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Abstract

This note explores the development of courts' refusal to extend comity to foreign representatives who have filed a proceeding under chapter 15 of the U.S. Bankruptcy Code. Congress adopted chapter 15 as part of a comprehensive 2005 bankruptcy reform. It allows foreign entities to receive protection under the U.S. Bankruptcy Code. In most cases, foreign representatives who file a chapter 15 proceeding are involved with ancillary insolvency proceedings outside the United States. There is often a question of how or if a U.S. court overseeing the chapter 15 proceeding will defer to a judgment or process within the foreign ancillary proceeding. In most cases, the court extends comity to respect international cooperation and grants the foreign representative their preferred relief.

However, as chapter 15 proceedings have exploded, courts have encountered compelling reasons to refuse comity to foreign representatives. As the number of chapter 15 proceedings increases, diligent chapter 15 litigants must improve their strategy by understanding when and why a court may refuse to grant comity. This note discusses the issue in two parts. First, it covers the development of transnational insolvency law within the United States, arguing that clarity has remained a central theme throughout. Second, it examines all cases from January 1, 2016-November 30, 2021, in which courts have refused to grant comity to foreign representatives who have filed chapter 15 proceedings.[1] *Ultimately, this analysis of recent cases will show that by articulating guiding principles for why and when a court will refuse to extend comity, courts have utilized the comity consideration as an opportunity to provide clarity within this evolving area of law.*

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[1] The note also explores *Casa Express Corp. v. Bolivarian Republic of Venez.*, 492 F. Supp. 3d 220, 226 (S.D.N.Y. 2020), which did not involve a chapter 15 filing, but provides helpful insight into the relevant trends discussed.

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INTRODUCTION

In 2005, Congress enacted chapter 15 within the Bankruptcy Abuse Prevention and Consumer Act as part of a comprehensive bankruptcy reform.[2] The chapter succeeded the now-repealed 11 U.S.C.S. § 304, which governed insolvency cases ancillary to foreign proceedings.[3] Chapter 15 provides a vehicle for a foreign entity involved in a foreign bankruptcy proceeding to access the U.S. courts and relief through the U.S. Bankruptcy Code.[4] Although chapter 15 has improved upon section 304 by providing some additional guidance to courts handling transnational insolvency proceedings, it did not clarify the role of comity: the practice of extending deference to the laws or judgments of a foreign entity.[5] In section 304, Congress listed comity as a guiding principle under which the court would determine whether to grant relief to a party in a case ancillary to a foreign proceeding.[6] In chapter 15, courts must ensure that their decisions to give "additional assistance to a foreign representative" are "consistent with the principles of comity."[7]

The role of comity in chapter 15 remains unclear. Kevin Beckering, a former Research Fellow at Southern Methodist University Dedman School of Law, provides an interesting perspective.[8] In his 2008 article, Beckering argues that between section 304 and chapter 15, comity evolved from an independent objective into a tool for courts to achieve Congress's restated primary purpose: "achiev[ing] a higher degree of harmonization and certainty regarding cross-border insolvency administration."[9] Subsequent case law supports Beckering's argument and prompts further exploration.

This note narrowly tests Beckering's hypothesis. It specifically analyzes whether the transition from section 304 to chapter 15 (which represents Congress's adoption of the Model Law)[10] has achieved a greater level of

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[2] U.S. courts, *Ancillary and Other Cross-Border Cases*, Chapter 15—Bankruptcy Basics (Oct. 17, 2021, 12:11 PM), https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109 Pub. L. No. 8, 119 Stat. 23.

[3] 11 U.S.C.S. § 304 (Repealed 2005).

[4] U.S. courts, *supra* note 2.

[5] Peter M. Gilhuly, Kimberly A. Posin & Adam E. Malatesta, *Bankruptcy Without Borders: A Comprehensive Guide to the First Decade of Chapter 15*, 24 AM. BANKR. INST. L. REV. 47, 54 (2016).

[6] 11 U.S.C.S. § 304(c)(5).

[7] *See* 11 U.S.C.S. § 1507(b).

[8] Kevin J. Beckering, then-Research Fellow to the *Law and Business Review of the Americas* at Southern Methodist University Dedman School of Law. *See* Kevin J. Beckering, *United States Cross-Border Corporate Insolvency: The Impact of Chapter 15 on Comity and the New Legal Environment*, 14 LAW & BUS. REV. AM. 281 (2008).

[9] *Id.* at 301.

[10] *See Hosking v. TPG Cap. Mgmt., L.P.* (*In re* Hellas Telecomms. (Lux) II SCA), 555 B.R. 323, 343-44 (Bankr. S.D.N.Y. 2016) (citing H.R. Rep. No. 109-31, pt. 1, 109-10, 2005 U.S.C.C.A.N. 88, 172-173 (the "House Report")).

certainty within the context of a court's refusal to grant comity to a foreign representative within a chapter 15 case. The note will examine all cases within the last five years in which a court has refused to grant comity to a foreign representative by refusing to grant relief that defers to the foreign proceeding's home jurisdiction. Ultimately, the recent cases support Beckering's theory. The cases illustrate that the courts have increased certainty for litigants by providing limiting principles for when a court will or will not extend comity to a foreign representative in an ancillary proceeding to a chapter 15 case.

This note will first discuss the history of comity as it relates to U.S. bankruptcy proceedings involving foreign entities; principally the evolution between section 304 and chapter 15. The note will then discuss a theory about why seemingly disparate judges have similarly contributed to developing chapter 15 jurisprudence. The remainder of the note will explore the cases between 2016-2021 when judges have refused to extend comity to illustrate how these cases have all provided limiting principles that can guide chapter 15 litigants. This analysis will show that in the last five years, in cases where courts have declined to extend comity by refusing to recognize the laws and judgments of the foreign proceeding's home jurisdiction, courts seemed focused on Congress's second objective of chapter 15: strengthening certainty for international transactions.

I. COMITY WITHIN THE EVOLUTION OF UNITED STATES CROSS-BORDER INSOLVENCY LAW

This section will consider how the comity tradition has evolved within the broader evolution of the U.S. Bankruptcy Code between section 304(c) and chapter 15. In the legal sense, "comity" refers to a principle of mutual recognition between jurisdictions, both within the United States and towards foreign judicial systems.[11] Although comity is a concern in several international legal fields, it has particular importance in transnational insolvency proceedings within U.S. jurisprudence.

The Second Circuit has articulated a guiding principle that favors granting comity by deferring to foreign bankruptcy proceedings unless those proceedings are procedurally unfair or violate fundamental U.S. law or policy.[12] First, as a leader in transnational insolvency filings, the Second Circuit heavily influences the broader jurisprudence in this field.[13] Therefore, it is likely that most courts will adopt this principle of balancing deference

[11] *Comity*, WEX, https://www.law.cornell.edu/wex/comity.

[12] SMP Ltd. v. SunEdison, Inc. (*In re* SunEdison, Inc.), 577 B.R. 120, 131 (Bankr. S.D.N.Y. 2017).

[13] *See generally* Chapter 15 Database, Global Insolvency (last visited Nov. 20, 2021, 1:37 PM), https://globalinsolvency.com/chapter-15-database?field_circuit_target_id&field_judge_value=&field_filing_date_value=&field_location_target_id&page=0. Data illustrates that the Second Circuit sees a disproportionate number of transnational insolvency filings.

and diplomacy with national interests.

Second, the Second Circuit likely adopted this philosophy because it aligns with fundamental principles underlying U.S. bankruptcy law. U.S. bankruptcy law principally aims to balance the interests of creditors with fairness to the debtor.[14] In the case of cross-border insolvency proceedings, a foreign debtor is usually requesting relief from debts owed to U.S. creditors. By limiting deference to foreign policies that do not undermine domestic bankruptcy policy, courts preserve the balance of equities between creditors and debtors as well as national and foreign interests.

A. Section 304

Before Congress repealed section 304 of the U.S. Bankruptcy Code in April 2005, the section governed "cases filed in the bankruptcy courts that are ancillary to foreign proceedings."[15] The repealed statute lists comity as one of six factors a court must consider when deciding whether to grant relief within "a case ancillary to a foreign [insolvency] proceeding."[16] Although some courts have emphasized the role of comity in section 304 analyses,[17] the statutory listing did not provide any clarity for how courts should evaluate the principle of comity.

Scholarship on the role of comity in section 304 further suggests a widespread understanding that comity was a crucial element in a court's evaluation of whether to grant relief under section 304. However, the literature also called for more clarity from Congress.[18] As discussed, the guiding philosophy in U.S. bankruptcy law balances interests between creditors and debtors. Transnational bankruptcy adds a diplomatic layer that requires balancing national and foreign interests. If it were to emphasize comity, Congress would signal the United States' confidence in other nations' insolvency laws and a commitment to diplomacy.

In contrast, de-emphasizing comity may delegitimize other nations' insolvency laws. When it limits comity, the United States suggests that it cannot trust other countries to conform to its standards of due process and fundamental fairness and therefore refuses to risk exposing creditors to unfair procedures. Ultimately, any clarity regarding the role of comity in

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[14] KEVIN M. LEWIS, CONG. RSCH. SERV., R45137, BANKRUPTCY BASICS: A PRIMER 1 (2018).

[15] H. R. Rep. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. at 324 (1977).

[16] 11 U.S.C. § 304(c)(5) (2004).

[17] *See* In re Hamilton, 240 F.3d 148, 156 (2d Cir. 2001) (finding comity to be the most important factor in considering whether to grant relief under § 304); In re Kyu-Byung Hwang, 309 B.R. 842, 845 (Bankr. S.D.N.Y 2004) (same).

[18] *See* James Garrett Van Osdell, *Transnational Insolvency Dilemma: Congress should Emphasize Comity of Nations*, 49 S. C. L. REV. 1327, 1337 (1998); Stuart A. Krause, Peter Janovsky & Marc A. Lebowitz, *Relief Under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies*, 64 FORDHAM L. REV. 2591, 2611 (1996).

transnational insolvency decisions sends a message about how Congress views other countries' insolvency laws and to what degree it values U.S. creditors' interests. Congress may have remained intentionally vague in order to avoid committing to a position that is too strong in either direction.

Although Congress's guidance was vague, the courts sought to clarify. In 1993, the court in *Allstate Life Insurance Co. v. Linter Group, Limited*[19] articulated an eight-part balancing test for how a court would evaluate whether to extend comity by granting deference to a foreign jurisdiction:

> (1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to the debtors' potential claimants; (5) whether there are provisions for creditors' meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.[20]

Similarly, the court in *In re Koreag, Controle et Revision S.A.* provided some guidance by removing one issue from any consideration of comity. The court in *Koreag* found that "[b]efore a particular property may be turned over pursuant to [section] 304(b)(2), a bankruptcy court should apply local law [(as opposed to foreign law)] to determine whether the debtor has a valid ownership interest in that property when the issue is properly posed by an adverse claimant."[21] The court in *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.* further clarified *Koreag* by specifying that the *Koreag* rule "only applies to disputes that present a *bona fide* question of property ownership."[22] Although *Koreag* and *J.P. Morgan* illustrate courts' efforts to clarify the role of comity in one issue, the rule's narrow application does not signal how the court will consider comity in most cases.

The court's contribution to clarity in *Allstate* was undoubtedly broader than that in *Koreag*. However, because the bankruptcy courts continued to apply section 304(c) inconsistently, it is unclear whether the *Allstate* test provided much guidance in subsequent cases.[23] Some courts abandoned the

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[19] Allstate Life Ins. Co. v. Linter Grp., Ltd., 994 F.2d 996, 999 (2d Cir. 1993) (citing Cunard S.S. Co. v. Salen Reefer Servs AB, 773 F.2d 452, 459-60 (2d Cir. 1985)).

[20] *Id.*

[21] In re Koreag, Controle et Revision S.A., 961 F.2d 341, 349 (2d Cir. 1992).

[22] JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 420 (2d Cir. 2005). *See also* CSL Astl. Pty. Ltd. v. Britannia Bulkers Plc, 2009 U.S. Dist. LEXIS 81173 *20-21 (reaffirming court's interpretation of the *Koreag* within the Chapter 15 context).

[23] Chris Farley, *An Overview, Survey, and Critique of Administrating Cross-Border Insolvencies*, 27.1 HOUS. J. OF INT'L L. 181, 194 (2004).

traditional presumption of comity to balance territorialism and universalism.[24] Chris Farley[25] describes territorialism and universalism as two ends of a continuum.[26] Territorialism represents "sovereign power" where each state independently makes and enforces all bankruptcy rules.[27] On the other end of the continuum, universalism represents a single bankruptcy code utilized and enforced by all jurisdictions.[28] While universalism offers a greater degree of predictability for international transactions, it fails to capture each sovereign nation's specific values and priorities, which sparks calls for territorialism. Although courts had sometimes articulated clear principles for when other priorities will conquer comity, such as in *Allstate* and *Koreag*, uncertainty remained.

With a dearth of formal guidance, both courts and litigants divined guiding principles from empirical study and inconsistent state law to determine when and how a court will factor comity into a decision. For example, in his research examining chapter 15 proceedings from 2005-2009, Jeremy Leong[29] found that U.S. courts rarely allow foreign representatives to distribute local assets if doing so would prejudice U.S. creditors.[30] The latter suggests that the court limits its comity application with a commitment to protecting local creditors' interests in local assets. This limitation provides greater clarity for litigants by clarifying the court's boundaries for applying comity.

In re Toga Manufacturing Limited provides an example of inconsistent application within case law. When explaining its refusal to grant comity to a Canadian bankruptcy court, the court in *Toga* emphasized that, under Canadian law, an American creditor would not receive the same priority recognition as he would under U.S. bankruptcy law.[31] In its reasoning, the court cited section 304(c)(4),[32] which states that in determining whether to grant relief, the court must consider whether, if it grants relief, the rules governing the distribution of proceeds to creditors would "substantially"

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[24] *Id.* at 195.

[25] Chris Farley graduated from the University of Houston Law Center in 2005, after receiving the 2004 James Baker Hughes Prize Writing Award for the best comment on International Economic Law. He has spent most of his career as in-house counsel. *See* Chris Farley, *supra*, note 23 at 219; Chris Farley, LINKEDIN, https://www.linkedin.com/in/christopher-farley-4aa34314.

[26] Chris Farley, *An Overview, Survey, and Critique of Administrating Cross-Border Insolvencies*, 27.1 HOUS. J. OF INT'L L. 181, 195 (2004).

[27] *Id.*

[28] *Id.*

[29] Jeremy Leong is the Managing Director of Acton Law in Eon Shenton, Singapore. Jeremy Leong, ACTON LAW, https://actonlaw.sg/.

[30] Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from U.S. Bankruptcy Court Cases*, 29.1 WIS. INT'L L. J. 110, 125 (2011).

[31] In re Toga Mfg. Ltd., 28 B.R. 165, 168 (Bankr. E.D. Mich. 1983).

[32] *Id.* at 168.

align with the U.S. Bankruptcy Code.[33] Although the court prioritized alignment between foreign and U.S. statutes' treatment of creditors, section 304(c) listed both comity and distribution of proceeds as factors the court must consider when determining whether to defer to a foreign proceeding. Congress did not weight any of the listed factors nor suggest that the listing order provided a ranking. Therefore, it is not apparent why the court found that U.S. distribution policy should trump comity. Moreover, while the *Toga* court focused on an aligned procedure for the distribution of proceeds, many courts have emphasized the "preeminence" of the comity factor.[34] The fact that the *Toga* court prioritized equal creditor treatment while other courts have prioritized comity, without an explanation for prioritizing one over the other, further illustrates how section 304 was applied inconsistently.

B. The Model Law

In 2005, Congress effectively replaced section 304 with the Model Law on Cross-Border Insolvency, developed by the United Nations Commission on International Trade Law (UNCITRAL).[35] Both the Model Law and the current version of chapter 15 promote five primary objectives: (1) promoting cooperation between international jurisdictions, (2) strengthening certainty for cross-border transactions, (3) fairly adjudicating transnational proceedings, (4) protecting the debtor's asset value, and (5) supporting the restructuring of distressed businesses.[36]

Before the Model Law's conception, scholars had discussed the potential benefits of "[a]n international bankruptcy treaty," which would streamline adjudications into fewer proceedings and "increase stability" by establishing a "uniform mechanism to resolve transnational bankruptcy disputes."[37] After UNCITRAL proposed the Model Law, scholars recognized it as a solution to efficiently harmonize the court's efforts to balance principles of territorialism and universalism.[38]

In his 2004 article, commentator Chris Farley analyzed the benefits and challenges posed by universalism and territorialism. He predicted that the

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[33] 11 U.S.C. § 304(c)(4) (2004).

[34] In re Bd. of Dirs. of Multicanal S.A., 314 B.R. 486, 502 (Bankr. S.D.N.Y. 2004); In re Hamilton, 240 F.3d 148, 156 (2d Cir. 2001) (finding comity to be the most important factor in considering whether to grant relief under § 304); In re Kyu-Byung Hwang, 309 B.R. 842, 845 (Bankr. S.D.N.Y 2004) (same).

[35] U.S. courts, *supra*, note 2. *See also* In re Oi Brasil Holdings Cooperatief U.A., 578 B.R. 169, 193 (Bankr. S.D.N.Y. 2017) (Case law and legislative history allow courts to consult the Model Law in interpreting ambiguous sections of Chapter 15.).

[36] U.S. courts, *supra*, note 2.

[37] Timothy S. O'Donnell, *Bankruptcy Law—Transnational Insolvencies—Comity Not Granted to Foreign Bankruptcy Plan Which Characterized Internal Revenue Service as Unsecured Creditor,* Overseas Inns S.A. v. United States*,* 911 F.2d 1146 (5th Cir. 1990), 15 SUFFOLK TRANSNAT'L L. J. 747, 757 (1992).

[38] Chris Farley, *An Overview, Survey, and Critique of Administrating Cross-Border Insolvencies*, 27.1 HOUS. J. OF INT'L L. 181, 218 (2004).

UNCITRAL Model Law would prove a "simple, straightforward answer to the international bankruptcy problem" because it "attempt[ed] to capture the efficiencies of universalism while [retaining] certain territorial provisions by which a court could opt-out of the Model Law."[39]

It is unclear to what extent chapter 15 has incorporated the Model Law. There remains a question of the impact of the Model Law on transnational insolvency proceedings in the United States, both when chapter 15 is applied and when it is not.[40] Courts have frequently disagreed on granting comity to foreign representatives in bankruptcy proceedings that have not filed chapter 15 proceedings.[41] However, courts have almost unanimously recognized Congress's intent for chapter 15 to codify the Model Law within the United States.[42] The legislative history supports this understanding. A House Report accompanying the Bankruptcy Abuse Prevention and Consumer Act of 2005 specifically states that chapter 15 "*is* the Model Law on Cross-Border Insolvency promulgated by [UNCITRAL]" (emphasis added).[43]

The Model Law supports courts that agree to extend comity to foreign representatives regardless of a chapter 15 proceeding.[44] It focuses on five main elements: access, recognition, relief, cooperation, and coordination. Therefore, courts that refuse to grant relief to foreign representatives that have not initiated a chapter 15 proceeding violate the first three principles of the Model Law. When courts require a chapter 15 proceeding as a requirement, they erect a barrier to relief for foreign representatives in

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[39] *Id. See also* Beckering, *supra, note* 8, at 300.

[40] Shmuel Vasser & David Koch, *International Bankruptcy: Do Principles of Comity Exist in Parallel to Chapter 15?*, N.Y. L. J. (Online) (Oct. 25, 2021, 6:48 PM) (arguing that it is unclear whether Chapter 15 substituted the application of other forms of comity as a source of relief). *See also* Brendan M. Driscoll, *International Comity After Chapter 15: A Residual Right to Recognition?*, 17 J. BANKR. L. & PRAC. (2008) Westlaw.

[41] *Compare* EMA Garp Fund v. Banro Corp., 2019 WL 773988, at *3-4 (S.D.N.Y. Feb. 21, 2019) (dismissing litigation under principles of comity even though the foreign representative had not initiated a chapter 15 proceeding with the bankruptcy court), aff'd, 783 Fed. Appx. 82 (2d Cir. 2019), *with* Halo Creative & Design Ltd. v. Comptoir Des. Indes., 2018 WL 4742066 ("[a foreign debtor] must comply with Chapter 15 of the U.S. Bankruptcy Code to receive recognition of its foreign bankruptcy and the corresponding relief it seeks").

[42] *E.g.*, In re Ace Track Co., 556 B.R. 887, 896-97 (N.D. Ill 2016) (Congress intended for Chapter 15 to codify the UNCITRAL Model Law on Cross-Border Insolvency into United States law); In re Platinum Partners Value Arbitrage Fund L.P., 583 B.R. 803, 817 (Bankr. S.D.N.Y. 2018) (Chapter 15 is based on the UNCITRAL Model Law on Cross-Border Insolvency); Beveridge v. Vidunas (In re O'Reilly), 598 B.R. 784, 793 (Bankr. W.D. Pa. 2019) ("Chapter 15 is our country's adoption . . . of the [UNCITRAL] Model Law on Cross-Border Insolvency . . . .").

[43] H.R. Rep. No. 109-31, pt. 1, 109-10, 2005 U.S.C.C.A.N. 88, 172-173.

[44] A foreign representative for an overseas insolvency proceeding involving U.S. assets or creditors may seek relief from the U.S. bankruptcy courts without initiating a chapter 15 proceeding. While some courts have granted relief regardless of a chapter 15 filing, others require a chapter 15 filing to grant relief. *Compare* EMA Garp Fund, 2019 WL 773988, *with* Halo Creative & Design Ltd., 2018 WL 4742066. The Model Law supports courts that do not require a chapter 15 filing to grant relief.

insolvency proceedings. Therefore, the requirement limits access, creates obstacles to recognition, and curtails opportunities for relief.

Moving forward, the significance of the Model Law is unclear. The past few years have seen a massive spike in chapter 15 filings and jurisprudence,[45] giving litigants a clearer picture of how courts will interpret the chapter. Furthermore, by filing a chapter 15, foreign representatives avoid the risk of a court refusing to consider comity because they did not file a chapter 15. As courts continue to develop chapter 15-specific jurisprudence, courts will likely consult chapter 15-specific interpretation, not the Model Law, for guidance in decision-making. It is unclear how courts that allow recognition and comity consideration without a chapter 15 filing will utilize the Model Law. Those courts may also turn to chapter 15-specific jurisprudence for guidance. However, these courts may also find it inappropriate to utilize chapter 15 interpretation for proceedings that do not specifically involve a chapter 15 filing and turn to the Model Law instead.

C. Chapter 15

Courts have recognized that chapter 15 "was enacted in place of [section] 304," specifically to reduce reliance on "highly discretionary comity analyses."[46] Although chapter 15 has improved upon section 304 by providing additional clarity and predictability for litigants, courts have offered minimal guidance for practitioners to understand how they will evaluate whether to extend comity under chapter 15.[47]

Courts have provided some guidance on how they will determine whether to extend comity to a foreign jurisdiction within a foreign ancillary proceeding. For example, the court in *Golden Dawn Corporation v. Neves* found:

> To determine whether comity is appropriate, courts typically consider three factors: "(1) whether the foreign court was competent and used proceedings consistent with civilized jurisprudence, (2) whether the judgment was rendered by fraud, and (3) whether the foreign judgment was prejudicial because it violated American public policy notions of what is decent and just."[48]

Most recently, *In re PT Bakrie Telecom Tbk* found that "federal courts assessing whether to extend comity look to (1) whether the foreign proceeding abided by fundamental standards of procedural fairness; (2) whether the foreign proceeding violated the laws or public policy of the

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[45] Daniel M. Glosband & Jack Esher, *2020 Developments in Chapter 15*, 2021 NORTON ANN. SURV. OF BANKR. L. 32, Westlaw (database updated October 2021).

[46] *Id.*

[47] *See* Beckering, *supra* note 8, at 296.

[48] Golden Dawn Corp. v. Neves (*In re* Neves), 783 F. App'x. 995, 996 (11th Cir. 2019).

United States; and (3) whether the foreign judgment was affected by fraud."[49]

Scholars have also tried to provide some guidance on how to predict whether a court will grant comity. In 2013, Barry Chang[50] offered a paradigm to analyze the role of comity in transnational insolvency proceedings.[51] Chang found that a court will likely evaluate whether to extend comity against a "*Gebhard* presumption."[52] In *Canada Southern Railway Company v. Gebhard,*[53] the Supreme Court opted to enforce a Canadian judgment in favor of a Canadian debtor at the expense of American creditors.[54] Chang argues that the decision in *Gebhard* represents a larger paradigm through which a court will decide whether to extend comity.[55] Under the *Gebhard* presumption, a U.S. bankruptcy court allows foreign jurisdictions to dictate the due process standard.[56]

If courts were to frame their analyses within the *Gebhard* presumption, this would represent a significant shift toward deference and diplomacy. Recall the Second Circuit's limiting principle: deference to a foreign court is preferred unless or until deference would sacrifice U.S. policy and due process standards. By allowing the *foreign court* to determine whether its proceedings provide sufficient due process, the United States would remove the outer limit of deference by deferring to the foreign court regardless of whether the United States would have found that the foreign procedures violated due process in the United States. Furthermore, this would require U.S. litigants to examine foreign laws to craft arguments and predict outcomes because of an overwhelming expectation that courts defer to foreign courts.

Finally, although the *Gebhard* court's guidance on whether it will extend comity to foreign judgments at first appears to provide clarity, a more nuanced analysis shows that it does not. Courts have found that the decision to enforce "a [reorganization] plan confirmed in a foreign proceeding should be made on a case-by-case basis."[57] At first, this unpredictable "case-by-case" analysis seems limited to one specific situation: plan confirmation. However, enforcing a plan confirmed in a foreign proceeding is likely to be one of the most common ways a court extends comity in chapter 15 cases.

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[49] *In re* PT Bakrie Telecom Tbk, 628 B.R. 859, 878 (Bankr. S.D.N.Y. 2021).

[50] Barry J. Chang, University of California, Los Angeles, JD-MBA, 2014. Mr. Chang is a partner in Baker McKenzie's Palo Alto office, and a member of the firm's Transactional Practice Group. Barry Chang, BAKER MCKENZIE, https://www.bakermckenzie.com/en/people/c/chang-barry (last visited Oct. 21, 2022).

[51] Barry J. Chang, *Making a Comedy of Comity: Analyzing In re Vitro's Implication for Cross-Border Insolvency Law*, 22 J. BANKR. L. & PRAC. 635, 642 (2013).

[52] *Id.* at 645.

[53] Canada S. Ry. Co. v. Gebhard, 109 U.S. 527, 540 (1883).

[54] Chang, *supra* note 52, at 642.

[55] *Id.*

[56] *Id.* at 645.

[57] In re Oi S.A., 587 B.R. 253, 265 (Bankr. S.D.N.Y. 2018).

One of the primary goals of chapter 15 is to support the restructuring of distressed businesses, which often involves a court confirming a reorganization plan.[58] Therefore, a court's decision to enforce an approved plan is likely to impact a large portion of transnational insolvency cases. This broad impact shows that the court's decision to determine these matters on a "case-by-case basis" rather than through an identifiable analytical framework amplifies the effects of the court's unwillingness to articulate guiding principles for whether it will extend comity. Furthermore, although some courts have analyzed jurisdictional issues in matters involving foreign litigants and U.S. bankruptcy estates, chapter 15 litigants cannot rely on jurisdiction analyses that courts have applied to chapters 7, 9, 11, 12, and 13, which further limits sources of guidance.[59]

Although courts have articulated guiding principles and factor tests to establish some predictability, corporations can benefit from better predicting whether a court will rule in their favor.[60] In a 2015 article, Professor Sandeep Gopalan[61] and Dr Michael Guihot[62] argue that courts should provide more specific and stricter limiting principles for comity analyses to provide more certainty for both debtors and creditors.[63] Similarly, Michael Gomez[64] calls for courts to "defer to comity when granting and modifying recognition of foreign stays in all but the most extreme circumstances."[65] If courts adopted this presumption, parties litigating recognition of a foreign stay would benefit from the increased certainty of a rebuttable presumption. Although Gomez calls for clarity in a more limited circumstance than Gopalan and Guihot, recognition of a foreign stay, like confirmation of a reorganization plan, is a common issue in a transnational insolvency proceeding. Therefore, an

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[58] U.S. courts, *supra* note 3.

[59] § 50A:38. Digest of decisions—Factors considered when determining whether to provide assistance [§ 1507(b)], 5A Bankr. Service Law. Ed. § 50A:38.

[60] Professor Sandeep Gopalan & Michael Guihot, *Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling*, 48 VAND. J. OF TRANSNAT'L L. 1225, 1284 (2015).

[61] Professor Sandeep Gopalan is the Vice Chancellor of Piedmont International University. He received his BA and LLB from National Law School of India, and his PhD from Oxford University. Gopalan, Sandeep Gopalan, Professor, HORIZON JOURNALS, https://horizon-jhssr.com/biography.php?id=7 (2022).

[62] Dr Michael Guihot is a Senior Lecturer on the Faculty of Business & Law at the School of Law at Queensland University of Technology, and the Deputy Chair of the Society on Social Implications of Technology. Dr Michael Guihot, QUT, https://www.qut.edu.au/about/our-people/academic-profiles/michael.guihot (2022).

[63] Professor Sandeep Gopalan & Michael Guihot, *Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling*, 48 VAND. J. OF TRANSNAT'L L. 1225, 1284 (2015).

[64] Michael Gomez, J.D., Texas Tech University School of Law, May 2018. Mr. Gomez is an Associate Attorney at Davis W. Smith P.C. in Lubbock, Texas. Michael Gomez, LINKEDIN, https://www.linkedin.com/in/michael-gomez-70bb7b16b (2022).

[65] Michael Gomez, *Stay Off My Land: The Potential Move away from Comity in Domestic Application of Foreign Stays*, 4 BUS. BANKR. L.J. 221, 242 (2017).

argument for a seemingly limited clarification would provide clarification broadly.

As more corporations expand internationally and are required to analyze outcomes under several legal regimes, a level of predictability in litigation risks is essential. Because a refusal to grant comity has been rare, practitioners within foreign administrative proceedings may erroneously expect a court to grant comity, resulting in an unfortunate and costly surprise if the court denies the motion. A complex litigation strategy could ultimately fail if a corporation erroneously assumed that a U.S. court would extend comity to a foreign court and fails to plan for situations in which courts do not extend comity.

II. THE LAST FIVE YEARS

This section will explore all published opinions from January 1, 2016-November 30, 2021 in which courts have declined to extend comity by refusing to recognize the laws and judgments of the foreign proceeding's home jurisdiction. All cases were decided in the Southern District of New York, which may lead some to believe that any conclusion about trends cannot apply more broadly. However, the disproportionate number of chapter 15 proceedings filed in the Southern District of New York makes the district a leader in bankruptcy jurisprudence trends that other districts are likely to follow.[66]

The fact that the judges in these cases have established limiting principles within a new and quickly developing field is likely a product of fundamental jurisprudential priorities within chapter 15, U.S. bankruptcy law, and the U.S. court system. First, the legislative history underlying chapter 15 illustrates Congress's primary objective: for chapter 15 to increase certainty for litigants within cross-border insolvency proceedings.[67] When judges create limiting principles to guide when they will and will not extend comity to foreign representatives, all litigants within chapter 15 proceedings will better predict outcomes.

The judges' choice to establish limiting principles also reflects bankruptcy-specific jurisprudential philosophy. U.S. bankruptcy law is grounded in a relatively singular goal: establishing a fair proceeding by coordinating creditors and ensuring amnesty for the debtor. By creating limiting principles to determine whether a foreign representative will or will not receive comity, judges allow litigants to better predict judicial decision-making. When creditors and debtors can better predict outcomes, they will be able to more confidently compare the risks and benefits of out-of-court

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[66] 41.3% of all Chapter 15 cases filed between 2005-2020 were filed in the Southern District of New York. *See* Chapter 15 Database, GLOBAL INSOLVENCY (Feb. 12, 12:30 PM), https://globalinsolvency.com/chapter-15-database?field_circuit_target_id&field_judge_value=&field_filing_date_value=&field_location_target_id&page=0.

[67] Beckering, *supra* note 8, at 301.

workouts with the risks and benefits of continuing through the bankruptcy. Therefore, creditors and debtors that may not have opted for an out-of-court workout may do so because of a stronger prediction of judicial decision-making. These parties may ultimately create a better solution than what the parties may have reached as part of a broader bankruptcy proceeding.

Finally, judges outside of bankruptcy courts also establish limiting principles to increase certainty for litigants. First, judges in all courts aim to encourage efficiency and cost savings through out-of-court workouts, which are more likely when all parties can better predict outcomes. Second, limiting principles allow judges to base both instant and future reasoning in a sound logical framework. When a judge bases a decision within a robust analytical framework, that decision is less vulnerable to being overturned on appeal.

CASES

The four cases analyzed below are discussed in chronological order to illustrate sequential and progressive trends.

A. SMP Limited v. SunEdison, Incorporated

In 2011, SunEdison Products Singapore ("SunEdison Singapore") and Samsung Fine Chemicals ("Samsung") created SMP: a joint venture to supply polysilicon in Korea.[68] The joint venture included an agreement where SunEdison granted SMP a license to construct and operate a plant (hereafter referred to as "SLA").[69] In April 2016, SMP shut down and filed an application to commence a reorganization proceeding in a Korean court. The Korean court approved the application by issuing a Commencement Order in June 2016, which began the reorganization proceeding.[70] The Korean Commencement Order "did not expressly grant any relief to SMP[,] such as stay of creditor actions."[71] At that point, "the SLA [contract] was an executory contract in full force and effect."[72] In August 2016, SunEdison filed a motion for an order approving a sale agreement ("Stalking Horse Agreement") that required SunEdison to take action in either Korea or the United States to terminate the SLA contract.[73] The Korean court approved the Stalking Horse Agreement in October 2016 despite SMP's objections.[74] In its termination notice to SMP, SunEdison "invoked the Ipso Facto Clause

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[68] SMP Ltd. v. SunEdison, Inc. (In re SunEdison, Inc.), 577 B.R. 120, 123 (Bankr. S.D.N.Y. 2017).

[69] *SMP Ltd.*, 577 B.R. at 124.

[70] *SMP Ltd.*, 577 B.R. at 124. *See also* DR & AJU LLC, *First-step analysis: restructuring & insolvency in South Korea*, LEXOLOGY (Dec. 3, 2019), https://www.lexology.com/library/detail.aspx?g=2575da6d-f027-4b2c-9cde-4cb0027dc572.

[71] *SMP Ltd*., 577 B.R. at 124-25.

[72] *Id.* at 125.

[73] *Id.*

[74] *Id.*

stating that SunEdison was terminating the SLA 'as a result of SMP's pending rehabilitation proceeding and its failure to pay debts generally as they come due.'"[75]

In May 2017, SMP filed a petition in the Southern District of New York for the U.S. Bankruptcy Court to recognize the Korean Bankruptcy Proceeding under chapter 15.[76] The U.S. Bankruptcy Court recognized the Korean bankruptcy proceeding as the foreign main proceeding, but "only to the extent necessary to support the findings in the Recognition Order."[77] In May 2017, SMP initiated an adversary proceeding in U.S. Bankruptcy Court. SMP argued that SunEdison could not terminate the SLA under the *ipso facto* clause because the comity granted by recognizing the Korean Commencement Order should extend to *all* Korean insolvency law, and "Korean law renders *ipso facto* provisions in executory contracts unenforceable against a debtor in a Korean rehabilitation proceeding."[78]

The court disagreed with SMP. First, the court found that because the Commencement Order did "not contain any language that prevented SunEdison from terminating the SLA," the court's decision to recognize the Commencement Order did not require the court to recognize a decision to prevent SunEdison from terminating the SLA.[79] However, SMP argued that the Commencement Order silently recognized the Korean common law that would prevent SunEdison from terminating the SLA. Therefore, if the court were to recognize the Commencement Order, the court would need to recognize this silent and invisible common law interpretation.[80] The court disagreed, emphasizing that applying Korean law, which contradicts New York law concerning *ipso facto* clauses,[81] would violate the parties' expectations because the parties had chosen New York law to govern their agreement.[82]

SMP Limited represents the court's trending desire to strengthen certainty in two ways. First, by refusing to recognize foreign common law when the foreign court order does not explicitly reference that common law, the court signals to future parties that the court's sources for interpreting foreign judgments will be limited. By limiting sources of guidance in aiding interpretation, courts allow litigants to focus their arguments and predictions on foreign law explicitly referenced in foreign judgments. Second, the court's emphasis on honoring the parties' original choice of New York law to govern their contract provides contracting parties with greater certainty that courts

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[75] *Id.* at 126.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 133.
[80] *Id.*
[81] *Id.* at 128.
[82] *Id.* at 133.

will enforce choice of law provisions in international insolvency proceedings.

B. In re Oi Brasil Holdings Cooperatief U.A.

In re Oi Brasil Holdings Cooperatief U.A.[83] supplies another example of the court providing certainty to future litigants by clearly removing another issue from the broader considerations of comity. In *Oi Brasil*, the court examined whether comity should play a role in recognizing a Dutch court's determination of the debtor's center of main interest (COMI). Determining a debtor's COMI is a critical part of a chapter 15 case because it determines whether the proceeding seeking recognition is a main or nonmain proceeding. The classification of a proceeding as main or nonmain triggers "substantial eligibility distinctions and consequences."[84]

The court found that it was not required to consider, let alone extend, comity to the Dutch court's determination of the debtor's COMI. Agreeing with the court in *In re Bear Stearns*,[85] the presiding court confirmed that "[i]n the case of recognition under chapter 15, '[b]oth the plain language and the legislative history of chapter 15 . . . requires [a bankruptcy court to make] a factual determination with respect to recognition before principles of comity come into play.'"[86] Therefore, according to this court, "while comity governs recognition of a foreign *judgment*, it does not govern the initial recognition of a foreign proceeding under Chapter 15. Recognition of a proceeding requires the application of 'objective criteria,' and it is only post-recognition relief that 'turns on subjective factors that embody principles of comity.'"[87] The court further emphasized the role of statutory language in its reasoning by highlighting that Section 1517, the part of chapter 15 that covers foreign recognition of a proceeding, does not reference comity.[88] Furthermore, the court distinguished dicta in *In re Ocean Rig*.[89] The *Oi Brasil* court determined that although the *Ocean Rig* court found that "it may well be appropriate for a U.S. bankruptcy court to give deference or comity to the [COMI] determination of the foreign court in the jurisdiction in which the foreign proceeding is filed," the court should limit its deference to international jurisdictions that have adopted the model law.[90]

The court's decision in *Oi Brasil* provides certainty to future litigants by clearly articulating that the court's determination of a debtor's COMI, and

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[83] *In re* Oi Brasil Holdings Cooperatief U.A., 578 B.R. 169, 169 (Bankr. S.D.N.Y. 2017).

[84] *Id.* at 193 (internal citation omitted).

[85] *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 122 (Bankr. S.D.N.Y. 2007).

[86] *In re* Oi Brasil, 578 B.R. at 214 (internal citation omitted).

[87] *Id.* (internal citation omitted).

[88] *Id.*

[89] *In re Oi Brasil*, 578 B.R. at 215-16 (citing *In re* Ocean Rig UDW Inc., 570 B.R. 687, 703 n.6 (Bankr. S.D.N.Y. 2017)).

[90] *Id.*

therefore the court's decision to recognize a proceeding as a foreign main or nonmain proceeding, will be addressed separately and differently to future determinations about whether to grant deference to foreign judgments. Like in *Koreag*, the court established greater predictability by removing an issue from the uncertainty of when it will apply a comity analysis. However, unlike in *Koreag*, where the issue was relatively uncommon, the decision to recognize a foreign main proceeding is the "gatekeeping" decision by which a court determines whether and how a chapter 15 case will proceed.[91]

Finally, the court reasoned that the statutory language in chapter 15 *compelled* it to separate the COMI determination from determinations of whether to extend deference to foreign judgments. The court found that the analyses must be independent because "[r]ecognition of a proceeding requires the application of 'objective criteria,' whereas only post-recognition relief 'turns on subjective factors that embody principles of comity.'"[92]

When a court focuses on objective criteria to reach a determination, litigants can better predict the risks and benefits of their position before litigation begins. The fact that the court removes the subjective comity analysis from a threshold issue in a chapter 15 proceeding further illustrates a trend favoring certainty and predictability for litigants.

C. In re PT Bakrie Telecom Tbk

In *In re Bakrie Telecom Tbk*, the court further clarified its consideration of comity by establishing requirements for enforcing a third-party release within a reorganization plan that a foreign court had approved. In this case, a foreign representative petitioned the court to recognize an Indonesian insolvency proceeding as a foreign main proceeding and enforce a debt restructuring plan (PKPU Plan), which both the lower and Supreme Courts of Indonesia had approved.[93] The court recognized the Indonesian insolvency proceeding as the foreign main proceeding. However, it refused to enforce the debt restructuring plan that the Indonesian court had approved without justification.[94] In a bankruptcy case, a third-party release is a provision releasing a non-debtor party from certain rights and obligations if such a release would benefit the organizational restructuring.[95] Although the third-party release was stipulated in the Indonesian judgment accepting the PKPU plan, the Indonesian judgment did not justify its decision about the third-party release. When the U.S. court evaluated the third-party release "through

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[91] Shmuel Vasser & David Koch, *International Bankruptcy: Do Principles of Comity Exist in Parallel to Chapter 15?*, N.Y.L.J. (ONLINE) (June 22, 2015), https://plus.lexis.com/api/permalink/d322b97a-ad43-44e1-8499-c4688900c50d/?context=1530671.

[92] In re Oi Brasil Holdings Cooperatief U.A., 578 B.R. 169, 214 (Bankr. S.D.N.Y. 2017) (quoting In re Atlas Shipping, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009)).

[93] In re PT Bakrie Telecom Tbk, 628 B.R. 859, 864 (Bankr. S.D.N.Y. 2021).

[94] *Id.* at 885.

[95] *Id.* at 880.

the prism of comity," it focused on how it would determine whether the foreign court accepted the third-party release as a result of a fair proceeding.[96] Ultimately, because the U.S. court could not determine whether the Indonesian court had utilized a fair process in reaching its conclusion to approve the third-party release, it chose not to extend comity. The court explained its decision by reasoning that "to grant comity to the PKPU Plan and its third-party release, there must be at least a rudimentary record in the foreign proceeding as to the basis for such releases and procedural fairness of the underlying process."[97]

In *PT Bakrie,* the court's decision further clarified the role of comity in international insolvency proceedings for both litigants and foreign jurisdictions. For litigants, this clear rule around when a court will and will not extend comity to foreign judgments that include third-party releases helps these litigants assess their positions and better frame their arguments. For foreign adjudicators hoping to be provided deference by the United States in transnational insolvency proceedings, this rule articulates that for a U.S. court to accept a third-party release within a reorganization plan, the foreign court will need to provide some justification for its decision to accept the third-party release.

Finally, the court's reasoning for its decision may be reasonably extrapolated to guide litigants and foreign jurisdictions in transnational insolvency proceedings beyond the issue of third-party releases. To extend comity to a foreign judgment approving a plan containing a release, a court will require that a formal record illustrate that the foreign jurisdiction reached its decision to approve the release by following "fundamental standards of procedural fairness."[98] In explaining this requirement, the court mentioned that "these considerations overlap with those of Sections 1521 and 1507, which assure the just treatment and protection against prejudice of claim holders in the United States through adequate procedural protections."[99] The latter connects the evaluation of whether to extend comity to a decision accepting a third-party release in a transnational reorganization plan, a specific issue, to other sections of chapter 15 and the fundamental principles of U.S. bankruptcy policy. This connection between the narrow third-party release issue and the broader policy reinforces that fundamentally fair procedures are critical for reaching a legitimate decision that U.S. courts will recognize. Therefore, foreign representatives petitioning the U.S. courts to extend comity by granting deference to a foreign decision should invest in establishing and producing records that clearly illustrate that the foreign court reached its conclusion via fundamentally fair procedures.

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[96] *Id.* at 884.
[97] *Id.* at 887.
[98] *Id.* at 884.
[99] *Id.*

D. Casa Express Corporation v. Bolivarian Republic of Venezuela

In *Casa Express,* the court articulated the limits to its consideration of comity by prioritizing predictability for the plaintiffs. Unlike the other cases discussed, *Casa Express* included a *sovereign* debtor, the Bolivarian Republic of Venezuela, instead of a private corporate debtor, and does not involve a chapter 15 proceeding.[100] However, because this case involved transnational debt restructuring and an analysis of whether to extend comity,[101] the courts' priorities and principles, in this case, are likely to parallel how a court would respond in a chapter 15 case.

A large part of this case considered the unique geopolitical situation plaguing Venezuela during the proceeding. At that time, Venezuela suffered from its ongoing political and humanitarian crisis, leaving the country in a state of tumultuous instability and unrest.[102] The dispute at issue in *Casa Express* arose when two plaintiffs sought to recover on bonds issued by the Venezuelan government. Venezuela, conceding liability, argued that "in light of the ongoing political and economic crisis in Venezuela, it [was] not in a position to litigate . . . or pay judgments" but expressed its intention to restructure its debts after the situation had stabilized.[103] In reaching its decision, the court balanced the hardship to Venezuela if forced to pay these bonds before a restructuring could occur against the hardship to the plaintiffs if forced to wait for payment.[104] Although the court recognized that Venezuela would suffer severe hardship if forced to pay the bonds before restructuring, specifically that the requirement to pay these bonds before restructuring could negatively impact a future restructuring, the court decided not to grant a stay preventing the plaintiffs from recovering.[105]

In explaining its reasoning, the court balanced comity to the foreign entity with certainty for the plaintiff. First, the court recognized that it must consider international comity when evaluating a foreign sovereign's petition to stay proceedings "to facilitate the restructuring of its debts."[106] However, the court saw the comity consideration as one limited to "a rule of practice, convenience, and expediency rather than of law." Therefore, "courts [would] not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States."[107]

Here, the court balanced the hardship suffered by the sovereign

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[100] *Casa Express v. Bolivarian Republic of Venez.*, 492 F. Supp. 3d 226, 228 (S.D.N.Y. 2020).

[101] *Casa Express*, 492 F. Supp. 3d at 228.

[102] *See* Human Rights Watch, *Venezuela*, HUMAN RIGHTS WATCH: WORLD REPORT 2020 (Jan. 29, 2019), https://www.hrw.org/world-report/2020/country-chapters/venezuela.

[103] *Casa Express,* 492 F. Supp. 3d at 224.

[104] *Id.* at 227.

[105] *Id.*

[106] *Id.*

[107] *Id.* (internal citations omitted).

defendant with the plaintiff's right to recovery, ultimately prioritizing stability and predictability for the plaintiff. First, the court reiterated the Second Circuit's cautioning "against granting stays to foreign sovereign litigants based on indeterminate debt restructuring proceedings," because granting a stay, in that case, would violate "'clear United States policy' allowing creditors to recover on foreign debts" [and] "make creditors' 'rights conditional on the completion of a process which had no obvious (and reasonably proximate) termination date.'"[108] Second, the court observed that while many courts have denied similar stay petitions from foreign sovereigns or foreign state-owned entities, the courts that *have* entered stays have "generally done so for a limited period in order to allow [the foreign sovereign or foreign state-owned entity] to seek out evidence not readily under their control."[109]

The fact that the court limited the timeframe for which a debtor could provide evidence supporting a petition for the court to grant a stay shows that it prioritized the plaintiff's sense of certainty that the proceeding would progress. The court limited this priority only by a principle of fundamental fairness: that the opposing party have an opportunity to gather critical evidence that it otherwise could not present. Furthermore, the court focused on the idea that "[p]laintiffs' rights [to recovery] cannot be put on hold pending geopolitical developments that may or may not come to pass, and which courts are ill-equipped to assess."[110] Since the court prioritized the plaintiff's right to recovery *before* uncertain circumstances may or may not arrive, future parties may now engage in transactions with the certainty that unpredictable geopolitical events will not delay their remedy.

Ultimately, the courts that have refused to grant comity to foreign representatives in Chapter 15 proceedings have done so, at least in part, to provide more certainty for litigants. To facilitate this predictability, courts have removed peripheral factors from their decision-making, enforced mutually agreed-upon choice of law provisions, and refused to allow future uncertainty to stall proceedings. In addition to guiding litigants in these specific circumstances, the courts' comprehensive explanations allow litigants to impute a preference for certainty to similar situations.

CONCLUSION

In the last 23 years, 49 states in 53 jurisdictions have adopted the UNCITRAL Model Law on Cross-Border Insolvency.[111] The Model Law's widespread adoption illustrates a broad desire to improve certainty and

[108] *Casa Express*, 492 F. Supp. 3d at 229.

[109] *Id.* at 227.

[110] *Id.* at 228.

[111] United Nations Commission on International Trade Law, *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last visited Oct. 25, 2021, 11:00 PM).

predictability in an increasing number of transnational insolvency proceedings. Kevin Beckering predicted that if Congress were to adopt the Model Law, it would do so with the idea that comity would provide a tool for providing greater coordination among international insolvency proceedings. Accepting the legislative history at face value, Congress supported these objectives and encouraged courts to apply comity to achieve greater stability within international insolvency proceedings. However, Congress's failure to provide clear guidance on how and when to address comity has handicapped the court's efforts to carry out Congress's articulated objectives of stability and consistency. The result shows that comity has become more of an obstacle than a tool. Congress's vagueness may have been an intentional foreign policy strategy to avoid strong signals of either territorialism or universalism within transnational insolvency policy. However, this strategy sacrifices clarity for courts and litigants.

In the last five years, courts have mitigated the unpredictability of comity analyses by removing comity considerations from some threshold issues. While some issues, like that in *Koreag*, have been narrow, others have been more wide-reaching. As cross-border transactions, and subsequent insolvency proceedings become more frequent and complex, courts may further shy away from addressing ambiguous comity concerns. Furthermore, increased complexity will make each case easily distinguishable from the next, rendering guiding principles only narrowly applicable.

It is also equally unlikely that Congress will amend chapter 15 to clarify how the court should incorporate comity into its decisions. The latter is especially true if Congress uses this ambiguity to avoid signaling too strongly to other countries. Therefore, litigants will find the most clarity in cases where the court has removed comity from its considerations. Parties that are not forced to rely on comity for their preferred outcome may decide to argue for why the court should *exclude* a threshold issue from a comity consideration to avoid the unpredictability of comity analyses.