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AVOIDANCE ACTIONS UNDER CHAPTER 15: WAS *CONDOR* CORRECT?

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INTRODUCTION

Since 2006, US courts have been developing a body of case law that interprets Chapter 15 of the US Bankruptcy Code ("Chapter 15").[1] Chapter 15, enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCA), grants US courts jurisdiction to recognize a non-US bankruptcy proceeding and provide effect to that bankruptcy.[2] Chapter 15 is based on the Model Law on Cross-Border Insolvency[3] ("Model Law"), promulgated by the United Nations Commission on International Trade Law ("UNCITRAL"), which offers a worldwide framework for coordinating international insolvencies.[4] As the United States' expression of the Model Law, Chapter 15 incorporates US policies on cross-border insolvency.[5]

Chapter 15 case law is still in its infancy.[6] Since its enactment, less than 200 Chapter 15 cases have been filed.[7]

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1. *See* 11 U.S.C. §§ 1501–32 (2006).

2. *Id.*

3. Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Jan. 30, 1998) [hereinafter Model Law].

4. 11 U.S.C. § 1501(a) (stating that the purpose of Chapter 15 is to incorporate the United Nation Commission on International Trade Law Model Law on Cross-Border Insolvency ("Model Law") into US law). An international or cross-border insolvency takes place when a debtor in bankruptcy has assets in more than one country and, therefore, the laws of two or more countries are implicated in the insolvency. *See* CARL FELSENFELD, FELSENFELD ON INTERNATIONAL INSOLVENCY 1–5 (2003); Gerald I. Lies, *Sale of a Business in Cross-Border Insolvency: The United States and Germany*, 10 AM. BANKR. INST. L. REV. 363, 390 (2002). The terms "international insolvency" and "cross-border insolvency" are used interchangeably throughout this Comment to refer to a bankruptcy that implicates the laws of more than one nation.

5. *See generally* 11 U.S.C. §§ 1501–1532.

6. *See, e.g.*, Selinda A. Melnik, *United States*, *in* CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 265, 324 (Look Chan Ho ed., 2d ed. 2009) (listing fewer than twenty significant Chapter 15 decisions through mid-2009); Case Law on UNCITRAL Texts, http://www.uncitral.org/clout/searchDocument.do;jsessionid=1687EC111D1E22A697667C4002159744.cl013 (last visited Aug. 4, 2011) (showing fewer than thirty-five US cases on this database, which compiles important case law interpreting enacted versions of the Model Law).

7. *See* Melnik, *supra* note 6, at 305–23; *cf. Business and Nonbusiness Cases Commenced by Chapter of the Bankruptcy Code*, U.S. COURTS, http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx (follow "12-month period ending in December" for relevant charts) (last visited June 2, 2011) (failing to provide statistics for the number of Chapter 15 cases filed in 2009 and 2010, while providing statistics on the number of cases filed under other chapters of the US Bankruptcy Code).

Additionally, it was not until *Fogerty v. Petroquest (In re Condor Ins. Ltd.) ("Condor")* that US courts had the opportunity to rule on the law governing avoidance actions[8] under this provision of the US Bankruptcy Code.[9]

In 2007, liquidators of Condor Insurance Limited ("Condor Insurance"), declared bankruptcy in St. Kitts & Nevis and thereafter petitioned for recognition of that insolvency in the United States under Chapter 15.[10] Condor Insurance's liquidators then commenced an avoidance action in the United States under St. Kitts & Nevis law to avoid an alleged fraudulent transfer made by Condor Insurance to its US subsidiary.[11] Whether Condor Insurance could commence an avoidance action via Chapter 15 as opposed to in connection with a plenary proceeding under Chapter 7 or 11 of the US Bankruptcy Code was debated before the lower courts.[12] In 2010, the US Court of Appeals for the Fifth Circuit issued a final decision on the matter, ruling that pursuant to § 1521 of Chapter 15, US courts have authority to permit avoidance actions via Chapter 15 under the law governing the main insolvency case.[13]

As a case of first impression, *Condor* provides some authority on how avoidance actions function under Chapter 15.[14] Yet, whether avoidance actions may be brought via Chapter 15 and whether US courts should unwaveringly defer to non-US

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8. Avoidance actions permit a debtor or the representative of a debtor's estate to recover assets that were transferred out of the debtor's estate prior to or during its insolvency for the benefit of the debtor's general body of creditors. *See infra* Part I.A (defining avoidance actions).

9. *See In re* Atlas Shipping, 404 B.R. 726, 743 (Bankr. S.D.N.Y. 2009) (explaining that *Condor* was the first case to discuss the avoidance carve-out under Chapter 15); Fogerty v. Petroquest Res., Inc. (*In re* Condor), 601 F.3d 319 (5th Cir. 2010).

10. *See infra* Part II.A (discussing *Condor*'s procedural history).

11. *See infra* Part II.A.

12. *See infra* Part II.A.

13. *See infra* Part II.B (discussing the Fifth Circuit's holding and rationale).

14. *See, e.g.*, *In re* Int'l Banking Corp. B.S.C., 439 B.R. 614, 629 (Bankr. S.D.N.Y. 2010) (citing *Condor* for the proposition that US courts have authority to handle avoidance actions under non-US law via Chapter 15); Decl. of Stewart Hey as Representative of Charles Russell, LLP, London, as External Adm'r of Awal Bank, B.S.C., In Administration, in Supp. of Chapter 11 Pet. and Related Mot. for Relief, *In re* Awal Bank, BSC, Nos. 09-15923 (Chapter 15 case) and 10-15518 (Chapter 11 case) (Bankr. S.D.N.Y. 2010) (showing that following *Condor*, a non-US representative filed a plenary proceeding for the purpose of commencing avoidance actions in the United States).

avoidance law is debatable.[15] *Condor* presented the unique circumstance that a non-US insurance company sought recognition under Chapter 15 and the authority to commence an avoidance action.[16] US law, however, prohibits insurance companies from filing for insolvency and commencing avoidance actions under federal law, including under Chapter 7 or 11 of the US Bankruptcy Code.[17] Rather than fashion an exception for insurance companies under Chapter 15 or suggest that Condor Insurance seek relief under state law, *Condor* instead broadly interpreted Chapter 15's avoidance provisions in a way that is not consistent with Chapter 15's legislative history or with the Model Law.[18]

As a result, this decision proposes to arm all non-US insolvency representatives with the right to proceed with an avoidance action under Chapter 15.[19] Chapter 15, though, is currently not an independent vehicle for avoidance actions.[20] *Condor* also promotes unwavering deference to the avoidance law governing the main insolvency case.[21] Support for this choice of law rule, however, is also not found in Chapter 15's legislative history.[22]

Going forward, US courts should not rely on *Condor*'s interpretation of Chapter 15's avoidance provisions. To defend this view and to clarify the avoidance rules under Chapter 15,

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15. *See infra* Part I.E (explaining that § 1523 is the only appropriate vehicle for avoidance actions under Chapter 15 and showing that pursuant to this section, an avoidance action brought in connection with a Chapter 15 case may be under US or non-US avoidance law, and discussing how *In re* Maxwell, the seminal US case on choice of law in avoidance actions under the former US law states that courts should engage in a choice of law analysis before determining whether to apply US or non-US avoidance law in this context).

16. *See infra* Part II.A–B (discussing Condor Insurance's status as an insurer and explaining that non-US insurance companies do not have access to Chapter 7 or 11).

17. *See infra* note 124 (explaining that insurance companies cannot file for bankruptcy under federal law).

18. *See infra* Part II.B (explaining *Condor*'s rationale); *infra* Part III.A (discussing how *Condor* misinterpreted the purpose of the avoidance rules under Chapter 15).

19. *See infra* Part II.B (discussing *Condor*'s holding).

20. *See infra* Part I.E (explaining that avoidance actions related to a Chapter 15 case must be commenced through a plenary proceeding under Chapter 7 or 11 of the US Bankruptcy Code).

21. *See infra* Part II.B (discussing *Condor*'s conclusions about when it is appropriate to apply US or non-US avoidance law).

22. *See infra* Part I.E (explaining the role of US choice of law principles in avoidance actions brought in connection with a Chapter 15 case).

this Comment proceeds in three parts.[23] Part I examines Chapter 15's origins, providing the context for and history of Chapter 15's avoidance rules. Part II explains the *Condor* case, including the Fifth Circuit's rationale and holding. Part III critiques *Condor* and concludes that avoidance actions may not be commenced in connection with a Chapter 15 case outside of a plenary proceeding under Chapter 7 or 11 of the US Bankruptcy Code. It explains that US courts should not unwaveringly defer to non-US avoidance law without engaging in a choice of law analysis. Finally, it asserts that *Condor*'s characterization of Chapter 15 is inconsistent with US policies and therefore with the spirit of Chapter 15.

I. *CHAPTER 15 AVOIDANCE PROVISIONS*

Chapter 15's avoidance provision had many influences in its drafting stage. Chapter 15 is based on the Model Law, which in turn was based on the European Union Regulation on Insolvency Proceedings ("EU Regulation").[24] Since former § 304 of the US Bankruptcy Code ("§ 304") preceded Chapter 15, it also remains relevant to Chapter 15's legislative history.[25] Section 304, however, is applicable to Chapter 15 only to the extent that it does not contradict Chapter 15.[26] This is because Chapter 15 is

23. For the sake of simplicity, throughout this Comment, the term "insolvency representative" will be used to refer to the representative of a debtor's estate, even though under US law, the appropriate term may be a "debtor in possession" or a "trustee," depending on the circumstances, and under European Union ("EU") law, the appropriate term is "administrator." *See* Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT'L L. 401, 414–15 (2010); Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 502 n.14 (1991). Moreover, throughout this Comment, the terms "bankruptcy" and "insolvency" will be used interchangeably, even though they have different meanings in different countries. The term "bankruptcy" in the United States describes a system for managing general default of both consumers and corporations, whereas in England, for example, it often refers only to individuals in bankruptcy while "insolvency" refers to business bankruptcies. *See* RICHARD E. BAINES, DOING BUSINESS IN THE UNITED KINGDOM § 15.01(2) (Matthew Bender ed., 2008) (elaborating on the difference between these terms); *Westbrook*, *supra* at 502 n.14 (asserting that the terms bankruptcy and insolvency have a different meaning in the United States and in other countries).

24. Council Regulation No. 1346/2000 on Insolvency Proceedings, 2000 O.J. L 160/1 [hereinafter EU Regulation].

25. *See* H.R. REP. No. 109-31, pt. 1, at 115 (2005) (explaining that Chapter 15 replaces § 304).

26. *See infra* note 91 (discussing the limited role of § 304 under Chapter 15).

a departure from the United States' previous approach to cross-border insolvency under § 304.[27]

To understand Chapter 15's avoidance provision, it is essential to examine these influences. This Part, therefore, presents an overview of how the EU Regulation, the Model Law, and § 304 influenced Chapter 15. Part I.A introduces the concept of avoidance actions. Part I.B summarizes the theories of international insolvency, which provide a paradigm for coordinating international insolvencies. Part I.C examines how the EU Regulation is structured and, in particular, how it provides for avoidance relief. Part I.D discusses the purpose of the Model Law and the avoidance provision therein. Part I.E explains the United States' approach towards cross-border insolvencies, initially under § 304, now under Chapter 15. It specifically examines Chapter 15 §§ 1521 and 1523, which address avoidance actions.

A. *AVOIDANCE ACTIONS*

When an entity files for or is placed in insolvency, the debtor or an insolvency representative for its estate may commence an avoidance action to collect assets that the debtor fraudulently transferred out of its estate, often to place them beyond the reach of the debtor's creditors.[28] Avoiding such transfers protects the interests of the debtor's general body of creditors by maximizing the assets in the debtor's estate, placing creditors in a favorable position to recover on their claims.[29]

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27. *See infra* Part I.E (discussing § 304 and Chapter 15 and showing that while § 304 permitted courts to grant any appropriate relief to non-US insolvencies based on a few enumerated principles, Chapter 15 is a much more detailed statute that specifies the procedure for obtaining various forms of insolvency relief).

28. *See* PHILIP R. WOOD, PRINCIPLES OF INTERNATIONAL INSOLVENCY 72 (1995) (stating that sophisticated bankruptcy laws worldwide permit insolvency representatives to pursue avoidance actions to undo transfers by the debtor in the twilight period or in order to prevent fraud); *Westbrook*, *supra* note 23, at 504–05 (asserting that most countries allow avoidance actions to remedy fraud, but also have preference laws, which allow transfers for less than equivalent value to be avoided).

29. *See* 8A C.J.S. *Bankruptcy* § 666 (2011) (explaining that post-petition avoidance actions prevent debtors from exhausting available resources before creditors have the opportunity to access them); WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 3D DICTIONARY OF BANKRUPTCY TERMS, § A160 (2011) (stating that pre-petition avoidance actions benefit creditors because property is recovered for the entire estate).

Thus, at its core, avoidance actions adjust or nullify transfers by the debtor and subsequently reorder or redistribute the recovered assets equitably among creditors.[30]

Avoidance laws often vary by country. As such, each legal system may provide different reach-back periods in which a transfer may be recovered, prescribe varying circumstances under which these actions may be commenced, and include unique redistribution priorities that reflect a nation's public policies.[31] When an entity files for or is placed into bankruptcy in one country and seeks to avoid a transfer in another country, determining which law should govern the action—the avoidance law of the primary insolvency case, or the avoidance law of the place of transfer—presents a choice of law dilemma.[32] In addition, determining where to commence such an avoidance action is an issue that has to be addressed when structuring a cross-border insolvency regime.[33]

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30. *See* Brendan Mockler, *Chapter 15 Choice of Avoidance Law in a U.S. Bankruptcy Court: Is It Really a Choice?*, *in* NORTON ANNUAL SURVEY OF BANKRUPTCY LAW Part I, art. 11 (2009) (asserting that the main goal of an avoidance action is to reallocate a debtor's assets according to public policy priorities as laid out by statute); *Westbrook*, *supra* note 23, at 508 (clarifying that avoidance laws restructure the way a debtor's assets have been allocated by replacing debtor-creditor actions with actions as prioritized by statute).

31. For example, St. Kitts and Nevis' fraudulent transfer laws provide for a reach-back period of up to ten years. *See* Laws of Saint Christopher and Nevis, Ch. 9, ¶ 44. In contrast, US fraudulent transfer law has a reach-back period of two years. *See* 11 U.S.C. § 548(a)–(b) (2006); *see also* Mockler, *supra* note 30, at 3 (explaining that some countries consider state of mind a relevant factor in making avoidance determinations, while others do not); Paul J. Omar, *The Internationalisation of Insolvency Law: An Anglo-French Comparison*, 39 INT'L L. 107, 119 (2005) (stating that France's avoidance laws favor employees over other creditors).

32. *See* U.N. COMM'N ON INT'L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW, 67, U.N. Sales No. E.05.V.10 (2005) [hereinafter LEGISLATIVE GUIDE] ("Where insolvency proceedings involve parties or assets located in different States, complex questions may arise as to the law that will apply to questions of validity and effectiveness of rights in those assets or of other claims; and to the treatment of those assets and of the rights and claims of those foreign parties in the insolvency proceedings."); *Westbrook*, *supra* note 23, at 499 (explaining that multinational companies usually engage in substantial pre-bankruptcy transfers in other countries and that this forces courts to determine which law should govern).

33. *See infra* Part I.B (explaining that both choice of forum and law issues are present in cross-border insolvencies).

B. *INTERNATIONAL INSOLVENCY PARADIGMS*

There are two dominant theories about how to administer cross-border insolvencies: territorialism and universalism.[34] Under territorialism, if a debtor with assets in more than one country files for insolvency, each country where the debtor's assets are located administers those assets pursuant to its local laws.[35] As a result, separate administration, filing, and evaluation of creditors' claims take place in multiple jurisdictions and are governed by varying laws.[36] Universalism, on the other hand, provides that the forum where the insolvency petition is filed, and its substantive law, will govern the distribution of a debtor's assets worldwide.[37] This regime treats all similarly situated creditors equitably and, in its purest form, does not vary the rights of interested parties based on their physical location.[38]

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34. *See, e.g.*, Edward S. Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43, 47 (2008) (stating that universalism and territorialism are the "two main theories" on structuring cross-border insolvency proceedings); Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J. 105, 108 (2005) (stating that universalism and territorialism are the "two dominant theories" on structuring cross-border insolvency proceedings).

35. *See, e.g.*, Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 742 (1999) (explaining that territorialism describes a system in which each country controls the distribution of assets within its own territory and allows other countries to do likewise); *Westbrook*, *supra* note 23, at 513 (describing territorialism as the "Grab Rule" because, in response to a bankruptcy, the courts of each country where a debtor's property is located "grab" the property located therein and distribute it according to its local laws).

36. *See* Bufford, *supra* note 34, at 114 (explaining that with territorialism each jurisdiction carries out its own administration, filing, evaluation, and prosecution of the debtor's estate); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2309 (2000) (stating that territorialism is time consuming for courts and insolvency representatives because creditor claims, estate administration, and actions occur simultaneously in multiple jurisdiction where the debtor has property).

37. *See* LoPucki, *supra* note 35, at 705 (asserting that universalism is a system in which a single court handles the administration and distribution of a debtor's assets worldwide); *Westbrook*, *supra* note 23, at 514 (explaining that under universalism, a single forum applies a single legal regime to all of the debtor's affairs worldwide).

38. *See* Bufford, *supra* note 34, at 110 (stating that because a single legal regime governs in universalism, conflicts regarding applicable law, which could vary the rights of interested parties, are eliminated); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 466 (1991) (clarifying that universalism "make[s] unequal distributions somewhat less unequal").

Tempered versions of these frameworks, known as modified universalism and cooperative territorialism, provide less extreme paradigms for conducting cross-border insolvencies. Cooperative territorialism envisions multiple full-scale insolvencies in countries administering local assets, but also calls for cooperation through communication by courts administering a debtor's assets.[39] Modified universalism conceives of a primary insolvency case with multiple ancillary cases to assist in implementing the decisions of the main proceeding.[40] The primary difference between these two systems is that modified universalism accords greater credence to the laws governing the main insolvency case than does cooperative territorialism.[41] Modified universalism is currently the most widely accepted, and it is embodied in the EU Regulation and in the Model Law—the two most comprehensive international insolvency regimes in effect today.[42]

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39. *See* Janger, *supra* note 23, at 406–07 (explaining that courts in different countries will communicate in cooperative territorialism).

40. *See* Adams & Fincke, *supra* note 34, at 48 (asserting that modified universalism permits a "non-home country" or "non-main" court to open a secondary insolvency case to supplement the "main" or "home country's" dominant case); Bufford, *supra* note 34, at 112 (stating that modified universalism recognizes that a main insolvency proceeding may require support through ancillary proceedings in other countries where the debtor's assets are located or where local support is otherwise needed to effectively carry out the objectives of the insolvency).

41. *See* Janger, *supra* note 23, at 406–07 (showing that modified universalism calls for the supremacy of the law where the main proceeding is pending whereas cooperative territorialism imagines bankruptcies in multiple jurisdictions governed by varying laws, coordinated only by communication between states); Paul L. Lee, *Ancillary Proceedings under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 122–23 (2002) (explaining that in cooperative territorialism courts usually defers to local law in ancillary bankruptcy proceedings); Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 573 (1996) (stating that cooperative territorialism provides less deference to a main proceeding than does modified universalism).

42. *See* Fernando Locatelli, *International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? (An Economic Analysis of its Benefits on International Trade)*, 14 LAW & BUS. REV. AM. 313, 318 (2008) (asserting that most countries have moved away from territorialism and universalism towards the more sophisticated "modified universalism"); Janis Sarra, *Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings*, 44 TEX. INT'L L.J. 547, 553 (2009) (explaining that while most jurisdictions used to be territorial in their approach to cross-border insolvencies, modified universalism has become more prevalent, as it represents a compromise to advance cooperation amongst nations).

C. *EUROPEAN UNION REGULATION*

In 1996, the EU Regulation was promulgated to harmonize insolvency proceedings among Member States of the European Union ("EU").[43] Under the EU Regulation, there is a primary insolvency proceeding, called a main proceeding, and it must be commenced in the Member State of the debtor's Center of Main Interests ("COMI").[44] The COMI is the place where the debtor regularly administers its affairs in a manner ascertainable to third parties and is presumptively a debtor's place of incorporation.[45] To ensure that the insolvency is commenced in the appropriate jurisdiction, prior to opening proceedings, the Member State in which relief is being sought must determine the location of a debtor's COMI.[46] Once a main proceeding is opened in the appropriate jurisdiction, Member States must automatically recognize that insolvency and the jurisdiction of the Member State governing its proceeding.[47] Thereafter, all

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43. Roland Lechner, *Waking from the Jurisdictional Nightmare of Multinational Default: The European Council Regulation on Insolvency Proceedings*, 19 ARIZ. J. INT'L & COMP. L. 975, 978 (2002) (showing that the EU Regulation was first adopted in 1996, and revised in 2000); *see also* EU Regulation, *supra* note 24.

44. *See* EU Regulation, *supra* note 24, art. 3(1), at 5 ("The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings.").

45. *Id.* pmbl. 13, at 2 ("The [COMI]" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."). *See generally Re* Eurofood IFSC, Ltd., Case C-341/04, [2006] E.C.R. I-03813 (explaining that a debtor's COMI is presumptively its place of incorporation).

46. Cour d'appel [CA] [Court of Appeal], Versailles, Dec. 15, 2005, I.L.Pr. 2006, 32, 681, Besse (Fr.) ("It is correct that the French courts must check that the court of a Member State has established that it has jurisdiction in its decision to open main insolvency proceedings; this jurisdiction is dependent upon the centre of main interests of the company being situated within the jurisdiction of the court hearing the case."). Indeed, much litigation has resulted from disputes over where a debtor's COMI is located. *See, e.g.*, *Eurofood* [2006] E.C.R. I-03813, ¶ 24 (addressing whether an Irish subsidiary of an Italian holding company should commence insolvency proceedings in Ireland or in Italy and examining the factors that determine a debtor's COMI).

47. *See* Cour d'appel [CA][Court of Appeal], Versailles, Sept. 4, 2003, B.C.C. 2003, 984, Besse (Fr.); *Eurofood* [2005] E.C.R. I-3813, ¶ 103 (discussing the obligations of Member States once a main insolvency proceeding has been commenced, the court notes that "[s]tates may not review the jurisdiction of the court of the State of origin, but only verify that the judgment emanates from a court of a Contracting State which claims jurisdiction under Article 3 [comity] and is accepted by numerous commentators."). Under the EU Regulation, whether a proceeding was opened in the appropriate country, i.e., the debtor's COMI, as a threshold matter, is the only issue

other EU proceedings relating to that insolvency are automatically ancillary to the main proceeding, and are called secondary proceedings.[48]

Pursuant to Article 4 of the EU Regulation, the law of the COMI continues to govern fundamental aspects of that entity's bankruptcy throughout the EU, including the choice of which avoidance law will control.[49] Recognizing that Member States make policy choices in fashioning their local avoidance laws, the EU Regulation calls for displacing the COMI's law in avoidance actions, despite the deference afforded to the law of a debtor's COMI in Article 4.[50]

If a non-COMI Member State opens an avoidance action related to a COMI proceeding, EU Regulation Article 13 controls and provides that the law of the debtor's COMI will govern the avoidance action only if the transfer would be avoidable under both the COMI's law and the law of the Member State where the avoidance action is taking place.[51]

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reviewable by the courts of Member States, with the other exception that courts of Member States may review whether recognizing a "foreign" insolvency is manifestly contrary to the recognizing Member States' public policy. *See id.*

48. EU Regulation, *supra* note 24, art. 3(3), at 5 ("Where insolvency proceedings have been opened under paragraph 1 [in a debtor's COMI], any proceedings opened subsequently . . . shall be secondary proceedings . . . .").

49. *See id.* art. 4(2)(m), at 6 (providing that the law governing the debtor's COMI shall determine various forms of relief including "rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors"); Adam Gallagher, *Center of Main Interest: The EU Insolvency Regulation and Chapter 15*, 28-6 AM. BANKR. INST. J. 44, 45 (2009) (explaining that the law governing the debtor's COMI determines, in large part, the parameters of any EU restructuring); Nigel John Howcroft, *Universal vs. Territorial Models for Cross-Border Insolvency: The Theory, The Practice, and The Reality That Universalism Prevails*, 8 U.C. DAVIS BUS. L.J. 366, 414–15 (2008) (stating that the law governing a debtor's COMI determines such matters as distribution of assets and the rights of debtors and creditors in an EU insolvency).

50. *See* EU Regulation, *supra* note 24, art. 13, at 7 (asserting that the COMI's law will not govern if proof is provided that "the act is subject to the law of a Member State other than that of the State of the opening of proceedings, and that law does not allow any means of challenging that act in the relevant case."); Miguel Virgos & Etienne Schmit, *Report on the Convention of Insolvency Proceedings*, EU Council Doc. 6500/96, ¶ 138, at 89 (May 3, 1996) (explaining that the goal of Article 13 is to displace the avoidance law of the debtor's COMI in favor of the law of the forum where the avoidance action is being commenced and discussing that this rule upholds the legitimate expectations of creditors or third-parties, and preserves local Member States' interests).

51. *See* Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions*, 33 TEX. INT'L L.J. 119, 128 (1998) (stating that Article 13 displaces the avoidance law of the debtor's COMI under certain circumstances); Virgos

Thus, there are circumstances in an EU insolvency in which the law of the debtor's COMI will not govern an avoidance action.[52] The EU Regulation accordingly provides jurisdictional mandates regarding insolvency amongst Member States and resolves choice of law issues in EU cross-border avoidance actions.[53]

D. *UNCITRAL MODEL LAW*

In 1998, UNCITRAL published the Model Law, using the EU Regulation as its guide.[54] Both common and civil law countries participated in formulating its principles.[55] The purpose of the Model Law is to suggest a method for streamlining cross-border insolvency among nations.[56] It presents a model law for countries to fashion similar cross-

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& Schmit, *supra* note 50, ¶¶ 136–37, at 88 (explaining that the only purpose of Article 13 of the EU Regulation is to reject the law of the debtor's COMI). The COMI's law, for example, will not control a contract subject to the laws of another Member State. *See id.* Also, the COMI's law will not trump the laws of another Member State when the laws of that other Member State would not, for example, permit a certain transfer to be challenged either under that Member States' insolvency rules or under its other applicable laws. *See id.*

52. Virgos & Schmit, *supra* note 50, ¶¶ 136–37, at 88 (explaining that the avoidance law of a debtor's COMI will not always govern in a cross border insolvency in the EU).

53. *See* EU Regulation, *supra* note 24, pmbl. 23, at 3 ("This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law . . . .").

54. *See* André J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 320 (1998) (stating that the EU Regulation was a source of inspiration for the drafters of the Model Law); Robert E. Cortes et al., *Cross-Border Insolvencies and Chapter 15: Recent U.S. Case Law Determining Whether a Foreign Proceeding Is "Main" or "Nonmain" or Neither*, 17 J. BANKR. L. & PRAC. 5, Art. 4 (2008) (explaining that the "main" and "nonmain" concepts under Chapter 15 were promoted by the Model Law, which adopted those concepts from the EU Regulation); *see also* Model Law, *supra* note 3.

55. *See* ABOUT UNCITRAL, ORIGIN, MANDATE, AND COMPOSITION, http://www.uncitral.org/uncitral/en/about/origin.html (last visited June 9, 2011) (stating that "[t]he Commission is composed of sixty member States elected by the General Assembly."); ABOUT UNCITRAL, FAQ, WHAT IS A WORKING GROUP? http://www.uncitral.org/uncitral/en/about/methods_faq.html (last visited June 9, 2011) ("Membership of working groups currently includes all States members of UNCITRAL.").

56. *See* Model Law, *supra* note 3, pmbl. (stating that the purpose of the Model Law is to provide a mechanism for handling cross-border insolvencies, to promote cooperation between nations, provide greater legal certainty for investors, to fairly and efficiently administer insolvencies, to maximize the debtor's assets, and to facilitate the rescue of troubled multinational businesses to protect employment and investment interests).

border insolvency laws consistent with the legal system and policies of the enacting state.[57] To date, nineteen countries have adopted domestic legislation based on its principles.[58] Unlike the EU Regulation, the Model Law does not call upon enacting nations to suspend their local choice of law rules.[59] While UNCITRAL tried, it failed to adopt uniform choice of law rules, and as a result, these matters are governed by established rules and practices of each enacting state.[60] The Model Law thus offers a basic framework for the jurisdictional treatment of cross-border insolvency proceedings by providing a method for determining the validity of an insolvency proceeding and, subsequently, the effects of recognition.[61]

Articles 15 through 17 of the Model Law govern the procedure for recognizing a foreign insolvency.[62] Enacting states should recognize a foreign insolvency as either a "foreign main proceeding," if it is taking place in the debtor's COMI, or as a

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57. *See* Model Law, *supra* note 3, pmbl. (explaining that the purpose of the Model Law is to streamline cross-border insolvencies world-wide); LEGISLATIVE GUIDE, *supra* note 32, at 311 (asserting that the Model Law takes into account differing approaches in national insolvency laws by leaving enacting states to indicate the meaning of the terms in italics within square brackets.

58. *See* STATUS: 1997—MODEL LAW ON CROSS-BORDER INSOLVENCY, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited June 9, 2011) (listing the nineteen countries).

59. *See* LEGISLATIVE GUIDE, *supra* note 32, at 67–68 ("In the case of such insolvency proceedings [involving parties or assets located in different States], the forum State will usually apply its local conflict of laws rules to determine which law is applicable to the validity and effectiveness of a right or claim and to their treatment in the insolvency proceedings. The UNCITRAL Model Law on Cross-Border Insolvency . . . does not include harmonized conflict of laws rules for adoption by enacting States, thus leaving these matters to established rules and practices.").

60. *See* UNCITRAL Rep. of the Working Group on Insolvency Law on the Work of the Eighteenth Session, 29th Sess., May 28–June 14, 1996, U.N. Doc. A/CN.9/419, ¶¶ 46–59, (Dec. 1, 1995) [hereinafter Rep. of the Working Group] (explaining that UNCITRAL could not agree to impose a system to resolve conflicts of law on enacting states in its Model Law); LEGISLATIVE GUIDE, *supra* note 32, at 67–68 (stating that the forum state will usually apply its own conflict of law rules to an international insolvency to determine which law is applicable to the validity and effectiveness of a right or claim).

61. *See generally* Model Law, *supra* note 3, pmbl. (stating that the purpose of the Model Law is to provide effective mechanisms for dealing with cases of cross-border insolvency and setting forth, in Chapter III of the Model Law, the process for recognizing an insolvency and explaining the effects of that recognition); *see also infra* notes 62–73 (discussing the Model Law articles that explain the steps for recognition and the effects of recognition).

62. *See* Model Law, *supra* note 3, arts. 15–17.

"foreign non-main proceeding," if it is occurring in a country where the debtor has an establishment.[63] The effects of recognition of a foreign insolvency are expressed in Articles 20 through 24 of the Model Law.[64] Some effects of recognition are automatic; for example, Article 20 calls for an automatic stay of adverse activities against the debtor upon recognition of a foreign main proceeding.[65] Some effects are discretionary and depend on the insolvency rights granted under the domestic law of the enacting state.[66] Article 21 is a discretionary article, stating that, upon recognition of a foreign proceeding and at the request of the foreign representative, courts may "grant any appropriate relief, including . . . relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State."[67] The italicized portion of this text is to be filled in by

63. *Id.* art. 17(2).

64. *See id.* arts. 20–24.

65. *Id.* art. 20(1).

66. *Id.* art. 21; GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY ¶¶ 154, 159 [hereinafter GUIDE TO ENACTMENT] (explaining that relief under Article 21 is discretionary and that courts may grant "any type of relief that is available under the law of the enacting State and needed in the circumstances of the case" and asserting that with respect to Article 21, "the proviso 'under the law of this State' reflects the principle underlying the Model Law that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of the foreign State. Instead, recognition of a foreign proceeding entails attaching to the foreign proceeding consequences envisaged by the law of the enacting State.").

67. Model Law, *supra* note 3, art. 21; *see* UNCITRAL, Rep. of the Working Group, *supra* note 60 (showing that although UNCITRAL considered having Article 21 govern avoidance actions, it decided instead to create a separate article: "While agreeing with the principle that a foreign representative should be given the right to commence actions to reverse or render unenforceable legal acts detrimental to creditors (sometimes referred to as "Paulian actions"), the Working Group considered that it would be preferable to delete the reference to them in subparagraph (b)(v) [of article 12 which covers the effects of recognition, i.e. the predecessor to Article 21 of the Model Law]. The numerous issues raised by such actions did not lend themselves to simple and harmonized solutions within the limited scope of Article 12 [predecessor to present Model Law Article 21]. The Working Group decided to remove the reference to those actions from (b)(v) [of Article 12; present Model Law Article 21]. However, the Working Group decided to consider, at a later stage, the question whether certain limited aspects concerning those actions could be dealt with in a separate article in the Model Provisions [present Model Law Article 23]. It was stated that such actions might present the only possible way for a foreign representative to recover assets. It was stated that, in any event, the standing of the foreign representative to commence such actions should be tied to recognition."); GUIDE TO ENACTMENT, *supra* note 66, at 62 (showing that Article 12 was the predecessor to current Model Law Article 21 because at the end

enacting states, with terms and rules consistent with their national insolvency laws.[68]

Other effects of recognition enumerated in the Model Law merely provide standing to a foreign insolvency representative.[69] An example of this is Article 23, which governs avoidance actions and aims to ensure that a foreign representative is not deprived of standing to commence an avoidance action simply because they are foreign.[70] Article 23 provides that "[u]pon recognition of a foreign proceeding, "the foreign representative has standing to initiate [*refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation*]."[71] Article 23 does not determine which law should govern avoidance actions or the circumstances under which such relief can be commenced[72] Instead, these matters are left to enacting states.[73]

Since issues regarding choice of law, particularly with respect to avoidance actions, may arise in the context of cross-border insolvencies, UNCITRAL's Legislative Guide addresses these issues in its commentary and recommendations.[74] It notes that some countries leave choice of law determinations regarding avoidance actions to their local choice of law rules or may steadfastly apply only the law of a debtor's COMI.[75] Other

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of the Guide to Enactment's discussion on Model Article 21 there is a heading called *Discussion in UNCITRAL and in the Working Group* that lists working group document A/CN.9/433, ¶¶ 127–134 and 138–139).

68. *See* LEGISLATIVE GUIDE, *supra* note 32, at 311 (asserting that the Model Law takes into account differing approaches in national insolvency laws by leaving enacting states to indicate the meaning of the terms in italics within square brackets).

69. Model Law, *supra* note 3, art. 23 (providing standing to a foreign insolvency representative to commence an avoidance action).

70. GUIDE TO ENACTMENT, *supra* note 66, at 167.

71. Model Law, *supra* note 3, art. 23.

72. *See* GUIDE TO ENACTMENT, *supra* note 66, ¶ 166 (stating that Model Law Article 23 was "drafted narrowly in that it does not create any substantive right regarding [avoidance actions] and also does not provide any solution involving conflict of laws").

73. *See supra* notes 59–60 and accompanying text (asserting that the Model Law does not harmonize conflict of laws rules for adoption by enacting states, but rather leaves that decision to the enacting states' established rules and practices).

74. *See* LEGISLATIVE GUIDE, *supra* note 32, at 71.

75. *See id.* at 67–68, 71 (explaining that when conflicts of law arise some states will apply their local choice of law rules to resolve while others may decide to apply the law governing the debtor's COMI).

countries apply the law of the place where the transfer occurred.[76] Still other countries might adopt a rule combining the law of a debtor's COMI with the law governing the place of transfer. For example, a country could permit the law governing the COMI to control only if the transfer is avoidable both under the COMI's law and the law where the transfer took place.[77]

Enacting states have dealt with Article 23, which governs avoidance actions, in different ways. Some states, such as Asutrailia and South Africa, drafted Article 23 to provide foreign insolvency representatives with standing to commence an avoidance action to the extent such relief is available under their local laws.[78] South Africa's version of the Model Law provides that a non-South African insolvency representative may commence an avoidance action only under South African law.[79] Likewise, Australia's version of the Model Law permits non-Australian insolvency representatives to avoid transfers solely according to Australian avoidance laws.[80] Japan's version of the

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76. *See id.* at 71 (asserting that some countries look to the law governing the transfer to also govern the avoidance action).

77. *See id.* (explaining that some states determine choice of law based on whether the transfer is avoidable either under the law of the debtor's COMI or the law where the transfer took place, for example, by stipulating that the law of the place of transfer will govern, unless the law of the debtor's COMI is stricter than that law).

78. *See* Cross-Border Insolvency Act 42 of 2000 §§ 21 & 23 (S. Afr.) ("21**.** (1) Upon recognition of foreign proceedings, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—*(g)* granting any additional relief that may be available to a trustee, liquidator, judicial manager, curator of an institution, or receiver under the laws of the Republic. . . . 23. (1) Upon recognition of foreign proceedings, the foreign representative has standing to initiate any legal action to set aside a disposition that is available to a trustee or liquidator under the laws of the Republic relating to insolvency."); Rachel Kelly & Claire van Zuylen, *South Africa*, *in* CROSS-BORDER INSOLVENCY 229, 242 (2009) ("Section 23 of the [South African] Cross-Border Insolvency Act enacts Article 23 of the Model Law and grants the foreign representative the same authority to initiative legal proceedings to set aside a disposition as is available to a trustee or liquidator under the South African laws of insolvency."); Explanatory Memorandum, *Cross-Border Insolvency Bill* 2008 (Cth) 12–13 (Austl.) ("For articles 14, 21, 23, 28 and 29 of the Model Law 'the law of this State' is a reference to Commonwealth law. In each case the relevant laws are the Corporations Act and the Bankruptcy Act, both of which are laws of the Commonwealth.").

79. *See* Cross-Border Insolvency Act § 21 (S. Afr.); Kelly & van Zuylen, *supra* note 78, at 242.

80. *See* Cross-Border Insolvency Act 2008 (Cth) § 23 (Austl.); Explanatory Memorandum, *Cross-Border Insolvency Bill* 12–13 (Austl.); Rosalind Mason, *Australia*, *in*

Model Law does not enact Model Law Article 23, but states that a non-Japanese insolvency representative may commence an insolvency proceeding in Japan to bring an avoidance action.[81]

These enactments are consistent with the drafters' understanding of Article 23. The Model Law's Guide to Enactment and Legislative Guide explain that the procedural standing provided by Model Law Article 23 extends only to rights available to local insolvency representatives.[82] Accordingly, countries implementing the Model Law should adopt Article 23 permission for foreign insolvency representatives to bring an avoidance action, if such right is available to domestic entities.[83]

E. *US TREATMENT OF CROSS-BORDER INSOLVENCIES*

The US approach to cross-border insolvency developed initially through the common-law doctrine of comity, whereby courts held discretion to assist or recognize non-US bankruptcy judgments.[84] In 1978, this doctrine was codified in § 304 of the

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CROSS-BORDER INSOLVENCY 15, 33 (2009) (explaining that, in Article 23, the governing law for avoidance actions is that of the Commonwealth).

81. *See* Shinichiro Abe, *Japan*, *in* CROSS-BORDER INSOLVENCY 139, 146 (explaining that a provision like Article 23 "is not included in Japan's insolvency laws—rather, the foreign representative is given full standing under the same conditions as domestic creditors"); *see generally Gaikoku tosan shori tetsuduki no shonin enjo ni kansuru horitsu* [Law Relating to Recognition and Assistance for Foreign Insolvency Proceedings] Law No. 129 of 2000 (Japan), *translation available at http://www.moj.go.jp/ENGLISH/information/lrtr-01.html* (showing that Japan's cross-border insolvency law does not have an avoidance provision like Model Law Article 23).

82. *See* GUIDE TO ENACTMENT, *supra* note 66, ¶¶ 165–66 ("The procedural standing conferred by article 23 extends only to actions that are available to the local insolvency administrator in the context of an insolvency proceeding" and "[t]he effect of the provision is that a foreign representative is not prevented from initiating such actions by the sole fact that the foreign representative is not the insolvency administrator appointed in the enacting State.")

83. *See supra* notes 79–81 and accompanying text (explaining that Australia and South Africa adopted Article 23 as permitting insolvency representatives to bring avoidance actions in accordance with Australian and South African laws and that Japan did not adopt it, but Japanese law explains how a foreign insolvency representative may avoid a transfer in Japan). Article 23 suggests that an insolvency representative's right to commence an avoidance action be consistent with the enacting state's policies. *See* GUIDE TO ENACTMENT, *supra* note 66, ¶ 166 (explaining that a foreign insolvency representative should not be deprived of an insolvency right available in that local jurisdiction simply because they are foreign).

84. *See* Can. S. Ry. Co. v. Gebhard, 109 U.S. 527, 539 (1883) (holding that international comity permits deference to the insolvency judgment of a Canadian court); Mary Elaine Knecht, *The "Drapery of Illusion" of Section 304—What Lurks Beneath:*

US Bankruptcy Code.[85] That section permitted US courts to provide ancillary relief to a non-US insolvency representative, guided primarily by comity, but also consistent with the following factors: just treatment to claim holders, protection of US parties, preventing fraudulent transfers, and providing debtors with a fresh start.[86] Courts had broad discretion to interpret § 304 to decide what assistance, if any, should be provided to non-US insolvencies.[87] However, since US courts were afforded so much discretion in fashioning relief under § 304, case law under this provision of the bankruptcy code produced inconsistent results.[88]

In 2006, Congress replaced § 304 with Chapter 15 of the US Bankruptcy Code ("Chapter 15").[89] The language of Chapter 15

Territoriality in the Judicial Application of Section 304 of the Bankruptcy Code, 13 U. PA. J. INT'L BUS. L. 287, 312–13 (1992) (explaining that the doctrine of comity preceded enactment of § 304).

85. *See* 11 U.S.C. § 304 (2006) (repealed 2005); *In re* Toga Mfg. Ltd., 28 B.R. 165, 169–70 (Bankr. E.D. Mich. 1983) (explaining that Congress codified the common law principles of comity in § 304).

86. *See* 11 U.S.C. § 304 (permitting courts to grant relief based on "what will best assure an economical and expeditious administration of such estate, consistent with—(1) just treatment of all holders of claims against or interests in such estate; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of such estate; (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title; (5) comity; and (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns").

87. *See, e.g.*, Angulo v. Kedzep Ltd., 29 B.R. 417, 418–19 (Bankr. S.D. Tex. 1983) (deferring to non-US law and giving effect to a Canadian bankruptcy on comity grounds because that would "best assure an economical and expeditious administration of [the] estate"); *see generally Toga*, 28 B.R. 165 (refusing to defer to non-US law and explaining that § 304 permitted US courts to make discretionary decisions under the circumstances of each case—rather than making them bound by inflexible rules—and thus denying a Canadian company's legal claim based on Canadian law in order to protect American interests).

88. *See, e.g.*, Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 458 (2d Cir. 1985) (affirming grant of comity to a non-US bankruptcy because that would best serve US interests); *In re* Treco, 240 F.3d 148 (2d Cir. 2001) (holding that differences between US law and non-US law can warrant rejecting recognition of a non-US judgment); Knecht, *supra* note 84, at 288 (discussing *In re* Koreag, Controle et Revision S.A., 130 B.R. 705 (Bankr. S.D.N.Y. 1991) which determined that US courts should defer to non-US bankruptcy law and principles to determine whether certain property was part of the debtor's estate).

89. *See* 11 U.S.C. § 1501(a) (2006) ("The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective

tracks that of the Model Law, but also incorporates US policies.[90] Due to its similarity to the Model Law, when applying Chapter 15, US courts are guided by application of the Model Law in other countries and, to a lesser extent, by § 304.[91]

To obtain recognition under Chapter 15, a non-US insolvency representative must file a petition with the US Bankruptcy Court asserting whether recognition is being sought for a foreign main or foreign non-main proceeding.[92] Preceding recognition, pursuant to § 1519, US courts may provide preliminary relief to the petitioning party, such as a discretionary stay under US law.[93] Upon recognition, additional relief arises,[94] including the possibility of further discretionary relief.[95] For either automatic or discretionary relief to become

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mechanisms for dealing with cases of cross-border insolvency . . . ."); *see also supra* note 1 (recognizing that this change was passed in Congress in 2006).

90. *Compare* 11 U.S.C. § 1501, *with* Model Law, *supra* note 3 (revealing that Chapter 15, nearly verbatim, incorporates the language of the Model Law, with modifications that are specific to US law, such as the exclusion of avoidance relief under Chapter 15). The numbered provisions of the Model Law even correspond to the numbered provisions under Chapter 15, in that, for example, Model Law Article 23 is the corresponding provision to 11 U.S.C. § 1523. *See* Model Law, *supra* note 3, art. 23; 11 U.S.C. § 1523; *see also In re* Tri-Cont'l Exch. Ltd., 349 B.R. 627, 632 (Bankr. E.D. Cal. 2006) ("The language of Chapter 15 tracks the Model Law, with adaptations designed to mesh with United States law.").

91. *See* 11 U.S.C. § 1508 (2006) ("In interpreting [Chapter 15], the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."). Mention of § 304 case law exists only in the commentary to § 1507, a provision permitting courts to provide additional assistance to non-US insolvency representatives subject to other provisions of Chapter 15 and consistent with comity. *See* 11 U.S.C. § 1507; H.R. REP. No. 109-31, pt. 1, at 119 (2005) ("[J]urisprudence which developed under § 304 is preserved in the context of new section 1507. On deciding whether to grant the additional assistance contemplated by section 1507, the court must consider the same factors specified in former section 304."); *id.* at 109 (explaining that § 1507 permits courts to grant additional relief, but shall not be a basis for denying or limiting relief otherwise available under Chapter 15).

92. *See* 11 U.S.C. § 1504 (2006) ("A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515."); 11 U.S.C. § 1515 ("A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.").

93. *See* 11 U.S.C. § 1519 (2006) (providing that while a petition for recognition is pending, "where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, [courts may] grant relief of a provisional nature, including—(1) staying execution against the debtor's assets").

94. *See* 11 U.S.C. § 1520 (2006).

95. *See* 11 U.S.C. § 1521 (2006).

available, however, the court must determine where a debtor's COMI exists and, based on that analysis, grant recognition either as a foreign main or foreign non-main proceeding.[96]

The breadth of discretionary authority granted to a US bankruptcy court pursuant to § 1521 is sweeping.[97] The court may grant "*any additional relief that may be available* . . . except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)."[98] Section 1521 thus allows courts to provide non-US insolvency representatives with additional relief under US law.[99] The relief excepted from § 1521 governs US avoidance powers.[100] This section's legislative history explains this exclusion by reference to the authority of a non-US insolvency representative's status to bring avoidance actions under § 1523.[101]

Section 1523 states, in relevant part, that upon recognition "the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under *sections 522, 544, 545, 547, 548, 550, 553, and 724(a).*"[102] This section's legislative history explains that § 1523 provides a non-US insolvency representative with the option to

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96. *See In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 126–27 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325, 336 (Bankr. S.D.N.Y. 2008) (stating that recognition must be coded as either main or non-main under Chapter 15); *see, e.g.*, *In re* SPhinX Ltd., 371 B.R. 10 (S.D.N.Y. 2007) (analyzing the level of activity of a corporation in the Caribbean, considering third party expectations, determining that the debtor's COMI was in the United States and not in the Caribbean, and denying recognition as a foreign main proceeding, but granting recognition as a foreign non-main proceeding).

97. *See* 11 U.S.C. § 1521.

98. *Id.* (emphasis added). Section 1521 adopts Model Law Article 21 nearly verbatim except for a modification in (a)(7). *Compare id.*, *with* Model Law, *supra* note 3, art. 21.

99. *See* 11 U.S.C. § 1521; *see also* GUIDE TO ENACTMENT, *supra* note 66, at 61 (asserting that Model Law Article 21 is present to provide foreign insolvency representatives with additional assistance under the law of the enacting state, which under Chapter 15 means that courts can provide non-US insolvency representatives other assistance that would be available to a US bankruptcy trustee).

100. *See* 11 U.S.C. §§ 522, 544, 545, 547, 548, 550, 724(a) (2006); *see also* H.R. REP. No. 109-31, pt. 1, at 115 (2005) ("The exceptions in . . . [§ 1521] relate to avoiding powers.").

101. *See* H.R. REP. No. 109-31, pt. 1, at 115. Model Law Article 21 was not meant to be an independent vehicle for avoidance actions. *See* Rep. of the Working Group on Insolvency Law, *supra* note 67, ¶ 134 (showing that UNCITRAL determined to adopt a wholly separate article to govern avoidance relief).

102. 11 U.S.C. § 1523 (emphasis added).

commence an avoidance action only in a plenary proceeding under another chapter of the US Bankruptcy Code.[103] Furthermore, it states that § 1523 does not "create or imply any legal rules with respect to the choice of applicable law . . . [and] courts will determine . . . what national law may be applicable to such action."[104] Section 1523 therefore only permits a non-US insolvency representative to commence an avoidance action through a plenary proceeding under either Chapter 7 or 11 of the US Bankruptcy Code.[105] It also leaves open the question of which law should apply to such an action.[106] As a result, choice of law rules generally applicable in federal district courts should control.[107]

Since § 304 case law provides guidance where Chapter 15 does not, § 304 case law discussing choice of law in avoidance actions brought in connection with a recognized non-US insolvency should still be good law.[108] The last word on the subject from the Second Circuit in *In re Maxwell* explains that US choice of law principles should guide this determination and should ultimately turn on the center of gravity of the transfer.[109]

In sum, while the EU Regulation sets forth both mandatory jurisdiction and choice of law rules for cross-border avoidance actions among Member States, the Model Law provides only jurisdictional guidance with respect to COMI, leaving enacting states with the task of determining how to address the choice of

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103. *See* H.R. REP. No. 109-31, pt. 1, at 116.

104. *See id.*

105. Chapter 7 of the US Bankruptcy Code governs the liquidation of a debtor's estate. *See* BLACK'S LAW DICTIONARY 96 (9th ed. 2009) (defining Chapter 7 of the US Bankruptcy Code). Chapter 11 of the US Bankruptcy Code governs the reorganization of a debtor's affairs. *See id.* (explaining Chapter 11 of the US Bankruptcy Code).

106. *See supra* notes 103–04 and accompanying text (stating that once an avoidance action is commenced through Chapter 7 or 11, US courts will determine "what national law may be applicable to such action").

107. *See generally In re* Maxwell Commc'ns Corp., 93 F.3d 1036, 1048, 1053 (2d Cir. 1996) (noting that US choice of law principles apply to determine which law will govern an avoidance action in the United States brought in connection with a non-US insolvency proceeding and explaining that, for example, US choice of law principles call for applying the law of the jurisdiction having the greatest interest in the avoidance action).

108. *See supra* note 91 (discussing the role of § 304 case law under Chapter 15).

109. *See Maxwell*, 93 F.3d at 1051 (holding that because the debtor's "center of gravity" was in England—the debtor and most of its creditors were British, and the debt was incurred in England,—British rather than US law should govern the avoidance action).

law questions that remain.[110] With its enactment of § 1523, Congress restricted all avoidance actions sought in connection with a Chapter 15 ancillary proceeding, by requiring, first, the commencement of a plenary proceedings under Chapter 7 or 11 of the US Bankruptcy Code.[111] Moreover as Congress did not codify a choice of law rule for such avoidance actions, § 304 case law guides this determination.[112] As the decisive US authority on the subject, *Maxwell* sets forth the choice of law rule for avoidance actions in this context.[113]

II. CONDOR

The US Court of Appeals for the Fifth Circuit determined in *Fogerty v. Petroquest (In re Condor Ins. Ltd.) ("Condor")* that a non-US insolvency representative could commence an avoidance action via Chapter 15 under non-US avoidance law.[114] To reach this decision, *Condor* employed a textual analysis of Chapter 15.[115] In order to reconcile its holding with § 1523, which states that all avoidance actions brought in connection with a Chapter 15 case must be brought through Chapter 7 or 11 of the US Bankruptcy Code, the court explained that § 1523 exists only to provide insolvency representatives with the option to commence an avoidance action under US law.[116] Where the non-US insolvency representative seeks to commence an avoidance action under non-US law, *Condo*r instead viewed § 1521 as controlling. [117] Since § 1521 does not, on its face,

110. *See supra* Part I.C–D (discussing the scope of the EU Regulation and the Model Law).

111. *See supra* Part I.E (explaining how Chapter 15 adopted Model Law Article 21 and 23 and stating that the legislative history of § 1521 explains that all avoidance actions brought in connection with a Chapter 15 case are governed by § 1523).

112. *See supra* notes 103–04 and accompanying text (explaining that § 1523 explicitly leaves open the possibility that a non-US insolvency representative can commence an avoidance action under either US or non-US law).

113. *See supra* note 109 (discussing *Maxwell*'s rule).

114. Fogerty v. Petroquest Res. Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 323 (5th Cir. 2010) (stating that because § 1521 is silent about avoidance under non-US law, Condor Insurance can pursue an avoidance action via this section under non-US avoidance law).

115. *See infra* Part II.B (explaining *Condor*'s rationale).

116. *See infra* note 130 and accompanying text (explaining *Condor*'s view of § 1523).

117. *See infra* notes 128–130 and accompanying text (explaining *Condor*'s view of § 1521).

precondition relief under this section on commencement of a plenary proceeding, the court saw no textual reason to preclude the representative's request.[118]

For the purposes of analyzing this decision, this Part explains the *Condor* case. Part II.A sets forth *Condor*'s factual and procedural history in the bankruptcy court, the district court, and in the Fifth Circuit. Part II.B then explains the court's rationale, including its textual analysis of Chapter 15.

A. *PROCEDURAL HISTORY*

On November 16, 2007, Condor Insurance declared bankruptcy in St. Kitts & Nevis.[119] Its liquidators subsequently filed for Chapter 15 recognition in the US Bankruptcy Court for the District of Mississippi.[120] On May 18, 2007, the bankruptcy court recognized Condor Insurance as a foreign main proceeding.[121] Thereafter, Condor Insurance commenced an avoidance action under St. Kitts & Nevis law against Condor Guaranty Trust ("Condor Guaranty"), its US subsidiary, seeking, among other things, to recover US$313 million in allegedly fraudulently transferred assets.[122]

On July 17, 2008, the bankruptcy court dismissed the avoidance action on the grounds that to bring an avoidance action, Condor Insurance must first file a plenary proceeding under Chapter 7 or 11.[123] Because Condor Insurance, as an insurance company, could not file for Chapter 7 or 11, it appealed the bankruptcy court's decision.[124] On February 9,

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118. *See* 11 U.S.C. § 1521 (2006) (revealing that this section does not require non-US insolvency representatives to commence a plenary proceeding to obtain additional relief).

119. *See In re* Condor, 601 F.3d. at 319.

120. *See id.* at 320.

121. *See id.* at 321.

122. *See* Fogerty v. Petroquest Res., Inc. (*In re* Condor Ins. Ltd.), 2008 WL 2858943 *1 (Bankr. S.D. Miss., July 17, 2008) *aff'd*, 411 B.R. 314 (S.D. Miss. 2009), *rev'd*, 601 F.3d 319 (5th Cir. 2010).

123. *See id.* at *3.

124. *See In re* Condor, 601 F.3d at 327 (explaining that non-US insurance companies do not have access to Chapters 7 and 11)*; see also* 11 U.S.C. § 109 (2006) (stating that insurance companies may not be debtors under federal bankruptcy law). Rather, state law governs the reorganization or liquidation of both US and non-US insurance companies; *see, e.g.*, N.Y. INS. LAW §§ 7406–07 (McKinney 2000) (providing

2009, the district court affirmed the bankruptcy court's decision.[125] The liquidators of Condor Insurance then appealed to the Fifth Circuit.[126] In its March 17, 2010 decision, the US Court of Appeals for the Fifth Circuit reversed the two lower court decisions and held that pursuant to § 1521, US courts may grant avoidance relief via Chapter 15 but only pursuant to the non-US avoidance law governing in the main insolvency case.[127]

B. *RATIONALE*

Employing a textual analysis of Chapter 15, the court found § 1521's silence on avoidance actions under non-US law significant, and determined that while § 1521 precludes avoidance under US law, it does not exclude avoidance under non-US law.[128] The court focused on § 1521, which states that US courts may grant any appropriate relief.[129] It found that while § 1523 provides a non-US insolvency representative only with the option to commence an avoidance action under US law by means of a Chapter 7 or 11 plenary case § 1521 is a vehicle for avoidance actions under the law governing the debtor's COMI.[130]

"[g]rounds for conservation of assets of a foreign or alien insurer" and "[a]n order of conservation or ancillary liquidation of a foreign or alien insurer").

125. Fogerty v. Petroquest Res., Inc. (*In re* Condor Ins. Ltd.), 411 B.R. 314 (S.D. Miss. 2009), *rev'd*, 601 F.3d 319 (5th Cir. 2010).

126. *See In re* Condor, 601 F.3d 319 (5th Cir. 2010).

127. *See id.*

128. *See id.* at 324 (invoking the statutory maxim "expressio unius est exclusio alterius" the court explained that, while the statute [11 U.S.C. § 1521(a)(7)] denies the non-US representative powers of avoidance created by the US Code absent a filing under Chapter 7 or 11 of the Bankruptcy Code, it does not necessarily follow that Congress intended to deny the non-US representative powers of avoidance supplied by applicable non-US law.).

129. *See id.* ("The statute provides for 'any relief' and excepts only actions under 522, 544, 545, 547, 548, 550, and 724(a) of the Code and includes no other language suggesting that other relief might be excepted. . . . If Congress wished to bar all avoidance actions whatever their source, it could have stated so; it did not.").

130. *See id.* at 323 ("Where avoidance actions under U.S. law are excluded from a Chapter 15 ancillary proceeding, section 1523(a) ensures they may be brought in a full bankruptcy proceeding. And to ensure that a foreign representative enjoys the status of a trustee under those provisions, section 1523(a) grants standing to a foreign representative wishing to pursue an avoidance action not under its domestic law but under U.S. bankruptcy law in a Chapter 7 or 11 proceeding . . . ."); *id.* at 323–24 ("[S]ection 1523(a) grants no substantive right of avoidance. Rather it lifts a potential standing roadblock for resort to Chapter 7 or 11."). The court also stated that § 1523

In reaching this conclusion, the court took a broad view on its authority under Chapter 15. It explained that § 1521 permits avoidance under non-US law because Chapter 15, taken as a whole, provides courts with authority to assist non-US insolvency representatives.[131] Citing to case law decided under § 304, the court determined that § 1521 adopts the rule from *In re Metzeler*, a district court case holding that non-US insolvency representatives seeking recognition should only be able to commence avoidance actions under the non-US law governing the main insolvency case in an ancillary proceeding under § 304.[132] *Condor* defended this decision as pragmatic, because it avoids the need for expansive plenary proceedings brought under US law, and, specifically in this case, prevents the United States from becoming a haven for fraudulent transfers by insurance companies.[133] Finally, the court asserted that this

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codifies the rule from a § 304 case called *In re* Metzeler, which provides that a non-US insolvency representative may only commence an avoidance action under non-US law through § 304. *See id.* at 329 ("Congress essentially made explicit *In re Metzeler*'s articulation of the bar on access to avoidance powers created by the U.S. code by foreign representatives in ancillary proceedings.").

131. *See id.* at 325 ("[A]s a catch-all, under section 1507 the court has authority to provide additional assistance to a foreign representative subject to the restrictions elsewhere in the Chapter."); *id.* ("Though the language does not explicitly address the use of foreign avoidance law, it suggests a broad reading of the powers granted to the district court in order to advance the goals of comity to foreign jurisdictions.").

132. *See id.* at 328 (citing *In re* Metzeler, 78 B.R. 674, 677 (Bankr. S.D.N.Y. 1987)) (asserting that a non-US insolvency representative may only commence an avoidance action under non-US law, because, relying on one academic article, this is more consistent with comity and because the US Bankruptcy Code does not explicitly permit non-US insolvency representatives to invoke US avoiding powers); *see also id.* at 328 n.50 (listing several other cases that also rely on *Metzeler* including: *In re* Aerovias Nacionales de Columbia S.A. Avianca, 303 B.R. 1 (Bankr. S.D.N.Y. 2003) (discussing where a debtor may file for insolvency and not discussing avoidance actions, choice of law in a non-US proceeding seeking recognition, or *Metzeler*); *In re* Griffin Trading Co., 270 B.R. 883 (Bankr. N.D. Ill. 2001) (citing *Metzeler* only to help define the term "US Trustee"); *Petition of* Kojima, 177 B.R. 696, 7032 (Bankr. D. Colo. 1995) (permitting avoidance under Japanese law after comparing US and Japanese avoidance laws, and citing to *Metzeler* for authority to permit such relief); and *In re* Tarricone, 80 B.R. 21 (Bankr. S.D.N.Y. 1987) (dismissing an avoidance action by a non-US insolvency representative under US law because it was brought too late for recovery and because, citing to *Metzeler*, it should have been brought under German law)); *see also supra* note 130.

133. *See In re* Condor, 601 F.3d at 327 ("Congress did not intend to restrict the powers of the U.S. court to apply the law of the country where the main proceeding pends. Refusing to do so would lend a measure of protection to debtors to hide assets in the United States out of the reach of the foreign jurisdiction, forcing foreign representatives to initiate much more expansive proceedings to recover assets

reading of the statute fosters predictability in international insolvencies.[134]

Thus, *Condor* concluded that Condor Insurance's avoidance action could proceed under St. Kitts & Nevis law via § 1521. In so holding, it determined that Chapter 15 is a vehicle for avoidance actions. It also found that the law of a debtor's COMI should govern an avoidance action brought pursuant to § 1521.

III. *CRITIQUE OF* CONDOR

While the decision provided Condor Insurance with the relief it sought, it broadly reframed the ability of a non-US representative to commence avoidance actions following recognition of a non-US proceeding under Chapter 15.[135] Chapter 15 sanctions the commencement of avoidance actions only in the context of a pending plenary proceeding under Chapter 7 or 11.[136] Moreover, although US courts occasionally enforce non-US law, they do so only after engaging in a choice of law analysis that directs application of non-US law.[137] *Condor* does not condition its conclusion that § 1521 enables non-US insolvency representatives to commence an avoidance action in a US court under the law of the debtor's COMI on such a choice

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fraudulently conveyed, the scenario Chapter 15 was designed to prevent. We are not persuaded that Congress has unwittingly facilitated such tactics—with foreign insurance companies, access to Chapters 7 and 11 is otherwise denied.").

134. *See id.* ("And this silence [regarding non-US avoidance law] is loud given the history of the statute including the efforts of the United States to create processes for transnational businesses in extremis."); *see id.* ("The application of foreign avoidance law in a Chapter 15 ancillary proceeding raises fewer choice of law concerns as the court is not required to create a separate bankruptcy estate. It accepts the helpful marriage of avoidance and distribution whether the proceeding is ancillary applying foreign law or a full proceeding applying domestic law—a marriage that avoids the more difficult depecage rules of conflict law presented by avoidance and distribution decisions governed by different sources of law.").

135. *See supra* Part II.B (explaining *Condor*'s rationale and noting that it is not limited to insurance companies).

136. *See supra* Part I.E (explaining that § 1523 is the only governing provision under Chapter 15 for avoidance actions and that it requires a non-US insolvency representative to first commence a plenary proceeding under Chapter 7 or 11).

137. *See* 11 U.S.C. § 1523 (2006) (explaining that a non-US insolvency representative may commence an avoidance action only within the framework of a plenary proceeding under Chapter 7 or 11 of the US Bankruptcy Code).

of law analysis. Nor does it even mention that *Maxwell* calls upon US courts to do so.[138]

To explain this, Part III critiques *Condor*'s holding and rationale. Part III.A examines *Condor*'s textual analysis of Article 21, § 1521, Article 23 and § 1523. It also discusses the structure and text of Chapter 15 and the role of statutory interpretation and comity under this chapter of the US Bankruptcy Code. Part III.B responds to *Condor*'s suggestion that US courts unwaveringly defer to the avoidance law of a debtor's COMI. It does so by scrutinizing the § 304 cases cited by *Condor*. Finally, Part III.C discusses why *Condor*'s characterization of Chapter 15 is inconsistent with US policies and therefore with the spirit of Chapter 15.

A. *CHAPTER 15's ORIGIN IN THE MODEL LAW DOES NOT SUPPORT* CONDOR*'S TEXTUAL ANALYSIS*

Chapter 15's origin in the Model Law is exceptionally relevant to understanding the purpose of each section under Chapter 15.[139] Article 21 of the Model Law looks to provide enacting states with the opportunity to give foreign insolvency representatives additional assistance under the local laws of the enacting state.[140] As such, § 1521 should be construed to permit US courts to grant additional relief available under US law to non-US insolvency representatives.[141] While Congress explicitly excluded avoidance actions under US law from § 1521, Congress' silence about avoidance under non-US law does not

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138. *Id.*

139. *See supra* note 89–90 (showing that Chapter 15 is based upon the Model Law).

140. *See supra* notes 66–67 and accompanying text (explaining the purpose of Model Law Article 21); *see also supra* note 78 (citing Article 21 South Africa's Cross-Border Insolvency Act, which shows that additional relief under its version of Model Law Article 21 is limited to relief available under South African law and citing to an Explanatory Memorandum on Australia's Cross Border Insolvency Bill, which likewise restricts all forms of additional relief in Australia's version of Article 21 to Australian law).

141. *See supra* notes 98–99 and accompanying text (explaining that pursuant to § 1521 US courts may provide additional assistance to non-US insolvency representatives only under US law).

mean that avoidance actions are permitted under non-US law pursuant to § 1521.[142]

In any event, Article 21 of the Model Law and accordingly Chapter 15's § 1521 were not intended to govern avoidance actions.[143] In formulating the Model Law, a report of the working group explains that Article 21 was not supposed to address avoidance actions.[144] Instead, the working group determined to draft a separate article governing avoidance actions.[145] Model Law Article 23 (and, accordingly, § 1523 of Chapter 15) alone governs avoidance actions.[146] Section 1521's legislative history similarly explains that all avoidance actions are governed by § 1523.[147]

Thus, § 1523 is the only controlling provision relating to avoidance actions brought by a non-US representative following recognition under Chapter 15.[148] Section 1523's legislative history explains that this provision is not intended to resolve choice of law determinations; as such, it encompasses avoidance actions under both US and non-US law and requires all avoidance actions to be brought through a plenary proceeding under Chapter 7 or 11 of the US Bankruptcy Code.[149]

Since §§ 1521 and 1523 are clear, they do not invite statutory interpretation. Congress explained in its legislative history that although § 1507 preserves § 304 case law and the

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142. *See supra* notes 98–99 and accompanying text (showing that Congress excluded avoidance under US law from § 1521); *supra* notes 128–30 and accompanying text (explaining *Condor*'s view that the silence in § 1521 about avoidance actions under non-US law means that they are permitted under this section of Chapter 15).

143. *See* Rep. of the Working Group on Insolvency Law, *supra* note 66 (discussing Model Law Article 21's purpose).

144. *See* Rep. of the Working Group on Insolvency Law, *supra* note 66 (explaining that avoidance actions were excluded from the general provision governing the effects of recognition under the Model Law because of their sensitive nature and instead would be dealt with by a separate article, which would become present Article 23).

145. *See supra* note 67 (explaining that UNCITRAL determined to adopt a separate article to govern avoidance actions).

146. *See supra* notes 69–73 and 102–07 (explaining Article 23 of the Model Law and § 1523 of Chapter 15).

147. *See supra* note 101 and accompanying text (discussing § 1521's legislative history, which states that all avoidance actions are governed by § 1523).

148. *See supra* notes 101–06 and accompanying text (addressing the purpose of § 1523).

149. *See supra* note 104 and accompanying text (explaining that § 1523 does not "create or imply any legal rules with respect to the choice of applicable law . . . [and] courts will determine . . . what national law may be applicable to such action."').

doctrine of comity for providing additional relief through § 1521, such case law and comity cannot be used to contradict Chapter 15.[150] Here, as § 1521's purpose is to provide additional relief only under US law, it is contradictory to use comity and § 1507 to alter § 1521's function.[151] It furthermore contradicts Chapter 15 to use § 304 case law, in this case, *Metzeler*, to rephrase § 1523's clear rule.[152] Chapter 15 does not codify any particular US case.[153] Chapter 15 is based on the Model Law—an international product imported into the US's legal system.[154] The structure of Chapter 15 thus restricts a court's discretion to look to sections other than § 1523 to govern avoidance actions and accordingly *Condor*'s textual analysis is unsuitable for interpreting Chapter 15.[155]

B. *US COURTS SHOULD NOT DEFER TO NON-US AVOIDANCE LAW IN THE ABSENCE OF CHOICE OF LAW ANALYSIS*

Condor also determined that an avoidance action governed by the non-US law of the debtor's COMI and brought in connection with the recognition of a non-US main proceeding, need not comply with the limits of § 1523, which requires a non-US insolvency representative to first commence a plenary proceeding under Chapter 7 or 11 of the US Bankruptcy Code.[156] This reading of § 1521, however, undermines the limits imposed in § 1523.[157] It also contradicts established § 304 case law discussing choice of law in this context, namely Maxwell.

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150. *See supra* note 91 (demonstrating that § 1507 preserves § 304 case law in the context of providing additional relief, but only to the extent that this case law does not contradict Chapter 15).

151. *See supra* notes 98–05 and accompanying text (discussing the purpose of §§ 1521 and 1523).

152. *See supra* note 132 (explaining that *Condor* states that § 1523 codified *Metzeler*'s ban on avoidance action under US law under § 304).

153. *See supra* note 4 (showing that in the introduction to Chapter 15, which explains its purpose, there is no mention of codifying US case law).

154. *See supra* note 4 (explaining that Chapter 15 incorporates the Model Law into US law); *supra* notes 89–90 (explaining that the United States adopted a version of the Model Law).

155. *See supra* Part I.E (discussing § 304 and Chapter 15 and showing that their structure is different).

156. *See supra* notes 128–30 and accompanying text (discussing *Condor*'s view of § 1521); *supra* notes 102–07 and accompanying text (explaining § 1523).

157. *See supra* notes 102–05 and accompanying text (discussing § 1523).

Maxwell is the seminal US authority on choice of law in avoidance actions in this context. Maxwell's rule looks at where the center of gravity of the fraudulent conveyance or preference is, in order to determine which country's law should govern in an avoidance action commenced by a non-US representative.[158] It requires US courts to employ US choice of law principles to determine which law should apply and primarily to consider the center of gravity of the transfer at issue to determine which country's law is implicated to the greatest extent.[159] *Condor* did not cite to *Maxwell* with respect to choice of law.[160]

Condor instead found that § 304 case law permitted avoidance only under non-US law citing *Metzeler*, *Tarricone*, and *Petition of Kojima*—lower court decisions that preceded *Maxwell*.[161] The rule in *Metzeler* is premised on a concern that non-US insolvency representatives may benefit from the use of US avoidance law.[162] To address this concern, *Metzeler* created an arbitrary bright line rule, prohibiting non-US insolvency representatives from commencing avoidance actions under US law via § 304.[163]

Although *Tarricone* cites *Metzeler* for the proposition that a non-US representative's avoidance actions are permissible, if at all, under non-US avoidance law, it is not clear that *Tarricone* followed *Metzeler*'s outright ban on avoidance under US law via § 304.[164] *Tarricone* analyzed whether the transfer at issue was

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158. *See supra* note 109 (explaining *Maxwell*'s choice of law rule).

159. *See supra* notes 109 and 132 (explaining that *Maxwell* holds that whether US or non-US law should apply to an avoidance action is determined by a conflict of law analysis; whereas *Metzeler* holds that avoidance should only be permitted under non-US law).

160. *See supra* note 132 and accompanying text (showing that *Condor* made no mention of *Maxwell* and instead looked to other § 304 case law for authority on choice of law).

161. The Court also cited *In re* Aerovias Nacionales de Columbia S.A. Avianca and *In re* Griffin—two cases that do not address avoidance actions. *See supra* note 132 (stating that *Aerovias Nacionales de Columbia S.A.* and *Griffin* do not address avoidance and demonstrating that *Metzeler*, *Tarricone*, and *Petition of Kojima* were decided before *Maxwell*).

162. *See supra* note 132 and accompanying text (discussing that *Metzeler*'s primary concern was that a non-US insolvency representative may benefit from using US avoidance law).

163. *See supra* note 132 (discussing *Metzeler* and its holding).

164. *See supra* note 132 (explaining that although *Tarricone* cited to *Metzeler*, it may not have been fundamental to the court's holding).

avoidable under both US and non-US law, and ultimately determined that the avoidance action was commenced too late for recovery under either law.[165] Thus, *Tarricone* seems to be concerned with whether the transfer was voidable under both US and non-US law before permitting avoidance under non-US law.[166] Likewise, while *Petition of Kojima* cites *Metzeler* for authority to permit an avoidance action under non-US law, it only allows the avoidance action to proceed after being satisfied that the transfer is avoidable under both US and Japanese law.[167] Thus, the analysis in *Petition of Kojima* also does not support *Metzeler*'s rule that avoidance should only be permitted under non-US law.[168]

In any event, *Metzeler* and *Tarricone* did not represent a trend regarding choice of law in avoidance actions under § 304.[169] Rather, as one scholar pointed out, the trend under § 304 case law was to permit avoidance actions either under US or non-US law, depending on the result of a choice of law analysis—the rule that was later articulated in *Maxwell*.[170] US courts did not historically, nor should they today, unwaveringly defer to non-US avoidance law.[171] Accordingly, *Condor*'s suggestion that US courts should unwaveringly defer to non-US avoidance law is incompatible with established US choice of law jurisprudence.

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165. *See supra* note 132 (describing *Tarricone*'s reasoning).

166. *See supra* note 132 (setting forth the analysis in *Tarricone*, which did not center on *Metzeler*).

167. *See supra* note 132 (explaining that the court looked at the results of permitting an avoidance action to go forward under US and Japanese law in order to make its determination with respect to choice of law).

168. *See supra* note 132 (showing that because *Petition of Kojima* analyzed the outcome of an avoidance action under two competing laws, it did not follow *Metzeler*'s bright line rule that avoidance should only be permitted under non-US law).

169. *See Westbrook*, *supra* note 23, at 525 (concluding that the trend under § 304 case law was to permit the use of non-US avoidance law only if the transfer was avoidable either under US or non-US law, at the discretion of a US court).

170. *Id.*

171. *Id.* (showing that historically under § 304 US courts did not unwaveringly defer to non-US avoidance law).

C. CONDOR *IS INCONSISTENT WITH THE SPIRIT OF CHAPTER 15*

All avoidance actions brought in connection with a Chapter 15 case must be sought in a plenary proceeding under Chapter 7 or 11 of the US Bankruptcy Code and choice of law principles applicable generally in US district courts control whether US or non-US law govern that action.[172] These rules were policy choices made by Congress when adopting Chapter 15.[173] Since the Model Law permits an enacting state to adopt a cross border insolvency law consistent with its domestic policies, Congress' choices with respect to Chapter 15's avoidance rules should be preserved.

There are good reasons to limit avoidance actions to Chapter 7 or 11 of the US Bankruptcy Code and to permit US courts to determine whether US or non-US law should govern these actions based on US choice of law principles.[174] By relegating avoidance actions to Chapter 7 or 11 of the US Bankruptcy Code, Congress ensures that long-standing safeguards and jurisprudence are preserved, even in the context of an avoidance action brought in connection with a Chapter 15 case.[175] Moreover, non-US insolvency law may not share the same policy considerations as US insolvency law.[176] The statute of limitations for avoidance actions may differ in the law of the debtor's COMI and in the place where the avoidance action is being commenced.[177] While US avoidance law has a reach back period of up to two years, St. Kitts & Nevis avoidance law seems to permit avoidance actions for up to ten years.[178]

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172. *See supra* notes 97–107 (explaining the avoidance rules under Chapter 15).

173. *See supra* note 89 (explaining that Chapter 15 incorporates US policies on cross-border insolvency); *supra* note 68 and accompanying text (explaining that the Model Law gives enacting states discretion in fashioning their cross-border insolvency laws).

174. *See supra* notes 102–09 (discussing § 1523 and *Maxwell*'s choice of law analysis).

175. *See supra* notes 100–03 and accompanying text (explaining that Congress relegated all avoidance action brought in connection with a Chapter 15 case to Chapter 7 or 11 plenary proceedings).

176. *See supra* notes 31, 68 and accompanying text (explaining that insolvency laws can vary between countries and that an enacting state's version of the Model Law incorporates its public policy choices).

177. *See supra* note 31 (showing that avoidance laws can vary between countries).

178. *See supra* note 31 (discussing US and St. Kitts avoidance laws).

Non-US avoidance law may also be incompatible with US insolvency policies for other reasons. For example, US bankruptcy law does not permit insurance companies to file for insolvency or commence an avoidance action under federal law.[179] Other countries may permit regulated entities to be liquidated or restructured under the same laws as all other business entities.[180] Allowing an insurance company to bring an avoidance action under non-US law through Chapter 15, may vest a non-US insurance company with more freedom in bankruptcy in the United States than is available to domestic insurance companies.[181]

Unwavering deference to foreign law in cross border insolvencies could thus undermine policy choices of the enacting state—a result that is not espoused by the Model Law.[182] Indeed, the Model Law does not promote universalism—where states that have enacted a version of the Model Law would be required in all instances to apply the law governing the main insolvency case.[183] The Model Law embraces modified universalism, where the tendency to defer to the law governing a debtor's COMI is not exclusive.[184] Modified universalism's flexibility and likewise the Model Law's framework provide enacting states with broad discretion to fashion cross-border insolvency laws consistent with their national policies.[185] It is precisely because the Model Law permits nations to maintain

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179. *See supra* note 124 (explaining that under US law, both domestic and non-US insurers must file for insolvency in state court under the supervision of state insurance departments).

180. *See supra* Part II.B (discussing *Condor*'s rationale and showing that for example, the court did not suggest the Condor Insurance had to go through a special bankruptcy proceeding in St. Kitts because of its status as an insurance company).

181. *See supra* note 124 and accompanying text (showing that US insurers are restricted to obtaining relief under state law).

182. *See supra* note 68 and accompanying text (explaining that enacting states adopt the Model Law in a manner consistent with their national insolvency policies).

183. *See supra* notes 37–38 and accompanying text (discussing universalism); *see also supra* note 60 and accompanying text (explaining that the Model Law leaves matters of choice of law to enacting states).

184. *See supra* notes 35–36 and accompanying text (discussing territorialism); *supra* note 59 and accompanying text (explaining that the Model Law leaves matters of choice of law to enacting states).

185. *See supra* note 68 (clarifying why Model Law articles have bracketed texts).

their sovereign choices while fostering coordination, that it provides a promising framework for cross-border insolvency.[186]

UNCITRAL provided enacting states with particularly great latitude under Model Law Article 23, recognizing that nations differ on whether foreign avoidance law should govern in an action commenced domestically following recognition of a foreign proceeding.[187] In the same vein, the EU Regulation does not require Member States to defer to foreign avoidance law, although they are much more integrated economically and politically than are nations implementing a version of the Model Law.[188] Instead, the EU Regulation calls upon Member States to determine whether the transfer at issue is avoidable under both the law of the debtor's COMI and the law of the country where the avoidance action is being commenced, before permitting avoidance under foreign law.[189] As such, there is furthermore no precedent in the Model Law's legislative history for enacting states to unwaveringly defer to foreign avoidance law.[190] Rather, the spirit of the Model Law is for enacting states to incorporate Article 23 as they deem fit.[191] Whereas, Congress did just that—made policy choices in enacting Chapter 15—those choices should be preserved.

CONCLUSION

As transnational business becomes more pervasive, cross-border insolvencies will also increase. Thus, there are certain to be future occasions when non-US insolvencies will petition for Chapter 15 recognition and seek to commence an avoidance action in the United States. To ensure that case law regarding

186. *See supra* note 31 and accompanying text (showing that each country has different avoidance laws consistent with its national policies).

187. *See supra* notes 70–73 and accompanying text (explaining that Model Law Article 23's purpose is to preserve some form of avoidance relief for insolvency representatives, but that it does not define any parameters of that relief or specify issues regarding choice of law).

188. *See supra* notes 50–51 and accompanying text (discussing when the law of the debtor's COMI is displaced in an EU avoidance action).

189. *See supra* notes 50–51 and accompanying text (setting forth the EU Regulation's general choice of law rule in avoidance actions).

190. *See supra* notes 54, 89–90 (explaining that Chapter 15 is based on the Model Law, which was based on the EU Regulation).

191. *See supra* note 68 and accompanying text (explaining that enacting states incorporate the Model Law in a manner consistent with their national policies).

cross-border avoidance actions develops in a manner consistent with the intentions of Chapter 15, courts should not rely on *Condor*.

Condor is inconsistent with Chapter 15 because it ignores § 1523's requirement and misapprehends the purposes of § 1521. It also espouses a choice of law rule that is inconsistent with established US choice of law jurisprudence. Going forward, courts faced with Chapter 15 petitions seeking avoidance relief should embrace § 1523 as the only governing provision for avoidance actions and require that all such actions be brought through a plenary proceeding under Chapter 7 or 11 of the US Bankruptcy Code. At that time, courts should look to *Maxwell* in their choice of law determinations.