

MULTINATIONAL INSOLVENCIES

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SELECTED PROBLEMS IN MULTINATIONAL INSOLVENCIES¹

I. INTRODUCTION

Insolvencies with international dimensions are not recent phenomena. However, insolvencies of large multinational enterprises such as Olympia & York, Bank of Credit and Commerce International (BCCI), Maxwell Communications, Versatel Telecom International and Cenargo International with insolvency proceedings in more than one jurisdiction, have focused renewed attention on many interesting and unresolved issues in the multinational insolvency context. The goal of this article is to review the case law and anticipate certain issues which could be raised as complex multinational proceedings unfold.

II. ISSUES RELATING TO SECTION 304 ANCILLARY PROCEEDINGS

A. Section 304 Ancillary Proceedings – Overview

A proceeding under section 304 is unique. In re: Petition of Shavit, 197 B.R. 763 (Bankr. S.D. N.Y. 1996). Such a proceeding is meant to serve as a “more efficient and less costly alternative” to a full scale bankruptcy case. Cunard S.S. Co. v. Salen Reefer Servs. A.B., 773 F.2d 452, 456 (2d Cir. 1985). Its commencement does not trigger the automatic stay, or cloak the petitioner with avoiding powers — alternatives available to the foreign representative should it instead file a full proceeding under section 303. In re: Axona Int’l Credit & Commerce Ltd., 88 B.R. 597 (Bankr. S.D.N.Y. 1988). Moreover, commencement of an ancillary proceeding does not create an estate. See 11 U.S.C. § 541(a) (“the commencement of a case under section 301, 302, or 303 of this title creates an estate”). It nevertheless is intended to prevent the

¹ Denis Forster, Brent Friedman, Stacy Goldschmidt, Andrew Fabens, Ira A. Reid and Shanell Cramer have contributed to periodic updates of these materials.

piecemeal dismantling of a foreign estate's assets in the United States. See In Re Koreag, Controle et Revision S.A., 961 F.2d 341, 348 (2nd Cir. 1991).

Stays must be sought on a case by case basis under section 304. The foreign representative instituting an ancillary proceeding must affirmatively request that a protective stay or other relief be granted. Interpool, Ltd. v. Certain Freights of the M/VS Venture Star, 878 F.2d 111 (3rd Cir. 1989). The court looks to six factors in deciding whether to grant such a request: (1) just treatment of all creditors and interest holders, (2) protection of U.S. creditors against prejudice and inconvenience in foreign proceedings, (3) prevention of preferential or fraudulent transfers of property involved in the proceeding, (4) distribution of proceeds in a manner substantially in accordance with the order prescribed by the Bankruptcy Code, (5) comity, and (6) if appropriate, the opportunity for a fresh start by an individual involved in such proceedings. 11 U.S.C. 304(c).

The scope of relief granted in response to a request under section 304 may vary, as courts weigh the facts of a situation against these criteria. For instance, a court held that “just treatment” under Section 304(c)(1) barred granting injunctive relief against unknown creditors, absent an attempt to notify these creditors of the commencement of the section 304 action and the injunctive relief requested. In re: Petition of Singer and Hughes, 1997 U.S. Dist. LEXIS 17220 (S.D.N.Y. 1997).

Under section 304, certain provisions of the Bankruptcy Code are not available to those entities that commence ancillary proceedings in the U.S. For instance, in In re: Maxwell Communications Corp., 186 B.R. 807, 819 (S.D.N.Y. 1995), aff'd on other grounds, 93 F.3d 1036 (2nd Cir. 1996), the court held that the voidable preference provisions of the Bankruptcy Code did not apply because the subject transfers did not occur in the U.S., and the debtor and the

banks that allegedly received the preferential transfers were primarily located in England. In so holding, the court stated that although a foreign debtor may not bring an avoidance action in an ancillary proceeding under §§ 304 or 305, that does not imply that the debtor has an unlimited ability to bring an avoidance claim in a plenary case under § 109.

B. Eligibility to File Under Section 304

There has been disagreement among the courts as to whether a foreign debtor, whose representative commences a section 304 proceeding, is eligible for general bankruptcy relief in the U.S. as a prerequisite for the commencement of an ancillary proceeding. Some courts have suggested indirectly that the debtor must be eligible for relief under both section 109(a) and section 109(b)(3) in order to proceed under section 304. In Angulo v. Kedzep, Ltd., 29 B.R. 417 (S.D. Tex. 1983), the court granted a section 304 petition in part on the grounds that the debtor owned assets in the U.S. and was eligible for Chapter 11 relief. See also In re: Stuppel, 17 B.R. 413, 415 (S.D. Fla. 1981); In re: Trakman, 33 B.R. 780, 783 (S.D. N.Y. 1983); In re: Toga Mfg., 28 B.R. 165, 167 (Bankr. E.D. Mich. 1983); In re: Culmer, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982) (motion to dismiss section 304 proceeding on grounds that debtor was foreign bank engaged in banking business in U.S. denied when court found that debtor was not in fact engaged in banking business in U.S.).

Cases, however, have held that the foreign entity need not be generally eligible for bankruptcy relief in the U.S. to file a section 304 proceeding. Noting that section 304 proceedings are merely ancillary to the primary foreign proceeding and are intended to be flexible, these cases have permitted representatives of foreign debtors to commence section 304 actions even where the foreign estate did not otherwise qualify under the Bankruptcy Code. See In re: Goerg, 844 F.2d 1562 (11th Cir. 1988), cert. denied, 488 U.S. 1034 (1989); In re: Brierly,

145 B.R. 151 (Bankr. S.D.N.Y. 1992); cf. In re: Gee, 53 B.R. 891, 898 (Bankr. S.D.N.Y. 1985) (finding that a representative of a foreign insurance company doing business in the U.S. and thus ineligible to file under § 109(b)(3) could obtain section 304 relief).

The determination of what constitutes a “foreign proceeding” under section 304(a) of the Bankruptcy Code has received discussion in several cases. This issue is paramount when determining whether an ancillary proceeding may be commenced in the U.S. upon action taken by overseas creditors, a receiver or trustee. If the foreign action cannot be deemed a “proceeding”, then it is not possible to institute an ancillary proceeding in the U.S. One court held that “[f]iling a section 304 petition does not initiate a case under title 11 of the Code. Rather, it commences a case ancillary to the foreign proceeding.” In re: Petition of Tam, 170 B.R. 838, 844 (Bankr. S.D.N.Y. 1994) (holding that a voluntary winding up of a Cayman Islands corporation not a “foreign proceeding”, so the liquidator could not commence an ancillary proceeding in a U.S. Bankruptcy Court.) However, where a court-sanctioned liquidator with fiduciary-like duties and responsibilities was overseeing a voluntary winding-up of a Zambian company, the court found a foreign proceeding to exist and denied a motion to dismiss a section 304 proceeding. In re: Petition of Ward, 201 B.R. 357 (Bankr. S.D.N.Y. 1996).

Section 101 of the Bankruptcy Code gives rise to further issues regarding section 304 eligibility by defining a “foreign proceeding” as one that takes place in a country where “the debtor’s domicile, residence, principle place of business, or principal assets were located at the commencement of such proceeding.” 11 U.S.C. § 101(23). In In re: Petition of Shavit, 197 B.R. at 767 the court held that the foreign liquidation of an American company whose principal place of business or principal assets exist in a foreign country can qualify as a “foreign proceeding” for purposes of federal bankruptcy law. See also In re: Rimsat, 98 F.3d

956 (7th Cir. 1996). Before allowing a Section 304 proceeding to be instituted in the U.S., the court may grant jurisdictional discovery to determine whether a foreign proceeding meets the requirements of Section 101(23). In re: Mid East Trading Ltd., 1997 U.S. Dist. LEXIS 14481 (S.D.N.Y. 1997) (allowing section 304 petitioner limited discovery to show that a Lebanese company, subject to winding-up proceeding in the United Kingdom, had sufficient assets there to qualify under Section 101(23)).

Most recently, the Bankruptcy Court for the Southern District of New York analyzed the requirements of 11 U.S.C. § 101(23) in order to determine whether a proceeding in the Polish judicial system constituted a “foreign proceeding” . In In re Netia Holdings S.A., 277 B.R. 571 (Bankr. S.D.N.Y. 2002) creditors argued that the judicial proceedings taken place in Poland failed to satisfy the requirements of a “foreign proceeding” as defined in 11 U.S.C. § 101(23) and therefore the debtor could not institute an ancillary proceeding in the U.S. under section 304. In analyzing whether a “foreign proceeding” existed, the Court stated that “(1) the proceeding must entail an administrative or judicial process involving insolvency or reorganization; (2) it must be conducted for the purpose of liquidating an estate, adjusting its debts or effecting its reorganization; and (3) it must be pending in a foreign country where the debtor maintains its residence, domicile or principal place of business.” Id. at 581. The Court found that the Polish proceeding entailed a judicial process to adjust debts and effect a reorganization, albeit different from that in the United States, the exact purpose of which was to adjust the debts of the debtor, which was clearly domiciled and had its principal place of business in Poland. Thus the Polish proceeding clearly met the section 101(23) requirements of a “foreign proceeding” and an ancillary proceeding pursuant to section 304 was allowed. Id.

C. Foreign Trustee's Ability to Compel Turnover of U.S. Assets

An issue of importance in ancillary proceedings concerns the power of the U.S. bankruptcy courts to compel the turnover of property which is located in the U.S., but connected to the foreign estate. The Second Circuit addressed this issue in In re: Koreag, Controle et Revision S.A., 961 F.2d 341 (2d Cir. 1992), cert. Denied, 506 U.S. 865 (1992).

In Koreag, the foreign debtor, Mebco, was a Swiss bank engaged in currency trading with Refco, a dealer in foreign currencies. Shortly after liquidation proceedings were commenced in Switzerland against Mebco, Refco had transferred approximately \$11 million to Mebco's bank accounts. Refco was unaware of Mebco's liquidation proceedings, and never received a reciprocal currency transfer from Mebco.

Upon learning of the Swiss proceeding, Refco filed an action in the U.S. to recover the disputed funds, and obtained an ex parte attachment of Mebco's New York bank account. Mebco's representative, Koreag, responded by filing a section 304 petition, asking the court to defer to the Swiss proceeding, and turn over control of the account to the Swiss liquidator.

The bankruptcy court granted Koreag's motion, and ruled that property involved in a foreign proceeding could be turned over to a foreign representative if an ancillary proceeding had been properly commenced under section 304(c). The court further stated that it would be the function of the foreign court to resolve any adverse claims to the subject property. In re: Koreag, Controle et Revision S.A., 130 B.R. 705 (Bank. S.D.N.Y. 1991).

The Court of Appeals vacated the bankruptcy court's order (which had been affirmed by the District Court), holding that before issuing an order for turnover of property to a

foreign representative under section 304(b)(2), the court must first determine whether the foreign debtor has a valid ownership interest in the subject property.

In vacating and remanding, the Second Circuit focused on the distinction between section 304(b)(1) of the Bankruptcy Code which allows the bankruptcy court to enjoin actions against a debtor with respect to property “involved in” a foreign proceeding, and section 304(b)(2) which allows the bankruptcy court to order the turnover of “property of such estate.” To obtain a stay under 304(b)(1) the court held that one must merely prove that the property is involved in a foreign proceeding, without proving that it is property of the foreign estate. However, before permitting turnover under 304(b)(2), the court held that a determination must be made that the property in dispute is in fact property of the foreign estate where there is a challenge by an adverse claimant.

Moreover, the Second Circuit also held that local law must be applied to determine which law governs the debtor’s ownership interest in the subject property. Because New York law provides that the law of the jurisdiction which has the greatest interest in the litigation governs ownership disputes, in Koreag the Court held that New York’s interests were superior to those of Switzerland on the grounds that Switzerland was primarily concerned with administration of the debtor’s estate, while New York was concerned with the underlying property and contract claims. 961 F.2d at 351

Subsequently, the bankruptcy court followed Koreag regarding ownership of the property in dispute in In re: Rubin, 160 B.R. 269, 274 (Bankr. S.D.N.Y. 1993). The court concluded that “I may order turnover only of *property of* the foreign estate or its proceeds, whereas I may enjoin actions against the *property of* the foreign estate and also against *property*

involved in the foreign proceeding.” Id. at 274. When ownership of the property becomes an issue, the court held that it must “first apply local law ... to determine whether the debtor has a valid ownership interest in the property.” In Rubin, the Court determined that New York law governed the dispute because “[t]he Trust agreement is governed by New York law. . . .” Id. at 275, note 5.

It will be interesting to see what, if any, effects the Koreag decision will have on the issue of reciprocity in the future. This issue concerns whether foreign jurisdictions will follow Koreag to turn-over property to a trustee who seeks to recover assets which are located overseas, for inclusion in the U.S. debtor’s estate. If foreign courts impose the same requirements that Koreag now imposes on U.S. courts, trustees will become embroiled in litigation in foreign jurisdictions (most likely under foreign law) regarding ownership of property for repatriation to the U.S.

D. Deference to Foreign Proceedings

Case law holds that domestic creditors are not entitled to special or priority status over the competing claims of foreign creditors regarding U.S. assets. See In re: Culmer, supra, at 632; see also Cunard S.S. Co., supra. In Cunard, the court noted that even in the absence of a section 304 proceeding or full bankruptcy proceeding, principles of comity mandate that domestic creditors not receive special treatment. But cf. In re: Lineas Aereas de Nicaragua, 10 B.R. 790, 791 (Bankr. S.D. Fla. 1981) (granting section 304 petition on the grounds that the assets would remain in the U.S. and “be applied primarily to satisfy the debts owing to the U.S. creditors”).²

² A related issue is whether foreign creditors are entitled to application of foreign priorities in a U.S. bankruptcy case. No cases have been found on this issue, although the answer would likely be no.

The issue of deference to foreign proceedings often arises when a foreign debtor requests injunctive relief in a section 304 ancillary proceeding, and a U.S. creditor objects, complaining that it should not have to forgo an opportunity to pursue U.S. statutory remedies, such as attachment, because a foreign proceeding is pending. In one typical case, the receiver for foreign companies which were the subject of separate bankruptcy cases in Canada was granted injunctive relief under section 304 to prevent the debtors' assets located in the U.S. from being seized by creditors in this country. In re: Petition of Davis, 191 B.R. 577 (Bankr. S.D.N.Y. 1996). In determining that the receiver should be entitled to a permanent injunction as determined by the Canadian proceeding, the U.S. court noted that the Canadian Bankruptcy and Insolvency Act closely resembles the Bankruptcy Code, and contains a comprehensive procedure for the orderly marshaling and equitable distribution of the assets of a Canadian debtor. Id. at 587. As a result, the bankruptcy court issued an injunction in the U.S. proceeding to prevent creditors from seizing assets in the U.S. or instigating other legal proceedings against the companies or their representatives, pending a final determination in the Canadian liquidation proceedings as to the disposition of assets.

The issue of deference to foreign proceedings was addressed in Rubin, 160 B.R. 273. In that case, the petitioners, liquidators for a reinsurance company based in Israel, brought an action under section 304 to enjoin "the commencement or continuation" of any attachments, liens, or judgments against assets located in the U.S. The Bankruptcy Court enjoined all actions by creditors against property of the debtor which was located in the U.S. In so doing, the court held that so long as the laws of the foreign jurisdiction are not repugnant to our own, there is a distinct judicial preference for deferring to the foreign tribunal with respect to litigation over the validity or amount of claims against a foreign debtor. Rubin, 160 B.R. at 283. The court also

noted that the creditor's plea for attachment of the debtor's U.S. property would have been more substantial if it had been perfected before the foreign proceedings had begun.

The same examination of foreign bankruptcy laws was undertaken by the U.S. Bankruptcy Court for the Southern District of New York in In re: Hourani, 180 B.R. 58 (Bankr. S.D.N.Y. 1995). In Hourani, a Jordanian debtor commenced a section 304 ancillary action after a U.S. creditor had obtained an attachment of the debtor's U.S. assets. Although the court stressed the importance of deferring to foreign liquidation proceedings, it denied the section 304 application. The court determined that the foreign liquidation procedures in question lacked minimum safeguards and protections for creditors because Jordanian law only required publication notice to creditors, not proof of actual notice of the commencement of proceedings.

The method used by the Hourani court in deciding whether minimum safeguards exist in a foreign proceeding was strongly criticized by Finanz AG Zurich v. Banco Economico S.A. 1998 U.S. Dist. LEXIS 5902 (S.D.N.Y. 1998). Citing a recent Second Circuit decision, the court held that the actual facts and circumstances of a given case are dispositive when deciding whether to defer to a foreign proceeding, not the particular rules of a jurisdiction. Id., citing Baker v. Latham Sparrowbush Associates, 72 F.3d 246, 254 (2nd Cir. 1995). Thus, in Hourani, information showing that the creditor in fact had actual notice of the Jordanian action should have rendered the adequacy of the local rules irrelevant.

Koreag also discussed deference to foreign proceedings. There, the Second Circuit acknowledged a general resistance to attempts of a foreign representative to procure the turnover of U.S. assets, but the court distinguished the U.S. creditor's purported position as the beneficiary of a constructive trust from "an effort by a normal bankruptcy creditor without any

plausible ownership claim to a specific asset, to gain a preferred position vis-a-vis other creditors by initiating a separate legal proceeding.” See Koreag 961 F.2d at 349-50.

In some earlier cases courts have expressed concern over the priority of liens obtained on assets in the U.S. when there are insolvency proceedings pending in foreign courts. These courts have declined to invalidate such liens, holding that their validity should be determined by U.S. courts in accordance with U.S. law, notwithstanding foreign law and the pendency of foreign proceedings. In the case In re: Toga Mfg. Ltd., a Canadian trustee sought protection under section 304 when a U.S. creditor obtained an order of attachment in the U.S. to enforce an arbitral award. The court determined that the creditor would lose its secured status in the Canadian proceedings, and denied injunctive relief to the debtor. In re: Toga Mfg. Ltd., 28 B.R. 165 (Bankr. E.D. Mich. 1983); see also, In re: Egeria Societa Per Azioni di Navigazione, 26 B.R. 494 (Bankr. E.D. Va. 1983); Comstat Consult. Services, 10 B.R. 134 (Bankr. S.D. Fla. 1981). The decision in In re: Toga Mfg. has been strongly criticized by the Bankruptcy Court for the Southern District of New York for giving a disproportionate piece of the estate to the U.S. creditor, to the detriment of others. The court stated that due to its “limited focus on the minor substantive differences between Canadian and U.S. law,” the decision was “out of line with the modern need for flexibility in the construction of comity.” In re: Axona Int’l Credit & Commerce Ltd., 88 B.R. 597, 611 (Bankr. S.D.N.Y. 1988)

Some courts have held that domestic attachments in derogation of foreign proceedings – i.e., levied after the commencement of such proceedings – are void. These courts seek to promote adherence to principles of international comity, rather than the specific provision of the Bankruptcy Code regarding the distribution of assets in foreign cases. See Interpool, 878

F.2d 111, 114; Cunard S.S. Co. v. Salen Reefer Servs., 773 F.2d 452, 458 (2d Cir. 1985); Banque de Financement v. First Nat'l Bank of Boston, 568 F.2d 911 (2d Cir. 1977).

The remedies offered by adherence to principles of international comity are not coextensive with those of section 304. While section 304 codifies such principles, it creates statutory remedies that do not exist in the common law. Hembach v. Quickpak Corp., 1998 U.S. Dist. LEXIS 40 (E.D. Pa. 1998). Whereas comity will support deference of a claim in recognition of a foreign proceeding, it is not suited to enforcement of an order obtained in a foreign jurisdiction. Hembach, citing In re: Maxwell, 93 F.3d at 1047.

Recently, the Second Circuit ruled that section 304(c)(4) protects secured creditors whose security interest would be substantially affected by subordination in a foreign insolvency proceeding. Treco v. Bank of New York, 240 F.3d 148 (2d Cir. 2001). In Treco, the liquidators of a Bahamian bank undergoing liquidation pursuant to Bahamian law sought the turnover of funds held by the Bank of New York and JCPL Leasing Corp. (collectively, "BNL.") BNL, however, argued that it was not required to turnover the funds because they had a security interest in them pursuant to a security agreement.

In support of its position, the liquidators argued that comity should be given greater weight than any of the other factors in section 304(c). BNL, on the other hand, focused on the differences between the treatment of secured creditors under Bahamian insolvency proceedings and those proceedings in the U.S. In particular, Bahamian law treats secured creditor's claims subordinate to administrative expenses, taxes, and prepetition wages. Id. at 155. Interpreting the statute, the Second Circuit rejected the argument that comity is the most important factor under section 304(c). The court reasoned that had Congress intended

comity be given greater weight it would have been addressed in the preamble and not as a separate factor. Id. at 156.

Finally, the court determined that comity should not be extended in this case. The court reasoned that the United States Bankruptcy Code gives special status to secured claims and the Bahamian insolvency laws were not in substantial accordance with this principle. Id. at 158-59; cf. In re Ionica, 241 B.R. 829 (Bankr. S.D.N.Y. 1999) (dismissing chapter 11 petition after finding that British insolvency laws are substantially in accordance with U.S. bankruptcy laws.) Furthermore, BNL's secured status would be substantially affected as a result of the potential subordination of their claim resulting in minimal, if any, recovery at all. Id. at 159. The case, however, was remanded to determine the validity of the security interest held by BNL. Id. at 161.

In conclusion, Treco, does not stand for the proposition that comity will be denied in all cases where foreign insolvencies treat secured claims differently than in the U.S. Such decisions, however, will be made on a case-by-case basis. Id. In fact, some courts have interpreted Treco to require denial of section 304 relief only where the court finds "clear evidence of maladministration or corruption." In re Bd. of Dirs. Of Compania De Combustibles S.A., 269 B.R. 104 (Bankr. S.D.N.Y. 2001) (denying comity be extended to creditors since Argentine law provided sufficient procedural safeguards to creditors and indication that Argentine proceedings were conducted fairly).

III. ISSUES RELATING TO U.S. BANKRUPTCY PROCEEDINGS OF MULTINATIONAL ENTERPRISES

A. First-Day Orders and Plan Provisions Paying Foreign Creditors

U.S. bankruptcy courts have issued “first day payment orders” permitting a debtor to pay off foreign creditors even though domestic creditors must go unpaid. This situation arises, for example, when foreign creditors are in a position to seize assets located in a foreign country, that are needed to carry out the reorganization of the debtor as a going concern. Thus, a bankruptcy judge applied the “extraordinary powers” of his office to pay a Japanese creditor that had seized a ship belonging to a bankrupt shipping company in Okinawa, in order to enable the ship to be used in Operation Desert Shield. Vessel Charters, Inc., No. 190-15899-260 (E.D.N.Y. Jan. 10, 1991).

Similarly, U.S. airlines have been authorized to pay pre-petition claims of foreign creditors to (a) prevent seizure of planes; (b) ensure continuing service by foreign vendors; and (c) enable the airline to continue operating overseas routes. For example, see the order issued by the bankruptcy court in In re: Pan Am Corp., et al., Nos. 91B 100080 through 10087 (CB) (Bankr. S.D.N.Y.) (Order dated Jan. 8, 1991). Such payments may be authorized under the “necessity of payment” doctrine. See, e.g., In re: Penn Cent. Trans. Co., 467 F.2d 100 (3d Cir. 1972); In re: Ionosphere Clubs, Inc., 98 B.R. 174 (Bankr. S.D.N.Y. 1989); In re: Chateaugay Corp., 80 B.R. 279 (Bankr. S.D.N.Y. 1987).

In the same vein, the Second Amended Joint Plan of Reorganization of Waterman Steamship Corporation, which was confirmed by order of the Bankruptcy Court dated June 19, 1986, provided for all foreign claims to be paid in full, in cash, since the debtor proposed to continue to sail vessels world-wide after emerging from Chapter 11, and it was believed that the plan would otherwise be unenforceable.

B. Extraterritoriality of the U.S. Bankruptcy Code

(1) The Aramco Standard

Prior to the Supreme Court's decision in Equal Employment Opportunity Comm'n v. Arabian Oil Co. and Aramco Services Co., 499 U.S. 244, 111 S. Ct. 1227, 113 L.Ed. 2d 274 (March 26, 1991) ("Aramco"), a number of lower courts had held that the U.S. Bankruptcy Code applies extraterritorially (i.e. in foreign countries where assets are located). See, e.g., U.S. Lines, Inc. v. Gac Marine Fuels Ltd., 68 B.R. 690 (Bankr. S.D.N.Y. 1986) and In re: McLean Industries, 74 B.R. 589 (Bankr. S.D.N.Y. 1987) (companion cases holding that the automatic stay provisions of § 362 prohibited a foreign creditor from arresting foreign vessels located in Hong Kong and Singapore which are owned by the debtor to enforce contractual obligations incurred outside the U.S.); In re: Deak & Co., Inc., 63 B.R. 422 (Bankr. S.D.N.Y. 1986) (voiding, as a preference, a pledge to a non-resident alien of stock in a foreign corporation to secure a debt incurred outside the U.S.); In re: Filipek, 35 B.R. 339 (Bankr. D. Haw. 1983) (finding failure by debtor to list assets in Canada constituted non-compliance with requirement to file schedules and statement of affairs relating to all property of the estate).

In 1991, the Supreme Court in Aramco, held that extraterritorial application of a federal statute requires that Congress clearly express an affirmative intention that a statute be applied on an extraterritorial basis. In Aramco, the Court held that Title VII of the Civil Rights Act of 1964 did not apply extraterritorially to regulate the employment practices of U.S. employers in their employment of U.S. citizens abroad. In reaching this conclusion, the Court first noted that Congress has the power, and authority, to enforce its laws outside the territory of the U.S. The issue then became whether Congress had, in fact, exercised that power and authority. In Aramco, the Court adopted a strict rule of statutory interpretation holding that the statute's language must clearly express such congressional intent for extraterritoriality to apply.

This rule is based on the “long-standing principle of American law that ‘legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the U.S.’” See Aramco, 111 S. Ct. at 1230 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281 at 285, 93 L.Ed. 680, 69 S.Ct. 575 (1949)). In Aramco, the Supreme Court stated that this rule is designed to “protect against unintended clashes between our laws and those of other nations which could result in international discord.” Aramco, 111 S. Ct. at 1230.

The Court went on to hold that “in applying this rule of construction, we look to see whether ‘language in the [relevant act] gives any indication of a congressional purpose to extend its coverage beyond places over which the U.S. has sovereignty or has some measure of legislative control’. Foley Bros., 336 U.S. at 285. We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is ‘the affirmative intention of the Congress clearly expressed,’ Benz v. Compania Naviera Hidalgo S.A., 353 U.S. 138, 147, 1 L.Ed.2d 709, 77 S.Ct. 699 (1957), we must presume it is primarily concerned with domestic conditions.’ Foley Bros., 336 U.S. at 285.” Aramco, 111 S. Ct. at 1230.

The dissenting opinion in Aramco argued that the majority had incorrectly elevated the presumption against extraterritoriality to a “clear statement” of express intent in the statute itself, and failed to take into account legislative history, the statute’s language and its administrative interpretation³. Aramco 111 S.Ct. at 1238, 1244. In fact, subsequent Supreme Court and Circuit Court decisions have not employed a clear statement rule. Instead, they have continued to consider all evidence of legislative intent including legislative history in

³ It is interesting to note that within eight months after the Aramco decision, Congress amended Title VII to make clear that Title VII is intended to apply extraterritorially. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1077 (1991).

determining whether Congress intended a statute to apply outside the U.S. See Sale v. Haitian Ctrs. Council, Inc., 113 S.Ct. 2549 (1993); Kollias v. D& G Marine Maintenance, 29 F.3d 67 (2nd. Cir. 1994).

Under the Aramco standard, as implemented, a court may or may not conclude that the Bankruptcy Code contains a clearly expressed intent to be applied extraterritorially. A limited number of courts have addressed the extraterritorial reach of the Bankruptcy Code with varying results under Aramco. See In re: McTaque, 198 B.R. 428 (Bankr. W.D.N.Y. 1996); In re: Lykes Bros. Steamship Co., Inc., 207 Bankr. 282 (Bankr. M.D. Fla. 1997) (finding arrest of vessel in Belgian port violated section 362 stay issued by U.S. bankruptcy court.)

Notable decisions articulating this standard are discussed below. They include: (1) Nakash v. Zur (In re: Nakash), 190 B.R. 763 (Bankr. S.D.N.Y. 1996), (2) Maxwell Communication Corp. v. Societe General PLC (In re: Maxwell Communication Corp.), 186 B.R. 807 (S.D. N.Y. 1995), aff'd on other grounds, 93 F.3d 1036 (1996); (3) In re: Rimsat, 98 F.3d 956 (7th Cir. 1996); and (4) In re: Simon, 153 F.3d 991 (9th Cir. 1998).

(2) In re: Nakash

In In re: Nakash, the receiver of a failed Israeli bank brought an action against the debtor due to the conduct of certain directors of the failed bank. The Israeli Receiver initially filed an involuntary bankruptcy proceeding against the debtor in Israel, but this proceeding was thereafter dismissed. Subsequently, the debtor filed a voluntary petition for reorganization in the U.S. under Chapter 11 of the Bankruptcy Code. In response, the Israeli Receiver — without informing either the U.S. court or the debtor — filed a second involuntary petition against the debtor in Israel. The debtor, in turn, brought an action in the U.S. bankruptcy court against the

Israeli Receiver alleging that the Receiver had violated the automatic stay under 11 U.S.C. § 362(a) by commencing the Israeli bankruptcy proceeding. See 11 U.S.C. § 362(a)(1).

In ruling for the debtor, the U.S. Bankruptcy Court for the Southern District of New York determined that the filing of the involuntary bankruptcy proceeding by the Israeli Receiver in Israel violated the automatic stay. The court held that §§ 362 and 541 of the Bankruptcy Code illustrate Congress' intent that the automatic stay be applied extraterritorially. The court held that since the Israeli Receiver had availed itself of U.S. law by attaching the debtor's property in New York, the bankruptcy court (in New York) was able to maintain personal jurisdiction over the Israeli Receiver.

In Nakash, the bankruptcy court held that the automatic stay was applicable extraterritorially. In so doing, the court first looked at the plain language of the statute, 11 U.S.C. § 541. The Court held that § 541 “creates an estate comprised of all of the debtor's property, wherever located and by whomever held.” The court stressed the significance of the language “wherever located,” which it held enabled the Court to invoke jurisdiction over assets located extra-territorially.

Second, the court looked to legislative history, and concluded that Congress intended for § 541 to be applied extra-territorially. The court did not refer to specific legislative history, but instead cited prior cases including In re: Deak & Co., Inc., 63 B.R. at 422, and In re: Filipek, 35 B.R. at 339 to illustrate Congressional intent that the Bankruptcy Code be applied extraterritorially. Surprisingly, the court in Nakash neglected to mention that the predecessor section to § 541 — Section 70(a) of the Bankruptcy Act — was specifically amended in 1952 to add the phrase “wherever located.” Inclusion of this legislative history would have provided

support for the court's proposition that Congress intended to extend the provisions of the Bankruptcy Act extraterritorially. The House report provides:

Section 23 amends Section 70(a) to make clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the U.S.. See Nadelman, The National Bankruptcy Act and the Conflict of Laws, 59 Harv. L. Rev. 1025 (1946). The words 'wherever located' have therefore been added at appropriate places. In addition, for ease of reference, the several sentences of Section 70(a)(1) [sic] have been made into separate paragraphs.

H.R. Rep. No. 2320, 82nd Cong., 2d Sess. 15 (1952), reprinted in 1952 U.S.C.C.A.N. 1960, 1976.

Finally, the court in Nakash held that applying § 541 extraterritorially furthers the purposes of the automatic stay by organizing the claims of all creditors into a single proceeding, and by preserving "the estate for the benefit of all creditors." Id. at 768. For these reasons, the bankruptcy court determined that the automatic stay applies extraterritorially.

(3) In re: Maxwell

The Court determined that other sections of the Bankruptcy Code, notably the voidable preference provisions of section 547, do not apply extraterritorially. See In re: Maxwell Communication Corp., 186 B.R. 807 (S.D.N.Y. 1995), aff'd, 93 F.3d 1036 (2nd Cir. 1996).

In Maxwell, the debtor was an English company with large ownership stakes in two U.S. companies. Three non-U.S. banks (the "Banks") had provided the debtor with credit prior to its insolvency. After defaulting on its indebtedness to the Banks, the debtor filed for Chapter 11 relief in the Southern District of New York. The very next day, the debtor began bankruptcy proceedings in England. An Examiner was appointed by the Southern District of New York to report to the court on the two liquidation proceedings.

Before the Debtor's bankruptcy case had been filed, the debtor had sold portions of its U.S. assets to pay-off the Banks. The Examiner thereafter sought to recover these payments as a preference under 11 U.S.C. § 547.

In attempting to persuade the court to apply § 547 extraterritorially, the debtor argued that an extraterritorial analysis of the Bankruptcy Code was unnecessary because "the money received by the Banks was derived from the sale of U.S. assets." The debtor therefore argued that the transfers had a substantial connection to the U.S., and that the court should invoke jurisdiction over these assets and apply U.S. preference law. Second, the debtor argued that because the Banks sought a ratable share of Maxwell Communication's assets (the bulk of which were generated in the U.S.), the Banks had acquiesced to Maxwell's Chapter 11 case, and had subjected themselves to the claims adjustment process of the Bankruptcy Code. Maxwell, 186 B.R. at 816.

The court rejected the debtor's argument, holding that Congress did not intend for the preference provisions (11 U.S.C. §547) to be applied extraterritorially. The court stated that all of the "component events of the transfers" must be considered by the court in determining whether to apply the Bankruptcy Code extraterritorially. Maxwell, 186 B.R. at 816. The court held that because the transfers did not occur in the U.S. and the debtor and the banks were primarily located in England, an extraterritorial analysis would be required. In so doing, the court held that "while relevant to an extraterritoriality analysis, the fact that the transferred funds derived from U.S. asset sales is insufficient in light of the absence of other domestic connections to characterize the transfers as occurring within the borders of the U.S." Id. at 817.

The court went on to hold that the Banks' conduct was not sufficient to demonstrate that they had "acquiesced" to participating in the chapter 11 claims adjustment process. The Court also held that because the Banks had not filed proofs of claim in the U.S. bankruptcy court (unlike the creditor in the Nakash), they had not subjected themselves to U.S. law.

Finally, the debtor argued that Congress intended for 11 U.S.C. § 547 to apply extraterritorially. In rejecting this argument, the Court stated that nothing in the legislative history indicates such an intention.

(4) In re: Rimsat

The U.S. Court of Appeals for the Seventh Circuit discussed the extraterritorial reach of the U.S. Bankruptcy Code in In re: Rimsat, 98 F.3d 956 (7th Cir. 1996). In Rimsat, the Seventh Circuit permitted the extraterritorial reach of the automatic stay provisions of the Bankruptcy Code to enjoin aspects of a foreign receivership which was commenced against a company in the Federation of St. Christopher and Nevis, a Caribbean Island nation which belongs to the British Commonwealth.

Rimsat had been formed in 1992 to provide satellite communications to certain countries in the South Pacific. It was incorporated in Nevis, though its principal place of business was located in Fort Wayne, Indiana. Most of its financial assets were also located in Fort Wayne, but its nonfinancial assets — principally its satellites — had no terrestrial site. When Rimsat became financially troubled, Hilliard, a director and shareholder, began to squabble with the company's managing director over control of the company. In December 1994, Hilliard obtained an injunction from the High Court of Nevis enjoining Rimsat from

declaring bankruptcy or continuing to prosecute a suit that it brought against Hilliard in the U.S. Thereafter, Hilliard obtained a further order from that same court appointing him receiver with full power to manage Rimsat.

Two weeks later, several creditors filed an involuntary petition in the U.S. against Rimsat under chapter 11 of the Bankruptcy Code. A trustee in bankruptcy was appointed, and a successor trustee brought suit in Bankruptcy Court, obtaining orders (i) enjoining Hilliard from exercising control over any property of Rimsat; (ii) commanding Hilliard to turnover all assets of Rimsat in his control; and (iii) holding Hilliard in contempt of court.

In rejecting Hilliard's appeal of these orders, and in determining the extraterritorial reach of the Bankruptcy Code, the Seventh Circuit held:

The fact that the stay affected proceedings in a foreign country would be relevant to a motion to lift the automatic stay (§ 362(d)), had one been made (none was). The movant could argue for relief from the stay on the basis of the doctrine of comity, though the argument ... might not succeed. But the mere existence of a foreign proceeding affecting the debtor does not ... invalidate the stay by giving it an impermissible extraterritorial reach.

In re: Rimsat, 98 F.3d 956, 961 (7th Cir. 1996).

The court noted that Hilliard, as a U.S. citizen, was "incontestably" subject to the lawmaking authority of Congress and the jurisdiction of the courts. The presumption against extraterritorial application adopted by the Supreme Court in Aramco, and cited unsuccessfully by Hilliard in his appeal, thus did not defeat an automatic stay against a U.S. citizen involved in a U.S. bankruptcy of a corporation headquartered in the U.S.

The Seventh Circuit went on to find that the efforts of Hilliard and the Nevis court "bespoke an effort to derail the bankruptcy proceeding by a foreign proceeding instituted later, the original proceeding having been one to create an operating receivership outside the

scope of section 305(a)(2)(A)”. Id. The court held that the “Nevis receivership has also not been shown to be a sufficiently close substitute for the U.S. bankruptcy proceeding to warrant abstention [cites omitted]”. Id. at 962.

(5) In re: Simon

The Ninth Circuit has discussed the extraterritorial reach of section 524 of the Bankruptcy Code, which provides for injunctions prohibiting collection of claims against the bankruptcy estate. In re: Simon, 153 F.3d 991 (9th Cir. 1998) cert. denied, 525 U.S. 1141 (1999). In Simon, the Ninth Circuit held that a bankruptcy court may validly exercise its *in rem* jurisdiction to protect property of the debtor’s estate, wherever the property is located, when issuing a discharge injunction pursuant to 11 U.S.C. § 524. Id. at 996.

Hong Kong and Shanghai Banking Corp., Ltd. (“Hong Kong-Shanghai”) is an international banking company incorporated in Hong Kong frequently engaging in business in the United States. Odyssey was an international company incorporated in the British Virgin Islands and maintained offices in Hong Kong. Odyssey’s major shareholder, Simon, personally guaranteed loans provided by Hong Kong-Shanghai to Odyssey. Instead of repaying personal debts amounting to over \$200 million, Simon filed a personal bankruptcy petition under Chapter 7 of the Code. As part of its discharge order, the bankruptcy court issued the following injunction:

All creditors whose debts are discharged by this order . . . are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above named debtor.

Id. at 994.

Hong Kong-Shanghai appealed the injunction, primarily arguing that the section 524 discharge injunction constituted an improper extraterritorial application of the statute and questioned whether such an extraterritorial application may operate to enjoin a foreign proceeding. Alternatively, Hong Kong-Shanghai argued that international comity required the case to be vacated.

The Ninth Circuit, however, concluded that Congress clearly intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate, therefore, protection of *in rem* jurisdiction was a sufficient basis for a court to restrain another court's proceedings. Id. at 996. Furthermore, the Ninth Circuit concluded that there was no functional difference between the automatic stay imposed by § 362 upon the commencement of a bankruptcy and the injunction prohibiting collection actions against the bankruptcy estate under § 524. Id. Thus, the § 524 discharge enjoining Hong Kong-Shanghai from collection against the estate property, regardless of its geographic location, was proper. Id.

In addressing the more difficult question as to whether a bankruptcy court may enjoin a foreign collection action against a debtor personally or as to assets which do not form part of estate property, if the creditor was not a party to the United States bankruptcy proceedings, the court decided that they need not squarely address that question because Hong Kong-Shanghai fully participated in the Simon bankruptcy when it filed a proof of claim, thus surrendering to United States jurisdiction. Id. at 997; 11 U.S.C. § 157.

Moreover, the Ninth Circuit held that international comity did not require them to vacate the bankruptcy court's injunction as Hong Kong-Shanghai suggested. Under the Bankruptcy Code, courts must consider the status and progress of other nations' insolvency

proceedings in determining how to manage domestic bankruptcies. Id. at 999. In this case, there was no proceeding pending in Hong Kong and there was no conflict which existed between Hong Kong and the United States law on the issues in question. Furthermore, the section 524 discharge injunction did not apply to Hong Kong courts, but only to the creditor who participated in the United States bankruptcy. Thus, under these circumstances, international comity did not require dismissal of the case because there was no conflict between domestic and foreign law. Hartford Fire Ins. v. California, 509 U.S. 764 (1993).

IV. PARALLEL U.S. AND FOREIGN BANKRUPTCY FILINGS

One issue that arises in pronounced form in large multinational bankruptcies is the effect of parallel proceedings — either of a single debtor or affiliated debtors — in different countries. Most U.S. case law to date has addressed the consequences of a single plenary proceeding in one country upon creditors or property of that estate located in other countries. Parallel proceedings pose a greater risk of conflict between courts in different countries.

A foreign debtor that otherwise satisfies the requirements of the Bankruptcy Code for commencing a case (for example, one which has a place of business or assets in the U.S., 11 U.S.C. § 109(a)), may commence a full fledged bankruptcy case in the U.S. notwithstanding the pendency of a proceeding overseas. See, e.g., Banque de Financement v. First Nat'l Bank of Boston, 568 F.2d 911 (2d Cir. 1977). In fact, section 303(k) provides that in the case of a foreign bank not engaged in banking in the U.S., an involuntary case may be commenced only if the debtor is already subject to a foreign proceeding.

Prior to the 1991-92 mega-proceedings of Maxwell, BCCI and Olympia & York, concurrent cases have typically involved a foreign debtor that has commenced a 304

proceeding in the U.S. to possibly avail itself of certain provisions of the Bankruptcy Code, such as obtaining a stay or avoiding powers, rather to carry out a reorganization in the U.S. See, e.g., In re: Axona, 88 B.R. 597 (liquidators in Hong Kong proceeding commenced U.S. case solely to avoid transfer, then obtained dismissal of U.S. proceedings). In proceedings where the debtors are actually seeking to reorganize, the potential for conflict with foreign laws is substantially greater.

The Chapter 11 proceeding of Maxwell Communications illustrates how courts deal with potentially conflicting bankruptcy and insolvency proceedings. In Maxwell, the debtor was subject to both a British insolvency proceeding and a U.S. bankruptcy chapter 11 case. These parallel cases created the potential for substantial conflict including disputes over estate property and the potential for inconsistent decisions. As a result, the U.S. bankruptcy court appointed an examiner who reached a protocol with the English receiver, as well as a mechanism for coordinating the two cases. In re: Maxwell Communications Corp., No. 915 15741 (Bankr. S.D.N.Y.) (order dated January 15, 1992).

The protocol permitted the U.K. receiver, subject to approval of the U.S. examiner or the U.S. Bankruptcy Court, to take the lead regarding the preparation of a plan of reorganization and to exercise control over the non-debtor subsidiaries. The protocol did not purport to address issues such as the scope of the automatic stay or potential conflicts regarding claims determination.

A. U.S. Debtor Filing Abroad

As reflected in reported U.S. cases, it does not appear that there have been many instances in which U.S.-based debtors are subject to pending U.S. bankruptcy cases and parallel proceedings overseas. The advantage of such filings would be to make foreign bankruptcy law

available to debtors in spite of a foreign jurisdiction's extraterritorial limitations on the application of the Bankruptcy Code. Presumably, a debtor would need to obtain permission from the U.S. bankruptcy court to apply U.S. law, in that an insolvency overseas would affect the purported jurisdiction of the U.S. court over assets of the debtor wherever located.

In the chapter 11 case of U.S. Lines, the debtor obtained permission from the U.S. bankruptcy court to commence a voluntary case in the Netherlands to prevent the dismemberment of assets in Holland (subject to the condition that the jurisdiction of the Dutch case be limited to assets located there). The Dutch court, which also operated on the principle of universal jurisdiction, rejected the filing because of its attempted limitation on the court's jurisdiction. Eventually an involuntary case was filed in the Netherlands.

Notwithstanding, in the same case the debtor was permitted to file a French proceeding to sell ships located in France. See In re: McLean Indus., Nos. 865 12238 - 865 12241 (Bankr. S.D.N.Y.) (order dated July 12, 1987). Because this proceeding was considered to be in rem, no problems arose concerning limitation of the foreign court's jurisdiction.

B. Section 508(a)

The Bankruptcy Code provides in 11 U.S.C. § 508(a) that creditors who receive distributions in foreign proceedings may not receive distributions in U.S. proceedings on the same claims, until other creditors with claims in the U.S. proceedings have received equal amounts. However, this does not mean that a creditor is allowed to maintain concurrent U.S. and foreign actions. In a case involving a foreign creditor's attempt to bring an enforcement action in a foreign court despite having participated in the U.S. bankruptcy proceeding, the court held that §508(a) is instead meant to encourage restoration of property to the distribution pool so that

all creditors may be treated equally. In re: William Neil Shawn, No. C 95-02211 CW at 11 (N.D. Ca. Aug. 22, 1996).

C. Class Claims by Foreign Representatives

May a foreign representative file a claim in the U.S. proceeding on behalf of all creditors in his custody? No cases have been found on this point, although U.S. law has been increasingly receptive to “class” claims in bankruptcy. See, e.g., In re: Charter Co., 876 F.2d 866, 870 (11th Cir. 1989); In re: American Reserve Corp., 840 F.2d 487 (7th Cir. 1988); In re: Chateaugay Corp., 104 B.R. 626, 632 (S.D.N.Y. 1989); but see In re: Standard Metals Corp., 817 F.2d 625, 626, vacated on other grounds, 839 F.2d 1383 (10th Cir. 1987).

D. Must U.S. Creditors Lift the Stay in the U.S. to Attach Foreign Assets of a Foreign Debtor That Files a 304 Proceeding in the U.S.?

As noted in Section III. B. above, various cases have held that if an entity commences a full scale bankruptcy case in the U.S., the automatic stay may prevent creditors of that debtor (who are subject to the personal jurisdiction of U.S. courts) from taking actions against the debtor’s property which is located overseas. The Court’s decision in In re: Nakash illustrates that these decisions may be upheld even in light of the U.S. Supreme Court’s decision in Aramco. Furthermore, this issue may assume additional difficulty in cases such as Olympia & York, where non-U.S. entities have filed chapter 11 cases in the U.S. In such cases, should U.S. creditors be forced to seek relief from the stay under section 362(d) prior to attaching assets overseas? If there is no stay in the foreign proceedings or if stay relief is more easily obtainable overseas, should the U.S. court decline to apply the stay, summarily grant relief therefrom or even consider this as a ground for abstention from the U.S. proceedings under section 305, at least where the foreign assets of the debtor are far more substantial than its U.S. assets?

Faced with the commencement of an involuntary chapter 11 proceeding against a foreign financial services company here in the U.S. that allegedly transferred money to accounts in Guernsey, a British crown dependency and offshore banking center to defraud creditors, the U.S. bankruptcy court voluntarily ceded jurisdiction over certain claims in favor of the Royal Court of Guernsey. In re: International Administrative Services Inc., 211 Bankr. 88 (Bankr. M.D. Fla.1997). Though the courts had concurrent jurisdiction, the U.S. court noted that the Guernsey court had a greater interest in regulating business there, and could exercise in rem and in personam jurisdiction over all the defendants.

E. Issues re Intercompany Claims

One issue which could become prominent in international mega-bankruptcies is the treatment to be accorded inter-corporate claims. In the U.S., of course, intercompany claims are not automatically subordinated in bankruptcy. In order for a claim to be subordinated, there generally must be some form of inequitable conduct by the creditor and harm to other creditors. See Pepper v. Litton, 308 U.S. 295, 84 L.Ed. 281, 60 S. Ct. 238 (1939); In re Mobile Steel Co., 563 F.2d 692, 700 (5th Cir. 1977) (holding subordination must not be inconsistent with the provisions of the Bankruptcy Act.); In re Baker & Getty Financial Services, Inc., 974 F.2d 712, 717 (6th Cir. 1992).

Issues could arise if there are discrepancies among different countries in their treatment of intercompany loans. This may arise where a U.S. debtor is purportedly owed moneys by an affiliated non-U.S. debtor, or where the non-U.S. debtor is subject to both U.S. and foreign bankruptcy proceedings. In this instance, an issue would arise as to the treatment of the U.S. entity's claim against the non-U.S. entity.

In parallel proceedings in Australia and the U.S. of the L.J. Hooker Corporation — a real estate and department store conglomerate — the U.S. debtors sought approval from the U.S. bankruptcy court to make claims in Australia against their parent and affiliates for mismanagement and waste, and to make them liable on alter ego grounds for claims against the U.S. entities. Ultimately, the U.S. debtors did not pursue these claims because of expense and the uncertainty of success.

F. Avoidance of Upstream Guarantees

In view of financing arrangements of large multinational entities, another issue which may arise in cross-border bankruptcies concerns the enforceability in different jurisdictions of “upstream” guarantees. In the U.S., of course, upstream guarantees are subject to avoidance as fraudulent conveyances, and may also be attacked on *ultra vires* grounds. See, e.g., Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 993 (2d Cir. 1981) (requiring quantifiable benefit to guarantor).

A question arises as to whether a foreign entity filing for bankruptcy protection in the U.S. may avoid upstream guarantees that would have been enforceable under the laws of the relevant foreign jurisdiction. When a foreign company files for bankruptcy protection in the U.S., it will have access to the avoiding powers provided in the U.S. Bankruptcy Code and would arguably be empowered to avoid upstream guarantees otherwise enforceable under the law of the foreign jurisdiction. However, a U.S. bankruptcy court should abstain from proceedings filed primarily to achieve such result, especially where the U.S. assets of the foreign guarantor are insignificant in relation to its foreign assets.

In the Hooker bankruptcy proceedings, significant consideration was given to the avoidability of bank claims arising from loan guaranties made by the U.S. subsidiary of the Australian parent. Ultimately, the issue was never litigated, and the avoidability of upstream guaranties in the international context remains unresolved.

V. CONCLUSION: THE UNCITRAL MODEL

The preceding discussion of selected issues in multinational insolvencies explores a number of areas of uncertainty and confusion in international bankruptcy practice that arise in the application of U.S. law. Such problems are only amplified when the issues are simultaneously considered from the point of view of the diverse laws of other countries.

This situation has become increasingly pronounced because of the ever increasing number of transnational companies. As a result, the United Nations Commission on International Trade Law has drafted a Model Law on Cross-Border Insolvency. The Model Law, which is intended to be adopted by any country that seeks to reform its bankruptcy code, marks a shift towards the restructuring and reorganizing companies, to maximize value for creditors and shareholders, as opposed to liquidation proceedings.

The United States has adopted the Model Law, as reflected in the new chapter 15 and other changes which are contained in the Bankruptcy Amendments of 2005.

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In re: Djordjivic v. Swiss Air Transport – 2004 U.S. Dist. Lexis 25343 (S.D.N.Y. 2004)

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