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THE TRANSNATIONAL INSOLVENCY DILEMMA: CONGRESS SHOULD EMPHASIZE COMITY OF NATIONS

I. INTRODUCTION

The rise in the number of transnational insolvencies¹ is an inevitable consequence of today's modern business world.² With the proliferation of complex, cross-border debtor-creditor relationships, U.S. practitioners and parties to bankruptcy proceedings need to be assured of fair and impartial administrations of insolvent estates. Unfortunately, § 304 of the Bankruptcy Code³ offers no clear answers for American creditors with interests in foreign insolvency proceedings. Instead, § 304(c) simply lists six factors⁴ that federal courts should consider when deciding whether to grant an ancillary U.S. bankruptcy proceeding. Because § 304(c) fails to make clear whether international notions of comity⁵ or the protection of domestic claim holders'

1. While a transnational insolvency can involve the attachment of an American debtor's foreign assets by foreign creditors, this Note will focus on the impact of insolvency proceedings involving American creditors who attempt to attach the domestic assets of a foreign debtor who has filed for bankruptcy protection under the laws of a foreign country. For a practical approach for today's bankruptcy practitioner in either type of situation, see Simon D. Haysom & Amelia T. Damiani, *Practitioner's Guide to International Bankruptcy*, N.Y. STATE B.J., Jan. 1996, at 42.

2. See Tandy Armstrong Panuska, Comment, *The Chaos of International Insolvency—Achieving Reciprocal Universality Under Section 304 or MIICA*, 6 TRANSNAT'L LAW. 373, 374 (1993).

3. 11 U.S.C. § 304 (1994).

4. Those factors are:

- (1) just treatment of all holders of claims against or interests in such estate;
- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of such estate;
- (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by [title 11];
- (5) comity; and
- (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

Id. § 304(c).

5. The Supreme Court first defined "comity" in 1895 in *Hilton v Guyot*, 159 U.S. 113 (1895), espousing that comity is

neither a matter of absolute obligation, . . . nor of mere courtesy and good will But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due

interests should control a court's decision of whether to grant an ancillary proceeding, insolvent debtors and unpaid creditors can rarely be certain whether a United States court will favor protecting local creditors or defer to a foreign adjudication.

In this Note, Part II introduces the two approaches federal courts have taken when deciding whether to grant relief to foreign representatives in a transnational insolvency. In addition, this section will discuss how the 1978 Revised Bankruptcy Code has shifted modern courts towards a policy of deferring to international notions of comity. Part III analyzes solutions commentators have suggested to resolve the problems inherent in cross-border insolvencies. Part IV proposes a revision of § 304(c) of the Revised Code. The objective of this revision is to provide courts with a flexible framework that will encourage deferral to foreign proceedings unless clear evidence of prejudice can be shown. In addition to assuring all interested parties of consistent, fair, and predictable administrations of insolvent estates, this framework will enable American creditors to base lending and investment decisions on the assumption that foreign debtors will not be subject to ancillary U.S. proceedings unless the laws of the foreign debtor's country are clearly prejudicial towards foreign creditors.

II. TRANSNATIONAL INSOLVENCIES UNDER THE BANKRUPTCY ACT OF 1898 AND THE REVISED BANKRUPTCY CODE

Historically, U.S. courts have applied either a "universality" or "territoriality" approach when addressing transnational insolvencies.⁶ American courts have applied either the universality or territoriality approach to decide whether to allow a foreign jurisdiction to administer assets based in the United States. Since the revision of the Bankruptcy Code in 1978,⁷ the trend has been

regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Id. at 163-64; see also BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

6. For an in-depth discussion of the case law outlining these two conflicting approaches, see, for example, Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 AM. BANKR. L.J. 135, 137-47 (1992). See also Stuart A. Krause et al., *Relief Under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies*, 64 FORDHAM L. REV. 2591 (1996) (advocating an amendment to § 304 to emphasize comity as the determinant factor in a court's analysis); Melissa S. Rimel, Comment, *American Recognition of International Insolvency Proceedings: Deciphering Section 304(c)*, 9 BANKR. DEV. J. 453 (1992) (proposing a balancing test approach to allow courts to properly weigh competing policy considerations); Barbara K. Unger, *United States Recognition of Foreign Bankruptcies*, 19 INT'L LAW. 1153 (1985) (advocating a balancing test approach that emphasizes comity).

7. Bankruptcy Reform Act of 1978, Pub. L. No. 95-989, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1994)).

for courts to defer to notions of comity under the universality approach and grant relief to foreign representatives who petition under the Code.⁸ However, a minority of courts continue to follow the territoriality approach, insisting that American claim holders' interests be protected in light of the possible prejudices that could occur in a foreign bankruptcy proceeding.⁹ Because of this split among federal courts, American creditors and foreign debtors cannot be certain whether an American ancillary proceeding will be granted in the event of insolvency.

A court adopting a universality approach would typically defer to the foreign bankruptcy proceeding, respecting notions of international comity and favoring a single distribution of assets by a foreign court. While the principal advantage to the universality approach is the prospect of a single adjudication that would equitably and efficiently dispose of all claims among all interested creditors, this approach can jeopardize American creditors' interests by subjecting them to the inconvenience and expense of asserting their claims in distant forums, under foreign bankruptcy law.

In contrast, U.S. courts that follow a territorialistic approach often protect the rights of American creditors by granting an ancillary bankruptcy proceeding.¹⁰ The two primary advantages of the territoriality approach for American creditors is the assurance that their claims will be considered under U.S. bankruptcy law and that they are not inconvenienced by being forced to adjudicate their claim in a foreign court.¹¹ However, the territoriality approach also promotes multiple insolvency proceedings and has done little to encourage countries to work toward harmonizing inconsistent domestic bankruptcy laws.¹² This resulting bankruptcy scheme increases the transaction costs of doing business in today's increasingly interconnected global marketplace, hampers the ability of lenders to accurately evaluate the risks of extending credit to foreign multinationals, and fails to assure foreign debtors that they will not be subject to multiple bankruptcy proceedings and conflicting judgments.

A. *Early Case Law*

Early American case law generally advocated a territoriality approach, often denying recognition to foreign proceedings in order to protect American

8. See *In re Hourani*, 180 B.R. 58, 63-64 & n.10 (Bankr. S.D.N.Y. 1995); see also *infra* note 22.

9. See, e.g., cases cited *infra* note 21.

10. See, e.g., *In re Linneas Areas de Nicaragua*, 13 B.R. 779 (Bankr. S.D. Fla. 1981) (appointing an independent trustee in the United States to prevent prejudice to local creditors).

11. See Booth, *supra* note 6, at 138.

12. For an excellent analysis of the advantages of the harmonization of international bankruptcy law, see Thomas M. Gaa, *Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?* 27 INT'L LAW. 881 (1993).

creditors' interests. In two early cases, *Disconto Gesellschaft v. Umbreit*¹³ and *In re Berthoud*,¹⁴ American courts refused to grant comity to pending foreign bankruptcy proceedings. In fact, throughout most of the 1900s courts relied on an interpretation of the Bankruptcy Act of 1898 and the Federal Rules of Bankruptcy Procedure that protected American creditors' interests at the expense of promoting comity.¹⁵ However, as the frequency and complexity of transnational insolvencies increased, the need for revision of the Bankruptcy Act of 1898 became clear. In 1974, the collapse of the German bank Bankhaus I.D. Herstatt revealed the inadequacies of the existing code structure.¹⁶ Observers recognized that a more comprehensive framework for dealing with transnational insolvencies was necessary in order to resolve future conflicts.¹⁷

B. The 1978 Revision of the Bankruptcy Act and § 304

In 1978, Congress revised the Bankruptcy Act of 1898.¹⁸ Responding to

13. 208 U.S. 570 (1908). In *Disconto* the Court acknowledged "the well-recognized rule between states and nations which permits a country to first protect the rights of its own citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond their borders." *Id.* at 582 (emphasis added).

14. 231 F. 529 (S.D.N.Y.), *appeal dismissed*, 238 F. 797 (2d. Cir. 1916).

15. Prior to 1978, Rule 119 of the Federal Rules of Bankruptcy Procedure and § 2(a)(22) of the Bankruptcy Act of 1898 dictated how courts should handle foreign bankruptcy proceedings. Bankruptcy Rule 119 stated:

When a proceeding for the purpose of the liquidation or rehabilitation of his estate has been commenced by or against a bankrupt in a court of competent jurisdiction without the United States, the court of bankruptcy may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, having regard to the rights and convenience of local creditors and other relevant circumstances, dismiss a case or suspend the proceedings therein under such terms as may be appropriate.

FED. R. BANKR. P. 119 (pre-1978), in *NEW BANKRUPTCY RULES AND OFFICIAL BANKRUPTCY FORMS* (1974). Section 2(a)(22) of the Bankruptcy Act of 1898, Pub. L. No. 696, 30 Stat. 544 (repealed 1978), contained similar wording. Both provisions espoused principles of comity and creditors rights "without clearly establishing how the courts should apply these competing theories." Rimel, *supra* note 6, at 458.

16. The Herstatt affair involved the failure of one of Germany's largest private banks and the efforts of the bank's worldwide creditors to attach its assets. Chase Manhattan Bank in New York was the principal clearinghouse for *Herstatt* in the United States. Chase froze Herstatt's accounts and refused to honor payment demands on the account after receiving news of its imminent liquidation. The German bank's creditors quickly scrambled to attach its assets and get in line to recover over \$150 million frozen in the New York account. While the parties eventually settled, the inadequacies of the Code in providing guidance for United States courts led observers to question its effectiveness within an international legal order. See Joseph D. Becker, *International Insolvency: The Case of Herstatt*, 62 A.B.A. J. 1290 (1976).

17. See, e.g., *id.* at 1295; Unger, *supra* note 6, at 1163 ("The Herstatt affair highlighted the underdeveloped status of United States law respecting foreign insolvency proceedings.").

18. Bankruptcy Reform Act of 1978, Pub. L. No. 95-989, 92 Stat. 2549 (codified at 11 U.S.C.

the Herstatt affair, § 304 of the Code attempted to clarify when courts should grant an ancillary American proceeding, specifically, § 304(c).¹⁹

Although the revised Code did not indicate which, if any, of the six factors should be weighted more heavily, courts quickly began interpreting whether comity or creditors' rights should control. Initially some courts continued to espouse a territoriality approach, protecting local creditors by refusing to recognize foreign proceedings.²⁰ However, beginning with a series of cases in the early 1980s, courts began recognizing foreign proceedings and spearheaded a movement toward a policy of deferring to notions of comity in sister common-law jurisdictions.²¹ This modern trend toward a universalism approach was hampered by other federal court decisions that seemed to either confuse the importance of comity as the determinative factor in a § 304 analysis²² or reject it outright.²³

101-1330 (1994)).

19. See *supra* note 3.

20. See *In re Toga Mfg. Ltd.*, 28 B.R. 165, 170 (Bankr. E.D. Mich. 1983) (refusing to defer to a Canadian proceeding and holding that it "must protect United States citizens' claims against foreign judgments inconsistent with this country's well-defined and accepted policies."); *In re Linneas Areas de Nicaragua*, 13 B.R. 779 (Bankr. S.D. Fla. 1981) (where the court utilized § 304(c)(2) to appoint a disinterested co-trustee in the United States).

21. See *Cunard S.S. Co. v. Salen Reefer Services AB*, 773 F.2d 452, 458 (2d Cir. 1985) (finding that "[t]he granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion."); *In re Koreag, Controle et Revision S.A.*, 130 B.R. 705, 712 (Bankr. S.D.N.Y. 1991) (stating that "[c]omity is inevitably the more significant factor since the other factors . . . are inherently taken into account when considering comity."), *vacated on other grounds*, *Koreag, Controle et Revision S.A. v. Refco F/X Assoc. (In re Koreag, Controle et Revision S.A.)*, 961 F.2d 341 (2d Cir. 1992); *In re Gercke*, 122 B.R. 621, 631 (Bankr. D.C. 1991) ("Federal courts should generally accord comity to a foreign court when the court is of competent jurisdiction and according comity does not prejudice the rights of United States citizens or violate domestic foreign policy."); *In re Axona Int'l Credit and Commerce Ltd.*, 88 B.R. 597, 608 (Bankr. S.D.N.Y. 1988) (finding that comity should be a "guiding factor" in the court's decision), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, *Chemical Bank v. Togut (In re Axona Int'l Credit & Commerce Ltd.)*, 924 F.2d 31 (2d Cir. 1991); *In re Culmer*, 25 B.R. 621, 628 (Bankr. S.D.N.Y. 1982) (quoting the legislative history of § 304(c): "'Principles of international comity and respect for the judgments and laws of other nations suggest that the court be permitted [to defer to the foreign proceeding].'" (quoting H.R. Rep. No. 95-595, at 325 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6281; S. Rep. No. 95-989, at 35 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5821)).

22. Specifically, two 1988 decisions paid lip service to considerations of comity, but seemed to return to a method of protecting creditors' interests at the expense of recognizing the ability of foreign common-law tribunals to fairly adjudicate insolvency proceedings. See *Interpool Ltd. v. Certain Freights of the M/V Venture Star*, 102 B.R. 373, 378-80 (D.N.J. 1988) (holding that Australian law would not sufficiently protect American creditors); *In re Banco Nacional de Obras y Servicios Plublicos*, 91 B.R. 661, 667 (Bankr. S.D.N.Y. 1988) (refusing to defer to a sister common-law Mexican proceeding, and stating that comity "will not be granted . . . if it would result in forcing American creditors to participate in foreign proceedings in which their claims

While a movement toward universalism has emerged, these decisions highlight the confusion surrounding the weight comity should be given in a § 304(c) analysis. The different approaches courts have taken when interpreting § 304 leaves little certainty whether an ancillary proceeding will be granted in the event of a foreign insolvency. Apparently, modern courts are unlikely to defer to a foreign proceeding if American creditors' interests are clearly unprotected. However, it is less clear whether a U.S. court will grant an ancillary proceeding when the foreign insolvency scheme is not clearly prejudicial to American creditors' interests, even if that proceeding were to take place in a similar, common-law jurisdiction. Therefore, despite the revision of the Code in 1978 and a general movement toward a universalism approach among courts, domestic creditors still cannot be certain that their claims will be adjudicated under U.S. insolvency law and foreign debtors cannot be assured that they will face only one insolvency proceedings. The result is a system that hampers the ability of creditors and debtors to accurately evaluate the risks of doing business across borders.

III. SOLUTIONS TO THE CONFLICT AND CONFUSION OF § 304

Commentators disagree as to how courts can resolve the conflict between the universality and territoriality approaches. Recently, three authors argued that comity should be emphasized as the determinant factor because Congress intended the other elements in the section to merely "temper a court's decision as to whether to afford comity to a foreign proceeding."²⁴ Krause proposed that Congress should amend § 304 to clarify that courts should consider the existing five factors "consistent with principles of comity."²⁵

will be treated in some manner inimical to this country's policy of equality").

23. See *In re Papeleras Reunidas, S.A.*, 92 B.R. 584, 594 (Bankr. E.D.N.Y. 1988) (interpreting the legislative intent behind the section as insisting that "it is best [for courts] to *equally consider all of the variables of § 304(c)* in determining the appropriate relief in an ancillary proceeding" (emphasis added)).

24. Krause et al., *supra* note 6, at 2611. The authors also examined the legislative history of § 304(c) in their comment. Specifically, they noted that just prior to the enactment of § 304, Congress added comity as a sixth factor to the section. Accordingly, this late addition should be interpreted "as an expression of congressional intent encouraging courts to lean toward a universality approach by giving greater deference to the foreign proceeding." Krause et al., *supra* note 6, at 2594-95. The House and Senate committee reports emphasized flexibility in a § 304(c) analysis. H.R. Rep. No. 95-595, at 325 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6281; S. Rep. No. 95-989, at 35 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5821.

25. Krause et al., *supra* note 6, at 2611. For a contrasting approach, see Stacey Allen Morales & Barbara Ann Deutch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573 (1984). Morales and Deutch advocated a territorialistic approach by encouraging two changes in the judicial approach to § 304 in order for courts to better protect American creditors' interests and provide a fair and reliable process for both domestic creditors and foreign debtors. See *id.* at 1595. First, courts should shift

Other commentators argue against amending the statute, advocating that courts should either resolve certain preliminary interpretation issues before applying the factors in § 304(c)²⁶ or interpret the section in accordance with other objective criteria.²⁷ Similarly, at least one commentator argues that applying a “balancing test” analysis to § 304(c) is the most effective way to ensure that courts are able to reserve discretion and flexibility when deciding whether to grant comity.²⁸

A more ambitious approach to resolving the confusion surrounding international insolvencies is the negotiation and enforcement of deference to treaties.²⁹ Commentators agree that if multilateral agreements can be worked

the burden of proof to the foreign petitioner. *See id.* at 1595 n.125 (citing *Culmer*, 25 B.R. at 633, and noting that the *Culmer* court seemed to indicate that American creditors bore the burden of proving that comity should not control). Second, American courts should recognize and enforce choice of venue clauses whenever possible. *See id.* at 1596.

26. *See* Richard A. Gitlin & Evan D. Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 BUS. LAW. 307 (1987). The authors note that the flexibility of the section can still be preserved if courts adopt a two-step recognition process—whether to recognize the foreign proceeding and then whether to enforce the specific decrees from the foreign proceeding—when dealing with § 304 petitions. *Id.* at 321-22.

27. *See* Booth, *supra* note 6. Booth proposed a two-part, multi-step interpretation of the existing section. In an effort to promote cooperation between nations, Booth’s proposal would require American courts to first determine if the foreign representative has satisfied eight general “threshold” requirements. Next, the court should apply the § 304(c) factors to determine whether comity should be extended to the foreign proceeding. In doing so, the court should defer to the foreign adjudication if: (1) the foreign proceeding provides for the “orderly and equitable” treatment of creditors; (2) the foreign laws and procedures are fair to all parties; and (3) if deferral would “best assure an economical and expeditious administration” of the debtor’s estate. *Id.* at 231.

28. *See* Rimel, *supra* note 6, at 482. Rimel suggests that courts should adopt a combination of the methods used by the courts in *In re Gercke*, 122 B.R. 621 (Bankr. D.C. 1991), and *In re Koreag, Controle et Revision S.A.*, 130 B.R. 705 (Bankr. S.D.N.Y. 191), *vacated on other grounds*, *Koreag, Controle et Revision S.A. v. Refco F/X Assoc.* (*In re Koreag, Controle et Revision S.A.*), 61 F.2d 341 (2d Cir. 1992), considering public policy and the significance of comity while weighing each factor in § 304(c) individually. Rimel advocates that this method will allow courts to reserve “the flexibility to weigh the competing policy considerations behind granting comity on an individual basis, as intended by Congress.” *Id.* at 483.

29. In 1997, the United Nations Commission on International Trade Law adopted a Model Law on Cross-Border Insolvencies. Although the impact of the law will hinge on its adoption by member nations, its objective is to foster cooperation between courts in the event of a cross-border insolvency. For a discussion of the potential impact of the Model Law, see, for example, E. Bruce Leonard, *A New Milestone in Cross-Border Insolvencies*, AM. BANKR. INST. J., July/Aug. 1997, at 20; Jeremy V. Richards, *How Well Does the U.S. Bankruptcy Code Support the Emerging Standards of Comity in Cross-Border Insolvencies?*, AM. BANKR. INST. J., Oct. 1997, at 20. For a brief analysis of a historic joint reorganizational hearing recently held between United States and Canadian bankruptcy courts, see E. Bruce Leonard, *A Historic Crossborder Proceeding*, AM. BANKR. INST. J., Feb. 1998, at 12. For a general historical discussion of United States and international efforts to harmonize commercial law, see Harold S. Burman, *Harmoniza-*

out, then a more uniform and international bankruptcy system would promote the resolution of international insolvency conflicts and assure creditors of equal treatment regardless of the jurisdiction overseeing the insolvency proceeding.³⁰ Moreover, countries could avoid the risk of resulting disruptions to important commercial and political relationships.³¹ However, hopes for an international treaty network among nations are unrealistic and impractical.³² Ultimately, this range of possible solutions requires some deference to foreign proceedings. The question remains whether focusing on notions of comity by the courts or negotiation of treaties should dominate efforts in this area.

IV. ANALYSIS OF PROPOSED SOLUTIONS AND A MODEL REVISION OF § 304

A. *Multinational Treaties*

Although formal multinational treaties or pacts will likely best assure creditors of equal treatment from foreign tribunals, United States courts should proceed cautiously until those agreements are negotiated. Without the assurance of reciprocity agreements between nations, American creditors still need the protection of American courts from clearly unjust foreign proceedings. Because nations must overcome immense cultural, political, and philosophical differences, an international treaty structure that could effectively address complex multinational insolvency situations will likely take many years to adopt and enact. Realistically, such a far-reaching arrangement may never be achieved.

Although insolvency harmonization may never be achieved on a truly global scale, smaller groups of countries more likely could successfully

tion of International Bankruptcy Law: A United States Perspective, 64 *FORDHAM L. REV.* 2543, 2544-47 (1996).

30. *See, e.g.,* Gaa, *supra* note 12, at 882-84 (concluding that by codifying an "international common law of bankruptcy" into multinational bankruptcy treaties, countries can harmonize insolvency laws and assure predictability, efficiency, equity, and finality when addressing international insolvency disputes).

31. *See id.* at 883-84. Gaa notes that without a system in place that promotes the resolution of international insolvencies, countries are risking economic and political consequences. *Id.*; *see also* Panuska, *supra* note 2, at 401-02 (espousing cooperative reciprocity and universality).

32. *See, e.g.,* Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 *WASH. U. L.Q.* 931 (1994) (noting that harmonization is unlikely to occur because a nation's bankruptcy laws are often rooted in unique cultural philosophies and legal principles). Instead, an ad hoc approach to the negotiation of bilateral and multilateral treaties should be continued until lawmakers can gain a deeper understanding of the social, legal, and political differences among nations. *Id.* at 939-40; *see also* Panuska, *supra* note 2, at 397-98. As a result of the failure of past treaty proposals, Panuska suggests that United States and foreign legislatures adopt the 1989 Model International Insolvency Cooperation Act (MIICA). *Id.* at 376 (citing IBA COMM. J. SECT. ON BUSINESS LAW, MODEL INTERNATIONAL INSOLVENCY COOPERATION ACT (MIICA) (3d draft, 1989)), *reprinted in* Panuska, *supra* note 2, app. A).

negotiate bankruptcy treaties. Regional pacts might be agreed to when countries have comparable legal norms, social philosophies and political systems. For example, member countries in the North Atlantic Foreign Trade Agreement (NAFTA) or the European Union (EU) could negotiate a uniform bankruptcy system to address the problems that exist when bankruptcies spill over within the confines of their respective regions.³³ If countries were required to agree to the terms of bankruptcy treaties when joining multinational trading pacts, the uncertainty involving foreign proceedings in member states would be removed. More importantly, initial efforts to harmonize domestic insolvency laws between these groups could establish models for other nations. Eventually, these types of treaty arrangements could “snowball” and indirectly encourage other nations to join or risk losing the same level of recognition afforded participating countries.

B. Amendment of § 304 of the Bankruptcy Code

Until multinational treaties can be negotiated, lawmakers should amend § 304 of the Bankruptcy Code to “modernize” the section.³⁴ By revising the section to emphasize comity as the controlling element in a § 304(c) analysis, Congress can advocate that courts should defer to foreign proceedings unless clear prejudice or preferential treatment is shown. The revised section should also distinguish these two elements as central to a § 304(c) analysis and minimize the significance of the remaining three elements as additional

33. See Ian F. Fletcher, *International Insolvency: A Case for Study and Treatment*, 27 INT’L LAW. 429, 443 (1993) (mentioning some of the main difficulties which develop from multilateral approaches including “exercise of jurisdiction, and the capability of the liquidator to act in other states and administer assets that are located there”).

34. A proposed amendment of § 304(c), follows revisions are highlighted in italics:

§ 304. Cases ancillary to foreign proceedings

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with *notions of international comity and respect for the judgments and laws of other nations.*

Subject to these notions, the court should consider the protection of claim holders in the United States against clear prejudice in the processing of claims or the possibility of preferential or fraudulent dispositions of property of such estate.

In addition the court should consider—

(1) just treatment of all holders of claims against or interests in such estate;

(2) distribution of proceeds of such estate substantially in accordance with the order prescribed by *title 11*; and

(3) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

See also Krause et al., *supra* note 6, at 2610-11.

elements for courts to consider. However, lawmakers should continue to allow courts some flexibility concerning when circumstances merit the granting of an ancillary United States proceeding.³⁵ Preserving flexibility for and focusing analysis on notions of comity requires balancing which is probably best left to Congress.³⁶

When amending § 304(c), Congress should acknowledge how the courts now are analyzing cross-border conflicts in insolvency proceedings. For example, a 1995 Bankruptcy Court decision exemplifies how courts should analyze a request for an ancillary United States bankruptcy proceeding under § 304(c). In *In re Hourani*³⁷ the Bankruptcy Court for the Southern District of New York refused to defer to a Jordanian bankruptcy proceeding³⁸ because deference should only be given when “a reasonable degree of certainty that the consideration of all parties’ rights will be fair and impartial.”³⁹ While the court’s decision might appear to mark a return to the territoriality approach, the unique facts of the case clearly supported the district court’s refusal to defer to the foreign proceeding.⁴⁰ No language in the *Hourani* decision indicates that

35. The House and Senate committee reports emphasized that the § 304(c) factors were “designed to give the court the maximum flexibility in handling ancillary cases” and that courts should “be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules.” See H.R. Rep. No. 95-595, at 325 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6281; S. Rep. No. 95-989, at 35 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 6281. Without the certainty of bilateral pacts between nations, American creditors still need the protection of United States bankruptcy law. However, an argument can be made for the efficiencies created by domestic bankruptcy law that mandated deferral to all foreign insolvency proceedings. Mandatory deferral to a bankruptcy proceeding in the home country of the foreign debtor would force domestic creditors to evaluate credit risks and investment decisions based on a careful analysis of the bankruptcy scheme of the foreign debtor’s home country. Because the recognition and enforcement problems associated with ancillary proceedings would be removed, both creditors and debtors could reduce the transaction costs associated with multiple proceedings. See Gaa, *supra* note 12, at 886 (noting that creditors cannot maximize recovery and debtors cannot fully realize all benefits available to them under the bankruptcy laws if judgments are not enforced or recognized in other forums).

36. *But see supra* note 28.

37. 180 B.R. 58 (Bankr. S.D.N.Y. 1995).

38. *Id.* at 70.

39. *Id.* at 64.

40. Specifically, the liquidation of the Jordanian Petra Bank was governed by special legislation and its affairs managed by a Jordanian Economic Security Committee. The court found that the resolutions lacked adequate procedural and substantive safeguards while granting the Committee substantial power to dispose of the bank’s assets and claims. *Id.* at 62, 66. The Resolutions also nullified the applicability of Jordanian Commercial Law or Civil Law to any insolvency proceeding involving the bank. *Id.* at 66. Interestingly, the court emphasized that the Petra Resolutions differed substantially from the provisions of the Jordanian insolvency statutes concerning a number of important safeguards, including a notice and claims processing procedure, a provision for the recovery of preferences and fraudulent conveyances, and a right of appeal for creditors. In fact, the court explicitly limited its analysis to the Petra Resolutions and affirmatively

the court was interested in protecting local creditor's rights at the expense of promoting comity. The *Hourani* court plainly stated that "[t]his court leans towards a 'universality' approach to international insolvency issues."⁴¹ However, the court added that "[w]hile this nation's preparedness to grant deference to the laws and proceedings of other countries is considerable, it is not unlimited."⁴² Instead of merely paying lip service to notions of international comity, the *Hourani* court balanced the competing interests involved, emphasizing that American ancillary proceedings will not be granted absent circumstances involving clear and unfair prejudice to creditors' interests.

V. CONCLUSION

Much has changed in the international business world since Congress revised the Bankruptcy Code twenty years ago. The complexity of modern international business relationships will continue to contribute to a greater number of cross-border insolvencies. Because the current Code fails to clearly indicate how much significance courts should give to notions of international comity in a § 304(c) analysis, different courts are using different standards when determining whether American creditors should be entitled to ancillary relief.

Congress should amend the section to emphasize that comity should be the controlling element in a § 304(c) analysis unless local creditors prove that their interests would be clearly prejudiced by an unfair and impartial foreign adjudication. Because a single proceeding consolidates all claims against the debtor, deference to a fair foreign proceeding may be the best way for courts to assure "an economical and expeditious administration of [an] estate."⁴³ By revising the statute to clarify Congress's intent to focus on notions of comity, parties to the litigation, practitioners, and multinational business concerns can take comfort in more consistent federal court decisions. Moreover, by embracing the movement toward a universality approach, Congress and the courts encourage other countries to favor comity in cross-border insolvency disputes. In this way, perhaps nations can move toward the gradual harmonization of international bankruptcy laws, assuring predictability and finality when insolvencies spill across borders. By emphasizing notions of international comity subject to the protection of domestic claim holders against clear prejudice or preferences inconsistent with U.S. bankruptcy law in the proposed

took no position as to the availability of ancillary relief based upon other proceedings under different law. *Id.* at 70. The implication is that the court would not have granted the ancillary proceeding had the liquidation taken place under Jordanian insolvency statutes. For an in-depth discussion of *In re Hourani*, see Krause et al., *supra* note 6, at 2605-09.

41. *In re Hourani*, 180 B.R. at 63.

42. *Id.* at 64.

43. 11 U.S.C. § 304(c) (1994).

amendment,⁴⁴ courts will be required to balance these two critical elements in a § 304(c) analysis.

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44. *See supra* note 34.