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Article

***713** CHAPTER 15 AT LAST

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After years of receiving plaintive emails from foreign bankruptcy lawyers, judges and academics asking when Chapter 15 would become part of United States law, we can at last celebrate its arrival. The specialists in multinational insolvency cases have long since read the various articles that have been written about the new Chapter 15, which governs United States law and procedure in multinational cases. [FN1] Rather than plow that ground again, this Article is designed to introduce nonspecialists to the workings of Chapter 15 and how it will relate to a broad range of cases, whether personal or corporate. It will also focus on a few of the most important changes from existing law under § 304 of the Bankruptcy Code, now replaced by Chapter 15.

Lawyers who do not imagine that the multinational rules will be important to them will be surprised over the next few years. The provisions of Chapter 15 will intrude into their professional lives because of two developments, one in the world and one in the provisions of Chapter 15 itself. On the one hand, bankruptcy cases of any size--whether personal or corporate--increasingly have some international element. Does the bankrupt CFO of a failed computer startup have a condo in Mexico? Chapter 15 will govern the trustee's right to liquidate it. [FN2] Does a California client have a franchise agreement ***714** with a Mexican group that has just entered a "concurso mercantile"? [FN3] Chapter 15 procedures will control the client's efforts to protect itself in the United States. [FN4] As more and more cases have an international connection, knowledge of Chapter 15 will grow more important.

From the other direction, Chapter 15 has a broader impact than the provision it replaces, § 304 of the Bankruptcy Code. It centralizes every aspect of the international practice. For example, suppose that California client has sued the Mexican party in the United States and there are United States assets like bank accounts or inventory. If the Mexican company wants to suspend the United States suit in deference to the Mexican bankruptcy, it cannot just ask the California

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court for a stay on comity grounds, relief that has often been granted in the past. [FN5] Instead, it must file a Chapter 15 recognition proceeding in the appropriate bankruptcy court and seek relief there. [FN6]

Closely related to Chapter 15 are the American Law Institute's Principles of Transnational Insolvency (the "Principles"). [FN7] Although other texts are more closely designed to interpret the language of Chapter 15, [FN8] the Principles were drafted with Chapter 15 in mind [FN9] and provide authority for resolution of a number of issues not fully addressed by Chapter 15 or addressed only in part. The Principles were developed specifically for use among the NAFTA countries, but the ALI concluded that they should be applied generally in multinational bankruptcy cases in United States courts. [FN10] One example of an interstitial issue not covered specifically in Chapter 15 is the situation where there may be a conflict of stays between United States and Canadian bankruptcy courts. The result may turn upon an interaction between the provisions of Chapter 15 and certain of the ALI Principles. [FN11] In ***715** this way, the Principles fill in a number of important details not addressed by Chapter 15 [FN12] and are designed so they can be adopted, in whole or part, by a court order mandating their application in a particular case. A number of other sources provide background for interpretation of Chapter 15. [FN13] This Article will touch on the basics of theory and practice under Chapter 15, including a bit of history and reference to sources, and then discuss how Chapter 15 and the Principles interact in some specific situations.

I. BASICS

We should begin by defining the coverage of Chapter 15. In general, it applies whenever there is a foreign insolvency proceeding relating to a debtor that is subject to a bankruptcy case of some kind in the United States. Given the broad jurisdiction of United States bankruptcy courts, [FN14] which can be invoked by the mere presence of a lawsuit or an item of property within our borders, [FN15] the sweep of Chapter 15 is very broad. Its scope is enlarged by various provisions adopted as part of the enactment of Chapter 15. Obviously, it applies in every bankruptcy of a multinational corporation that is a United States corporation or a foreign corporation with United States assets or operations. But it also applies in much more down-to-earth situations like the examples given just above.

A. THEORY AND TERMINOLOGY

There are three basic dichotomies in multinational bankruptcy or "insolvency" cases. [FN16] They are the distinctions between universalism and territorialism, between main and nonmain proceedings, and between ancillary and parallel proceedings.

1. Universalism and Territorialism

In general, universalism would treat a multinational bankruptcy ideally as a unified global proceeding administered by a single court assisted by courts in other countries, while territorialism is the traditional approach by which each court in a country in which assets are found seizes them (the "grab rule") and uses them to pay local creditors. Both approaches have become considerably ***716** more sophisticated in recent years. Universalism is now characterized as modified universalism, meaning a pragmatic approach that seeks to move steadily toward the ideal of universal proceedings while accepting the reality of step-by-step progress through cooperation. [FN17] Territorialism has changed also, moving toward cooperative territorialism, which seeks to ameliorate some of the most wasteful features of the grab rule by a measure of judicial cooperation. [FN18]

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Although there are some United States opponents of modified universalism, [FN19] it is supported by the great majority of academic and practicing specialists in multinational bankruptcy [FN20] and permeates the ALI Principles. [FN21] We need not revisit the debate here, [FN22] except to say that Chapter 15, like the Principles, represents an embrace of universalism by the United States, a course already charted by most American court decisions in multinational cases and anticipated by the adoption of § 304 of the Bankruptcy Code in 1978. [FN23]

***717** 2. Main Versus Nonmain Proceedings

A "main" bankruptcy proceeding is one that is brought in the courts of the country where the "center of the main interests" of the debtor is found, cheerfully known as COMI. [FN24] A nonmain bankruptcy proceeding is--you guessed it--a proceeding in some other country. Section 304 of the Code provided for relief only in cooperation with main proceedings. [FN25] Chapter 15 changes that by permitting some limited cooperation with nonmain bankruptcies, but most of its focus is on foreign main proceedings. Thus if LondonDelights, PLC, ("LD") files for administration [FN26] in London, that proceeding would be the main proceeding entitled to full cooperation under Chapter 15. If a case is brought against LD in Munich, where it has an office, that proceeding would be nonmain and would get only limited deference from us. We will discuss COMI more later.

3. Ancillary and Parallel Proceedings

Section 304 cases under prior law were classic ancillary proceedings. They were not bankruptcy cases, but only a set of procedures by which a foreign representative (e.g., the British administrator for LD) could obtain relief in the United States. A common form of relief was an injunction halting lawsuits and creditor seizures of United States assets. [FN27] No distributions would be made through the § 304 proceeding. Instead, one of three things would happen: the parties would go off to London to sort it all out, a full United States bankruptcy case [FN28] would be opened to distribute United States assets in the old-fashioned grab-rule way, or the court would simply permit creditors to have at the United States assets in nonbankruptcy courts. Most of the time, the first alternative--resolution of the whole thing in the foreign court with the main proceeding--was the answer given by the American courts. [FN29]

The second alternative, a full United States bankruptcy case, is an instance of a parallel proceeding. However, such proceedings do not have to be grab-rule affairs. It is possible for the United States court to cooperate with the foreign court in the context of a full United States case under any operative ***718** chapter. Chapter 15 specifically contemplates that sort of cooperation. [FN30]

Having said that, it is much easier to cooperate using the ancillary approach for a variety of reasons. One important one is that the law is ambiguous as to the relationship between United States priority rules and choice-of-law rules. [FN31] The Code does not have a specific choice-of-law rule, even for domestic cases. As a result, we do not have a provision that tells us whether another country's law might apply for distribution purposes. Suppose, for example, that LD had an office in New York and a United States Chapter 7 case is pending there. We do not have a stated rule about what priority should be applied to claims for wages owed to the employees in its Columbia office, even if the United States choice-of-law rule would call out, say, Columbian law and that law provides a different priority than the Bankruptcy Code. These difficulties, among others, mean that it is often more sensible to dismiss the United States case under § 305 and send all the parties to

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the main proceeding, something that United States courts have not hesitated to do. In our example, the dismissal of the United States case then leaves the United States court free to use the ancillary proceeding to work with the British court that has jurisdiction of LD's main proceeding. In that way, there is hope that the London court will apply a consistent choice-of-law rule that will give the same justice to similarly situated employees of LD in various countries, either through application of the law of each employee's country or through a single United Kingdom rule for all. [FN32]

B. HISTORY, CONTEXT, AND SOURCES

The United States courts have long been open to cooperation with foreign bankruptcy proceedings. [FN33] This has been especially true in the Second Circuit, where the bulk of the large multinational cases arise. [FN34] Thus it was merely a next step in American law when Professor Stefan Riesenfeld succeeded in persuading Congress to adopt § 304 in the 1978 Bankruptcy Code. That section for the first time codified United States notions of comity and cooperation with foreign courts in bankruptcy matters. It provided a mechanism for a foreign trustee appointed in a main proceeding to initiate a United ***719** States ancillary case in which the trustee could seek injunctions, turnover of assets, and other relief in aid of the proceedings in the debtor's home country. A substantial number of cases over the quarter-century since the adoption of § 304 have, on the whole, nurtured and expanded its central notion of deference and cooperation. [FN35]

By the early Nineties, other countries had begun to respond to this initiative, but progress was painfully slow. [FN36] At the urging of the United States and several other countries, the problem of cooperation in multinational bankruptcies was taken up by the United Nations Commission on International Trade Law ("UNCITRAL"), based in Vienna. It convened a "working group" [FN37] to explore possible solutions. Although great skepticism was expressed about making any progress in so localized and technical a field, within two years UNCITRAL promulgated a Model Law on Cross-Border Insolvency. [FN38] The United States delegation was a major player in those negotiations. The resulting Model Law was embraced unanimously and "enthusiastically" by the United States National Bankruptcy Review Commission, [FN39] a truly rare event for the commission. During the many years of struggle over the bankruptcy legislation that finally passed in April 2005, Chapter 15 was part of every version and received virtually unanimous bipartisan support. It seems clear that it could have passed years earlier, but, like other desirable reforms, it was held hostage by the resolve of the bill's backers to get all or nothing.

The most important source of authoritative interpretation of Chapter 15 is the House Committee Report. [FN40] Chapter 15 was drafted to follow the Model Law as closely as possible, with the idea of encouraging other countries to do the same. [FN41] One example is use of the phrase "center of main interests," which could have been replaced by "principal place of business" as a phrase more familiar to American judges and lawyers. The drafters of Chapter 15 believed, however, that such a crucial jurisdictional test should be uniform around the world and hoped that its adoption by the United ***720** States would encourage other countries to use it as well. [FN42] Any departures from the actual text of the Model Law in its official English version were as narrow and limited as possible. In only one or two respects were those departures meant to make any substantive change and those instances are specifically identified. Because Chapter 15 so closely follows the Model Law, the next most useful interpretive document is the Guide prepared by the UNCITRAL staff in connection with promulgation of the Model Law. [FN43]

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Because § 304 has been repealed, the case law developed under that section is not directly controlling in Chapter 15 cases, but it remains relevant to a limited extent. Although Chapter 15 was meant to be generally consistent with existing United States law, [FN44] it does have provisions both more and less favorable to cooperation than the § 304 case law. Its drafters were anxious to adopt those approaches in Chapter 15 that are more cooperation-friendly than existing United States law, but did not want to lose the benefits of § 304 case law that might be more advanced in the cooperative direction. [FN45] Section 1507 reflects that intent. It adds back to the Model Law some language that is a virtual copy of § 304, while limiting its applicability to providing "additional assistance." Thus the § 304 language and prior case law apply only where they enable the court to go beyond Chapter 15 in cooperating with the foreign court. Prior law does not apply where it limits relief under Chapter 15. On the other hand, the additional assistance offered by § 1507 is available only if the preexisting § 304(c) criteria are satisfied. [FN46]

C. ADOPTION ELSEWHERE

Chapter 15 explicitly commands that the courts attempt to maintain uniformity of interpretation of this Model Law. [FN47] Thus the United States courts can look to the court decisions of other countries who have adopted it in one form or another, as they will no doubt review the United States decisions. The Model Law has been adopted in Japan, Mexico, Poland, Romania, and South Africa, among other countries. [FN48] It has been enacted but not yet ***721** put into effect in the United Kingdom, where implementing regulations will be issued sometime this year. [FN49] The primary disappointment to date has been the failure of Germany and Spain to adopt the Model Law despite having enacted some new international provisions. [FN50] It is said that the EU countries will simply apply the provisions of the EU Regulation on Insolvency [FN51] to non-EU countries, which would provide different treatment than the Model Law but would in some ways be even more generous in cooperation. [FN52] However, the Regulation does not apply in terms to non-EU countries, so most observers would have been more assured had the Model Law itself been adopted. [FN53] An even better solution would be adoption of the Model Law at the EU level with regard to cooperation by all EU countries with all non-EU countries. [FN54]

II. PROCEDURES

A. RECOGNITION AND RELIEF

The Model Law is a procedural vehicle for cooperation among courts. [FN55] It does not adopt substantive rules of bankruptcy law or change domestic law except as necessary to permit results that are fair and sensible from a worldwide perspective.

Section 304 did not provide for recognition of a foreign bankruptcy proceeding as such. It simply gave the United States courts the authority to open an ancillary proceeding and grant various forms of relief to the representative of a foreign main proceeding if the statutory criteria were satisfied. By contrast, the Model Law specifically provides for a petition for recognition to open an ancillary case under Chapter 15. Section 1515 sets forth a very simple procedure meant to be fast and inexpensive in most cases. The applicant must demonstrate his or her authority as a foreign representative by ***722** filing official papers from the foreign court. [FN56] A disclosure is also required of all proceedings involving the same debtor pending in other countries. [FN57] The foreign representative should also show the court whether the foreign proceeding is a main or nonmain proceeding, so it can be recognized as such. [FN58] The foreign representative will be aided by a

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presumption in favor of authenticity and a presumption that the jurisdiction of incorporation or habitual residence (for individuals) is the debtor's COMI, [FN59] although the latter set of presumptions are indulged only "[u]nless there is evidence to the contrary." As under § 304, the filing of a petition for recognition opens a "case" under the Bankruptcy Code. The statute provides for emergency relief where necessary pending a ruling on the petition. [FN60]

If recognition is granted, a wide range of relief is available to the foreign representative. The most immediate is an automatic stay of the usual scope and subject to the usual exceptions and possible lift-stay orders. [FN61] The major difference from a full-case stay is that its effect is limited to the territorial jurisdiction of the United States. The foreign representative is also authorized by § 1520 to operate the debtor's United States business under § 363. Sections 549 and 552 apply as well, again within United States territorial jurisdiction.

The ALI Principles elaborate the territorial restrictions on the stay in an effort to avoid friction with our friends, especially our neighbors in NAFTA. Procedural Principle 4 establishes the rule that a primary and ancillary pair of stays should restrict themselves to their respective territories. For example, when a United States court recognizes a main proceeding in Canada, the automatic stay that issues under § 1520 of the Bankruptcy Code should not have effect in Canada nor affect the Canadian proceeding, and the Canadian court should not enforce its worldwide stay in the United States. [FN62] In that way, the two courts will not come into conflict and the parties will not be subject to two different injunctive regimes.

Relief beyond the § 1520 automatic stay must be specifically sought. It may include additional injunctions against creditor activity, discovery, [FN63] and ***723** turnover of assets for distribution in the foreign proceeding. [FN64] However, at every point the court must be satisfied that the interests of United States creditors are sufficiently protected. [FN65] It is important to note that these provisions do not require that United States creditors must enjoy the same rights, priorities, or realizations that would result in a United States full bankruptcy case. If they did, no meaningful international cooperation would be possible. [FN66] It means rather that the creditors must be treated in a way that is fair and reasonable in the context of the global financial crisis that has engulfed the debtor's estate. That global perspective lay at the heart of Professor Riesenfeld's vision in putting forward § 304 and in most of the court opinions decided under that section, as well as in the United States position at the UNCITRAL negotiations. It rejects the vested rights perspective embodied in the traditional grab-rule territorial regime. [FN67]

Chapter 15 expressly contemplates the possibility of parallel full cases in the United States and elsewhere. It goes so far as to require that relief in a Chapter 15 be made consistent with the United States full bankruptcy case, but it also commands cooperation and coordination with the foreign proceeding. [FN68] Importantly, if the United States bankruptcy is brought after the foreign proceeding has been recognized, then the United States case is limited to assets within the territorial reach of the United States. [FN69] This qualification is important, because ordinarily United States bankruptcy jurisdiction reaches around the world to all of the debtor's assets "wherever located." [FN70]

A foreign nonmain proceeding can be recognized as well, but it gets no automatic stay and United States assistance is distinctly limited. [FN71]

B. COMMUNICATION AND COOPERATION

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The statute imposes an affirmative duty upon the United States courts to cooperate with foreign courts in administering the worldwide case. [FN72] Perhaps the most innovative provision in the chapter is the authorization for the courts, as well as a trustee or DIP, to communicate directly with the foreign court and trustee. [FN73] One of the attractive elements of bankruptcy practice is ***724** that a case often starts like a cluster of preliminary injunction proceedings, with every item an emergency. As I tell my students, that process provides a rush not always available in other forms of civil litigation. But that same quality means that the slow minuet of traditional international litigation will not answer the purpose. Frauds can move millions around the world at the flick of a switch and factories anywhere may shut down if the payroll money is not in the bank Thursday night. It is essential that courts and trustees use modern communications to resolve problems and reach agreement quickly.

Beyond speed, the difficulties of language and culture often require direct oral communication. Anyone with international experience knows how frustratingly difficult it is to understand the problems facing a court in another legal system or how a procedure that seems obvious to someone in our legal system is almost unthinkable in another system--and vice versa. One of the illuminating moments in the ALI Principles project came when the lawyers, judges, and academics from all three NAFTA countries realized that the ex parte communications with the court that were regarded as unacceptable by the common law crowd were considered normal and necessary by our Mexican colleagues. [FN74] Most often people make the mistake of thinking that these differences are a good reason not to communicate. On the contrary, they make communication necessary. After enough talk, it becomes possible to grasp a common ground where solutions can be found.

Recent cases in the United States have demonstrated the crucial importance of direct communication between courts. [FN75] The ALI Principles provide Procedural Principles and an appendix with a truly innovative set of guidelines agreed among the Canadian, Mexican, and American lawyers on the joint advisory committee, thus establishing guidelines that largely cut across the civil-law, common-law divide. [FN76] The International Insolvency Institute is creating and making available translations of these guidelines into a large number of languages, so that they can easily be placed in the hands of all the counsel, judges, and judicial staff concerned. [FN77]

***725** C. EXCLUSION OF CONSUMER CASES

The United States delegation felt strongly that the Model Law should be limited to legal entities, because its application to natural persons would invoke all of the policy conundrums of domestic relations law, exemption law, and other areas that could be avoided in a purely corporate setting. However, the majority of delegates were unwilling to exclude natural persons and acceptance of their view was essential to success. The United States was able, however, to gain the concession that it would be proper for adopting countries to exclude consumer cases if their domestic laws had traditionally given different treatment to consumers.

On that basis, Chapter 15 excludes the bankruptcies of natural persons who fall within the limits established for Chapter 13 cases under § 109(e) of the Bankruptcy Code. [FN78] Note this is not an exclusion of Chapter 13 cases per se. Rather, the exclusion utilizes the debt and income limits in § 109(e) as a proxy for smaller cases under any chapter that should not be pulled into the international procedural orbit. [FN79] Therefore cases within those debt limits remain subject to the domestic rules and general notions of comity and cooperation

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extant prior to § 304.

The converse, of course, is that an American citizen whose habitual residence is her condo in San Miguel de Allende and who has a total secured debt of $1.5 million is subject to Chapter 15. If a bankruptcy proceeding is brought against her in Mexico, the foreign representative from Mexico can seek § 1515 recognition in the United States and may pre-empt any bankruptcy filed here, subject to the discretion of the United States court. [FN80]

III. SUMMARY OF IMPORTANT CHANGES FROM CURRENT LAW

The most important thing to say about the changes in United States law wrought by Chapter 15 is that they are only in the details. The Commission report makes it clear that Chapter 15 was not intended to change the basic approach of United States law, although it fills in a number of details and provides a common platform for cooperation with other countries around the ***726** world. [FN81] The number one reason for adopting it was to demonstrate the United States commitment to the Model Law and to cooperation and universalism generally, in the hope that our example would encourage other countries to follow. Many other countries, especially in the civil law world, had no statutory basis for many of the important procedures needed in multinational cases. [FN82] The adoption of the Model Law provides the necessary authorization. For example, in many civil-law countries direct communication and cooperation with foreign courts would not be permitted absent such statutory authority.

As noted above, a major change is that recognition is granted to a foreign main proceeding without reference to criteria like those formerly set forth in § 304(c). In addition, an automatic stay issues upon recognition reducing the need for one or more specific injunctions tailored to each case. On the other hand, the United States court has considerable discretion to fashion and limit relief depending on the circumstances of the case, including the fair treatment of United States creditors in the foreign proceeding. [FN83] That discretion is exercisable, of course, in the context of a deep and long-standing commitment to cooperation and deference in pursuit of universalist results to the extent practical. That commitment has only been reinforced by the adoption of the Model Law.

While the foreign representative still has to go to court to generate a United States stay, the new focus on a relatively mechanical and simple procedure for recognition, followed by the imposition of the automatic stay, should make the process faster and cheaper even as it emphasizes the United States preference for an ancillary, cooperative result where the other country is the primary jurisdiction.

One structural change is the centralization of the recognition and comity-granting process. In the past, any court in the United States might be moved by comity to stay its hand in a United States case when advised of a foreign proceeding in the home country of one of the parties, even if that party's foreign representative had not sought a § 304 stay. Now the foreign representative must go through the Chapter 15 process to get the United States action stayed. Deferral for comity reasons in other courts is not authorized without the Chapter 15 process. [FN84] The goal is to have the Chapter 15 criteria applied uniformly and by courts with specialized knowledge of the bankruptcy process.

A change that will affect many bankruptcy cases is a new set of requirements ***727** for notice to creditors with foreign addresses. [FN85] The Rules Committee is currently working on interim rules to deal with this new provision, which seeks to

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ensure that foreign creditors get notices that alert them to the key steps they must take to participate in a United States case and to give them sufficient time to do so effectively. [FN86] The ALI Principles add another very important notice rule that would require trustees and administrators in the various countries with pending proceedings as to a common debtor to give each other notice of important hearing dates and orders in their respective cases. [FN87] Closely related is a provision calling for exchange of lists of creditors and claims, [FN88] information concerning claims that have been allowed or disputed, and similar information. [FN89]

Another change that may affect a large number of cases is the requirement that a trustee in bankruptcy obtain court permission to act outside the United States. [FN90] The dual concern here was first that the trustee should have specific authorization to show to the foreign courts or other authorities and second that trustees provide some justification before spending a month in the South of France, let's say, allegedly pursuing valuable chateaus purchased with company funds.

The new definition of a main proceeding will reverse a ruling of some importance, In re National Warranty Insurance Risk Retention Group. [FN91] In that case, [FN92] the debtor was a quasi-insurance company that operated in a no-man's land Congress had created in which such companies were largely unregulated by either state or federal regulators. Its business was sale of automobile warranties to consumers through a network of dealers and other resellers. All of its business, its headquarters, all of its employees, and virtually all of its creditors were in the United States, but it was incorporated in the Cayman Islands. Shortly before bankruptcy, its management transferred most of its remaining assets to the Caymans and then opened a provisional liquidation there. Then the Cayman liquidators sought to block any actions, in or outside of bankruptcy, in the United States by filing a § 304 proceeding. ***728** Over the strenuous objections of the class-action creditors, they were permitted to carry out the liquidation in the comfortable remove of those islands, far from the maddening crowd of United States claimants.

It is clear that this ploy could not be successful under Chapter 15, because the Caymans case would have been a nonmain proceeding entitled to limited recognition at best, while the United States would be the home to the main proceeding, as it obviously should be, and would thus be able to protect properly its victimized consumers. The basis for upholding the § 304 relief in the National Warranty case was that the Caymans proceeding was held in the country of incorporation of the debtor which the courts held was also its "domicile" for the purposes of § § 101(23) and 304. [FN93] Under § 1502(4) of Chapter 15, by contrast, the COMI of a company like National Warranty would be clearly located in Nebraska and thus the Caymans liquidation could not be its main proceeding. [FN94]

CONCLUSION

Chapter 15 will open a new era of cooperation in multinational cases, one in which many lawyers will find themselves with interesting and useful new avenues of practice in the new international aspects of the kinds of cases that a few years ago might have been wholly domestic. Chapter 15 and the ALI Principles are only a modest step forward, but they are nonetheless important. Their application will raise international cooperation to a new level, helping to uncover the solutions to the problems we were not ready to address at stage one. As with every answer, they will serve to introduce the next question.

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[FN1]. See, e.g., Jenny Clift, The UNCITRAL Model Law on Cross-Border Insolvency-A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency, 12 TUL. J. INT'L & COMP. L. 307, 308-09 (2004); Andre J. Berends, The UNCITRAL Model Law On Cross-Border Insolvency: A Comprehensive Overview, 6 TULANE J. INT. LAW. 309 (1998); Ronald J. Silverman, Advances In Cross-Border Insolvency Cooperation: The UNCITRAL Model Law On Cross-Border Insolvency, 6 ILSA J. INT'L & COMP. L. 265 (2000); Jay Lawrence Westbrook, Modeling International Bankruptcy, in 1998-1999 ANNUAL SURVEY OF BANKRUPTCY LAW 465 (1999); Jay Lawrence Westbrook, Multinational Enterprises In General Default: Chapter 15, The ALI Principles, And The EU Insolvency Regulation, 76 AM. BANKR. L.J. 1 (2002) [hereinafter Westbrook, Chapter 15]. See generally, Andrew T. Guzman, International Bankruptcy: In Defense of Universalism, 98 MICH. L. REV. 2177, 2179, 2181 (2000); Lynn M. LoPucki, The Case for Cooperative Territoriality in International Bankruptcy, 98 MICH. L. REV. 2216 (2000); Frederick Tung, Fear of Commitment in International Bankruptcy, 33 GEO. WASH. INT'L L. REV. 555 (2001); Jay Lawrence Westbrook, A Global Solution to Multinational Default, 98 MICH. L. REV. 2276 (2000). These articles in turn cite a host of interesting articles discussing multinational insolvency and § 304 generally.

[FN2]. Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 801, 119 Stat. 23 (2005) to be codified at 11 U.S. C. § 1505 (2005). Future references will be to the codified provisions. Although this provision is written permissively, it is intended to require judicial authorization. H.R. REP. NO. 190-31, at n.114 (2005) [hereinafter H.R. REP.].

[FN3]. "Concurso mercantile" is the current term in Mexican law for any sort of bankruptcy proceeding. See American Law Institute, STATEMENT OF MEXICAN BANKRUPTCY LAW at 2 (2003) [hereinafter "MEXICAN STATEMENT"].

[FN4]. 11 U.S.C. § 1520 (2005).

[FN5]. See American Law Institute, INTERNATIONAL STATEMENT OF UNITED STATES BANKRUPTCY LAW 83 n.276 (2003) [U.S. LAW].

[FN6]. 11 U.S.C. § 1509(b)(2)-(3), (c) (2005).

[FN7]. American Law Institute, PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES (2003) [hereinafter "Principles"]. The Principles were developed as part of the Transnational Insolvency Project of the ALI, which includes volumes discussing the bankruptcy laws of each of the three NAFTA countries, each volume having been written and revised by leading experts from each of the countries.

[FN8]. See infra text at notes 40-43.

[FN9]. Chapter 15 had been well-established in the pending bankruptcy reform legislation by the time the Principles were adopted and the Principles in effect recommended its adoption by recommending adoption of the model law on which Chapter 15 is based. See infra text at notes 38-39.

[FN10]. See PRINCIPLES, supra note 7, at 23.

[FN11]. See 11 U.S.C. § § 1502, 1515, 1520 (2005); PRINCIPLES, supra note 7, Procedural Principles 4-5, 42-51 (stays).

[FN12]. For example, the PRINCIPLES take a small but important first step in addressing the problem of corporate groups. See Principles, supra note 7, Topic C,

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Subtopic 3.

[FN13]. See, e.g., Anne Nielson et al., The Cross-Border Insolvency Concordat: General Principles to Facilitate the Resolution of Cross-Border Insolvencies, 70 AM. BANKR. L.J. 533, 543 (1996). For a recent note arguing that it is time for a multinational bankruptcy treaty, see Peter J. Murphy, Why Won't The Leaders Lead? The Need For National Governments To Replace Academics And Practitioners In The Effort To Reform The Muddled World Of International Insolvency, 34 U. MIAMI INTER-AM. L. REV. 121 (2002).

[FN14]. 11 U.S.C. § § 1334, 1405.

[FN15]. See, e.g., In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005).

[FN16]. People in the rest of the world when referring to a business bankruptcy in the English language usually say "insolvency." See PRINCIPLES, supra note 7, at 1 note 2.

[FN17]. See PRINCIPLES, supra note 7, at 8.

[FN18]. See Lynn M. LoPucki, Cooperation in International Bankruptcy: A Post-Universalist Approach, 84 CORNELL L. REV. 696 (1999).

[FN19]. See Lynn LoPucki, Global and Out of Control?, 79 AM. BANKR. L.J. 79 (2005); Frederick Tung, supra note 1. See infra note 23.

[FN20]. See, e.g., Kent Anderson, The Cross-Border Insolvency Paradigm: A Defense Of The Modified Universal Approach Considering The Japanese Experience, 21 U. PA. J. INT'L ECON. L. 679 (2000); Lucian Arye Bebchuk & Andrew T. Guzman, An Economic Analysis Of Transnational Bankruptcies, 42 J.L. & ECON. 775 (1999); Silverman, supra note 1; Liza Perkins, Note, A Defense of Pure Universalism in Cross-Border Corporate Insolvencies, 32 N.Y.U. J. INT'L L. & POL. 787 (2000). See also Hannah L. Buxbaum, Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory, 36 STAN. J. INT'L L. 23, 60 (2000) (arguing for a single jurisdiction internationally following the logic of domestic practice); Lore Unt, Note, International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue, 28 Law & Pol'y Int'l Bus. 1037 (1997) (arguing that the answer is cooperation among decentralized courts in liberal states).

[FN21]. PRINCIPLES (passim).

[FN22]. See, e.g., Colloquium, International Bankruptcy, 98 MICH. L. REV. 2276 (2000).

[FN23]. It is precisely because Chapter 15 adopts universalism that it is so steadfastly opposed by Professor LoPucki. See LoPucki, supra note 19. Judge Bufford's response to Professor LoPucki's article quite effectively rebuts his arguments about universalism and the Model Law. Samuel L. Bufford, Global Venue Controls Are Coming: A Reply to Professor LoPucki, 79 AM. BANKR. L.J. 105 (2005). It is not possible nor necessary for me to say more on this occasion, having a different assignment. I will note, however, that the debates between Professor LoPucki and myself on this point go back a long way. See, e.g., Lynn M. LoPucki, The Trojan Horse in UNCITRAL, 33 BANKR. CT. DEC. (CRR) No. 25 at A5 (Mar. 30, 1999); Jay Lawrence Westbrook, Fearful Future Far Off, 33 BANKR. CT. DEC. (CRR) No. 25 at A5 (Mar. 30, 1999). His efforts to make the "center of main interests" test

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somehow impossible to apply have been refuted at length in the Michigan symposium cited in note 1. I look forward to discussing the European cases that he mentions another time, but I will point out that the anomalies in those cases arise from the problem of corporate groups, a problem neither the Model Law nor the Principles attempt to address in a complete way. Both of those texts begin to supply solutions to the overall problem. A journey of a 1000 miles begins with a single step.

[FN24]. 11 U.S.C. § 1502(4) (2005).

[FN25]. 11 U.S.C. § 101(23) [repealed 2005]. Section 304 did not use the "main/non-main" terminology, but the term "foreign proceedings" was meant to define proceedings in the debtor's home country. The definition of main proceeding is much more specific, being limited to its COMI rather than including alternatives like location of principal assets or "domicile."

[FN26]. See, e.g., Rizwaan Jameel Mokal & John Armour, The New UK Corporate Rescue Procedure--The Administrator's Duty to Act Rationally, (2004) 1(3) International Corporate Rescue 1.

[FN27]. See U.S. LAW, supra note 5, at 86.

[FN28]. The term "full" bankruptcy cases is used to distinguish a United States case under Chapters 7, 9, 11, 12, or 13 from an ancillary case under prior § 304 or the new Chapter 15.

[FN29]. U.S. LAW, supra note 5, at 83-87.

[FN30]. 11 U.S.C. § 1529 (2005).

[FN31]. See Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V., 310 F.3d 118 (3d Cir. 2002). For a discussion of the choice-of-law implications of Lernout, see Jay Lawrence Westbrook, Universalism and Choice of Law, 23 Penn. St. Int'l. L.J. ____ (2005) (forthcoming) (International Academy of Commercial and Consumer Law, 2004 meeting, Riga, Latvia).

[FN32]. Jay Lawrence Westbrook, Universal Priorities, 33 TEX. INT'L L.J. 27 at notes 64-69 (1998).

[FN33]. See Canadian S. Ry. v. Gebhard, 109 U.S. 527 (1883). See generally Hilton v. Guyot, 159 U.S. 113 (1895).

[FN34]. See, e.g., Cornfeld v. Investors Overseas Services, Ltd. 471 F. Supp. 1255 (S.D.N.Y. 1975). See generally Jay Lawrence Westbrook, Transnational Bankruptcy, in THE DEVELOPMENT OF BANKRUPTCY LAW IN THE SECOND CIRCUIT COURT OF APPEALS (1996).

[FN35]. See U.S. LAW, supra note 5, at 86.

[FN36]. See Jay Lawrence Westbrook, "U.S. Fights Bankruptcy 'Grab' Rule Alone," WALL ST. J. (January 29, 1988).

[FN37]. Such a group meets in a large formal hall with delegation placards, simultaneous translation, and all the rest, so it is not quite the sleeves-rolled-up, around-a-table meeting that the name suggests to a North American.

[FN38]. U.N. GAOR, 52nd Sess, U.N. Doc. A/Res./52-158 (1998). See Clift, supra note 1, at 308-09.

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[FN39]. National Bankruptcy Review Commission, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT at Vol. 1, Chap. 2, Part 3 (1997) [hereinafter NBRC REPORT].

[FN40]. H.R. REP., supra note 2.

[FN41]. A number of people contributed ideas to the drafting of Chapter 15, but Dan Glosband and I worked most closely with the staff in the drafting process.

[FN42]. The concern was especially cogent as to this point, because the EU Regulation, which governs multinational insolvency cases within the EU, uses the same jurisdictional phrase.

[FN43]. U.N. Tdbor Comm'n On Int'l Trade Law, 30th Sess., Art. 2(D), at 67- 73, U.N. Doc. A/CN.9/442 (1997) [hereinafter Guide]. The Guide and other useful information can be found at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (last visited July 29, 2005).

[FN44]. See H.R. REP., supra note 2, at 105-119.

[FN45]. See H.R. REP., supra note 2, at note 117. For example, the Chapter 15 provisions concerning the effects of opening a local bankruptcy could be construed as a preference for parallel rather than ancillary proceedings. 11 U.S.C. § 1529. The drafters did not intend such a change in United States law and did several things meant to avoid it.

[FN46]. These criteria have no effect in Chapter 15 except in the § 1507 context.

[FN47]. 11 U.S.C. § 1508 (2005).

[FN48]. Countries have varied greatly in the form of adoptions. Mexico and South Africa, for example, have adopted the Model Law almost word for word, but with a couple twists each. On the other hand, Japan has adopted the spirit of the Model Law but little of its language. See Westbrook, Chapter 15, supra note 1.

[FN49]. Ian Fletcher, International Insolvency in Transformation: United Kingdom Perspectives on Implementation of the European Union Regulation on Insolvency Proceedings in PROCEEDINGS OF THE GERMAN PROCEDURE ASSOCIATION (2002).

[FN50]. See generally Jay Lawrence Westbrook, The Multinational Provisions of the New Spanish Law, in ESTUDIOS SOBRE LA LEY CONCURSAL: LIBRO HOMENAJE A MANUEL OLIVENCIA (2005).

[FN51]. The EU Regulation establishes the rules for cooperation within the EU in multinational bankruptcy cases. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [Official Journal L 160 of 30.06.2000], http://europa.eu.int/scadplus/leg/en/lvb/133110.htm (last visited July 29, 2005).

[FN52]. Westbrook, Chapter 15, supra note 1.

[FN53]. Better still might have been amendment of the EU Regulation to include those not members of the "club," but that might have been unrealistic. Id.

[FN54]. Id.

[FN55]. See Guide, supra note 43, at 10.

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[FN56]. 11 U.S.C. § 1515 (2005). The foreign representative is given alternative methods of making this showing.

[FN57]. 11 U.S.C. § 1515(c) (2005). The Principles expand upon the disclosures that should be made. See PRINCIPLES, supra note 7, Procedural Principles 8 and 16, at 56, 68.

[FN58]. 11 U.S.C. § 1517 (2005).

[FN59]. Id. at § 1516.

[FN60]. Id. at § 1519.

[FN61]. Id. at § 1520.

[FN62]. See PRINCIPLES, supra note 7, Procedural Principle 4, Illustration 2; Procedural Principle 5: Reconciliation of Stays.

[FN63]. See also PRINCIPLES, supra note 7, Procedural Principles 8-9 (providing assistance in the form of information and discovery).

[FN64]. 11 U.S.C. § 1521 (2005).

[FN65]. Id. at § § 1521(b), 1522.

[FN66]. In re Board Of Directors Of Compañía General De Combustibles S.A., 269 B.R. 104 (Bankr. S.D.N.Y. 2001).

[FN67]. See LoPucki, supra note 18.

[FN68]. 11 U.S.C. § § 1528-29 (2005).

[FN69]. Id. at § 1528. It might sometimes reach assets in other countries, but only if those assets are not under the control of another court.

[FN70]. 28 U.S.C. § 1334(e) (1993).

[FN71]. 11 U.S.C. § § 1520(a), 1521(c).

[FN72]. Id. at § § 1525, 1529-1530. See Jay Lawrence Westbrook, The Duty to Seek Cooperation in Multinational Insolvency Cases, in ANNUAL REVIEW OF INSOLVENCY LAW 2004 (Canada) [hereinafter Duty].

[FN73]. Id. at § § 1525-1526. This authorization is the best example of the importance of a model law like this one that was developed by representatives of forty-odd nations, most of whom have civil law regimes. It is those regimes that might have the most reluctance to engage in this sort of direct communication and therefore the inclusion of these provisions has particular importance in civil-law countries. In general, one of the key contributions that UNCITRAL makes to the development and acceptance of better commercial laws around the world is the fact that it provides a forum in which experts can work through the requirements of many different legal systems. In that way, it also confers legitimacy on its results.

[FN74]. See MEXICAN STATEMENT, supra note 3, at 13.

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[FN75]. Duty, supra note 72.

[FN76]. See PRINCIPLES, supra note 7, Procedural Principle 10 and App. B. A major difficulty impeding cooperation and direct communication by Mexican courts was removed by its adoption of the model law providing statutory authorization for those activities. See Mexican Statement, supra note 3, at 111.

[FN77]. http://www.iiiglobal.org/international/guidelines.html.

[FN78]. 11 U.S.C. § 1501(c)(2) (2005).

[FN79]. In deference to the delegations who felt strongly about including natural persons, including those who might flee to the United States, the exclusion only applies to citizens and permanent residents of the United States. Thus, for example, a Canadian cannot nip down to Detroit for a proceeding that can evade the Chapter 15 rules.

[FN80]. If the woman living in Mexico in our example were a Mexican citizen and filed a full bankruptcy case in the United States despite an absence of substantial United States assets or other substantial justification for that case, the Principles call for dismissal of the case as an "abusive filing." See PRINCIPLES, supra note 7, Procedural Principle 6.

[FN81]. NBRC REPORT, supra note 39, at § 2.2.1.

[FN82]. Clift, supra note 1, at 309, 322.

[FN83]. § § 1521-1522.

[FN84]. 11 U.S.C. § 1509(c) (2005).

[FN85]. 11 U.S.C. § 1514 (2005).

[FN86]. The Rules Committee is working on several other interim rules it hopes to put in place before the October 17 effective date for Chapter 15. Other changes will go through the usual multi-year rules process before being adopted.

[FN87]. See PRINCIPLES, supra note 7, Procedural Principle 16.

[FN88]. See PRINCIPLES, supra note 7, Procedural Principle 21.

[FN89]. The Principles anticipate agreements that would permit claims to be adjudicated in each national court for the convenience of the litigants, with the result in country A being accepted as res judicata in country B. See PRINCIPLES, supra note 7, Procedural Principle 22.

[FN90]. 11 U.S.C. § 1505.

[FN91]. 384 F.3d 959 (8th Cir. 2004).

[FN92]. I have refrained from writing about this case previously, because I was involved in its early stages as counsel to a firm that brought a class action on behalf of the consumer victims of the company's collapse and flight to the Cayman Islands.

[FN93]. 384 F.3d at 962.

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[FN94]. Under § § 1515-1516, there would be a presumption that its jurisdiction of registration--there the Cayman Islands--was also its COMI, but the presumption would be easily overcome on facts like those in National Warranty.

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