

TRANSNATIONAL INSOLVENCY

Cases commenced under the Bankruptcy Code as well as cases commenced under the insolvency or reorganization schemes in other countries increasingly involve assets in various countries as companies increasingly have international business interests. Administering assets in other countries has historically been difficult for a number of reasons, including no recognition of the “foreign” insolvency proceeding in the country where the assets are located, inadequate notice to foreign creditors, and the inability to stay actions against foreign assets in order to administer them in one collective proceeding to the benefit of all creditors.

The Commission could not have addressed these issues without significant guidance from the international legal community, which would have been difficult given the Commission’s limited lifespan and funds. Fortunately, the Commission’s work in this area follows the groundbreaking development of an international model law on insolvency and reorganization drafted by the United Nations Commission on International Trade Law (UNCITRAL).⁸⁷⁴ The Commission’s Recommendations on transnational insolvency propose conforming changes to the Bankruptcy Code in order to implement the provisions of the UNCITRAL model law. In addition, the Commission has recommended an amendment to the venue provisions regarding ancillary proceedings under section 304.

⁸⁷⁴ The Commission’s work in this area is due to the efforts of the American delegation to UNCITRAL. The delegation was led by Professor Jay L. Westbrook and Harold Burman and included John Barrett, Donald Bernstein, Professor Carl Felsenfeld, and Hon. Burton R. Lifland. Richard Gitlin and Daniel Glosband also assisted the Commission in these efforts.

RECOMMENDATIONS

- 2.2.1 Adoption of the UNCITRAL Model Law for Cross-Border Insolvencies**
- 2.2.2 Retention of provisions for additional relief**
- 2.2.3 Amendment of title 28 to add jurisdiction over the Model Law provisions**
- 2.2.4 Conforming amendments to the definitions of foreign proceeding and foreign representative in 11U.S.C. § 101(23)-(24)**
- 2.2.5 Exclusion from the application of the Model Law of consumers resident in the United States if their debts are within the limits for Chapter 13**
- 2.2.6 Recognition *vel non* of foreign tax claims to be left to evolving caselaw and treaty negotiations**
- 2.2.7 28 U.S.C. § 1410 should be amended to provide that the various bases for venue may be used in the alternative as a matter of choice, i.e., the word “only” should be deleted from the section; additionally there should be a catch-all venue choice related to the interest of justice and convenience of the parties**

DISCUSSION

The Grab Rule

Although there is widespread agreement that the globalization of trade and enterprise requires a coordinated approach to international bankruptcy, the field of bankruptcy law (or, as most of the world calls it, “insolvency law”) has remained steadfastly parochial. “Territorialism” or the “grab rule” has prevailed since time immemorial. When a person or a company with international operations falls into serious financial trouble, each country employs its insolvency laws to grab local assets and administer them locally according to the procedures and priorities of that country’s laws. Even where no local proceeding is opened, the delay and expense of obtaining local judicial cooperation with a foreign insolvency proceeding encourages debtors to conceal assets in foreign caches and prevents realization of full value for assets that are recovered.

Scholars and practitioners have long criticized the unhappy results of territorialism. There are five major disadvantages:

a) Reorganization is difficult or impossible, because each uncoordinated local proceeding is focused on maximizing the return for local creditors. The local officials are often unwilling to permit any use of local assets for ongoing international operations. Indeed, in many countries there is no authority for cooperation with foreign proceedings even if the local officials were so inclined. In addition, many of the actions necessary for cooperation are not contemplated by local procedures and would violate local law.

b) Even in a liquidation there can be realization of much greater value if assets can be sold without regard to national borders. For example, a division of a company may have manufacturing and distribution facilities in several countries. That division might be saleable for a much higher price as a unit than would be each bundle of assets in each country, but existing law makes it very difficult to sell assets in multinational packages.

c) Although virtually all national insolvency laws endorse the principle of equality of distribution to creditors, territorialism produces highly unequal results. Aside from differing priority rules in each country, the distributions vary greatly depending on the assets seizable in each country at the moment of bankruptcy. Local creditors benefit where they are lucky enough to have more assets in their country at

that moment and suffer where their jurisdiction is less fortunate. A few very sophisticated international creditors may collect in several proceedings and do very well, but most smaller creditors cannot play that game. The results are arbitrary and inconsistent with the principles of virtually every country's laws. Above all, they are unpredictable, creating substantially increased transaction costs in international financing.

d) Shrewd debtors can exploit modern technology and the globalization of commerce to move assets rapidly from one jurisdiction to another and to transfer assets to insiders or preferred creditors in other countries. Because recognition of foreign insolvency proceedings and cooperation with those proceedings is so cumbersome in most countries, it is very hard for administrators or liquidators to pursue and capture the assets.

e) Although overt discrimination against foreign creditors is relatively rare, they often receive little or no real notice of insolvency proceedings and too often suffer *de facto* discrimination in those proceedings.

United States Leadership – Section 304

By adopting section 304 of the 1978 Reform Act, Congress put the United States in a position of leadership in the field of international insolvency. Although the United States courts had taken some important steps toward international cooperation, section 304 for the first time gave the courts explicit authority to recognize foreign insolvency proceedings, to cooperate with those proceedings, and, where appropriate, to transfer assets from the United States to a foreign proceeding in the debtor's home country. As one might expect, the degree of internationalism displayed by our courts has varied, but on the whole the United States has established an enviable record of cooperation with foreign jurisdictions in insolvency matters.

For a number of years other countries seemed to be indifferent to the United States lead in this regard. As noted by Professor Jay Westbrook, after ten years there had been little sign that other countries were responding to the section 304 initiative by granting similar cooperation to our insolvency proceedings.⁸⁷⁵ Although Congress in adopting section 304 had deliberately eschewed any reciprocity requirement (a requirement that usually reduces the chances for cooperation in international litigation to somewhere near zero), he predicted the United States would not wait forever for other countries to begin to respond in a positive way.

⁸⁷⁵ Jay L. Westbrook, *U.S. Fights Bankruptcy 'Grab' Rule Alone*, WALL ST. J., January 29, 1988.

Happily, they have begun to do so. Reacting to the example of section 304 and spurred by efforts of the International Bar Association and of INSOL (an international association of insolvency practitioners affiliated in the United States with the American Bankruptcy Institute), courts and legislatures around the world have begun in the last few years to expand international cooperation in insolvency matters. For example, the United Kingdom has adopted a provision calling for close cooperation with countries designated by its government for cooperation in insolvency matters.⁸⁷⁶ The new Australian statute has gone farther, surpassing even section 304.⁸⁷⁷ At the same time, the European Union has finally broken a two-decade logjam to adopt a bankruptcy convention for its member countries that is widely expected to receive final approval this year.⁸⁷⁸

Largely through the efforts of INSOL, the United Nations Commission on International Trade Law (UNCITRAL) was persuaded to embark on a project to improve international cooperation in insolvency cases. UNCITRAL has a long and successful record of developing treaties and model laws relating to business and commerce. Its convention and model law on arbitration, for example, are perhaps the most successful international commercial laws in history, having been adopted by most of the leading commercial countries of the world. One reason for its success is that it is very selective in the projects it undertakes. After judicial colloquia organized with the help of INSOL and involving judges from around the world, UNCITRAL concluded that there was a realistic chance to achieve progress in the insolvency field, despite its difficulty, and began an insolvency project.

The UNCITRAL Process

The UNCITRAL process involves meetings held alternately in Vienna (the headquarters of UNCITRAL) and New York, lasting two weeks at a time in each venue. The first meeting on insolvency was in Vienna in October, 1995. The convocation is described as a “Working Group,” but is in fact a formal UN-style meeting, in a large conference hall with simultaneous translation into the six official languages of the UN, recording of the meetings, and so forth. There are approximately thirty member countries on UNCITRAL at any given time, always including the five permanent members of the Security Council. For any given subject, any other member nation may send observers who are given full rights to speak on the floor. UNCITRAL also invites relevant “NGOs,” Non-Governmental Organizations,

⁸⁷⁶ Insol. Act 1986, ch. 45, § 426. *Barclays Bank PLC v. Homan*, BCLC 680 (1993).

⁸⁷⁷ AUSTL. CORP. L. §§ 580-581 (1997).

⁸⁷⁸ European Union Convention on Insolvency Proceedings, Nov. 23, 1995, 35 I.L.M. 1223. The full text of the Convention is set forth in Nick Segal, *The Choice of Law Provisions in The European Union Convention on Insolvency Proceedings*, 23 BROOK. J. INT'L L. 57, 75 (1997).

with a particular expertise to bring to the discussions. Approximately forty countries and several NGOs participated in the insolvency meetings. Decisions are always by consensus and there is no voting.

The insolvency project began with countries very reluctant to take substantial steps toward cooperation with foreign proceedings. For example, there was an attempt at the start to exclude a debtor in possession completely. There was also substantial sentiment for requiring that the foreign proceeding involve a threshold finding of the debtor's insolvency. In these and other respects, over the course of the project the text moved decisively in the directions sought by the United States and by the leading NGOs. On the other hand, there were substantial compromises reflecting the concerns of delegations from around the world.

Throughout the discussions, a significant minority of countries favored a treaty rather than a model law, in part because they favored a system based on reciprocity. However, a substantial majority, in which the United States took a leading role, favored the model-law approach as a first step that could be agreed and implemented far more quickly and more generally than a treaty.

The UNCITRAL process results in a proposed text, here a model law. The text of a model law is accompanied by a series of reports of each meeting, a final report upon adoption, and, usually, a Guide to Enactment. Although there is no legislative history as such, the reports and the Guide provide insights into the drafters' intentions. Where the text is a model law, it is understood that it should be adopted in as uniform a manner as possible, but that some adjustments to fit each national legal system are inevitable.

The product of a Working Group is then taken up by the Commission itself at its annual meeting, final revisions are agreed, and it is adopted. Subsequently, its work is reviewed and approved by the Sixth (Legal) Committee of the General Assembly and the Assembly then recommends the law for adoption by member states. The final text of the Model Law on Cross-Border Insolvency was adopted by the Commission in May, 1997, and it will be recommended for adoption by the Sixth Committee and the Assembly this fall. The Guide to Enactment (which has been largely agreed in draft) will be published in the fall as well.

By the very nature of a model law adopted in such an international context, the text is a matter of compromise. The ambiguities of compromise are inevitably exaggerated by the challenges of translation. Thus the text is not in the standard statutory language used in the United States or any other member country and is not always felicitous. On the other hand, English was the working language in the drafting of the Model Law on Insolvency and the other language texts were based on the English draft, although of course all six language texts are equally official.

Overall Description of The Model Law

Because the text is a model law rather than a treaty, it is meant to be adopted as part of the law of each enacting state. Thus in the United States, it will become part of the Bankruptcy Code.

The Model Law's 32 articles can be grouped and summarized by subject, at least as to the key points. The key subjects of the Model Law are as follows: a) scope; b) access and recognition; c) effects of recognition; d) treatment of foreign creditors; e) cooperation and coordination among proceedings in several countries.

Scope (Arts. 1 & 2)

The recognition, nondiscrimination, and cooperation procedures undertaken by the enacting state in adopting the Model Law extend to any proceeding "relating to insolvency," if the proceeding is "collective" and the debtor's assets and affairs are subject to court supervision or control. The definitions are carefully constructed to include the United States Chapter 11 proceeding (and similar debtor in possession reorganization proceedings in Latin America and elsewhere). Both reorganization and liquidation are covered and no specific finding of the debtor's insolvency is required. As in the European Union Convention, insolvency is understood to include financial distress of the sort that leads to insolvency. In addition, a debtor in possession is included in the definition of a "foreign representative" under Article 2, because a representative may be a person (*e.g.*, a trustee in bankruptcy) or a "body" authorized to administer the proceeding.

"Interim" proceedings of the sort commonly found in Commonwealth countries are also included, as are nonjudicial procedures in some countries that have purposes and effects similar to judicial bankruptcy cases. Individual creditor actions, like attachment and garnishment, are excluded. Also excluded are the insolvencies of entities, like banks and insurance companies, that are subject to a specialized insolvency regime in the enacting state. It is contemplated that a separate convention or model law will be developed for these kinds of bankruptcies, with the Model Law as the starting point.

The Model Law applies to natural persons as well as companies and makes no distinction between consumer and business debtors. The United States delegation pressed hard for a consumer exclusion. We were unsuccessful in putting an exclusion in the text, but we did succeed in getting a concession in the Guide to Enactment that enacting states may exclude consumer debtors to a substantial extent (see below).

Access and Recognition (Arts. 9-12; 15-24)

Access

The Model Law gives a "foreign representative" the right to appear in local courts, a right denied or subject to elaborate diplomatic requirements in many states. It also protects the foreign representative from being subject to local jurisdiction outside of the subject matter of its appearance, a provision similar to section 306 of the Bankruptcy Code. Articles 11 and 12 give the foreign representative standing to initiate a local bankruptcy or to participate as of right in an existing local bankruptcy proceeding. After recognition, in initiating an insolvency proceeding the foreign representative will have the benefit of a presumption of insolvency given by Article 31.

Recognition

In typical Anglo-American fashion, the United States courts have not focused much on a concept of "recognition" as such, but upon the specific requests for relief made by foreign representatives. In most countries, however, recognition is key to any sort of cooperation, or even standing, for a foreign representative. Thus recognition is a key procedural step under the Model Law, giving rise to a number of effects and entitlements.

Recognition of a foreign representative is presently a long and expensive process in many countries. Articles 15-17 of the Model Law are designed to make the recognition process as simple, fast, and inexpensive as possible. Article 15 provides that the only showing necessary is that the applicant for recognition is a duly approved foreign representative in a foreign proceeding, as defined in Article 2, and permits proof of those facts by certificates from the foreign court or certified copies of its decision. Article 16 permits the local court to presume that such documents are genuine unless shown to be otherwise and to presume that such a decision or certificate is factually correct. Thus recognition can be reduced to a simple documentary process, unless challenged by an interested party.

The Model Law requires recognition of both "main" and "non-main" proceedings, although a representative in a non-main proceedings is entitled to far less relief. A main proceeding is defined in Article 2 as a proceeding in the debtor's home country, "the center of its main interests," a concept taken from the European Union Convention on Insolvency and akin to concepts like "principal place of business" or "chief executive office." Article 16 provides a presumption that a company's place of incorporation is the center of its main interests, unless proof to the contrary is offered. Under Article 17, a proceeding in a country other than the debtor's home country (i.e., a non-main proceeding) must be recognized only if the debtor has an "establishment" in that country. An establishment is defined in Article 2 as a

“nontransitory” place where the debtor operates with “human means and goods or services.” Again the definition comes from the EUC and means something more than a mail drop but not necessarily as much as a branch. If a local proceeding is opened in a country where the debtor has assets but no establishment, recognition is not required.

Although recognition is required upon a proper showing, the local court retains broad discretion under articles 6, 17, 19 and 22 to revoke or modify recognition or to revoke or modify the relief granted to the foreign representative. At several points, the court is required to consider the interests of creditors, including local creditors, and of other interested parties, including the debtor.

Effects of Recognition (Arts. 19-24)

Article 19 of the Model Law permits a foreign representative to apply for temporary, emergency relief while an application for recognition is pending. Thereafter, if the foreign proceeding is recognized as a foreign main proceeding (*i.e.*, a proceeding in the debtor's home country), then recognition produces certain mandatory effects under Article 20. A stay comes into effect restraining all lawsuits and creditor enforcement actions and all transfers of interests in the debtors' assets. The stay is similar to the automatic stay under section 362 of the Code, although not quite as broad, along with the restrictions on debtors provided primarily by sections 363 and 549. It is subject to the limitations on a bankruptcy stay that would apply under local bankruptcy laws, primarily section 362(b) and section 363 of the Code in the case of the United States. It can be modified or terminated as a result of the opening of a local proceeding involving the same debtor.

Article 21 gives the local court the power to grant additional relief to the foreign representative, including turning over assets to the foreign proceeding. The relief includes obtaining information and evidence to the extent permitted by local law.

The mandatory stay under Article 20 does not apply to recognition of a non-main proceeding. The representative of a non-main proceeding can use article 21 to obtain any of the relief available under articles 20 and 21, but only with regard to assets that local law considers properly within the domain of that non-main proceeding. Examples would be obtaining an asset fraudulently transferred from the foreign jurisdiction where the non-main proceeding is pending or getting information relating to such an asset.

Recognition also gives the foreign representative the right to intervene in actions to which the debtor is a party, although not as a substitute for the debtor, and gives the representative standing to bring avoidance actions available under local insolvency law.

Treatment of Foreign Creditors (Arts. 13-14)

Article 13 of the Model Law gives "national treatment" to foreign creditors. That is, they are generally to be treated without discrimination in the same way that local creditors are treated, including the right to commence and participate in a local insolvency proceeding. Article 13 does permit the enacting state to grant or deny equivalent treatment for foreigners as to priorities, as in Bankruptcy Code section 507(a), but provides a general floor of treatment as a general, unsecured creditor. It also leaves to the enacting state, as an option, whether to accept foreign tax claims in an insolvency.

Article 14 provides for "national treatment plus," recognizing that foreign creditors are always at a disadvantage compared to local creditors. It requires that notice be given to foreign creditors whenever it is given to local creditors under local law. It goes further to provide that notice to foreign creditors must be individual, not merely published or tacked on the courthouse door, unless the court finds that another method is appropriate. The exception was adopted primarily in light of costs in very small cases. It also requires that foreign creditors be told of the time given them to file claims and that the time for filing be reasonable. They must also be told where claims should be filed and whether secured creditors are required to file at all.

Cooperation and Coordination (Arts. 25-32)

Articles 25 through 27 empower local courts to cooperate with foreign courts, a power otherwise unavailable in many countries. Cooperation is authorized between courts or between courts and representatives or between representatives, as appropriate, and examples of cooperation are listed for illustration. The courts are also authorized to communicate directly with foreign courts as appropriate, although it is assumed such authority will be exercised in accordance with local ideas of due process and fairness. In the United States, the statute or the rules will provide appropriate guidance, including notice to the parties, a record of the communication, and so forth.

Articles 28 through 32 deal with the problem of coordinating multiple proceedings. As noted above, a *sine qua non* of achieving this first step in international cooperation was agreement that local insolvency proceedings involving the same debtor would trump foreign proceedings, although with the considerable reform that the foreign representative would be authorized to intervene in the local proceeding under article 12. Articles 28 and 29 require that relief given to the foreign representative be made consistent with the existence of the local proceeding, including modification or termination of that relief as necessary. On the other hand, this requirement is stated in the context of a strong emphasis on cooperation and coordination with foreign proceedings and does not preclude deference to the foreign proceeding.

Article 30 addresses coordination where more than one foreign proceeding seeks recognition. If one of them is a foreign main proceeding, it gives primacy to that proceeding.

Article 32 provides a "hotchpot" rule analogous to section 508(a) of the Code, so that a creditor that receives a distribution in a foreign insolvency proceeding must stand aside in a local distribution until creditors of the same class have gotten as much from the local proceeding as the first creditor got from the foreign one. Of course, distributions will be equal within the class from that point on. Thus if a general, unsecured creditor owed \$100 received \$5 in a foreign proceeding and the distribution to general creditors in a United States proceeding involving the same debtor was 15%, the first creditor would receive \$10, putting that creditor proportionately equal to the other general creditors at a 15% overall dividend.

2.2.1 Adoption of the UNCITRAL Model Law for Cross-Border Insolvencies

Because the United States is already a world leader in this field, adoption of the Model Law will result in relatively minor substantive changes to U.S. Bankruptcy Law. Some of the most important are noted below. These changes will add some definition and predictability to U.S. law, which is now almost entirely case law, by providing specific provisions concerning various issues that must now be addressed on a case-by-case basis. A provision permitting additional assistance, beyond that mandated by the Model Law, will enable the United States courts to continue to use ideas of international cooperation as they have been evolving under section 304 as to issues not reached by the Model Law.

Although these changes will be beneficial, the principal benefit to the United States from adopting the Model Law will lie in the effect of its adoption on other jurisdictions. Early adoption by the United States is likely to influence other countries to adopt this law and to spur international organizations to encourage countries to do so. The leadership of the United States in adopting section 304 has been an important factor in increasing cooperation in this field up to now and its adoption of the Model Law is probably essential to the law's widespread adoption by other countries.

Adoption of the model law by other countries will dramatically increase the potential for cooperation with those countries in multinational insolvencies and the likelihood that such cooperation will in fact occur. The most important provisions of the Model Law (a) establish a relatively simple and mechanical process for recognition of a foreign insolvency proceeding, including reorganization proceedings; (b) permit fast application of a bankruptcy stay something like the automatic stay under U.S. law, getting assets safely under court control; (c) strengthen the rights of foreign creditors, by ensuring them proper notice and by granting them a substantial measure

of equal treatment; and (d) direct local courts to cooperate and coordinate with foreign courts, especially those of the home country of the debtor.

In turn, those provisions will make it much more practical to reorganize a troubled multinational, saving jobs and preserving value. They will also help to prevent debtor fraud and to increase distributions to employees, suppliers, and others in liquidation situations. Finally, they will improve predictability of result, lowering the risks and costs of international financing.

In particular, adoption of the Model Law by the United States, Canada, and Mexico would greatly facilitate the current project of the American Law Institute to develop cooperative insolvency procedures among the three NAFTA partners.

It is important not to claim too much. The Model Law is necessarily a first step and no more. It bows to the primacy of local proceedings wherever they may be opened and depends greatly upon a willingness of local officials to cooperate. It leaves many difficult legal issues unresolved. Nonetheless, it does give special precedence to "main" proceedings--proceedings in the debtor's home country--and makes it possible for the home-country's "foreign representative"--the person or entity acting for the bankruptcy estate--to move quickly to protect foreign assets from debtor manipulation and creditor seizure. At a minimum, it should help considerably in getting a situation under control until the interested parties and the courts can formulate fair solutions.

It is recommended that the law be adopted as a single section, with a few exceptions. The law is drafted as a coherent whole and will be more useful to the courts in that form. Furthermore, because it is hoped that other countries will follow the United States' lead in adopting it, our approval will be clearer and more demonstrable if it is all in one place in our law, rather than in bits and pieces.

Summary of Changes In United States Law

Adoption of the Model Law by the United States would require some substantive changes in the Bankruptcy Code. Many of these changes would have little effect on present practice, but would put in the statute rules presently found only in the case law and require their systematic observance.

The most significant changes will be:

1. Section 304 authorizes relief for a foreign representative only vis a vis what the Model Law calls a foreign main proceeding. The definition of "foreign proceeding" in present United States law, section 101(23), is limited to the debtor's home country (as defined by domicile, residence, principal assets, or principal place of business). The Model Law goes farther, providing for recognition of a foreign

non-main proceeding as well, although it narrowly constrains the relief available to a foreign representative in such a proceeding.

2. Section 304 gives the court substantial discretion in determining whether to grant relief to a foreign representative. The Model Law requires recognition of any such proceeding, subject to public policy considerations (Article 6), but gives the court broad discretion as to the relief that will be granted or maintained. Article 20 provides for mandatory effects restraining creditors and the debtor from disturbing the status quo once the foreign representative has been recognized, but the relief is qualified with reference to local exceptions and the court is given the power to limit or terminate those effects under Articles 16(4) and 20(2). As under present section 304, all of the relief available in Articles 19 and 21 is subject to the court's discretion from start to finish, although always in the context of cooperation and of a general policy of deference to a home-country proceeding.

3. United States law currently has no special provisions relating to foreign creditors. Indeed, we have no definition of foreign creditors. The Model Law requires that creditors with foreign addresses (a neat and practical finesse) be given notice that explains about filing a claim (see below). The statute and rules would have to be modified to provide for this special notice. It also requires nondiscriminatory treatment for foreign creditors, but that has generally been United States policy in any case.

2.2.2 Retention of provisions for additional relief

It is appropriate to provide U.S. courts with the flexibility to deal with issues beyond those covered in the Model Law, using the concepts and techniques that have been evolving under section 304 up to now. Article 7 of the Model Law expressly contemplates retention of provisions providing additional or different assistance to an international insolvency administration. While adoption of the Model Law will be a large step forward in many countries, limitation of relief in U.S. courts to its provisions would actually be a step backwards in some respects. By retaining the capacity to continue a common law development begun under section 304, the U.S.]courts have the power to cooperate in ways beyond the provisions of the Model Law and the U.S. can continue to break new ground in this field.

2.2.3 Amendment of title 28 to add jurisdiction over the Model Law provisions

Article 4 of the Model Law is an empty vessel into which each nation is to pour the necessary designation of courts to exercise jurisdiction over its provisions. Assuming no change in the current structure of the bankruptcy court, jurisdiction would go to the district courts, with referral to the bankruptcy courts, under sections 1334 and 157 of title 28, as long as the current jurisdictional scheme remains in place. Section 19 of the Model Law clarifies that the district courts and the bankruptcy

courts by way of referral, will have power to issue emergency relief pending consideration of recognition of a foreign insolvency proceeding.

2.2.4 Conforming amendments to the definitions of foreign proceeding and foreign representative in 11 U.S.C. § 101(23)-(24)

The Model Law's definitions cover non-main as well as main (that is, home country) proceedings and the foreign proceedings to be recognized are broadly defined to include all legal efforts of a collective nature designed to address the problems of actual or threatened insolvency, including Chapter 11 and the debtor in possession. These definitions are especially important, because their breadth ensures that United States proceedings under Chapter 11 via a debtor in possession will be widely recognized.

The addition of non-main proceedings is a change in U.S. law, which arguably has recognized only main proceedings in the past. It is a healthy change, however, because sometimes local politics or the awkwardness of local law prevents initiation of a bankruptcy proceeding in the debtor's home country, but a proceeding can and should be started in other countries to protect creditors and other company constituencies. Any concern about recognition of a rogue proceeding brought in a friendly forum is greatly reduced by two limitations:

a) If a local proceeding is opened in a country where the debtor has assets but no establishment (which is a nontransitory, on-going operation), recognition is not required.

b) Relief under the Model Law for a foreign representative in a non-main proceeding is very narrow, being limited to assistance with respect to assets having some close connection to the country where the non-main proceeding was instituted. For example, relief might be granted to an English liquidator of a non-English company as to moneys looted from an English pension fund and deposited in a New York account.

2.2.5 Exclusion from the application of the Model Law of consumers resident in the United States if their debts are within the limits for Chapter 13

This exclusion would represent a variation from the Model Law, but one recognized as necessary for some countries by the Report and Guide to Enactment. The United States is one such country, because we have specialized and quite different treatment for consumer debtors as opposed to debtors whose debts arise primarily from business. The Model Law is designed primarily for business and commercial debts. Its use to enforce debts against United States resident noncommercial individuals would be controversial and may be unjust. The excluded debtors would be those whose debts were incurred primarily for personal, family, or

household purposes. Discretionary relief of the sort now available under section 304 would remain available to protect creditors as well as debtors in consumer cases with international dimensions and it would be important for the U.S. courts to use that relief to help other countries in pursuing individual consumer debtors in appropriate cases, especially where fraud or other serious wrongdoing is involved.

Even as to debtors with primarily consumer debts, very large debts will almost certainly include business or investment-related obligations and the debtors involved will generally be able to afford more than adequate legal representation. The new, much larger Chapter 13 debt limits established (and indexed to inflation) by the 1994 amendments to the Bankruptcy Code represent Congress' decision about the line between ordinary consumers and those whose affairs require broader judicial supervision and creditor participation. Therefore those limits seem an appropriate place to draw the line on a consumer exclusion from the Model Law. As in other respects, the U.S. courts will retain broad discretion to prevent any unfair treatment of debtors.

A residence requirement is included per the UNCITRAL Guide to Enactment. The requirement reflects the agreements reached at UNCITRAL between countries like the United States who are anxious to protect consumers and other countries greatly concerned about possible misuse of a consumer exclusion by fraudsters. The United States certainly does not wish to be a haven for those who might come here just to avoid their home-country authorities or others who might stash assets in the United States while living elsewhere. This limitation may be especially important to our friends in Canada and Mexico.

2.2.6 Recognition *vel non* of foreign tax claims to be left to evolving caselaw and treaty negotiations

Traditionally the United States has not enforced foreign revenue laws. There is no statutory provision involved. Instead, the rule derives from an ancient common-law doctrine traceable to Lord Mansfield. Article 13 of the Model Law, which forbids discrimination against foreign creditors as such, permits an optional exception that foreign revenue claims will not be recognized.

Congress could decide that international comity requires recognition of such claims, although it would then have to decide whether and when the claims would be given the same priority as domestic tax claims under section 507(a)(8). On the other hand, Congress could decide for the first time to forbid recognition of such claims by statute. The first solution raises some complex problems that would require careful study prior to enactment. The second might offend a number of our friends and might block otherwise helpful negotiations in the on-going evolution of our tax-treaty practice.

The most sensible approach would be for Congress to leave the question open explicitly by saying that nothing in the provision is intended either to endorse or to repudiate current law and by instructing the Treasury to include in future tax-treaty negotiations the mutual recognition of revenue claims in insolvency proceedings.

2.2.7 28 U.S.C. § 1410 should be amended to provide that the various bases for venue may be used in the alternative as a matter of choice, i.e., the word “only” should be deleted from the section; additionally there should be a catch-all venue choice related to the interest of justice and convenience of the parties

In addition to UNCITRAL, the Commission discussed the venue of ancillary proceedings under the Bankruptcy Code. Section 304 of title 11 provides for the commencement of a proceeding ancillary to a foreign (non-U.S.) insolvency proceeding in order to administer U.S. assets of foreign debtors or to otherwise assist the foreign proceeding.⁸⁷⁹ Such assistance may include enjoining actions and enforcement of judgments against the foreign debtor or against property of the debtor. The venue provisions for section 304 ancillary proceedings require that a proceeding be commenced in each and every district in which such property of the foreign debtor is located or where an action is pending or threatened against the foreign debtor.⁸⁸⁰

⁸⁷⁹ Section 304 provides in pertinent part that:

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

11 U.S.C. § 304 (1994).

⁸⁸⁰ Section 1410 provides that:

(a) A case under section 304 of title 11 to enjoin the commencement or continuation of an action or proceeding in a State or Federal court, or the enforcement of a judgment, may be commenced only in the district court for the district where the State or Federal court sits in which is pending the action or proceeding against which the injunction is sought.

(b) A case under section 304 of title 11 to enjoin the enforcement of a lien against a property, or to require the turnover of property of an estate, may be commenced only in the district court for the district in which such property is found.

(c) A case under section 304 of title 11, other than a case specified in subsection (a) or (b) of this section, may be commenced only in the district court for the district in which is located the principal place of business in the United States, or the principal assets in the United States, of the estate that is the subject of such case.

28 U.S.C. § 1410 (1994).

Problems arise, however, when a foreign debtor has U.S. assets or actions pending or threatened against it in multiple districts. A literal interpretation of section 1410 would require a separate ancillary proceeding to be filed in each and every district where the foreign debtor had property or was a party to litigation. Multiple ancillary proceedings are costly and create a risk of piecemeal distribution of the estate as well as inconsistent rulings and are obviously an inefficient use of judicial resources.

Statutory Background. Section 304 was enacted as part of the Bankruptcy Reform Act of 1978. The purpose behind section 304 was to preserve the U.S. assets of a foreign debtor and otherwise assist the foreign insolvency proceeding.⁸⁸¹ It is not a full case under any of the debtor-relief chapters of the Bankruptcy Code: an estate is not formed, the automatic stay of section 362 is inapplicable, and a discharge is not granted.⁸⁸² Broad relief is, however, available under section 304 consistent with the legislative history.⁸⁸³ The assistance provided

⁸⁸¹ See *Koreag, Controle et Revision S.A. v. Refco F/X Assoc., Inc.*, 961 F.2d 341, 348 (2d Cir.) (“The purpose of a § 304 petition is to prevent the piecemeal distribution of assets in the United States by means of legal proceedings initiated in domestic courts by local creditors.”) *cert. denied*, 113 S. Ct. 188 (1992); *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987) (Section 304 “allows foreign bankrupts to prevent piecemeal distribution of assets in this country by filing ancillary proceedings in domestic bankruptcy courts.” citations omitted); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 454-55 (2d Cir. 1985) (“In order to administer assets in the United States and to prevent dismemberment by local creditors of assets located here, the representative of a foreign bankrupt may commence a section 304 proceeding, rather than a full bankruptcy case.”).

⁸⁸² H.R. REP. No. 95-595, at 324-25 (1977); S. REP. No. 95-989, at 35 (1978).

⁸⁸³ “Congress intended that bankruptcy courts have ‘maximum flexibility handling ancillary cases’ under section 304. The statute achieves that purpose by authorizing the bankruptcy court to order ‘other appropriate relief’ in addition to or in lieu of the specifically authorized injunctive and turnover relief. This catch-all authorization, in effect, gives the bankruptcy court a “near blank check” in molding relief under section 304.” 2 COLLIER ON BANKRUPTCY ¶ 304.03, 304-9 (Lawrence P. King et al. eds. 15th ed.) (citing H.R. REP. No. 95-595, at 324-25 (1977); S. REP. No. 95-989, at 35 (1978)).

under section 304 includes ordering discovery,⁸⁸⁴ enjoining an action or the enforcement of a lien,⁸⁸⁵ or to order the turnover of property in the United States.⁸⁸⁶

Section 1410 of title 28 prescribes the proper venues for an ancillary petition. Subsections (a) and (b) provide that if the relief is to enjoin an action or enforcement of a lien, or to turnover property, the petition shall only be filed in the district where the action is pending or the property is located.⁸⁸⁷ In all other cases, subsection (c) provides that the petition shall be filed in the district where the foreign entity has its principal place of business or principal assets in the United States.⁸⁸⁸ Thus, if property is located in more than one district and the foreign representative seeks a turnover order of such property, section 1410, as written, requires an ancillary proceeding to be commenced in each district where such property is located. Similarly, if multiple actions are pending or threatened against a foreign debtor, multiple ancillary proceedings would be required to enjoin the continuation or commencement of each of those actions.

Venue of Ancillary Proceedings

The clear meaning of section 1410 requires multiple ancillary petitions when there are several actions pending or threatened against a foreign debtor in several districts in the United States, or when it is necessary to seek a turnover of property from various sources located in various districts in the United States. Multiple pending ancillary proceedings, however, are contrary to the purpose behind section 304.⁸⁸⁹ The tension between the clear meaning of section 1410, which requires multiple ancillary proceedings and the flexible purpose behind section 304 has

⁸⁸⁴ See, e.g., *Angulo v. Kedzep, Ltd.*, 29 B.R. 417, 419 (Bankr. S.D. Tex. 1983) (utilizing section 304 ancillary proceeding to obtain discovery).

⁸⁸⁵ See, e.g., *Saleh v. Triton Container Int'l, Ltd.*, 175 B.R. 422 (Bankr. S.D. Fla. 1994) (continuing nationwide injunction preventing enforcement of creditor remedies against foreign debtor's U.S. assets).

⁸⁸⁶ Despite the hint by some courts that foreign debtors can utilize Bankruptcy Code-based avoidance powers (see, e.g., *In re Trakman*, 33 B.R. 780, 783-84 (Bankr. S.D.N.Y. 1983), most courts have held that the foreign debtor's rights are delineated by the foreign law. See, e.g., *In re A. Tarricone, Inc.*, 80 B.R. 21, 23 (Bankr. S.D.N.Y. 1987); 2 COLLIER ON BANKRUPTCY ¶ 304.03, 304-8 (Lawrence P. King et al. eds., 15th ed. 1996).

⁸⁸⁷ For the text of 28 U.S.C. § 1410(a) & (b), see note 880, *supra*.

⁸⁸⁸ For the text of 28 U.S.C. § 1410(c), see note 880, *supra*.

⁸⁸⁹ See note 881 *supra*.

led some courts to permit a single ancillary proceeding to suffice.⁸⁹⁰ One court even deferred to the nationwide injunction entered by a bankruptcy court in New York and dismissed as moot the multiple ancillary proceeding filed in the bankruptcy court in Florida.⁸⁹¹

The courts to date that have diverged from literal application of the venue provisions of section 1410 have done so because literal application would conflict with the purposes behind a section 304 ancillary proceeding. In *Evans v. Hancock, Rothert & Bunshoft*,⁸⁹² the foreign debtor (a British insurance company) commenced an ancillary proceeding in its principal place of business in the United States.⁸⁹³ The relief sought was a nationwide temporary restraining order staying the “226 cases pending in 34 states and 114 judicial districts” in the United States.⁸⁹⁴ The *Evans* court overruled a motion to transfer venue, holding that a literal reading of section 1410 “contravenes the purpose of” section 304.⁸⁹⁵ Similarly, the court in *Saleh v. Triton Container Int’l, Ltd.*⁸⁹⁶ held that the foreign debtor had to file only one ancillary proceeding and issued a nationwide preliminary injunction protecting all of the foreign debtor’s U.S. property.⁸⁹⁷ Undue burdens on the foreign debtor as well

⁸⁹⁰ See *Evans v. Hancock, Rothert & Bunshoft*, 177 B.R. 193, 197 (Bankr. S.D.N.Y. 1995) (permitting foreign representative to bring single ancillary proceeding to obtain nationwide injunction similar to automatic stay; “[t]his construction of 28 U.S.C. § 1410 not only comports with Section 304, but is also consistent with the principles that venue statutes should be liberally construed to avoid unnecessary litigation and excessive costs.”); *Saleh v. Triton Container Int’l, Ltd.*, 175 B.R. 422, 425 (Bankr. S.D. Fla. 1994) (permitting a single ancillary proceeding in order to enjoin multiple creditor remedies; “With due deference to the ‘plain meaning’ rule, the Court does not find that doctrine applicable here.... ‘A statute susceptible of more than one meaning must be read in the manner which effectuates rather than frustrates the major purpose of the legislative draftsman.’”).

⁸⁹¹ *In re Kingscroft Ins. Co., Ltd.*, 150 B.R. 77 (Bankr. S.D. Fla. 1992) (dismissing as moot ancillary proceeding filed in Florida bankruptcy court under section 1410(a); deferral was proper to national injunction issued by bankruptcy court in New York).

⁸⁹² 177 B.R. 193 (Bankr. S.D.N.Y. 1995).

⁸⁹³ *Id.* at 195.

⁸⁹⁴ *Id.*

⁸⁹⁵ *Id.* at 197.

⁸⁹⁶ 175 B.R. 422 (Bankr. S.D. Fla. 1994)

⁸⁹⁷ *Id.* at 426.

as the risk of inconsistent results between multiple proceedings warranted a departure from literal application of section 1410.⁸⁹⁸

A section 304 ancillary proceeding is not a full bankruptcy case; it does not deal with the continuing operation of a business, general distribution to creditors, the appointment of an estate representative or retention of professionals, or any aspects of reorganizing a business. As a result, the issues in an ancillary proceeding are much more discrete and circumscribed. Flexible venue rules are more suitable for this type of proceeding.

Competing Considerations. It can be argued that it is preferable to have some nexus between the issue of the proceeding and the court in which relief is requested. Section 1410, as written, provides that relationship. As a matter of policy, however, it should not be necessary to have multiple proceedings. The Proposal maintains a nexus between the foreign debtor, the court in which relief is requested and the subject of the ancillary proceeding, but offers eligible venues in the alternative in order to eliminate the need for multiple proceedings. Under the Proposal, any single venue chosen would be proper and there would be no question of a single bankruptcy court's authority to issue an order that would have nationwide application. As a jurisdictional matter, it is important to recognize that a bankruptcy court has nationwide jurisdiction.⁸⁹⁹ Furthermore, venue is not jurisdictional and is waivable. Aside from the possibility of leading to conflicting results, the current requirements under section 1410 are wasteful of both time and money.

⁸⁹⁸ *Id.* (“Enormous burdens would be placed on a foreign petitioner if it had to file an ancillary proceeding in every federal district in which there was litigation pending or property situated. . . . With multiple § 304 cases, there would be significant risk of inconsistent results. Furthermore, there would be litigation in multiple forums, discovery proceedings in multiple forums and, in general, a procedural nightmare inconsistent with the intended purpose of § 304.”).

⁸⁹⁹ 28 U.S.C. § 1334(e) (1994).