

LEAPING OVER THE GREAT WALL: EXAMINING CROSS-BORDER INSOLVENCY IN CHINA UNDER THE CHINESE CORPORATE BANKRUPTCY LAW

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*In these matters the only certainty is that
nothing is certain.*¹

ABSTRACT

Historically, cross-border bankruptcy has caused a great deal of confusion and uncertainty. Due to the lack of binding uniform multinational rules, in most cases, worldwide bankruptcies are inefficient and uncoordinated, and often result in inequitable distributions of the debtor's assets. While the new Chinese Corporate Bankruptcy Law is generally considered a significant step forward, it contains vague and imprecise language addressing cross-border insolvency proceedings that is likely to lead to concerns about enforceability of foreign bankruptcy judgments in China.

This Article examines the cross-border insolvency provisions of the Chinese Corporate Bankruptcy Law within the context of the primary academic approaches to cross-border insolvency: territorialism and universalism. It compares the Chinese approach to the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency and the U.S. approach under Chapter 15 of the U.S. Bankruptcy Code. The Article concludes with a proposal for adjustments to China's bankruptcy law to more effectively deal with the problems associated with cross-border insolvency cases.

I. INTRODUCTION

Historically, cross-border bankruptcy has caused a great deal of confusion and uncertainty. Due to the lack of binding uniform multinational rules, in most cases, worldwide bankruptcies are inefficient and uncoordinated, and often result in inequitable distributions of the debtor's assets. As one commentator noted, "[I]nternational insolvency is an administrative nightmare when no country holds complete jurisdiction over the debtor, its assets, or its creditors."²

Legal scholars have considered two primary approaches to deal with cross-border insolvency cases: territorialism,³ which has been the historical

1. PLINY THE ELDER, THE NATURAL HISTORY, BOOK II. AN ACCOUNT OF THE WORLD AND THE ELEMENTS 7 (John Bostock & H. T. Riley eds. 1855).

2. Evelyn H. Biery, Jason L. Bolund, & John D. Cornwell, *A Look at Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 47 B.C. L. REV. 23, 48 (2005) (citing M. Cameron Gilreath, *Recent Development Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad*, 16 BANKR. DEV. J. 399, 402 (2000)).

3. See *infra* notes 15-28 and accompanying text.

response based on national sovereignty concerns, and universalism,⁴ which is generally regarded as the most efficient approach, but one that is not necessarily politically viable. A version of universalism, called modified universalism,⁵ attempts to create a compromise between the two extremes. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border-Insolvency adopted modified universalism.⁶ UNCITRAL Model Law on Cross-Border Insolvency was incorporated into Chapter 15 of the U.S. Bankruptcy code⁷ with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.⁸

On August 27, 2006, the Standing Committee of the National People's Congress adopted the Corporate Bankruptcy Law of the People's Republic of China, which went into effect on June 1, 2007.⁹ The new law replaced the existing enterprise bankruptcy law, originally enacted in 1986. The Corporate Bankruptcy Law is a significant step forward in Chinese bankruptcy law and should provide firms seeking to invest in China with more confidence that their investments will be protected. That confidence should assist China in continuing to attract foreign economic investment activity.¹⁰ However, the Corporate Bankruptcy Law contains vague and imprecise language addressing cross-border insolvency proceedings¹¹ that could lead to concerns about enforceability of foreign bankruptcy judgments in China.

This Article examines the cross-border insolvency provisions of the Chinese Corporate Bankruptcy Law. Part II examines the primary academic approaches to cross-border insolvency, including territorialism and universalism and the UNCITRAL Model Law. Part III provides an

4. See *infra* notes 30–41 and accompanying text.

5. See *infra* notes 32–35 and accompanying text.

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

7. 11 U.S.C. § 1501-1532 (2010).

8. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 135-145.

9. [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 1.

10. See *Short Takes: Foreign Investment*, THE CHINA BUS. REV.: THE MAG. OF THE US-CHINA BUS. COUNS. (May-June 2010), <http://www.chinabusinessreview.com/public/1005/shorttakes.html> (describing the plans announced by the PRC State Council to improve the environment for foreign investment by streamlining approval processes, updating the Catalogue Guiding Foreign Investment in Industry, and promoting investment in central and western China); *China Tweaks Foreign Investment Rules*, THE CHINA BUS. REV.: THE MAG. OF THE US-CHINA BUS. COUNS. (Nov.-Dec. 2009), <http://www.chinabusinessreview.com/public/0911/cmi.html> (describing efforts by the PRC Ministry of Commerce and other agencies to encourage private foreign investment).

11. [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 5; see *infra* notes 152-157 and accompanying text.

overview of the U.S. approach under Chapter 15. Part IV examines China's Corporate Bankruptcy Law and the cross-border insolvency provisions contained therein. Part V provides a proposal for adjustments to China's bankruptcy law to deal more effectively with the problems associated with cross-border insolvency cases.

II. APPROACHES TO CROSS-BORDER BANKRUPTCY: TERRITORIALISM, UNIVERSALISM AND THE UNCITRAL MODEL LAW

Legal scholars have considered two primary approaches¹² to deal with cross-border insolvency cases: territorialism and universalism.¹³

A. Territorialism

Territorialism is the traditional approach to cross-border insolvency cases.¹⁴ Under this approach, the debtor's assets physically present in each separate country are subject to control and distribution by local courts under the local rules of that jurisdiction.¹⁵ This approach has sometimes been called the grab rule, referring to the process of selling a debtor's local assets and distributing the proceeds under the law of the local jurisdiction without regard to other international bankruptcy proceedings.¹⁶ Commentators have suggested that when a multinational company has assets in multiple countries, a particular form of territorialism, called cooperative territorialism,¹⁷ will resolve the issues involving the disposition of that firm's assets. Under this approach, bankruptcy proceedings are instituted in each country where the company has assets, the bankruptcy authorities in

12. Under a third approach called contractualism, a debtor may select in advance which approach to take for cross-border bankruptcy issues depending on the debtor's circumstances. See Robert K. Rasmussen, *Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252 (2000). Because this approach is currently entirely academic, this article does not consider it in detail.

13. Samuel L. Bufford, *Global Venue Controls are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J. 105, 108 (2005).

14. John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89, 93 (2006).

15. *Id.*; Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Business*, 98 MICH. L. REV. 2216, 2218 (2000) [hereinafter LoPucki, *Case for*]; Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L L. REV. 555, 561 (2001).

16. Kevin J. Beckering, *United States Cross-Border Corporate Insolvency: The Impact of Chapter 15 on Comity and the New Legal Environment*, 14 LAW & BUS. REV. AM. 281, 284 n.6 (2008); see Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 5 (2002).

17. LoPucki, *Case for*, *supra* note 15, at 2221; Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 742-44 (1999) [hereinafter LoPucki, *Cooperation in*].

each of those countries appoint a representative for the bankruptcy estate in that country, and the representatives then attempt to negotiate a resolution.¹⁸ If the assets of the entity are worth more on a continuing basis, the representatives will agree to combine them.¹⁹ If they cannot agree, then the rules of each jurisdiction will apply to determine how the assets in that jurisdiction are distributed.²⁰

Those who advocate the territorialism approach claim several advantages. First, because the cooperative territorialism approach is used in most of the world today,²¹ the results are predictable and align with the expectations of creditors at the time they extend credit to the debtor.²² Second, while it is possible to transfer assets from one jurisdiction to another and thereby affect the ultimate distribution, such transfers are subject to local bankruptcy rules that would limit or reverse such transfers.²³ Finally, bankruptcy representatives in each country have sufficient incentive to cooperate in order to achieve the most value for the assets of the entity on a global basis.²⁴

Conversely, critics of the territorialism approach point to the high costs involved in maintaining separate insolvency proceedings in each country where assets are located.²⁵ They also claim that the distribution results are uneven and unpredictable, increasing the cost of capital due to the uncertain outcomes of insolvency.²⁶ Furthermore, critics claim that incentives exist, for both the debtor and the various creditors, to engage in strategic positioning to enhance their individual interests at the expense of the general creditors of the insolvent debtor.²⁷ Finally, while cooperation may be logical, it may not be authorized under the bankruptcy laws of a particular country involved. Additionally, the representative or bankruptcy court in a given country may choose not to cooperate even if it makes

18. LoPucki, *Case for, supra* note 15, at 2219.

19. *Id.*

20. *Id.*

21. Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 162 (2005) [hereinafter LoPucki, *Unravels*].

22. Edward S. Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43, 57 (2008/2009).

23. *Id.* at 58. See, e.g., 11 U.S.C. § 547(b) (2010) (allowing the bankruptcy trustee under U.S. law to avoid most transfers of property to or for the benefit of a creditor for a debt owed by the debtor before the transfer made while the debtor was insolvent and within the ninety day period before the filing of the bankruptcy petition); see also [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 31-34 (providing the receiver under Chinese bankruptcy law to recover improperly transferred property).

24. Adams & Fincke, *supra* note 22, at 57 (citing LoPucki, *Unravels, supra* note 21, at 161-62).

25. Bufford, *supra* note 13, at 105.

26. *Id.*

27. *Id.*

economic sense to do so.²⁸

B. Universalism

Universalism takes a very different approach to the international insolvency problem.²⁹ Under this approach, a single bankruptcy court in the debtor's home country has jurisdiction over the debtor's worldwide assets; those assets are distributed in accordance with the laws of that supervising jurisdiction.³⁰ Based solely on economic analysis, this approach makes sense because it will minimize the costs inherent in the insolvency proceedings and make the most efficient distribution of the debtor's assets.³¹ Despite these economic advantages, this pure version of universalism is not viable due to "the practical recognition of the enduring differences among political and economic systems, legal regimes, and court systems, as well as among enforcement of those regimes."³² Thus, advocates of universalism generally endorse a modified version of the approach in which local courts have some discretion as to whether compliance with the requests of the debtor's home country is appropriate. Courts base the decision on an analysis of whether compliance alters the legal entitlements of the parties or offends the country's public policy.³³ Under this approach, a single main insolvency case is maintained in the debtor's home country, governed by the home country laws. Secondary, or ancillary, cases are maintained in other countries where the debtor's assets exist.³⁴ In these ancillary cases, courts apply local law and retain discretion to evaluate the fairness of the main case proceedings and to protect the interests of local creditors.³⁵

Supporters of universalism point to a more efficient allocation of capital, lower costs due to a reduction in the number of separate bankruptcy proceedings, avoidance of forum shopping, facilitated reorganizations, and

28. Adams & Finke, *supra* note 22, at 59.

29. See generally 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 (2008) (discussing the theory and practice underlying the territorialism-universalism debate).

30. *Id.*; Adams & Finke, *supra* note 22, at 48.

31. Adams & Finke, *supra* note 22, at 49; see Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 N.Y.U. J. INT'L L. & POL. 787, 788 (2000); Robert K. Rasmussen, *A New Approach to International Insolvencies*, 19 MICH. J. INT'L L. 1, 6-10 (1997).

32. Adams & Fincke, *supra* note 22, at 48.

33. *Id.* at 48-49. This is the approach taken by the United States under the recently enacted Chapter 15 of the U.S. Bankruptcy Code. 11 U.S.C. § 1501-1532 (2010); see *infra* notes 79-111 and accompanying text.

34. Adams & Fincke, *supra* note 22, at 50; Jay L. Westbrook, *A Global Solution to International Default*, 98 MICH. L. REV. 2276, 2300-01 (2000).

35. Westbrook, *supra* note 34, at 2301.

greater clarity and certainty to interested parties.³⁶ They also claim that universalism promotes fairness and equality in the distribution of assets to creditors by administering the case in a single central forum.³⁷

However, critics suggest that governments are reluctant to adopt universalism because it requires giving up a degree of national sovereignty, and generally countries tend to be unwilling to have foreign laws apply within their territory.³⁸ Additionally, under the universalism approach, because most large multinational companies are based in developed countries, filing for bankruptcy protection would result in the laws of developed countries being applied over the laws of less-developed countries.³⁹ Finally, critics urge that it is not always clear which jurisdiction is the home country for corporations that have business interests worldwide.⁴⁰ In addition to the place of incorporation, other factors must be considered when determining the home country, including location of assets and creditors and the location where the debtor's business is primarily conducted.⁴¹

C. *The UNCITRAL Model Law*

The United Nations General Assembly established UNCITRAL in 1966⁴² "to further the progressive harmonization and unification of the law of international trade."⁴³ In an effort to promote consistency in international insolvency proceedings, UNCITRAL adopted the UNCITRAL Model Law on Cross-Border Insolvency.⁴⁴ The UNCITRAL Model Law was designed to: 1) promote cooperation between courts of different countries in cross-border insolvency; 2) provide greater legal certainty for trade and investments; 3) provide fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and the debtor; 4) protect and maximize the value of the debtor's assets; and 5) facilitate

36. Adams & Fincke, *supra* note 22, at 52.

37. *Id.*

38. *Id.* at 53; Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31, 46 (2001). For a detailed discussion of these arguments, see Chung, *supra* note 14, at 93.

39. Adams & Fincke, *supra* note 22, at 54.

40. *Id.*

41. *Id.* (citing *Barclays Bank v. Maxwell Commc'n Corp.*, 170 B.R. 800, 817, n.22 (Bankr. S.D.N.Y. 1994)).

42. G.A. Res. 2205 (XXI), U.N. Doc. A/RES/2205 (Dec. 17, 1966).

43. See *Origin, Mandate and Competition, About UNCITRAL*, UNCITRAL, <http://www.uncitral.org/uncitral/en/about/origin.html> (last visited Dec. 21, 2010). UNCITRAL's website indicates that "[t]he Commission has since come to be the core legal body of the United Nations system in the field of international trade law." *Id.*

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

the rescue of financially troubled businesses.⁴⁵ The law addresses the cross-border insolvency problem by providing foreign assistance for an insolvency proceeding taking place in an enacting country, foreign representatives with access to the courts of the enacting country, and recognition of foreign proceedings, cross-border cooperation, and coordination of concurrent insolvency proceedings.⁴⁶ Both the International Monetary Fund and the World Bank have recommended that countries adopt the UNCITRAL Model Law.⁴⁷ Eighteen countries have adopted legislation based on UNCITRAL Model Law provisions.⁴⁸ While a detailed discussion of all the provisions of the UNCITRAL Model Law is beyond the scope of this Article, a brief discussion of several points is useful in understanding U.S.⁴⁹ and Chinese bankruptcy laws.⁵⁰

Under the UNCITRAL Model Law, a foreign representative is provided direct access to the courts of the enacting State.⁵¹ In addition to this general right of access, the foreign representative may commence a local insolvency proceeding,⁵² participate in an insolvency proceeding,⁵³ or intervene in proceedings concerning individual actions in the enacting State that affect the debtor or its assets.⁵⁴ Likewise, the UNCITRAL Model Law authorizes the courts of the enacting State to seek assistance from foreign

45. *Id.*

46. Biery, Boland & Cornwell, *supra* note 2, at 50.

47. See INT'L MONETARY FUND LEGAL DEP'T, *Cross-Border Insolvency Issues, in ORDERLY & EFFECTIVE INSOLVENCY PROCEDURES: KEY ISSUES* (1999), available at <http://www.imf.org/external/pubs/ft/orderly/index.htm>; WORLD BANK PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS (2001), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/11/16/000160016_20041116125658/Rendered/PDF/306470v.10DC200100008.pdf.

48. See Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, Annex, U.N. Doc. A/RES/52/158/Annex (Jan. 30, 1998). Countries adopting the Model Law include Eritrea (1998); Japan, Mexico and South Africa (2000); Montenegro (2002); British Virgin Islands, Poland and Romania (2003); Serbia (2004); United States (2005); Columbia, Great Britain, New Zealand and Republic of Korea (2006); Slovenia (2007); Australia (2008); and Canada and Mauritius (2009). Rep. of the Comm'n on Int'l Trade Law, June 21-July 9, 2010, U.N. DOC A/CN.9/694; 43d Sess. (2010). See generally Jenny Clift, *The UNCITRAL Model Law on Cross Border Insolvency—A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 TUL. J. INT'L & COMP. L. 307, 333-39 (2004) (discussing the legislation enacted by various countries).

49. See *infra* notes 80-111 and accompanying text.

50. See *infra* notes 112-157 and accompanying text.

51. Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, Annex, art. 9, U.N. Doc. A/RES/52/158 (Jan. 30, 1998). These types of requests are commonly referred to as inbound requests.

52. *Id.* art. 11.

53. *Id.* art. 12.

54. *Id.* art. 24.

jurisdictions on behalf of a local insolvency proceeding.⁵⁵

The UNCITRAL Model Law addresses two kinds of foreign proceedings: foreign main proceedings and foreign non-main proceedings.⁵⁶ A foreign main proceeding takes place in the state where the debtor's "centre of main interests" is located.⁵⁷ Centre of main interests is not defined in the UNCITRAL Model Law. But the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Bankruptcy⁵⁸ indicates that the term, drawn from the European Union Convention on Insolvency Proceedings,⁵⁹ is meant to "correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."⁶⁰ A foreign non-main proceeding is any foreign proceeding, other than a main proceeding, taking place in a state where the debtor has a place of operations and carries out a non-transitory economic activity within that place of operations.⁶¹

In a foreign main proceeding, the court may issue relief including a stay of actions of individual creditors against the debtor, a stay of enforcement proceedings against the debtor's assets, and a suspension of the debtor's right to transfer or encumber assets.⁶² The granting of exceptions to this type of relief is left to the laws of the enacting State.⁶³ In a foreign non-main proceeding, the court may grant the same type of relief upon application from the foreign representative.⁶⁴ The court may also grant additional discretionary relief for the benefit of a foreign proceeding, whether main or non-main, at the request of the foreign representative.⁶⁵ This additional relief may include appointing an administrator for the debtor's assets, providing access to information about the assets and liabilities of the debtor, and any other relief available under the laws of the

55. *Id.* art. 25. These requests are often referred to as outbound requests.

56. *Id.* art. 2.

57. *Id.* art. 2(b).

58. U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL) MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Sales No. E.99.V.3 (1997) available at <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> [hereinafter GUIDE TO ENACTMENT]. The Guide to Enactment was prepared by the Secretariat at the request of UNCITRAL and was designed to provide background and explanatory information in order to make the UNCITRAL Model Law a more effective tool for legislators. Guide to Enactment, paras. 9-10.

59. *Id.* paras. 72-73.

60. Council Regulations (EC) 1346/2000, 2000 O.J. (L 160) 1, para. 13.

61. Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, Annex, art. 2(c), 2(f), U.N. Doc. A/RES/52/158/Annex (Jan. 30, 1998).

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

63. *Id.* art. 20(2).

64. *Id.* art. 21(1)(a)-(c).

65. *Id.* art. 21.

enacting State.⁶⁶

The UNCITRAL Model Law also contains articles directing both the courts of the enacting State and the person or body administering the insolvency proceedings in the enacting State to cooperate to the maximum extent possible. These articles also authorize them to communicate directly with foreign courts or foreign representatives.⁶⁷ Such cooperation may be implemented by any appropriate means, including communication of information, coordination of administration and supervision of the debtor's assets and affairs, approval or implementation of agreements concerning the coordination of proceedings, coordination of concurrent proceedings regarding the same debtor,⁶⁸ and other forms or examples of cooperation the enacting State may wish to add.⁶⁹ These cooperation provisions are intended to address a perceived gap in many national bankruptcy laws by providing express authorization for courts to extend cooperation in the areas covered.⁷⁰

III. OVERVIEW OF THE U.S. APPROACH TO CROSS-BORDER BANKRUPTCY

A. 11 U.S.C. § 304

Until recently, U.S. bankruptcy law addressed international bankruptcy proceedings through 11 U.S.C. § 304.⁷¹ The purpose of 11 U.S.C. § 304 was to “administer assets located in [the United States], to prevent dismemberment by local creditors of assets located here, or for other appropriate relief.”⁷² Under this provision, a foreign representative in a foreign insolvency case could file an ancillary proceeding in U.S. bankruptcy court. The ancillary case allowed a foreign representative to gather U.S. assets, obtain discovery, and otherwise protect and facilitate administration of the foreign bankruptcy case.⁷³ Once the ancillary case was filed, the bankruptcy court could order “appropriate relief,”⁷⁴ thus providing bankruptcy judges with broad authority over U.S. insolvency cases.

66. *Id.* art. 21(1)(b)-(d).

67. *Id.* arts. 25(1)-(2), 26(1)-(2).

68. The UNCITRAL Model Law also provides more specific suggestions concerning the coordination of concurrent proceedings involving the debtor. *See* Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, Annex, arts. 28-32, U.N. Doc. A/RES/52/158/Annex (Jan. 30, 1998).

69. *Id.* art. 27(a)-(e).

70. GUIDE TO ENACTMENT, *supra* note 58, paras. 39-41.

71. 11 U.S.C. § 304 (repealed 2005).

72. H.R. Rep. No. 95-595, at 324-25 (1977).

73. Adams & Fincke, *supra* note 22, at 73 (citing ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY, ¶ 304.04[1] (15th ed. 2004)).

74. 11 U.S.C. § 304(b)(3) (repealed 2005).

In determining appropriate relief, the court was required to consider six factors: 1) just treatment of all claims holders in the bankrupt estate, 2) protection of U.S. claims holders against prejudice and inconvenience in the foreign proceeding, 3) prevention of preferential or fraudulent dispositions of property in the estate, 4) distribution of the proceeds of the estate substantially in accordance with U.S. bankruptcy law, 5) comity, and 6) provision of an opportunity for a fresh start for the individual (if appropriate).⁷⁵ Inherent conflicts are contained in these factors. For example, distributing the estate according to U.S. bankruptcy law and granting comity to the foreign bankruptcy law are two factors likely to conflict. In applying these two factors, U.S. courts sometimes favored the interests of U.S. creditors over foreign creditors and debtors,⁷⁶ inconsistently granting relief to foreign representatives.⁷⁷

B. Chapter 15

In 2005, because of the inconsistent application of 11 U.S.C. § 304 and general dissatisfaction with its results,⁷⁸ Congress repealed 11 U.S.C. § 304 and adopted a new chapter of the bankruptcy code entitled Ancillary and Other Cross-border Cases (Chapter 15) codified at 11 U.S.C. § 1501-1532.⁷⁹ This new chapter was specifically designed to incorporate the UNCITRAL Model Law.⁸⁰ Chapter 15 applies in four cases: 1) a foreign court or representative seeks assistance in the United States in connection with a foreign proceeding; 2) assistance is sought in a foreign country in connection with a U.S. bankruptcy case; 3) a foreign case and a U.S. bankruptcy case involving the same debtor are pending concurrently; or 4)

75. 11 U.S.C. § 304(c)(1)-(6) (repealed 2005).

76. Adams & Fincke, *supra* note 22, at 73 (citing Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329, 340 (1990), and Anne Norby Nielsen, Note, *Section 304 of the Bankruptcy Code: Has it Fostered the Development of an "International Bankruptcy System"?*, 22 COLUM. J. TRANSNAT'L L. 541, 554 (1984)).

77. See Kevin J. Beckering, *United States Cross-Border Corporate Insolvency: The Impact of Chapter 15 on Comity and the New Legal Environment*, 14 LAW & BUS. REV. AM. 281, 291-299 (2008) (discussing the inconsistent application of 11 U.S.C. § 304 (repealed 2005)). See also Lesley Salafia, *Cross-Border Insolvency Law in the United States and its Application to Multinational Corporate Groups*, 21 CONN. J. INT'L L. 297, 305-316 (2006).

78. See Jennifer Greene, *Bankruptcy Beyond Borders: Recognizing Foreign Proceedings in Cross-Border Insolvencies*, 30 BROOK. J. INT'L L. 685 (2005) (critiquing 11 U.S.C. § 304 (repealed 2004) and discussing how the then proposed Chapter 15 could provide a solution).

79. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. See Aaron L. Hammer & Matthew E. McClintock, *Understanding Chapter 15 of the United States Bankruptcy Code: Everything You Need to Know About Cross-Border Insolvency Legislation in the United States*, 14 LAW & BUS. REV. AM. 257 (2008) (discussing Chapter 15).

80. 11 U.S.C. § 1501(a) (2010).

creditors in a foreign country have an interest in requesting the commencement of, or participation in, a U.S. bankruptcy case.⁸¹

1. Commencement of the Ancillary Case and Provisional Relief

An ancillary case under Chapter 15 is commenced when a foreign representative⁸² files a petition⁸³ for recognition of a foreign proceeding⁸⁴ under 11 U.S.C. § 1515.⁸⁵ Once the petition is filed, the foreign representative may request, and the court may grant, provisional relief to protect the assets of the debtor or interests of the creditors.⁸⁶ Unless specifically extended, any provisional relief granted terminates when the petition for recognition is granted.⁸⁷

2. Recognition of the Foreign Proceeding and Granting Relief

Once the petition is filed, the U.S. court must enter an order recognizing the foreign proceeding if three requirements are met: 1) the foreign proceeding to be recognized is a foreign main proceeding or a foreign non-main proceeding under Chapter 15, 2) the foreign representative applying for recognition is a person or body, and 3) the

81. 11 U.S.C. § 1501(b)(1)-(4) (2010).

82. A foreign representative is “a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs as a representative of such foreign proceeding.” 11 U.S.C. § 101(24) (2010). Chapter 15 specifically provides that filing a petition under 11 U.S.C. § 1515 does not, by itself, subject the foreign representative to the jurisdiction of any U.S. court for any other purpose. 11 U.S.C. § 1510 (2010).

83. The petition must be accompanied by a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative, a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative, or other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative. 11 U.S.C. § 1515(b)(1)-(3) (2010). These documents must be translated into English. 11 U.S.C. § 1515(d) (2010). Also, the petition must be accompanied by a statement identifying all foreign proceedings regarding the debtor known to the foreign representative. 11 U.S.C. § 1515(c) (2010).

84. A foreign proceeding is “a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which the proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.” 11 U.S.C. § 101(23) (2010).

85. 11 U.S.C. § 1504 (2010).

86. 11 U.S.C. § 1519 (2010). The relief that may be granted includes staying execution against the debtor’s assets, entrusting administration or realization of the debtor’s assets in the U.S. to the foreign representative or another person authorized by the court to protect and preserve the value of assets that are perishable, susceptible to devaluation or otherwise in jeopardy. § 1519(a)(1)-(2).

87. § 1519(b).

petition meets the requirements of 11 U.S.C. § 1515.⁸⁸ Under Chapter 15, a foreign main proceeding is a foreign proceeding pending in the country where the debtor has the center of its main interests.⁸⁹ A foreign non-main proceeding is a foreign proceeding other than a foreign main proceeding pending in a country where the debtor has an establishment.⁹⁰

Once the case is recognized as a foreign main proceeding, 11 U.S.C. § 1520 provides the foreign representative with certain relief, including an automatic stay with regard to the debtor and its property within the United States, the right to operate the debtor's business, and the right to deal with the debtor's property in the same manner as a trustee or debtor-in-possession in the United States.⁹¹

In both foreign main proceedings and foreign non-main proceedings, the court may grant additional relief at the request of the foreign representative when necessary to effectuate the purpose of Chapter 15 and to protect the assets of the debtor or interests of the creditors.⁹² This additional relief may include: 1) staying any actions concerning the debtor's assets, rights, obligations, or liabilities; 2) staying execution against the debtor's assets to the extent not already stayed under 11 U.S.C. § 1520(a); 3) suspending the right to transfer, encumber or otherwise dispose of the debtor's assets; 4) providing for examination of witnesses, taking of evidence or delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities; entrusting the debtor's assets within the United States to the foreign representative or another person authorized by the court; 5) extending the provisional relief granted under 11 U.S.C. § 1519(a); and 6) granting any additional relief available to a trustee, with certain exceptions.⁹³ In granting such relief in a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under U.S. law, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.⁹⁴

3. *Cooperation and Administration of Concurrent Proceedings*

Chapter 15 also has specific modified universalism provisions that impart cooperation with foreign courts and foreign representatives, as well

88. 11 U.S.C. § 1517(a) (2010).

89. 11 U.S.C. § 1502(4) (2010). The definition of foreign main proceeding and foreign non-main proceeding are based on, though not identical to, the definitions of those terms under the UNCITRAL Model Law. *See supra* notes 56-61 and accompanying text.

90. 11 U.S.C. § 1502(5) (2010). An establishment is defined as any place of operation where the debtor carries out a non-transitory economic activity. 11 U.S.C. § 1502(2) (2010).

91. 11 U.S.C. § 1520(a)(1)-(4) (2010).

92. 11 U.S.C. § 1521(a) (2010).

93. § 1521(a)(1)-(7).

94. 11 U.S.C. § 1521(c) (2010).

as procedures governing the administration of concurrent proceedings.⁹⁵ Consistent with the goals set forth in 11 U.S.C. § 1501, the U.S. bankruptcy court is directed to cooperate, to the maximum extent possible, with a foreign court or foreign representative, either directly or through the bankruptcy trustee.⁹⁶ The U.S. court is authorized to communicate directly with, or request information or assistance from, a foreign court or foreign representative, subject to the rights of notice and participation for a party in interest.⁹⁷ The same requirement of cooperation and authorization for communication applies to the bankruptcy trustee or other person authorized by the court, subject to the bankruptcy court's supervision.⁹⁸ These cooperation mandates may be implemented by "any appropriate means," including appointment of a person or body to act at the discretion of the court, communication of information by any means considered appropriate by the court, coordination of the administration of the debtor's assets and affairs, approval or implementation of agreements concerning such coordination, and coordination of concurrent proceedings regarding the debtor.⁹⁹

When a foreign proceeding and a case under Chapter 15 concurrently regard the same debtor, the bankruptcy court is directed to seek cooperation and coordination as described above.¹⁰⁰ Additionally, the court is also subject to specific rules regarding coordinating the U.S. and foreign cases.¹⁰¹

When the U.S. case is pending at the time the petition for recognition of the foreign proceeding is filed, any provisional or permanent relief granted must be consistent with the relief granted in the U.S. bankruptcy case.¹⁰² Also, 11 U.S.C. § 1520 will not apply to provide the relief described within that section,¹⁰³ even if the foreign proceeding is recognized as a foreign main proceeding.¹⁰⁴

When U.S. Chapter 15 commences after recognition of the foreign proceeding or after the filing date of the petition for recognition, the relief granted under 11 U.S.C. §§ 1519 and 1521 must be reviewed by the court and either modified or terminated if it is inconsistent with the U.S. case.¹⁰⁵

95. These provisions parallel the UNCITRAL Model Law provisions. See Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, Annex, arts. 25-32, U.N. Doc. A/RES/52/158/Annex (Jan. 30, 1998).

96. 11 U.S.C. § 1525(a) (2010).

97. 11 U.S.C. § 1525(b) (2010).

98. 11 U.S.C. § 1526(a)-(b) (2010).

99. 11 U.S.C. § 1527(1)-(5) (2010).

100. 11 U.S.C. § 1529 (2010).

101. See *infra* notes 102-112 and accompanying text.

102. § 1529(1)(A).

103. See *supra* note 91 and accompanying text.

104. 11 U.S.C. § 1529(1)(B) (2010).

105. § 1529(2)(A).

Further, if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in 11 U.S.C. § 1520(a) must be modified or terminated if it is inconsistent with the relief granted in the U.S. case.¹⁰⁶ However, in granting, extending, or modifying relief to the foreign representative in a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under U.S. law, should be administered or concern information required in the U.S. case.¹⁰⁷

Finally, in achieving cooperation and coordination required under Chapter 15, the court may, after proper notice and hearing, dismiss the U.S. case or suspend all U.S. proceedings if the interests of creditors and the debtor or the purposes of Chapter 15 would be better served by dismissal or suspension.¹⁰⁸

IV. CROSS-BORDER BANKRUPTCY UNDER CHINA'S CORPORATE BANKRUPTCY LAW

A. Overview of China's Corporate Bankruptcy Law¹⁰⁹

On August 27, 2006, the Standing Committee of the National People's Congress adopted the Corporate Bankruptcy Law of the People's Republic of China.¹¹⁰ The new law, effective June 1, 2007, replaced the existing enterprise bankruptcy law enacted in 1986.¹¹¹ China's new bankruptcy law is "formulated in order to regulate the procedure of corporate bankruptcy, to wind up debts and indebtedness fairly, to protect the legitimate rights and interests of creditors and debtors, and to maintain the order of the socialist market economy."¹¹² Modeled after western bankruptcy laws and standards,¹¹³ the new Corporate Bankruptcy Law

106. § 1529(2)(B).

107. § 1529(3).

108. 11 U.S.C. § 1529(4) (2010) (referencing the relief available under 11 U.S.C. § 305(a)(1)-(2)(2010)).

109. This overview is largely drawn from the author's previous work in this area. See Steven J. Arsenault, *The Westernization of Chinese Bankruptcy: An Examination of China's New Corporate Bankruptcy Law through the Lens of the UNCITRAL Legislative Guide to Insolvency Law*, 27 PENN ST. INT'L L. REV. 45 (2008) (providing a detailed examination of China's Corporate Bankruptcy Law and a comparison to U.S. bankruptcy law).

110. [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 1.

111. See Adam Li, *China: Bankruptcy and Insolvency Law and Policy*, in THE LAW OF INTERNATIONAL INSOLVENCIES AND DEBT RESTRUCTURINGS 127-141 (James R. Silkenat & Charles D. Schmerler, eds., 2006) (discussing the prior Chinese bankruptcy law).

112. *Id.*

113. Ann vom Eigen, *China's New Bankruptcy Law Encourages Investment*, 25-OCT. AM. BANKR. INST. J. 8 (2006); Mary Swanton, *Bankruptcy: China Passes Its First Unified Bankruptcy Law*, INSIDE COUNS., Nov. 2006, at 68. Western bankruptcy law has been used as the basis for other countries' bankruptcy laws. For example, Chapter 11 of the U.S.

represents a significant step forward in Chinese bankruptcy law.

The new bankruptcy law applies broadly to all types of business enterprises in China including most state-owned¹¹⁴ and non-state-owned enterprises.¹¹⁵ The new law provides for either a voluntary bankruptcy filing by the debtor or an involuntary bankruptcy filing by a creditor through an application to the People's Court¹¹⁶ in the debtor's place of residence.¹¹⁷ Under the new law, in order to voluntarily file for bankruptcy, the business entity must either: 1) be unable to repay debts that fall due and have insufficient assets to repay debts in full, or 2) must be clearly insolvent.¹¹⁸ A debtor meeting these basic filing criteria may submit a bankruptcy application to the People's Court.¹¹⁹ However, an involuntary filing by a creditor is held to a lower filing standard; a creditor need merely show that the debtor is unable to repay the debt due.¹²⁰ The new law provides three different types of bankruptcy proceedings: reorganization, settlement, and liquidation.¹²¹ All three types are available to a debtor filing for voluntary bankruptcy protection, but only reorganization and liquidation are available in an involuntary proceeding.¹²²

Once an application is filed with the People's Court in China, the court has fifteen days to review the application and determine whether to accept or reject the filing.¹²³ If the People's Court accepts the

Bankruptcy Code served as the basis for amendments to the bankruptcy law in France, Japan and Korea in recent years. See Sandor E. Schick, *Globalization, Bankruptcy and the Myth of the Broken Bench*, 80 AM. BANKR. L.J. 219 (2006).

114. Approximately 2000 state-owned enterprises are excluded from the scope of the new bankruptcy law designated by the State Council. These are primarily business entities engaged in military or mining operations. See James H.M. Sprayregent & Jonathan P. Friedland, *The Middle Kingdom's Chapter 11? China's New Bankruptcy Law Comes into Sight*, 23-JAN AM. BANKR. INST. J. 34 (2005).

115. The new law applies to all "[c]orporate legal persons." [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 2.

116. *Id.* art. 7.

117. *Id.* art. 3.

118. *Id.* art. 2. However, the new law does not explicitly define the term "insolvent." See Arsenaault, *supra* note 109, at 84-85 (discussing the issues raised this lack of definition).

119. [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 7.

120. *Id.*

121. *Id.* The addition of provisions allowing for reorganization is a significant feature of the new Chinese bankruptcy law and is consistent with prevailing international practice. See Weijing Wu, *Commencement of Bankruptcy Proceedings in China Key Issues in the Proposed New Enterprise Bankruptcy and Reorganization Law*, 35 VICT. U. WELLINGTON L. REV. 239, 249 (2004).

122. [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 7.

123. The law refers to this decision as "taking cognizance of a bankruptcy application." *Id.* arts. 10-11.

application,¹²⁴ all property belonging to the debtor and any property later obtained becomes property of the bankruptcy estate, subject to the jurisdiction of the court.¹²⁵ Additionally, any repayment by the debtor to an individual creditor is invalid.¹²⁶

Under the Corporate Bankruptcy Law, the court must appoint a professional and independent administrator. This receiver has broad powers to manage the debtor's property and business affairs.¹²⁷ The receiver has the right not only to decide day-to-day expenses and other necessary expenses of the debtor, but also to manage, distribute, and dispose of the debtor's property and estate.¹²⁸ The receiver may also recover improperly transferred property.¹²⁹ Specifically, the receiver may ask the court to nullify transactions committed up to one year prior to the bankruptcy filing if the transactions involved transfers of property without compensation, transactions at a clearly unreasonable price, provisions of guarantees for debt without property, repayment of debts not yet due, or abandonment of debt.¹³⁰ The receiver may also petition the court to nullify any repayment to an individual creditor made within six months prior to filing if the debtor was insolvent. However, a receiver may not petition to nullify transactions or repayments that benefited the debtor's property and the bankruptcy estate.¹³¹ Finally, any action to conceal and transfer the debtor's property for purpose of evasion, including fabrication of indebtedness or admitting false indebtedness, shall be declared invalid.¹³²

124. It is the acceptance of the bankruptcy application by the court, rather than its initial filing, that has legal effect under the Chinese law. Unlike U.S. law, which provides for an automatic stay of proceedings and other actions by creditors against the debtor upon filing of the bankruptcy petition, *see* 11 U.S.C. § 362 (2010), under the Chinese law, it is the court's acceptance of the bankruptcy application that triggers an automatic stay of creditor's actions against the debtor and a stay of execution proceedings against the debtor's assets. [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 19-20. Even then, the automatic stay only applies until a receiver is appointed to manage the debtor's property. New civil suits can be commenced against the debtor after the bankruptcy is commenced by filing suit in the People's Court that has jurisdiction over the debtor's bankruptcy proceeding. [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 20.

125. [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 30.

126. *Id.* art. 16.

127. *Id.* arts. 22, 25. The receiver is required to take over the property, books and records of the debtor; investigate and report on the debtor's property; manage the affairs and day-to-day expenses of the debtor; manage, distribute and dispose of the debtor's property; and represent the debtor in legal proceedings. *Id.* art. 25.

128. *Id.* art. 25(4), (6).

129. *Id.* art. 34.

130. *Id.* art. 31.

131. *Id.* art. 32.

132. *Id.* art. 33.

In each of the above cases, the receiver has the power to recover the debtor's property obtained by improper acts.¹³³

Once the court cognizes the bankruptcy, it must determine a time limit for creditors to declare their debts. The time limit must be between thirty days and three months,¹³⁴ and creditors are required to declare their debts within the time limit specified.¹³⁵ Creditors must specify in writing the amount of their debts, any relevant evidence of the debts, and whether the debts are secured by property.¹³⁶ If a creditor fails to declare his or her debt within the specified time limit, he or she may make a late declaration before the final distribution of the bankruptcy estate.¹³⁷ However, the creditor will not be given any supplementary distribution for distributions already made. The costs and expenses of examining and confirming the late filing will be the responsibility of the creditor.¹³⁸ Moreover, a creditor who has not declared his or her debt will not be allowed to exercise creditor rights under the Corporate Bankruptcy Law.¹³⁹

Once the declaration of debts is received, the receiver must keep records of the declarations, scrutinize the debts declared, and prepare a statement of debts¹⁴⁰ to be presented for examination and verification at the first creditors' meeting.¹⁴¹ Either the debtor or creditors may bring suit in the People's Court if they disagree with the statement of debts prepared by the receiver.¹⁴² Under the new law, claims of creditors holding the equivalent of a security interest in a specific property generally receive first priority against that specific property.¹⁴³ Priority is then given to bankruptcy costs and expenses. These consist of expenses for litigation of the bankruptcy estate, expenses for managing and disposing of the debtor's property, and fees and expenses of the receiver.¹⁴⁴ Secondary priority is given to debts for the common benefit. These debts include contracts into which the receiver has entered, debts incurred by management without cause, debts incurred as a result of unjust benefit to the debtor, and costs for personal injury caused by the receiver or the property and estate of the

133. *Id.* art. 34.

134. *Id.* art. 45.

135. *Id.* art. 48.

136. *Id.* art. 49.

137. *Id.* art. 56.

138. *Id.*

139. *Id.*

140. *Id.* art. 57.

141. *Id.* art. 58.

142. *Id.*

143. *Id.* art. 109; Dexter Roberts, *China's New Mantra: Creditors First*, BUS. WK. (Aug. 31, 2006), http://www.businessweek.com/globalbiz/content/aug2006/gb20060830_421789.htm?campaign_id=rss_topStories.

144. [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 41.

debtor.¹⁴⁵ Wages and other funds owed to staff and employees receive next priority¹⁴⁶ followed by social insurance expenses owed by the debtor and, finally, ordinary unsecured debts.¹⁴⁷ When assets are insufficient to repay the claims in full within each preference category, they are paid pro rata.¹⁴⁸

B. The Corporate Bankruptcy Law and Cross-Border Bankruptcies

The Corporate Bankruptcy Law includes two provisions dealing with international or cross-border bankruptcies, addressing both the application of China's bankruptcy law outside of China and the recognition of the judgments of foreign bankruptcy courts in China. Outside China, the Corporate Bankruptcy Law makes clear that bankruptcy proceedings initiated in China are binding on the debtor's property and estate situated outside of China.¹⁴⁹ Thus, the new law specifically provides for extraterritorial application of its provisions.

Regarding the recognition of foreign bankruptcy court judgments in China, the new law provides that judgments and decisions in foreign courts involving the debtor's property or estate may be recognized by the People's Court.¹⁵⁰ However, in order to do so, the People's Court must scrutinize the judgment in accordance with applicable international treaties. It may recognize and enforce such judgments when the court determines that it does not "impair the security and sovereignty of the country and social and public interests or the legitimate rights and interests of the debtors within the People's Republic of China."¹⁵¹

While much of the Corporate Bankruptcy Law is written in terms of requirements, including the provision that bankruptcy proceedings in China *are* binding on the debtor's property outside of China,¹⁵² the language involving recognition of foreign judgments is permissive – providing that the foreign judgment *can* be recognized and that after scrutiny the People's Court *may* recognize the judgment.¹⁵³ This language is extremely vague and imprecise, and it may lead to a concern regarding the enforceability of

145. *Id.* arts. 42, 113.

146. Prioritization of claims is a significant change from China's prior bankruptcy law, particularly with regard to claims by employees. Under China's former law, employee claims took priority over the claims of secured creditors. See John Rapisardi & Deryck Palmer, *Precedent Needed*, 26 INT'L FIN L. REV. 4 (2007); vom Eigen, *supra* note 113. See Arsenault, *supra* note 109, at 57-58 (discussing in more detail the political compromises necessary to implement this change).

147. [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 113.

148. *Id.*

149. *Id.* art. 5.

150. *Id.*

151. *Id.*

152. *Id.* art. 5.

153. *Id.*

foreign bankruptcy judgments in China. This concern regarding recognizing foreign judgments is precisely the kind of issue that cross-border insolvency proceedings face in general, considering that “international insolvency is an administrative nightmare when no country holds complete jurisdiction over . . . the debtor, its assets, or its creditors.”¹⁵⁴

While the language is imprecise, China’s Corporate Bankruptcy Law contains elements of both universalism and modified universalism.¹⁵⁵ For cases filed in China involving Chinese business entities, China takes jurisdiction over the debtor’s worldwide assets and their distribution.¹⁵⁶ For cases involving foreign companies with assets in China, the new law seems to assume that the main insolvency case will be maintained in the debtor’s home country. It also assumes China will maintain an ancillary or secondary case subject to the requirement that enforcement not offend Chinese law, Chinese security, sovereignty and public interests, or the interests of the debtor in China.¹⁵⁷ Thus, the arguments of supporters and critics of the universalism and modified universalism approaches discussed above¹⁵⁸ would also apply to the cross-border insolvency provisions of China’s Corporate Bankruptcy Law.

V. PROPOSAL FOR ADJUSTMENTS TO CHINA’S LAW

China’s Corporate Bankruptcy Law incorporates theories of universalism and modified universalism in its approach to cross-border insolvency cases. The Corporate Bankruptcy Law largely follows the guidance offered by the UNCITRAL Model Law. Having examined the new law in this area, two proposed adjustments are appropriate for China’s Corporate Bankruptcy Law: clarify the language of Article 5 and add cooperation language.

A. Clarify the Language of Article 5 of the Corporate Bankruptcy Law

The Corporate Bankruptcy Law’s permissive language concerning the recognition of foreign bankruptcy judgments in China is extremely vague and imprecise.¹⁵⁹ Foreign parties, already uneasy about the application of

154. Biery, Bolund & Cornwell, *supra* note 2, at 48 (citing Gilreath, *supra* note 2, at 401).

155. *See supra* notes 30-35 and accompanying text.

156. *See* [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 27, 2006, effective June 1, 2007) art. 5.

157. *Id.*

158. *See supra* notes 36-41 and accompanying text.

159. *See supra* notes 149-150 and accompanying text.

China's laws to foreign entities,¹⁶⁰ are likely to view this language with concern. This concern has the potential to undermine both the goals of cooperation under the UNCITRAL Model Law and the foreign economic investment activity that China seeks. As one commentator indicated, effective and predictable rules of insolvency create a better environment for foreign direct investment, allowing lenders and international investors to more accurately analyze and assess risks associated with specific transactions.¹⁶¹

China should revise the Corporate Bankruptcy Law to provide the court with more specific guidance about the exercise of its discretion in enforcing foreign bankruptcy judgments. The language most likely to concern foreign investors is the reference to the "security and sovereignty of the country and social and public interests."¹⁶² This type of language is directed at protecting the state rather than the economic interests of the debtors and creditors involved in the insolvency proceedings. Modified universalism preserves the ability of local courts to evaluate the fairness of the main case proceeding, to protect the interests of local creditors, and, in some cases, even assess whether compliance offends the country's public policy.¹⁶³ However, modified universalism's focus on the state interest outside the insolvency proceeding is too broad. This type of language has historically caused foreign investors to question the applicability of the rule of law to foreigners in China.¹⁶⁴

Of course, eliminating such a provision from China's law would forfeit some degree of sovereignty and control that, at least at the time the Corporate Bankruptcy Law was adopted, was important to Chinese legislators. Additionally, China would likely argue that the insolvency laws of other countries that are based on the UNCITRAL Model Law include similar policy-based discretion. Indeed, Chapter 15 of the U.S. Bankruptcy Code includes a provision allowing the Bankruptcy Court to refuse to hear an action that "would be manifestly contrary to the public policy of the

160. See, e.g., Aaron Back, *U.S. Firms Criticize Chinese Policy - Business Group's Survey Shows Growing Concern About Protectionism, but Optimism Over Economy*, WALL ST. J., April 27, 2010, at A13. See also Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 30-32 (2006) (describing local protectionism exhibited by China's judiciary).

161. 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, 323 (2008); see *id.* at 320-323 (examining in detail the economic basis for insolvency law in general and specifically cross border insolvency provisions).

162. [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) art. 5.

163. See *supra* notes 32-35 and accompanying text.

164. See Back, *supra* note 160, at A13; Lubman, *supra* note 160, at 30-32.

United States.”¹⁶⁵ China should revisit this issue and balance its public policy concerns against the effects of the Corporate Bankruptcy Law’s vague provisions on foreign investment.

B. Add Cooperation Language to the Corporate Bankruptcy Law Similar to 11 U.S.C. § 1501-1532

China should consider adding cooperation instructions for Chinese courts hearing in cross-border insolvency cases. This instruction could be modeled after the cooperation and concurrent administration provisions contained in Chapter 15 of the U.S. Bankruptcy Code.¹⁶⁶ Such a change would be less controversial than the elimination of the public interests language discussed above.¹⁶⁷ Although it would not provide significantly more substantive protection, potential economic investors could see it as indicating a more open and cooperative approach to foreign proceedings.

This type of cooperative language is suggested by the UNCITRAL Model Law¹⁶⁸ and was included in Chapter 15 of the U.S. Bankruptcy Code. Chapter 15 directs U.S. courts to cooperate with foreign insolvency courts and foreign representatives “to the maximum extent possible.”¹⁶⁹ While this standard is imprecise, it demonstrates the United States’ cooperative rather than obstructive intent. Such intent is a positive approach to cross-border insolvency issues.¹⁷⁰ A demonstration of similar intent is likely to be welcome in China as well.

VI. CONCLUSION

A lack of binding multinational rules has made cross-border insolvencies inefficient and uncoordinated. A number of countries, including the United States, have adopted insolvency provisions based on the UNCITRAL Model Law to address these concerns. The recently enacted Corporate Bankruptcy Law in China, while not specifically based on the UNCITRAL Model Law, does incorporate modern concepts of modified universalism. Clarifying the language of Article 5 and adding

165. 11 U.S.C. § 1506 (2010).

166. See 11 U.S.C. §§ 1525-1532 (2010); see also *supra* notes 95-108 and accompanying text.

167. See *supra* notes 162-165 and accompanying text.

168. Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, Annex, ch. IV, U.N. Doc. A/RES/52/158/Annex (Jan. 30, 1998).

169. 11 U.S.C. §§ 1525(a), 1526(a) (2010).

170. The Legislative Guide to Enactment indicates a similar sentiment, stating that “even in jurisdictions in which there is a tradition of wider judicial latitude, enactment of a legislative framework for cooperation has proved to be useful.” GUIDE TO ENACTMENT, *supra* note 58, para. 173; see also Clift, *supra* note 48, at 327.

cooperation language to the Chinese law would encourage foreign direct investment in China.

