the right to appear" by a court or governmental authority authorized to grant such approval." 15 U.S.C. § 77c(a)(10) (2006). Because the Act does not define the term "fairness" and SEC has adopted a restrictive approach to the section 3(a)(10) exemption, the section 3(a)(10) exemption has been used "sparingly"; though, as a policy matter, it should be applied more liberally, particularly where an ancillary proceeding has granted recognition to the foreign proceeding pursuant to which such exchange will occur. *See Impact of U.S. Securities Laws*, *supra* note 179, at 7–9 ("[I]t should be possible for the foreign proceeding to meet the standards of [section] 3(a)(10) even if the 'fairness hearing' is not identical to the hearing required for confirmation of a plan under the Bankruptcy Code"); Ball & Greene, *supra* note 91, at 238–39 (discussing requirements of section 3(a)(10) exemption). The "private placement" exemption, particularly when implemented in a manner to comply with Rule 144A/Regulation D, is limited to securities offered and sold to "qualified institutional buyers"/"accredited investors" and, as a result, small "retail" investors cannot be solicited under such exemption. *See Impact of U.S. Securities Laws*, *supra* note 179, at 6 (stating inability of issuers to solicit small individual holders of debt in the U.S.); Ball & Greene, *supra* note 91, at 229–231 (examining requirements of "private placement" exemption). Notably, section 3(a)(9) and section 3(a)(10) exemptions both begin with language stating these exemptions apply "[e]xcept with respect to a security exchanged in a case under title 11 of the United States Code," but this language has been interpreted in a manner not to render these exemptions unavailable simply because an ancillary "case under title 11" is pending with respect to the restructuring in which the securities are to be issued. *See Multicanal S.A.*, 331 B.R. at 546 (holding securities issued under Argentine reorganization plan were issued "in a case brought under the law of Argentina" not a "case under Title 11" for purposes of section 3(a)(9) notwithstanding pending section 304 case under title 11).

[182] Ball & Greene, *supra* note 91, at 228 (describing time and expense involved in registering securities for prepackaged bankruptcy and noting that "the registration requirements [of the U.S. securities law] can be time consuming and costly; and time and cost are very important factors for a financially troubled issuer"); William F. Hagerty, *Lifting the Cloud of Uncertainty Over the Repo Market: Characterization of Repos as Separate Purchases and Sales of Securities*, 37 VAND. L. REV. 401, 419 (1984) (noting expensive and time consuming nature of SEC registration); Joseph Shade, *Financing Exploration: Requirements of Federal and State Securities Laws*, 37 NAT. RESOURCES J. 749, 757 (1997) (acknowledging SEC "[r]egistration is a costly and time consuming process"). Indeed, the legislative history of the Bankruptcy Code indicates that Congress enacted the section 1145 exemption because it recognized that strict compliance with the registration requirement of the U.S. securities laws imposed an unreasonable burden upon financially distressed debtors in bankruptcy proceedings. *See* H.R. REP. NO. 95-595, at 236–38 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6198–97 (discussing policy underpinning of section 1145 exemption).

from the registration requirement of the U.S. securities law.[183] While this decision focused upon the section 3(a)(10) exemption, the same powers could, in the author's view, similarly be used to determine whether the securities should be exempt under section 1145 in cases where the foreign debtor can prove that "adequate disclosure" was used in connection with the foreign reorganization proceeding.[184]

III. Concurrent Proceedings

In some circumstances, the foreign debtor may wish to implement its expedited reorganization in concurrent proceedings under both chapter 11 and the insolvency procedure in the foreign debtor's home country. The debtor may need a plenary insolvency in its home jurisdiction for any number of reasons, including having the ability to bind creditors in its home country efficiently and to protect its assets located there during the reorganization. This concern might be particularly acute where there is a holdout creditor or another party adverse to the restructuring that is not subject to the jurisdiction of the U.S. bankruptcy court and may therefore take adverse action in the debtor's home country. At the same time, the debtor may also need a plenary chapter 11 proceeding because such a proceeding offers legal advantages necessary or desirable for the efficient implementation of its restructuring that are not automatically available in an ancillary proceeding.[185]

For example, a chapter 11 proceeding automatically triggers the section 1145 exemption for the solicitation and issuance of securities under the reorganization

---

[183] *In re* Bd. of Dirs of Multicanal S.A., 340 B.R. 154, 167 n.17 (Bankr. S.D.N.Y. 2006) ("Under [c]hapter 15, upon recognizing a foreign main proceeding, a bankruptcy court can . . . grant 'any appropriate relief,' as well as 'additional assistance to a foreign representative under this title or under other laws of the United States.' The Court's authority to make a [section] 3(a)(10) finding of fairness is even clearer under [c]hapter 15.") (citations omitted).

[184] For a discussion of how the section 1145 and section 3(a)(10) exemptions could be applied in a chapter 15 case, see Mayr, *supra* note 178, which discusses how section 1145 and section 3(a)(10) exemptions could be applied in chapter 15 cases. The section 1145 exemption for chapter 11 reorganizations is based upon a congressional policy compromise that seeks to relieve debtors of the burden of compliance with the registration requirement of the U.S. securities laws to promote successful business reorganizations, while at the same time promoting the U.S. securities law policy of preventing securities fraud and promoting disclosure in securities offerings. *See id.* at 369–76 (discussing legislative history regarding section 1145). The latter policy is protected by the requirements of section 1145's statutory sibling, section 1125 of the Bankruptcy Code, which requires that all chapter 11 disclosure statements must contain adequate information for creditors and other stakeholders to make an informed investment decision regarding the securities to be issued under the reorganization plan. 11 U.S.C. § 1125 (2006); *see In re* A. H. Robins Co., Inc., No. 98-1080, 1998 WL 637401, at *3 (Va. Ct. App., Aug 31, 1998) ("The disclosure statement must contain 'adequate information.'"). This policy compromise is even more appropriate in the cross-border reorganization context where there is adequate disclosure and strict enforcement of the U.S. securities laws would unnecessarily burden the foreign reorganization proceeding, particularly given Congress' express direction that chapter 15 is intended to "faciliat[e] . . . the rescue of troubled businesses" and "provide greater legal certainty for trade and investment." 11 U.S.C. § 1501(a) (2006).

[185] *See* Gropper, *supra* note 126, at 835 ("A plenary proceeding will often be brought when the foreign representative needs to access a particular provision of U.S. bankruptcy law that is available in a plenary suit but not clearly available under [section] 304.").

plan.[186] While, as discussed above, the foreign debtor may be able to seek section 1145 relief (or other registration exemption relief) in a chapter 15 case, such relief will not be automatic and cannot be guaranteed. A concurrent chapter 11 case therefore provides added certainty regarding U.S. securities laws issues, particularly where the foreign debtor cannot efficiently resolve such issues through SEC registration or reliance upon another registration exemption. Though, as noted above, if the concurrent chapter 11 proceeding is to be a "pure" U.S. prepack (i.e., one where the solicitation takes place before commencement of the chapter 11 proceeding), the section 1145 exemption might not extend to the pre-petition solicitation process. In such a circumstance, the safest course, from a U.S. securities law perspective, may require the foreign debtor to (i) implement the restructuring through a "pre-negotiated" chapter 11 proceeding,[187] (ii) register the new securities offering with the SEC,[188] or (iii) structure the pre-petition solicitation to qualify for a non-section 1145 exemption.

Another advantage that a plenary U.S. bankruptcy proceeding might offer is the ability to avoid fraudulent and preferential transfers.[189] In some cases, the Bankruptcy Code avoidance powers may be broader and more advantageous to the debtor than those available under the insolvency law of the foreign debtor's home country.[190] As noted above, these powers under the U.S. Bankruptcy Code are not available to the debtor in a chapter 15 proceeding (though the debtor may assert

---

[186] *See* 11 U.S.C. § 1145 (2006).

[187] *See generally* G COLLIER (15th ed.), *supra* note 2, § 2.4.17 ("The lack of an exemption for [pre-petition]solicitation [in a prepack] can be a significant impediment, which might lead a debtor to initiate a traditional chapter 11 case instead, or pursue a 'pre-negotiated' plan in which most of the negotiation--but not the solicitation--takes place prior to filing."); Ball & Greene, *supra* note 91, at 245–47 (discussing prenegotiated chapter 11 cases); Carter, *supra* note 100, at 310–11 ("The prenegotiated reorganization differs from the prepackaged case in that the debtor does not commence the solicitation process until it has obtained the bankruptcy court's approval of the disclosure statement.") (quotations and citations omitted).

[188] *See, e.g., In re* Bd. of Dirs. of Telecom Argentina S.A., No. 05-17811, 2006 WL 686867 (Bankr. S.D.N.Y., Feb. 24, 2006) (granting section 304 relief to APE reorganization proceeding where solicitation was registered with SEC).

[189] *See* 11 U.S.C. § 544 (2006) (stating trustee may avoid any obligation incurred by debtor that is voidable by lien creditor); 11 U.S.C. § 545 (granting trustee ability to avoid fixing of certain statutory liens on debtors property); 11 U.S.C. § 547 (allowing trustee to avoid transfer of interest of debtor's property under defined conditions); 11 U.S.C. § 548 (providing trustee ability to avoid any transfer of interest in property that was intended to hinder or defraud creditor); 11 U.S.C. § 550 (authorizing trustee to recover transferred interests that were supposed to be avoided under sections 544, 545, 547, 547, 549 and 554(b)).

[190] Though, the existence of concurrent proceedings may result in a conflict of laws scenario between the avoidance powers under U.S. law and the insolvency law of the debtor's home country. *See* Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.), 93 F.3d 1036 (2d Cir. 1996) (holding true conflict of law present in international insolvency proceeding). *See generally* Samuel A. Caufield, *Fraudulent and Preferential Conveyances of the Insolvent Multinational Corporation*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 571, 571–73 (1997) (stating avoiding court must make choice of law decisions in multinational corporation insolvency proceedings); Chris Farley, Comment, *An Overview, Survey, and Critique of Administrating Cross-Border Insolvencies*, 27 HOUS. J. INT'L L. 181, 195–97 (2004) (noting multiple proceedings lead to inconsistent results and conflict of law determination).

similar claims under applicable non-U.S. law).[191] Similarly, the debtor may perceive an advantage to the subordination provisions of the Bankruptcy Code that may be superior to those, if any, under foreign law.[192] The ability to reject executory contracts and unexpired leases may also offer U.S. law advantages not available under foreign law.[193] There may be other advantages depending upon the circumstances of a particular foreign debtor's restructuring.

For U.S. bankruptcy law purposes, the procedure for the foreign debtor's expedited restructuring would proceed generally in the manner discussed in Section I above, but such solicitation procedure may need to be modified to accommodate the requirements of the insolvency law of the debtor's home country (e.g., specific notice requirements or voting rules) or to take full advantage of the section 1145 exemption where desirable. In addition, the substantive requirements of the Bankruptcy Code and the insolvency laws of the foreign debtor's home country may need to be harmonized, and in the worst case, may conflict in a manner that precludes concurrent proceedings as a viable option.[194] New chapter 15 provides a

---

[191] *See supra* note 144; *see also* Gropper, *supra* note 126, at 836–37 (noting jurisprudence holding foreign representative may sue to avoid transfers under laws of its home country even though it cannot sue under U.S. Bankruptcy Code avoidance provisions).

[192] *See* 11 U.S.C. § 510 (2006) (providing various subordination powers/rights). As with avoidance powers, the subordination powers under the Bankruptcy Code may require resolution of conflict of law issues with respect to the insolvency law of the debtor's home country. *See* Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V., 310 F.3d 118, 130–133 (3d Cir. 2002) (suggesting court consider both United States and foreign country's subordination rules to resolve choice of law issues).

[193] *See* 11 U.S.C. §§ 365(a) (2006) (granting trustee right to reject any executory contract or unexpired lease of the debtor except as provided in statute); *id.* § 1123(b) (authorizing plan to provide for rejection of executory contracts or unexpired leases of debtor); *see also In re* Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1, 9–10 (Bankr. S.D.N.Y. 2003) (noting U.S. Bankruptcy Code was more advantageous for Colombian airline debtor because Colombian insolvency law had no provision for rejection of burdensome leases). In the case of unexpired leases for non-residential property, the Bankruptcy Code provides a further advantage because it imposes a statutory cap upon the amount that landlords may be able to claim as rejection damages. 11 U.S.C. § 502(b)(6) (2006) (defining when statutory cap may be imposed); *see* Laura B. Bartell, *Revisiting Rejection: Secured Party Interests in Leases and Executory Contracts*, 103 DICK. L. REV. 497, 529–30 (1999) (stating Code contains limit on damages from rejection of a lease); Scott A. Wolfson, *Deciphering the Damage Cap: Filing the Landlord's Claim in Bankruptcy*, 81 MICH. B. J. 26, 28 (2002) (noting purpose of cap is to compensate landlord for its loss in debtor's rejection of lease).

[194] For example, if the priority of distribution scheme provided by the foreign insolvency law was fundamentally inconsistent with the priority scheme under the U.S. Bankruptcy Code, such conflict could render a concurrent plenary proceeding infeasible unless an accommodation can be reached. *See Stonington Partners*, 310 F.3d at 130–31 (acknowledging conflict regarding subordination powers of U.S. law and insolvency law of foreign debtor's home country); Bank of N.Y. v. Treco (*In re* Treco*)*, 240 F.3d 148, 158–60 (2d Cir. 2000) (denying section 304 relief to foreign proceeding that subordinated secured claims because "security interests have been recognized as property rights protected by our Constitution's prohibition against takings without just compensation."); *see also In re Maxwell*, 93 F.3d at 1041–43 (noting conflict of avoidance powers under U.S. law and the insolvency law of foreign debtor's home country); Gropper, *supra* note 126, at 835–46 (stating substantive conflicts of law have arisen between U.S. and foreign insolvency law in concurrent proceedings); Ziegel, *supra* note 119, at 382–88 (2001) (discussing conflicts presented by substantive consolidation principles of U.S. bankruptcy law).

statutory mandate that U.S. courts should seek to cooperate and coordinate such plenary U.S. proceedings with the concurrent foreign insolvency proceeding.[195]

CONCLUSION

Cross-border restructurings of foreign debtors that have accessed U.S. capital markets present layers of complexity that must be carefully managed to ensure a successful result that can be recognized and enforced in the United States. A prepackaged or expedited bankruptcy process exclusively under U.S. or foreign law, or concurrently under both, offers foreign debtors a powerful and versatile mechanism to efficiently achieve that result. When implemented correctly, a prepackaged bankruptcy can dramatically reduce transaction costs by controlling risk through a consensual process that can proceed at an accelerated pace for the benefit of the foreign debtor and all of its stakeholders.

[195] 11 U.S.C. § 1529 (2006) ("If a foreign proceeding and a case under another chapter of this title are pending concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 1525, 1526 and 1527 . . . ."); *see* Gropper, *supra* note 126, at 846–47 (reporting chapter 15 tries to deal with conflicts between insolvency proceedings in United States and foreign jurisdictions). *See generally* Westbrook, *supra* note 59, at 717–18 (discussing ability of United States courts to cooperate with foreign courts in bankruptcy proceedings).