HOW INSOLVENT MULTINATIONAL BUSINESSES SHOULD ADJUST TO CONGRESS'S CREATION: CHAPTER 15

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I. INTRODUCTION

A. *The Pace of Business Collapses Commerce into One Marketplace*

In the twenty-first century, business moves seamlessly and quickly over air, water, and land.[1] This sweeping connectivity

1. *See* Hu Jintao, President, People's Republic of China, Speech at UN Summit: Strive to Build a Harmonious World Where There Are Permanent Peace and Common

enables multinational corporations to blur geographical limitations[2] and brings every corner of the world within reach.[3] For example: Coca-Cola's bottling partners distribute Coca-Cola to roughly 850 million people from more than 170 plants on the African continent;[4] Rolling Stones fans from New Jersey to New Zealand can purchase concert tickets from the band's website twenty-four hours a day;[5] Nike conducts its sneaker and sports apparel operations across six continents;[6] and a few clicks of a mouse can move Chinese antique furniture out of inventory, onto a truck, then a ship, onto another truck, and finally to the New York art dealer who placed the order from his computer several thousand miles away from China.[7]

A multinational firm ("multinational"), operating like an octopus, can strategically spread its tentacles and conduct business through its subsidiaries.[8] Subsidiaries are located around the world to accumulate market share, generate revenue,

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Prosperity (Sept. 15, 2005), *in* BBC WORLDWIDE MONITORING ("[A]ll types of global and regional cooperation are thriving.... Mankind is developing and advancing at an unprecedented speed."); *see also* Shira J. Boss, *On the Clock, All the Time*, CHRISTIAN SCI. MONITOR, Sept. 25, 2000, at 11 (bankers, engineers and other white-collar employees, as well as factory workers and waitresses, now work in a "24-hour culture"); Stephen Roach, *Is America's Economic Dominance at an End?*, STANDARD (H.K.), Mar. 5, 2005, *available at* http://www.thestandard.com.hk/news_detail.asp?pp_cat=&art_id=4257&sid=&con_type=1&d_str=20050305&sear_year=2005 (noting that the process of globalization "now occurs at hyper-speed").

2. *See* Jintao, *supra* note 1 ("The further development of the trend of economic globalization has intertwined the interests of all countries and has made it such a way that the development of various countries is tied so closely to the development of the world that they cannot be separated.").

3. *See generally* David Uren, *Multinationals Dance to a Difficult New Tune*, WEEKEND AUSTRALIAN, Jan. 3, 1998, at 24 ("[Multinationals'] subsidiaries around the world dance[] to a tune orchestrated [by] their headquarters.... The new gospel of multinationals" requires global exposure.).

4. Press Release, Coca-Cola, Coca-Cola Ebony Festival Celebrates African Music and Commits to a New Vision for Africa (May 21, 2004), http://www2.coca-cola.com/presscenter/nr_20040521_africa_ebony_festival.html.

5. *See* Rolling Stones Tickets, https://tickets.rollingstones.com (last visited Sept. 23, 2006).

6. Nike Company Overview, http://www.nike.com/nikebiz/nikebiz.jhtml?page=3&item=facts (last visited Sept. 25, 2006).

7. *See, e.g.*, MingDragon.com, Online Wholesaler of Chinese Antique Furniture, http://www.mingdragon.com/index.asp (last visited Sept. 24, 2006); *see also* Boss, *supra* note 1 ("The 24-hour business day started with the Internet, and with international companies kept awake by the fact that every minute, somebody, somewhere is doing business.").

8. *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, 122 (2002) ("Recent technological developments in the fields of communication, travel, and e-commerce have greatly increased the ability of businesses to stretch their corporate structures, assets, and transactions across a multitude of borders.").

target demographics, develop product lines, and gain brand recognition.[9] With the added layer of e-commerce, multinationals and their subsidiaries are operating in a global arena that collapses commerce into one marketplace.[10]

B. *Global Business Collides with the Law*

A multinational can be subject to adverse economic factors and cyclical woes that stifle growth and profitability.[11] Inflation in South Africa,[12] bank scandals in China,[13] a recession in Argentina,[14] or a terrorist attacks in Indonesia[15] can disrupt or derail a country's economy and combining businesses.[16] Further, such negative occurrences curb profitability, investor confidence, and financial stability because businesses are not immune from an unstable geopolitical climate.[17] When any of these adverse

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9. Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 156 (2005) [hereinafter *Universalism Unravels*] (noting that General Motors, IBM, General Electric, Tyco, Ingersoll-Rand, Global Crossing, and Fruit of the Loom each have a "domestic parent company and numerous foreign subsidiaries. The foreign subsidiaries produce a substantial portion, if not most, of the group's revenues."); Christopher Lorenz, *Transnational Consequences*, FIN. TIMES (London), July 6, 1989, at I26 (reviewing CHRISTOPHER A. BARTLETT & SUMANTRA GHOSHAL, MANAGING ACROSS BORDERS (Harvard Business School Press) (1989)) (noting that Unilever, an Anglo-Dutch company, has been successful in "globalising" local innovations through the transfer of brand concepts from one country to another); William J. Holstein, *The Multinational as Cultural Chameleon*, N.Y. TIMES, Apr. 10, 2005, § 3, at 9 (quoting the CEO of a construction and industrial equipment making company as stating, "[t]he objective of any multinational is to appear to be local in their market while having the benefits of a global cost structure.").

10. Thomas L. Friedman, Editorial, *Foreign Affairs; Dear Dr. Greenspan*, N.Y. TIMES, Feb. 9, 1997, § 4, at 15 ("'[G]lobalization' [is] the integration of financial, information and trade networks to create a single, high-speed global marketplace . . . .").

11. *See infra* notes 12-15 and accompanying text.

12. Thabo Mbeki, President of South Africa, State of The Nation Address to Houses of Parliament (Feb. 6, 2004), *in* AFRICA NEWS, Feb. 2004 (noting that by 1994, South Africa had had over two decades of double-digit inflation and "three years of negative growth [during which] the economy and the wealth of the nation was shrinking . . . .").

13. Chris Buckley, *Limits on Loans Aim to Calm Markets: China Bank Regulator Plans Tighter Rules After Scandal*, INT'L HERALD TRIBUNE (Fr.), Feb. 8, 2005, at 11 (explaining that banking scandals in northeast China added to investor worries that bank "management failings may contribute to a new tide of unrecoverable debts in coming years . . . .").

14. Judy T. Gulane, *Fiscal Measures Include P116-Billion 'Pain Package'*, BUSINESSWORLD (Phil.), Sept. 10, 2004, at 3 ("Argentina, which fell into a recession between 1998 and 2002, posted negative GDP growths of -4.6% in 1999, -1.7% in 2000 and -7.0% in 2001.").

15. John Garnaut, *Bali Attack Hurts Indonesian Flows*, SYDNEY MORNING HERALD, Oct. 30, 2002, at 21 ("The Indonesian economy has been hurt by the terrorist attacks in Bali in mid-October 2002. . . . [E]quity investment flows show that investors have fled Indonesia.").

16. *See* Robert Westervelt, *Plastics Problems*, CHEMICAL WEEK, Oct. 17, 2001, at 29 (referring to worldwide economic weakness).

17. Robert Orr & Elizabeth Wine, *Accenture Cautious after Fall in Revenues*, FIN.

factors become a reality, liabilities begin to compound and a business's financial health becomes imperiled.[18] Like passengers on a sinking ship looking to stay afloat, businesses can grab a legal life preserver: bankruptcy.

There are many objectives in the body of bankruptcy law, but most significantly, bankruptcy provides a "fresh start."[19] Thus, bankruptcy allows a business to side-step a death sentence of infinite financial and operational hardship.

However, the administration of bankruptcy law can be complex. In contrast to the ease with which business moves across the world, bankruptcy law is only binding within a country's territory.[20] Therefore, as multinationals and subsidiaries operate on a global platform, each must thoroughly comply with the distinct, unique, and specific law of the country in which it operates.[21]

Disruption and unpredictability result when one subsidiary or any single tentacle becomes insolvent.[22] Conflicts of law arise because the insolvent multinational has assets and debts in multiple jurisdictions.[23]

Furthermore, because the law differs from one jurisdiction to

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TIMES (LONDON), Jan. 10, 2003, at 27 (stating that Accenture, the world's largest consulting firm, believed the unstable geopolitical climate at the time contributed to a continuing economic downturn and caused a lack of "risk taking" and investment for the consulting industry).

18. *See id.*

19. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 566 (2005) (noting that on the day President Bush signed the new bankruptcy bill into law, he remarked, "[The bankruptcy laws] give those who cannot pay their debts a fresh start.").

20. *See* Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 157 (2002) ("For an entity with significant operations in more than one foreign jurisdiction, the appropriate or likely place of primary bankruptcy jurisdiction will be unclear . . . ."); M. Cameron Gilreath, Comment, *Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad*, 16 EMORY BANKR. DEV. J. 399, 402-03 (2000) ("[S]ince the local insolvency laws of various nations differ, conflicts in international insolvencies as to what form the proper and equal treatment of parties must take can therefore be frequent and substantial.") (quoting RICHARD A. GITLIN & RONALD J. SILVERMAN, INTERNATIONAL INSOLVENCY AND THE MAXWELL COMMUNICATION CORPORATION CASE: ONE EXAMPLE OF PROGRESS IN THE 1990s, *in* INTERNATIONAL BANKRUPTCIES: DEVELOPING PRACTICAL STRATEGIES 7, 10 (Practicing Law Institute Series No. 628, 1992)).

21. *See* Kojo Yelpaala, *Strategy and Planning in Global Product Distribution - Beyond the Distribution Contract*, 25 LAW & POL'Y INT'L BUS. 839, 860 (1994) (stating that strategic planning and product distribution objectives in the global business environment are contingent upon "how effectively transnational practitioners comply with the laws of jurisdictions affected by the plan.").

22. *See id.* at 879-80.

23. *See* Gilreath, *supra* note 20, at 402-03.

the next, there are competing interests involved.[24] This reality produces a host of questions: Which country's law controls?[25] Are creditors in foreign jurisdictions at the mercy of local creditors?[26] Analogous to a house of cards, does the entire multinational fall or just the subsidiary? The purpose of this Comment is to explore the United States' method of resolving those issues caused by cross-border insolvencies.

C. *The Mechanics of Bankruptcy Law*

Once a bankruptcy petition is filed with a bankruptcy court, an automatic stay affords the debtor protection and prohibits any creditor from seizing the debtor's assets.[27] Simultaneously, the automatic stay maintains order among the numerous and well-informed creditors, who would otherwise engage in a "free-for-all" to attach their interest or claim to a debtor's assets.[28] In the United States, bankruptcy law is promulgated under federal law.[29] During administration of bankruptcy, courts ensure payment to creditors according to their legal priority while preserving the debtor's exempt property.[30] At the same time, bankruptcy flushes out fraudulent transfers,[31] resolves competing creditor disputes,[32] allows for updated payment plans,[33] and reaffirms debts.[34]

II. THE CURRENT STATE OF BANKRUPTCY LAW IN THE UNITED STATES

On April 20, 2005, the existing Bankruptcy Code was overhauled when President George W. Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") into law.[35] BAPCPA now serves as the controlling authority for any individual or corporation choosing

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24. *See id.*
25. *See* Lee, *supra* note 20, at 157.
26. *Id.* at 118, 157.
27. *See* 11 U.S.C.A. § 362 (2000 & West 2006) ("A petition filed under [the Bankruptcy Code] operates as a stay . . . .").
28. Gilreath, *supra* note 20, at 402.
29. *See* U.S.C.A. § 103 (2000 & West 2006); Jensen, *supra* note 19, at 485 (noting that the process of reforming the bankruptcy system involved tremendous "legislative legerdemain" and took approximately ten years to achieve).
30. *See* U.S.C.A. § 362(a); *see generally id.* § 507.
31. *See id.* § 548.
32. *See id.* § 507.
33. *See* FED. R. BANKR. P. 3015(g).
34. *See* U.S.C.A. § 524(k)(3)(J) (West 2006).
35. *See* Pub. L. No. 109-8, 119 Stat. 23; Jensen, *supra* note 19, at 566.

either to liquidate or reorganize.[36] It includes sweeping provisions for creditors, debtors, lawyers, and the courts.[37]

Admittedly, BAPCPA was primarily a response to individual filers who abused bankruptcy laws[38] and "gamed" the system.[39] In the past, many individuals sought bankruptcy protection from mounting consumer debt in the form of credit card liabilities.[40] The rate of filing was alarmingly high and the findings of Congress reflected a general sentiment to implement a new bankruptcy code.[41] After the November 2004 elections, BAPCPA was overwhelmingly passed by both Houses.[42]

However, BAPCPA's authority and applicability reached beyond individual bankruptcies because congressional effort simultaneously produced a new stand-alone chapter, Chapter 15, entitled "Ancillary and Other Cross-Border Cases" ("Chapter 15").[43] The new chapter is triggered when bankruptcy is declared by: (1) a multinational corporation incorporated in the United States; or (2) a foreign corporation with business

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36. H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89 ("The 'Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,' is a comprehensive package of reform measures pertaining to both consumer and business bankruptcy cases.").

37. *Id.* ("The purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.").

38. *Id.* at 3 ("[The] recent escalation of consumer bankruptcy filings does not appear to be just a temporary event, but part of a generally consistent upward trend. . . . Over the past decade, the number of bankruptcy filings has nearly doubled to more than 1.6 million cases filed in fiscal year 2004.").

39. Jensen, *supra* note 19, at 565-67 (noting that on the day BAPCPA was signed into law, President Bush stated, "[i]n recent years, too many people have abused the bankruptcy laws. . . . [T]he new law will also make it more difficult for serial filers to abuse the most generous bankruptcy protections. . . . The law will also allow us to clamp down on bankruptcy mills that make their money by advising abusers on how to game the system."); *see* H.R. REP. NO. 109-31, pt.1, at 2, 2005 U.S.C.C.A.N. at 89 ("[T]he proposed reforms respond to many of the factors contributing to the increase in consumer bankruptcy filings, such as lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system.").

40. Jensen, *supra* note 19, at 520 (reporting the argument of lawmakers opposing the Bankruptcy Reform Act of 1999 that "the increase in bankruptcy filings was due to the credit card industry itself, which, they claimed, actively solicits unsuspecting consumers through the mail with terms of easy credit . . . addicting debtors to this 'financial crack.'").

41. *See id.* at 556, 558 (indicating that the Administrative Office of the United States Courts reported that "as of June 2002 [bankruptcy filings] exceeded 1.5 million, which 'broke all records' and represented the 'largest number of cases ever filed in any 12-month period,'" and noting that during the 108th Congress, bankruptcy reform legislation was passed six times by the House and four times by the Senate).

42. *Id.* at 565-66 (stating that the Senate passed BAPCPA by a vote of 74 to 25 and the House passed it by a vote of 302 to 126).

43. *See* 11 U.S.C.A. §§ 1501-1532 (West 2005) (repealing 11 U.S.C. ch. 15 and scattered sections of 11 U.S.C.).

activities and assets in the United States.[44]

III. THE INGREDIENTS OF CHAPTER 15

A. *Background*

The language, purpose, and scope of new Chapter 15 can be traced back to the 1978 Bankruptcy Code ("1978 Code").[45] Section 304[46] from the 1978 Code set the foundation for United States' treatment of cross-border insolvencies.[47] The language of that section reflected a willingness by the United States to cooperate with foreign jurisdictions and their bankruptcy proceedings.[48] Despite the United States' cooperative push, progress proved to be "painfully slow."[49]

In response to the lack of progress, the United Nations Commission on International Trade Law ("UNCITRAL") developed a Model Law on Cross-Border Insolvencies ("Model Law")[50] to aid in achieving consistency, guidance, predictability, and active cooperation.[51] The Model Law, enacted in 1997[52], was:

> [D]esigned to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency. Those

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44. *See id.* § 1501(b); Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 715 (2005) [hereinafter *Chapter 15 at Last*] ("Obviously, [new Ch. 15] applies in every bankruptcy of a multinational corporation that is a United States corporation or a foreign corporation with United States assets or operations.").

45. *See* Gilreath, *supra* note 20, at 409 (explaining that the Bankruptcy Reform Act of 1978 was enacted with a provision to initiate and develop "international cooperation" for bankruptcies occurring in multiple jurisdictions).

46. All textual references to specific section numbers are designated as either the Bankruptcy Code of 1978 or the newly enacted Bankruptcy Code provisions in 11 U.S.C.A. §§ 1501-1532.

47. *Chapter 15 at Last*, *supra* note 44, at 720 ("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.").

48. *Id.* at 718.

49. *Id.* at 719.

50. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT (United Nations Commission on International Trade Law (UNCITRAL) 1997), http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf [hereinafter UNCITRAL MODEL LAW].

51. Gilreath, *supra* note 20, at 400-01 (explaining that the Model Law was "formulated . . . to address the many bankruptcy issues that arise in the global economy and to provide a way to standardize transnational bankruptcy cases.").

52. Lynn M. LoPucki, *Global and Out of Control?*, 79 AM. BANKR. L.J. 79, 86 (2005) [hereinafter *Global and Out of Control?*].

> instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.
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> . . . .
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> The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that help in several modest but significant ways.[53]

Fast-forwarding to BAPCPA, Congress imported the Model Law into Chapter 15.[54] The United States is not alone, as Japan, Mexico, Poland, Romania, and South Africa have at least adopted parts of the Model Law.[55]

Looking back, both § 304 from the repealed 1978 Code and prior case law are still relevant to the extent they enable courts to go outside of Chapter 15 to cooperate with foreign courts.[56]

B. *Foundation of the Model Law*

The Model Law appropriately incorporates universalism[57] instead of the short-sighted territorialism approach.[58] Multinational corporations operate on a global scale, blurring territorial boundaries,[59] but territorialism only administers the local law of the forum in which the bankruptcy occurs.[60] As a

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53. *See* UNCITRAL MODEL LAW, *supra* note 50, at pt. 2, § 1, ¶¶ 1, 3.

54. H.R. REP. NO. 109-31, pt. 1, at 105 (2005) *as reprinted in* 2005 U.S.C.C.A.N. 88, 169 ("[The] new chapter [of] the Bankruptcy Code .... incorporates the Model Law on Cross-Border Insolvency to encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases.").

55. *See Chapter 15 at Last*, *supra* note 44, at 720.

56. *Id.*

57. *See Universalism Unravels*, *supra* note 9, at 143; Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 8 (2002) [hereinafter *Multinational Enterprises in General Default*] ("[T]he expansion of global markets and of global ideas has moved [insolvency law] in the direction of universalism. In the United States, universalism is very generally accepted.") (footnote omitted).

58. Gilreath, *supra* note 20, at 406 ("[T]he territoriality approach 'rejects, if not contravenes, the principle of creditor equality' .... and refus[es] to recognize the interests of other jurisdictions.") (quoting Charles Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of the United States*, 66 AM. BANKR. L.J. 135, 136 (1992)).

59. *See supra* notes 1-10 and accompanying text.

60. *Multinational Enterprises in General Default*, *supra* note 57, at 5 ("Territorialism contemplates [seizure of] local assets and ... with little or no regard for foreign proceedings.... In this approach, national sovereignty imposes the law of the sovereign on all within its territorial reach ....").

result, local creditors unjustly benefit because territorialism does not account for the rights of creditors outside the local forum.[61]

Given the global nature of twenty-first century businesses, there is a need for the law to adapt to business,[62] and universalism meets this demand. First, universalism accounts for all creditors because it is premised on the idea that "bankruptcy proceedings will attach to the debtor rather than the locale. . . . This creates one central proceeding and one applicable law."[63] With these assumptions in play, all creditors (local and foreign) can expect a "fair share" because all courts administer the recognized substantive law.[64] Universalism underpins Chapter 15,[65] meaning the United States has attempted to meet the requisite balance where the law is in harmony with the global speed of business.

IV. HYPOTHETICAL: WILLY'S WORLDWIDE WIDGETS, INC.

The purpose of this Comment is to suggest how relief would be administered to a multinational business under Chapter 15 when a multinational commences bankruptcy proceedings worldwide; therefore, this Comment will incorporate the use of a hypothetical multinational corporation, Willy's Worldwide Widgets, Inc.

Willy Smith worked as a salesman at Texas Local Supplies for twenty years. During his employment, Willy learned how to make widgets, how to sell widgets, and how to handle customer questions and complaints. Over time, Willy also witnessed a technological revolution at work—one that automated many widget-producing operations, tracked inventory, traced customer complaints, and computed financial data. Believing he developed

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61. Gilreath, *supra* note 20, at 406 ("Territoriality limits the proceedings to the property within the jurisdiction, with no extraterritorial results. . . . [L]ocal creditors can benefit from this because they do not have to adjudicate abroad and will have the benefit of local law . . . ."); *see also* Lee, *supra* note 20, at 118 ("Critics of [territorialism] argue that it is protectionist and that in cross-border insolvencies it leads to preferences for local creditors over other creditors of the debtor.").

62. *Multinational Enterprises in General Default*, *supra* note 57, at 8 ("[A] globalizing market requires a globalizing insolvency law; that is, as the market moves toward global dimensions, insolvency law must also become steadily more global.").

63. Gilreath, *supra* note 20, at 407 (footnotes omitted).

64. *Id.*

65. *Universalism Unravels*, *supra* note 9, at 143 ("The Model Law makes universalism the foundation of the United States' international bankruptcy policy."); *see also Multinational Enterprises in General Default*, *supra* note 57, at 18-19 ("Chapter 15 tracks the Model Law from start to finish. The drafters even maintained the numbering of the original law, so that section 1501 of Chapter 15 adopts article 1 of the Model Law and so on.").

the expertise to open up his own business, Willy left Texas Local Supplies in December 2003.

At the beginning of 2004, Willy qualified for a small business loan from Big Bank, a Delaware corporation. Willy then hired a lawyer to see that his company, Willy's Widgets, Inc., complied with all state and federal laws. After getting the green light from his attorney, Willy began making and selling widgets in southwest Texas. Soon after, Willy's Widgets was booming and began taking orders from all over the country. By word of mouth, Willy's reputation grew and his widgets became the industry standard.

Willy also believed the industry was going to change because he first saw the advent of e-commerce at his old job. Willy believed through the internet his business could meet the demands of any customer from anywhere in the world.

With unrestricted ambition to go global, Willy employed an internet platform and electronic database at his headquarters in Houston, Texas to handle electronic orders. He borrowed more money from Big Bank to finance the electronic platform of his business and changed the name of his business to Willy's Worldwide Widgets, Inc. Orders began to trickle in from beyond the United States, specifically from Mexico and Canada. Willy recognized the demand for his widgets in those countries and wanted to bridge any gap between his product and the customer. He therefore set up subsidiaries in Mexico and Canada to give customers both immediate access to sales representatives as well as the ability physically to touch and see the products.[66] Willy believed this was the best way to grow his business.[67] At the same time, Willy found it easier to borrow from the local banks in those countries. Willy expanded his subsidiaries by leveraging growth through loans.

As Willy's reputation grew in North America, many other industries took notice. Builders, contractors, and venture capitalists from Japan placed orders. Parties in Australia and South Africa also looked to Willy's company for widgets. The quality of widgets and customers made Willy's Worldwide Widgets, Inc. a household name. Following his vision in Mexico and Canada, Willy set up subsidiaries in Japan, Australia, and South Africa. Willy also continued to borrow from local banks

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66. *See* Holstein, *supra* note 9, at 9 (explaining that one benefit of a multinational is that it can sell through the "veil" of local or other brand names to lessen the chance that a customer will question who owns the company; for example, when American goods are sold in Germany, the customers deal with Germans instead of Americans).

67. *See id.* ("The objective of any multinational is to appear to be local in their market . . . . You have to be French in France.").

and local investors in each country.

However, the blistering pace of Willy's business flooded the market with widgets, as Willy's widgets, coupled with existing local competitors, saturated the industry. Orders began to decrease, and one by one, each subsidiary began to collapse for one reason or another. As a result, Willy's headquarters reflected a declining profit line as the interest on his short-term and long-term debts rose rapidly. Further complicating his financial health, many of his debts were scheduled to mature within the next month.

In financial despair and with mounting debts, Willy called his chief counsel, who recommended Willy's Worldwide Widgets, Inc. file for bankruptcy. Although Willy had poured his heart and soul into his business, he knew bankruptcy would allow him to survive these financial hardships.

Counsel informed Willy that Chapter 15 of BAPCPA would govern bankruptcy proceedings where creditors, trustees, and other interested parties from around the world would seek relief in the United States. This Comment now illustrates how relief, procedurally and substantively, would be obtained under Chapter 15.

V. THE WORLD-WIDE BANKRUPTCY UNDER CHAPTER 15

A. *Old Guard: Section 304*[68]

In the past, when bankruptcy proceedings commenced in foreign jurisdictions, foreign representatives[69] incurred unpredictability and failure, at times, when trying to reach a debtor's assets in the United States.[70] This reality was a product of poorly-defined procedures for U.S. courts under the repealed Bankruptcy Code.[71] Section 304 governed foreign insolvency proceedings with a sound purpose, but its actual application has proved difficult.[72] Because its "metes and bounds" were

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68. All references to the Bankruptcy Code in this Part V.A. are to Chapter 15 in 11 U.S.C. 2000, which was repealed by the new Chapter 15 in 2005.

69. For purposes of this Comment, the terms "foreign representatives" and "representatives" are inclusive of trustees and creditors from jurisdictions outside the United States.

70. *See* Lee, *supra* note 20, at 123-24 (discussing comity between domestic and foreign courts though they reach different results).

71. *See id.*

72. *Id.* at 115 (stating that § 304 provided more challenges for U.S. bankruptcy courts than originally considered by the scholars and practitioners who sought out the section's enactment).

unclear,[73] bankruptcy courts "define[d] the limits of their own power under § 304 . . . ."[74] This judicial autonomy produced inconsistent and unfair results.

For example, in refusing to recognize a liquidation proceeding from the Cayman Islands under § 304,[75] a U.S. bankruptcy court held: (1) the Cayman Islands' law was "too loose" to create a sufficient foreign proceeding; (2) there was a lack of oversight from any government authority; and (3) the voluntary liquidation "was not a judicial proceeding because the liquidator operated free from supervision or control of the Cayman court."[76] Therefore, foreign representatives could not obtain relief in the United States under § 304 because a court's recognition of a foreign proceeding was needed to trigger its application.[77]

Remarkably, there was a different outcome in a similar liquidation arising in the Cayman Islands.[78] An insurance company transferred its remaining assets to the Cayman Islands just before liquidation proceedings began and filed a § 304 petition to block all actions that might have been brought by creditors.[79] In response, class-action creditors objected to the effect of a § 304 petition that would have rendered their claims worthless.[80] Nonetheless, the U.S. court recognized the foreign proceeding[81] even though the United States had previously faulted the Cayman Islands' procedure of conducting voluntary winding ups "without any regulatory oversight and virtually no creditor participation."[82]

No matter how the bankruptcy courts tried to parse the two proceedings, it became clear that courts had great unchecked

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73. *Id.* ("The general purpose of § 304 . . . is clear, but its metes and bounds are not.").

74. *Id.*

75. *In re* Tam, 170 B.R. 838, 839 (Bankr. S.D.N.Y. 1994).

76. Lee, *supra* note 20, at 129-30.

77. *See id.* at 128 ("[A]s a predicate to the invocation of the power of the bankruptcy courts under § 304, it might be expected that the determination of what constitutes a foreign proceeding would be an important threshold consideration."); *see also In re Tam*, 170 B.R. at 846.

78. *See* Hoffman v. Bullmore (*In re* Nat'l Warranty Ins. Risk Retention Group), 384 F.3d 959, 962 (8th Cir. 2004) (upholding the bankruptcy court's finding that the Cayman Islands proceeding was a § 304 foreign proceeding); *see also Chapter 15 at Last*, *supra* note 44, at 727-28.

79. *Hoffman*, 384 F.3d at 961.

80. *See id.* at 963-64; *Chapter 15 at Last*, *supra* note 44, at 728.

81. *Hoffman*, 384 F.3d at 964 (allowing the liquidation under § 304).

82. *In re Tam*, 170 B.R. at 843; *see also* Lee, *supra* note 20, at 130-31 (noting that the bankruptcy court later distinguished its holding in *In re Tam* from a Zambian case, *In re Ward*, 201 B.R. 357 (Bankr. S.D.N.Y. 1996)).

discretion under § 304, and that inconsistent and unpredictable results were likely to follow.

Under the 1978 Code, once a proceeding was recognized, relief was not automatic because numerous guidelines under § 304(c) had to be followed.[83] Procedurally, a foreign representative could file a petition for recognition with a U.S. court under § 304(a), but the remedies a court could grant under subsection (b) were ultimately subject to subsection (c).[84]

A court could enjoin commencement of an action only after accounting for six considerations under § 304(c).[85] The court had to ensure that any subsection (b) action was in harmony with subsection (c)'s purpose to achieve "an economical and expeditious administration."[86] As noted before, the manner in which to achieve this purpose was not clear.[87]

First, there was a lack of priority among the enumerated list of considerations under § 304(c).[88] Then confusion followed as the Second Circuit held that comity should be the "ultimate consideration" among the six factors[89] but simultaneously held other considerations under § 304(c) could support a court's decision.[90] Therefore, the Second Circuit's holding opened the door for other courts to trump comity. As a result, courts have a range of reasons under which to grant or deny relief.[91]

Lastly, relief under § 304(b) was typically limited to an injunction freezing judicial proceedings and creditor seizures of U.S. assets.[92] Furthermore, distributions of assets were not available.[93] Just as alarming, "[t]he filing of a § 304 petition [did] not invoke the automatic stay provision of the Code. All relief under § 304 [had to] be expressly ordered by the

83. *See* 11 U.S.C. § 304(c) (2000) (repealed 2005).

84. *See id.* § 304(a)-(c).

85. *See id.* § 304(c).

86. *Id.*

87. *See supra* notes 72-74 and accompanying text.

88. *Id.* at 116-17.

89. *Id.* at 125 (citing Bank of New York v. Treco (*In re* Treco), 240 F.3d 148, 156 (2d Cir. 2001)).

90. *Id.* ("The Second Circuit said that while comity is the ultimate consideration in granting relief under § 304, it does not automatically override the other factors listed in § 304(c).").

91. *Id.* at 116-17 ("The bankruptcy courts are free to grant relief or deny any relief in respect to a foreign proceeding. Subsection (c) of § 304 provides the principles by which the bankruptcy courts are to be 'guided' in exercising their discretion whether to grant relief."); *see also Hoffman*, 384 F.3d at 962-63 (enumerating the factors under § 304(c) that "guide the court in their determination of whether to grant § 304 relief.").

92. *See Chapter 15 at Last*, *supra* note 44, at 717.

93. *Id.*

bankruptcy court."[94]

Because § 304 did not curb or define a bankruptcy court's power,[95] a "discretionary scheme"[96] existed which created unpredictability for its participants.[97] When relief could not be obtained, creditors' claims were worthless because they could not repossess assets that had been pledged as collateral to secure an extension of credit or an issuance of debt.[98]

Alternatively, under new Chapter 15, U.S. courts do not have to overcome statutory hurdles and are not restricted to granting limited forms of relief.[99] Instead, Chapter 15 reflects the goals of the Model Law: (1) "promoting more efficient cooperation between jurisdictions"; (2) "aid[ing] in the recognition of foreign proceedings"; and (3) "promot[ing] access to foreign proceedings by estate representatives."[100]

B. *New Guard: Chapter 15*

Chapter 15 was formulated under the Model Law with the intent to further cooperation between U.S. and foreign courts, trustees, examiners, debtors, and creditors.[101] To achieve this purpose, Chapter 15 provides for the recognition of a "foreign main proceeding" among the numerous jurisdictions involved in a worldwide bankruptcy[102] and prescribes specific forms of relief based upon this distinction.[103] Relief under Chapter 15 is administered when:

> (1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding;
> (2) assistance is sought in a foreign country in connection with a case under [BAPCPA];

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94. Lee, *supra* note 20, at 138 (footnote omitted).

95. *See id.* at 115 (explaining that as a result of the statute's ambiguity, bankruptcy courts were compelled "to define the limits of their own power under § 304").

96. *Id.* at 116.

97. *See id.* at 115.

98. *See* BLACK'S LAW DICTIONARY 278 (8th ed. 2004) (defining collateral as "[p]roperty that is pledged as a security against a debt").

99. This is because Chapter 15 tracks the Model Law, which eliminated these problems. *See* Gilreath, *supra* note 20, at 416.

100. *Id.* (footnotes omitted).

101. 11 U.S.C.A. § 1501(a)(1) (West 2005).

102. *See id.* § 1517(b)(1) (directing a U.S. court to recognize a foreign main proceeding).

103. *See id.* § 1520 (enumerating the effects of recognizing a foreign main proceeding).

(3) a foreign proceeding and a case under [BAPCPA] with respect to the same debtor are pending concurrently; or

(4) creditors . . . in a foreign country have an interest in . . . a case or proceeding [under BAPCPA].[104]

C. *Triggering Chapter 15*

The first requisite in seeking relief under Chapter 15 is filing a petition for recognition.[105] In contrast to overcoming statutory criteria as seen under § 304, the scope, procedure, and breadth of Chapter 15 are intended to make the process generally "fast and inexpensive."[106]

Section 1515 lays out the components of a petition, which include a certified copy of a foreign proceeding's decision and appointment of a foreign representative; however, other evidence can be submitted to establish the existence of a foreign proceeding and appointment of the foreign representative[107] so long as it is "acceptable to the court."[108] Furthermore, under § 1516, the petition is filed based on a couple of underlying assumptions. First, a petition and any accompanying documents may be assumed to be authentic even in the absence of legalized documentation.[109] Second, a U.S. court is entitled to assume the existence of a foreign proceeding and foreign representative when provided with a certificate to that effect as required by § 1515(b).[110] By not requiring proof or remedial action to prove authenticity, the presumptions increase the speed at which a petition is reviewed, and avoids transactional costs that would have been incurred to prove authenticity.[111]

In the hypothetical above, as bankruptcy proceedings

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104. *Id.* § 1501(b). A "case under [BAPCPA]" refers to the filing of a Ch. 7 liquidation, a Ch. 11 reorganization, or any other case under BAPCPA.

105. *See id.* § 1504.

106. *Chapter 15 at Last*, *supra* note 44, at 721.

107. *See* 11 U.S.C.A. § 1515(b)-(c).

108. *E.g.*, *In re* Artimm, 335 B.R. 149, 158 (2005) (accepting "a certified copy of the decision commencing the insolvency case in Rome and appointing the representative").

109. 11 U.S.C.A. § 1516(b).

110. *Id.* § 1516(a).

111. Gilreath, *supra* note 20, at 401 (noting that in light of the "duplication of expenses and litigation" resulting under the old law, the Model Law has created provisions to ease the administration of worldwide bankruptcy proceedings); *Chapter 15 at Last*, *supra* note 44, at 726 (stating the recognition of a petition under the new process should be "faster and cheaper"); *Multinational Enterprises in General Default*, *supra* note 57, at 14 ("Recognition of a foreign representative [in the absence of the Model Law] is presently a long and expensive process in many countries.").

commence in Canada, Mexico, Japan, South Africa, and Australia, creditors on behalf of local banks or trustees from these bankruptcy proceedings would try to reach the assets of Willy's Worldwide Widgets, Inc. ("WWW, Inc.") in the U.S. Here, each creditor or trustee would obtain some type of documentation or decision that recognizes that WWW, Inc. is bankrupt in the respective jurisdictions and that the petitioning party is qualified to be a foreign representative.[112] If a copy of the foreign court decision could not be obtained in this context, then "any other evidence" could be submitted that would substantiate WWW, Inc.'s bankruptcy.[113] The phrase "any other evidence" provides great latitude so long as the court is satisfied with such evidence.[114] Again, the presumptions afforded by § 1516 would aid creditors of WWW, Inc. because there is no need to overcome rigorous statutory criteria and burdens of proof.[115]

Lastly, the petition must disclose every bankruptcy proceeding, commenced or pending, that is known to the foreign representative.[116] For our purposes, any petition would disclose the bankruptcies filed or conducted against WWW, Inc. in Canada, Mexico, Japan, South Africa, and Australia. This disclosure of all proceedings involving WWW, Inc. is required because when a U.S. court recognizes a foreign proceeding from these countries, it must also designate it as either: (1) a foreign *main* proceeding; or (2) a foreign *non-main* proceeding.[117] Just as importantly, forms of relief are contingent upon the initial recognition.[118]

1. Relief While the Petition Is Pending

Whether or not a foreign proceeding is ultimately designated as a main or non-main proceeding, § 1519 provides emergency relief to protect the debtor's assets and creditors' interests *while* a U.S. court reviews the petition for recognition.[119] Subsection

112. *See* 11 U.S.C.A. § 1515(a)-(b); *see e.g., In re Artimm*, 335 B.R. at 158.

113. *See* 11 U.S.C.A. § 1515(b)(3).

114. *Id.*

115. *See supra* note 111 and accompanying text.

116. *Chapter 15 at Last*, *supra* note 44, at 722 ("A disclosure is . . . required of all proceedings involving the same debtor pending in other countries.").

117. 11 U.S.C.A. § 1517(b); *see Chapter 15 at Last*, *supra* note 44, at 722 ("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.").

118. *See* 11 U.S.C.A. § 1521(a)-(c) (detailing the possible relief measures that can be granted once a foreign proceeding is recognized as such by the court).

119. *See id.* § 1519 (specifying the forms of relief available from the time of filing a petition for recognition until the court rules on the petition).

(a) recognizes the need to preserve the value of an asset, which otherwise, in select "circumstances"[120] may ultimately become worthless by the time a court's decision is made. This foresight preserves the interests of creditors, because when assets significantly lose their value or become of inconsequential value, a creditor's claim becomes worthless as a debt remains unpaid.

Furthermore, a foreign *non-main* proceeding is not entitled to an automatic stay,[121] but the language of subsection (a)(1) allows for "staying the execution against the debtor's assets" until such a decision is made by the court.[122] Section 1519 thus reinforces the chapter's foresight to protect the value of assets and interests of creditors by preserving an asset's value. However, once a petition for recognition is granted, any relief obtained under § 1519 ceases; therefore, § 1519 provides only "provisional" relief.[123]

While the petition sits on the court's desk, a foreign representative would most likely seek some type of emergency relief under § 1519.[124] Here, a representative's purpose is to safeguard the value of WWW, Inc's assets while proceedings are pending and until distributions commence. A court order can provide emergency relief in the following ways to achieve this purpose: (1) "entrust" debtor assets to the foreign representative or anyone else authorized by the court;[125] (2) "suspend[] the right to transfer, encumber, or otherwise dispose of any assets";[126] (3) divulge information regarding the debtor's "assets, affairs, rights, obligations or liabilities;"[127] or (4) apply provisions of an injunction.[128] The primary form of relief would be a

120. *Id.* § 1519(a)(2) (indicating that relief can be granted "to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy . . . .").

121. *Chapter 15 at Last*, *supra* note 44, at 723.

122. 11 U.S.C.A. § 1519(a)(1).

123. *See id.* § 1519(b). However, the relief would not terminate if extended under § 1521(a)(6). *Id.*

124. *Multinational Enterprises in General Default*, *supra* note 57, at 15 ("[T]he Model Law [which Chapter 15 embodies] permits a foreign representative to apply for temporary emergency relief while an application for recognition is pending."); *see* UNCITRAL MODEL LAW, *supra* note 50, at Art. 19 ¶ 1, no. 137 ("[R]elief of a collective nature may be urgently needed already before the decision on recognition in order to protect the assets of the debtor and the interests of the creditors. Exclusion of collective relief would frustrate those objectives. On the other hand, recognition has not yet been granted and, therefore, the collective relief is restricted to urgent and provisional measures.").

125. *See* 11 U.S.C.A. § 1519(a)(2).

126. *Id.* § 1521(a)(3); *see also id.* § 1519(a)(3) (authorizing relief outlined in § 1521(a)(3),(4), and (7)).

127. *Id.* § 1521(a)(4); *see also id.* § 1519(a)(3).

128. *See id.* § 1519(e); H.R. REP. NO. 109-31, pt. 1, at 114 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 177 ("Subsection (e) makes clear that [§ 1519] contemplates injunctive

representative's request to have the asset physically transferred to him/her or some other entity approved by the court, to make certain the asset does not diminish in value.[129]

2. Relief in a Foreign Main Proceeding

a. Recognition as a Foreign Main Proceeding and the "Center of Main Interests" Problem

Once a U.S. court reviews and decides that the petition satisfies § 1515 requirements for recognition of a foreign proceeding,[130] § 1517 then instructs that court to recognize the foreign proceeding as either a foreign *main* proceeding or a foreign *non-main* proceeding.[131] The recognition of the foreign main proceeding hinges entirely upon the debtor's center of main interests ("COMI").[132] However, it is unclear what (debtor's residence, domicile, principal place of business, or principal assets) and when (at the time of filing or at the time the business was solvent) qualifies as COMI.[133] As a result, there is opportunity for a corporation or subsidiary to "quickly and easily relocate," resulting in easy forum-shopping.[134]

For example, in 1999, Singer, N.V. ("Singer NV"), manufacturer of the Singer sewing machine, had its bankruptcy recognized in the United States even though at the time: (1) Singer NV's place of incorporation was the Netherlands Antilles; (2) Singer NV's headquarters were located in Hong Kong; and (3) seventy-five percent of Singer NV's employees were in Asia, Europe, Africa, and the Middle East.[135] Prior to filing bankruptcy in the U.S., Singer NV created a new corporation, Singer USA LLC ("Singer USA").[136] All Singer NV assets were transferred to and all liabilities were guaranteed by Singer USA.[137] "Singer's strategy was to replace the Netherlands Antilles corporation with a newly minted U.S. one and bankrupt

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relief and that such relief is subject to specific rules and a body of jurisprudence.").

129. *See* 11 U.S.C.A. § 1519(a)(2).

130. *See generally id.* § 1515.

131. *See id.* § 1517(b).

132. *Id.*

133. *See Universalism Unravels*, *supra* note 9, at 151; *see also* Lee, *supra* note 20, at 183 (stating the concept of COMI lacks "precision").

134. *Global and Out of Control?*, *supra* note 52, at 101.

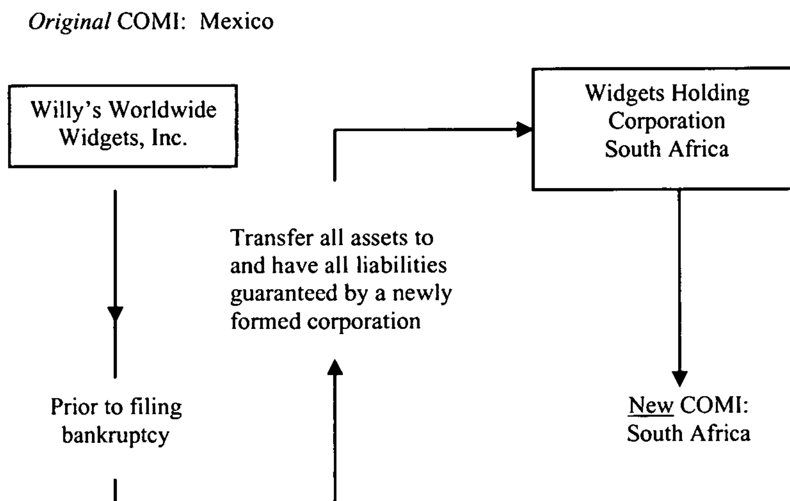
135. *Id.* at 98 ("By whatever standard one applie[s], Singer [is] no longer an American firm.").

136. *Id.*

137. *Id.* at 98-99 ("Thereafter, Singer NV's sole asset would consist of its equity interest in Singer USA.").

the new corporation immediately."[138] The strategy succeeded, because a New York bankruptcy court approved the plan.[139]

Similar to Singer NV, WWW, Inc. could change its place of incorporation[140] in the following manner:[141]



After finding a jurisdiction with the most relaxed and favorable bankruptcy laws, WWW, Inc. could create a new corporation, in South Africa, for example.[142] The new corporation would own every existing asset and guarantee every liability of the original company, WWW, Inc. This new corporation would be recognized as the COMI because under the Model Law, "a [corporate] debtor's registered office . . . is presumed to be the center of the debtor's main interests."[143] Here, WWW, Inc.'s registered office would be in South Africa. Therefore, when a foreign representative from South Africa seeks relief in the U.S., South Africa would be the foreign *main* proceeding and that representative would be afforded the far-reaching forms of relief under § 1520. But if South Africa's bankruptcy laws are relaxed,

138. *Id.* at 99.

139. *Id.*

140. *See id.* ("Under both the EU regulation and the model law, changing home countries in anticipation of bankruptcy is fair game.").

141. *See generally id.* at 98-99 (analogizing the hypothetical in this Comment to Singer's transactions as illustrated by the flowchart in LoPucki's article).

142. Murphy, *supra* note 8, at 134 (stating that before adoption of the Model Law, a country can modify its form and opt out of its provisions). South Africa in particular adopted the Model Law after making a few significant changes to its provisions. *Id.*

143. Lee, *supra* note 20, at 183; *see* 11 U.S.C.A. § 1516(c) (West 2005).

the South African representative may not seek relief so as to operate the business or place a freeze on WWW, Inc.'s ability to dispose of assets. Thus, changing COMI to a country with relaxed bankruptcy jurisprudence creates an opportunity for businesses such as WWW, Inc. to hide, dispose of, and transfer assets for its own financial gain. There is no provision prohibiting such a change "on the eve of bankruptcy or authorizing the court to ignore such changes."[144]

However, there appears to be a check on this type of behavior in the language of § 1516(c), because the presumption of the debtor's COMI could vanish if the court is presented with "evidence to the contrary."[145] Therefore, when facts suggest or reveal a different COMI than the one presented in the petition, the burden falls on the foreign representative to establish the debtor's COMI to the court's satisfaction.[146] The court's ability to consider evidence in this context means parties cannot freely manipulate COMI. Otherwise, if COMI could strategically change without restriction, creditors would face more expensive and arduous bankruptcies. In some instances, creditors may not be able to obtain assets, relief, or any distributions.[147]

The principles and language of the Model Law, embodied in Chapter 15, allow for "speed and convenience" in international bankruptcies,[148] but if unchecked, entities could unfairly take advantage of these presumptions. Fortunately, § 1516(c) prevents such acts and ensures the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities."[149]

b. Relief

Once the debtor's COMI is established and a foreign proceeding is recognized as a foreign *main* proceeding, § 1520 prescribes the following forms of relief:

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144. *Global and Out of Control?*, *supra* note 52, at 99-100.

145. 11 U.S.C.A. § 1516(c) ("In the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests.").

146. H.R. REP. NO. 109-31, pt. 1, at 112 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 175 ("The ultimate burden as to each element is on the foreign representative, although the court is entitled to shift the burden to the extent indicated in [§] 1516.").

147. *See supra* notes 76-77 and accompanying text (stating that creditors were subject to Cayman Islands' jurisdiction that lacked supervision and oversight).

148. H.R. REP. NO. 109-31, pt. 1, at 113, 2005 U.S.C.C.A.N at 175 ("The presumption that the place of registered office is also the [COMI] is included for speed and convenience of proof when there is no serious controversy.").

149. 11 U.S.C.A. § 1501(a)(3) (West 2005).

i. An automatic stay on the debtor's property "that is within the territorial jurisdiction of the United States."[150]
ii. Relief necessary to ensure adequate protection the debtor's property "that is within the territorial jurisdiction of the United States."[151]
iii. Operation of the debtor's business and exercise of the rights and powers of a trustee by a foreign representative to: (1) sell, use, or lease property; and (2) satisfy security interests after bankruptcy is filed.[152]
iv. "Commence[ment] [of] an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor."[153]
v. Commencement by a foreign representative of a Chapter 7, Chapter 11, or any other action under any chapter of BAPCPA.[154]

The benefit now comes in specific and exact forms of relief, which the repealed Code lacked.[155] Under the old regime, courts and representatives had to overcome aforementioned § 304(c) criteria before effectuating any of the limited forms of relief under § 304(b).[156] Instead, Chapter 15 provides "a wide range of relief" that guides all parties with precision.[157]

Furthermore, Chapter 15 restricts effects of the automatic stay and adequate protection only to U.S. territorial jurisdiction for the following reason:

> [W]hen a United States court recognizes a main

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150. *See id.* § 1520(a)(1) (applying § 362 regarding the automatic stay to foreign main proceedings under § 1520); *see* 11 U.S.C. § 362 (2000 & West 2006); 11 U.S.C.A.§ 1502(8) (West 2005) (defining "within the territorial jurisdiction of the United States" as "tangible property located within the territory of the United States and intangible property deemed under applicable nonbankruptcy law to be located within that territory").

151. 11 U.S.C.A. § 1520(a)(1) (applying § 361 regarding "adequate protection" to foreign main proceedings under § 1520); *see* 11 U.S.C. § 361 (2000 & West 2006).

152. *See* 11 U.S.C.A. § 1520(a)(3) (authorizing a foreign representative to exercise rights under §§ 363 and 552); 11 U.S.C. § 363(b) (2000 & West 2006) (describing a trustee's permitted actions in the use, sale, or lease of estate property); U.S.C. § 552 (describing the effect of the bankruptcy petition on the debtor's pre-petition security agreements).

153. 11 U.S.C.A. § 1520(b).

154. *See id.* § 1520(a), (c).

155. *Chapter 15 at Last*, *supra* note 44, at 721 (contrasting the lack of recognition of a foreign proceeding under § 304 with Chapter 15, which provides for recognition plus specific forms of relief).

156. *See supra* text accompanying notes 83-87.

157. *Chapter 15 at Last*, *supra* note 44, at 722 ("If recognition is granted, a wide range of relief is available to the foreign representative.").

> proceeding in Canada, the automatic stay that issues under [§] 1520 . . . 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. In that way, the two courts will not come into conflict and the parties will not be subject to two different injunctive regimes.[158]

Therefore, the restriction in this regard ensures international cooperation, which is a central purpose of Chapter 15.[159]

Second, the designation of a foreign main proceeding not only determines forms of relief but also puts all participants—courts, creditors, debtors, potentially interested parties—on the same page as to which jurisdiction will be the "home" court.[160]

For example, *if* Mexico[161] is deemed to be WWW, Inc.'s center of main interests, *then* Mexico would be designated as the foreign main proceeding, and a foreign representative from Mexico could seek relief under § 1520. As noted before, when devalued assets are eventually distributed, the creditor's debts will not be satisfied in full or part. Therefore, the Mexican representative would first likely seek an automatic stay on all of WWW, Inc.'s assets within the U.S. or seek relief that adequately preserves the value of those assets. Next, the Mexican representative could operate WWW, Inc., but this seems unlikely here because the catalyst for filing bankruptcy was WWW, Inc.'s lack of profitability. However, the Mexican representative can exercise rights that a trustee would in selling, using, and leasing property, which brings creditors one step closer to having their debts satisfied. Equally important, the Mexican representative could file a Chapter 7 liquidation case if the representative believes liquidation would yield high enough proceeds to sufficiently satisfy debts.[162] On the other hand, if there is a belief or evaluation that WWW, Inc. can continue to be a viable company if structured differently, then a Chapter 11

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158. *Id.*

159. *See* 11 U.S.C.A § 1501(a)(1)(A)-(B).

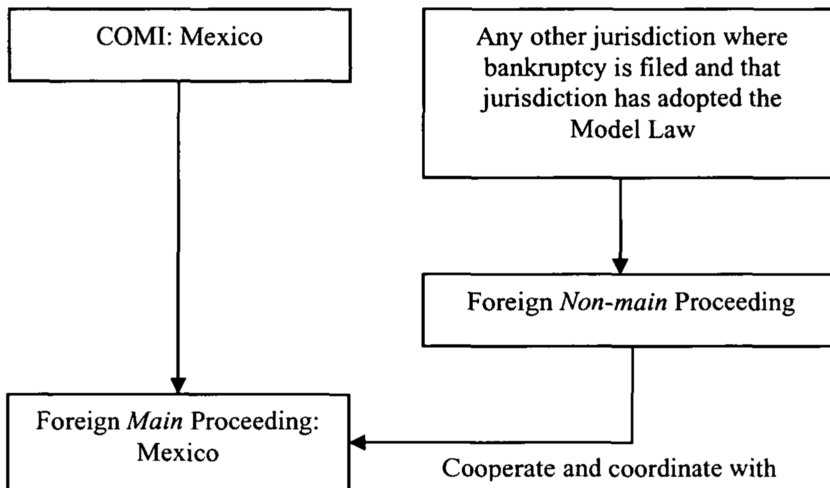
160. *Cf. Universalism Unravels*, *supra* note 9, at 143 (explaining that under universalism and therefore the Model Law, "the court of a multinational debtor's 'home country' would apply home country law to control the company's bankruptcy worldwide," and that "home country" is defined as "the country where the debtor has 'the centre of the debtor's main interests . . . .'").

161. For the sole purpose of illustrating the type of relief available to a foreign representative from a foreign *main* proceeding, Mexico is assumed to be WWW, Inc.'s center of main interests.

162. *See generally* 11 U.S.C. ch. 7 (2000 & West 2006).

reorganization case could be filed under BAPCPA.[163]

As for the remaining foreign representatives from Canada, Japan, Australia, and South Africa who seek relief in the U.S., their proceedings would be recognized as foreign *non-main* proceedings under § 1517. Under the Model Law principles, the remaining jurisdictions are to cooperate and coordinate with the "home" court or Mexico bankruptcy proceeding as illustrated:



3. Relief in a Foreign Non-Main Proceeding

Once the court recognizes a foreign proceeding as a non-main proceeding, at the request of the foreign representative, the court may grant relief including the following:

i. staying the commencement . . . of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities . . .;
ii. staying execution against the debtor's assets . . .;
iii. suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor . . .;
iv. providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
v. entrusting . . . all or part of the debtor's assets within the territorial jurisdiction of the United

163. *See generally id.* ch. 11.

States to the foreign representative or another [court-approved entity];

vi. extending relief granted under [§] 1519(a); and

vii. granting any additional relief that may be available to a trustee, except for relief available under [various] sections . . . .[164]

Section § 1521 also provides what the court cannot do. Under § 1521(d), the court "may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding . . . ."[165]

Again, the primary motive here is to protect the value of assets. Therefore, foreign representatives from Canada, Mexico, Japan, South Africa, and Australia could seek § 1521 relief. However, notice that a foreign representative from a non-main proceeding cannot initiate a Chapter 7 liquidation case, a Chapter 11 reorganization case, or any other case under another chapter of the Bankruptcy Code.[166] That relief is afforded only to the foreign *main* proceeding.[167]

D. *Relief and Limits*

As noted above, a foreign representative of a foreign main proceeding has the authority to file a Chapter 7 liquidation, Chapter 11 reorganization or any other case under the Bankruptcy Code.[168] Other sections throughout Chapter 15 allow a court to: extend protective relief,[169] transfer assets to a foreign representative,[170] prevent fraudulent transfers,[171] freeze repossession efforts,[172] assume petitions are authentic,[173] and so forth. But, at every point "the [U.S.] court [must be] satisfied that the interests of creditors in the United States are sufficiently protected."[174]

Section 1529, in the same spirit, authorizes a U.S. court to tailor any relief obtained by a foreign representative when either:

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164. 11 U.S.C.A. § 1521(a).

165. *Id.* § 1521(d).

166. *Cf. supra* note 154 and accompanying text.

167. *See* 11 U.S.C.A. § 1520(a), (c) (listing the Bankruptcy Code sections that apply to foreign main proceedings).

168. *Id.*

169. *See id.* § 1521(6).

170. *See id.* §§ 1519(a)(2), 1520(a), 1521(a)(5).

171. *Id.* § 1507(b)(3).

172. *See id.* §§ 1519(a)(1), 1520(a)(1)-(3), 1521(a)(2).

173. *Id.* § 1516(b).

174. *Id.* § 1521(b).

(1) the petition for recognition is filed *while* a full U.S. bankruptcy case is pending; or (2) a full U.S. bankruptcy case begins *after* recognition of a foreign proceeding.[175] Any relief granted while a petition is waiting for recognition, in a foreign main or non-main proceeding, "must be consistent with the relief granted" in the full U.S. bankruptcy case.[176] In effect, international cooperation is paramount because if U.S. creditors had untouchable rights and priorities as they normally do in Chapter 7 and Chapter 11 cases, then "no meaningful international cooperation" would exist.[177] Chapter 15 molds expectations so that relief in any foreign proceeding is consistent with a full U.S. bankruptcy case. Lastly, a U.S. court has the ability to dismiss a full bankruptcy case when deference to the foreign proceeding would be more appropriate.[178]

"[T]he United States court[s] [have] considerable discretion to fashion and limit relief depending on the circumstances of the case, including the fair treatment of United States creditors in [a] foreign proceeding."[179] Businesses can extend credit knowing that their secured claims in bankruptcy are not subject to the whim of foreign proceeding decisions, and any relief obtained outside the United States will be screened for consistency and fairness.

VI. THE PINK ELEPHANT IN THE CORNER OF THE ROOM

A. *Public Policy Exception*

Debtors, creditors, lawyers, and courts expect Chapter 15 "to provide effective mechanisms" for handling international insolvencies,[180] but a single sentence within Chapter 15 can prevent its entire authority and application.[181] Section 1506 is a public policy exception clause, which reads: "Nothing in [Chapter 15] prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the

175. *See id.* § 1529.

176. *See id.* § 1529(1)(A).

177. *Chapter 15 at Last*, *supra* note 44, at 723.

178. *See* Lee, *supra* note 20, at 198-99. ("Chapter 15 . . . provide[s] that a bankruptcy court may dismiss or suspend a bankruptcy proceeding against a foreign debtor when a foreign proceeding with respect to that debtor has been recognized and when the purposes of Chapter 15 would best be served by the dismissal or suspension.").

179. *Chapter 15 at Last*, *supra* note 44, at 726.

180. 11 U.S.C.A. § 1501(a).

181. *See id.* § 1506.

public policy of the United States."[182] The U.S. is not alone in this regard because South Africa, who has adopted the Model Law, has a similar ability to "opt out of its provisions."[183] Accordingly:

> South Africa [has] made a substantial change in the Model Law by declaring that [it] was applicable only to "officially designated" countries. Getting a foreign country so designated, or getting their designation revoked, is "not as routine as it may appear because both types of notices [of designation] must be approved by the South African Parliament before they become official." In effect, by not making the Model Law automatically applicable to all cross-border insolvency proceedings, the South African parliament retained its ability to negotiate individual designation treaties or agreements with other countries . . . to guarantee that South African companies operating in foreign countries would be extended the same protections as foreign companies and representatives would be extended in South Africa. This is just one example of how . . . countries can bypass the cooperative intent of the drafters and adjust the scope of the laws in a manner more closely aligned with their own national insolvency laws and interests.[184]

A country's ability to "opt out" by favoring its own bankruptcy law over application of the Model Law undermines the intent and incorporation of the Model Law, but Chapter 15 follows suit in this regard.[185]

B. *Split Decision?*

Because the phrase "manifestly contrary" is not clearly defined in Chapter 15, there is a lack of predictability or consistent guidelines by which a company can expect an action to fall within the § 1506 exception.[186] Further, when a standard is

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182. *Id.*

183. *See* Murphy, *supra* note 8, at 134.

184. *Id.* at 134-35 (third alteration in original) (footnotes omitted).

185. *See* 11 U.S.C.A. § 1506 (authorizing the court to refuse to recognize a proceeding under Ch. 15 if such recognition "would be manifestly contrary to the public policy of the United States").

186. H.R. REP. NO. 109-31, pt. 1, at 109 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88,

not readily defined or understood, courts are forced, in select circumstances, to decide what the public policy should be.[187] Therefore, § 1506 and its impact on bankruptcy proceedings under Chapter 15 create an interesting dynamic for businesses engaged in activity that could be deemed "manifestly contrary" to U.S. public policy.[188]

For example, Google has created Google Earth, satellite imagery software that freely gives users a "bird's eye view" of any location in the world.[189] Satellite images of banks, schools, restaurants, and shopping areas are freely available.[190]

However, Google Earth has sparked international reaction: India complained Google Earth "could severely compromise a country's security," South Korea expressed fear that the program disclosed "sensitive military installations," and Thailand said "[it] intended to ask Google to block images of vulnerable government buildings."[191]

The international reaction in turn sparked U.S. concern, given the international commitment and cooperation in pursuing U.S. national security.[192] Part of the national security agenda includes the United States "forging new, productive international relationships and redefining existing ones."[193] In pursuance of this top priority,[194] the United States is developing new relationships with the same countries whose leaders have been irked by Google Earth. Recently, the U.S. began laying the

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172 ("The word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States.").

187. Aron J. Estaver, *Dangerous Criminals or Dangerous Courts: Foreign Felonies as Predicate Offenses Under Section 922(g)(1) of the Gun Control Act of 1968*, 38 VAND. J. TRANSNAT'L L. 215, 255 (Jan. 2005) ("Arguing for enforcement of foreign judgments [in the restricted context of the Gun Control Act] for which no domestic cause of action exists is a very ambiguous standard for courts to apply. It essentially forces upon a court the responsibility of deciding what, exactly, domestic public policy should be – an activist role many oppose courts and judges from taking.").

188. *See* 11 U.S.C.A. § 1506.

189. Paul Taylor, *The World at Your Fingertips*, FIN. TIMES (London), at 9, Aug. 26, 2005.

190. *Id.*

191. Katie Hafner & Saritha Rai, *Google Earth Asked to Back Off: Some Nations Fear Free Up-Close Photos Jeopardize Sensitive Sites*, S.F. CHRON., Dec. 20, 2005, at A-2.

192. *See* NAT'L SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, Sept. 2002, at 6-7, http://www.whitehouse.gov/nsc/nss.pdf [hereinafter NATIONAL SECURITY STRATEGY] ("[The United States is] using effective public diplomacy to promote the free flow of information and ideas to kindle the hopes and aspirations of freedom of those in societies ruled by the sponsors of global terrorism.").

193. *Id.* at 7.

194. *Id.* at iii, v ("Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. . . . [I]nternational obligations are to be taken seriously. They are not to be undertaken symbolically to rally support for an ideal without furthering its attainment.").

foundation for closer relations with India, as both countries have a "converging set" of security interests.[195] U.S. also continues to strengthen its relationship with South Korea, as the "two countries are . . . very close diplomatic partners . . . ."[196] Lastly, the U.S. has "deepened cooperation on counterterrorism" with Thailand.[197]

With these policies in play, an interesting dynamic exists. First, suppose a foreign representative from any of the aforementioned countries files a Chapter 15 petition for recognition of a foreign proceeding under § 1517 and subsequent relief under §§ 1519 or 1520. Second, suppose any of the aforementioned countries have bankruptcy laws that grant equal status to both unsecured and secured creditors (which runs contrary to U.S. bankruptcy policy and jurisprudence).[198] In the U.S., secured creditors have priority over unsecured creditors,[199] which reflects a public policy decision "to protect contractual arrangements and to foster an efficient financing system."[200] However, a foreign jurisdiction might not reflect the same "values" when its laws grant an unsecured claimant the same status as a secured creditor.[201] Therefore, it is possible a U.S. court would refuse to recognize a foreign proceeding under § 1506 because subjecting an American debtor to foreign proceedings where unsecured creditors have equal status would be "manifestly contrary" to public policy embodied by U.S. bankruptcy laws.[202]

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195. BUREAU OF INT'L INFO. PROGRAMS, U.S. DEP'T OF STATE, STATE'S BURNS HAILS GROWING U.S.-INDIA RELATIONS (2006), http://usinfo.state.gov/sa/Archive/2006/Jan/18-630643.html [hereinafter GROWING U.S.-INDIA RELATIONS] (quoting Under Secretary of State for Political Affairs Nicholas Burns as stating, "[W]hat we are embarked upon, India and the United States, is an absolutely unique venture in international diplomacy.").

196. Alexander Vershbow, U.S. Ambassador to the Republic of Korea, President Bush's Foreign Policy and the Future of U.S.-Foreign Relations, Remarks for the Korean Human Development Institute's CEO Forum for Human Development (Jan. 12, 2006), *in* GROWING U.S.-INDIA RELATIONS, *supra* note 195 (quoting U.S. ambassador Alexander Vershbow: "[South Korea is one of the United States'] primary partners in the world today . . . [and] our security alliance will be more sustainable.").

197. *See* NATIONAL SECURITY STRATEGY, *supra* note 192, at 26.

198. Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J INT'L L. 23, 55 (2000) ("[A]lthough our bankruptcy rules establish the rights of individual creditors, they also reflect public policy choices.").

199. Schimmelpenninck v. Byrne, 183 F.3d 347, 364 (5th Cir. 1999); *see* 11 U.S.C. § 726(a) (2000 & West 2006) (making distributions from the bankruptcy estate to secured creditors before any unsecured creditors).

200. Buxbaum, *supra* note 198, at 56.

201. *Id.* at 56-57.

202. *See* 11 U.S.C.A. § 1506 (West 2005).

On the other hand, a different U.S. court under the same circumstances might conclude that refusing to recognize a foreign proceeding from any of the aforementioned countries would be "manifestly contrary" to U.S. public policy if refusal would disrupt and undermine the national security agenda;[203] simply put, the weight of maintaining national security and its objectives might outweigh the financial expectations of local U.S. debtors and creditors.

Both results are plausible because courts can "deviate from the chosen law."[204]

> Public policy takes many forms. . . . [and] appears in all incarnations of multilateral rules, in recognition of the need to protect certain interests of the forum state. . . . [P]ublic policy is merely the flip side of comity: [w]here comity is viewed as a reason to accept a choice leading to the application of the laws of another nation, public policy is viewed as a reason to refuse that choice, preferring instead to apply the laws of one's own.[205]

As noted earlier, the scope of Chapter 15 is to "provide effective mechanisms,"[206] "fair and efficient administration"[207] and "greater legal certainty"[208] for participants in international insolvencies. However, the problem lies in the language of § 1506, which provides an equal chance of producing a result that is either adverse or beneficial to a party.[209] Businesses must be aware of this section's language, effect, and potential for different outcomes,[210] because the unrestricted language of § 1506 provides sufficient justification for a court to either close or open the door to relief.

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203. *See* NATIONAL SECURITY STRATEGY, *supra* note 192, at 6-7.

204. *See* Buxbaum, *supra* note 198, at 46 ("Faced with an unfair result, a court will search for ways to deviate from the chosen law and apply local law in its place.").

205. *Id.*

206. 11 U.S.C.A. § 1501(a).

207. *Id.* § 1501(a)(3).

208. *Id.* § 1501(a)(2).

209. *See id.* § 1506.

210. *See* Murphy, *supra* note 8, at 134. ("In cross-border insolvencies, the more defined cross-border insolvency laws and procedures are, the better off debtors and creditors are going to be. The Model Law . . . leave[s] too much discretion in the hands of judges, and fail[s] to provide enough predictability for the business community.").

VII. THE UNPREDICTABLE VOID BETWEEN BUSINESS AND THE NEW CODE

One clear purpose of Chapter 15 is to provide "greater legal certainty for trade and investment."[211] However, businesses continuously develop technology that is innovative, yet continues to elude definitive legal treatment:

> [T]he [e-commerce] industry worries that such new technologies as Wi-Fi and radio-frequency identification (RFID) tagging—which could revolutionize the e-commerce space—will start garnering new legislative and regulatory attention, and not of the good kind.
>
> In addition, there is a war on Capitol Hill right now over what constitutes e-commerce, and whether state and local governments can regulate and tax any transactions that are performed via a dial-up connection or a broadband connection . . . .[212]

Cable television system operators[213] and Voice over Internet Protocol ("VoIP") technology[214] providers have come before Congress to ensure that they will not engage in any action that may run against United States public policy.[215] This call-to-duty placed on business, however, does not satisfy the aforementioned goals of Chapter 15, because the legal treatment of twenty-first century business ideas, products, and technology by the legislative branch is not readily identified or established. In turn, this treatment by the legislature leaves ambiguities for the judiciary to resolve.

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211. *See* 11 U.S.C.A. § 1501 (a)(2).

212. *The Debate Over Regulating Voice Over IP*, ELECTRONIC COM. NEWS, July 19, 2004, [hereinafter *Voice Over IP Debate*].

213. *Law Enforcement Access to Digital Communication: Testimony Before the H. Subcomm. on Telecomm. and the Internet, H. Comm. on Energy and Commerce*, 108th Cong. 3 (2004) (statement of Richard Green, President and CEO, Cable Television Laboratories, Inc.) [hereinafter *Testimony*].

214. *See Voice Over IP Debate, supra* note 212 ("Voice over Internet Protocol (VoIP) technology . . . aims to deliver voice services not over the traditional public switched telephone network, but via the very cost-effective Internet.").

215. *See Testimony, supra* note 213 (quoting Richard Green as stating "[T]he cable industry and CableLabs will continue to work with the United States Government to ensure that law enforcement is able to access lawfully the information needed to safeguard our national security."); *Voice Over IP Debate, supra* note 212 (noting that Laura Parsk, deputy assistant attorney general of the Department of Justice's Criminal Division, told a Senate Commerce Committee, "It is imperative that public safety and national security concerns be carefully considered when evaluating advance in [VoIP] communications technology.").

VIII. CONCLUSION

Businesses continue to evolve and expand on a global scale. Products, employees, inventories, assets, and operations exist in multiple jurisdictions. Simultaneously, as businesses continue to grow in this fashion, companies leverage many of their operations through debt. As far back as ancient Athens and Rome, certain political and social upheavals were associated with "widespread burdens of debt."[216] In a globalized business community, the dynamic of the creditor-debtor relationship entails a "promise to pay,"[217] but businesses could be undermined without enforcement of this promise.[218] Bankruptcy seeks to preserve this promise and provide a financial restart for businesses, and the Model Law serves to achieve both of these purposes on an international scale.

In the U.S., Chapter 15 follows the spirit of the Model Law, in that its provisions and purposes ultimately seek "cooperation, communication and coordination with the foreign courts and representatives."[219] The ideas are in place, and now the application of Chapter 15 will unfold.

Neil Desai

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216. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, LAW OF DEBTORS AND CREDITORS: 2005 CASEBOOK SUPPLEMENT 217 (Aspen Publishing Co. 2005).

217. *Id.* at 218 ("[I]n every society there is a deep-seated concern that a relaxation of the traditional commitment to legal enforcement of promises to pay . . . may represent a decadent trend that will undermine the commercial basis for a successful community.").

218. Gilreath, *supra* note 20, at 400-01 (mentioning the 1997 economic downturn, which affected Asia, Russia, and Latin America, and the increased number of worldwide bankruptcies in the 1990s that revealed a need to "standardize" international insolvencies).

219. H.R. REP. NO. 109-31, pt. 1, at 106 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 169.