THE TRUST INDENTURE ACT AND INTERNATIONAL DEBT RESTRUCTURINGS

GEORGE W. SHUSTER, JR.*

INTRODUCTION

Recent international insolvencies have highlighted the potential significance of a statute that most lawyers would rather ignore—the Trust Indenture Act of 1939 (the "TIA").[1] At times considered obscure, antiquated, and irrelevant, the TIA has been given a fresh look and perhaps may have a new power in litigation involving United States bondholders and foreign debt issuers. This Article re-examines a pivotal provision of the TIA—section 316(b)—and discusses its present and prospective implications for U.S. debt investors and foreign companies. What is section 316(b), and who and what was it designed to protect? Are those interests implicated in international debt restructurings, and does the TIA condition or limit the effects of those restructurings? This Article submits the answer to these questions will hinge on how individual bondholders, foreign debtors, and U.S. courts approach the new chapter 15 of the Bankruptcy Code and interpret its provisions in accordance with comity principles.

I. THE LANGUAGE OF TIA SECTION 316(b)

Section 316(b) of the TIA was enacted to protect certain rights of individual bondholders to payment of principal and interest.[2] It states as follows:

> Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder, except as to a postponement of an interest payment consented to in paragraph (2) of subsection (a) of this section, and except that such indenture may contain a provision limiting or denying the right of any such

---

*George W. Shuster, Jr. is counsel at Wilmer Cutler Pickering Hale and Dorr LLP. He graduated from the University of Virginia School of Law in 2000 and from Columbia College in 1997. The author gives special thanks to John D. Sigel for his guidance and assistance in the drafting of this article.

[1] 15 U.S.C. §§ 77aaa–77bbbb (2000) (cited in the main text as TIA sections 301 *et seq.*).

[2] *See, e.g.*, UPIC & Co. v. Kinder-Care Learning Ctrs., Inc., 793 F. Supp. 448, 452 (S.D.N.Y. 1992) ("Section 316(b) expressly prohibits use of an indenture that permits modification by majority securityholder vote of any core term of the indenture, i.e., one affecting a securityholder's right to receive payment of the principal of or interest on the indenture security on the due dates for such payments . . . .").

> holder to institute any such suit, if and to the extent that the institution or prosecution thereof or the entry of the judgment therein would, under applicable law result in the surrender, impairment, waiver, or loss of the lien of such indenture upon any property subject to such lien.[3]

Before we proceed with the discussion of section 316(b), a summary of its language serves as a useful guide. First and foremost, section 316(b) governs TIA-qualified indentures without regard to any language in the indentures contrary to or inconsistent with section 316(b).[4] Most qualified indentures contain language that parallels the language in section 316(b). However, whether the indentures contain this language or not, section 316(b) will effectively become a part of the indenture. Additionally, if the language in the indentures departs from the language in section 316(b), the language in section 316(b) will override the language in the indentures.[5] Sometimes the section 316(b) protections are labeled "absolute"[6] because they override contractual agreements to the contrary, but the word "absolute" is a misnomer—as discussed below, section 316(b) is limited in scope and subject to a number of exceptions.

---

[3] 15 U.S.C. § 77ppp(b) (2000).

[4] Many trust indentures governing publicly-held debt securities are "qualified" under the TIA for securities law reasons, and these trust indentures are therefore subject to section 316(b). *See* 15 U.S.C. § 77ccc(9) (2000) (defining "indenture to be qualified"); *see also UPIC*, 793 F. Supp. at 450 n.3 ("An indenture 'qualified' under the Trust Indenture Act of 1939 is an indenture which complies with the Act's substantive requirements, . . . and under which a security has been issued, concerning which the required registration statement has been filed and has become effective.") (citations omitted).

[5] *See* 15 U.S.C. § 77ppp(a) (2000) (stating provisions automatically included in qualified indentures). The deemed inclusion and contractual pre-emption of section 316(b) were made clear through the 1990 amendments to the statute, Pub. L. 101-550, § 415(1)–(3), which amendments were codified in section 318(c):

> The provisions of sections 310 to and including 317 that impose duties on any person (including provisions automatically deemed included in an indenture unless the indenture provides that such provisions are excluded) are a part of and govern every qualified indenture, whether or not physically contained therein, shall be deemed retroactively to govern each indenture heretofore qualified, and prospectively to govern each indenture hereafter qualified under this title and shall be deemed retroactively to amend and supersede inconsistent provisions in each such indenture heretofore qualified. The foregoing provisions of this subsection shall not be deemed to effect the inclusion (by retroactive amendment or otherwise) in the text of any indenture heretofore qualified of any of the optional provisions contemplated by section[s] 310(b)(1), 311(b), 314(d), 315(a), 315(b), 315(e) or 316(a)(1).

15 U.S.C. § 77rrr(c) (2000); *see also* 15 U.S.C. § 77aaaa (2000) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.").

[6] *See UPIC*, 793 F. Supp. at 455 (inferring from legislative history "Congress' intent to have Section 316(b) interpreted so as to give effect to the absolute and unconditional nature of the right to payment it affords a Securityholder") (citation omitted).

Second, section 316(b) protects the rights of each individual bondholder under an indenture as against other bondholders under that indenture. It is a "countermajoritarian" protection designed to preserve the rights of the one against the desires of the many[7]—if the TIA is the bondholder's Constitution, then section 316(b) is their Bill of Rights. It functions only indirectly to protect a bondholder against a debt issuer (creditor against debtor) but functions directly to protect a bondholder against fellow bondholders (creditor against other creditors).[8] More specifically, the legislative history for the TIA suggests that section 316(b) was passed to protect an individual, "retail" holder from the attempts of institutional investors, usually in coordination with the debt issuer, to restructure all of the issuer's debt.[9] Although absent section 316(b) an indenture might explicitly provide that a majority of bondholders may vote to reduce all debt issued under the indenture, an individual purchasing bonds under the indenture might not recognize

---

[7] *See In re* Bd. of Dirs. of Multicanal S.A., 307 B.R. 384, 389 (Bankr. S.D.N.Y. 2004) ("Section 316(b) . . . declares that . . . the right of any holder to institute suit for principal or interest on the holder's bonds or debentures cannot be impaired without consent."); *see also UPIC*, 793 F. Supp. at 452 (describing "majority action clauses" provided by section 316(b)).

[8] *See* Richard L. Epling, *Exchange Offers, Defaults, and Insolvency: A Short Primer*, 8 BANKR. DEV. J. 15, 32 (1991) (stressing protections inherent in section 316(b) regarding individual holders' rights to receive principal and interest). A debtor will likely want the ability to restructure all of its debt without the unanimous consent of all bondholders, and thus majoritarian bondholder rights also benefit the debtor.

[9] *See In re Multicanal*, 307 B.R. at 388 ("One purpose of the statute was to regulate and reform prior practice whereby indentures contained provisions that permitted a group of bondholders . . . to agree to amendments to the indenture that affected the rights of other holders—so-called 'majority' or 'collective' action clauses."). The legislative history for the TIA comes in two primary sources—the statements of the House of Representatives and the Senate, and a multi-volume report spearheaded by the then commissioner of the U.S. Securities and Exchange Commission ("SEC"), William O. Douglas, and published in the late 1930's. *See* S.E.C., REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF THE PROTECTIVE AND REORGANIZATION COMMITTEES (Adelaide Rosalia Hasse ed., 1936-1940). In fact, the SEC's testimony on the TIA is mostly drawn from this report. As to the specific main text to which this footnote relates, the SEC's testimony is peppered with arguments favoring the individual bondholder. For example, "[t]o the extent that the indenture is the product of the borrower, the underwriter or the trustee, only their respective interests are reflected therein. The individual purchaser of such security cannot normally bargain for special provisions." *Testimony of SEC Comm'r William O. Douglas: Hearing on S. 2344 Before a Subcomm. of the S. Comm. on Banking and Currency*, 75th Cong. 24 (1937); *see* Gen. Statement on Trust Indenture Act of 1938, H.R. 10292, 1938, Tab. No. 19 (attaching *For This Relief, No Thanks*, WALL ST. J., May 14, 1938 (discussing inappropriate majority bondholder control in railroad restructurings)) ("In other words, the affect of this prohibition will be to limit . . . the control of the majority over the destinies of the individual minority security holder. If an investor buys a $1,000 bond payable on January 1, 1940, the majority cannot turn it into a $500 bond payable in 1960, without his consent, and without resort to the reorganization machinery now provided by law. There is nothing in this provision, however, to prevent the majority from waiving *its own* rights.").

this majoritarian power or appreciate its meaning.[10] Section 316(b), then, has an analog in consumer legislation, where the principle of "caveat emptor" is qualified by an aspect of congressional paternalism. Undoubtedly, there are instances where consumers should be protected by legislation—but it can fairly be asked whether purchasers of bonds under TIA-qualified indentures are included in this category.

Third, section 316(b) protects only a limited set of bondholder rights—rights to collect principal and interest when due, in the amounts due, and rights to institute suit to that end. The amount and timing of principal and interest due on an individual's bond may not be changed without the consent of the individual bondholder, but virtually any other provision of an indenture may be changed by the vote of a group of bondholders (often a simple majority).[11] For example, a majority of bondholders may decide to accept a reduced payment on their own debt and simultaneously "strip the covenants" from the indenture. This would leave any remaining minority bondholders, who did not accept the reduced payment, with their bare principal and interest rights—but with no covenants and no non-monetary defaults. Such "exit consents" do not run afoul of section 316(b) and are often used to neuter small percentages of dissenting or abstaining bondholders in otherwise fully consensual out-of-court restructurings.[12]

Section 316(b) provides that an individual bondholder, without needing to join with other bondholders in a collective enforcement action, may undertake a collection suit on its own.[13] Such a suit may be a simple money-collection action or, as interpreted by one court, such a suit may be an involuntary bankruptcy

---

[10] *See* Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 YALE L.J. 232, 263 (1987) (criticizing inadequacies of section 316(b) "[a]s a protective measure"). The SEC cast underwriters, who have participated in the documentation of the debt issuance as proxies for those who will later become bondholders, in particularly nefarious roles in the supposed hoodwinking of individual investors, declaring: "And the indemnifier, though admittedly performing at times a protective function, has too often been motivated by factors not compatible with the objectives of the prospective investors." *Regulation of Sale of Securities: Hearing on S. 2344 Before a Subcomm. of the S. Comm. on Banking and Currency*, 75th Cong. 19 (1937) (statement of William O. Douglas, SEC Comm'r, on Barkley Bill (later TIA)). In additional statements, "[t]he underwriter may have reasons for concealing defaults when it would be to the best interest of the security holders to proceed forthwith to foreclosure, receivership, or bankruptcy." *Id.* at 28. Furthermore, "[t]he underwriting bankers have not afforded adequate protection to security holders against emasculating and oppressive provisions in indentures." *Id.* at 24.

[11] *See* 15 U.S.C. § 77ppp (2000) (stating "the right of any holder . . . 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").

[12] *See* Ezra G. Levin, *The Acquisition of Troubled Companies*, C115 A.L.I.-A.B.A. 23, 30 (1995) (describing "sacrosanct" nature of principal, interest, or maturity date of publicly held bonds). For example, if an issuer makes a tender offer to repurchase its bonds at a price 20% below par, and if 95% of the bondholders agree and tender, then the issuer might choose to keep the remaining 5% of the bondholders outstanding at par, but with only their bare principal and interest rights, and with no ability to sue for non-monetary defaults.

[13] *See* Envirodyne Indus., Inc. v. Conn. Mut. Life Co. (*In re* Envirodyne Indus., Inc.), 174 B.R. 986, 996 (Bankr. N.D. Ill. 1994) (allowing collection action filed by noteholder).

proceeding.[14] This protection of an individual bondholder's right to sue should be understood in the context of so-called "no-action" clauses, often found in indentures. "No-action" clauses provide that bondholders may enforce the provisions of the indenture only if some percentage of bondholders (as low as 25%) decide to undertake such an action.[15] Section 316(b) limits the effect of "no-action" clauses, removing collection actions, but not, for example, suits to foreclose on any collateral securing the bondholders' claims, from the scope of "no-action" clauses.[16] As noted below, one of the two express exceptions to section 316(b) also addresses the exclusion of collateral foreclosure suits from the protections afforded by section 316(b).

Fourth, section 316(b) is subject to two explicit exceptions: one related to temporary postponement of interest payments under section 316(a)(2)[17] and another related to "election of remedies" laws.[18] The first of these exceptions is self-

---

[14] *See id.* at 996–97 (permitting involuntary chapter 7 filing); *see also* Grey v. Federated Group, Inc., (*In re* Federated Group, Inc.), 107 F.3d 730, 733 (9th Cir. 1997) (concluding indenture trustee was entitled to join involuntary petition). The filing of an involuntary bankruptcy proceeding, even if permitted under the indenture and the TIA, generally requires three petitioning creditors holding in the aggregate at least $12,300 in unsecured claims. *See* 11 U.S.C. § 303(b) (2006) (requiring three or more entities with undisputed claims aggregating at least $12,300 to commence involuntary case). It may be possible for secured creditors to waive a portion of their security in order to meet the unsecured claim requirements. *See, e.g.*, CC Britain Equities, L.L.C. v. Allen-Main Assocs. Ltd. P'ship (*In re* Allen-Main Assocs. Ltd. P'ship), 223 B.R. 59, 61 (B.A.P. 2d Cir. 1998) (asserting "it is also possible for a fully secured creditor to waive all or part of its claim to become an eligible unsecured creditor"). However, creditors may not acquire claims for the purpose of commencing an involuntary case. FED. R. BANKR. P. 1003(a) ("An entity that has transferred or acquired a claim for the purpose of commencing a case for liquidation under chapter 7 or for reorganization under chapter 11 shall not be a qualified petitioner.").

[15] A typical "no action" clause might read as follows: "No holder of any Note shall have any right by virtue of or by availing of any provision of this Indenture to institute any suit, action, or proceeding in equity or at law upon or under or with respect to this Indenture, or for the appointment of a receiver, trustee, liquidator, custodian, or similar official, or for any other remedy hereunder, unless such holder previously shall have given to the Trustee written notice of an Event of Default and the continuance thereof, and unless also the holders of not less than 25% in aggregate principal amount of the Notes then outstanding shall have made a written request to the Indenture Trustee to initiate such suit, action, or proceeding in its own name and shall have offered to the Indenture Trustee such indemnity as required hereunder, and the Indenture Trustee shall after sixty (60) days have neglected or refused to institute such suit, action, or proceeding, and no direction inconsistent with such written bequest shall have been given to the Indenture Trustee by a Majority of Holders hereunder, and provided that no Holder shall have any right to affect, disturb, or prejudice the rights of any other Holder hereunder or under the Notes, or to enforce any right hereunder or thereunder except for the equal and ratable benefit of all Holders." *See, e.g.*, Marcel Kahan, *Rethinking Corporate Bonds: The Trade-Off Between Individual and Collective Rights*, 77 N.Y.U. L. REV. 1040, 1050 (2002) (providing another example of no-action clause).

[16] *See* 69 AM. JUR. 2D *Securities Regulation—Federal* § 887 (1993) (indicating "no-action" clauses are "ineffective with respect to suit for the payment of principal and interest when due, but have been held to regulate suits on other grounds against the obligor, although not suits against the trustee").

[17] Section 316(a)(2) allows an interest payment (and not a principal payment) to be postponed (and not reduced) for a period not to exceed three years, with the consent of at least 75% of the outstanding debt. *See* 15 U.S.C. § 77ppp(a)(2) (2000); *see also* Epling, *supra* note 8, at 31 (1991) (describing section 316(a)(2) as enabling provision which permits interest deferment).

[18] This exception is found in the following language in section 316(b):

explanatory and simply provides a margin of flexibility for mostly-consensual forbearance in limited circumstances (e.g., if an issuer misses a scheduled payment but expects to be back on track shortly).

The second exception is more complicated. It states that an indenture may contain a provision limiting or denying the right of a bondholder to sue if and to the extent that that suit would, under applicable law, result in an adverse effect on a lien securing the bonds.[19] This exception was added to section 316(b) through the Hinshaw Amendment passed when the original bill was considered by the House of Representatives, following passage by the Senate.[20] Congressman Hinshaw explained that the amendment was necessary to address certain state laws in which a suit to recover a debt, without a parallel suit to foreclose on security for that debt, would constitute a waiver of the security.[21] Recalling that the TIA protects a bondholder's right to sue for principal and interest, but not to foreclose on security, a secured bondholder might pursue the former action but not the latter. Under "election of remedies" laws, the former suit by one bondholder might constitute a waiver of the latter suit by any and all bondholders. This unacceptable result gave rise to the Hinshaw Amendment, which limits the section 316(b) rights of secured bondholders. Indeed, depending on the state (or foreign) laws applicable to foreclosure on the security for the bonds, this "election of remedies" exception may take away any right of an individual secured bondholder to sue under section 316(b).[22]

> [E]xcept that such indenture may contain a provision limiting or denying the right of any such holder to institute any such suit, if and to the extent that the institution or prosecution thereof or the entry of the judgment therein would, under applicable law result in the surrender, impairment, waiver, or loss of the lien of such indenture upon any property subject to such lien.

15 U.S.C. § 77ppp(b) (2000).

[19] *See id.*; *see also* Royce de R. Barondes, *An Economic Analysis of the Potential for Coercion in Consent Solicitations for Bonds*, 63 FORDHAM L. REV. 749, 751 n.10 (1994) ("Under the TIA, an indenture also may limit the right of bondholders to bring an action that would impair the lien of the indenture on any property.").

[20] *See* 84 CONG. REC. 9073, 9528 (1939) (transcribing proposal and debate of Hinshaw Amendment).

[21] *See id.* (referring to laws of California and other western states which allow only "one action to foreclose a mortgage").

[22] For example, consider the holder of a secured bond for which the liens are governed by the foreign law of the debtor's home country (i.e., a real estate mortgage for the debtor's foreign headquarters). If foreign election of remedies law states that a suit to enforce a secured debt must be accompanied by a suit to enforce the lien, or else the lien is waived, then TIA section 316(b) would not protect the individual holder's right to sue to enforce the debt. *See* 15 U.S.C § 77ppp (2000) (stating exception for indentures containing provisions limiting or denying right of holder to institute suit). The TIA would, however, continue to protect the holder's rights to principal and interest—just not the right to sue to collect that principal and interest. *See In re* Nw. Corp., 313 B.R. 595, 600 (Bankr. D. Del. 2004) (construing impairment of holder's rights under Act as applying to "holder's legal rights and not the holder's practical rights to the principal and interest itself.").

Section 316(b) also has a third exception that is not explicit—chapter 11 of the U.S. Bankruptcy Code. This third "unwritten" exception and its limitations will be a primary focus of the latter parts of this Article.[23]

In sum, section 316(b):

- provides contractually preemptive protection;
- to one bondholder against other bondholders;
- for payment of principal and interest when due;
- subject to certain exceptions.

Although the foregoing description may appear elementary, it will be helpful to keep these four points in mind as this Article proceeds. The answer to the ultimate question addressed by this Article—whether section 316(b) has a role in foreign insolvency proceedings—should be informed by, among other things, these basic facets of the statute.

II. THE TIA AND DOMESTIC DEBT RESTRUCTURINGS

Before turning to a discussion of the TIA in the context on international debt restructurings, it is helpful to consider the TIA in a domestic context. Section 316(b) was adopted with a specific purpose in mind—to prevent out-of-court debt restructurings from being forced upon minority bondholders.[24] The perceived problem was that, absent section 316(b), a debt issuer would be able to agree with a majority of its bondholders that all bond debt will be reduced. Such an out-of-court agreement would allow the issuer to circumvent or "contract-around" the provisions of the U.S. Bankruptcy Code, which would apply different, statutory requirements for debt reduction.[25] For example, if an indenture allowed bond debt to be reduced on a vote of bondholders representing 50% of the principal amount of bonds, such a vote would be inconsistent with the bankruptcy voting requirements in section 1126 of the Bankruptcy Code, which provide that a chapter 11 plan of reorganization may

---

[23] *See* Richard J. Morgan, *Application of the Securities Laws in Chapter 11 Reorganizations Under the Bankruptcy Reform Act of 1978*, 1983 U. ILL. L. REV. 861, 915 (1983) (discussing various exemptions under TIA and two exemptions from requirements of TIA under Bankruptcy Act). It is notable that the TIA does not contain an explicit chapter 11 bankruptcy exception, and that the Bankruptcy Code does not explicitly override the TIA with regard to confirmation of chapter 11 plans involving existing debt securities. Section 1145(d) of the Code does exempt from the TIA certain new debt securities issued as a result of a confirmed chapter 11 plan. *See* 11 U.S.C § 1145(d) (2006) (exempting short term commercial notes issued under reorganization plan from TIA application).

[24] *See* Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 YALE L. J. 232, 251–55 (1987) (offering excellent and in-depth review and critique of section 316(b)'s origins and implications in modern domestic debt restructurings).

[25] *See id.* at 251 (recognizing SEC's desire to bring contractual recapitalization under jurisdiction of federal bankruptcy court through trust indenture legislation); *see also* William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1, 53 n.182 (2004) (pointing out purpose of section 316(b) was to discourage out-of-court agreements without judicial supervision).

be approved by a class of debt if affirmative notes are cast by two-thirds in amount of the claims constituting the class, and more than one-half in number of the creditors in the class, with the fractions measured against those claims and creditors actually voting on the plan.[26] The United States Securities and Exchange Commission ("SEC"), in promoting the TIA, was consciously forcing debt restructurings involving TIA-qualified indebtedness to occur in bankruptcy court under the applicable laws and rules, rather than in an out-of-court setting under rules contracted by the parties.[27] The SEC's rationale, again, was to protect the minority bondholders from disadvantageous decisions of the majority—to protect the "mom and pop" investor from the institutions and insiders. This rationale has a decidedly modern ring to it, even though it was pronounced in the late 1930's.

Although the legislative history of section 316(b) makes clear that the SEC and Congress preferred bankruptcy to out-of-court debt restructurings, as far as protecting individual bondholders was concerned, Congress made no explicit reference to bankruptcy in section 316(b). Notwithstanding this textual omission, the TIA's legislative history and its citation by courts and commentators have caused the bankruptcy "exception" to become a standard inference in section 316(b)

---

[26] *See* 11 U.S.C. § 1126(c) (2006).

[27] The House Report on section 316(b) of the TIA states, "[e]vasion of judicial scrutiny of the fairness of debt-readjustment plans is prevented by this prohibition." H.R. REP. NO. 76-1016, at 56 (1939), *reprinted in* FED. BAR ASS'N SEC. LAW COMM., FEDERAL SECURITIES LAWS 3710 (BNA Books 1983). It should be noted that while the provisions governing chapter 11 reorganizations today were not in place when the TIA was passed in 1939, they were in place when the TIA was amended in 1990, and although Congress could have revisited the TIA in the passage of the Bankruptcy Code in 1978 or in later Bankrupcty Code amendments, it did not. For the purposes of this article, it is more important to recognize that in passing the TIA Congress wanted to force bond debt restructurings into court proceedings under bankruptcy law, than to examine the particulars of the bankruptcy laws in effect in 1939. It suffices to state, for present purposes, that a concept of debt restructuring (a "composition") by majority vote (by number and amount) did exist in the federal bankruptcy law in effect in the late 1930s. *See* FRANK B. GILBERT, GILBERT'S COLLIER ON BANKRUPTCY ¶ 396, at 255 (James WM. Moore & Edward H. Levi eds., 4th ed. 1937) (stating only majority of creditors, both in number and amount, is necessary to constitute consent to composition). It is notable that the Gilbert treatise addresses the constitutionality of such a law that permits a majority of creditors to vote away the rights of an individual creditor to enforce its claims. *See id.* ¶ 381, at 250 (noting Congress' power to establish uniform system of bankruptcy includes allowing compositions). In part, the constitutionality is defended based upon the provision of the bankruptcy law requiring that a creditor receive at least as much in the composition as it would receive in a liquidation. *Id.* (commenting on constitutionality of compositions because they achieve *pro rata* distribution of assets). The principle is that there can be no unconstitutional deprivation of the individual creditor's rights as long as the individual creditor ends up substantially the same as, or better off than, the creditor would if it were left to enforce its individual rights. This principle is found in the modern Bankruptcy Code's section 1129(a)(7) and is often referred to (and was in its prior form in the 1930s referred to) as the "best interests of creditors" test. *See* 11 U.S.C. § 1129(a)(7) (2006). The question for the purposes of this article is whether a foreign proceeding that lacks an equivalent to section 1129(a)(7) is nevertheless constitutionally sound and deserving of an extension of the bankruptcy exception to TIA section 316(b). It may be relevant to this line of inquiry that in the 1930s the acceptance of a composition by the majority of creditors was *prima facie* evidence that the composition was in the best interests of the creditors, and the burden was on the dissenting creditor to demonstrate otherwise. GILBERT, *supra*, ¶ 405, at 260 ("The approval of the majority of the creditors is evidence, *prima facie*, that the composition is for the best interests of the creditors and the burden is upon those who attack it to show the contrary.").

analysis.[28] But it makes sense to consider exactly what this bankruptcy exception is, and why the SEC and Congress thought that it made sense.

Chapter 11 bankruptcy "reorganization" cases regularly involve (1) the proposal (by a debtor, creditor, or other interested party) of a plan of reorganization for a debtor's business, (2) the vote by creditors on whether to accept or reject that plan, and (3) the confirmation or non-confirmation of a creditor-accepted plan by the bankruptcy court. As suggested above, the second step in this process is governed by detailed voting procedures, as set forth in the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. Voting is arranged by classes of creditors—creditors whose claims are alike with those of one another and, usually, different from those of creditors in another class.[29] A class of creditors accepts a plan of reorganization if creditors holding at least two-thirds in amount and constituting more than one-half in number of the creditors in that class vote in favor of the plan. Only creditors who vote are calculated in these fractions, so in most cases a class will accept a plan with something less than the two-thirds and one-half amounts if measured on an absolute basis. At a bare minimum, one class of creditors must vote to accept a plan if that plan is to be confirmed by the court.

The confirmation of a plan of reorganization is a topic far too complex for the purposes of this Article. But for present purposes, it suffices to state that the chapter 11 voting mechanics are complicated and are determined at the time and in the circumstances of the chapter 11 proceeding. For any number of reasons, they are highly unlikely to match the relatively simple voting mechanics in an indenture, which in any event are decided upon when the debt is issued, not when the debt is in default. Moreover, it is important to note that the chapter 11 voting mechanics are only one aspect of the Bankruptcy Code and only one portion of the plan confirmation process. Other legal requirements provide further conditions and limitations on the confirmation of a plan of reorganization and the restructuring of a debt issuer's obligations.[30]

---

[28] *See supra* note 8 and accompanying text (referring to benefit of majoritarian bondholder rights).

[29] It is usual for all bondholders under a single indenture to constitute a single class, distinct from bondholders under a different indenture and distinct from all other creditors, but this is not a hard-and-fast rule—two bondholders under a single indenture could have different rights and belong in different classes, or bondholders under one indenture might have identical rights to bondholders under a different indenture, making common classification appropriate. *See, e.g.*, St. Louis Union Trust Co. v. Champion Shoe Mach. Co., 109 F.2d 313, 316 (8th Cir. 1940) (holding bondholders who secured their bonds through same trust indenture were entitled to distinct classifications depending on when or whether they had agreed to grant issuer extension).

[30] Many of these requirements are set forth in section 1129 of the Code. *See* 11 U.S.C. § 1129 (specifying requirements for confirming plans). One important example is the so-called "absolute priority rule" section 1129 (b)(2)(B), which provides a protection to unsecured creditors that is not available in the out-of-court context. Specifically, the "absolute priority rule" limits retentions and distributions of property (including stock) by and to equity holders if unsecured creditors are not paid in full—retentions and distributions that are often part of out-of-court restructurings. *See* Paul W. Bonapfel, *Individual Chapter 11 Cases Under BAPCPA*, 25 AM. BANKR. L.J. 1, 54 (2006) (giving general meaning and interpretations of absolute priority rule).

From the perspective of an individual bondholder, chapter 11 provides a process for a portion of a debt issuer's creditors to agree to a reduction in bond debt, principal and/or interest, and for the court to make that reduction binding upon the individual bondholder without regard to whether it has agreed to it, opposed it, or abstained from voting on it. But isn't this precisely what section 316(b) prohibits? How can chapter 11 and the TIA be reconciled if the one statute infringes upon individual rights that the other protects? The answer is as noted above—that chapter 11 offers and requires more than just a reduced creditor voting percentage. It is a statute that carefully balances the rights of the individual against the rights of the group, the rights of the debtor against the rights of its creditors. Within this scheme, there is an advanced degree of comfort that the individual bondholder's rights will not be unduly prejudiced. And, unlike an out-of-court restructuring, there is a judge waiting to hear the equitable concerns that an individual bondholder might raise.

Before leaving the domestic arena, it is useful to note that the chapter 11 system is premised upon recognizing "beneficial holders" of claims, as opposed to "named creditors." In chapter 11, the beneficial holder of a bond issued under an indenture is entitled—and indeed is the only party entitled—to vote the claim corresponding to that bond.[31] And a beneficial holder has standing, as a creditor, to be heard on other issues in the chapter 11 case. Most important, a beneficial holder has the ability to participate in filing an involuntary bankruptcy petition against the debt issuer (a right, as noted above, that is protected by section 316(b) of the TIA).[32] To an attorney practicing solely within the U.S., these aspects of chapter 11 might be taken for granted. However, attorneys practicing in other countries will note that most foreign civil-law jurisdictions recognize only a named creditor and not any party holding a claim through that creditor. In the case of debt issued under an indenture, a foreign court might grant standing and a right to vote only to the indenture trustee. Recognition of the indenture trustee as the sole creditor of bond debt conflicts with the purposes of the TIA, because the TIA cannot protect the

---

[31] *See* 11 U.S.C. § 1126(a) (2006) (stating holder of claim or interest may accept or reject plan); *see also* FED. R. BANKR. P. 3018 (indicating who may accept or reject plan in chapter 11 reorganization case); *In re* Pioneer Fin. Corp., 246 B.R. 626, 633 (Bankr. D. Nev. 2000) (finding only holder of claim or interest is permitted to vote on plan pursuant to section 1126(a)).

[32] *See In re* Bd. of Dirs. of Multicanal S.A., 307 B.R. 384, 387 n.2 (Bankr. S.D.N.Y. 2004) [hereinafter *Multicanal I*] (citing Drachman v. Harvey, 453 F.2d 722, 727 (2d Cir. 1972) (declaring federal law grants beneficial shareholders standing to sue)) (noting federal courts have allowed beneficial holders to sue under TIA rights); *see also* Envirodyne Indus., Inc. v. Conn. Mut. Life Co. (*In re* Envirodyne Indus., Inc.), 174 B.R. 986, 993 (Bankr. N.D. Ill. 1994) (analyzing legislative history of section 316(b) to support right of noteholder to pursue action for principal and interest).

rights of an individual to take actions—like commencing an insolvency proceeding against a debtor—if those rights do not exist in the first place.[33]

III. THE TIA AND INTERNATIONAL DEBT RESTRUCTURINGS

The rule regarding domestic debt restructurings is relatively clear: outside of a chapter 11 plan of reorganization, a bondholder's debt may not be reduced or its term extended without that bondholder's consent.[34] This rule starts to fall apart, however, in the context of international debt restructurings.

It is an open question as to whether foreign insolvency proceedings are within the "bankruptcy" exception to section 316(b). Recall that the bankruptcy exception, while well-established, is not explicitly stated in section 316(b), so there is no text in the TIA to guide us. Instead, we have to consider from an interpretation of legislative history, and from a perspective of public policy, whether section 316(b) should protect individual bondholders under a TIA-qualified indenture from being bound by foreign insolvency proceedings. As we will discuss in more detail below, the inquiry is likely take place on a country-by-country basis and is likely to have uncertain results.

As a preamble to the discussion of these legal issues, it is appropriate to consider the business context in which the issues develop. Foreign companies regularly look to the U.S. capital market for money to assist their businesses. Whether the money is sought for project finance, a privatization, or an acquisition, the transaction is often structured as an issuance of debt securities under U.S. law through a U.S. indenture trustee and through a U.S. underwriter, to mostly U.S. investors. The issuer of the debt may have some presence in the U.S. or no presence at all, but it will, at a minimum, establish a bank account in the U.S. for

---

[33] As will be discussed later in this Article, there is often an issue under foreign law as to whether an indenture trustee is one creditor of the debtor or is a representative of many bondholder creditors, each with its own rights in the foreign proceeding. This "one creditor or many" issue creates conflict in additional ways when a debtor attempts to restructure U.S. bond debt through a foreign insolvency proceeding. For example, most indentures expressly prohibit the indenture trustee from voting on any plan of reorganization or similar agreement, with the idea, based on the U.S. chapter 11 model, that the beneficial holders of the bonds will vote on their own behalf. *See In re* Value Merchs., Inc., 202 B.R. 280, 288 (Bankr. E.D. Wis. 1996) (recognizing indentured trustees' plans of reorganization are of little utility because actual creditors vote on reorganization plans and indentured trustees are prohibited from voting under the terms of most indentures). But, if the U.S. indenture prohibits the indenture trustee from voting, and if the foreign law allows only the indenture trustee to vote, then there is an impasse. *See* Peter J.M. Declercq, *Restructuring European Distressed Debt: Netherlands Suspension of Payment Proceeding . . . The Netherlands Chapter 11?*, 77 AM. BANKR. L.J. 377, 396, 400–02 (2003) (contrasting right to vote on reorganization plans in Netherlands to indentured trustees' rights to vote in United States). *See generally* Mark M. Polebaum, Denis L. Jenkins, George W. Shuster, Jr., Alegandro Sainz & Manuel Ruiz-de-Chavez, *One Creditor or Many? Bondholder Standing in Foreign Insolvencies*, FINANCIER WORLDWIDE, May 2005, at 46.

[34] *See Multicanal I*, 307 B.R. at 388 (repeating language of section 316(b) of TIA asserting right of indenture security holder to receive payment on principal or interest "shall not be impaired or affected without the consent of such holder"); UPIC & Co. v. Kinder-Care Learning Ctrs., Inc., 793 F. Supp. 448, 452 (proclaiming under section 316(b) of TIA, holder's rights to receive payment of principal and interest can not be affected or impaired without consent).

the purpose of making its U.S. dollar-denominated interest and principal payments to the U.S. indenture trustee. On the one hand, the U.S. investors clearly understand that they have lent money to a foreign company that is governed by foreign law. On the other hand, the foreign company has issued debt under U.S. law and has consented to jurisdiction in U.S. courts.

If the foreign company experiences financial difficulty and seeks to restructure its debt, the company will likely have an array of options. The foreign company could attempt a voluntary out-of-court restructuring by way of a tender or exchange offer or consent solicitation. These solutions would work on their own only if a high percentage of bondholders accept the tender offer. As discussed above, the TIA prevents a bondholder from being forced to accept a reduction of principal and interest outside of bankruptcy, and this "hold-out" power may cause a tender or exchange offer to fail, because the offer is only successful to the extent that bondholders voluntarily subscribe to its terms. Only through a court proceeding could individual bondholders be compelled to accept a reduced amount of money (or new debt securities) in full satisfaction of their claims against the foreign company.[35]

Thus, the troubled foreign company could attempt an in-court restructuring. In that case, the foreign company may have a choice between a foreign proceeding in its home country or in the U.S. The rules for jurisdiction over a debtor in the U.S. are generous, and there is precedent for a chapter 11 case involving a company with only minimal assets in the U.S. (e.g., a retainer held by U.S. counsel or a single U.S. bank account with a small balance).[36] If the foreign company's debt is mostly bonds

---

[35] *See Multicanal I*, 307 B.R. at 388 (confirming that TIA restricts majority bondholders from reducing and affecting minority bondholders' rights to satisfaction without consent). In some instances, the coercive effect of a potential insolvency proceeding will make tender and exchange offers more successful than they might be in the absence of such a threat, and the insolvency proceeding will be thereby averted. *See* LTV Corp. v. Valley Fid. Bank & Trust Co. (*In re* Chateaugay Corp.), 961 F.2d 378, 381 (2d Cir. 1992) (observing debtors and creditors prefer to restructure debtors' financial obligations outside of court to avoid transaction costs and default by debtors, and to increase likelihood of payment to creditors).

[36] Courts have held that retainers may satisfy the "property" requirement in section 109(a) of the Bankruptcy Code. *See, e.g.*, *In re* Global Ocean Carriers, Ltd., 251 B.R. 31, 39 (Bankr. D. Del. 2000) (concluding retainers paid on behalf of all debtors constitute sufficient property to file bankruptcy petitions under section 109); *In re* Indep. Eng'g Co., Inc., 232 B.R. 529, 533 (B.A.P. 1st Cir. 1999) (deeming retainer paid by third party as property of debtor's estate); *see also* 11 U.S.C. § 109(a) (2006) (defining who may be debtor). Bank accounts with balances as low as $194.00 have also been held sufficient to make a debtor eligible under section 109(a) of the Bankruptcy Code. *See, e.g.*, *In re* Farmer, 288 B.R. 31, 32–33 (Bankr. N.D.N.Y. 2002) (qualifying individual with $600 in bank accounts as debtor); *In re Global Ocean*, 251 B.R. at 38–39 (considering less than $100,000 in debtors' bank accounts property for purposes of eligibility); *In re* McTague, 198 B.R. 428, 431–32 (Bankr. W.D.N.Y. 1996) (holding $194.00 in bank account as sufficient property); *see also In re* Aerovias Nacionales de Colombia, S.A. Avianca, 303 B.R. 1, 8–9 (Bankr. S.D.N.Y. 2003) (holding minimal U.S. property satisfied section 109(a) for Colombia-based debtor). The recent case of Yukos Oil is an extreme (and failed) example of a foreign company attempting to make use of U.S. insolvency law. *In re* Yukos Oil Co., 321 B.R. 396, 410–11 (Bankr. S.D. Tex. 1998) (dismissing petition for chapter 11 relief because funds were transferred to account one week before filing of petition for primary purpose of creating jurisdiction in U.S. Bankruptcy Court). Moreover, courts have stated that they lack jurisdiction to question what amount of property is necessary to satisfy section 109(a), since the statute contains no minimum:

issued in the U.S. to U.S. creditors, it is even more likely that a U.S. court could exercise jurisdiction over the company's debt restructuring case.[37] Nonetheless, the foreign company might find advantages in an insolvency proceeding under the laws of its home country. For example, the company may have trade creditors that are best dealt with through a home-country proceeding, or may have regulatory or business-specific issues that need to be addressed locally. In that case, in order to ensure that orders entered by a foreign court are binding upon the U.S. bondholders, the company might still file a full-fledged "plenary" proceeding in the U.S. under section 301 or 303 of the Bankruptcy Code,[38] or the company might file what was previously an "ancillary" proceeding in the U.S. under section 304 of the Bankruptcy Code and what is now a chapter 15 case following the 2005 amendments to the Bankruptcy Code.[39]

> Consequently, as applied to the case at bar, the statute does not seem to be vague or ambiguous, and it seems to have such a plain meaning as to leave the Court with no discretion to consider whether it was the intent of Congress to permit someone to obtain a bankruptcy discharge on the basis of having a dollar, a dime or a peppercorn located in the United States.

In re McTague, 198 B.R. at 432. However, courts have suggested that the result could be different if nominal assets were maintained in the United States solely to make a debtor eligible under section 109(a). *See In re* Head, 223 B.R. 648, 651–52 (Bankr. W.D.N.Y. 1998) (rejecting debtors arguments for eligibility where they established façade of eligibility by obtaining U.S. mailing addresses and opening small bank accounts in U.S. banks (citing *In re McTague*, 198 B.R. at 432 (suggesting "bad faith filings" may be appropriate grounds for dismissal))); *see also In re Farmer*, 288 B.R. at 31 (reasoning bank accounts were sufficient property where there was no allegations they were opened simply to manufacture eligibility for debtor to use U.S. law).

[37] *See generally* Jeff Carruth, *International Secured Transactions and Insolvency*, 39 INT'L LAW. 363 (2005) (surveying cases in U.S. federal courts addressing issues of international insolvency). U.S. bond documents generally contain choice-of-law and consent-to-jurisdiction clauses specifying New York law and New York courts. *See, e.g.*, Valley Nat'l. Bank v. Greenwich Ins. Co., 254 F. Supp. 2d 448, 456 (S.D.N.Y. 2003) (holding choice of law clause on bond applying New York's law governs any disputes arising under bond). Even if these clauses are not specifically enforceable in the case of a foreign debtor, a U.S. court might take them into account in its jurisdiction analysis. *See, e.g.*, *In re* Lois/USA, Inc., 264 B.R. 69, 96–97 (Bankr. S.D.N.Y. 2001) (upholding choice of law provisions in loan documents).

For a recent decision regarding the issue of whether a foreign debtor may be subject to an involuntary chapter 11 case, see *In re Globo Comunicacoes e Participacoes S.A.*, 317 B.R. 235, 252–254 (S.D.N.Y. 2004), in which the court held that a foreign company having property in the U.S. and substantial debt to U.S. creditors can be subject to involuntary bankruptcy proceedings. *But see In re* Bd. of Dirs. of Multicanal S.A., 314 B.R. 486, 523 (Bankr. S.D.N.Y. 2004) [hereinafter *Multicanal II*] (dismissing involuntary proceeding for, among other reasons, inability of court to force rehabilitation of debtor over its objection).

[38] *See* 11 U.S.C. § 301 (2006) (allowing commencement of voluntary petition by debtor); 11 U.S.C. § 303(b)(4) (2006) (granting foreign representative of estate in foreign proceeding ability to commence involuntary case). The company could file a voluntary chapter 11 case under section 301, or its foreign representative could file an involuntary chapter 11 case under section 303(b)(4). *See, e.g.*, *In re* Axona Int'l Credit & Commerce, Ltd., 88 B.R. 597, 606 (Bankr. S.D.N.Y. 1998) (upholding proceeding brought by foreign representative under section 303(b)(4)).

[39] *See* 11 U.S.C. § 1501 (2006) (defining chapter 15 purpose and scope of application); *see also In re* Treco, 240 F.3d 148, 153 (2d Cir. 2001) (discussing foreign company's ability to bring ancillary proceedings under section 304); *In re* Seok Lee, No. 06-40043, 2006 WL 2434065, at *4 (Bankr. W.D. Wash. 2006) (granting permanent injunction by motion under chapter 15 without filing of adversary proceeding).

The path that the company chooses to follow makes a significant difference in the analysis under section 316(b) of the TIA. As noted above, there is an implicit but well-established exception to the TIA for debt restructurings effected through chapter 11 of the U.S. Bankruptcy Code. This exception would likely include both "stand-alone" chapter 11 cases involving foreign debtors, as well as voluntary (section 301) and involuntary (section 303) chapter 11 cases filed by a debtor or its "foreign representative," respectively, in connection with a contemporaneous foreign insolvency proceeding for the same debtor in its home country.[40] It is unclear, however, whether the exception will apply in the case where a foreign debtor's only insolvency proceeding is in its home country, or in the case where a foreign debtor has an insolvency proceeding in its home country and a section 304 "ancillary" proceeding in the U.S. (under the law prior to the 2005 amendments to the Bankruptcy Code) or a chapter 15 case (under the amended Bankruptcy Code).[41]

The question is this: assuming that Congress intended to permit a chapter 11 plan to override section 316(b) of the TIA, did Congress also intend to permit foreign insolvency proceedings to override section 316(b)?

There are two basic circumstances under which this question will arise. Under one scenario, the foreign debtor would be the first party to seek a determination by a U.S. court. The foreign debtor would ask the U.S. court for an order that recognizes the foreign insolvency proceeding and declares that the discharge obtained in the foreign proceeding overrides a bondholder's right to sue and collect under TIA section 316(b). Under the other scenario, a bondholder of a foreign debtor would be the first party to seek a determination by a U.S. court. The bondholder would sue on its bond in a U.S. court, notwithstanding the pending or completed foreign insolvency proceeding.[42] The foreign debtor would raise as a defense the argument that the foreign proceeding has discharged or will discharge the bondholder's claim, thus nullifying the bondholder's section 316(b) rights. Ultimately, a similar analysis will be required for each of these two circumstances. However, the former circumstance, in which a debtor seeks affirmative recognition of the foreign insolvency proceeding to pre-empt any relevant bondholder claim, has a more definite statutory scheme attached to it.

---

[40] All of these proceedings would involve the full array of chapter 11 rights and duties, and the mere presence of a contemporaneous foreign insolvency proceeding would not likely effect the applicability of the implied U.S. bankruptcy exception to section 316(b). However, comity issues could develop as the foreign and U.S. proceedings develop, and it is unlikely that TIA concerns could arise when conflicting U.S. and foreign laws are reconciled. *See Multicanal I*, 307 B.R. at 392 (considering comity one factor in determining whether to grant relief in foreign proceeding under section 304).

[41] Another type of bankruptcy case is an involuntary chapter 11 case filed by bondholders against a foreign debtor under section 303 of the Bankruptcy Code. The issues addressed in this Article will not likely arise in such an involuntary chapter 11 filing unless the foreign debtor contests the chapter 11 filing (for example, on section 305 abstention grounds) in favor of a foreign insolvency proceeding (with or without an accompanying chapter 15 proceeding). *See, e.g.*, Universal Cas. & Sur. Co. v. Gee (*In re Gee*) 53 B.R. 891, 904–05 (Bankr. S.D.N.Y 1985) (dismissing competing chapter 11 petition under section 305 where case ancillary to foreign proceeding was also filed).

[42] As described *supra* in note 14, a group of bondholders might instead begin with an involuntary chapter 11 filing, which is likely to raise the same set of issues in a different initial procedural context.

And, in fact, that statutory scheme has recently changed. Prior to the effectiveness of the 2005 amendments to the Bankruptcy Code, a debtor's foreign representative would have commenced an "ancillary proceeding" in the United States under section 304 of the Bankruptcy Code and, in that ancillary proceeding, would have requested an injunction barring suits by bondholders on their bonds.[43] Under the new law, a debtor's foreign representative would seek the same type of relief by commencing a case under the new chapter 15 of the Bankruptcy Code.[44] This Article will first address the prior law under section 304, because the only available precedent for the issues raised in this Article is found in the section 304 context. Then, this Article will describe the provisions of the new chapter 15 that would be employed in a TIA section 316(b) analysis. Finally, this Article will describe an analysis of the TIA section 316(b) issues that could apply in section 304, chapter 15, and any suit by a bondholder on its bond in the absence of a pre-emptive section 304 or chapter 15 proceeding. Ultimately, the TIA section 316(b) analysis does not depend upon the type of proceeding commenced or whether the foreign debtor or its bondholder is the party taking the first litigation steps, but rather upon broad concepts of cross-border insolvency law.

IV. FORMER BANKRUPTCY CODE SECTION 304

Former section 304(a) of the Bankruptcy Code permitted a "foreign representative" to file a petition to commence a case in the U.S. that is "ancillary" to a "foreign proceeding."[45] The terms "foreign proceeding" and "foreign representative" were defined in sections 101(23) and 101(24) of the Bankruptcy Code:

> (23) "foreign proceeding" means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating

---

[43] *See Multicanal I*, 307 B.R. at 387 (describing foreign debtor's "ancillary" case seeking preliminary injunction to enjoin domestic creditors from proceeding with State court lawsuits); *see also In re* Netia Holdings, S.A., 278 B.R. 344, 345 (Bankr. S.D.N.Y. 2002) (granting members of foreign debtor's management board in ancillary proceeding preliminary injunction to protect foreign debtors' assets in U.S.).

[44] *See* 11 U.S.C. § 1520(a)(1) (2006) (applying relief of sections 361 and 362 of Bankruptcy Code to debtor and property of debtor in U.S. upon recognition of foreign proceeding under chapter 15); *see also* 11 U.S.C § 362(a)(1) (2006) (providing automatic stay to "commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title . . . .").

[45] *See* 11 U.S.C. § 304(a) (2000) ("[A] case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative"), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802(d), 119 Stat. 23, 146.

> an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization;[46]
> (24) "foreign representative" means duly selected trustee, administrator, or other representative of an estate in a foreign proceeding.[47]

Thus, if an insolvency proceeding had been commenced for a foreign bond issuer in its home country, a representative of that company's estate was able to enter the U.S. Bankruptcy Court and commence an ancillary proceeding under U.S. law. In the context of that ancillary proceeding, former section 304(b) authorized the U.S. Bankruptcy Court to "enjoin the commencement or continuation of any action against a debtor with respect to property invoked in such foreign proceeding"[48] or any action against such property, and to "enjoin the commencement or continuation of the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate."[49] Section 304(b) also authorized the U.S. Bankruptcy Court to "order turnover of the property of such estate, or the proceeds of such property, to such foreign representative."[50]

The provisions of section 304(b) contemplated the issuance by the U.S. Bankruptcy Court of orders in furtherance of the foreign insolvency proceeding. A classic example would be the issuance by the U.S. court of an injunction protecting U.S. assets of the foreign company from foreclosure by U.S. creditors of that company. More specific to the concerns of this Article, most practitioners would agree that section 304(b) gave the U.S. court an ability to enjoin U.S. bondholders from bringing suit against foreign company—and an ability to subject those U.S. bondholders to the rulings of the foreign court in the company's foreign insolvency proceeding.

However, to grant the relief authorized in section 304(b), the U.S. court was required to consider "what will best assure an economical and expeditious administration of such estate, consistent with"[51] six factors:

---

[46] *See* 11 U.S.C. § 101(23) (2000) (defining "foreign proceeding"), *amended by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802(b), 119 Stat. 23, 145.

[47] *See* 11 U.S.C. § 101(24) (2000) (defining "foreign representative"), *amended by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802(b), 119 Stat. 23, 145.

[48] *See* 11 U.S.C. § 304(b) (2000), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802(d), 119 Stat. 23, 146; *see also* Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (*In re* Koreag), 961 F.2d 341, 346 n.4 (2d Cir. 1992) (quoting text of section 304 in case ancillary to foreign proceeding).

[49] *See* 11 U.S.C. § 304(b) (2000), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802(d), 119 Stat. 23, 146. *See generally* Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 137–39 (2002) (elaborating on use of section 304 to obtain injunctive relief in ancillary proceedings).

[50] *See* 11 U.S.C. § 304(b)(2) (2000); *see also* Haarhuis v. Kunnan Enters., Ltd., 177 F.3d 1007, 1011–12 (D.C. Cir. 1999) (interpreting plain language of section 304).

[51] *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), 119 Stat. 23, 146; Evelyn H. Biery et al., *A Look at Transnational*

> (1) just treatment of all holders of claims against or interests in such estate;
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
> (3) prevention of preferential or fraudulent dispositions of property of such estate;
> (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
> (5) comity; and
> (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns [not applicable in corporate cases].[52]

Although each of these factors carries its own specific significance, the fifth factor, "comity," is a term that was broad enough to describe as a whole the inquiry into whether section 304(c) relief was appropriate. The comity inquiry, in essence, questions whether the foreign proceeding has characteristics that warrant recognition and approval under U.S. law (or lacks characteristics that would be required for such recognition and approval). Often, this inquiry manifested itself as a comparison of the foreign insolvency law with the U.S. Bankruptcy Code. If the two legal systems are close enough—they need not be identical—then the U.S. court would defer and "extend comity" to the foreign proceeding.

V. *MULTICANAL* AND *CABLEVISION*

As described above, one context in which a section 316(b) challenge might arise is a chapter 15 case. Because there is no chapter 15 precedent at this time, one can look to an analogous context, the recent section 304 ancillary proceedings in which TIA section 316(b) challenges have been raised recently in the *In re Board of Directors of Multicanal S.A.*[53] and *In re Cablevision S.A.*[54] bankruptcies.

Multicanal S.A. is an Argentine media conglomerate with virtually all of its assets and operations in Latin America. Between 1997 and 2001, Multicanal issued

---

Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 47 B.C. L. REV. 23, 37 (2005) (listing factors enumerated by statute and describing "competing goals" of Bankruptcy Code).

[52] *See* 11 U.S.C. § 304(c) (2000); *see also In re* Treco, 240 F.3d 148, 155–59 (2d Cir. 2001) (analyzing factors enumerated in section 304(c)).

[53] 314 B.R. 486 (Bankr. S.D.N.Y. 2004).

[54] 315 B.R. 818 (S.D.N.Y. 2004).

approximately $500 million in debt under five indentures governed by U.S. law and qualified under the TIA.[55]

In 2003, Multicanal proposed to restructure its obligations through an Argentine legal proceeding called an "acuerdo preventivo extrajudicial," commonly referred to as an "APE." An APE is a privately-negotiated debt restructuring for which court approval is sought[56]—it has some similarities to a prepackaged U.S. chapter 11 proceeding. Multicanal's U.S. bond debt constituted substantially all of the company's indebtedness for money borrowed. Under Multicanal's proposal, the holders of the U.S. bond debt would suffer a reduction in amounts of principal and interest owed to them. About 80% of the bondholders were U.S. individuals and institutions.[57]

Holders of approximately 94% of the principal amount of the Multicanal bonds voted on the company's APE plan, with holders of 68% of the principal amount voting in favor of the plan. One significant holder opposing the plan objected to the plan's approval by the Argentine court, and in a parallel track, commenced litigation against Multicanal in New York, seeking to collect the full amount of principal and interest due on its bonds.[58] As a defensive measure, Multicanal filed a section 304 petition in the Bankruptcy Court for the Southern District of New York.[59] Multicanal argued that the bankruptcy court should exercise its section 304 powers to enjoin the New York litigation in deference to the APE, which injunction would eliminate the objecting bondholder's right to sue Multicanal in the U.S.[60] The bondholder, for its part, argued that the TIA prevented the U.S. court from infringing upon the bondholder's right to sue—that neither the APE nor section 304 could interfere with the bondholder's rights under section 316(b) of the TIA.[61] The bondholder, together with other affected bondholders, also filed an involuntary chapter 11 petition against Multicanal under section 303 of the Bankruptcy Code.

---

[55] *Multicanal II*, 314 B.R. at 492 (indicating Multicanal's debt includes Bank debt and five series of U.S. dollar-denominated notes amounting to $509 million). Factual information from the *Multicanal II* and *In re Cablevision* cases is drawn from the dockets and pleadings in the corresponding bankruptcy cases, references to which are stated in the main text below.

[56] *Id.* at 493 (describing APE as privately negotiated debt restructuring, "supported by a qualified majority of a debtor's creditors, that is submitted to an Argentine court for judicial approval.").

[57] *Id.* at 494 (indicating over 80% of Multicanal creditors were U.S. individuals and institutions).

[58] *Id.* at 499 (detailing commencement of litigation in Supreme Court of New York by bondholder).

[59] *See* Verified Petition for Relief Under 11 U.S.C. § 304, No. 04-10280 (Bankr. S.D.N.Y., Jan. 16, 2004) (seeking relief under section 304).

[60] *Multicanal II*, 314 B.R. at 500 (explaining Multicanal sought to enjoin bondholder from proceeding with State court actions).

[61] *Id.* (specifying arguments against using section 304 proceeding to limit bondholder's rights). The bondholder also filed an involuntary petition for a "plenary" chapter 11 case against Multicanal. *Id.* at 491 (stating bondholder filed involuntary chapter 11 action against Multicanal). Effectively, the bondholder was willing to give up its TIA section 316(b) rights in exchange for the protections of a U.S. chapter 11 case, but was not willing to give up those TIA rights in exchange for the protections of an Argentine APE. *See id.* at 520 (providing bondholder argued involuntary proceeding is only method for U.S. creditors to obtain relief and it will not impact foreign proceedings).

The U.S. bankruptcy court initially ruled against the bondholder and granted a preliminary injunction in favor of Multicanal.[62] Specifically, the court held that the bondholder's "rights under the Trust Indenture Act do not preclude the granting of relief to Multicanal under [section] 304 of the Bankruptcy Code."[63] Subsequently, in determining whether to continue the effect of the preliminary injunction, the court again ruled against the bondholder by granting section 304 relief and dismissing the bondholder's involuntary section 303 petition.[64] In making its ruling, the court did not take the TIA issues head-on. Instead, the court considered whether the APE was entitled to recognition under section 304. Its implied logic appears to be as follows: if chapter 11 trumps the TIA, and if the APE is enough like chapter 11 to warrant section 304 recognition, then the APE must trump the TIA.[65]

Consistent with this logic, a major portion of the court's August 27, 2004, opinion addressed the issue of whether the APE is indeed enough like chapter 11 to warrant section 304 recognition. Interestingly, the court began its legal analysis by citing a nineteenth-century Supreme Court decision, *Canada Southern Railway Company v. Gebhard*,[66] and stating, "[t]he Supreme Court made clear over a century ago that in contracting with a foreign entity, a person subjects himself to the laws of the foreign government 'affecting the powers and obligations of the corporation with which he voluntarily contracts.'"[67] The court next cited Second Circuit precedent, which the court characterized as recognizing "that foreign courts have an interest in presiding over the insolvency proceedings of their own domestic business entities to promote the systematic distribution of a debtor's assets."[68]

The court's preface to its legal analysis sets up the framework for its subsequent discussion of section 304—that foreign insolvency proceedings should be given deference unless they are fundamentally unfair, and that U.S. investors in foreign companies should accept the consequences of the risk they have voluntarily assumed by making the foreign investment. The message is: "If you don't like the country's law, don't invest in that country."

Although the *Multicanal* court's decision has the appeal of simplicity, there are a number of questions that go to the core of the court's reasoning. First, the court's logic is somewhat tautological. By saying that a U.S. investor must accept the

---

[62] *See id.* at 500 (indicating bondholder's rights did not prevent court from ordering preliminary injunction for Multicanal).

[63] *Id.*

[64] *See id.* at 523 (recognizing and enforcing Multicanal's APE in U.S and dismissing involuntary chapter 11).

[65] Or does the Bankruptcy Code as a whole, and not just chapter 11, form an implied exception to the TIA? *See id.* at 491 (considering whether APE proceeding in Argentina is entitled to recognition under section 304).

[66] 109 U.S. 527, 537 (1883) (discussing contracting powers and obligations).

[67] *Multicanal II*, 314 B.R. at 486, 500–01(quoting Canada S. Ry. Co. v. Gebhard, 109 U.S. 527, 537 (1883)).

[68] *See id.* at 501 (citing Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 458 (2d Cir. 1985) (discussing foreign interest in presiding over proceedings which affect domestic entities)).

consequences of foreign law on a foreign investment, unless that law is unfair by U.S. standards, the court is imposing on the foreign law the same U.S.-centric expectations that it is discouraging in the U.S. investor. In other words, how can the court at once measure foreign law by U.S. standards and inform a U.S. investor that it is improper to do the same?

Second, the *Multicanal* court's logic overlooks at least one view of the market dynamic involving issuances of U.S. bonds by foreign companies. Rather than speak to what law a U.S. investor must subject itself to when investing in a foreign company, why not focus on what law a foreign company must subject itself to when accessing U.S. capital markets, through the issuance of bonds governed by U.S. law and by documents in which the foreign company has submitted to the jurisdiction of U.S. courts?

Third, when section 316(b) of the TIA is considered specifically, the idea that *Multicanal* is a debtor-versus-creditor dispute begins to unravel. Remembering that section 316(b) protects a minority bondholder from the majority, why shouldn't the TIA—a U.S. statute—govern the relationship between a minority U.S. investor and a majority composed of mostly U.S. investors?

Fourth, the precedent cited by the *Multicanal* court—*Canada Southern* and *Cunard Steamship Co. v. Salen Reefer Services AB*[69]—dealt with the question of whether or U.S. party's *contractual* rights could be impaired by a foreign (Canadian or Swedish, respectively) insolvency proceeding.[70] The TIA rights of section 316(b) are created under statute, and the analogy to *Canada Southern* and *Cunard* may therefore be misplaced.

Some of these same arguments were raised by the lawyers representing the U.S. investor in the recent insolvency litigation involving Cablevisión S.A.[71] Like Multicanal, Cablevision is an Argentine media company that sought to restructure itself through an APE. Cablevision had issued debt under U.S. law, and that debt—about $725 million in principal—constituted the lion's share of Cablevision's liabilities.[72] Perhaps most significant, Multicanal and Cablevision also shared the same minority bondholder who raised TIA arguments in opposition to the proposed APE.

---

[69] 773 F.2d 452 (2d Cir. 1985).

[70] *Multicanal II*, 314 B.R. at 500–01 (explaining how contracting with foreign entity exposes person to laws of foreign government).

[71] In Cablevision's Memorandum of Law in Opposition to Respondent SHL Company's Request for Summary Judgment and Injunctive Relief and In Further Support of Cablevision's Section 304 Petition and Motion For Preliminary Injunction, No. 04-CV-07278 (Bankr. S.D.N.Y. Oct. 20, 2004), at 9–10, Cablevision asserts that *Multicanal I* correctly held that a foreign insolvency case can overcome TIA rights. In Respondent SHL Company's Memorandum of Law in Further Support of Its Motion to Withdraw the Reference of This Matter From the Bankruptcy Court Pursuant to 28 U.S.C. § 157(d), No. 04-15697 (Bankr. S.D.N.Y. Sept. 27, 2004) [hereinafter *Respondent SHL Company's Motion Sept. 27, 2004*], SHL rejects *Multicanal's* holding as erroneous federal statutory interpretation.

[72] *In re* Cablevision S.A., 315 B.R. 818, 819 (S.D.N.Y 2004) (discussing outstanding principal amount on U.S. dollar-denominated debt).

In the Cablevision case, the investor argued that the proposed APE would permit Cablevision's existing shareholders to maintain an 80% ownership interest in the company, while at the same time forcing creditors to accept payment of only 65% of their claims for principal and interest.[73] The investor followed three lines of reasoning: (1) no "foreign representative" or "foreign proceeding" existed to allow Cablevision to invoke section 304 of the Bankruptcy Code; (2) the Argentine APE process should not be afforded comity; and (3) the APE process could not "trump" the TIA.[74] The investor's first line of reasoning was technical and stilted—the "foreign proceeding" and "foreign representative" definitions in section 101 of the Bankruptcy Code are intentionally broad and inclusive. The second and third rationales were more complex and give rise to the same questions addressed in this paper.

Ultimately, the Cablevision investor sold its bonds, and the TIA issue was never decided by the court.[75] But the extensive briefing of the TIA issue by Cablevision and the investor provided a post-*Multicanal* illustration of the strengths of section 304 and the TIA relative to one another. The issue in each instance is comity—whether foreign insolvency proceedings should have the same status and power as chapter 11 vis-à-vis the TIA. *Cablevision* would have been a good test case, because the restructuring permissible under the APE was problematic under the "absolute priority rule" applicable in chapter 11—the unsecured creditors were not being paid in full, yet the shareholders were retaining a substantial interest in the company.[76]

VI. NEW CHAPTER 15

The new chapter 15 of the Bankruptcy Code—sections 1501 through 1532—incorporates a comprehensive set of rules regarding the interaction of U.S. and foreign bankruptcy courts that is far more robust than what was in place under section 304. Under section 1501(a), the purposes of chapter 15 are set forth, including international judicial cooperation, greater legal certainty for investment,

---

[73] *See generally* Respondent SHL's Memorandum of Law in Opposition to Petitioner's Motion for a Preliminary Injunction, No. 04-15697 (Bankr. S.D.N.Y. Sept. 24, 2004), at 1–2(stating facts of case).

[74] *See generally Respondent SHL Company's Motion Sept. 27, 2004*, at 3–15 (outlining and discussing arguments of investor).

[75] It should be noted that the TIA's application to a bondholder's rights in the issuer's bankruptcy has an added procedural effect in bankruptcy litigation; namely, they may provide grounds for mandatory or permissive withdrawal of the reference from the bankruptcy court to the federal district court under section 157(d) of title 28 of the United States Code. *See* 28 U.S.C. § 157(d) (2000) (allowing district court to withdraw proceeding if resolution requires consideration of chapter 11 and other laws regulating organizations or activities affecting interstate commerce). Withdrawal of the reference in fact occurred in *In re Cablevision*. *See*, 315 B.R. at 822 (holding issues of whether section 304 overrides TIA and whether extending comity to APE is appropriate should be resolved by Article III Court, not bankruptcy court).

[76] Another good test case would be one in which the foreign court does not recognize the standing of individual bondholders, but only the standing of their indenture trustee. *See supra* note 33 and accompanying text (addressing conflicts arising when debtor attempts to restructure U.S. bond debt through foreign insolvency proceedings).

fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and the debtor, protection and maximization of the debtor's asset value, and facilitation of the rescue of the financially troubled business with a goal of protecting investment and preserving employment.[77] While these purposes are broad, they contain more than a suggestion that protecting bondholders is within their scope. But are the rights of a bondholder under TIA section 316(b) among the rights that chapter 15 proposes to protect in the international insolvency context?

A chapter 15 case is commenced by a foreign representative's filing of a petition for recognition of the foreign insolvency proceeding.[78] The U.S. court will recognize the foreign proceeding if it meets a number of formal requirements found in section 1515. Recognition itself is not conditioned upon any substantive analysis of the foreign proceeding or the laws of the country in which the foreign proceeding is based, yet, even absent substantive analysis, recognition of a foreign proceeding makes certain types of relief available.

Assuming the foreign proceeding is a "foreign main proceeding" (that is, it is based in the country where the debtor has the center of its main interests), [79] the order recognizing the foreign proceeding will result in the automatic application to the debtor and its U.S. assets of Bankruptcy Code sections 361 (adequate protection), 362 (automatic stay), 363 (use of property), 549 (post-petition transfers) and 552 (post-petition effect of security interest).[80] Recognition does not affect non-U.S. assets of the debtor and does not bar actions brought outside the U.S. by creditors of the debtor to the extent necessary to preserve those creditors' claims.[81] Section 1520 relief is both interim in nature and narrow in scope. While it would stay an attempt by a bondholder to exercise its TIA section 316(b) rights as to U.S. assets, it would not discharge the foreign debtor from its obligations to a bondholder and would not prevent suits with respect to non-U.S. assets.

In addition to the automatic relief under chapter 15 upon recognition of a foreign proceeding, other "appropriate relief" may be granted "where necessary to effectuate the purpose of [chapter 15] to protect the assets of the debtor or the

---

[77] *See* 11 U.S.C. § 1501(a) (2006) (setting forth objectives of providing effective mechanisms for dealing with cases of cross-border insolvency).

[78] *See* 11 U.S.C. § 1504 (2006) ("A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515."); *see also* United States v. J.A. Jones Constr. Group, LLC, 333 B.R. 637, 638 (E.D.N.Y. 2005) (offering relief under chapter 15 only after foreign representatives commence ancillary proceeding for recognition of foreign proceedings before bankruptcy court).

[79] *See* 11 U.S.C. § 1502(4) (2006) (defining foreign proceeding as "pending in the country where the debtor has the center of its main interests").

[80] *See* 11 U.S.C. § 1520(a) (2006) (laying out other applicable sections of Bankruptcy Code when dealing with foreign main proceedings). This assumption would be true for all purposes of this Article, because this Article addresses the question of whether a discharge in a foreign main proceeding provides an exception to the bondholder rights in section 316(b).

[81] Certain limited relief is available upon the filing of a petition and before recognition is granted. *See* 11 U.S.C. § 1519 (2006) ("From the time of filing a petition for recognition until the court rules on the petition, the court may . . . grant relief of a provisional nature . . . .").

interests of the creditors."[82] Like section 1520, section 1521(c) makes clear that relief under section 1521 must relate to assets that should be administered in the chapter 15 case—namely, assets that are located in the U.S.[83] Any relief under section 1521 or section 1519 (pre-recognition interim relief that is analogous to section 1521 post-recognition relief) may be granted only if the interests of the creditors and the debtor are sufficiently protected.[84]

Section 1507 provides that the court presiding over a chapter 15 case may, upon recognition of a foreign proceeding and subject to the specific limitations elsewhere in chapter 15, provide "additional assistance" to a foreign representative "under [title 11] or under other laws of the United States."[85] Such additional assistance must, consistent with the principles of comity, reasonably assure—

> (1) just treatment of all holders of claims against or interests in the debtor's property;
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed in [title 11]; and
> (5) if appropriate [in bankruptcies of individuals], the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[86]

If these factors seem familiar, it is because they are almost identical to the section 304(b) factors described above. The most notable difference between section 1507 and section 304(b) is the movement of "comity" from its status as one factor among six in section 304(b) to an overarching principle for all factors in section 1507. This difference is truly more form than substance, however, because

---

[82] 11 U.S.C. § 1521 (2006) ("Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interest of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief . . . .").

[83] 11 U.S.C. § 1521(c) (2006) ("In granting relief under this section to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.").

[84] *See* 11 U.S.C. § 1522 (2006); *see also In re* Tri-Continental Exch., 2006 Bankr. LEXIS 2224, at *25 (Bankr. D. Cal. 2006) (illustrating function of section 1522).

[85] *See* United States v. J.A. Jones Constr. Group, LLC, 333 B.R. 637, 638 (Bankr. E.D.N.Y. 2005) (quoting section 1507 to illustrate importance of comity when seeking assistance under chapter 15).

[86] 11 U.S.C. § 1507 (2006).

courts interpreted comity as a general, overarching principle in section 304 cases, despite the structure of the statute.[87]

It is not clear what constitutes "additional assistance" under section 1507—which requires a comity analysis—as opposed to "appropriate relief" under section 1521—which does not expressly require a comity analysis.[88] The legislative history regarding section 1507 states that the provision offers relief "beyond that permitted under sections 1519-1521," but it fails to draw any definite lines where section 1521 ends and section 1507 begins.[89] The legislative history regarding section 1521 states that section 1521 "does not expand or reduce the scope of relief currently available in ancillary cases under sections 105 and 304," but it does not state whether all of the forms of relief previously available under sections 304 are now available under section 1521, as opposed to section 1507.[90] It would be remarkable if in drafting chapter 15, Congress made all of the relief previously available in sections 304 now available in section 1521, yet removed the standards from section 304 and placed them in section 1507.[91]

Part of the confusion regarding section 1507 may arise from the genesis of section 1507 in the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law"). In the Model Law, the source for section 1507 (article 7 of the Model Law) reads as follows: "Nothing in this Law limits the power of a court . . . to provide additional assistance to a foreign representative under the laws of this State."[92] The Model Law does not describe article 7 relief as an additional type of relief under the Model Law. Instead, article 7 allows any relief available outside the Model Law to survive the enactment of the Model Law. Section 1507 is a different animal than article 7 of the Model Law, and the language of section 1507 suggests that it is an integral part of chapter 15, not simply a reference to law outside of chapter 15.

---

[87] *See, e.g.*, *In re* Treco, 240 F.3d 148, 156–57 (2d Cir. 2001) (interpreting function of courts under section 304 as determining whether comity should be extended to specific foreign proceeding in light of other statutory factors); *see also In re* Garcia Avila, 296 B.R. 95, 108 (Bankr. S.D.N.Y. 2003) (viewing comity as important factor when considering whether to grant relief under section 304).

[88] Nor is it clear whether either section 1507 relief or section 1521 relief will be required if sufficient relief can be granted under section 1520.

[89] H.R. Rep. No. 109-31, pt. 1, at 109, 116 (2005).

[90] *Id.* at 116.

[91] In the legislative history, Congress described section 1521 relief in comparison to section 105 and section 304 relief. *See id.* ("This section does not expand or reduce the scope of relief currently available in ancillary cases under sections 105 and 304"). Section 105(a), sometimes called the "bankruptcy all-writs statute," states that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code." *See* 11 U.S.C. § 105(a) (2006). One way to read the legislative history in connection with the new chapter 15 as enacted may be to consider that section 105 relief, as applied to chapter 15, has become codified as section 1507 relief under the old section 304 standard, and that section 304 relief has become codified as section 1521 relief but has been shed of its former requirements. *See* Evelyn H. Biery et al., *supra* note 51, at 55–56 (describing overlap between sections 1507 and 1521 and old section 304). This reading would leave no role in chapter 15 for the actual section 105(a), which facially applies to all of the Bankruptcy Code, including the new chapter 15.

[92] U.N. Comm'n on Int'l Trade Law (UNCITRAL), *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, at 26, U.N. Doc. A/CN.9/442 (Dec. 19, 1997).

There are two other provisions of chapter 15 that are important to the issues raised in this Article. First, section 1506 contains a "public policy exception" to chapter 15: "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."[93] Second, section 1508 provides a rule for interpretation of all of chapter 15: "In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."[94] Section 1506 is an "anti-comity" provision, allowing the U.S. court to deny chapter 15 relief if such relief (and, by implication, the applicable foreign insolvency law) violates U.S. public policy. Section 1508 is a "comity" provision. It codifies chapter 15's preference for recognizing foreign insolvency proceedings and cooperating with foreign bankruptcy courts. Between section 1506 and section 1508 is the tension underlying the issues raised throughout this Article:

- Should a U.S. court, for purposes of comity, allow foreign insolvency law to form an exception to TIA section 316(b)?
- Or, are the bondholder rights in TIA section 316(b) protected from the potential inequities of foreign insolvency law (or at least the potential substantive differences between foreign insolvency law and chapter 11)?
- Do the recitations of creditor protection in chapter 15 (specifically section 1501 and 1522) argue in favor of preserving TIA section 316(b) rights over an application of foreign insolvency law that would nullify those rights?

A foreign representative seeking to prevent a bondholder from exercising its rights under TIA section 316(b) on a permanent basis will likely seek an order from the U.S. court enforcing the discharge granted to the debtor by the court presiding over its primary insolvency proceeding. There are at least two possibilities for how the U.S. court might treat the foreign representative's request. The court might look to section 1521 and not section 1507, in which case the standard for relief would be somewhat vague (hinged on the word "appropriate") and the relief itself would be limited in scope (expressly limited to U.S. assets). Or, the court might look at section 1507 and not section 1521, in which case the more rigorous "section 304" standard would apply but the relief itself would, at least facially, have a potential for extraterritorial effect.

Because it is unclear where section 1521 ends and where section 1507 begins, it is also unclear which of these paths the court will follow—whether it will consider entry of an order enforcing a foreign discharge as "appropriate relief" under section 1521 or as "additional assistance" under section 1507. The expansive language of

---

[93] 11 U.S.C. § 1506 (2006).
[94] 11 U.S.C. § 1508 (2006).

the preamble to section 1521(a), "any appropriate relief, including," indicates a legislative intent to permit relief outside the express language of the items in section 1521(a)(1) through (7),[95] which do not include discharge matters. However, the itemized types of relief, such as staying proceedings, suspending asset transfers, and entrusting assets to the foreign representative, seem to further the interim purposes of the foreign main proceeding, rather than extend the permanent effects of the foreign main proceeding (e.g., discharge) to the U.S. Professor Westbrook, in his recent article "Chapter 15 and Discharge," accepts that section 1521 is the provision under which foreign discharge enforcement will be considered and that section 304 cases will be no more than "general guides" to those considerations.[96] But sections 1507 and 1521 appear to leave open the possibility that enforcement of foreign discharge is a matter that is still measured by the list of factors set forth in the prior section 304(c), through the operation of section 1507 (rather than section 1521), and thus the section 304 cases may be more than "general guides."[97]

Section 1521 and section 1507 have very different standards for relief, but is there a practical distinction between a U.S. court order barring the exercise of TIA section 316(b) rights only as to U.S. assets (under section 1521), and an order purporting to bar the exercise of TIA section 316(b) rights in a general, international sense (under section 1507)? A bondholder attempting to exercise its TIA section 316(b) rights will probably sue in a U.S. court and will probably try to attach U.S. assets of the foreign debtor, if they exist. But a bondholder will not likely limit its requested relief to U.S. assets of the foreign debtor and may want a judgment on its bond from the U.S. court, so that the judgment could be brought to a foreign country (neither the U.S. nor the foreign debtor's home country but rather a third country where the foreign debtor has assets) for enforcement. Because section 1521 is expressly limited to U.S. assets, section 1521 relief cannot provide the foreign debtor with protection for non-U.S. assets, even if a suit against those non-U.S. assets is brought under U.S. law (TIA section 316(b)) by a U.S. domiciled

---

[95] 11 U.S.C. § 1520(a) (2006) ("[C]ourt may, at the request of the foreign representative, grant any appropriate relief . . . .").

[96] *See* Jay Lawrence Westbrook, *Chapter 15 and Discharge*, 13 AM. BANKR. INST. L. REV. 503, 511 (2005) ("[S]ection 304 cases just discussed will be general guides to the exercise of discretion in enforcing discharges under chapter 15, but probably no more than that."); *see also* Judge Samuel L. Bufford, *International Accord: Included in the New Bankruptcy Law are Provisions Adopting the U.N. Model Law on International Insolvencies*, L.A. LAW., Jul.–Aug. 2006, at 32, 34 (indicating case law stemming from section 304 cases are still applied in circumstances not addressed explicitly by chapter 15 provisions).

[97] *See, e.g.*, *In re* Artimm, S.r.L., 335 B.R. 149, 160 (Bankr. C.D. Cal. 2005) (analyzing factors set forth by section 304(c) in case concerning enforcement of foreign discharge); s*ee also* Evelyn H. Biery et al., *supra* note 51, at 55–56 (remarking on similarities of factors set forth by section 1507 and section 304 of the Bankruptcy Code).

bondholder.[98] This limitation seems important in theory, but the situations under chapter 15 in which material assets of the foreign debtor are located neither in the U.S. nor in the debtor's home country may be very limited in practice. Thus, the additional benefit of section 1507 to a foreign debtor, with respect to enforcement of foreign discharge, may be of limited utility and may not be worth the higher standard for relief that the foreign debtor will be required to show.

If it is the case that a foreign discharge can be enforced with respect to U.S assets without any showing under section 1507, then such enforcement seems likely to be granted liberally. To the extent that the U.S. assets of a foreign debtor constitute the most promising source of recovery for a bondholder seeking to exercise its TIA section 316(b) rights, liberal enforcement of the foreign discharge as to U.S. assets would eviscerate those TIA section 316(b) rights altogether and would answer the main question of this Article—whether there is a TIA section 316(b) exception for foreign insolvency proceedings—in the affirmative. However, even if the section 1521 standard is more flexible than the standard under section 1507, the standard under section 1521 might not be as liberal as it first appears.

In the section 1521 context, the word "comity" is not directly applicable. However, as described above, the balance of sections 1506 and 1508 involves the concept of comity because of the possible tension between domestic policy and recognition of foreign law. In addition, the creditor protection purposes recited in sections 1501 and 1522 have the concept of comity imbedded within them, because protection of U.S. creditors, and rights of all creditors under U.S. law, is potentially at odds with the application of foreign law to those creditors. The provisions of sections 1501, 1506, 1508, and 1522 are all applicable to determinations of what relief is arguably "appropriate" under section 1521, and thus the doctrine of comity is applicable to section 1521, even though section 1521 does not expressly reference comity in the way that section 1507 does. Some level of comity-type analysis should be a part of any determination of whether a U.S. court should enter an order extending a foreign discharge and barring the exercise of TIA section 316(b) rights, whether that determination arises under section 1507, where comity is an explicit

---

[98] *See* Lesley Salafia, *Cross Border Insolvency Law in the United States and its Application to Multinational Corporate Groups*, 41 CONN. J. INT'L L. 297, 319 (2006) (noting in case where recognition of foreign main proceeding has commenced, case will "be restricted to those U.S. assets alone."); *see also* Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 723 (2005) (acknowledging U.S. bankruptcy courts are limited to assets within U.S. in cases where foreign proceedings have already been recognized).

consideration, or under section 1521, where comity is an implicit consideration through the applicability of other sections of chapter 15.[99]

Similarly, as described further below, a comity-type analysis should be performed by a U.S. court in which a bondholder has sued to enforce its TIA section 316(b) rights after a foreign insolvency proceeding has been commenced or has been completed, assuming no chapter 15 case has been commenced. Therefore, this Article returns to the issue of comity to discuss in more detail the foundations and complications of that doctrine.

VII. COMITY

Whether expressed through the specific language of section 304 of the Bankruptcy Code or its successor chapter 15, or raised as a more general concept in non-bankruptcy U.S. litigation, section 316(b) of the TIA will only apply in a foreign restructuring if a U.S. court denies comity to that foreign proceeding.[100]

Comity in the most general sense is:

> [N]either a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of any other persons who are under the protection of its laws.[101]

---

[99] Of course, the public policy exception in section 1506 and the creditor protection purposes in sections 1501 and 1522 would require a strong showing, and the comity balance would tip strongly against a bondholder's TIA section 316(b) rights if the bondholder were relying on these sections alone (and not the section 1507 factors) to protect its interests against enforcement of a foreign discharge under section 1521. *See generally In re* Sphinx, LTD., No. 06-11760 (RDD), 2006 Bankr. LEXIS 2078, at *22 (Bankr. S.D.N.Y. Sept. 6, 2006) (discussing similarities of creditor protection purposes in sections 1501(a) and 1522 of Bankruptcy Code); *In re* Ephedra Prods. Liab. Litig., No. 04 MD 1598 (JSR), 2006 U.S. Dist. LEXIS 57595, at *85 (Bankr. S.D.N.Y. Aug. 11, 2006) (stressing public policy exception stated by section 1506 gives court power to refuse "to take an action governed by this chapter . . . ."). However, one must remember that TIA section 316(b) rights are themselves categorical and "absolute" within their scope, and that even the chapter 11 exception to TIA section 316(b) is implied, not express. *See, e.g.*, UPIC & Co. v. Kinder-Care Learning Ctrs., Inc., 793 F. Supp. 448, 453–54 (S.D.N.Y. 1992) (affirming defendant's recognition of absolute and unconditional rights given under section 316(b) towards noteholders).

[100] *See In re* Bd. of Dirs. of Multicanal, S.A., 307 B.R. 384, 392 ("Comity is one of the factors to be considered in determining whether to grant relief under [section] 304, and ARC correctly argues that comity demands 'due regard' for rights under U.S. law."). This is the U.S.-centered view. Of course, a foreign court might also consider whether to extend comity to the TIA and might evaluate whether the foreign country's insolvency laws contain a chapter 11-like implied exception to the TIA. *See* Canada S. Ry. Co. v. Gebhard 109 U.S. 527, 537 (1883) ("[E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes."). I do not presume to guess at the process or result of such a foreign-court analysis.

[101] Hilton v. Guyot, 159 U.S. 113, 164 (1895); *see also* Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir. 1985) ("Comity will be granted to the decision or judgment of a foreign court if it is

A key phrase in the above quotation is "which one nation allows *within* its territory." Comity is sometimes loosely characterized as a restriction upon the extraterritorial effect of U.S. law.[102] However, this principle of statutory instruction, often called the "presumption against extraterritoriality," is different than (but certainly related to) comity.[103] Under this "presumption against extraterritoriality," U.S. statutes are presumed to lack extraterritorial effect absent clear congressional intent to the contrary.[104]

As described by the Second Circuit in *Kollias*:

> The presumption against extraterritorial application of statutes embodies several important policies. For example, "it protect[s] against unintended clashes between our laws and those of other nations which could result in international discord." Moreover, the presumption recognizes that Congress "is primarily concerned with domestic conditions."[105]

The *Kollias* court also pointed out that the Supreme Court has held "that the presumption against extraterritoriality, which embodies numerous policies, applies even if the potential for international discord is weak or non-existent."[106]

Comity proper, then, could be viewed as an "in-bound" doctrine, a consideration of whether foreign laws should be recognized in U.S. disputes.[107] The "presumption against extraterritoriality," conversely, could be viewed as an "out-bound" doctrine, a consideration of whether U.S. laws should be recognized in

---

shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated.").

[102] *See* Maxwell Commc'n Corp. v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036, 1055 (2d Cir. 1996) (holding doctrine of international comity precludes application of American avoidance law to transfers in which England's interest has primacy).

[103] *See id.* at 1047 ("Moreover, international comity is a separate notion from the 'presumption against extraterritoriality' which requires a clear expression from Congress for a statute to reach non-domestic conduct.") (citation omitted); *see also In re* Florsheim Group Inc., 336 B.R. 126, 130 (Bankr. N.D. Ill. 2005) ("When applying U.S. laws to transactions with international dimensions, the court should weigh principles of international comity to determine whether application of the stature is appropriate.").

[104] *See* Kollias v. D & G Marine Maint., 29 F.3d 67, 70 (2d Cir. 1994) (presuming Congress intended enactments to apply only within territorial jurisdiction of U.S., unless legislation reflects contrary intent); *see also* Foley Bros. v. Filardo 336 U.S. 281, 284–285 (1949) (recognizing legislation of Congress applies only within territorial jurisdiction of U.S. unless there is apparent contrary intent). *But see* Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 532 (D.C. Cir. 1993) (holding presumption against extraterritoriality does not apply where conduct regulated by statute occurs primarily in U.S.).

[105] *Kollias*, 29 F.3d at 70 (citations omitted).

[106] *Id.* at 71 (citing Sale v. Haitian Ctrs. Council, 509 U.S. 155, 174 (1993)).

[107] *See* Pravin Banker Assocs. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997) (noting under principles of international comity, acts and proceedings taking place in foreign countries are ordinarily allowed to have extraterritorial effects in U.S.); *see also In re Maxwell*, 93 F.3d at 1047 (realizing "international comity" may be described as canon of construction or viewed as discretionary act of deference by national court to decline exercising jurisdiction in properly adjudicated case in foreign state).

foreign disputes.[108] Accordingly, an overall TIA "comity" analysis could be divided into three parts: (1) is the bondholder's TIA action a U.S. dispute or a foreign dispute; (2) if it is a U.S. dispute, should the U.S. court favor a foreign court decision (or foreign law) over otherwise applicable U.S. law—the TIA—for reasons of comity; and (3) if it is a foreign dispute, does the TIA have extraterritorial reach?

A. Choice of Law

The first question begins with a choice-of-law analysis. If a U.S. court were to determine, under its regular choice-of-law rules, that the TIA is not applicable to the dispute, then the court would not need to proceed to a comity analysis. As a general matter, a court applies the choice-of-law analysis developed in its forum. State courts apply the choice-of-law analyses of their respective states, and federal courts exercising diversity jurisdiction apply the choice-of-law analyses of their host states.[109] Federal courts exercising subject matter jurisdiction (as in most bankruptcy litigation) also generally follow state choice-of-law rules. A federal choice-of-law analysis, developed in the federal common law, may be permissible in cases of subject matter jurisdiction, but "a significant conflict between some federal policy or interest and the use of state law must first be specifically shown."[110] A suit by a bondholder under the TIA would likely be brought in New York federal or state court, because most bond debt is issued under documents purporting to be governed by New York law, and New York courts are sophisticated in adjudicating disputes in the realm of corporate finance. The action might sound in tort, styled as the violation of the TIA, or it might sound in contract, styled as a breach of the indenture.[111]

In New York courts, choice-of-law for tort disputes generally require an "interest analysis" while contract disputes generally follow the "center of gravity"

---

[108] *See Foley*, 336 U.S. at 285 (assuming Congress and its legislation is primarily concerned with domestic conditions); *see also* Smith v. Raytheon Co., 297 F. Supp. 2d 399, 403 (D. Mass. 2004) (refusing to apply coverage of Fair Labor Standards Act's overtime rate requirement to work performed in Antarctica because it is not within jurisdiction of U.S. and Congress legislation is meant only to apply within territorial jurisdiction of U.S.).

[109] *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–97 (1941) (reasoning state is free to determine whether given issue is governed by law of forum or some other law and proper function of state federal court is to ascertain what state law is); *see also* Lexington Ins. Co. v. Gen. Accident Ins. Co. of Am., 338 F.3d 42, 46 (1st Cir. 2003) (observing federal court must apply choice-of-law framework of forum state when determining what state law is relevant).

[110] *See In re* Gaston & Snow, 243 F.3d 599, 606 (2d Cir. 2001) (citing Atherton v. FDIC, 519 U.S. 213, 218 (1997)); *see also* Advani Enters., Inc. v. Underwriters at Lloyds, 140 F.3d 157, 162 (2d Cir. 1998) (applying federal maritime law and federal choice-of-law rules because underlying dispute arose from maritime contract).

[111] Recall that the statutory nature of a bondholder's TIA rights is important to the bondholder's claim, and a plaintiff might attempt to assert a tort claim to force a type of choice-of-law analysis not available in contract litigation. *See generally* Bluebird Partners v. First Fid. Bank, N.J., 85 F.3d 970, 974 (2d Cir. 1996) (emphasizing TIA provides uniform method to protect investors under federal scheme).

standard.[112] The "interest analysis" examines the facts and contacts in the context of the purpose of the tort law at issue (i.e., the conduct being regulated); the "center of gravity" analysis does not focus as heavily on public policy concerns. New York tort cases have also focused on the place where the tort occurred under the doctrine of *lex loci delicti commissi*, a doctrine inapplicable to contract disputes. There is at least a good argument that the "interest analysis" would favor application of New York law in a TIA bondholder suit. The New York contract law "center of gravity" approach, also called a "grouping of contacts" approach, considers five types of contacts: the place of contracting, negotiation and performance of the contract, the location of the subject matter of the contract, and the domicile of the parties.[113] Several of these factors would place the "center of gravity" in New York for a TIA bondholder suit. The federal choice-of-law analysis, though stated in somewhat different terms than the New York state analysis, would run through the same general questions and would likely arrive at the same result.

Thus, when a court first considers what law applies to a bondholder's TIA claim, it could look to the law in effect in New York, including applicable federal statutes like the TIA. It will be noted that this result might sidestep the "presumption against extraterritoriality" principle, and for good reason. When a dispute is based on contracts entered into and conduct occurring in the U.S., the application of U.S. law is fully domestic, even if that application creates potentially extraterritorial ripples.[114]

On the other hand, a court could decide, under aspects of the choice-of-law analysis like "the interests of a foreign country" or "the domicile of the defendant," that U.S. law should not apply to the bondholder's TIA claim. In this instance, the

---

[112] For a discussion of the tort standard, see Curley v. AMR Corp., 153 F.3d 5, 14 (2d Cir. 1998), employing Mexican law "which has the greatest interest in regulating the behavior of the parties to this appeal and which is the locus of the alleged tort." *Cf.* Semi-Tech Litig., L.L.C. v. Bankers Trust Co. 353 F. Supp. 2d 460, 483 (S.D.N.Y. 2005) (requiring plaintiffs to show valid causation to uphold TIA tort claim). For a discussion of the contract standards, see *In re Gaston & Snow*, 243 F.3d at 609, which ruled that the question of whether an oral agreement and certain documents composed a contract was an issue for the jury. *See, e.g.*, *In re* Commodore Int'l, Ltd., 242 B.R. 243, 255−56 (Bankr. S.D.N.Y. 1999) (applying Bahamian bankruptcy law because forum has greatest interest in controversy); *see also* Curden v. Bank of N.Y., 957 F.2d. 961, 968−69 (2d Cir. 1992) (applying New York statute of limitations for contracts involving breach of indenture claim).

[113] *See* Brink's Ltd. v. South African Airways, 93 F.3d 1022, 1030–31 (2d Cir. 1996) (setting out "center of gravity" or "grouping of contracts" approach for contract claims in New York); *see also* Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 821 (1983) (discussing how center of gravity test was first employed in New York courts).

[114] The Second Circuit in *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 72 (2d Cir. 1994), suggested a broader application of the "presumption against extraterritoriality" by stating "in any case, the concept of extraterritoriality does not refer to the body of law that governs the dispute; if it did, extraterritorial application of United States statutes would be an impossibility because any place where United States law governed a particular dispute would be considered United States territory." However, the *Kollias* case dispute was based on an injury that had a definite physical locus—a ship at sea, outside U.S. waters. *Id.* at 69 (reciting case surrounding case). The locus of the subject matter of a bondholder's TIA dispute is metaphysical but could fairly be placed in New York. *See* LNC Invs., Inc. v. First Fid. Bank, 173 F.3d 454, 462 (2d Cir. 1999) (allowing bondholders with TIA claim to sue *trustee* for breaches under New York statute).

"presumption against extraterritoriality" would be applicable. The New York court would apply foreign law and would only give effect to the TIA if the "presumption against extraterritoriality" were overcome. In sum, in a dispute that is a "U.S. dispute," the TIA should be given effect, even where the issuer of the bonds is a foreign company, and giving effect to the TIA in such a case does not run afoul of the "presumption against extraterritoriality." Conversely, in a dispute that is a "foreign dispute," the TIA should not be given effect unless the "presumption against extraterritoriality" is overcome.[115]

B. Whether Comity Demands Favoring a Foreign Court Order Over the TIA

In the circumstance where the TIA generally applies, a court might nevertheless decide, for reasons of comity, to restrict application of the TIA. Take the example of a restructuring that has been fully completed under foreign law, with a final order from the foreign court that provides the equivalent of a confirmed chapter 11 plan. In this example, the question would be whether the U.S. court should deny a plaintiff-bondholder the rights secured by the TIA (to sue and collect) in order to preserve the stated effects of the foreign court's restructuring order. The answer, of course, is as political as it is legal, and there are at least two possibilities. First, the answer could be yes—the plaintiff-bondholder's TIA rights should be abridged—because ultimately the U.S. investor cannot seek shelter in a U.S. statute from the laws of a foreign country where he chose to invest. Second, the answer could be no—the plaintiff-bondholder's TIA rights should be upheld—because neither "international duty" nor "convenience" outweighs "the rights of [the United States'] own citizens" under applicable U.S. law.[116] These answers, it will be recognized, are the same possible answers before the courts in section 304 cases like *Multicanal* and *Cablevision*, although they have been arrived upon through a different path of legal analysis.

C. Whether the TIA Should Be Given Extraterritorial Effect

The TIA is unlikely to overcome the "presumption against extraterritoriality," because neither the statute nor the legislative history makes a point of stating otherwise. So, in the circumstance where U.S. law does not generally apply—where a choice-of-law analysis determines foreign law to apply—the TIA will have no effect. From a practical standpoint, this may end the instant line of logic.

---

[115] A pair of Supreme Court choice-of-law cases addressing maritime injuries form part of the legal framework in this area. In *Lauritzen v. Larsen*, 345 U.S. 571, 592 (1953), the Court held foreign law applied to a dispute based on an injury to a foreign seaman incurred on a foreign ship sailing in foreign waters. In *Romero v. Int'l. Terminal Operating Co.*, 358 U.S. 354, 383 (1959), the Court held foreign law also applied to a dispute based on an injury to a foreign seaman incurred on a foreign ship temporarily situated in U.S. waters. There was no need to apply the "presumption against extraterritoriality" in these cases, because the choice-of-law analysis favored foreign law.

[116] *See* Hilton v. Guyot, 159 U.S. 113, 163–164 (1895) (defining comity).

However, it is useful to pause and consider an illogical alternative. What if the TIA did pronounce its extraterritorial reach? Would it then clearly override foreign insolvency laws? The answer is no—there would still be the question of comity. A court would still be required to reconcile two equally applicable but conflicting laws, one purporting to permit a debt restructuring that the other purports to prohibit. And, in this reconciliation, the governing principle would again be comity. Comity is, in the end, a court's choice to demur when the court is empowered to act, or a court's choice to accept when the court is empowered to reject. It is a matter in a court's quintessentially equitable discretion.

VIII. CONTRACTING AROUND SECTION 316(b)

The *sine qua non* of TIA section 316(b) is its statutory pronouncement that parties may not "contract around" its fundamental bondholder protections.[117] Thus, no matter what an issuer, underwriter, and initial purchaser may desire or agree, subsequent holders of bonds under a TIA-qualified indenture are presumably entitled to section 316(b) protection. But this presumption has two twists that make "contracting around section 316(b)" less of an oxymoron than it first appears.

For one, it is technically possible for parties to agree to an indenture that modifies section 316(b) protections, if SEC approval is obtained. Section 304(d) of the TIA permits the SEC to issue exemptions to section 316(b), upon its own motion or by application of an interested person.[118] The exemptions may be conditional or unconditional, and the SEC's decision is guided by whether the exemptions are "necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the [TIA]."[119]

Within the last two years, the SEC granted just such an exemption, albeit in circumstances of limited applicability.[120] Petróleos Mexicanos ("Pemex") is a public entity formed by the Mexican Government to manage the country's oil and gas resources. Pemex established a Delaware statutory trust and caused the trust to issue bonds under a TIA-qualified indenture. Because Pemex's debt had historically been restructured in tandem with the debt of the Mexican government, and because Pemex was not subject to U.S. or Mexican bankruptcy protections in which the consent of less than 100% of [bondholders] would be permitted, the debtor argued that the implied bankruptcy exception to section 316(b) would not apply to

---

[117] *See generally* 15 U.S.C. § 77ppp(b) (2000).

[118] Section 304 of the TIA is codified at 15 U.S.C. § 77ddd (2000).

[119] *See* 15 U.S.C. § 77ddd (2000).

[120] *See, e.g.*, Order Granting Application for Exemption: Petroleos Mexicanos and the Pemex Project Funding Master Trust, S.E.C., File No. 22-28755 (Oct. 13, 2004), at 2–14, *available at* http://sec.gov/divisions/corpfin/cf-noaction/pemex101304.pdf (granting application for exemption under section 316(b)).

Pemex.[121] In other words, because the debtor was statutorily prohibited from entering an insolvency proceeding, no insolvency proceeding for the debtor could serve as an exception to section 316(b) for the debtor's TIA-qualified debt. Without an exemption to section 316(b), there would be no potential "release valve" to restructure the debt fully without 100% bondholder consent. Pemex asked the SEC to permit its indenture to contain a collective action clause allowing holders of 75% of its bonds to change the bonds' maturity, principal, and interest in connection with a restructuring of Mexican government debt generally.[122] The SEC granted the exemption from section 316(b) and permitted the collective action clause. The result was that the Delaware statutory trust's indenture had a collective action clause that matched and that was tied to the collective action clauses in Mexico's other sovereign debt instruments.

The Pemex case demonstrates a creative approach to section 316(b) of the TIA for a debt issuer with peculiar international issues. Although section 304(d) of the TIA seems from a bondholder notice perspective more fairly applied before an indenture is executed and before bonds are issued, its text is not so limited, and an exemption from section 316(b) might be permissible even after issuance of the bonds. For example, an application for exemption might be filed with the SEC simultaneously with the filing of a foreign insolvency proceeding, so that the SEC might grant the exemption in connection with the confirmation of a foreign restructuring plan.

The second twist to "contracting around Section 316(b)" is demonstrated through modern indentures themselves. In the increasingly complex financial markets, an issuer is likely to issue bonds under not just one but several TIA-qualified indentures. Each series of debt may be senior to, junior to, or *pari passu* with each other series, under subordination rules expressly set forth in and unique to each indenture. For example, one set of bonds might be subject to a rule that if a default occurs under any of the issuer's debt, then those junior bonds will not be repaid until all senior bonds are repaid. The junior indenture might also provide that, in any bankruptcy of the issuer, the senior bondholders will have the right to exercise the junior bondholders' votes on a restructuring plan. The varieties of subordination provisions that have developed raise an interesting TIA question: do they impair an individual junior bondholder's section 316(b) rights? There are two basic views on this point. First, the subordination provisions could be viewed as integral parts of a junior bondholder's principal and interest rights.[123] Under this view, the subordination provisions do not *impair* the junior bondholder's section

---

[121] *See* Trust Indenture Act Releases, S.E.C. News Digest, Issue No. 2004-200 (Oct. 18, 2004), at 2, *available at* http://www.sec.gov/news/digest/dig101804.txt (discussing order granting application for exemption to debtor); *see also* Trust Indenture Act Releases, S.E.C. News Digest, Issue No. 2004-177 (Sept. 14, 2004), at 5, *available at* http://www.sec.gov/news/digest/dig091404.txt (discussing grant of exemption under 316(b)).

[122] *See supra* note 120 (noting SEC grant of exemption to Pemex).

[123] *See* 15 U.S.C. § 77ppp (2000) (discussing bondholder's rights and provisions for postponement of interest payments).

316(b) rights because they *are* the bondholder's section 316(b) rights. Second, the subordination provisions could be viewed as restrictions on the payment of the junior bondholder's principal and interest, which restrictions directly conflict with section 316(b) and are therefore invalid.[124]

There are only a very few reported decisions that approach the intersection of subordination provisions and the TIA. The most illuminating decision is *UPIC & Co. v. Kinder-Care Learning Centers, Inc.*[125] In *UPIC*, "the parties . . . framed the issues such that the Court is called upon not merely to interpret TIA section 316(b) but, in large measure, to construe provisions of the Indenture which are in apparent conflict with section 316(b), namely the subordination provisions . . . ."[126] The debt issuer admitted "that TIA section 316(b) [and the corresponding language in the indenture] guarantees UPIC's absolute and unconditional right to recover interest under the Securities, and thus 'overrides' the subordination and notice provisions of the Indenture."[127] However, the parties disagreed as to whether the same "override" applied to principal payments upon redemption, a circumstance to which, the defendant argued, TIA section 316(b) does not apply. The court found that notwithstanding the subordination provisions of the indenture, the junior bondholder had a right under section 316(b) to sue for both interest and principal.[128] However, the court distinguished this "procedural" right to sue from the junior bondholder's "substantive" right to collect payment.[129] Ultimately, the court upheld the subordination provisions as between the senior and junior debtholders without directly impairing the rights of the junior debtholders as against the issuer (which rights would be available, for example, through the junior bondholder's exercise of subrogation rights contained in the subordination provisions).[130] At least one other court has followed this distinction between a junior bondholder's "legal rights" under section 316(b), as opposed to its "practical rights" to payment.[131]

The *UPIC* decision appears to favor subordination provisions over section 316(b) rights, at least from the perspective of who gets paid first, but the decision's ambiguities cloud further application to specific types of subordination provisions. For example, the *UPIC* decision suggests, somewhat in tension with its main holding, that section 316(b) would invalidate a subordination provision that

---

[124] *See id.*

[125] 793 F. Supp. 448 (S.D.N.Y. 1992).

[126] *Id.* at 453 (discussing application of section 316(b)).

[127] *Id.* at 454.

[128] *See id.* ("[Defendant] contends, however, that in this case such right applies only to UPIC's claim for payment of interest and not payment of principal.").

[129] *See id.* at 456–57 (determining "manner in which [the Court] may give effect to section 316(b) while enforcing the subordination provisions of the Indenture.").

[130] *See id.* at 457–59 (reasoning Subordination Clause protects rights of senior indebtedness against other security holders).

[131] *See In re* Nw. Corp., 313 B.R. 595, 600 (Bankr. D. Del. 2004) (stating subject indenture and Trust Indenture Act of 1939 apply to holder's "*legal* rights" and not holder's practical rights to principal and interest).

prohibits a junior bondholder from filing suit, or a subordination provision that allows a senior bondholder to vote a junior bondholder's bankruptcy claims.

The issue of subordination provisions and the TIA may play out differently in U.S. and foreign bankruptcies. Section 510(a) of the Bankruptcy Code states, a "subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law."[132] Although the *UPIC* decision suggests that the TIA might be "applicable nonbankruptcy law" limiting subordination agreements, the general U.S. rule is that subordination works in bankruptcy just as it works outside bankruptcy.[133] This rule, however, may not hold outside the U.S., and foreign insolvency law may restrict the enforcement of subordination agreements, at least to the extent they involve the debtor (and not separate creditor-against-creditor litigation). Thus, even putting aside the issues of international restructurings addressed in this Article, the effects of the TIA on subordination provisions, the effects of foreign law on subordination provisions in a debt issuer's foreign bankruptcy, and the effects of foreign law and the TIA on one another are all open questions.

The idea of "contracting around" section 316(b) may appear removed from the main topic of this Article, because it does not have a significance unique to international insolvencies. However, the idea is part of the investigation of the outer limits of section 316(b) and the determination of the extent to which debtor and creditor claims may alter the effects of section 316(b). Whether by "contracting around" section 316(b) or by choosing a forum for a restructuring, the question is whether the section 316(b) of the TIA is as "absolute" as it is sometimes described.

CONCLUSION

From its passage into law in 1939, section 316(b) of the TIA has by design brought bond debt restructurings within the surveillance of a bankruptcy judge. In the interrelationship of the TIA and U.S. bankruptcy law, an individual bondholder has always been given one set of rights or another—either the firmly guaranteed rights to enforce principal and interest under section 316(b), or the procedural and substantive rights of a creditor under chapter 11. Congress established these balanced sets of rights in 1939, and it should be assumed that their balance has survived the amendments to U.S. bankruptcy law and the TIA since then. It should not be assumed, however, that this balance holds when U.S. bankruptcy law is displaced by foreign bankruptcy law.

Rather than make such an assumption, courts have recently compared the U.S. bankruptcy law to the foreign bankruptcy law to determine whether the two are

---

[132] 11 U.S.C. § 510(a) (2006).

[133] There is a further question as to whether section 510 of the Bankruptcy Code falls within the implied bankruptcy exception to the TIA, because section 510 is not within chapter 11 and is not necessarily an integral part of the plan or reorganization voting process. *See generally In re* Bd. of Dir. of Multicanal S.A., 314 B.R. 486, 521 (Bankr. S.D.N.Y. 2004) (holding section 304 factors were substantially met and it was not necessary or practical to go forward with chapter 11 proceeding).

similar enough to preserve the balance between bankruptcy and section 316(b) of the TIA. This comparison, part of the comity analysis discussed in this Article, is highly subjective, fact-specific, and outcome-driven. In short, it is nothing like the established, clear-cut statement of law in section 316(b) of the TIA, and it is inconsistent with the TIA's purposes.

The "absolute" rights of an individual bondholder under section 316(b) of the TIA will be respected most fully if a foreign debtor wishing to restructure its debt through U.S. insolvency law is required to file a plenary chapter 11 case under section 301 or 303 of the Bankruptcy Code. Such a plenary case—unlike a section 304 ancillary case or a chapter 15 foreign nonmain proceeding—would give both the debtor and its bondholders their full U.S. law rights and would preserve an accepted and predictable balance between bankruptcy law and section 316(b) of the TIA. Foreign debtors might complain that this regime will require them to satisfy both the bankruptcy laws of their own jurisdictions and the bankruptcy laws of the U.S. However, a debtor who comes to the U.S. to access its capital markets and legal structures cannot fairly complain that in the restructuring of its indebtedness it must play by the same rules as in the borrowing.[134]

The enactment of chapter 15 has increased a foreign debtor's ability to argue that it should be entitled to an exception from section 316(b) of the TIA without having to bear the burdens of a plenary chapter 11 case. Some of the principles behind chapter 15, along with ambiguities in its drafting, have created an opportunity for foreign debtors to expand the implied bankruptcy exception to section 316(b) of the TIA. Bondholders will face an uphill battle in arguing that a chapter 11 case is required for the foreign debtor, and they may be required instead to voice their concerns within the confines chapter 15, by arguing for a comity analysis under section 1507 or section 1521. Yet, the arguments for individual bondholder protections will retain resonance where foreign insolvency proceedings deny individual bondholders the rights afforded to them under chapter 11.

---

[134] This idea has precedent in cases under section 547 of the Bankruptcy Code that arose under the former section 304 ancillary proceeding regime. Courts generally held that a debtor may not avail itself of section 547 preferential transfer avoidance powers in a section 304 ancillary proceeding, but rather must file a section 301 or 303 plenary proceeding. The concept was that a foreign debtor should not be permitted to pick and choose what U.S. law rights and obligations are to its liking, and must either avoid the U.S. altogether or take the favorable laws along with the unfavorable laws. A minority of courts has allowed a debtor to elect to use U.S. avoidance powers in a section 304 ancillary proceeding, without becoming subject to the restrictions of a plenary bankruptcy case. *See* Metzeler v. Bouchard Transp. Co. (*In re* Metzeler), 78 B.R. 674, 677 (Bankr. S.D.N.Y. 1987) (disagreeing with minority and ruling section 304 does not provide benefit of American avoidance powers simply because there may be better powers than foreign court). However, chapter 15 appears to prevent further decisions granting avoidance action powers such as those under section 544, 547, 548, and 550 of the Bankruptcy Code. *See* 11 U.S.C. § 1521(a)(7) (2006) ("[G]ranting any additional relief that may be available to a trustee, except for relief under sections 522, 544, 545, 547, 548, 550, and 724(a)."). One question is whether section 1521 supports or undermines the premise that a foreign debtor should bring a plenary chapter 11 case to become eligible for a TIA section 316(b) exception. *See generally* Richard L. Epling , *Are Rule 23 Class Actions a Viable Alternative to the Bankruptcy Code?*, 23 SETON HALL L. REV. 1555, 1559 (1993) (noting conflict in accepting express policy of section 316(b)). One could argue the point in both directions, and only new chapter 15 cases will provide guidance on this point.