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Conflicting Norms: Impact of the Model Law on Chapter 11's Global Restructuring Role

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CONFLICTING NORMS: IMPACT OF THE MODEL LAW ON CHAPTER 11's GLOBAL RESTRUCTURING ROLE

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The Model Law on Cross-Border Insolvency[2] is said to embody the concept of modified universalism for cross-border insolvency matters.[3] In a pure universalist system, a single proceeding would deal with all of the debtor's assets and debts globally.[4] This is in contrast to a purely territorial approach, where multiple local proceedings would be required; one in each jurisdiction where the debtor had assets or debts, but each limited to the assets and debts located in that jurisdiction.[5] While universalism emphasizes the economic goals of insolvency theory – to maximize the value of the estate and minimize the expense of the process -- territorialism emphasizes (or at least recognizes) the sovereignty of the states where the assets of the debtor are located or the effects of the insolvency proceeding are felt.

The modified universalist approach embodied in the Model Law reflects a compromise between the theory of universalism and the practical realities of the territorial sovereignty limitations on the effectiveness of any one state's insolvency orders.[6] It does this by accepting that there would be multiple proceedings in different states and then trying to reduce the inefficiencies that might create. Some of the inefficiencies can be reduced simply by communication and cooperation, but often the goal of maximizing value requires that there be a single plan for the resolution of the affairs of a single debtor. This requires coordination of the multiple proceedings pending in diverse jurisdictions. Coordination will often require that one of the local proceedings (the "main" proceeding) control the process and that the other proceedings (the "secondary" proceedings) defer to that proceeding.[7] The Model Law accomplishes this by

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[2] UNCITRAL Model Law on Cross-Border Insolvency, U.N. Commission on International Trade Law, 30th Sess., Annex 1, U.N. Doc. A/52/17 (1997) [hereinafter Model Law].

[3] *See* Edward S. Adams & Jason K. Finke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism,* 15 Colum. J. Eur. L. 43 (2008-09).

[4] Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Insolvencies,* 32 NYU J Int'l L & Pol. 787, 803 (2000).

[5] Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy,* 98 Mich. L. Rev. 2216, 2218 (2000).

[6] Adams & Finke, *supra* note 3.

[7] The Guide to Enactment states, "In principle, the proceeding pending in the debtor's centre of main interests is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs." *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency,* IV-28, 29, U.N. Commission on International Trade Law, 30th Sess., U.N. Doc. A/CN.9/442 (1997) at 19, para. 1 [hereinafter Guide to Enactment].

permitting the courts in an adopting jurisdiction to grant additional relief to a foreign representative from the main proceeding and encouraging deference to the main proceeding.[8]

From a purely universalist perspective, it should not matter which jurisdiction is the main jurisdiction so long as its orders are enforceable in all other necessary jurisdictions.[9] However, had the Model Law incorporated such a view, it likely would not have been widely adopted. Further, the courts in an enacting jurisdiction might be hesitant to grant relief to an insolvency representative from a jurisdiction with little or no connection to the debtor.[10] The Model Law addresses this by designating as the main proceeding the one pending in the debtor's "center of main interest" or COMI. Selecting the proceeding with the most significant connection to the debtor as the main proceeding also appeals to the historical insistence of most jurisdictions that debtors must have a strong local connection to file a local insolvency proceeding. While the Model Law does not define the center of main interest, it does create a presumption, absent proof to the contrary, that a juridical entity's center of main interest is located in the jurisdiction of its registered office.[11]

In contrast the COMI-centric view embodied in the Model Law, the United States domestic bankruptcy law adopts a very aggressive universalist approach to insolvency and restructuring proceedings filed in the United States, but without any COMI requirement. There are two primary aspects of the United States bankruptcy law that are critical to an understanding of this contrast. First, the United States courts will entertain chapter 11 cases filed by entities with almost no connection to the United States. Second, the United States chapter 11 has global effect under United States law, even when the entity has no significant United States connection. Put together, these features of United States law create a COMI-neutral universalist approach.

Unlike most insolvency regimes, the United States bankruptcy jurisdiction over juridical entities is not limited to those with a registered office in the United States or even those with significant operations in the United States. Instead, the mere existence of property in the United States is a sufficient basis for instituting a United States chapter 11 proceeding.[12] The relevant statutory provision provides that "a person that resides or has a domicile, a place of business, *or property* in the United States … may be a debtor."[13] This provision has been interpreted very liberally by the courts.[14] Early cases indicated that any amount of property was sufficient, even a bank account with a small balance.[15] Further, that property could have been placed in the United

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[8] *See, e.g.*, Model Law Article 32 (stating that relief granted in a foreign non-main proceeding should be consistent with the relief granted in the foreign main proceeding); Model Law Article 28 (limiting the effect of a local proceeding when a foreign main proceeding has been recognized); *compare* Model Law Article 20 *with* Model Law Article 21 (providing additional relief for a foreign main proceeding).

[9] While most universalist writings state that the universal proceeding should be in the debtor's "home" court, the home jurisdiction idea is indeterminate and vulnerable to strategic manipulation. *See* Perkins, *supra* note , at 814-15; *see also* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 Cornell L. Rev. 696, 704-06 (1999).

[10] *See* Jay L. Westbrook, *Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court*, 96 Tex. L. Rev. 1473, 1474 (2018).

[11] Model Law Article 16(3).

[12] 11 U.S.C. § 109(a); 2 Collier on Bankruptcy para. 109.02[3] at 109-14 (16th ed. 2016).

[13] 11 U.S.C. § 109(a) (emphasis added).

[14] 2 Collier on Bankruptcy Para. 109.02[3], *supra* note 12, at 109-15.

[15] *See, e.g.*, In re Iglesias, 226 Bankr. 721, 723 (Bankr. S.D. Fla. 1998) ($522 in a United States bank account).

States for the purpose of creating jurisdiction there.[16] For example, in *Global Ocean Carriers,*[17] funds sent to a United States lawyer as security for fees that would be earned during the anticipated chapter 11 case were found to be sufficient.

The second relevant aspect of domestic United States insolvency law is that the United States adopts the view that a United States insolvency proceeding has global effect.[18] While this is not a feature unique to United States law, the impact is far greater when the jurisdiction of the court is not limited to domestic entities. The United States law grants the United States courts "exclusive jurisdiction" over "all of the property, wherever located," of the debtor.[19] This section brings into the United States proceeding all global assets of the entity.[20] Thus, the United States courts have jurisdiction over a foreign entity if it has any property in the United States, but that jurisdiction extends to all property of the entity anywhere in the world. This jurisdiction over both the entity and all its property means that, in theory, a United States chapter 11 could deal with all of the assets and business operations of a foreign debtor and adjust the status of the debtor by discharging or restructuring the claims against it, including those held by foreign creditors.

It is one thing for a court to claim authority over all foreign assets and all foreign claims of a foreign entity, but quite another to actually excise such broad authority. An order of a United States court has no legal effect in a foreign territory unless the foreign court chooses to give it effect. However, United States courts clearly do have the power to deal with any entity and any assets located within the territory of the United States. This is the source of the practical effectiveness of a foreign entity's United States chapter 11. The United States has the world's largest economy and is an important commercial center. Almost any business that has or desires global scale must have operations or engage in activities that involve the United States. Thus, it is likely that most of the significant creditors and contract counter-parties of a debtor who files a United States chapter 11 will either be United States entities or have United States interests that could be at risk if the entity fails to abide by the orders of a United States court.[21] Consequently, the United States automatic stay that arises upon the filing of a United States chapter 11 is, as a practical matter, a global moratorium because it enjoins all United States-connected creditors from taking action against the debtor or its assets anywhere in the world.[22] Similarly, the discharge under United States law is a permanent injunction that can be enforced globally against entities with United States interests.[23]

These features made the United States chapter 11 process an attractive option for attempting a global restructuring of a global enterprise. Indeed, in many cases, the United States

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[16] 2 Collier on Bankruptcy Para. 109.02[3], *supra* note 12, at 109-15 (stating that because funds could be deposited on the eve of bankruptcy "there is virtually no formal barrier to a foreign entity commencing a case.")
[17] In re Global Ocean Carriers Ltd., 251 Bankr. 31, 39 (Bankr. D. Del. 2000).
[18] 1 Collier on Bankruptcy Para. 3.01[4] at 3-26 (16th ed. 2018).
[19] *See* 28 U.S.C. § 1334(e)(1).
[20] *Ibid.*
[21] The United States injunction can be enforced against any entity amenable to the United States court's jurisdiction. 1 Collier on Bankruptcy, *supra* note 18, para. 3.01[4] at 3-26.
[22] *See* Westbrook, *Global Insolvency Proceedings for a Global Market, supra* n. 2, 96 Tex. L. Rev. at 1479-81 (discussing "control countries" where creditors can be enjoined).
[23] *See* 11 U.S.C. § 524(a)(2 & 3).

may have been the only jurisdiction where a global restructuring could be achieved. Until the fairly recent trend toward adoption of rescue regimes, liquidation was the only option available to many foreign debtors under their local laws. Thus, even if all assets and creditors were subject to the foreign court's jurisdiction, a proceeding filed there could not achieve a rescue. The answer was a United States chapter 11, where the restructuring would be incorporated into a chapter 11 plan of reorganization and the United States court order confirming the plan could be enforced by threatening the United States-based interests of creditors, even if the foreign jurisdiction would not recognize the chapter 11. Alternatively, even if the foreign home jurisdiction had a functional rescue regime, a United States chapter 11 might be preferable if major creditors or contract counter-parties had little at stake in the home jurisdiction and might ignore the orders of the home court. Shipping companies provide an extreme example of this scenario, because no jurisdiction's moratorium could prevent the seizure of vessels in all other nations' ports. However, the practical power of the United States courts to enforce the automatic stay has made chapter 11 an option for restructuring shipping companies.[24]

Prior to the adoption of the Model Law, the United States courts willingly accepted the role as the world's restructuring jurisdiction. They did this without regard to the location of the debtor's COMI or the extent of its connection to the United States, so long as it had at least some property in the United States.

There were, however, some limits on the United States courts' acceptance of chapter 11 cases filed by foreign debtors. While it is a general principle of United States jurisprudence that a court is required to exercise the jurisdiction granted to it,[25] the United States bankruptcy law creates an exception that permits the bankruptcy court to abstain from exercising jurisdiction over a bankruptcy case. This abstention doctrine permits a United States court to dismiss the bankruptcy case or to suspend all proceedings in the case if "the interests of creditors and the debtor would be better served by such dismissal or suspension."[26] The abstention provision applies to all bankruptcy cases, not only those filed by foreign debtors. It is, however, a very narrow exception that should be used only in extraordinary circumstances.[27] In addition, it requires that both the debtor and the creditors be better served by abstention.[28] As a result, it was rarely applied where a foreign debtor filed a voluntary chapter 11 case.[29] Instead, its primary use in cases involving foreign debtors was where disgruntled creditors filed United States involuntary cases in order to undermine the pending foreign insolvency proceedings.[30]

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[24] Almost all foreign companies that utilize chapter 11 for global restructurings are either part of a multi-jurisdictional enterprise group or owners of mobile assets, like shipping companies. Oscar Couwenberg & Stephen J. Lubben, *Corporate Bankruptcy Tourists,* 70 Bus. Law. 719, 740 (2015). "Both types highlight the importance of a restructuring proceeding that can achieve a result that will hold throughout the global economy." *Id.*

[25] As a general principle, the United States courts have a "virtually unflagging obligation … to exercise the jurisdiction given them." *Colo. River Water Conservation Dist.v. United States,* 424 U.S. 800, 817 (1976).

[26] 11 U.S.C. § 305(a)(1).

[27] Michael M. Mazek, *Abstention Recent Developments*, 2018 Ann. Surv. of Bankr. L. 14; 2 Collier on Bankruptcy, *supra* note 12, para. 305.02[4] at 305-6.

[28] *Id.* para. 305.01[1] at 305-4 and para. 305.02[1] at 305-6 & 7.

[29] *See* George W. Shuster, Jr. & Benjamin W. Loveland, *Will Chapter 15 be the "Exclusive Destination" for Foreign Debtors?,* 34 Am. Bankr. Inst. J. 42, 42 (December 2015).

[30] *See* Mazek, *supra* note 27.

The United States' adoption of the Model Law in 2005 added its COMI-centric view to United States domestic bankruptcy law.[31] That approach is at odds with the previously established COMI-neutral principles of open access to chapter 11 and global enforcement of United States orders. While the Model Law purports to deal only with cross-border cooperation and coordination, does its COMI-centric approach create new limitations on the use of chapter 11 by foreign debtors? These limitations could appear as statutory provisions that restrict the use of chapter 11 by foreign debtors or limit the geographic reach of a United States proceeding. They also could appear as a reduction in the willingness of the United States courts to entertain chapter 11 cases filed by foreign debtors. That could be reflected in an explicit reinterpretation of the statutory "any property" requirement for eligibility, an explicit reinterpretation of the statutory standard for abstention, increased exercise of the courts' discretion to abstain without explicitly changing the stated statutory standard, or application of non-statutory doctrines like comity that permit deference to foreign proceedings.

There is some indication that the adoption of the Model Law did reduce the availability and effectiveness of chapter 11 relief for foreign debtors. First, statutory changes that are part of the Model Law and a few non-uniform provisions inserted by the United States as part of its incorporation of the Model Law limit the availability of chapter 11 relief in a few situations. These statutory provisions apply only where there are insolvency proceedings pending both in the United States and in a foreign jurisdiction, but they do limit the chapter 11 options of foreign debtors when the foreign proceeding is in the debtor's COMI.

Article 28 of the Model Law addresses the situation where a domestic proceeding is instituted after a foreign proceeding has been recognized as a foreign main proceeding.[32] In such a case, the Model Law provides that the effects of the domestic proceeding generally are limited to assets within the domestic jurisdiction.[33] Assets outside the jurisdiction can be administered in the domestic proceeding, but only to the extent necessary to implement cooperation and coordination under Model Law articles 25, 26 & 27.[34] The United States version of the Model Law appears in chapter 15 of its Bankruptcy Code. Chapter 15 adopts article 28 and thus changes the prior United States law by limiting the effect of a chapter 11 case to United States assets if the chapter 11 case is filed after recognition of a foreign main proceeding.[35] That provision does not change the effect of or the availability of chapter 11 relief if the chapter 11 case is commenced before any foreign proceeding has been opened.[36] Nonetheless, article 28

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[31] *Cf.*, Lynn M. LoPucki, *Universalism Unravels*, 79 Am. Bankr. L.J. 143 (2005) (stating that the adoption of the Model Law "makes universalism the foundation of United States international bankruptcy policy").

[32] Model Law Article 28.

[33] Article 28 states:

> After recognition of a foreign main proceeding, a proceeding under [*identify laws of the enacting State relating to insolvency*] may be commenced only if the debtor has assets in the State; the effects of that proceeding *shall be restricted to the assets of the debtor that are located in the State* and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

Model Law Article 28 (emphasis added). *See also* Guide to Enactment, *supra* note 7, at 101, para. 227.

[34] Model Law Article 28.

[35] *See* 11 U.S.C. § 1528.

[36] The Model Law imposes virtually no limitations on the jurisdiction of local courts to commence or continue insolvency proceedings. Guide to Enactment, *supra* note 7, at 100, para 224.

imports into domestic United States law a policy that chapter 11's global reach can be trumped by the Model Law's principle of deference to the COMI jurisdiction.

Article 29 of the Model Law provides an important limitation on the Model Law's deference to the COMI jurisdiction.[37] It appears to establish the primacy of the domestic proceeding when it predates a foreign main proceeding.[38] Normally, recognition of a foreign main proceeding results in automatic relief under article 20 of the Model Law. But, if the domestic case is commenced *before* the petition for recognition, then article 20 does not apply. Further, any relief granted to the foreign representative must be consistent with the relief granted in the domestic case.

Article 29 goes further and provides that even if the domestic case is commenced *after* the filing of the petition for recognition, the relief granted to a foreign representative under articles 19 and 21, and the automatic effects of a foreign main proceeding under article 20, shall be modified or terminated if inconsistent with the relief granted in the domestic case.[39] While this provision appears to establish the primacy of the domestic case even if filed later, its impact is severely restricted if the foreign proceeding is a foreign main proceeding. This is because article 28 restricts the reach of the domestic case to local assets and thus the primacy granted by article 29 is local and not global.

Nonetheless, while article 28 imposes new territorial limitations on the scope of chapter 11 in the rare situation where a chapter 11 case is commenced after recognition of a foreign main proceeding, article 29 appears to validate the continued use of chapter 11 as a global restructuring tool for foreign debtors in all other cases -- even when there is a pending

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[37] Model Law Article 29 states:

> Where a foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:
>
> (a) When the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,
>
> (i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and
>
> (ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;
>
> (b) When the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,
>
> (i) Any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and
>
> (ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 if inconsistent with the proceeding in this State;
>
> (c) In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Model Law Article 29.

[38] The Guide to Enactment makes clear that this was intended. The Guide states, "[Article 29] maintains a pre-eminence of the local proceeding over the foreign proceeding." Guide to Enactment, *supra* note 7, at 103, para. 231.

[39] Model Law Article 29(b)(ii).

proceeding in the COMI jurisdiction.[40] While this conclusion may be correct under the Model Law, it may not be correct under the United States version of article 29.[41] Although the United States adopted the language of articles 28 and 29 with only minor changes, it added a new subsection to its version of article 29.[42] This new subsection refers to the United States abstention provision discussed above. The United States provision states "In achieving cooperation and coordination under sections 1528 and 1529 [articles 28 and 29 of the Model Law], the court may grant any of the relief authorized under section 305 [the abstention provision]."[43] Does the United States abstention doctrine override the principles set forth in articles 28 and 29 of the Model Law and what effect might that have on chapter 11's continuing availability as a global restructuring tool for foreign entities?

The United States abstention provision, section 305 of the Bankruptcy Code, was also amended as part of the United States process of adopting the Model Law. Section 305 provided two grounds for abstention. The first, discussed above, was the "interests of creditors and the debtor" ground. That provision remained unchanged. However, the second provision was revised to permit abstention if (1) a foreign proceeding had been recognized, and (2) "the purposes of chapter 15 [the Model Law] … would be best served" by abstention.[44] Unfortunately, the language of the new provisions does not make the relationship between them as clear as it could be. Does the section 1529(4) reference to "the relief authorized under section 305" mean that abstention under section 1529(4) must satisfy one of the two grounds for abstention listed in section 305? Or, does section 1529(4) add "achieving cooperation and coordination under section 1528 and 1529" as a new ground for abstention and borrow only the "relief" authorized by section 305, without incorporating any of the other features of section 305? This becomes important because United States courts tend toward a textualist approach[45] to statutory interpretation, rather than a purpose-driven approach.[46] Under a textual approach, the presumption against surplus language is one of the most widely used canons of construction.[47] Thus, the addition of section 1529(4) to the law may mean that the only permissible "cooperation and coordination" reasons for abstention must come from sections 1528 and 1529.

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[40] Article 29 does, however, give the local court latitude to cooperate with the foreign court and to grant relief under Articles 19 and 21. Thus, while Article 29 acknowledges the primacy of the local proceeding, it "avoids establishing a rigid hierarchy." Guide to Enactment, *supra* note 7, at 103, para. 231.

[41] *See* 11 U.S.C. § 1529.

[42] *See* 11 U.S.C. § 1529(4).

[43] *Id*.

[44] 11 U.S.C. § 305(a)(2).

[45] The late Supreme Court Justice Antonin Scalia is credited with spearheading the Supreme Court's shift towards "the new textualism" that "consider[s] the text, the whole text, and nothing but the text." Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 Montana L. Rev. 229, 234-36 (2004); *quoting* William N. Eskridge, *A Matter of Interpretation: Federal Courts and the Law by Antonin Scalia*, 96 Mich. L. Rev. 1509, 1514 (1998) (book review).

[46] Scalia's interpretative approach stands in contrast to William Blackstone's plain language rule. "Blackstone started with the text then looked to the 'effects and consequences of the spirit and reason of the law' to determine its meaning. Goodman, *supra* note 45, at 233, *quoting* 1 William Blackstone, Commentaries On The Laws Of England 43 (Wayne Morrison ed., Cavendish Publishing Limited 2001) (1765).

[47] Charlie D. Stewart, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 Mich. L. Rev. 1485, 1496-97 (2018). Stewart criticizes this canon and assets that "[l]egislative drafters purposely add in surplus terms in a belt and suspenders approach to ensure that their intended meaning gets across." *Id.* at 1496.

How could this affect the use of chapter 11 by foreign debtors? As discussed above, section 1528 and 1529 operate to give a United States chapter 11 case dominance over a foreign main proceeding, except in the rare case that the chapter 11 is filed *after* recognition of a foreign main proceeding. If the abstention power can be exercised only to further that structure, then it prohibits abstention in a chapter 11 case that is filed *before* the petition for recognition since there is nothing in section 1528 or 1529 that subordinates such a chapter 11 case to a foreign proceeding. Thus, a United States court cannot abstain in a chapter 11 case involving a foreign entity with property in the United States even if a proceeding in the COMI jurisdiction would be in the best interests of both the creditors and the debtor.

An alternative view is that the section 1529(4) merely affirms what would be the result under amended section 305 in any event. Specifically, that achieving cooperation and coordination under section 1528 and 1529 is a purpose of chapter 15 so abstention is appropriate under amended section 305(a)(2). Under this view, the addition of section 1529(4) changed nothing and means nothing. That interpretation would allow section 305 to have full effect and would permit abstention based either on the best interests of both creditors and the debtor or on the purposes of chapter 15.

The first ground authorizes abstention in a United States chapter 11 case of a foreign debtor if that is in the best interests of both the creditors and the debtor.[48] Did that ground remain unchanged when the United States adopted the Model Law, or does it now include consideration of the COMI-centric policy of chapter 15? The textualist answer is no. While the amended statute requires a United States court to consider the purposes of chapter 15 and to abstain based on those purposes, it is authorized to do so only if a petition for recognition has been granted.[49] Thus, in the classic case where a foreign entity files chapter 11 before a foreign proceeding has been recognized, the United States bankruptcy court has no statutory authority to abstain based on COMI concerns.

However, at a later point in time, abstention may be available. If an insolvency proceeding is commenced in the COMI jurisdiction and the foreign representative is granted recognition, then the foreign representative may seek abstention based on the purposes of chapter 15.[50] That leads to the question of what those purposes are. The Model Law states a purpose in its preamble. That language is incorporated, with some changes, into section 1501(a) of United States chapter 15.[51] The provision is both exceedingly narrow and extremely broad.

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[48] *See* 11 U.S.C. § 305(a)(1).

[49] *Compare* 11 U.S.C. § 305(a)(1) *with* (a)(2).

[50] For example, in *In re Spanish Cay Co., Ltd.*, 161 Bankr. 715 (Bankr. S.D. Fla. 1993), the United States case was filed at a time when no foreign proceeding was pending. Since dismissal was not in the best interest of both the debtor and the creditors, the court had no grounds to abstain under section 305(a)(1) and, since there was no pending foreign proceeding, the earlier version of section 305(a)(2) did not apply. However, the court reasoned that it could lift the automatic stay to permit the filing of a foreign proceeding and then abstain under former section 305(a)(2) and its "comity" principle. *Id.* at 724.

[51] Section 1501(a) provides:

> (a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of--
>
> (1) cooperation between--
>
> (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and

The "purpose" language is quite narrow if the focus is on the introductory clause in subsection (a). That language focuses on providing "effective mechanisms" for dealing with cross-border cases.[52] This appears limited to the specific provisions of the Model Law and the mechanisms established by it. As discussed above, none of the specific mechanisms in the Model Law address the use of chapter 11 as a global restructuring tool, especially when there is no pending foreign proceeding. Under this narrow "mechanism" view of the purposes of chapter 15, abstention would be proper only where necessary to make a specific provision effective. Consequently, abstention in a foreign debtor's chapter 11 case never would be appropriate if the chapter 11 case was commenced before the petition for recognition was filed because section 1529 gives primacy to the domestic proceeding in such cases.

On the other hand, the purpose provision is also broadly worded. After mentioning "effective mechanisms" in the introductory clause, the section adds a list of very broadly-stated "objectives."[53] If these are viewed as the purposes of the act, then the focus would be on achieving those objectives. Abstention might be appropriate if it furthered one of those objectives, even though no specific provision of the Model Law was implicated. The stated objectives include "greater legal certainty for trade and investment" and "fair and efficient administration of cross-border insolvencies".[54] Either of those objectives might be furthered by United States courts refusing to exercise jurisdiction over chapter 11 cases lacking strong United States connections. The objectives of greater legal certainty and fairness might even justify abstention in any case lacking a United States COMI.

An even broader view of purpose would move away from the language of the purpose provision and take a more holistic view of the Model Law. Under this view, a major purpose of the law is to achieve the goals of modified universalism by designating a main proceeding and encouraging all other proceedings to defer to it.[55] This deference principle is similar to the United States deference concept of international comity,[56] but much more specific in that the

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(B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

(2) greater legal certainty for trade and investment;

(3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;

(4) protection and maximization of the value of the debtor's assets; and

(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

11 U.S.C. § 1501(a).

[52] *See* 11 U.S.C. § 1501(a).

[53] *See* 11 U.S.C. § 1501(a)(1-5).

[54] 11 U.S.C. § 1501(a)(2 & 3).

[55] *See* Guide to Enactment, *supra* note 7, at 19, para. 1 (stating "the proceeding in the debtor's centre of main interests is expected to have primary responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors . . . .")

[56] The United States concept of comity dates to the 1885 Supreme Court case of *Hilton v. Guyot*, 159 U.S. 113, 163. It is difficult to define with precision and includes a number of related doctrines. *See* William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071 (2015). "Adjudicative comity" operates to limit the exercise of United States courts' jurisdiction with the aim of avoiding multiple parallel proceedings. *Id.* at 2105 & 2109-2112. Chapter 15 provides a legislative authorization that makes United States courts more willing to abstain in favor of foreign proceedings in bankruptcy matters. *Id.* at 2112 n. 254.

Model Law recognizes as the main proceeding the one pending in the jurisdiction with the strongest connection to the debtor.[57] Indeed, a proceeding like many chapter 11 global restructurings, where the debtor has no United States connection other than assets,[58] is entitled to no deference at all under the Model Law.[59] This view of purpose emphasizes the COMI-centric policy of the Model Law. Under that approach, the United States courts should exercise their board jurisdiction only if other Model Law purposes, such as the need for fair administration, protection and maximization of assets, and facilitation of a rescue, override the COMI policy. This may be the case, for example, where it is not possible to have an effective proceeding in the COMI jurisdiction.[60] But this would convert chapter 11 from a global restructuring tool of first resort to the tool of last resort.

Beyond the small change to chapter 11's reach made by section 1528, the legislative changes made in connection with the United States' adoption of the Model Law do not clearly alter the prior law. However, the COMI-centric approach of the Model Law and the adoption of that approach as a global norm may affect how United States courts interpret domestic law. There is some indication that this is beginning to occur and that judicial attitudes are changing about the appropriateness of allowing a United States chapter 11 filing when adequate relief is available in the COMI jurisdiction.[61]

Thus far, the change is limited to cases interpreting the section 305 abstention provision. No reported cases suggest that the liberal section 109 test for jurisdiction is changing. The post-adoption section 305(a)(1) cases have restated the abstention test to add a new factor when a foreign insolvency proceeding is pending. The new version of the test requires consideration of the doctrine of international comity and its principle of deference to foreign insolvency proceedings. However, while the articulation of the abstention test has changed, that change does not yet appear to have changed the analysis of the courts employing it. Nonetheless, the United States' notion of international comity bears some similarity to the Model Law goals of cooperation and coordination and its inclusion in the abstention test so soon after chapter 15's adoption arguably reflects the Model Law's influence on domestic United States law. On the other hand, if Model Law policies were seeping into United States chapter 11 jurisprudence, the cases should reflect the Model Law's strong emphasis on the COMI. They do not. The United States courts continue to employ a balancing approach that compares the effectiveness of a foreign restructuring to the effectiveness of a United States restructuring. That analysis may include consideration of COMI factors, but the decisions do not use COMI terminology or mention the Model Law. Thus, it appears that the Model Law has not yet had much impact on the willingness of United States courts to be the world's restructuring jurisdiction.

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[57] *See* Model Law Article 2(b) (defining foreign main proceeding).
[58] *See, e.g., Global Oceans*, *supra* note 17.
[59] *See* Model Law Article 2(c & f) (requiring an "establishment").
[60] Professor Westbrook suggests that this might be a situation that permits a non-COMI restructuring. Westbrook, *supra* note 10, at 1487-88.
[61] *See*; Shuster & Loveland, *supra* note 29, at 43; *see also* Josefina Fernandez McEvoy, *Tallying Involuntary Insolvency Proceedings in the Wake of Chapter 15*, 27 Am. Bankr. Inst. J. 34, 34 & 65 (Mar. 2008); Francis G. Conrad & Richard J. Corbi, *Cross-Border Bankruptcy Update: Do U.S. Bankruptcy Courts Have the Final Say?*. 27 Am. Bankr. Inst. J. 42, 42 & 82 (Aug. 2008).

A case decided only two years after the United States' adoption of the Model Law has been heralded as an example of its COMI-centric principles replacing chapter 11's traditional COMI-neutral approach.[62] That case involved a motion to abstain in an involuntary United States chapter 11 case filed by dissatisfied creditors of a foreign company that was subject to a long-running insolvency proceeding pending in Argentina.[63] The COMI clearly was in Argentina, with the business' operations centered there, all employees located there and 98% of its customers there.[64] In fact, the related enterprise group was Argentina's largest bread producer, controlling 63% of the country's packaged bread market.[65] The connection to the United States was exceedingly thin. The only property in the United States was one United States trademark and three pending trademark applications.[66] The court's analysis began with a recitation of the typical section 305(a)(1) factors used to evaluate whether the interests of both creditors and the debtor are better served by dismissal. But then it added the following language, "Although abstention under § 305 is considered an extraordinary remedy [citations omitted], the pendency of a foreign insolvency proceeding *alters the balance by introducing considerations of comity into the mix."*[67]

That language represents a major departure from the traditional section 305(a)(1) analysis. The focus of section 305(a)(1) had been solely on the interests of creditors and the debtor. In contrast, comity has almost nothing to do with those interests but, instead, focuses on the relationship between sovereigns and the respect that should be accorded to the laws and courts of a foreign nation.[68]

The timing of the *Fargo* decision, coming only two years after the United States adopted the Model Law, strongly suggests that its incorporation of international comity into the section 305(a)(1) abstention analysis was influenced by the Model Law. But, if that were the case, one would expect the court to at least mention the Model Law in its decision because that would provide some authority for deferring to the foreign proceeding. The *Fargo* opinion does not mention the Model Law or chapter 15. Nor does it refer to Model Law concepts. For example, although Argentina clearly was the COMI, and the only jurisdiction with any real interest in the businesses' insolvency, the *Fargo* court never used the term "center of main interest." The absence of such references does not result from ignorance of the Model Law. The *Fargo* judge, Stuart M. Bernstein of the Southern District of New York, was very familiar with the Model Law and its concepts, having already published at least two decisions discussing chapter 15 by the time the *Fargo* opinion was issued on October 12, 2007.[69] Nonetheless, it remains possible that

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[62] *See* Shuster & Loveland, *supra* note 29; McEvoy, *supra* note 61.
[63] *In re Compania de Alimentos Fargo, S.A.*, 376 Bankr. 427, 429 (Bankr. S.D. N.Y. 2007). The court suggests the United States proceeding may have been instituted to "hijack" the Argentine proceeding or to increase the disgruntled creditors' leverage in any negotiations. *Id.* at 441.
[64] *Id.* at 429.
[65] *Id.*
[66] *Id.* at 439.
[67] *Id.* at 434 (emphasis added).
[68] *See Hilton v. Guyot*, *supra* note 55, at 163.
[69] *See In re Euro-American Lodging Corp.*, 357 Bankr. 700 (Jan. 9, 2007); *In re Petition of Wurthrich*, 337 Bankr. 262, 266 n. 3 (2006). In addition, Judge Bernstein issued a third reported decision discussing chapter 15 less than three weeks after issuing the *Fargo* decision. *See In re Bancredit Cayman Ltd.*, 2007 WL 3254369 (Nov. 2, 2007).

the Model Law's expression of a new global insolvency norm of cooperation and deference influenced the decision.

Although there are few reported cases dealing with abstention,[70] subsequent cases repeated the comity language and suggested that comity might be more important than the traditional abstention factors.

In *Monitor Single Lift*, the court rephrased the *Fargo* principle as, "While all factors are considered, not all are given equal weight in every case. Where there is a pending foreign proceeding, concerns of comity must be taken into account and deference must be given to the foreign proceedings."[71] Thus, only one year after *Fargo*, comity had gone from simply being in the mix of factors to being one that *must* be taken into account, with deference added as something that *must* be given to the foreign proceeding. The *Monitor* court's phrasing also suggests that comity is more important than most, if not all, of the traditional factors.[72] Notwithstanding its expansive restatement of the Fargo test, the *Monitor* court did not abstain from the foreign debtor's chapter 11 case because the pending foreign proceeding involved an affiliate and not the entity that filed chapter 11.[73] While the *Monitor* court's discussion of comity was mere *dicta*, the court accepted and arguably expanded the *Fargo* doctrine. This is how a single decision can evolve into a trend.

The *Fargo* doctrine reappeared recently in what may be the most prominent example of a United States court declining to exercise jurisdiction over a global restructuring case -- the attempted chapter 11 restructuring of the Baha Mar resort in The Bahamas.[74] Although a few of the related debtor entities had United States connections, bankruptcy jurisdiction over several of the debtors was based on United States bank accounts established days before the chapter 11 filings.[75] The focus of the case was the unfinished 3.3 million square foot resort that was expected to represent 12% of the GDP of The Bahamas once operational.[76] Although the court did not engage in a COMI analysis, COMI certainly was located in The Bahamas for most of the debtor entities. The debtor entities chose chapter 11 because allegedly the only option under Bahamian law was a liquidation proceeding.[77] The United States bankruptcy court decided to abstain and, in its published decision, devoted several paragraphs to a discussion of comity. After quoting extensively from the *Fargo* opinion, the court stated, "Here, considerations of comity support abstention pursuant to § 305(a)."[78] Like the *Fargo* decision, the *Northshore Mainland* opinion does not appear to rely upon the Model Law or its concepts. The opinion does refer to the "center of main interest" and the principle of modified universality, but only in its quotation of the Bahamian judge's opinion in its factual summary.[79] However, the court did

[70] One commentator noted that there is little case law on the general abstention provision, section 305(a)(1), and even less on the provision dealing with pending foreign proceedings, section 305(a)(2). Mazek, *supra* note 27.
[71] *In re Monitor Single Lift I, Ltd.*, 381 Bankr. 455, 465 (Bankr. S.D. N.Y. 2008).
[72] *Accord* Conrad & Corbi, *supra* note 61, at 81.
[73] *Monitor Single Lift*, *supra* note 71, at 465-67.
[74] *See In re Northshore Mainland Services, Inc.*, 537 Bankr. 192 (Bankr. D. Del. 2015).
[75] *Id.* at 201.
[76] *Id.* at 195-96.
[77] *Id.* at 205.
[78] *Id.* at 208.
[79] *Id. at 198.*

discuss the expectations of stakeholders used the term "main" insolvency proceeding to assert that the parties would not have expected the main insolvency proceeding to be in the United States.[80]

With two New York judges and one Delaware judge adopting the comity language, both of the major United States cross-border jurisdictions appear to have changed the test for abstention under section 305(a)(1). Commentators took notice and viewed the *Fargo*, *Monitor*, and *Northshore* decisions as the beginning of the end of the United States courts' role as a global restructuring jurisdiction. For example, one commentator viewed the *Northshore* case as part of a trend toward a regime where chapter 15 will not be simply one option for foreign debtors but will become the exclusive type of United States bankruptcy protection available.[81]

That view seems to read too much into the decisions. While it is undeniable that *Fargo* and its progeny do add comity to the section 305(a)(1) analysis,[82] there is no evidence that change results from the adoption of Model Law and its COMI-centric principles. First, although the cases give lip-service to the comity principle, it did not appear to affect their section 305(a)(1) analysis. The *Monitor* case did not grant abstention and, although both *Fargo* and *Northshore* granted abstention, both cases involved classic scenarios where abstention was appropriate under the pre-chapter 15 law. *Fargo* involved the classic case of recalcitrant creditors filing an involuntary bankruptcy to undermine a pending proceeding. This is such a common situation justifying abstention that it was mentioned in the legislative reports accompanying section 305.[83] In *Northshore*, opposition to the chapter 11 proceeding by the Bahamian courts and the Bahamian government meant that the United States court lacked the

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[80] The court stated:

> Notwithstanding some agreed venue provisions in some of the relevant documents, I agree with Justice Winder's determination in his July 31, 2015 ruling that many stakeholders in the Project would expect that any insolvency proceedings would likely take place in The Bahamas, the location of this major development Project. I perceive no reason—and have not been presented with any evidence—that the parties expected that any "main" insolvency proceeding would take place in the United States. In business transactions, particularly now in today's global economy, the parties, as one goal, seek certainty. Expectations of various factors—including the expectations surrounding the question of where ultimately disputes will be resolved—are important, should be respected, and not disrupted unless a greater good is to be accomplished. Under these circumstances, I can perceive no greater good to be accomplished by exercising jurisdiction over these chapter 11 cases, except for that of [a Delaware subsidiary].

Id. at 206.

[81] Shuster & Loveland, *supra* note 29, at 42; *see also* McEvoy, *supra* note 61 (discussing *Fargo* and questioning whether the United States remains a viable option for involuntary cross-border chapter 11 cases).

[82] This appears to result from two errors by the *Fargo* court. First, comity has long been an important abstention factor, but *only* under the second prong of section 305. That provision, prior to the adoption of chapter 15, permitted abstention based on section 304(c) factors when a foreign proceeding was pending. The primary section 304(c) factor was comity. Thus, *Fargo* conflated the analysis under former section 305(a)(2) with the standards under section 305(a)(1). Further, since section 304(c) was repealed in 2005 and section 305(a)(2) was amended to refer only to cases where a chapter 15 petition for recognition had been granted, there was no statutory basis for considering comity in *Fargo*, *Monitor*, or *Northshore* because none involved recognition of a foreign proceeding. The second error was the *Fargo* court's reliance on cases that dealt with the very different abstention issue of declining to adjudicate in collateral United States lawsuits creditor claims that are the subject of a foreign insolvency proceeding. None of the cases relied upon by *Fargo* for the proposition that comity required deference to a foreign proceeding dealt with abstention from the bankruptcy case itself. Nonetheless, *Fargo* appears to have succeeded in inserting comity into the section 305(a)(1) analysis.

[83] *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977); S. Rep. 95-989, 95th Cong., 2d Sess. 35 (1978).

ability to effectively restructure the business.[84] This is another typical reason for dismissing a United States case. It is simply a practical application of the statutory test that measures whether dismissal is in the best interest of the debtor and creditors. Where the bankruptcy proceeding cannot achieve its purpose, dismissal is appropriate.[85] Finally, neither *Fargo* nor *Northshore* mention the Model Law or use COMI terminology in reaching their conclusions. Thus, neither decision is driven by the COMI-centric policy of the Model Law. [86] Indeed, although both cases discuss factors that would be included in a COMI analysis, it is clear that those factors are discussed as part of a traditional section 305(a)(1) balancing analysis of the relative benefits of the United States and foreign proceeding,[87] with no presumption that the COMI is the proper jurisdiction for a global restructuring.

Thus, it appears that chapter 11 remains a global restructuring tool and that the COMI-centric policies of the Model Law have not changed that very much. The *Fargo* line of authority applies only where a foreign proceeding is pending and has no impact in cases like *Monitor* where the United States chapter 11 is only insolvency proceeding filed. However, even where a foreign insolvency proceeding is pending, *Fargo* and its progeny call for a balancing approach that will permit a United States chapter 11 global restructuring to proceed if it is a better option than the foreign proceeding, regardless of the location of COMI.

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[84] The Bahamian Attorney General opposed the debtors' request for recognition of the chapter 11 cases by the Bahamian courts and the request was denied. *Northshore Mainland*, *supra* note 74, at 197-200.

[85] *See. e.g., In re Int'l Zinc Coatings & Chemical Corp,* 355 Bankr. 76, 85 & 87 (Bankr. N.D. Ill. 2006) (noting there was no reason to have a bankruptcy case and that the proceeding must have a legitimate bankruptcy purpose); *In re Bos,* 561 Bankr. 868, 900-01 (Bankr. N.D. Fla. 2016) (evaluating the benefit of a bankruptcy liquidation). *Compare, In re Yukos Oil Co*, 321 Bankr. 396, 411 (Bankr. N.D. Tex. 2005) (dismissing chapter 11 case under section 1112 because the cooperation of the Russian government was required to restructure a business with the vast majority of its assets located in Russia).

[86] Although he dismissed the cases of the Bahamian debtors, the *Northshore Mainland* judge reaffirmed the view that a United States chapter 11 would be an appropriate restructuring vehicle for those debtors. Expressing his frustration with the creditors' and the Bahamian government's refusal to negotiate, Judge Carey stated:

> Chapter 11 of the United States Bankruptcy Code, with all stakeholders participating, under these circumstances, would be an ideal vehicle for the restructuring of this family of related companies with the ultimate goal of finishing a project said to be 97% complete and, upon its exit from chapter 11, to be in sound financial footing, with appropriate treatment of creditors. I am consequently disappointed that the parties have been so far unable to formulate a consensual exit strategy, whether that would involve taking a plan to confirmation or providing an agreed dismissal as part of a consensual resolution of their disputes.

Northshore Mainland, *supra* note 74, at 206.

[87] The practical focus of the *Northshore Mainland* decision is clear from Judge Carey's statement that he "might consider denying the Dismissal Motion" if that would bring the major creditors and the government of The Bahamas "back to the bargaining table." *Id.*