

Fordham International Law Journal

Volume 29, Issue 6

2005

Article 3

Recognition of Cross-Border Insolvency Proceedings: An Evaluation of Solvent Schemes of Arrangement and Part VII Transfers under U.S. Chapter 15

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Recognition of Cross-Border Insolvency Proceedings: An Evaluation of Solvent Schemes of Arrangement and Part VII Transfers under U.S. Chapter 15

Jennifer D. Morton

Abstract

This Note analyzes whether solvent schemes of arrangement and Part VII transfers should be recognized under Chapter 15. Although this issue primarily concerns U.K. insurance companies, the discussion of Chapter 15 is useful outside the context of insurers. Part I of this Note outlines the requirements for recognition of a scheme of arrangement under §425 of the Companies Act 1985 and for Part VII transfers under the FSMA, and their prior treatment under 11 U.S.C. §304. Part II evaluates the statutory criteria under Chapter 15, highlighting differences between Chapter 15 and former §304, and asserts that solvent schemes of arrangement qualify as “foreign proceedings” under Chapter 15 because the Companies Act is a law related to insolvency. Because there is, as yet, no case law established under Chapter 15 concerning Part VII transfers, Part III of this Note evaluates Part VII transfers under the Chapter 15 criteria and questions whether Part VII transfers will be recognized under Chapter 15. It presents both sides of the argument: Part VII transfers do not qualify as foreign proceedings because they do not arise out of a law relating to insolvency; and, conversely, Part VII transfers should qualify as foreign proceedings because they arise out of a law that adjusts debt. Part III of this Note also provides alternative solutions for Part VII transfers if they are not recognized under Chapter 15. This Note concludes that although several solvent schemes of arrangement have been recognized under Chapter 15, it does not confirm that all solvent schemes of arrangement will be recognized. Moreover, due to the inconsistent and limited case law concerning Part VII transfers under the U.S. Code, it is unclear whether Part VII transfers qualify as “foreign proceedings” under Chapter 15. Despite arguments asserting that Part VII transfers do not arise out of a law relating to insolvency, and therefore do not qualify as “foreign proceedings” under Chapter 15, the author concludes that in light of the goals of Chapter 15 and the Model Law, U.S. courts will try to facilitate recognition of Part VII transfers within the framework of Chapter 15.

NOTE

RECOGNITION OF CROSS-BORDER INSOLVENCY PROCEEDINGS: AN EVALUATION OF SOLVENT SCHEMES OF ARRANGEMENT AND PART VII TRANSFERS UNDER U.S. CHAPTER 15

*Jennifer D. Morton**

INTRODUCTION

On May 24, 2006, the English High Court sanctioned Lloyd's of London's ("Lloyd's" or "Lloyd's of London") first Part VII insurance transfer ("Part VII transfer"), available under § 105 of the Financial Services and Markets Act 2000 ("FSMA").¹ Having received High Court approval, Syndicate 982 of Lloyd's of London transferred GB£400,000 of liabilities associated with life insurance policies outside of the Lloyd's market to a target insurance company, Sterling Life Ltd.² The Part VII transfer relieved Syndicate 982 of all duties associated with the transferred policies.³ Indeed, as a result of the Part VII transfer, policyhold-

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1. See *Spectrum's Shift of Liabilities out of Lloyd's Could Spur Use of Runoff*, BESTWIRE, May 26, 2006 (commenting that U.K. High Court sanctioned first Part VII transfer in Lloyd's insurance market); see also Sarah Veysey, *Court Allows Policy Transfer from Lloyd's to Outside Company*, BUS. INSUR., May 29, 2006, at 21 (noting that Part VII transfers arise from Part VII of Financial Services and Markets Act 2000 ("FSMA")).

2. See Philip Grant, *Lloyds: Run-off A Job Half Done?*, POST MAG., Dec. 21, 2006, at 15 (establishing that Lloyd's has only allowed one transfer of business under Part VII, FSMA, from syndicate to non-Lloyd's target company); see also *Spectrum Shift of Liabilities*, supra note 1 (stating that Syndicate 982 transferred GB£400,000 (US\$747,000) in liabilities to Sterling Life Ltd.).

3. See Financial Services and Markets Act 2000 ("FSMA"), 2000, c.8, pt. VII, § 112 (setting forth effect of Part VII transfer after High Court sanctions transfer); see also Financial Services Authority ("FSA"), Explanatory Notes to the Financial Services and Markets Act 2000, para. 213, <http://www.opsi.gov.uk/acts/en2000/2000en08.htm> (last visited Feb. 24, 2007) [hereinafter FSA, Explanatory Notes] (explaining purpose of § 112 of FSMA; emphasizing High Court's ability to order all or part of rights and liabilities associated with transferred business are incurred by receiving company and that "appropriate measures" are implemented to "extinguish or reduce" those transferred rights and liabilities from transferring company to receiving company). See generally *First Part VII transfer at Lloyd's*, RUNOFF & RESTRUCTURING, May 24, 2006, <http://www.runoff>

ers must now exercise their rights under the transferred contracts against Sterling Life.⁴

Part VII transfers, like the one entered into by Lloyd's, are one of the mechanisms that U.K. insurance market participants use to reorganize liabilities.⁵ Finalizing present and future claims, an important goal in the insurance industry, is especially difficult for companies that issue occurrence-based policies, which produce indefinite claims.⁶ Schemes of arrangements, available under § 425 of the Companies Act 1985⁷ ("Companies Act") provide another tool that U.K. insurance companies use to finalize all present and future claims.⁸ A scheme of arrange-

andrestructuring.com/news.php?id=49 (last visited Feb. 18, 2007) (citing Richard Murphy, Chief Executive, Spectrum Syndicate Management, who stated that majority of policyholders of transferred business are in U.K. and in Europe).

4. See FSMA, 2000, c.8, pt. VII, § 112 (articulating scope of High Court's power to transfer all or part of business being proposed in Part VII transfer to receiving company); see also FSA, Explanatory Notes, *supra* note 3, para. 213 (specifying that pursuant to § 112 of FSMA, rights and liabilities associated with transferred business are incurred by receiving company; noting that those rights and liabilities are extinguished from transferring company). See, e.g., Juliette Stevens, *Lloyd's Becomes the Latest to Benefit from Transfers of Business*, LLOYD'S LIST, Aug. 3, 2006, at 6 (commenting that policyholders' rights can only be exercised against target company subsequent to transfer).

5. See Companies Act of the U.K. ("Companies Act"), 1985, c.6, § 425; FSMA, 2000, c.8, pt. VII, § 105 (providing standards for insurance companies to initiate and establish Part VII transfers under FSMA); see also FSA, Explanatory Notes, *supra* note 3, para. 197 (summarizing requirements of Part VII insurance transfer mechanism under § 105); *Run-off—Victory VII*, REINSURANCE MAG., Sept. 1, 2006, at 41 (contextualizing Part VII transfers and schemes of arrangements under § 425, Companies Act in insurance industry).

6. See LEWIS E. DAVIDS, *DICTIONARY OF INSURANCE* 183 (Littlefield, Adams & Co. ed., 1977) (defining "occurrence" as continuance or repeated exposure to conditions which result in injury); see also Ken Coleman & John Wardrop, *Too Much of a Good Thing? Solvency and S.304 Relief for Insurance Companies*, 17 MEALEY'S LITIG. REP. INS. INSOLV. 13, 13 (2005) (observing that primary goal for companies in runoff is to expedite finality on their liabilities and to reduce costs incurred); Ian McKenna & Richard Gregorian, *Dream Scheme*, LAWYER, Sept. 13, 2004, at 23 (emphasizing that companies in runoff are motivated to reach finality on their liabilities).

7. It should be noted that the Companies Act of 1985 is in the process of being repealed by the Companies Act of 2006. The Companies Act of 2006 restates §§ 425-427 of the Act of 1985 and makes a few additional changes. Because the effective dates of the each section of the Companies Act 2006 differ, this Note refers to § 425 of the Companies Act of 1985. See Companies Act, 1985, c.6, § 425 (noting that Companies Act 1985 has been repealed by Companies Act, 2006, § 1295, sch.16); see also Office of Public Sector Information Explanatory Notes, ¶¶ 895-901 (restating §§ 425-427 Companies Act 1985; ¶¶ 1165-1167 (explaining that Companies Act 2006 restates §§ 425-427 Companies Act 1985; discussing two changes to those sections), http://www.opsi.gov.uk/acts/en2006/ukpgaen_20060046_en.pdf (last visited Mar. 14, 2007).

8. See Coleman & Wardrop, *supra* note 6, at 13 (2005) (commenting that mecha-

ment is a business plan that establishes a procedure for estimating and settling all liabilities against an insurer, usually by a specific date.⁹ Alternatively, Part VII transfers, exemplified by the Lloyd's transfer, enable U.K. insurers to financially restructure through the transfer of all or a part of their business to a target company to relieve them of the duties associated with the transferred business.¹⁰

Because the U.K. insurance market, especially Lloyd's of London, issues a large percentage of insurance policies to U.S. companies, U.K. insurers often have creditors and policyholders in the United States.¹¹ Thus, when an insolvent U.K. insurer restructures its debt through a scheme of arrangement or consolidates business under a Part VII transfer, it often seeks recognition under U.S. law to protect assets located in the United States from attachment by U.S. creditors, and to bind all U.S. creditors to the terms of the scheme or transfer.¹² Although

nism to achieve finality of claims is "Holy Grail" for companies in runoff and that schemes of arrangements are used frequently in this context); *see also* McKenna & Gregorian, *supra* note 6, at 23 (describing role that schemes of arrangements and Part VII transfers play in facilitating runoff of insurance liabilities).

9. *See* Joseph J. Schiavone & Jeffrey S. Leonard, *Beware Solvent Scheme Procedures*, 40 *BUS. INS.* 10, 10 (2006) (affirming that if High Court sanctions scheme of arrangement, creditors must submit claims by specific bar date); *see also* Veronica Cowan, *Stick or Twist*, *POST MAG.*, Apr. 14, 2005, at 19 (commenting that solvent schemes of arrangement establish bar dates that provide final day policyholders may file claims against it; positing that bar dates today allow shorter periods of time to file claims); Dan Schwarzmann et al., *Solvent Schemes of Arrangement for Discontinued Insurance Business*, 20 *INSOLVENCY LAW & PRAC.* 13, 13 (2004) (explaining that all present and future claims can be estimated by certain date through solvent schemes of arrangement).

10. *See* FSMA, 2000, c.8, pt. VII, § 112 (stipulating that High Court may order all or part of proposed business subject to Part VII transfer may be incurred by receiving company, thereby eliminating all rights and liabilities associated with that business from transferor); *see also* FSA, Explanatory Notes, *supra* note 3, para. 213 (articulating purpose of § 112 of FSMA, and High Court's power to sanction Part VII transfer; providing that transferring company is relieved of all rights and liabilities of business being transferred).

11. *See* Press Release, Lloyds of London Signs Its First License Agreements for Services From Insurance Services Office (Mar. 14, 2000), http://www.iso.com/press_releases/2000/03_14_00.html; Louis A. Chiafullo, *Review Essay: The Maelstrom at Lloyds of London: Is It Sink or Swim For Policyholders?*, 26 *SETON HALL L. REV.* 1392 (1996) (noting that because Lloyd's provided substantial amount of insurance to United States at beginning and middle of twentieth century, Lloyd's underwriters have sustained significant losses arising from those policies). *But see* Jeffrey B. Struckhoff, *The Irony of Uberimae Fidei: Bad Faith Practices in Marine Insurance*, 29 *TUL. MAR. L. J.* 287, 287 (highlighting that London Market's share of marine insurance has declined because of competition from other markets with laws that are more friendly to insureds).

12. *See* Joe Bannister & Alexander Wood, *Recognition of UK Solvent Schemes at Risk*,

non-U.S. insurers cannot file for bankruptcy under U.S. law,¹³ a foreign representative of a foreign proceeding related to insurance may seek protection under Chapter 15 of the U.S. Bankruptcy Code ("Code").¹⁴

Prior to the enactment of Chapter 15, 11 U.S.C. § 304 of the Code authorized the recognition of ancillary foreign insolvency proceedings, under which solvent and insolvent schemes of arrangement and Part VII transfers have qualified.¹⁵ Applicable to petitions filed on or after October 17, 2005,¹⁶ Chapter 15 introduces new criteria for recognition of cross-border insolvency proceedings.¹⁷ These new criteria are largely due to Chapter

24 INT'L. FIN. L. REV. 10, 23 (2005) (acknowledging that recognition of solvent scheme or Part VII transfer in U.S. court protects scheme or transfer from U.S. creditors taking action against its assets); *see also* Coleman & Wardrop, *supra* note 6, at 13 (emphasizing importance of obtaining order from U.S. court, recognizing scheme, in order to bind U.S. creditors to terms of scheme).

13. *See* 11 U.S.C. § 109(b)(3)(A) (providing that foreign insurance companies are not considered debtors for purposes of Chapter 7 of Bankruptcy Code). *But see* 11 U.S.C. § 1501(c)(1) (excepting foreign insurance companies reorganized under foreign proceeding from § 109(b), which precludes foreign insurance companies from filing for bankruptcy under Chapters 7 and 11). *See, e.g.*, H.R. REP. NO. 109-31, pt. 1, at 106 (observing that § 1501 provides exception to § 109 exclusion of foreign insurance companies, enabling foreign proceedings associated with foreign insurance companies to seek recognition under Chapter 15).

14. *See* 11 U.S.C. § 101(24) (defining foreign representative to include person authorized to administer reorganization or liquidation of debtor's assets in foreign bankruptcy proceeding); *see also* 11 U.S.C. § 1509(a) (stating that foreign representative may file petition directly with court for recognition of foreign proceeding).

15. *See* *In re Kingscroft Ins. Co.*, 138 B.R. 121 (Bankr. S.D.N.Y. 1992) (finding that KWELM Companies' insolvent scheme of arrangement qualified as foreign proceeding under § 304); *see also* *In re* Petition of the Bd. of Dirs. Hopewell Int'l Ins. Ltd., 238 B.R. 25 (Bankr. S.D.N.Y. 1999) (granting solvent scheme of arrangement ancillary relief to foreign proceeding that sanctioned [solvent] scheme of arrangement, finding petitioner's representatives were foreign representatives under § 304 and statutory factors for injunction, including comity, were met); *In re* Riverstone Insurance (U.K.) Limited, 2005 Bankr. LEXIS 1697 (Bankr. S.D.N.Y. 2005) (order recognizing Riverstone's Part VII transfer as foreign proceeding under § 304).

16. *See* 11 U.S.C. § 1501(a) (2005) (emphasizing that purpose of Chapter 15 is to incorporate United Nations Commission on International Trade ("UNCITRAL") Model Law on Cross-Border Insolvency ("Model Law") on Cross Border Insolvency); *see also* *The Bankruptcy Abuse Protection and Consumer Protection Act of 2005*, MONDAQ, May 12, 2005 [hereinafter *BAPCPA*] (noting that Chapter 15 became effective on October 17, 2005).

17. *See* 11 U.S.C. § 101(23) (requiring that foreign proceeding arise under law related to insolvency or adjustment of debt); *see also* Jay Lawrence Westbrook, *Chapter 15 and Discharge*, 13 AM. BANKR. INST. L. REV. 503, 503-04 (2005) (highlighting that Chapter 15 eliminates § 304(c) requirements and aligns U.S. law with other States' law that adopted Model Law).

15's adoption of the United Nations Commission on International Trade ("UNCITRAL") Model Law on Cross-Border Insolvency ("Model Law").¹⁸ Notably, due to its integration of the Model Law's terms, Chapter 15 conditions recognition on a showing that the foreign proceeding "arise[s] under a law related to insolvency or adjustment of debt."¹⁹

This Note analyzes whether solvent schemes of arrangement and Part VII transfers should be recognized under Chapter 15. Although this issue primarily concerns U.K. insurance companies, the discussion of Chapter 15 is useful outside the context of insurers. Part I of this Note outlines the requirements for recognition of a scheme of arrangement under § 425 of the Companies Act 1985 and for Part VII transfers under the FSMA, and their prior treatment under 11 U.S.C. § 304. Part II evaluates the statutory criteria under Chapter 15, highlighting differences between Chapter 15 and former § 304, and asserts that solvent schemes of arrangement qualify as "foreign proceedings" under Chapter 15 because the Companies Act is a law related to insolvency.

Because there is, as yet, no case law established under Chapter 15 concerning Part VII transfers, Part III of this Note evaluates Part VII transfers under the Chapter 15 criteria and questions whether Part VII transfers will be recognized under Chapter 15. It presents both sides of the argument: Part VII transfers do not qualify as foreign proceedings because they do not arise out of a law relating to insolvency; and, conversely, Part VII transfers should qualify as foreign proceedings because they arise out of a law that adjusts debt. Part III of this Note also provides alternative solutions for Part VII transfers if they are not recognized under Chapter 15.

This Note concludes that although several solvent schemes of arrangement have been recognized under Chapter 15, it does

18. See H.R. REP. No. 109-31, pt. 1, at 105 (asserting that Chapter 15 incorporates UNICITRAL'S Model Law on Cross Border Insolvency); see also Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 726 (2005) (discussing Chapter 15's adoption of Model Law).

19. See 11 U.S.C. §§ 101(23)-(24) (aligning definitions of foreign proceeding and foreign representative under U.S. law with those of Model Law; expanding on Model Law's definition of foreign proceeding under § 101(23) to include that foreign proceeding arise out of law relating to adjustment of debt); see also Bannister & Wood, *supra* note 12, at 23 (examining new definition of "foreign proceeding" under Chapter 15 compared to § 304).

not confirm that *all* solvent schemes of arrangement will be recognized. Moreover, due to the inconsistent and limited case law concerning Part VII transfers under the U.S. Code, it is unclear whether Part VII transfers qualify as “foreign proceedings” under Chapter 15. Despite arguments asserting that Part VII transfers do not arise out of a law relating to insolvency, and therefore do not qualify as “foreign proceedings” under Chapter 15, the author concludes that in light of the goals of Chapter 15 and the Model Law, U.S. courts will try to facilitate recognition of Part VII transfers within the framework of Chapter 15.

I. STATUTORY CRITERIA FOR SOLVENT SCHEMES OF
ARRANGEMENT AND PART VII TRANSFERS
UNDER U.K. LAW

Part I introduces the statutory criteria of solvent schemes under § 425 of the Companies Act 1985 and Part VII transfers under § 105 of the FSMA and examines their treatment under former § 304. Sections I.A and I.B provide an analysis of the statutory criteria for schemes of arrangement and Part VII transfers, respectively, highlighting some of the differences between the two mechanisms for the purposes of Chapter 15. Section I.C evaluates the common law doctrine of comity, the statutory criteria for “foreign proceeding” under former 11 U.S.C. § 304, and treatment of solvent schemes of arrangement and Part VII transfers under § 304.

A. Schemes of Arrangement: § 425 Companies Act 1985

A scheme of arrangement, under § 425 of the Companies Act, enables a solvent or insolvent company²⁰ to suspend payment of outstanding liabilities to creditors in order to financially reorganize and restructure its debt.²¹ Through a scheme of ar-

20. See Companies Act 1985, c.1, § 1(3) (defining “public company” to include company having shares or guarantees and having share capital that has complied with registration criteria set forth under Companies Act on or after December 22, 1980; and private company as one that is not a public company); see also Andrew Wilkinson & Rosemary Sutherland, *Creditors’ Schemes of Arrangement: Their Use for Troubled Insurance Companies in the London Market*, 2 INT’L. L.R. 30-37 (1993) (explaining that “company” includes any company liable to be wound up under Insolvency Act of 1986, whether incorporated in England or not).

21. See David Milman, *Schemes of Arrangement: Their Continuing Role*, 4 INSOLV. LAW. 145 (2001) (commenting that scheme of arrangement are used to reconstruct distressed insurance companies); see also Wilkinson & Sutherland, *supra* note 20, at 37

rangement, the board of directors of a company, with advice from appropriate professionals, including accountants or actuaries, establishes a method for estimating and settling all present and future liabilities in order to expedite final payment to creditors.²² The Companies Act defines a scheme as a compromise between a company and its creditors, who play an instrumental role in the recognition of a scheme under U.K. law.²³

To establish and enforce a scheme of arrangement, a company must receive High Court approval to hold creditors meetings to enable each class of creditors to consider and vote on the scheme.²⁴ After the company receives requisite creditor approval, a majority in number representing three-fourths in value of the creditors or each class of creditors,²⁵ the High Court must sanction the scheme to make its terms binding on all creditors.²⁶ If the High Court sanctions the scheme of arrangement, the terms of the scheme are binding on all creditors.²⁷ While not

(stating that after scheme is sanctioned by High Court, creditors cannot bring claims against debtor's assets because scheme establishes procedure for paying claims).

22. See *In re Bd. of Dir. Hopewell Ins. Ltd.*, 238 B.R. 25 (Bankr. S.D.N.Y. 1999) (positing that scheme of arrangement establishes agreement between debtor company and creditors in order to runoff liabilities in economic and efficient way); see also Wilkinson & Sutherland, *supra* note 20 (noting that schemes of arrangement can distribute assets to creditors more effectively than liquidation).

23. See Companies Act, 1985, c.6, § 425(1) (stating that scheme establishes compromise between debtor company and creditors); see also *In re Hopewell*, 238 B.R. 25, 109-10 (1999) (asserting that majority of creditors, representing three-fourths in value, must vote in favor of scheme in order for it to be passed, and before court can sanction it).

24. See Companies Act, 1985, c.6, § 425(1)-(2) (articulating that debtor company proposing scheme of arrangement must receive High Court approval to hold creditor meeting where all classes of creditors must vote on scheme); see also *Kempe v. Ambassador Ins. Co.*, [1998] 1 BCLC 234, 238 (stating that High Court may order meeting of creditors for company proposing scheme of arrangement at which all class of creditors may vote on scheme of arrangement).

25. See Companies Act, 1985, c.6, § 425(2) (stating that to be considered for High Court sanctioning, proposed scheme of arrangement must receive majority of creditors representing three-fourths in value). See, e.g., *Kempe*, [1998] 1 BCLC 234, 238 (reiterating that § 425 Companies Act requires majority of creditor vote representing three-fourths in value to be considered for High Court sanctioning).

26. See Companies Act, 1985, c.6, § 425(1)-(2) (providing that after receiving majority vote of creditors, representing three-fourths in value, in favor of scheme of arrangement, it may be considered for High Court sanctioning—if sanctioned, terms of scheme are binding on all creditors); see also *In re Hopewell*, 238 B.R. 25, 64-65 (1999) (asserting that after proposed scheme of arrangement receives High Court sanctioning, terms of scheme are binding on all creditors).

27. See Companies Act 1985, c.6, § 425(2) (explaining that scheme becomes binding on all creditors after receiving High Court sanctioning); see also *In re Hopewell*, 238

limited to insurance companies, schemes of arrangement are available to solvent and insolvent insurance companies to achieve finality on all outstanding liabilities and to expedite payments to creditors.²⁸

1. Scheme Creditors and High Court Sanctioning

The creditors of the company proposing a scheme of arrangement play a paramount role in its approval and recognition by the High Court.²⁹ In addition to the voting requirement, the composition of each class of creditors must fairly represent the creditors in that class.³⁰ Failure to establish the appropriate number and composition of creditor classes provides grounds for the High Court to deny sanctioning the scheme, even after it received the requisite creditor approval.³¹

To ensure that members of a class are fairly represented, the class must be composed of members whose rights share sufficient similarities to reflect a common interest among all par-

B.R. 25, 64 (1999) (explaining that scheme of arrangement's terms become binding on all creditors after High Court sanctioning and filing it with Registrar).

28. See *In re Kingscroft Ins. Co.*, 138 B.R. 121 (1992) (granting § 304 recognition to insolvent scheme of arrangement); see also *In re Hopewell Int'l Ins. Ltd.*, 238 B.R. 25 (1999) (recognizing solvent scheme of arrangement as foreign proceeding under § 304); James Veach, *Intersecting Alternatives to the Current U.S. Insurer (Reinsurer) Insolvency Mode*, 889 PRAC. L. INST. 679, 690-91 (reporting that most London Market insolvencies are executed through insolvent scheme of arrangement, but English court sanctioned first solvent scheme of arrangement in 1977).

29. See Companies Act, 1985, c.6, § 425(1)-(2) (mandating that proposed scheme of arrangement receive majority vote of creditors, representing three-fourths in value, in order to be considered for High Court sanctioning); see also *In Re British Aviation*, [2006] B.C.C. 14 (denying BAIC's solvent scheme of arrangement because scheme incorrectly placed Incurred But Not Reported ("IBNR") creditors in same class as creditors with matured claims).

30. See *In re Sovereign Life Ins. Co.*, [2006] EWHC 1335 (Ch), [2007] 1 BCLC 228 (observing that when debtor files application to English court order authorizing meeting of creditors, court must evaluate composition of voting classes to determine if creditors are fairly represented in each class; see also *In Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241 at [11], [2001] 2 BCLC 480 at [11] (finding that provisions in scheme of arrangement did not create different rights among insurance and non-insurance creditors and therefore did not establish different classes of creditors).

31. See *In re Sovereign Life*, [2007] 1 BCLC 228, para. 92(2) (concluding that debtor company's IBNR creditors should be in separate class from all other creditors in order to ensure fair representation of creditor rights); see also *In Re British Aviation*, [2006] B.C.C. 14 (denying BAIC's solvent scheme of arrangement because organization of creditor class to include IBNR creditors with creditors with matured claims did not fairly represent rights of IBNR creditors).

ties.³² For example, the English Court of Appeal in *In re Hawk Insurance* ruled that differences among creditors are not necessarily critical to determining whether a single class exists; it is the nature of the differences that is the pivotal factor.³³ The English Court of Appeal then concluded there was sufficient similarity among Hawk's different creditors for them to be treated as a single class.³⁴

Identifying different classes of creditors is particularly challenging in the insurance industry because creditors may have both matured claims³⁵ and incurred but not reported ("IBNR") claims, which are current, undiscovered liabilities.³⁶ In particular, identifying a class of creditors with IBNR claims—such as asbestos claims for which a policyholder's exposure to asbestos occurred during the policy coverage years, but the resulting per-

32. See *In Re BTR plc*, 2 BCLC at 740 (1999) (concluding class defined by Justice Jonathan Parker in *In re Sovereign Life* as "those persons whose rights are not so dissimilar as to make it impossible for them to consult together with view to acting in their common interest"); see also *In re Sovereign Life*, [2007] 1 BCLC 228, para. 118 (citing *In re BTR*, court concluded that Sovereign's solvent scheme creditors' rights were not so dissimilar to justify placing them into different classes).

33. See, e.g., *In re Hawk Insurance*, 2001 B.C.C. 57 (concluding that to determine whether scheme of arrangement should be composed of different classes of creditors, it is necessary to determine whether creditors' rights provided under scheme were so different among each creditor to warrant different classes); see also *In Re UDL Holdings Ltd* [2002] 1 HKC 172, 184 (concluding that test of whether a scheme of arrangement should have several classes of creditors should be based on differences between creditors' legal rights against company provided under scheme of arrangement, not creditors' different interests deriving from those rights); Dennis Keenan, *Corporate Recovery—Schemes of Arrangement*, ACCOUNTANCY, June 1, 2002 (noting that in *In re Hawk Insurance*, court concluded that unless there are substantive and significant differences among creditors' rights provided under scheme of arrangement, all creditors are capable of consulting with each other).

34. See *In re Hawk Insurance*, 2001 B.C.C. at 65 (concluding that creditors' rights provided under scheme of arrangement were sufficiently similar to constitute one class); see also, *Variation in Currency Conversion Date*, TIMES (London), May 27, 2004, at 44 (stating that English court in *In re Hawk Insurance* determined that creditors must share common interest in order to remain in same class).

35. See *In re Ronald Paul Lamarre*, 269 B.R. 266, 267 (Bankr. D.Mass 2001) (citing BLACKS LAW DICTIONARY, "matured claim" is claim that is due for payment); see also BLACK'S LAW DICTIONARY 240 (7th ed. 1999) (defining matured claim as "a claim based on a debt that is due for payment").

36. See *In re British Aviation*, [2006] B.C.C. 14 (defining IBNR claims as potential claims where event implicating policyholder's liability has already taken place, but no claim has yet been made against policyholder or reported to insurance company); see also American International Group Insurance Co. ("AIG"), Annual Report (Form 10K), at 6-7 (2006) (describing AIG management's method for monitoring reserves for IBNR losses).

sonal injury claim, like asbestosis, does not arise until later in time—can be difficult.³⁷ Although both involve claims under insurance contracts, case law indicates that creditors with matured claims should be in a separate class from those with IBNR claims, as discussed below.

In *In the Matter of British Aviation*, the High Court ruled that British Aviation Insurance Company's ("BAIC") creditors with matured and contingent claims should be grouped in a separate class from those with IBNR claims and, accordingly, separate meetings should have been held.³⁸ The High Court found that the terms of the scheme of arrangement had an adverse impact on policyholders with IBNR claims substantively through the valuation process and procedurally through the voting process.³⁹

Under the terms of the proposed scheme, IBNR creditors would have incurred a distinct risk because their claims would have been valued much less than matured claims, which would have received full indemnification.⁴⁰ As a result, the High Court concluded that the interests of the policyholders with IBNR

37. See *Amer. Steamship Owners Mutual Prot. and Indem. Assoc., Inc. v. Alcoa*, 232 F.R.D. 191, 191-93 (S.D.N.Y. 2005) (observing that by early 1980's, insurer started to receive claims from insured for asbestos-related diseases while allegedly working aboard vessels in 1940's); see also Ian Kelley, Note, *Regulatory Crisis at Lloyd's of London: Reform from Within*, 18 *FORDHAM INT'L L.J.* 1924, 1943-44, n.206 (1995) (commenting that reserves are held at end of year for claims that are not yet reported, especially with environmental and asbestos claims). See, e.g., Harvey J. Kesner, 62 *AM. BANKR. L.J.* 69, 70-72, (1988) (referring to *In re Johns-Manville Corporation*, 36 *BANKR.* 727 (Bankr. S.D.N.Y. 1984)). Johns-Manville Company's ("Manville") made claims against insurers, which provided insurance coverage during time when massive amounts of employees and consumers were exposed to Manville's asbestos products, but injuries did not arise until after policy coverage periods. See *id.*

38. See *In re British Aviation*, [2006] B.C.C. at 83 (concluding that creditors with IBNR claims did not share common interest with those with matured claims, thereby requiring IBNR claimants in separate class); *In re Sovereign Marine Ins.*, [2007] BCLC 228, para. 12 (citing *In re British Aviation*, [2006] B.C.C. at 92); referencing that in *In re British Aviation*, court found that IBNR creditors' rights so sufficiently different than other creditors with matured claims that they had no commonality of interest, which required IBNR creditors to be in separate voting class from all other creditors).

39. See *In re British Aviation*, [2006] B.C.C. at 51, 124-25 (concluding IBNR creditors' claims were devalued and their interests were not properly represented in vote in favor of scheme); see also Richard Astor & Joe Bannister, *U.K. Solvent Schemes of Arrangement: Insurance Creditors and the Court Finally Bite Back*, 24 *AM. BANKR. L.J.* 38, 86 (2005) (highlighting that under BAIC's scheme of arrangement, IBNR creditors' claims would have been devalued through scheme's uncertain estimation methodology).

40. See *In re British Aviation*, [2006] B.C.C. at 124-25 (highlighting that there was no methodology established to value creditors' IBNR claims); see also Astor & Bannister, *supra* note 39, at 86 (confirming that in *In re British Aviation*, court concluded that IBNR

claims were so different from those with matured claims that placing them in the same voting class did not fairly represent the interests of the IBNR claimants.⁴¹ The High Court, therefore, denied sanctioning BAIC's solvent scheme of arrangement.⁴² Despite the challenges associated with identifying different classes of creditors, exemplified by the *BAIC* decision, several schemes of arrangement have been approved under U.K. law.⁴³

2. Creditors Meetings and High Court Approval

To begin the sanctioning process, the debtor company must first petition the High Court to hold meetings for all classes of creditors so the classes can consider and vote on the scheme of arrangement.⁴⁴ During this phase, the High Court determines

creditors' claims would have been undervalued based on scheme of arrangement's estimation methodology).

41. *See In re British Aviation*, [2006] B.C.C. at 124-25 (finding that creditors with IBNR claims were not fairly represented in votes approving scheme of arrangement); *see also Astor & Bannister*, *supra* note 39, at 88 (asserting that in *In re British Aviation*, court concluded that IBNR creditors' interests were not fairly represented when creditors voted in favor of scheme).

42. *See In re British Aviation*, [2006] B.C.C. at 144 (dismissing BAIC's petition to sanction scheme of arrangement); *see also Astor & Bannister*, *supra* note 39, at 88 (summarizing reasons why court in *In re British Aviation* dismissed sanction petition, including lack of substantive and procedural fairness to IBNR creditors).

43. *See In re Cape plc and Other Companies*, [2006] EWHC 1446 (Ch) (sanctioning scheme of arrangement between debtor company and its creditors with asbestos-related claims); *see also In re Linton Park plc*, [2005] All ER (D) 174 (rejecting creditor's argument that scheme of arrangement did not receive requisite creditor approval, thereby approving scheme); *In re Peninsula and Oriental Steam Navigation Co.*, [2006] EWHC 389 (Ch), Mar. 2, 2006 (recognizing two schemes of arrangement for debtor company); *In re Marconi Corporation plc*, [2004] All ER (D) 119 (approving scheme of arrangement and rejecting debtor's request for early termination of twelve month waiting period, starting from scheme's effective date, which enabled creditors that submitted claims during that period to be paid in full); *In re Drax Holdings Ltd*; *In re Inpower Ltd*, [2003] EWHC 2743 (Ch.), [2004] 1 BCLC 10 (finding that because both schemes of arrangement proposed by Drax and Inpower had sufficient connection with England, court sanctioned both schemes of arrangement); *In re Pan Atlantic Insurance Co Ltd*, [2003] EWHC 1696 (Ch.), [2003] 2 BCLC 678 (holding that no additional consideration should be given to non-insurance creditors than insurance creditors under scheme of arrangement).

44. *See Companies Act, 1985, c.6, § 425(1)* (stating that upon application of debtor company proposing scheme of arrangement, court may order meeting of creditors to bring scheme of arrangement to vote); *see also In re Hawk Insurance Co Ltd*, [2001] EWCA Civ 241 at [11], [2001] 2 BCLC 480 at [11] (noting that there are three phases under § 425 Companies associated with sanctioning scheme of arrangement—first phase involves company proposing scheme of arrangement to petition court to order meeting of creditors).

the composition of each creditor class, whether the meetings should be held, the number of meetings, and the advertisements that should be made to notify creditors.⁴⁵ After the court orders the meeting of creditors, § 426 of the Act requires the company to notify all creditors of the proposed reorganization under the scheme of arrangement and the dates and times of all meetings.⁴⁶

The board of directors of the debtor company must provide an explanatory statement to all creditors articulating the effect of the scheme of arrangement, any material interests that the individual directors might have in the company, and the effect of those interests on the scheme of arrangement.⁴⁷ In general, the statement must provide all information creditors may reasonably need to make an informed decision on the arrangement.⁴⁸

3. Creditor Approval and High Court Sanctioning

If a majority of creditors, representing three-fourths in value, in each class of creditors approves the scheme, the company may then petition the High Court for an order sanctioning the scheme.⁴⁹ When evaluating a scheme, the High Court con-

45. See Companies Act, 1985, c.6, § 425(1) (establishing that when court considers whether to issue order for creditor meeting, it determines how meeting will be summoned); see also *In re Hawk Insurance Co Ltd*, [2001] 2 BCLC 480 at [11] (observing that when company petitions court for order summoning meeting of creditors, i.e., in first stage, court directs how meetings will be summoned, evaluates procedural and substantive fairness of creditors classes established under scheme).

46. See Companies Act, 1985, c.6, § 426(1)-(7) (defining steps company must take to notify all creditors of meeting after receiving order from court approving creditor meeting); see also Veronica Cowan, *Risk Report—Stick or Twist*, POST MAG., Feb. 8, 2007 (claiming that notice periods have been extended from six weeks up to eight to ten weeks, in order to enable creditors more time to consider scheme proposals).

47. See Companies Act, 1985, c.6, § 426 (2) (requiring explanatory statement, highlighting issues of material fact, to be distributed to all creditors when company notifying creditors of meeting); see also DP Seller, *The Scottish Courts' Attitude to Interdicts in Company Disputes*, 35 J. L. SCOTLAND 160 (1990) (surmising that § 426, Companies Act requires explanatory statement discussing terms of scheme of arrangement, to be distributed to all creditors).

48. See Companies Act, 1985, c.6, § 426 (2), (4-5) (mandating that explanatory statement be distributed to all creditors when company provides notice of court-approved creditor meeting). See, e.g., Wilkinson & Sutherland, *supra* note 20 (explaining that explanatory statement may also highlight duties of Scheme Administrator ("SA"), if one is appointed, who oversees scheme administration and liaises with creditors committee to ensure effective and efficient execution of scheme's terms).

49. See Companies Act, 1985, c.6, § 425(2) (providing that majority of creditors,

siders whether the company satisfied the statutory procedures required under §§ 425 and 427.⁵⁰ If the meetings were improperly constituted or conducted, the High Court will dismiss the petition.⁵¹ Significant procedural defects in the creditors' meeting(s), violation of public policy, and evidence of fraud are also grounds for the court to deny sanctioning a scheme of arrangement.⁵²

4. High Court Sanctioning Binds All Creditors

Until the High Court sanctions the scheme, there is no moratorium on creditors' suits against the insurer.⁵³ Once the High Court sanctions the scheme of arrangement, however, creditors must file all claims against the policies protected under the scheme of arrangement by the bar date set forth under the scheme.⁵⁴ If creditors fail to file claims by that date, they forfeit

representing three-fourths in value, must approve scheme); *see also In re Hawk Insurance Co Ltd*, [2001] EWCA Civ 241 at [11], [2001] 2 BCLC 480 at [11] (observing that § 425 Companies Act requires that majority of creditors, representing three-fourths in value, vote in favor of scheme before requesting order from court for meeting of creditors).

50. *See In re British Aviation*, 2001 B.C.C. at 142 (ruling that IBNR claimants were not represented fairly in creditor vote nor in claims valuation process, therefore High Court rejected BAIC's sanction petition for scheme of arrangement); *see also In re Hawk Insurance Co Ltd*, [2001] 2 BCLC 480 at [11] (articulating three-stage process of scheme sanctioning outlined in *In re British Aviation*, which includes substantive and procedural analysis of court in different phases).

51. *See In re British Aviation*, 2001 B.C.C. at 142 (dismissing debtor's petition for sanctioning scheme of arrangement due to procedural and substantive unfairness to IBNR creditors); *see, e.g.*, Milman, *supra* note 21 (noting that grounds for dismissal include improperly conducted meeting of creditor).

52. *See In re British Aviation*, 2001 B.C.C. at 142 (failing to adequately represent IBNR creditors in creditor voting provided grounds for dismissal); *see also* Wilkinson & Sutherland, *supra* note 20 (asserting that court will reject scheme of arrangement due to procedural defects and fraud).

53. *See* Companies Act, 1985, c.6, § 425(2) (specifying that terms of scheme of arrangement become binding only after it is sanctioned by High Court and then subsequently registered with registrar of companies pursuant to § 425(3)); *see also In re Hopewell*, 238 B.R. at 109 (summarizing that once scheme is sanctioned through statutory procedure under Companies Act, creditors' rights set forth under scheme supersede creditors' contractual rights before scheme was sanctioned).

54. *See generally* Dan Schwarzmann, Paul Evans, Mark Batten & Nigel Rackham, *Solvent Schemes of Arrangement for Discontinued Insurance Business*, 20 *INSOLVENCY L. & PRAC.* 13, 15 (2004) (explaining that all present and future claims can be estimated by certain date through solvent scheme of arrangement); *see also* Neil Golding, Catherine Derrick & Craig Montgomery, *U.K.'s Chapter 11 Plan: Schemes of Arrangement*, 25 *AM. BANKR. L. J.* 30, 30 (2006) (explaining that in insurance schemes of arrangement, creditors with IBNR and matured claims must submit them by bar date).

payments associated with those claims.⁵⁵ After the bar date, the insurer evaluates all filed claims and pays or resumes payment to its creditors in accordance with the scheme provisions.⁵⁶

B. *Part VII Transfers: § 105, Financial Services and Markets Act 2000 (“FSMA”)*

Unlike a scheme of arrangement, a Part VII insurance transfer provides a tool for one or more companies to transfer all or part of their business to another company in order to consolidate liabilities and liberate the transferor companies from duties associated with the transferred business.⁵⁷ A company that proposes a Part VII transfer must file a report with the Financial Services Authority (“FSA”), which provides details of the terms of the transfer and the potential impact the transfer might have on policyholders and/or creditors.⁵⁸ Although creditor approval of the report is not required to receive High Court sanctioning, creditors can object to the approval of the report before the High Court if they find that their rights would be adversely affected by the transfer.⁵⁹

55. See Golding et al., *supra* note 54, at 30 (highlighting that all creditors must bring claims against scheme of arrangement before bar date); William Goddard, Note, *The Revolution of the Times: Recent Changes in U.K. Insurance Insolvency Laws and the Implications of Those Changes Viewed from a U.S. Perspective*, 10 CONN. INS. L.J. 139, 146-47 (2004) (commenting that schemes of arrangement may set bar date for creditors to submit claims, after which they can no longer submit claims).

56. See Companies Act, 1985, c.6, § 426(2) (requiring that explanatory statement describing all material information concerning procedures set forth in scheme is distributed to all creditors after court issues order approving meeting of creditors); see also Golding et al., *supra* note 54, at 30 (explaining that after creditors submit claims before bar date, estimation method established under scheme determines amount owed to creditor).

57. See FSMA, 2000, c.8, pt. VII, § 105 (setting forth requirements for Part VII transfers); see also Her Majesty’s (“HM”) Treasury, Financial Services and Markets Act 2000 March 2001 Control of Business Transfers (Requirements on Applicants) Regulations 2001—A Consultation Document, HM Treasury Website, http://www.hm-treasury.gov.uk/consultations_and_legislation/fsma/control_of_business_transfers_requirements_on_applicants/fsma_cbt_intro.cfm, at 1 (last visited Feb. 27, 2007) [hereinafter HM Treasury, Consultation Document] (indicating that Part VII, FSMA enables insurance companies and banks to transfer acquire or transfer assets from one company to another).

58. See FSMA, 2000, c.8, pt. VII, § 109 (specifying that company proposing Part VII insurance transfer must file report with FSA); see also HM Treasury, Consultation Document, *supra* note 57, at 4 (recognizing that transfer report is only required in Part VII insurance transfer, and not with banking transfer, and must be prepared by qualified person).

59. See FSMA, 2000, c.8, pt. VII, § 110 (providing that any person, who feels that he

1. FSMA, § 105 Insurance Transfer Requirements

According to § 105(1) of the FSMA, a Part VII transfer is recognized under U.K. law if it: (i) satisfies one of the three conditions under § 105(2);⁶⁰ (ii) the business is transferred to a company established in a State within the European Economic Area (“EEA”);⁶¹ or (iii) the transfer is not an excluded scheme under § 105(3) of the FSMA.⁶² Section 105 of the FSMA also

would be adversely affected by proposed transfer can be heard before High Court); *see also* HM Treasury, Consultation Document, *supra* note 57, at 4 (emphasizing that § 110 FSMA provides opportunity for any person who thinks he would be adversely affected by transfer to be heard before High Court).

60. *See* Section 105(2) sets forth the following conditions for a proposed transfer to qualify as a Part VII transfer:

(a) the whole or part of the business carried on in one or more member States by a UK authorised person who has permission to effect or carry out contracts of insurance (“the authorised person concerned”) is to be transferred to another body (“the transferee”);

(b) the whole or part of the business, so far as it consists of reinsurance, carried on in the United Kingdom through an establishment there by an EEA firm qualifying for authorisation under Schedule 3 which has permission to effect or carry out contracts of insurance (“the authorised person concerned”) is to be transferred to another body (“the transferee”);

(c) the whole or part of the business carried on in the United Kingdom by an authorised person who is neither a UK authorised person nor an EEA firm but who has permission to effect or carry out contracts of insurance (“the authorised person concerned”) is to be transferred to another body (“the transferee”).

Id.; *see also* FSMA, 2000, c.8, pt. VII, § 105(8) (defining U.K. authorized person to include body incorporated in United Kingdom; or unincorporated association formed under law of United Kingdom).

61. *See* FSMA, 2000, c.8, pt. VII, § 105(1) (establishing statutory requirements for Part VII insurance transfer); *see also* HM Treasury, Consultation Document, *supra* note 57, at 4 (recognizing that company proposing Part VII transfer must submit report to FSA, in addition to satisfying statutory requirements under § 105(1)).

62. *See* FSMA, 2000, c.8, pt. VII, § 105(1) (providing statutory requirements for Part VII insurance transfer); *see also* HM Treasury, Consultation Document, *supra* note 57, at 9 (acknowledging that insurance business is complicated and Part VII report provides clarification of transfer’s impact on rights of policyholders). Section 105(3) provides four cases whereby a transfer would be excluded under FSMA, 2000, Part VII:

CASE 1

Where the authorised person concerned is a friendly society.

CASE 2

Where-

(a) the authorised person concerned is a UK authorised person;

(b) the business to be transferred under the scheme is business which consists of the effecting or carrying out of contracts of reinsurance in one or more EEA States other than the United Kingdom; and

(c) the scheme has been approved by a court in an EEA State other than the United Kingdom or by the host state regulator.

enables the company that receives the transferred liabilities to implement a scheme of arrangement under § 425 of the Companies Act, to finalize outstanding liabilities with its creditors.⁶³

a. Regulatory Approval

Under § 109 of Part VII, a company proposing a Part VII transfer must file a report with the FSA outlining the terms of the transfer.⁶⁴ An independent expert, whose qualifications are subject to the FSA approval, writes and files the report with the High Court.⁶⁵ The report must include: the effect of the transfer on policyholders, the scope of the report, the purpose of the transfer, and evidence in support of the independent expert's

CASE 3

Where-

- (a) the authorised person concerned is a UK authorised person;
- (b) the business to be transferred under the scheme is carried on in one or more countries or territories (none of which is an EEA State) and does not include policies of insurance (other than reinsurance) against risks arising in an EEA State; and
- (c) the scheme has been approved by a court in a country or territory other than an EEA State or by the authority responsible for the supervision of that business in a country or territory in which it is carried on.

CASE 4

Where the business to be transferred under the scheme is the whole of the business of the authorised person concerned and-

- (a) consists solely of the effecting or carrying out of contracts of reinsurance, or
 - (b) all the policyholders are controllers of the firm or of firms within the same group as the firm which is the transferee,
- and, in either case, all of the policyholders who will be affected by the transfer have consented to it.

FSMA, 2000, c.8, pt. VII, § 105(3) (providing four cases whereby transfer would be excluded under Part VII, FSMA).

63. See FSMA, 2000, c.8, pt. VII, § 105(6) (enabling Part VII transfer to implement scheme of arrangement under § 425 Companies Act); see also HM Treasury, Consultation Document, *supra* note 57, at 11 (asserting that § 105, FSMA preserves possibility of using §§ 425-427A of Companies Act 1985 to enable reconstruction of insurance business or to come to arrangement between company and its creditors).

64. See FSMA, 2000, c.8, pt. VII, § 109 (mandating that report accompany proposed Part VII insurance transfer must explain material information); see also HM Treasury, Consultation Document, *supra* note 57, at 8 (recognizing that company proposing Part VII transfer must submit report to FSA, in addition to satisfying statutory requirements under § 105(1)).

65. See FSMA, 2000, c.8, pt. VII, § 109(2) (defining qualifications for independent expert; requiring independent expert to possess requisite skills to compose appropriate report to be approved by FSA); see also HM Treasury, Consultation Document, *supra* note 57, at 7 (stating that independent expert must produce report on any transfer scheme).

opinions.⁶⁶ The report is distributed to all policyholders to give them the opportunity to determine whether their rights would be adversely affected by the transfer.⁶⁷ Pursuant to § 110 of the FSMA, all interested parties affected by the transfer are entitled to raise objections against the transfer before the High Court.⁶⁸ The High Court can impose any incidental, consequential, and supplemental obligations necessary to ensure that the transfer is effectively executed.⁶⁹

b. High Court's Evaluation of Part VII Transfers

The High Court, which strongly defers to the FSA's opinion, evaluates whether a policyholder or any interested party would be adversely affected by the terms of the Part VII transfer.⁷⁰ Specifically, the High Court considers the reasonable expectations and security of the policyholders and, most importantly, whether the transfer is fair to all interested parties.⁷¹ The High Court

66. See FSMA, 2000, c.8, pt. VII, § 109(1) (requiring report outlining terms of Part VII transfer to be submitted to FSA); see also FINANCIAL SERVICES AUTHORITY ("FSA"), FSA HANDBOOK, c.18, SUP 18.2.33, <http://fsahandbook.info/FSA/html/handbook/SUP/18/2> (last visited Feb. 11, 2007) [hereinafter FSA HANDBOOK] (outlining requirements for report).

67. See HM Treasury, Consultation Document, *supra* note 57, at 8 (indicating that report must be sent to all creditors and shareholders affected by Part VII insurance transfer); see also Nola Beirne, Christopher Jackson & Richard Butler, *Banking and Insurance Business Transfers*, 18 BUTTERWORTHS J. INT'L. BANK. & FIN. L. 52, 53 (2003) (stating that § 109 of FSMA does not require transfer of debt to qualify as Part VII transfer under U.K. law).

68. See FSMA, 2000, c.8, pt. VII, § 110 (providing that any person who feels Part VII transfer will adversely affect their rights may be heard before Court; see also HM Treasury, Consultation Document, *supra* note 57, at 4 (emphasizing that § 110 FSMA provides opportunity for any person who thinks he would be adversely affected by transfer to be heard before High Court).

69. See FSMA, 2000, c.8, pt. VII, § 111(d) (pointing out that court may impose incidental or consequential conditions to ensure that Part VII transfer is effectively executed); see also FSA, FSA HANDBOOK, *supra* note 66, § SUP 18.2.41 (suggesting that court may issue order to facilitate company's financial situation in order to facilitate efficient execution of Part VII transfer).

70. See FSMA, 2000, c.8, pt. VII, § 107 (providing that company proposing Part VII transfer may petition court for sanctioning); see also FSA HANDBOOK, *supra* note 66, § SUP 18.2.60 (observing that court most likely wants to know FSA's opinion, which is sometimes included in FSA's affidavit to court).

71. See FSMA, 2000, c.8, pt. VII, § 109 (requiring that scheme report be filed with High Court, highlighting all material information proposed by Part VII transfer); see also FSA HANDBOOK, *supra* note 66, § SUP 18.2.53 (providing public policy reasons as to why FSA may reject Part VII transfer, whose opinion upon which High Court gives strong reliance).

reviews the transfer as the whole, but does not make suggestions to improve the details of the proposed transfer.⁷² In reviewing the Part VII transfer, the High Court may sanction all or part of the proposed business to be transferred to the target company.⁷³

Prior to Chapter 15, foreign proceedings, including schemes of arrangement and Part VII transfers, sought recognition under 11 U.S.C. § 304 of the Code.⁷⁴ The following section first examines the common law doctrine of comity, the statutory criteria for “foreign proceeding” under § 304, and § 304’s treatment of solvent schemes of arrangement and Part VII transfers.

C. *The Antecedent to Chapter 15: 11 U.S.C. § 304*

1. The Common Law Doctrine of Comity⁷⁵

Under U.S. federal law, the recognition of foreign proceedings has long been governed by comity, the mutual recognition of legislative, judicial, and executive acts among States.⁷⁶ The

72. See FSA HANDBOOK, *supra* note 66, § SUP 18.2.32 (advising that purpose of proposed transfer scheme report is to inform court and it is independent expert’s duty to provide all relevant details concerning transfer to High Court); see also HM, Consultation Document, *supra* note 57, at 9 (explaining purpose of Part VII transfer scheme report is to inform policyholders and shareholders of material information so they can make informed decision as to whether transfer adversely impacts their rights).

73. See FSMA, 2000, c.8, pt. VII, § 112 (stating that court has discretion to transfer all or part of business being proposed in Part VII transfer); see also FSA HANDBOOK, *supra* note 66, § SUP 18.2.41 (asserting that court can issue discretionary orders to ensure effective implementation of Part VII transfer).

74. See, e.g., *In re Kingscroft*, 138 B.R. 121 (1992) (finding that KWELM Companies’ insolvent scheme of arrangement qualified as foreign proceeding under § 304); *In re Hopewell*, 238 B.R. 25 (1999) (granting solvent scheme of arrangement ancillary relief to foreign proceeding that sanctioned [solvent] scheme of arrangement, finding petitioner’s representatives were foreign representatives under 11 U.S.C. § 304 and statutory factors for injunction, including comity, were met); *In re Petition of David Rose*, 318 B.R. 771 (Bankr. S.D.N.Y.) (denying recognition to Part VII transfer because FSMA is not law related to insolvency); *In re Riverstone Insurance*, 2005 Bankr. LEXIS 1697, at *18 (Bankr. S.D.N.Y. 2005) (Order Giving Full Force and Effect to U.K. Scheme). It should be noted that the *Riverstone* case provides only an order giving recognition to Riverstone’s Part VII transfer and does not provide any judicial analysis concerning whether Part VII transfers qualify as “foreign proceedings” under Chapter 15.

75. The potential role comity could play in Chapter 15 requires a substantive analysis that is beyond the scope of this Note. Indeed, this Note briefly touches upon comity under 11 U.S.C. § 304 and evaluates relevant case law that provides insight into its application in federal bankruptcy and non-bankruptcy contexts.

76. See *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (establishing international comity as recognition of legislative, executive or judicial acts of another State); see also, BLACK’S LAW DICTIONARY 261 (7th ed. 1999) (defining comity as courtesy among States in recognizing legislative, judicial, and executive acts).

U.S. Supreme Court case, *Hilton v. Guyot*, established the foundation for the application of comity under U.S. law.⁷⁷ Subsequent to the *Hilton* case, U.S. federal courts routinely applied and interpreted the doctrine of comity in foreign insolvency cases.⁷⁸ In *Maxwell Communication Corp. v. Societe Generale*, a representative of the debtor company sought to avoid loan payments it made to three international banks within ninety days prior to filing for Chapter 11 bankruptcy under U.S. law, claiming that the transfers violated § 547(b).⁷⁹ Affirming the district court's decision, the Court of Appeals for the Second Circuit dismissed the debtor's claim.⁸⁰ The Court held that § 547(b) did

77. See *In re Yukos Oil Company*, 321 B.R. 396, 409 (Bankr. S.D.Tex.) (referencing *Hilton v. Guyot* in concluding that comity does not form independent basis for dismissal of Chapter 11 case); see also *Hilton v. Guyot*, 159 U.S. at 163-64 (1894).

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due 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.

78. See *JPMorgan Chase Bank v. Altos Hornos De Mexico*, 412 F.3d 418 (2d Cir. 2005) (recognizing debtors Mexican insolvency proceeding based on doctrine of comity; dismissing JPMorgan's suit claiming ownership of monies located in debtor's bank); *Haarhuis v. Kunnan Enterprises, Ltd.*, 177 F.3d 1007 (D.C. Cir. 1999) (granting comity to foreign ancillary proceeding based on expert testimony and finding that Taiwanese reorganization law was based on United States and Japanese law, and friendship treaty existed between United States and China); *Cunard S.S. Co. Ltd. v. Salen Reefer Services AB*, 773 F.2d 452 (2d Cir. 1985) (affirming district court's application of comity in recognizing Swedish foreign ancillary proceeding, but commenting that filing for recognition under § 304 was preferred statutory remedy over directly filing in U.S. federal court based on comity); see also *In re Maxwell Communication Corp. plc*, 93 F.3d 1036 (2d Cir. 1996) (concluding that comity applied in ordinary Chapter 11 proceedings, not just in foreign ancillary proceedings); *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987) (asserting that so long as foreign ancillary proceeding comports with due process and fairly treats U.S. creditors, that federal courts may recognize foreign proceedings based on comity).

79. See *In Re Maxwell Communication Corp.*, 93 F.3d at 1043-44 (1996) (explaining that § 547(b) allows Chapter 11 trustee to avoid transactions made within ninety days of filing for bankruptcy because creditor would have received more in value than upon liquidation of debtor's estate, thereby giving that creditor preference over all other creditors); see also Richard Diwan *International Litigation: Extraterritorial Application of U.S. Law*, 31 INT'L LAW. 331, 331 (1997) (reporting that Court of Appeals in *In re Maxwell* determined that debtor company had stronger connection to England, therefore U.S. law should not apply).

80. See *In Re Maxwell*, 93 F.3d at 1053-55 (1996) (concluding that based on international comity, U.S. bankruptcy law should not apply to matter because of debtor company's strong connection to United Kingdom); see also Thomas M. Gaa & Paula E. Garzon, *International Creditors' Rights and Bankruptcy*, 31 INT'L LAW. 273 (1997) (high-

not have the jurisdictional reach to avoid transfers made abroad and that international comity precluded U.S. courts from exercising jurisdiction.⁸¹ In *JPMorgan Chase v. Altos Hornos De Mexico*, the Second Circuit Court of Appeals also observed that federal courts defer to foreign bankruptcy proceedings based on comity as long as the proceedings do not violate the laws or public policy of the United States; or lack procedural fairness.⁸² According to the Court, the purpose of comity is to maintain relationships between States and it is a discretionary rule of convenience, and expediency.⁸³

The principles of comity were routinely applied under § 304 proceedings.⁸⁴ Specifically, under § 304(c), bankruptcy courts were guided by principles of international comity and respect for laws of other States. Case law suggests that comity played a central role in the court's analysis, despite being listed as only one factor a court could consider when evaluating a foreign proceed-

lighting that Court of Appeals in *In re Maxwell* applied certain factors in its comity analysis, including: connection between regulating State and relevant activity; nature of activity and its importance to regulating State; effect and significance of regulation to international system; and other States' interests).

81. See *In Re Maxwell*, 93 F.3d at 1051-52 (1996) (concluding that international comity precludes application of U.S. avoidance law under § 547(b); finding that English preference law should apply over U.S. preference law due to strong connection English law has in underlying bankruptcy proceeding, specifically that debtor and its creditors are English); see also *Gaa & Garzon*, *supra* note 80 (noting that *In re Maxwell* court declined U.S. jurisdiction over matter based on international comity).

82. See *JPMorgan Chase*, 412 F.3d at 424 (2005) (commenting that role of international comity in case was based on discretion of court to exercise jurisdiction over matter pending in non-U.S. court, similar to *In re Maxwell*); see also *Courts of Appeal*, BCD NEWS & COMMENT, Vol. 40, July 26, 2005 (summarizing court's conclusion in *JPMorgan Chase* to defer to Mexican bankruptcy law based on international comity).

83. See *JPMorgan Chase*, 412 F.3d at 423 (2005) (limiting *Koreag* ruling to disputes relating to property ownership); see also, *Courts of Appeal*, *supra* note 82 (observing that *JPMorgan Chase* decision clarified scope of *Koreag* ruling to disputes concerning property ownership).

84. See 11 U.S.C. § 304(c) (providing comity as one factor bankruptcy court could consider in its analysis); see also *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 126 (C.A. Del. 2002) (commenting that principles of comity are appropriately applied in bankruptcy because of complexities in cross-border proceedings); Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, The Ali Principles, and The EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 21 (2002) (positing that under § 304 any U.S. court could suspend or dismiss a civil action on basis of common law doctrine of "comity"); Jay Lawrence Westbrook, *Theory And Pragmatism In Global Insolvencies: Choice Of Law And Choice Of Forum*, 65 AM. BANKR. L.J. 457, 472-73 (1991) (emphasizing that listing comity as only one factor to consider among several other factors under § 304(c) could deemphasize its central importance in recognizing cross-border proceedings).

ing.⁸⁵

2. “Foreign Proceeding” Under § 304

The definition of foreign proceeding, under § 304 did not require that a foreign proceeding arise under a law related to insolvency—instead, if a foreign proceeding effectuated a plan that adjusted debt, or executed a reorganization plan, it was ostensibly entitled to recognition.⁸⁶ Given these criteria, coupled with the role that comity played in the courts’ analysis, both solvent schemes of arrangement and Part VII transfers were recognized under § 304.

3. Solvent Schemes of Arrangement Under § 304

Under § 304, the U.S. Bankruptcy Court of the Southern District of New York granted recognition to Hopewell International Insurance Company’s solvent scheme of arrangement. In *In re Board of Directors of Hopewell*, the Court provides a probative analysis of whether a solvent scheme of arrangement qualifies as a foreign proceeding under § 304.⁸⁷ In its evaluation, the Court considered the purpose of the scheme of arrangement and the amount of judicial involvement in the foreign proceeding.⁸⁸

Defining “foreign proceeding” under § 304 to mean a pro-

85. See *In re Petition of Banco Nacional de Obras y Servicios Publicos, S.N.C.*, 91 B.R. 661, 667 (Bankr. S.D.N.Y. 1988) (observing that bankruptcy courts under § 304 were to be guided by principles of international comity and respect for laws of other States; emphasizing that comity would not be granted if U.S. creditors were forced to participate in foreign proceedings in which their claims were be treated less equally than under U.S. laws).

86. The definition of “foreign proceeding” under former § 304 did not require that it arise from a law relating to bankruptcy—instead, a foreign proceeding whose purpose was to liquidate an estate, adjust debts by composition, extension, or discharge, or effecting reorganization could be recognized under § 304. See 11 U.S.C. § 101(23) (under former § 304).

87. See generally *In re Hopewell*, 238 B.R. 25 (1999) (granting Hopewell’s solvent scheme of arrangement recognition under 11 U.S.C. § 304; see also Peter Chaffetz & Howard Seife, *US Legal; Cross-Border Clashes*, REINS. MAG., Apr. 1, 2000, at 29 (observing that Hopewell’s solvent scheme of arrangement received recognition as foreign proceeding).

88. See *In re Hopewell*, 238 B.R. at 48-53 (1999) (analyzing that level of judicial involvement required under § 99 Companies Act (now § 425 Companies Act), including petitioning court for creditor meeting, setting for requisite creditor majority approval, judge’s determination of class of creditors and procedural fairness, satisfied § 101(23) requirement that scheme of arrangement be subject to foreign proceeding); see also Jennifer Greene, Note, *Bankruptcy Beyond Borders: Recognizing Foreign Proceedings in Cross-Border Insolvencies*, 30 BROOKLYN J. INT’L L. 685, 690 (2005) (recounting that court in *In*

ceeding that liquidates the foreign estate, adjusts debts, or effectuates a reorganization,⁸⁹ the Court confirmed that Hopewell's solvent scheme qualified as a foreign proceeding because its purpose was to liquidate Hopewell's assets and debts and to pay its creditors in full by a specific date.⁹⁰ Regarding the U.K. procedural requirements, the Court found that the amount of judicial involvement and oversight required by § 99 of the Companies Act, now § 125 of the Companies Act 1985, throughout the entire sanctioning process ensured the existence of fairness and due process to its creditors.⁹¹

The case law for Part VII transfers under § 304 is less defined than that of schemes of arrangements. The following section examines the inconsistent treatment of Part VII transfers under 11 U.S.C. § 304.

4. 11 U.S.C. § 304 and Part VII Transfers

In *In re Petition of David Rose*, the Bankruptcy Court for the Southern District of New York denied § 304 relief to a Part VII

re Hopewell concluded that scheme of arrangement qualified as foreign proceeding under § 304 because of high level of judicial involvement).

89. See *In re Hopewell*, 238 B.R. at 48 (1999) (concluding that Hopewell's scheme of arrangement is foreign proceeding because it is intended to liquidate Hopewell's assets and debts to pay creditors in full); see also Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 131 (2002) (remarking that based on level of judicial involvement overseeing scheme of arrangement under Companies Act and given opportunity creditors have to protect interests under Companies Act, court concluded that Hopewell's scheme of arrangement process qualified as foreign proceeding under § 304).

90. See *In re Hopewell*, 238 B.R. at 49 (1999) (finding that purpose of scheme of arrangement, including liquidation of assets and debts to pay back creditors qualified as foreign proceeding under § 304; see also Lee, *supra* note 89, at 131 (observing that court focused on amount of judicial involvement of Hopewell's scheme of arrangement and level of creditor access to court—applying this standard, court found scheme of arrangement qualified as foreign proceeding).

91. See *In re Hopewell*, 238 B.R. at 51-52 (asserting that Hopewell's scheme process had more judicial involvement than Chapter 11 bankruptcy proceeding). The court observed that the U.K. High Court must approve the creditors' meetings after the scheme is proposed so that the different classes of creditors may vote on the scheme. The Companies Act 1981 enabled the court to fine the officers of Hopewell if they failed to provide adequate notice of the creditors meetings and do not accompany that notice with an explanatory statement disclosing the effect of the scheme on its creditors. After receiving the requisite amount of votes in favor of the scheme, the High Court has to sanction the scheme in order to make it binding on all creditors. *Id.*; see also Lee, *supra* note 89, at 131 (asserting that court considered level of judicial involvement in scheme sanctioning process as well as level of creditor access to court to be sufficient to qualify as foreign proceeding under § 304).

insurance transfer.⁹² The transfer sought to move the assets and liabilities of twelve solvent insurance and reinsurance companies to one corporation, established to implement the runoff of the transferred business.⁹³ The petitioner argued that, absent a definition in the U.S. Bankruptcy Code, the term “reorganization” found under § 304 included any type of corporate restructuring within any type of foreign proceeding.⁹⁴ Rejecting this argument, Judge Prudence Beatty asserted that to include corporate restructurings in bankruptcy in the same definition with those outside of bankruptcy was too broad—a foreign proceeding must be related to the bankruptcy process to be recognized under § 304.⁹⁵ Indeed, Judge Beatty concluded that the Part VII transfer did not qualify as a foreign proceeding⁹⁶ because Part VII of the FSMA was not a bankruptcy law.⁹⁷

Despite Judge Beatty’s ruling in *In re Rose*, Judge Robert D. Drain of the Bankruptcy Court for the Southern District of New York subsequently signed an order granting recognition to a Part

92. See *In re Rose*, 318 B.R. at 772 (2004) (concluding that Part VII transfer did not arise from law relating to insolvency and therefore did not qualify as foreign proceeding for purposes of § 304); see also Lesley Salafia, Note & Comment, *Cross-Border Insolvency Law in the United States*, 21 CONN. J. INT’L L. 297, 316 (2006) (noting that bankruptcy court did not grant recognition to *In re Rose* Part VII transfer because it was not related to bankruptcy proceeding).

93. See *In re Rose*, 318 B.R. at 772 (declaring that debtor company sought recognition of its Part VII transfer that would shift majority of assets and liabilities of twelve companies into target company); see also Salafia, *supra* note 92, at 315 (stating that twelve U.K. insurance companies sought recognition of Part VII transfer whereby majority of assets from twelve companies were transferred to target company).

94. See *In re Rose*, 318 B.R. at 774 (highlighting petitioner’s argument that term “reorganization” under § 304 applies to any corporate reorganization inside and outside of bankruptcy); see also Joseph J. Schiavone et al., *BAIC And Scottish Lion Decisions: A Wake-Up Call For U.S. Creditors To Challenge Fairness Of U.K. Solvent Schemes*, 16-20 MEALEY’S LITIG. REP. REINS. 13 (2006) (discussing petitioner’s argument that any corporate reorganization falls within scope of foreign proceeding under § 304).

95. See *In re Rose*, 318 B.R. at 775 (rejecting petitioner’s position that “reorganization” under 11 U.S.C. § 304 includes any corporate restructuring does not comport with intent of bankruptcy code); see also Schiavone et al., *supra* note 94, (explaining bankruptcy court’s conclusion that because Part VII transfer was not characteristic of bankruptcy proceeding that it could not be recognized under § 304).

96. See *In re Rose*, 318 B.R. at 772 (ruling that petitioner’s Part VII transfer did not qualify as foreign proceeding because it did not derive from bankruptcy law); see also Schiavone et al., *supra* note 94 (discussing bankruptcy court’s decision to deny Rose’s Part VII transfer recognition under § 304).

97. See *In re Rose*, 318 B.R. at 773 n.2 (articulating that FSMA is not bankruptcy law and therefore Part VII transfer could not be recognized under § 304); see also Salafia, *supra* note 92, at 315-16 (commenting that court characterized Rose’s Part VII transfer as corporate restructuring, not bankruptcy proceeding).

VII insurance transfer.⁹⁸ *In re Riverstone* involved thirteen insurance companies that transferred all or part of their insurance businesses into Riverstone Insurance to eliminate all duties associated with the transferred business and to create a streamlined legal structure.⁹⁹ Riverstone's foreign representative applied for § 304 protection because U.S. trusts and reinsurance contracts supported some of the transferred business for one of the companies.¹⁰⁰ On December 15, 2004, the English High Court granted Riverstone the Part VII transfer, which subsequently received recognition July 26, 2005 under 11 U.S.C. § 304 in the U.S. Bankruptcy Court.¹⁰¹ Although Judge Drain signed the order granting Riverstone's Part VII transfer recognition under Chapter 15, the order explicitly states that it has *no precedential value* for any future case or controversy in that Court or any other court.¹⁰² Moreover, because it was an order and not an opinion, Judge Drain did not provide any further guidance as to whether Part VII transfers qualify as a "foreign proceedings" under § 304.¹⁰³

The inconsistent and limited case law concerning Part VII

98. See *In re Riverstone*, 2005 Bankr. LEXIS 1697, at *18 (Bankr. S.D.N.Y.) (Order Giving Full Force and Effect to U.K. Scheme). Please note that this order is not an opinion of the court and therefore does not provide any judicial analysis regarding whether Part VII transfers qualify as "foreign proceedings" under § 304. See, e.g., Coleman & Wardrop, *supra* note 6, at 13 (2005) (examining bankruptcy court's decision to sanction Riverstone's Part VII transfer).

99. See, e.g., Helen Morris, *Keeping Things Trim*, 19 LAWYER 16, Nov. 28, 2005 (noting that Riverstone's Part VII involved transfer of business from twelve companies to one company); Scott Ramsay, *Run-off—Victory VII*, REINS. MAG., Sept. 1, 2006, at 41 (explaining complexity of Riverstone's Part VII transfer because it transferred business of twelve companies into one company).

100. See *In re Riverstone*, 2005 Bankr. LEXIS 1697, at *1 (stating that Riverstone sought relief under § 304. See, e.g., Coleman & Wardrop, *supra* note 6, at 13 (emphasizing that Riverstone's petition for recognition under § 304 was for only one of transferring companies that was supported by U.S. trusts and reinsurance contracts).

101. See *In re Riverstone*, 2005 Bankr. LEXIS 1697, at *5 (declaring that High Court issued order sanctioning Riverstone's Part VII transfer on Dec. 15, 2004; U.S. bankruptcy court order sanctioning Riverstone's Part VII transfer dated July 26, 2005); see also, Ramsay, *supra* note 99 (mentioning that U.S. bankruptcy court issued order granting Riverstone's Part VII transfer in July).

102. See *In re Riverstone*, 2005 Bankr. LEXIS 1697, at *18 (emphasizing that order has no precedential value in U.S. court); see also Coleman & Wardrop, *supra* note 6 (pointing out that U.S. bankruptcy court order expressed that it did not have any precedential value).

103. See, e.g., *In re Riverstone*, 2005 Bankr. LEXIS 1697 (order granting Riverstone's Part VII transfer under § 304 of U.S. Code); see also Coleman & Wardrop, *supra* note 6 (observing that because Judge Robert D. Drain issued order granting recognition, he

transfers under § 304, demonstrated by the *Rose* and *Riverstone* cases, as well as the lack of case law under Chapter 15, raises the question as to whether Part VII insurance transfers qualify as foreign proceedings under Chapter 15. To continue this inquiry, the following section analyzes the criteria set forth under Chapter 15 for a foreign insolvency proceeding to be recognized under U.S. law.

II. CHAPTER 15

The new criteria introduced by Chapter 15 are largely due to Congress's adoption of the Model Law therein.¹⁰⁴ To gain a better understanding of Congress's intent, the following section provides background information concerning the Model Law and its impact on Chapter 15.

A. Chapter 15's Statutory Criteria and the Model Law

UNCITRAL promulgated the Model Law in 1997 to provide standardized legislation to address cross-border insolvencies.¹⁰⁵ The Model Law responded to inconsistent treatment that foreign insolvent proceedings received around the world, which had created jurisdiction and choice of law controversies.¹⁰⁶ As a

does not provide additional guidance regarding Part VII transfers as foreign proceedings under § 304).

104. See H.R. REP. No. 109-31, pt. 1, at 105 (asserting that Chapter 15 incorporates UNCITRAL'S Model Law on Cross Border Insolvency); see also Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 726 (2005) (examining Chapter 15's criteria based on its adoption of Model Law).

105. See UNCITRAL's Website, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (last visited Jan. 14, 2007) ("[T]he Model Law is designed to assist States to equip their insolvency laws with modern, harmonized and fair framework to address more effectively instances of cross-border insolvency."); see also UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, pmbl., pt. I, <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> (last visited Apr. 23, 2007) [hereinafter UNCITRAL, *Guide to the Model Law*] (articulating that purpose of Model Law is to "provide effective mechanisms for cases dealing with cross border insolvencies . . ."); see also Daniel Glosband, *America's New Insolvency Reform Explained: As a New Bankruptcy Law Comes into Effect*, INTL. FIN. L. REV., Oct. 1, 2005, at 19 (commenting that because most national laws do not provide adequate mechanisms to accommodate cross-border insolvencies, UNCITRAL developed Model Law).

106. See David Costa Levenson, *Proposal for Reform of Choice of Avoidance Law in the Context of International Bankruptcies from a US Perspective*, 10 AM. BANKR. INST. L. REV. 291, 292 (2002) (asserting that due to increase of cross border insolvencies involving large corporations, which have assets in different countries, creates choice of law and forum issues). *Id.* at 292. See, e.g., *BAPCPA*, *supra* note 16 (declaring that purpose of Model Law is to facilitate restructurings, which involve multiple jurisdictions).

result, the drafters of Chapter 15 implemented the Model Law to facilitate recognition of cross-border insolvencies in the United States and to encourage uniform interpretation of the Model Law globally.¹⁰⁷ The United States is one of several countries to have adopted the Model Law to date, including the United Kingdom, Japan, South Africa, Romania, Mexico, the British Virgin Islands, Eritrea, Montenegro, and Poland.¹⁰⁸

Consistent with the Model Law, the primary goals of Chapter 15 are to foster inter-court communication and to establish uniform laws that promote efficient and effective standards of relief for cross-border insolvencies.¹⁰⁹ Indeed, Chapter 15 provides explicit direction for U.S. courts to cooperate and directly communicate with non-U.S. courts or non-U.S. representatives¹¹⁰ in order to eliminate any procedural formalities that might delay the recognition process.¹¹¹ Because Chapter 15 incorporates the Model Law, U.S. courts can reference court decisions in other countries that have adopted the Model Law and vice versa, as well as reference relevant case law established

107. See U.S. Court's Website, <http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter15.html> (last visited Jan. 14, 2007) (confirming that purpose of Chapter 15 and Model Law, is to provide effective mechanisms for dealing with insolvency cases involving more than one State); see also H.R. REP. NO. 109-31, pt. 1, at 105, (emphasizing that Chapter 15 incorporated Model Law to encourage cooperation between U.S. and other States concerning cross-border insolvency cases).

108. See generally UNCITRAL's Website, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Jan. 14, 2007); Peter Fidler, *United Kingdom: UNCITRAL Model Law on Insolvency—Implications for Banks*, MONDAQ BUS. BRIEFING, Mar. 30, 2006 (confirming United Kingdom recently adopted Model Law, effective Apr. 6, 2006).

109. See 11 U.S.C. § 1501(a)(1) (providing that among objectives of Chapter 15 is to encourage cooperation between U.S. courts and courts of other States); see also, U.S. Court's Website, *supra* note 107 and accompanying text (emphasizing that purpose of Chapter 15 is to provide effective mechanisms for dealing with cross-border insolvencies).

110. 11 U.S.C. § 1501(a)(1) (noting that among objectives of Chapter 15 is to promote cooperation between U.S. courts and courts of other States); see also UNCITRAL, *Guide to the Model Law*, *supra* note 105, paras. 38-48 (noting Model Law similarly would require court-to-court cooperation by all implementing States).

111. See UNCITRAL, *Guide to the Model Law*, *supra* note 105, pmbl., para. (c); art. 17, para. 3 (providing for fair and efficient administration of cross-border insolvency cases; stipulating that recognition of foreign proceeding should occur as soon as possible); see also Andre J. Berends, *The UNCITRAL Model Law on Cross Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 379 (1998) (asserting that express authorization for court in enacting State to cooperate with foreign court is especially important in civil law jurisdictions where discretionary authority of courts is narrowly construed).

under § 304.¹¹²

The following sections analyze specific criteria introduced by Chapter 15, including: (i) the definitions of “foreign representative” under § 101(24) and (ii) “foreign proceeding” under § 101(23); and (iii) the authority of the bankruptcy courts to deny recognition to a foreign proceeding based on public policy under § 1506.

1. 11 U.S.C. § 101(24): Foreign Representative

Section 1509(a) of U.S. Chapter 15 provides that a foreign representative authorized to file a foreign proceeding may commence an ancillary proceeding seeking recognition of a foreign proceeding by filing a petition under Chapter 15 in a U.S. bankruptcy court.¹¹³ Section § 101(24) defines a “foreign representative” as a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or to act as a representative of such foreign proceeding.¹¹⁴

2. 11 U.S.C. § 101(23): Foreign Proceeding

Chapter 15 revised the definition of a foreign proceeding, set forth in § 101(23) to be: (i) a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, (ii) under a law relating to insolvency or the adjustment of debt in which (iii) the assets and affairs of the debtor

112. See H.R. REP. NO. 109-31, pt. 1, at 109 (documenting that U.S. courts’ reference to *Guide to the Model Law* and to CLOUT, “UNCITRAL Case Law On Uniform Texts,” which receives reports from national reporters all over world concerning court decisions interpreting treaties, model laws, and other text promulgated by UNCITRAL, contributes to uniform interpretation of Model law, and increases likelihood that U.S. courts’ decisions will be “persuasive elsewhere”); see also U.S. Court’s Website, *supra* note 107 (emphasizing that U.S. application and interpretation of Model Law must be consistent with interpretation applied by other adopting countries to “promote a uniform and coordinated legal regime for cross-border insolvency cases”).

113. See 11 U.S.C. § 1509(a) (2005) (providing that foreign representative, as defined by § 101(24), may file directly with U.S. bankruptcy court for recognition of proceeding under § 1515); see also H.R. REP. NO. 109-31, pt. 1, at 110 (stating that § 1509 implements Article 9 of Model Law).

114. See 11 U.S.C. § 101(24) (2005) (broadening definition of foreign representative under § 304, which was limited to selected trustee, administrator, or other representative of estate in foreign proceeding); see also UNCITRAL, *Guide to the Model Law*, *supra* note 105, art. 2(d) (defining foreign representative, which is adopted under 11 U.S.C. § 101(24)).

are subject to control or supervision by a foreign court, (iv) for the purposes of reorganization or liquidation.¹¹⁵

a. A Law Relating to Insolvency or Adjustment of Debt

According to the legislative history of Chapter 15, the additional requirement of “adjustment of debt” to the Model Law’s definition, which only provides that the proceeding relates to insolvency, broadens the scope of Chapter 15 not only to include insolvent debtors, but also those suffering from severe financial distress.¹¹⁶ Although neither the legislative history nor Chapter 15 provides a definition of severe financial distress, U.S. case law indicates that courts consider whether the debtor has suffered substantial losses, the debtor’s level of cash flow, and its ability to perform its obligations in its contracts with third parties to determine whether the debtor is in severe financial distress.¹¹⁷

b. Foreign Main v. Foreign Nonmain Proceedings

Because the Model Law adopted specific provisions from the European Council Regulation on Insolvency Proceedings (2002) (“EC Regulation”), some of Chapter 15’s criteria stem from the EC Regulation,¹¹⁸ specifically, Chapter 15’s application

115. 11 U.S.C. § 101(23) (defining “foreign proceeding” to include foreign proceeding arising from law relating to insolvency or adjustment of debt); *see also* UNCITRAL, *Guide to the Model Law*, *supra* note 105, art. 2(a) (providing narrower definition of foreign proceeding as foreign proceeding arising from law relating to insolvency).

116. *Compare* 11 U.S.C. § 101(23) (defining “foreign proceeding” differently from that of Model Law by including law relating to insolvency or “adjustment of debt”); *with* UNCITRAL, *Guide to the Model Law*, *supra* note 105, art. 2(a) (providing narrower definition of “foreign proceeding” as foreign proceeding arising from law related to insolvency). *See* H.R. REP., No. 109-31, pt. 1, at 118 (explaining that addition of “adjustment of debt” to definition of “foreign proceeding under § 101(23) was meant to expand scope of statute to those suffering from severe financial distress).

117. *See* Joseph F. Distefano et al. v. Peter M. Stern et al., 236 B.R. 112 (D. Mass. 1999) (finding that debtor was in severe financial distress from 1990-1992 because it reported combined losses of US\$403,874 on its federal tax return during those years, there were substantial decreases in debtor’s inventory, but its accounts receivable increased by only US\$550, and amount of outstanding debt at end of 1992 was over US\$700,000). For a more detailed analysis of debtor’s financial status, *see id.* at 3-5; *see also* In re Schwinn Bicycle Co. v. AFS Cycle & Co., 192 B.R. 477, 480-81 (Bankr. N.D.Ill. 1996) (concluding that debtor company was in severe financial distress due to decline in sales from 1990-1991, corresponding with losses of US\$23,292,000 and US\$2,943,000, and debtor’s inability to perform obligations with its contracts, especially those with its products suppliers). For a more detailed summary of Schwinn’s financial status *see* paragraph 11 of judgment. *Id.* at 481-82.

118. *See* Daniel Glosband, *Sphinx Chapter 15 Opinion Misses the Mark*, 25 AM. BANKR.

of “foreign-main” and “nonmain” proceedings. The EC Regulation distinguishes between “foreign main” proceedings and “foreign nonmain” proceedings, a distinction that turns on the company’s center of main interest (“COMI”),¹¹⁹ presumptively located in the place of the company’s registered office.¹²⁰ Chapter 15’s incorporation of these concepts, foreign main and nonmain proceedings and COMI, demonstrates the drafters’ efforts to relate U.S. bankruptcy law to international antecedents in an attempt to develop global standards for the coordination of cross-border insolvency proceedings.¹²¹

A foreign main proceeding is brought in the State of the company’s COMI.¹²² Accordingly, a foreign nonmain proceeding is brought in a location other than the company’s COMI.¹²³

INSR. J 44, 84 (2007) (stating that Model Law and Chapter 15 adopted COMI test from European Council (“EC”) Regulation); *see also* Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 197 (2002) (highlighting that Article 28 of Model Law, which is incorporated into § 1528 of Code, reflects EC’s recognition of concurrent proceedings in cross-border insolvency cases).

119. *See* COUNCIL REGULATION (EC) No 1346/2000 OF 29 MAY 2000 ON INSOLVENCY PROCEEDINGS (“EC REGULATION”), 1 O.J. L 160, paras. 12-14, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R1346:EN:HTM> (characterizing COMI as place where debtor administers its business on regular basis). For an interesting discussion on COMI *compare* Lynn M. LoPucki, *Global and Out of Control?*, 79 AM. BANKR. L.J. 79 (2005) (asserting that Model Law’s adoption of COMI test could increase forum shopping), *with* Hon. Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J. 105, 106 (2005) (arguing that modified universalism facilitates administration of international insolvency cases compared to territorialism).

120. *See* 11 U.S.C. § 1516(c) (2005) (providing that debtor’s registered office is presumed to be location of its COMI); *see also* *In re Artimm, S.R.L.*, 335 B.R. 149, 159 (Bankr. C.D. Cal. 2005) (confirming that debtor’s COMI under Chapter 15 where debtor’s registered office is located—the court in *Artimm* found its COMI to be in Rome, Italy).

121. *See* 11 U.S.C. § 1501 (stating that purpose of Chapter 15 is to incorporate UNCITRAL’s Model Law); *see also* H.R. REP., No. 109-31, pt. 1, at 104-05 (articulating that Chapter 15 incorporates Model Law in order to encourage cooperation among courts in cross-border cases, to provide better legal certainty for trade and investment, and to provide expedient relief).

122. *See* EC REGULATION, *supra* note 119, para. 13 (highlighting that COMI is located where debtor regularly conducts its business); *see also* Glosband, *supra* note 118, at 83-84 (asserting that COMI derived from EC Regulation and assessing *Sphinx* court’s reliance on EC Regulation to identify factors that help determine debtor’s COMI).

123. *See* 11 U.S.C. 1502(5) (defining foreign nonmain proceeding as a proceeding other than main proceeding, pending in State where debtor has establishment); *see also* Westbrook, *supra* note 104, at 717 (observing that nonmain proceeding is one that occurs in country other than debtor’s COMI).

Section 11 U.S.C. § 1520(a) provides different relief for a foreign main proceeding than for a foreign nonmain proceeding. When a court recognizes a foreign main proceeding, the debtor company's assets will be subject to an automatic stay under 11 U.S.C. § 362.¹²⁴ As a result, the foreign representative has the authority to operate the debtor's assets, including the power to lease, use, or sell the assets of the debtor under § 363 and § 552 of the Code.¹²⁵ In addition to receiving automatic relief under a foreign main proceeding, a foreign representative may commence a plenary case under the Code pursuant to § 301 or § 302.¹²⁶ Unlike a foreign main proceeding, a foreign nonmain proceeding is not subject to automatic relief; nonetheless, a U.S. court may grant similar relief in a foreign nonmain proceeding at the request of the foreign representative.¹²⁷

In *In re Tri-Continental Exchange Ltd.*, the Bankruptcy Court for the Eastern District of California confirmed that the debtor's COMI is determined by the entity's principal place of business for the purposes of § 1502(4).¹²⁸ The debtors were organized under St. Vincent and Grenadines ("SVG") law and conducted their regular business activities there.¹²⁹ The debtor also con-

124. See 11 U.S.C. § 1520(a)(1-4) (2005) (explaining scope of foreign representative's rights if foreign proceeding is recognized as main proceeding; Berends, *supra* note 111, at 363 (explaining intent of drafters of Model Law to achieve "automatic" effects upon recognition of foreign main proceeding); see also Lee, *supra* note 118, at 186-87 (citing §§ 1520(a)(1-2)).

125. See 11 U.S.C. § 1520(a) (2005) (providing foreign representative with authority to transfer debtor's interest in property within United States if proceeding is recognized as foreign main proceeding).

126. See 11 U.S.C. § 1511(a) (2005) (enabling foreign representative to commence case under §§ 301 or 303 of U.S. Code after proceeding is recognized under Chapter 15); see also H.R. REP., No. 109-31, pt. 1, at 111 (acknowledging that § 1511 adopts Article 11 of Model Law, but notes that § 1511 separates out voluntary and involuntary petitions under §§ 301 and 303, respectively, and permits filing of voluntary proceeding under 301 if foreign proceeding is recognized as main proceeding).

127. See 11 U.S.C. § 1521(c) (2005) (allowing court discretion to determine whether relief granted to nonmain proceeding relates to assets that pursuant to U.S. law should be administered in foreign nonmain proceeding); see also Westbrook, *supra* note 104, at 723 (noting that foreign nonmain proceedings may be recognized under Chapter 15, but will not receive automatic stay, which limits relief it may receive in United States).

128. See 11 U.S.C. § 1516(c) (2005) (providing that debtor's registered office is presumed to be its COMI); see also *In re Tri-Continental Exchange LTD.*, 349 B.R. 627, 629 (Bankr. E.D.N.Y. 2006) (finding that debtor's COMI to be undefined term, thus requiring fact-based analysis).

129. See 11 U.S.C. § 1516(c) (2005) (asserting that debtor's registered office is presumed to be its COMI); see also *In re Tri-Continental*, 349 B.R. at 629 (reporting that

ducted illegal business activity outside of SVG.¹³⁰ A creditor who had a lien on the debtors' assets argued that it was a nonmain proceeding because the debtors' COMI was located in the place where they conducted the illegal activity.¹³¹ Rejecting this argument, the court recognized the debtors' insolvency proceeding as a foreign main proceeding because the debtors conducted their regular business activities in SVG.¹³² Because their proceeding was a foreign main proceeding, the debtor received automatic relief provided under 11 U.S.C. § 1520.¹³³

That a foreign main proceeding receives automatic relief under Chapter 15 is a significant change as from § 304—under former § 304, a stay was only available on a discretionary basis, although, as a practical matter, these requests were regularly granted.¹³⁴ Section 304(c) set forth standards for a petition to receive recognition under U.S. law—a modified version of those factors are now found under §1507, as discussed below.¹³⁵

debtors are organized under St. Vincent and Grenadines law and conducted business there).

130. See *In re Tri-Continental*, 349 B.R. at 629 (acknowledging that despite debtors' insurance scam conducted in United States and Canada, their COMI was in St. Vincent because they conducted regular business and were registered there); see also UNCITRAL, *Guide to the Model Law*, *supra* note 105, art. 2(b) (declaring that foreign main proceeding is location of debtor's center of main interest).

131. See *In re Tri-Continental*, 349 B.R. at 631 (stating creditor's assertion that debtors' COMI was in United States because most of creditors and insureds were located there); see also H.R. REP., No. 109-31, pt. 1, at 113 (clarifying that for purposes of foreign main proceeding, debtor's COMI is presumed to be located in jurisdiction of its registered office, i.e., place of incorporation).

132. See *In re Tri-Continental*, 349 B.R. at 635 (concluding that debtors' COMI was in St. Vincent because their registered office is located there, which is "probative" of debtors COMI). For a substantive analysis of COMI as it relates to Chapter 15, Model Law, and EC Regulation see *id.* at 633-35. See, e.g., UNCITRAL, *Guide to the Model Law*, *supra* note 105, art. 16(3) (presenting that debtor's registered office is its COMI for purposes of foreign main proceeding).

133. See 11 U.S.C. § 1520(a)-(c) (providing scope of relief awarded to foreign main proceedings); see also *In re Tri-Continental*, 349 B.R. at 640 (concluding that proceeding was foreign main proceeding).

134. See Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 186-87 (2002) (noting that granting automatic stay to recognized foreign main proceedings is significant change from § 304 because under § 304 bankruptcy court could dismiss petition even if qualified as foreign proceeding); see also Wilkinson & Sutherland, *supra* note 20, at 30-37 (discussing relief under § 304 for schemes of arrangement).

135. See 11 U.S.C. § 304(c) (providing five factors courts considered when granting relief including: just treatment of holders of claims against foreign debtor; protection of claim holders in United States against prejudice; inconvenience in processing of their claims in foreign proceeding; and comity); see also Margot Schonholtz, Madlyn

Under § 1515(a) of Chapter 15, a foreign representative may directly file a petition for recognition of a foreign proceeding in a U.S. bankruptcy court—recognition of a foreign proceeding is conditioned on satisfying the criteria for foreign representative and foreign proceeding set forth under § 101(24) and § 101(23), respectively.¹³⁶

Where the foreign representative seeks “additional assistance” on the behalf of a foreign main or nonmain proceeding, § 1507 incorporates criteria similar to 304(c) in evaluating whether a foreign proceeding should receive such relief.¹³⁷ The § 1507 criteria closely resemble those found in former § 304(c); despite this rhetorical similarity, 304(c) applied these factors more generally to the question of recognition and not to the narrower question of “additional assistance,” as under § 1507.

c. Subject to Control or Supervision by a Foreign Court

The revised definition of “foreign proceeding” under Chapter 15 further requires that the proceeding be subject to control or supervision by a “foreign court,” defined as “a judicial or other authority competent to control or supervise a foreign proceeding.”¹³⁸ Because the definition includes any “competent authority,” not just a court, its scope covers proceedings supervised by a foreign agency or tribunal.¹³⁹ The definition also covers interim proceedings as provisional until formally commenced by

Gleich Primoff & Wendy Kraus, *Corporate Restructuring and Bankruptcy, Avenues of Relief for Non-US Debtors*, 234 N.Y.L.J. 1 (2005) (noting that ancillary proceedings under § 304 had to satisfy factors under § 304(c) in order to obtain relief).

136. See 11 U.S.C. § 1515(a) (2005) (providing that a foreign representative may directly apply to U.S. bankruptcy court for recognition of foreign proceeding by filing petition for recognition); see also Lee, *supra* note 134, at 186-87 (commenting that recognition of a foreign main proceeding indicates that debtor will receive all associated benefits, like automatic stay, without having to satisfy § 304(c) factors).

137. See 11 U.S.C. § 1507 (2005) (enabling bankruptcy court discretionary power to grant additional assistance to foreign proceeding, consistent with principles of comity); see also Lee, *supra* note 134, at 187-88 (analyzing § 1507's use of § 304(c) factors in granting additional assistance to foreign proceeding).

138. See 11 U.S.C. § 1502(3) (2005) (defining foreign court as judicial or authority competent to control or supervise foreign proceeding); see also Lee, *supra* note 134, at 179 (citing 11 U.S.C. § 1502(3) and observing that scope of new definition covers judicial and administrative proceedings).

139. See 11 U.S.C. § 101(23) (including in criteria for foreign proceeding, that its assets be under supervision or control of competent authority); see also UNCITRAL, *Guide to the Model Law*, *supra* note 105, para. 69 (clarifying scope of “interim proceeding” to address inconsistent applications among adopting States).

court order.¹⁴⁰

In addition to denying recognition to a foreign proceeding because a foreign court did not control or supervise the debtor's assets, a bankruptcy court may deny recognition to a foreign representative if the foreign proceeding is against public policy of the United States.¹⁴¹ The following section evaluates the criteria for public policy considerations under Chapter 15.

3. Public Policy Considerations

Section 1517(a), subject to § 1506, provides a public policy exception for a court to deny recognition of a foreign proceeding.¹⁴² Section 1506 provides that a court may reject recognition of a foreign proceeding if recognition would be "manifestly contrary" to a fundamental public policy of the United States,¹⁴³ which, according to legislative history and the Model Law, should be narrowly read.¹⁴⁴

Judge Rakoff's decision in *In re Ephedra Products Liability Litigation* (S.D.N.Y.) provides insight into the public policy exception under 1516(a) as it applies to U.S. claimants' constitutional right to a jury trial. There, the debtor company entered into a Claims Resolution Procedure ("Procedure") under Canadian

140. See 11 U.S.C. § 101(23) (expanding scope of foreign proceeding to include interim proceedings); see also Lee, *supra* note 134, at 180 (commenting that inclusion of interim proceeding within definition of foreign proceeding is due to fact that, according to Model Law, bankruptcy proceedings commence as interim proceedings in many international jurisdictions).

141. See 11 U.S.C. § 1517(a) (conditioning recognition of foreign proceeding on whether it violates public policy of United States as provided under § 1506); see also H.R. REP., No. 109-31, pt. 1, at 113 (commenting that § 1517 does not base recognition of foreign proceeding on prior § 304(c) factors).

142. See 11 U.S.C. § 1517(a) (providing public policy exception for court to deny recognition to foreign proceeding); see also H.R. REP., No. 109-31, pt. 1, at 109 (noting that § 1506 exception should be narrowly read).

143. See Lee, *supra* note 134, at 175 (noting Article 26 of EC Regulation contains similar public policy exception to recognition of insolvency proceeding opened in another Member State); see also H.R. REP., No. 109-31, pt. 1, at 109 (noting that § 1506 exception should be narrowly read, only applying to proceedings that would be "manifestly contrary" to fundamental policies of United States).

144. See UNCITRAL, *Guide to the Model Law*, *supra* note 105, at 89 (stating that public policy exceptions to foreign proceedings should be read "restrictively"); see also Berends, *supra* note 111, at 373-74 (observing that if court is reluctant to invoke public policy grounds to deny recognition, it may nonetheless use other provisions in Model Law to limit effect of recognition); see also Lee, *supra* note 134, at 186 (commenting that U.S. House Report suggests that "manifestly" contrary to public policy should be only applied fundamental policies of United States).

law that established a claims settlement process with all the claimants who brought personal injury actions against the debtor related to the use of Ephedra.¹⁴⁵ U.S. claimants opposed recognition of the Procedure under U.S. law, arguing that the claims resolution process denied them due process and trial by jury.¹⁴⁶ In granting recognition to the Procedure under Chapter 15, Judge Rakoff concluded that § 1506 or any other U.S. law did not preclude a U.S. court from granting recognition to a foreign proceeding on the grounds that the procedure for settling claims did not include the right to a jury trial.¹⁴⁷ In support of his conclusion, Judge Rakoff asserted that, although right to a jury trial is an important aspect of the U.S. legal system, the Procedure provided a fair and impartial proceeding to settle their claims.¹⁴⁸

B. Comity and Chapter 15

Chapter 15 codifies the common law doctrine of comity in different respects: (i) it is a central concept for a court to determine whether it should grant “additional assistance” to a foreign nonmain proceeding under § 1507; (ii) it allows recognized proceedings to receive comity from other U.S. courts outside of bankruptcy under 1509(b)(3); and (iii) it provides an opportunity for foreign debtors that are not recognized under Chapter 15 to receive relief under U.S. non-bankruptcy law under

145. See *In re Ephedra*, 349 B.R. 333, 334 (describing background of case); see also *Ephedra Judge Responds To Objections To Canadian Claims Resolution Procedure*, 6-5 MEALEY'S LITIG. REP., Sept. 2006 (reporting that debtor company entered into Claims Resolution Procedure in Canada that did not include right to jury trial).

146. See *In re Ephedra*, 349 B.R. at 335 (presenting claimants argument that right to jury trial is U.S. constitutional right and therefore Procedure violates U.S. public policy); see also *Ephedra Judge Responds To Objections To Canadian Claims Resolution Procedure*, 6-5 MEALEY'S LITIG. REP., Sept. 2006 (stating that Procedure denies claimants right to jury trial).

147. See *In re Ephedra*, 349 B.R. at 335-36 (ruling that denial of right to jury trial in Procedure did not provide grounds for denial of recognition under U.S. law); see also *Ephedra Judge Responds To Objections To Canadian Claims Resolution Procedure*, 6-5 MEALEY'S LITIG. REP., Sept. 2006 (referring to Judge Rakoff's sanctioning Procedure, despite its denial of claimants' right to jury trial).

148. See *In re Ephedra*, 349 B.R. at 338 (commenting that Procedure provided fair proceeding for administration of claims); see also *Ephedra Judge Responds To Objections To Canadian Claims Resolution Procedure*, 6-5 MEALEY'S LITIG. REP., Sept. 2006 (recounting Judge Rakoff's reasoning that fair and impartial proceeding can be achieved without jury trial).

§ 1509(d), at the discretion of the bankruptcy court.¹⁴⁹

Because the drafters of Chapter 15 considered comity as only one of six factors under § 304(c) to be “misleading,” they elevated comity to the introductory language of § 1507(b) to emphasize that it should be a central factor in a court’s determination of whether to grant “additional assistance” to a foreign debtor.¹⁵⁰ In addition, if a foreign debtor is recognized under Chapter 15, § 1509(b)(3) provides that a U.S. court, federal or state, may grant comity to the foreign representative outside of the bankruptcy context.¹⁵¹ Moreover, legislative history states that a foreign proceeding that is outside the scope of Chapter 15, and therefore excluded from § 1509(b)(3), may seek comity from other U.S. courts.¹⁵²

Under § 304, a foreign representative could avoid the statutory requirements of that Section by filing for recognition in any state or federal court based on the doctrine of comity, which the drafters of Chapter 15 considered “undesirable” and potentially abusive of the Code.¹⁵³ To limit this abuse, the drafters imple-

149. See 11 U.S.C. §§ 1507, 1509(b)(3), 1509(d) (establishing statutory scope of comity for foreign debtors that are: recognized under Chapter 15, denied recognition, and for those that fall outside scope of Chapter 15); see also H.R. REP., No. 109-31, pt. 1, at 110 (articulating that foreign proceedings recognized under Chapter 15 may receive recognition in any U.S. court based on comity; explaining that § 1509(d) provides discretion to bankruptcy court judge to issue order precluding foreign proceedings denied recognition under Chapter 15 from seeking relief under U.S. law based on comity).

150. See 11 U.S.C. § 1507(b) (listing factors similar to § 304(c) in determining whether court should grant additional assistance to foreign proceeding, except that comity is listed in introductory language); see also H.R. REP., No. 109-31, pt. 1, at 109 (asserting that placement of comity as only one factor to be considered by courts under 304(c) to be misleading and purpose of elevating comity to introductory language of § 1507(b) was to clarify that it should be central factor in court’s decision to grant additional assistance to foreign debtor).

151. See 11 U.S.C. § 1509(b)(3) (mandating that if foreign proceeding is recognized under Chapter 15, then U.S. court shall grant comity or cooperation to foreign representative); see also Lee, *supra* note 134, at 195 (pointing out that purpose of 1509(c) is to preclude foreign representatives from seeking recognition from U.S. courts outside of bankruptcy based on comity).

152. See 11 U.S.C. § 1509(b)(3) (providing condition that foreign proceeding must be recognized under Chapter 15 in order for U.S. non-bankruptcy courts to grant comity or cooperation to foreign representative; see also H.R. REP., No. 109-31, pt. 1, at 106 (stating that foreign proceedings outside Chapter 15’s scope may seek comity from other U.S. courts because § 1509(b)(3) would not apply to them).

153. See H.R. REP., No. 109-31, pt. 1, at 110 (observing that some foreign proceedings have been recognized in U.S. courts based on comity without filing petition under § 304; noting that foreign debtor’s ability to avoid statutory requirements set forth

mented § 1509(d), which gives discretion to the U.S. bankruptcy courts to issue an order denying the foreign representative comity or cooperation from any U.S. federal court if it is not recognized under Chapter 15.¹⁵⁴ Because the court's power under this Section is discretionary, a foreign representative's ability to file for recognition outside the bankruptcy arena based on the doctrine of comity is not necessarily conditioned on the foreign proceeding being recognized under Chapter 15.¹⁵⁵ Nonetheless, even if a foreign representative is not granted recognition under Chapter 15, the foreign representative still has standing in a U.S. court to bring an action to recover or collect property of the debtor.¹⁵⁶

Although no U.S. bankruptcy court has yet reached the issue of comity under Chapter 15, the Eastern District of New York alluded to its application in *J.A. Jones Construction*.¹⁵⁷ In *J.A. Jones Construction*, the U.S. Government brought an action against the debtor company for failure to perform its duties under certain contracts.¹⁵⁸ *J.A. Jones Construction* argued that it should receive an automatic stay based on its Canadian insolvency pro-

under Code could lead to "abuse" of comity); see also Lee *supra* note 134, at 195 (observing that under § 304, non-bankruptcy courts considered and granted recognition to foreign proceedings based on international comity).

154. See 11 U.S.C. § 1509(d) (providing court discretion to issue order precluding foreign proceeding, denied recognition under Chapter 15, from seeking relief from U.S. courts outside context of bankruptcy); see also H.R. REP., No. 109-31, pt. 1, at 110 (stating that 1509(d) incorporated to preclude foreign representative from seeking relief in other U.S. courts after being denied recognition under Chapter 15).

155. See § 1509(d) (providing that bankruptcy court "may" issue any appropriate order to prevent foreign representative from obtaining comity from courts in United States after being denied recognition under Chapter 15); see also H.R. REP., No. 109-31, pt. 1, at 110 (specifying that §1509(d) incorporated into Chapter 15 to preclude foreign representatives whose foreign proceeding was denied recognition under Chapter 15, from seeking relief in other U.S. courts based on comity).

156. See 11 U.S.C. § 1509(f) (articulating that foreign representative still has standing in U.S. court to collect or recover claim involving debtor's property); see also H.R. REP., No. 109-31, pt. 1, at 110-11 (providing limited exception to prior recognition requirement to recover or assert claims involving debtor's property).

157. See generally *U.S. v. J.A. Jones Construction*, 333 B.R. 637 (Bankr. E.D.N.Y. 2005) (granting sixty-day stay of Government's action against debtor so that debtor could seek recognition of its foreign bankruptcy proceeding under Chapter 15; referencing doctrine of comity in granting of automatic stay to debtor); see also H.R. REP., No. 109-31, pt. 1, at 109 (commenting that under 11 U.S.C. § 304 placement of comity among several factors was misleading).

158. See *J.A. Jones Construction*, 333 B.R. at 639 (stating that action brought against *J.A. Jones Construction* because of its failure to perform under contracts); see also Susan Jaffe Roberts et al., *International Secured Transactions and Insolvency*, 40 INT'L LAW. 381,

ceeding; however, it had not filed for recognition under Chapter 15, which precluded the Court from having jurisdiction.¹⁵⁹ Stating that “given the comity” that U.S. courts should accord to foreign bankruptcy proceedings, the Court granted J.A. Jones Construction a sixty day stay against the U.S. Government’s action to provide the debtor an opportunity to file for relief under Chapter 15.¹⁶⁰ Thus far, this is the only instance in which a U.S. bankruptcy court has referred to comity in its opinion under Chapter 15, leaving open the question as to the role comity should play in recognizing or granting interim relief to foreign bankruptcy proceedings.

In order to evaluate whether solvent schemes and Part VII transfers can be recognized under Chapter 15, the following sections articulate a statutory analysis of § 425 of the Companies Act and § 105 of the FSMA under its criteria.

C. *Schemes of Arrangement Under Chapter 15*

Pursuant to § 1504, a foreign representative may seek recognition of the foreign proceeding by bringing a petition to commence an action under Chapter 15.¹⁶¹ The statutory requirements set forth under § 1504 require only that the person or entity filing on behalf of the proceeding qualify as a “foreign representative,” defined under § 101(24), and the proceeding satisfy the requirements of a “foreign proceeding” provided under § 101(23).¹⁶² The next section evaluates solvent schemes

384-85 (2006) (noting that suit brought against J.A. Jones Construction because of delays in its performance in certain contracts).

159. See *J.A. Jones Construction*, 333 B.R. at 639 (emphasizing that debtor company had not yet filed for recognition under Chapter 15); see also Susan Jaffe Roberts et al., *International Secured Transactions and Insolvency*, 40 INT’L LAW. 381, 385 (2006) (explaining that absent filing for recognition under Chapter 15, bankruptcy court cannot grant any relief to debtor company).

160. See *J.A. Jones Construction*, 333 B.R. at 639 (referring to comity in its decision to grant temporary stay to debtor company to file for recognition under Chapter 15); see also Susan Jaffe Roberts et al., *International Secured Transactions and Insolvency*, 40 INT’L L. 381 (2006) (observing that bankruptcy courts will give greatest deference to comity and will use their power to effect its principles).

161. See 11 U.S.C. § 1504 (2005) (providing that case under Chapter 15 begins with filing of petition for recognition of foreign proceeding under § 1515); see also H.R. REP., No. 109-31, pt. 1, at 107-08 (describing use of “ancillary” in title to acknowledge that bankruptcy proceedings outside of U.S. commence as ancillary proceedings to main proceedings).

162. See 11 U.S.C. § 1504 (2005) (requiring that foreign representative must satisfy requirements under § 101(24) and proceeding must qualify as foreign proceeding

of arrangement under §§ 101(23) and 101(24) and the established case law under Chapter 15 concerning solvent schemes, which are composed of judicial orders, not actual judicial decisions. The orders associated with *In re Lion City*, *In re Gordian*, and *In re Lloyd* do not provide any further guidance or insight into the evaluation of schemes of arrangement under Chapter 15.¹⁶³

1. Section 101(23) “Foreign Proceeding” and Solvent Schemes of Arrangement

The criteria § 101(23) requires to qualify as a “foreign proceeding” under Chapter 15 include: (i) the law governing the foreign proceeding must relate to insolvency or adjustment of debt; (ii) a foreign court must control or supervise the foreign debtors’ assets; and (iii) the purpose of the law governing the foreign proceeding must be to reorganize or liquidate the assets and liabilities of the foreign debtor.¹⁶⁴ Schemes of arrangement under § 425 of the Companies Act establish a compromise or arrangement between a company, including insurers, and its creditors, whereby the company identifies, values, and finalizes all liabilities owed to creditors.¹⁶⁵ A scheme of arrangement is related to insolvency because it involves debtors reducing, and eventually eliminating, all debt owed to creditors, events that are within the scope of insolvency.¹⁶⁶ The opportunity for a company to enter into a scheme of arrangement is not predicated on

under terms of § 101(23)); *see also* Lee, *supra* note 134, at 184-85 (commenting that ancillary case is brought under Chapter 15 upon filing petition for recognition).

163. *See* In re: Petition of Jeffrey John Lloyd, 2005 Bankr. LEXIS 2794 (Order Granting Recognition and Relief in Aid of Foreign Main Proceeding); *Lion City Run-Off Private Limited*, Case No. 06-B-10461 (Bankr. S.D.N.Y. 2006) (Court’s Order and Final Decree Granting Recognition of a Foreign Main Proceeding, Permanent Injunction and Related Relief); *In re Gordian Runoff (U.K.) Limited*, Case No.06-11563 (Bankr. S.D.N.Y. 2006) (Court’s Order and Final Decree Granting Recognition of a Foreign Main Proceeding, Permanent Injunction and Related Relief).

164. *See* 11 U.S.C. § 101(23) (setting forth criteria for foreign proceeding under Chapter 15); *see also* Lee, *supra* note 134, at 178-79 (highlighting that § 101(23) comports with standards set forth in Model Law, specifically foreign main and nonmain proceedings).

165. *See* Companies Act, 1985, c.6, § 425(1) (establishing statutory requirements for schemes of arrangement under U.K. law). *See generally* *In re Hopewell*, 238 B.R. 25 (1999) (comparing scheme of arrangement to Chapter 11 proceeding under U.S. law).

166. *See In re Hopewell*, 238 B.R. at 48-53 (1999) (holding that purpose of scheme was to liquidate assets and debts of company in order to pay creditors back—procedure that qualifies as foreign proceeding under § 304); *see also* UNCITRAL, *Guide to the Model*

its solvency.¹⁶⁷ As a result, even solvent schemes of arrangement should arise under a law “related to insolvency,” and most likely qualify as a mechanism that adjusts debt.

As previously mentioned in Part I, the statutory definition of “debt” is liability on a claim and, according to *Black’s Law Dictionary*, “adjust” means to determine the amount that an insurer will pay an insured to cover a loss, or to establish a new agreement with a creditor for the payment of a debt.¹⁶⁸ Based on these criteria, a scheme of arrangement qualifies as a foreign proceeding arising from a law related to debt adjustment because it establishes a process of evaluating, valuing, and finalizing liabilities a debtor owes and must pay to its creditors.¹⁶⁹ Moreover, case law suggests that claims administration is equivalent to the adjustment of debt, whether or not the debtor has sufficient assets to create a distribution to unsecured creditors.¹⁷⁰

According to the legislative history of Chapter 15 and the *Guide to the Model Law*, the inclusion of a law relating to “adjustment of debt” in addition to insolvency indicates that Chapter 15 applies not only to debtors that are insolvent, but also those under severe financial distress.¹⁷¹ Although the terms “adjust-

Law, supra note 105, paras. 52, 71 (noting that insolvency means people or entities in severe financial distress).

167. See Companies Act, 1985, c.6, § 425(1) (providing statutory requirements which do not condition use of scheme of arrangement based on debtor’s financial status); see also *In re Hopewell*, 238 B.R. at 48-53 (concluding that solvent scheme of arrangement qualified as foreign proceeding under § 304).

168. See 11 U.S.C. § 101(12) (providing statutory definition of “debt” to mean liability on a claim); see also BLACK’S LAW DICTIONARY 43 (7th ed. 1999) (defining “adjust” as establishing new agreement with creditor for payment of debt).

169. See Companies Act, 1985, c.6, § 426(2) (requiring that once English court grants order to convene meeting of creditors, explanatory statement describing all material procedures must be distributed to all creditors); see also *In re Hopewell*, 238 B.R. at 49-50 (concluding that purpose of scheme of arrangement was to liquidate assets to pay back creditors, which qualified proceeding as a foreign proceeding for purposes of § 304).

170. See *In Re Frankmaster Ltd.*, 237 B.R. 627, 634 (Bankr. E.D.TX 1999) (observing that foreign debtor’s proceeding may qualify as adjustment of debt for purposes of § 304 recognition, if there were sufficient assets to administer claims administration process; declaring that possible insufficient assets to pay claims to unsecured creditors did not preclude foreign proceeding from qualifying as adjustment of debt).

171. See H.R. REP. No. 109-31, pt. 1, at 118 (clarifying that inclusion of “adjustment of debt” was to expand scope of “foreign proceeding” to include debtors in severe financial distress); see also *Guide the Model Law, supra* note 105, para. 71 (stating that term “insolvency” in Model Law’s definition of foreign proceeding means those debtors in severe financial distress).

ment of debt” are intended to include debtors in “severe financial distress” within the scope of Chapter 15, whether a solvent scheme or Part VII transfer adjusts debt is not predicated on the debtor company being in severe financial distress.¹⁷²

a. High Court Control or Supervision

The requirement for control or supervision by a foreign court over the assets or affairs of a solvent scheme of arrangement is most likely satisfied by the High Court’s authorization of the meeting of scheme creditors, and the sanctioning of the scheme after creditor approval.¹⁷³ When the High Court sanctions a scheme of arrangement, the terms of the scheme of arrangement are binding on all scheme creditors, and the assets of the debtor company are protected from being attached by scheme creditors.¹⁷⁴ As a result, the High Court’s authority to recognize a scheme of arrangement and to protect the assets of the debtor company should qualify as “control” or “supervision.”¹⁷⁵ Further, as previously discussed, the Bankruptcy Court for the Southern District of New York in *In re Hopewell* found that the High Court’s supervision and review required by the Companies Act over the solvent scheme of arrangement ensured fairness and due process to its creditors.¹⁷⁶

172. See Companies Act, 1985, c.6, § 425 (articulating statutory criteria for schemes of arrangement without mandating that debtors must experience severe financial distress); see also Look Chan Ho, *Solvent Schemes for Foreign Insurers*, 21 *INSOLVENCY LAW & PRAC.* 169, 169-70 (2005) (noting there is no condition that company proposing scheme of arrangement experience severe financial distress).

173. See 11 U.S.C. § 101(23) (requiring that foreign court have control or supervise assets of foreign debtor to qualify as foreign proceeding); see also *In re Hopewell*, 238 B.R. at 49 (concluding that supervisory role and judicial involvement throughout scheme sanctioning process satisfied criteria for foreign proceeding under § 304).

174. See Companies Act 1985 § 425(2) (requiring that Part VII transfer must be sanctioned by High Court to have terms binding on all creditors); see also *In Re Hawk Insurance Co Ltd*, [2001] EWCA Civ 241 at [11], [2001] 2 BCLC 480 at [11] (articulating three-stage process for sanctioning scheme of arrangement outlined in *In re British Aviation*).

175. See *In re Hopewell*, 238 B.R. at 51-52 (finding that there is substantial judicial involvement on part of High Court in scheme process; analogizing solvent scheme to U.S. Chapter 11 proceeding).

176. See Lee, *supra* note 89, at 131 (asserting that court considered level of judicial involvement in scheme sanctioning process as well as level of creditor access to court to be sufficient to qualify as foreign proceeding under § 304); see also *In re Hopewell*, 238 B.R. at 51-52 (granting recognition to solvent scheme of arrangement).

2. Case Law Involving Solvent Schemes of Arrangement

Since Chapter 15 became effective on October 17, 2005, several solvent schemes of arrangement have received recognition.¹⁷⁷ On December 7, 2005, the Bankruptcy Court for the Southern District of New York recognized a solvent scheme of arrangement in *In re: Petition of Jeffrey John Lloyd*.¹⁷⁸ Lloyd was the foreign representative for La Mutuelle du Mans Assurances (“MMA”), a solvent insurer that stopped underwriting insurance several years ago.¹⁷⁹ The business subject to the scheme of arrangement involved marine hull and cargo insurance policies written in the 1990s in England by the U.K. branch of MMA.¹⁸⁰ MMA’s creditors approved its solvent scheme of arrangement in the U.K. on September 5, 2005 and the High Court subsequently approved the scheme of arrangement on October 28, 2005.¹⁸¹ Although MMA is a French company, the U.S. Bankruptcy Court judge found MMA’s COMI to be in the U.K., the location of its solvent scheme of arrangement.¹⁸² As a result, the Bankruptcy Court ruled that it was a foreign main proceeding,¹⁸³ thereby granting MMA an automatic stay.¹⁸⁴

177. See *In re Lloyd*, 2005 Bankr. LEXIS 2794; see also *Lion City Order*, Case No. 06-B-10461 (Bankr. S.D.N.Y. 2006); *Gordian Order*, Case No.06-11563 (Bankr. S.D.N.Y. 2006).

178. See *In re Lloyd*, 2005 Bankr. LEXIS 2794 (granting recognition of solvent scheme under Chapter 15); see also Terry Brennan, *French Insurer can Block Creditors*, DAILY DEAL, Dec. 13, 2005 (highlighting that La Mutuelle du Mans Assurances (“MMA”) received U.S. bankruptcy court sanctioning under Chapter 15).

179. See *In re Lloyd*, 2005 Bankr. LEXIS 2794 (documenting that Lloyd was MMA’s foreign representative); see also Brennan, *supra* note 178 (commenting that MMA stopped writing insurance twelve years ago).

180. See Brennan, *supra* note 178 (stating that scheme applies to marine hull and cargo insurance); see also *Chapter 15 Foray Reveals Gaps Between Theory, Practice*, CONSUMER FIN. SVS. L. REP. 15, Feb. 8, 2006 (noting that scheme of arrangement dealt with marine insurance).

181. See *In re Lloyd*, 2005 Bankr. LEXIS 2794, at *1 (sanctioning scheme of arrangement under Chapter 15; see also Brennan, *supra* note 178 (reporting that MMA’s scheme of arrangement received recognition under Chapter 15)).

182. See Brennan, *supra* note 178 (noting that MMA’s COMI was located in U.K.); see also *Chapter 15 Foray Reveals Gaps Between Theory, Practice*, *supra* note 181 (commenting that case raised complex COMI issue because it was U.K. branch of French company).

183. See *In re Lloyd*, 2005 Bankr. LEXIS 2794, at *3 (recognizing that scheme of arrangement was foreign main proceeding); see also Brennan, *supra* note 178 (commenting that scheme of arrangement was foreign main proceeding with COMI in United Kingdom).

184. See 11 U.S.C. § 1520(a)(1) (granting automatic stay to recognized foreign main proceedings); see also *In re Lloyd*, 2005 Bankr. LEXIS 2794, at *4-5 (recognizing that scheme of arrangement was foreign main proceeding, which grants automatic relief pursuant to § 1520(a)(1)).

Subsequent to the *In re Lloyd* decision, Judge Bernstein of the U.S. Bankruptcy Court for the Southern District of New York granted recognition to a solvent scheme of arrangement in *Lion City Run-Off Private Limited*.¹⁸⁵ Lion City's solvent scheme of arrangement was formed under § 425 of the Companies Act 1985 and § 210 of the Companies Act, Chapter 50 of Singapore.¹⁸⁶ Omni Whittington Group BV established Lion City in 2004 to acquire the Offshore Insurance Fund portfolio of the Insurance Corporation of Singapore, Ltd.¹⁸⁷ Judge Bernstein granted Lion City's order, recognizing it as a foreign main proceeding, triggering the automatic relief provided under § 362.¹⁸⁸

Subsequent to the *In re Lloyd* and *Lion City Runoff* orders, Gordian Runoff (U.K.) Limited also filed for recognition of its solvent scheme in the U.S. Bankruptcy Court for the Southern District of New York.¹⁸⁹ After Gordian, originally known as GIO (U.K.) Ltd., ceased underwriting insurance policies, it entered into solvent runoff in 1999.¹⁹⁰ Judge Drain of the Bankruptcy Court for the Southern District of New York granted Gordian's order recognizing its solvent scheme as a foreign main proceeding.¹⁹¹ Gordian, like MMA and Lion's Gate, received an auto-

185. See, e.g., *In re Lion City*, Case No. 06-B-10461 (Bankr. S.D.N.Y. 2006) (recognizing solvent scheme of arrangement under Chapter 15); David Elman, *Lion City Gets Ch. 15 Recognition*, DAILY DEAL/THE DEAL, Apr. 14, 2006 (reporting that Lion City's scheme of arrangement received recognition under Chapter 15).

186. See, e.g., Elman, *supra* note 185 (noting that Lion City is Singapore insurer that will runoff liabilities through scheme of arrangement); see also *Omni Whittington; Insurance Industry*, 25 REACTIONS (UK) 12, July 1, 2005 (observing that Lion City's scheme of arrangement is first of its kind for Singapore insurance industry).

187. See, e.g., Elman, *supra* note 185 (reporting that Omni Whittington formed Lion City in June 2004 to acquire Offshore Insurance Fund portfolio of Insurance Corp. of Singapore Ltd.); see also *Omni Whittington; Insurance Industry*, *supra* note 186 (providing that Omni Whittington received approval from both U.K. and Singapore to administer scheme of arrangement).

188. See 11 U.S.C. § 1520(a)(1) (giving recognized foreign main proceedings automatic stay under Chapter 15); *In re Lion City*, Case No. 06-B-10461, paras. 2-3 (granting recognition to Lion City's scheme of arrangement, entitling it to automatic stay).

189. See *In re Gordian*, Case No.06-11563, para. 7 (Bankr. S.D.N.Y. 2006) (stating that Gordian formed scheme of arrangement under § 425 Companies Act).

190. See Terry Brennan, *Gordian Granted a Ch. 15*, DAILY DEAL/THE DEAL, Aug. 30, 2006 (confirming that Gordian was originally known as GIO (U.K.) Ltd., ceased underwriting policies and entered into runoff in 1999); see also *Law List For Today*, CANBERRA TIMES (Austr.), Aug. 7, 2005, at 20 (mentioning that Gordian was formerly known as GIO (U.K.)).

191. See *In re Gordian*, Case No.06-11563, para. 9 (declaring that Gordian's scheme of arrangement as foreign main proceeding); see also, *supra* note 190 (reporting that Gordian's scheme of arrangement was recognized as foreign main proceeding).

matic stay, providing immediate protection of its U.S.-based assets from attachment.¹⁹² Although several solvent schemes have been recognized under Chapter 15, the orders associated with *In re Lloyd*, *Lion City*, and *Gordian* do not provide any judicial insight into the qualification of solvent schemes of arrangement as “foreign proceedings” under Chapter 15. The limited case law associated with Part VII transfers presents a similar predicament.

III. PART VII TRANSFERS AND CHAPTER 15

There are only two cases decided under § 304 concerning Part VII transfers—*In re Rose*, which provides judicial analysis regarding whether Part VII transfers qualify as “foreign proceedings”; and *In Re Riverstone*, an order signed by the bankruptcy court granting recognition to Riverstone’s Part VII transfer, but emphasizes that the order has no precedential value in any U.S. court.¹⁹³ The following sections evaluate Part VII transfers under Chapter 15 in light of these cases.

A. Part VII Transfers and “Foreign Proceeding” Under § 101(23)

Based on the definition of foreign proceeding under § 101(23), a Part VII transfer’s recognition under Chapter 15 is conditioned on, *inter alia*, its arising from a law related to insolvency or adjustment of debt; and its assets subject to the control or supervision of a foreign court. In light of these criteria, arguments against Part VII transfers being recognized under Chapter 15 include: (i) they do not arise out of a law related to insolvency; (ii) they do not necessarily adjust debt because they do not finalize liabilities with creditors, like a scheme of arrangement; and (iii) they may not involve debtors in “severe financial distress.”¹⁹⁴

192. See 11 U.S.C. § 362 (preventing all creditors from seeking collection of any debt while automatic stay is in effect); see also § 11 U.S.C. § 1520(a) (providing that foreign main proceedings receive automatic stay pursuant to § 362 of Code).

193. See *In re Petition of David Rose*, 318 B.R. 771 (Bankr. S.D.N.Y. 2004) (exemplifying foreign representative seeking recognition of Part VII transfer under § 304); see also *In re Riverstone*, 2005 Bankr. LEXIS 1697, at *18 (declaring that *Riverstone* order has no precedential value in any U.S. court).

194. See 11 U.S.C. § 101 (23) (requiring that foreign debtor arise out of proceeding arising from insolvency or adjustment of debt); see also H.R. REP. No. 109-31, pt. 1, at 118 (explaining that “adjustment of debt” broadens scope of Chapter 15 to proceedings involving insolvent debtors and those who are in severe financial distress; citing UNCITRAL, *Guide to the Model Law*, *supra* note 105, paras. 51-52, 71).

1. Part VII Transfers Do Not Qualify as Foreign Proceedings

As the U.S. Bankruptcy Court for the Southern District of New York determined in *In re Rose*, Part VII transfers arise under the FSMA, which regulates insurance, investment business, and banking, through the Financial Services Authority (“FSA”), and is not directly related to insolvency.¹⁹⁵ The purpose of the FSMA is to confer a range of authoritative powers upon the FSA to facilitate regulation of different financial industries, including insurance.¹⁹⁶

Moreover, Part VII transfers shift risk by transferring all or part of an insurance business from one company to another; however, the mechanism does not necessarily involve the estimation or finalization of liabilities, actions likely to qualify as an adjustment of debt.¹⁹⁷ In a Part VII transfer, there will only be closure of the transferred business if creditors’ claims are valued and finalized, which can be effectuated through a scheme of arrangement, pursuant to § 105(6).¹⁹⁸ Section 105 of the FSMA preserves the possibility of using § 425 of the Companies Act 1985 to enable a company to restructure an insurance business or to come to an arrangement with its creditors.¹⁹⁹

U.S. legislative history also indicates that the drafters of Chapter 15 added “adjustment of debt” to the Model Law’s lan-

195. See *In Re Petition of David Rose*, 318 B.R. at 776 (noting Part VII of FSMA is not bankruptcy law because it is regulated by FSA); see also HM Treasury, Consultation Document, *supra* note 57, para. 1. “Part VII of the FSMA deals with transfers of banking and insurance business. Such transfers occur, for example, when one bank or insurance company purchases or takes over the business of another. Part VII provides a mechanism for such transfers to take place, subject to the transfer scheme being sanctioned by the courts.” *Id.*

196. See FSA, Explanatory Notes, *supra* note 3, para. 3 (defining FSA’s role in overseeing regulatory process associated with Part VII transfer); see also *In re Rose*, 318 B.R. at 773 n.2 (establishing that FSMA confers rights to FSA, which is regulatory authority that oversees administrative process associated with Part VII transfers).

197. See BLACK’S LAW DICTIONARY 43 (7th ed. 1999) (defining “adjust” as determining amount that insurer will pay insured); see also FSMA, 2000, c.8, pt. VII, § 105 (providing mechanism to shift business from one entity to another).

198. See FSMA, 2000, c.8, pt. VII, § 105(6) (facilitating opportunity for Part VII transfer to runoff liabilities through scheme of arrangement under § 425 Companies Act); see also HM Treasury, Consultation Document, *supra* note 57, para. 11 (asserting that Part VII transfers may use § 425 Companies Act to runoff business).

199. See HM Treasury, Consultation Document, *supra* note 57, para. 11 (commenting that Part VII FSMA leaves open opportunity for receiving company to restructure business through a scheme of arrangement); see also FSMA, 2000, c.8, pt. VII, § 105(6) (stipulating that § 425 Companies Act is available under Part VII FSMA).

guage in order to include those debtors who suffer from severe financial distress.²⁰⁰ Insurers that restructure through a Part VII transfer may not be in severe financial distress—for example, Part VII transfers can apply in situations where one insurance company buys another insurance company, and the policies of the acquired company are transferred to the new company through a Part VII transfer.²⁰¹ Transfers enable firms to manage their affairs more effectively.²⁰² Indeed, Part VII transfers can strengthen a company's balance sheet by transferring liabilities or discontinued business to a target company.²⁰³ The transfers can also be utilized to consolidate discontinued business.²⁰⁴ Typically, in this situation, the target company receiving that business utilizes a scheme of arrangement to bring it to closure.²⁰⁵ Given these motivations, the transferring company may not necessarily experience severe financial distress when entering into a Part VII transfer.

Despite these arguments, however, the following section opines that Part VII transfers may qualify as foreign proceedings because they adjust debt by establishing a new agreement be-

200. See H.R. REP. No. 109-31, pt. 1, at 118 (explaining that “adjustment of debt” broadens scope of Chapter 15 to proceedings involving insolvent debtors and those who are in severe financial distress); see also UNCITRAL, *Guide to the Model Law*, *supra* note 105, paras. 51-52, 71 (adding that definition of “foreign proceeding” under Article 2(a) of Model Law is intended to include proceedings involving companies in severe financial distress). *Id.* para. 71.

201. See *In re Rose*, 318 B.R. 771, 773, n.2 (noting that: “Part VII of the FSMA is not a bankruptcy law. Rather it contains the provisions of U.K. law that permit the transfer or portfolios of insurance business as a matter of law without the need for policy by-policy decisions.”); see also HM Treasury, Consultation Document, *supra* note 57 (providing examples of ways Part VII transfers can be applied in business context).

202. See FSA HANDBOOK, *supra* note 66, § SUP 18.2.1 (asserting that Part VII transfers enable companies to shift liabilities to receiving companies to relieve balance sheet); see also *Riverstone*, 2005 Bankr. LEXIS 1697, at *18 (enabling twelve companies to shift and consolidate business into one target company).

203. See FSA HANDBOOK, *supra* note 66, § SUP 18.2.1 (highlighting some positive financial results Part VIIs can provide transferring companies); see also *Riverstone*, 2005 Bankr. LEXIS 1697, at *18 (facilitating effective transfer of business from twelve companies to one target company).

204. See *Run-off – Victory VII*, *supra* note 5 (commenting that when discontinued business are consolidated runoff expert might assume them and bring business to closure); see also FSMA, 2000, c.8, pt. VII, § 105(6) (providing receiving company to runoff liabilities through scheme of arrangement).

205. See *Run-off—Victory VII*, *supra* note 5 (noting that schemes of arrangements are used by target companies in Part VII transfers to close books of transferred business); see also FSMA, 2000, c.8, pt. VII, § 105(6) (facilitating runoff of liabilities for Part VII transfer by enabling company to use scheme of arrangement).

tween the transferring company's creditor and the target company for the repayment of a debt.

2. Part VII Transfers Qualify as Foreign Proceedings

a. Part VII Transfers Adjust Debt

Although the act of transferring business does not necessarily involve the finalization of liabilities, the actual transfer could implicate the rights of policyholders of the insurance contracts being transferred.²⁰⁶ Indeed, due to the complexity of insurance business, a proposed transfer could subtly change the rights or reasonable expectations of policyholders.²⁰⁷ The regulatory process required by the FSMA and evaluated by the FSA for each proposed Part VII transfer, consider the rights of the policyholders and the possible impact the transfer might have on those rights.²⁰⁸ In its evaluation of a scheme report, the FSA may object to a Part VII transfer if it is unfair to a class of policyholders or if it has a material adverse affect on the security of the policyholders.²⁰⁹

The possibility that a Part VII transfer may affect the policyholders' rights indicates that a Part VII transfer could qualify as a mechanism that "adjusts debt" because the transfer establishes a new agreement between the transferring company's creditors and the target company for the payment of a debt, criteria established by *Black's Law Dictionary*.²¹⁰ For instance, although it is reported that the policyholders' rights were not affected by the

206. See HM Treasury, Consultation Document, *supra* note 57, para. 9 (observing that policyholders' right could be impacted by Part VII transfer); see also FSA HANDBOOK, *supra* note 66, § SUP 18.2.1 (noting that Part VII transfer is interference of contracts between client and firm).

207. See HM Treasury, Consultation Document, para. 9, *supra* note 57 (asserting that Part VII transfer may impact policyholders' rights that may not be apparent); see also FSA HANDBOOK, *supra* note 66, § SUP 18.2.1 (highlighting that Part VII transfer may impact rights of third parties).

208. See FSA HANDBOOK, *supra* note 66, § SUP 18.2.51 (listing scope of oversight duties assigned to FSA when reviewing proposed Part VII transfer); see also FSA, Explanatory Notes, *supra* note 3, para. 3 (explaining that FSMA confers rights to FSA to oversee regulatory process).

209. See FSA HANDBOOK, *supra* note 66, § SUP 18.2.53 (considering impact of Part VII transfer on policyholder rights is within scope of FSA's discretionary power); HM Treasury, Consultation Document, *supra* note 57, para. 9 (acknowledging that transfer report must be sent to all policyholders to inform them of any possible adverse material effects on their rights).

210. See BLACK'S LAW DICTIONARY 43 (7th ed. 1999) (defining "adjust" as establishing new agreement with creditor for payment of debt); see also HM Treasury, Consulta-

Lloyd's Part VII transfer, the fact that those policyholders must assert their rights against Sterling Life and not Syndicate 982 after the transfer, establishes new terms for claim repayment to the policyholders.²¹¹

To protect the rights of the policyholders, the FSA plays an important role in overseeing the entire regulatory process to determine the potential impact a Part VII transfer may have on the policyholders. The following section describes the roles of the FSA and the High Court in this process and concludes that their roles satisfy the supervision by a foreign court requirement.

b. Control or Supervision by a Foreign Court

The transfer scheme report must be sanctioned by the High Court in order for the Part VII transfer to become effective.²¹² Before the High Court considers the report, the FSA oversees the regulatory process associated with proposing a Part VII transfer.²¹³ When evaluating a proposed Part VII transfer, the FSA considers the following: the independent expert's opinion, the potential risk posed by the transfer; the purpose of the scheme; the security of policyholders' contractual rights; possible alternatives; the impact of policyholders' and third parties' rights and reasonable expectations; the opportunity given to policyholders to consider the scheme; and any views expressed by policyholders.²¹⁴

Through these authoritative powers, the FSA serves as a fil-

tion Document, *supra* note 57, para. 9 (observing that Part VII transfer could affect rights and or reasonable expectations of policyholders in way that is not apparent).

211. See HM Treasury, Consultation Document, *supra* note 57, para. 9 (explaining that Part VII transfer may impact rights of policyholder that may not be apparent); see also Stevens, *supra* note 4, at 6 (observing that policyholders can only assert their rights against company receiving transferred business after Part VII transfer is sanctioned).

212. See FSMA, 2000, c.8, pt. VII, § 111-12 (mandating that High Court must approve Part VII transfer, after which it becomes effective on all policyholders); see also FSA HANDBOOK, *supra* note 66, § SUP 18.2.1-2 (articulating required consent of High Court is important protection for consumers because it provides those who think they will be adversely affected opportunity to present issues before court).

213. See FSMA, 2000, c.8, pt. VII, §§ 109-10 (playing instrumental role in identifying possible issues associated with Part VII transfers); see also FSA HANDBOOK, *supra* note 66, §§ SUP 18.2.1-6, 18.2.10, 18.2.51 (describing FSA's involvement throughout each phase of regulatory process).

214. See FSA HANDBOOK, *supra* note 66, § SUP 18.2.51 (listing factors FSA considers when analyzing terms of Part VII transfer); see also FSA, Explanatory Notes, *supra* note 3, para. 21 (expressing FSA carries out duties conferred to it in FSMA, pursuant to requirements of FSMA).

ter to the High Court, because it conducts an extensive analysis before the scheme report is filed in the High Court.²¹⁵ As a result, the High Court may request the FSA's opinion regarding the fairness of a proposed Part VII transfer.²¹⁶ Even though the FSA oversees the regulatory process, the High Court still has the ultimate discretion as to whether the transfer will be sanctioned.²¹⁷ The process described in this section and in Part I of this Note concerning the role of the FSA and the High Court, coupled with the public policy considerations factored into the regulatory approval process, could satisfy the requirement that a foreign court exercise control or supervision over the assets of the debtor."²¹⁸

Despite arguments that Part VII transfers could qualify as foreign proceedings, a foreign representative has alternative solutions to obtain relief under U.S. law if Part VII transfers are not recognized under Chapter 15.

B. *Solutions if Denied Recognition*

If a Part VII transfer is denied recognition under Chapter 15, a U.S. policyholder might try to bring a claim against the transferring company instead of the target company, because the transfer was not recognized under U.S. law.²¹⁹ Likewise, a

215. See FSA HANDBOOK, *supra* note 66, §§ SUP 18.2.31, 18.2.51-60 (articulating FSA's role in evaluating scheme report, independent expert's qualifications, adverse effects on policyholders, compulsory communication between transfer scheme promoter and FSA). Pursuant to § 18.2.31, the scheme report must be approved by FSA before filed with court. The Court will likely ask for the FSA's opinion of the transfer. *Id.* § 18.2.60. See generally FSA, Explanatory Notes, *supra* note 3, para. 3 (noting that FSA has wide range of power provided under FSMA).

216. See FSA HANDBOOK, *supra* note 66, §§ SUP 18.2.46, 18.2.60 (asserting that High Court may ask for FSA's opinion concerning risks and fairness of transfer); see also HM Treasury, Consultation Document, *supra* note 57, para. 12 (mandating that all required statutory documents must be filed with FSA before considering Part VII transfer application).

217. See FSMA, 2000, c.8, pt. VII, §§ 111-112 (providing that High Court must sanction Part VII transfer to make terms binding); see also HM Treasury, Consultation Document, *supra* note 57, para. 1 (stating that Part VII transfer sanctioning is subject to High Court evaluation and approval).

218. See 11 U.S.C. § 101(23) (requiring that foreign proceeding have foreign court control or supervise assets and affairs of debtor); see also FSA HANDBOOK, *supra* note 66, §§ SUP 18.2.1, 18.2.51-60 (describing roles of court and FSA throughout different stages of regulatory process).

219. See 11 U.S.C. §§ 1521-1522 (listing scope of relief granted to recognized foreign proceedings, including automatic stay—those proceedings not recognized will not be subject to this relief); see also *Run-off—Victory VII*, *supra* note 5, at 41 (explaining that

solvent scheme that is not recognized as a foreign proceeding under Chapter 15 would not receive the automatic stay, and U.S. creditors might attempt to attach property to recover an antecedent debt.²²⁰ Even if Part VII transfers are not recognized under Chapter 15, a foreign representative under 1509(f) may still bring an action in any U.S. court to collect or recover property of the debtor.²²¹

Further, a Part VII transfer that seeks to finalize claims can runoff the liabilities through a solvent or insolvent scheme of arrangement.²²² After being sanctioned by the High Court, a foreign representative of the Part VII transfer that is subsequently running off the Part VII transfer's liabilities through a solvent scheme could then file for recognition in a U.S. court under Chapter 15.²²³ Based on established case law and statutory interpretation herein, a solvent scheme that runs-off the transferred business has a strong chance of being recognized as a foreign proceeding and receiving the full scope of relief available under Chapter 15.²²⁴

Although no U.S. bankruptcy court has ever reached the issue of comity under Chapter 15, U.S. federal courts might recognize a Part VII transfer or solvent scheme based on the common law doctrine.²²⁵ A U.S. bankruptcy judge, who has denied recognition to a Part VII transfer, however, could exercise his discre-

absent recognition of Part VII transfer under U.S. law, U.S. policyholders may try to sue transferor).

220. See 11 U.S.C. §§ 1520-1521 (describing automatic stay for foreign main proceeding and court's staying power to foreign nonmain proceedings, respectively); see also 11 U.S.C. § 362(a)(1-8) (stating different protections afforded debtor if granted automatic stay).

221. See 11 U.S.C. § 1509(f) (stating that if foreign proceeding is denied recognition under Chapter 15, foreign representative may still bring claim or collect property associated with debtor); see also H.R. REP. NO. 109-31, pt. 1, at 110-11 (providing account receivable owed to debtor as example for when foreign representative may have standing in U.S. court without filing for recognition under Chapter 15).

222. See *supra* notes 199-200 and accompanying text (noting that § 105(6) of FSMA allows Part VII transfers to implement solvent schemes to runoff liabilities).

223. See 11 U.S.C. § 1515(a) (requiring that foreign representative must file to court for recognition of foreign proceeding under Chapter 15); see also 11 U.S.C. § 101(23) (stating that to be recognized as foreign proceeding, debtor's assets or affairs must be under control or supervision by foreign court).

224. See *supra* notes 178-193 and accompanying text (analyzing solvent schemes of arrangement under Chapter 15 and established case law).

225. See *supra* notes 158-161 and accompanying text (discussing comity under Chapter 15 and relevant case law).

tion provided under § 1509(d) and issue an order precluding the Part VII transfer from receiving comity from any U.S. court.²²⁶

CONCLUSION

Solvent schemes of arrangement and Part VII transfers provide mechanisms for insurance companies to restructure liabilities and property, but arise from laws that serve different purposes.²²⁷ Section 425 of the Companies Act 1985 sets forth criteria for companies to estimate and finalize outstanding and future liabilities owed to creditors through a insolvent or solvent scheme of arrangement.²²⁸ Although solvent schemes of arrangement have been recognized under Chapter 15,²²⁹ it does not guarantee that *all* solvent schemes of arrangement will be recognized.²³⁰ Indeed, if a U.S. bankruptcy court finds that granting relief to a solvent scheme would be manifestly contrary to public policy in the United States, a solvent scheme could be denied recognition.²³¹

Part VII of the FMSA, § 105, establishes a tool for insurers to transfer all or part of its business to a target company to alleviate the insurers from duties associated with the transferred business.²³² Based on the inconsistent and limited case law under § 304 concerning Part VII transfers, composed of the *Rose* decision and *Riverstone* order, coupled with the fact that there are currently no cases decided under Chapter 15, it is unclear whether Part VII transfers qualify as foreign proceedings under

226. *See supra* notes 155-157 and accompanying text (addressing U.S. bankruptcy court's discretion to issue order precluding non-recognized foreign representative to seek relief in other U.S. courts on basis of comity).

227. *See supra* notes 5-11 and accompanying text (describing solvent schemes of arrangement under § 425 of Companies Act and Part VII transfers under Part VII of FSMA enable companies to reorganize debt or business).

228. *See supra* notes 21-57 (describing and analyzing statutory requirements of schemes of arrangement).

229. *See supra* notes 159-191 and accompanying text (discussing case law granting solvent schemes recognition under Chapter 15).

230. *See supra* notes 38-48 and accompanying text (describing High Court's decisions involving solvent schemes of arrangement).

231. *See supra* notes 146-149 and accompanying text (discussing public policy exception under 11 U.S.C. § 1506 in light of Judge Rakoff's decision *In re Ephedra*).

232. *See supra* notes 58-74 (providing statutory analysis for Part VII transfers under § 105 FSMA).

Chapter 15.²³³ It could be argued that although Part VII transfers are not related to an insolvency law, as the *Rose* decision concluded, Part VII transfers adjust debt within the meaning of 11 U.S.C. § 101(23) because they establish a new agreement between the transferring company's creditors and the target company for the repayment of a debt. The act of transferring policies to a target company relieves the original insurer of all duties associated with those policies.²³⁴ As a result, subsequent to the transfer, policyholders must bring all claims against the target company, which essentially adjusts the terms of debt payment to the policyholder.²³⁵

Nonetheless, if a Part VII transfer is denied recognition under Chapter 15, the foreign representative still has standing in a U.S. court to collect or file suit concerning any property of the debtor.²³⁶ Moreover, a Part VII transfer involving may finalize outstanding liabilities through a solvent scheme, which has a strong chance of being recognized under Chapter 15.²³⁷ Finally, in addition to the lack of legislative history describing the role of comity under Chapter 15, no U.S. bankruptcy court has reached the question of comity since Chapter 15's implementation.

Based on this analysis, several questions remain concerning Chapter 15 and the recognition of solvent schemes of arrangement and Part VII transfers. What role does comity play in Chapter 15? Does the scope of Chapter 15 include recognition of foreign bankruptcy as well as non-bankruptcy proceedings? How would a U.S. bankruptcy court respond if Spectrum Life, or any foreign representative of a Part VII transfer, filed for recognition under Chapter 15? Will U.S. bankruptcy courts follow the

233. See *supra* notes 196-206 and accompanying text (explaining that Part VII transfers do not finalize liabilities and FSMA does not arise from law relating to insolvency).

234. See *supra* notes 210-218 and accompanying text (describing impact that Part VII transfers have on policyholders' rights and asserting that Part VII transfers establish new terms for debt payment to policyholders).

235. See *supra* notes 193-205 (asserting that Part VII transfers could qualify as foreign proceedings because they establish a new agreement for creditor to pay claim to insured).

236. See *supra* notes 222-225 (providing alternatives for foreign representative of non-recognized Part VII transfer under U.K. and U.S. law).

237. See *supra* notes 21-74 (conducting statutory analysis of schemes of arrangement and Part VII transfers; providing examples of case law involving solvent schemes under Chapter 15).

analysis in the *Rose* decision, concluding that Part VII transfers are not foreign proceedings under the U.S. Code?

Consistent with the Model law, the primary goals of Chapter 15 are to foster inter-court communication and to establish uniform laws that promote efficient and effective standards of relief for cross-border insolvencies. In light of these goals, the author concludes that U.S. bankruptcy courts will try to facilitate recognition of Part VII transfers within the framework of Chapter 15.

