ANCILLARY AND CROSS-BORDER CASES:

APPLICATION OF UNITED STATES BANKRUPTCY LAW TO ARGENTINE DEBTORS AND THEIR U.S. CREDITORS

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In recent years, the United States Bankruptcy Courts have played a role in several high-profile reorganization cases concerning Argentine debtors. These debtors sought relief in United States Bankruptcy Courts under Bankruptcy Code (Title 11 United States Code[1]) Section 304 as cases "ancillary to a foreign proceeding," meaning, in this context, the principal reorganization proceedings in Argentina.[2]

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1 All references in this article to the "Bankruptcy Code" mean the United States Bankruptcy Code, Title 11 U.S.C.

2 The text of 11 U.S.C. § 304 provides:

> **§ 304. Cases ancillary to foreign proceedings**
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> (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
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> (b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may--
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> (1) enjoin the commencement or continuation of--
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> (A) any action against--
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> (i) a debtor with respect to property involved in such foreign proceeding; or
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> (ii) such property; or
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> (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
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> (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
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> (3) order other appropriate relief.
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> (c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with--
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> (1) just treatment of all holders of claims against or interests in such estate;
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> (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;

The Bankruptcy Abuse Prevention and Consumer Protection Act, which became effective October 17, 2005, repealed Section 304 and added an entirely new chapter to the Bankruptcy Code governing cross-border bankruptcy and insolvency cases. Titled "Ancillary and Other Cross-Border Cases," Chapter 15 is patterned after the Model Law on Cross-Border Insolvency, an underlying structure of legal principles formulated by the United Nations Commission on International Trade Law (UNCITRAL) in 1997 to deal with the rapidly expanding volume of international insolvency cases.

Section 304 permitted an accredited representative of a debtor in a foreign insolvency proceeding to commence a limited "ancillary" bankruptcy case in the United States for the purpose of protecting the foreign debtor's assets located in the United States from creditor collection efforts, and in some cases, facilitating the repatriation of those assets abroad to be administered in the debtor's insolvency or bankruptcy case. Chapter 15 continues that practice, but establishes new rules and procedures applicable to cross-border bankruptcy cases. In comparing Chapter 15 to former Section 304, Bankruptcy Judge Allan L. Gropper writes:

> It is important to note that the National Bankruptcy Review Commission, in recommending adoption of the UNCITRAL Model Law as part of its report in 1997, was of the belief that adoption of the Model Law would not represent a significant change from current U.S. law. This is because Chapter 15 maintains the "ancillary proceeding" as a principal – if not the principal – method for foreign representatives to seek recognition for a foreign insolvency proceeding in the United States. Many of the principles of § 304 are still recognizable, and many of the § 304 cases are still likely to be relevant. Nevertheless, Chapter 15 replaces § 304, and it makes important changes in ancillary proceeding practice. The 2005 Law also contains significant amendments to the other statutory provisions relevant to cross-border insolvency cases.[3]

> (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.

3 Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, 15

As of the date of this article there are no reported cases concerning Argentine insolvency proceedings under Chapter 15 of the Bankruptcy Code; however, the cases decided under Section 304 in connection with Argentine reorganization cases will continue to serve as a foundation for interpreting and applying Chapter 15. In particular, the cases decided under Section 304 continue to stand for the fact that Argentine reorganization proceedings are entitled to comity by U.S. Courts. The Argentine cases under Section 304 have resulted in interpretations of the rights of U.S. creditors under the Trust Indenture Act of 1939 [4], an issue that arises in many U.S. cross-border insolvency cases.

I. Recognition of APEs Under the United States Bankruptcy Code

A. In re Board of Directors of Multicanal, S.A.

Multicanal S.A. ("Multicanal"), an Argentine cable company and wholly-owned subsidiary of Grup Clarin, filed an *acuardo preventivo extrajudicial* ("APE") proceeding under Argentine insolvency law. An APE is a privately negotiated restructuring of an insolvent company's debt.

> Under Argentine law, such a plan must first be approved by two-thirds in amount and a majority in number of the holders of the debt, and then be judicially confirmed in proceedings brought before the Commercial Trial Court, in this case, in Buenos Aires, with a right to appeal to the higher Argentine courts. If the court approves, finding no material inaccuracies in the company's current financial information, approval by the requisite number and amount of creditors, and that the plan is not abusive or fraudulent, all creditors are bound by the plan and the company's debt becomes restructured and modified in accordance with the plan.[5]

After Multicanal filed the APE, certain U.S. noteholders sued in United States courts to obtain a judgment against Multicanal on their defaulted debt. Multicanal then filed a petition in

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Journal of Bankruptcy Law and Practice, April 2006 at 825-826 (footnote omitted).

4 15 U.S.C. §77aaa *et seq.* Hereafter, the "Trust Indenture Act."

5 *Argentinian Recovery Co. v. Bd. of Dirs. of Multicanal S.A.*, 331 B.R. 537, 540 (S.D.N.Y. 2005).

the United States under Section 304 and sought a temporary injunction against the litigation that had been commenced in the United States by the noteholders.

The U.S. noteholders moved to dismiss the Section 304 petition, arguing that the Trust Indenture Act prohibits impairment of their rights by a foreign insolvency proceeding unless the proceeding is identical to one under United States law. The Bankruptcy Court refused to dismiss the Section 304 petition. United States Bankruptcy Judge Allan L. Gropper ruled that "Section 304 does not require that the foreign proceeding be identical to the U.S. proceeding."[6] In his ruling, Judge Gropper relied on prior cases, including an 1883 Supreme Court case that declared:

> [E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes.[7]

The Bankruptcy Court viewed Section 304 of the Bankruptcy Code as allowing the maximum flexibility possible in considering international comity and respecting the laws and judgments of other nations.[8] Moreover, the court found that U.S. noteholders' rights could also be adjusted in a foreign insolvency proceeding entitled to recognition under Section 304.[9]

Judge Gropper disagreed with the noteholders' argument that creditors' individual rights should take priority over the recognition of foreign insolvency proceedings.[10] The court also rejected the noteholders' argument that Multicanal should be forced to bring a full bankruptcy proceeding in the United States under Chapter 11 of the Bankruptcy Code, because "a

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6 *In re Bd. of Dirs. of Multicanal S.A.*, 307 B.R. 384, 391 (Bankr. S.D.N.Y. 2004)

7 *Canada So. Ry. Co. v. Gebhard*, 109 U.S. 527, 3 S.Ct. 363, 27 L.Ed. 1020 (1883).

8 307 B.R. at 391.

9 *Id.* at 394.

10 For example, the Trust Indenture Act provides: "the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder." 15 U.S.C.A. § 77ppp (b).

fundamental purpose" of Section 304 is "to avoid the inconvenience and expense of a full U.S. Chapter 11 proceeding."[11]

Judge Gropper then examined whether Multicanal met its burden of establishing that the APE was entitled to recognition under Section 304.[12] First, the court noted that only a "foreign representative" had standing to seek relief under Section 304, and ruled that a board of directors can be a foreign representative "if it plays a role similar to that of a debtor in possession under the United States Bankruptcy Code, where management remains in control of the reorganizing debtor and an independent trustee is not ordinarily appointed."[13] The court reviewed the guidelines for recognition of a foreign proceeding, found in Section 304(c), noting that they are guidelines, not requirements, and that each case should be examined on a case-by-case basis, "guided by what will best assure an economical and expeditious administration of such estate," consistent with the following:

(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 applicable, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[14]

The court acknowledged that generally United States courts will grant comity to foreign insolvency proceedings when it is clear that the foreign court is a court of competent jurisdiction,

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11 307 B.R. at 392.

12 *In re Bd. of Dirs. of Multicanal S.A.*, 314 B.R. 486 (Bankr. S.D.N.Y. 2004).

13 314 B.R. at 501.

14 *Id.* at 501-502; *see also* 11 U.S.C. § 304(c)(1)-(6) (repealed), and 11 U.S.C. § 1507(b)(1)-(5).

and that the laws and public policy of the forum state and the rights of its residents will not be violated.[15]

Certain U.S. creditors (including the noteholders that originally sought dismissal of the Section 304 petition) argued that the APE should not be recognized under Section 304 because the APE was a type of private insolvency proceeding that was not subject to adequate judicial control. The court rejected this because the APE "bears a strong resemblance to U.S. prepackaged plans of reorganization ('Prepacks'), which in one form or another have been an established means of restructuring in the United States for many years."[16] Next, the objecting U.S. creditors argued that the APE would not satisfy the conditions for confirmation of a plan of reorganization under Chapter 11 of the Bankruptcy Code. Judge Gropper rejected this argument and responded that the issue is whether the foreign proceeding is consistent with the factors in Section 304(c) discussed above. Thus, "[t]here is no requirement that a foreign proceeding incorporate the conditions to confirmation [of a plan of reorganization in the] U.S. Bankruptcy Code."[17]

At this point, an impediment to recognition arose. The found that there was "not much dispute" about the fact that under the APE, the U.S. noteholders received different treatment from other creditors of the same class. This treatment violated the requirement of Section 304(c)(1) for "just treatment of all holders of claims against or interests in" the foreign estate, and the requirement of comity in Section 304(c)(5).[18] Judge Gropper interpreted the reference to

15 *Id.* at 502-503 (quoting *Cunard S.S. Co. v. Salen Reefer Servs. AB (In re Cunard)*, 773 F.2d 452, 457 (2d Cir. 1985)).

16 *Id.* at 504.

17 *Id.* at 506.

18 *Id.* at 509-510.

"just treatment" in Section 304(c)(1) to implicate "general due process standards."[19] Although a creditor does not need to receive the same distribution in a foreign case as it would in a hypothetical Chapter 11 proceeding in the United States, creditors of the same class should be treated equally in the distribution of assets in the foreign proceeding.[20] The court then ruled that it would not recognize the foreign proceeding under Section 304 until the discrimination was remedied.[21]

Multicanal proposed to cure the discrimination against U.S. noteholders by offering them the same election of cash or securities offered to all other holders. Based on Multicanal's proposed cure, Judge Gropper indicated that he would approve the APE, as amended, and issue an order granting the Section 304 petition subject to implementation of the cure. Judge Gropper's order would have the effect of permanently enjoining all creditors of Multicanal from taking any actions in the United States, including suits or proceedings in any forum, which would impede administration of the APE. The Bankruptcy Court did not rule whether the proposed cure was lawful under the United States Securities Act of 1933.[22]

On appeal, District Judge Alvin K. Hellerstein affirmed Judge Gropper's rulings but remanded the proceedings, "to consider if the securities offered to appellants are exempt from the registration requirements of the U.S. securities laws and, if not, whether the registration with the Securities and Exchange Commission . . . that [Multicanal has] begun to pursue will provide just and non-discriminatory treatment to the holders of the debt instruments of Multicanal, S.A."[23] In the course of the decision, Judge Hellerstein granted comity to the decisions of the

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19 *Id.*

20 *Id.* at 518-519.

21 *Id.* at 519-520.

22 15 U.S.C. § 77a *et seq.* Hereafter, the "Securities Act."

23 *See Argentinian Rec. Co. v. Bd. of Dirs. of Multicanal S.A.*, 331 B.R. 537, 539 (S.D.N.Y. 2005).

Argentine Courts, including the Argentine Commercial Court's rejection of the argument by U.S. noteholders that the cure proposed by Multicanal would impermissibly amend the APE.[24] This meant that the U.S. courts would respect the finding by the Argentine Courts that the APE, as amended, did not discriminate among creditors or produce substantial prejudice, and therefore did not require a new vote by creditors.[25] Nevertheless, Section 304 could not be satisfied until Multicanal was able to show that the cure could be implemented in a way that would satisfy the Securities Act, either by satisfying certain securities registration requirements or proving that an exemption from registration was available. Judge Hellerstein reasoned that Multicanal's proposal for compliance with Section 304 would also have to comply with U.S. securities laws; otherwise, the cure would be unlawful and therefore illusory.[26]

On remand, Judge Gropper determined that Multicanal's offer of securities did not qualify for certain exemptions and safe harbors provided under the Securities Act, but might qualify under Section 3(a)(10) of the Securities Act upon the finding of "fairness".[27] Multicanal could not (without a no-action letter from the Securities and Exchange Commission) claim the Section 3(a)(10) exemption as a matter of law, but only after a "fairness hearing". The District Court asked Judge Gropper to consider the Bankruptcy Court's authority to hold a "fairness hearing" under Section 3(a)(10) of the Securities Act, and "whether the proceedings in Argentina, or indeed, in the United States, provided a 'hearing upon the fairness' adequate to satisfy the requirements of Section 3(a)(10)."[28] Judge Gropper ruled that the Bankruptcy Court had authority to conduct a "fairness hearing," and that this authority derived "from its express

24 *Id*.

25 *Id*.

26 *Id.* at 546.

27 *In re Bd. of Dirs. of Multicanal S.A.*, 340 B.R. 154, 160 (Bankr. S.D.N.Y. 2006).

28 331 B.R. at 551.

authority under § 304(b)(3) to 'order other appropriate relief,' in connection with the recognition of a foreign insolvency proceeding under § 304."[29] In Judge Gropper's view, the fact that the Bankruptcy Court had jurisdiction to hold a fairness hearing "does not, however, mean that the courts in Argentina would lack such jurisdiction."[30] Judge Gropper indicated a willingness to conduct such a hearing and directed Multicanal to provide notice to the parties of how it intended to proceed.[31]

At the same time that Judge Gropper was considering whether to grant relief under Section 304, he ordered the dismissal of an involuntary Chapter 11 bankruptcy petition that U.S. creditors filed against Multicanal. Judge Gropper reasoned: "In the instant case, the economical and expeditious administration of the foreign estate is best served by proceeding with its § 304 petition and dismissing the involuntary petition."[32] Judge Gropper found that a full-fledged U.S. Chapter 11 bankruptcy proceeding at the same time as the APE, "would hinder rather than advance an equitable distribution in this case."[33]

> Section 304 implicitly acknowledges that centralizing an insolvency proceeding will frequently provide the optimal result for a debtor and its creditors alike by preventing certain creditors from gaining an advantage over others by virtue of differing judicial systems. A single primary proceeding also minimizes the time, expense and administrative burdens of managing full cases in multiple jurisdictions.[34]

Judge Gropper dismissed the involuntary Chapter 11 case based on provisions in Section 305(a)(1) of the Bankruptcy Code, which gives a Bankruptcy Court discretion to dismiss or suspend a bankruptcy proceeding when "the interests of creditors and the debtor would be better

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29 340 B.R. at 165 (citations omitted).

30 *Id.* at 167 (citing SEC no-action letters).

31 *Id.* at 180.

32 *In re Bd. of Dirs. of Multicanal S.A., supra,* 314 B.R. at 521.

33 *Id.*

34 *Id*.

served by such dismissal or suspension."[35] In determining whether the interests of creditors and the debtor would be better served by dismissal or suspension of a proceeding, courts have considered "whether another forum is available and whether another proceeding has proceeded to the point that it would be costly and time-consuming to start afresh under the Bankruptcy Code."[36] Judge Gropper noted that both factors supported dismissal or suspension of the involuntary Chapter 11 case and cited an additional factor – that "the objective futility of the maintenance of a Multicanal reorganization in the United States, over the opposition of the putative debtor." Judge Gropper observed:

> Bankruptcy jurisdiction has traditionally been premised on the existence of a *res* and the *in rem* jurisdiction of the court in administering the estate. See *Tennessee Student Assistance Corp. v. Hood,* 541 U.S. 440, 446-447, 124 S.Ct. 1905, 1910, 158 L.Ed.2d 764 (2004). Where an enterprise held property in more than one jurisdiction, the traditional territorial rule provided that each nation would take control of the property within its jurisdiction and administer it without much regard for the enterprise as a whole. A central purpose of the system of "modified universality" represented by § 304 is to avoid the waste and inefficiency of multiple proceedings by positing a "main proceeding" in one jurisdiction and an

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35 *Id.* at 521-522. Bankruptcy Code Section 305, as amended October 17, 2005, provides:

> **§ 305. Abstention**
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> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if –
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> > (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or
> > (2)(A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and
> > (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.
>
> (b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.
>
> (c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

36 314 B.R. at 522.

> ancillary proceeding in aid of the principal case in other jurisdictions. *See, e.g.*, Jay Westbrook, *A Global Solution to Multinational Default*, 98 Mich. L.Rev. 2276, 2300-01 (2000)…. In any event, the main cause for multiple proceedings has been the existence of property or property interests in various jurisdictions. The presence of some property in the United States remains a prerequisite to the maintenance of a title 11 case involving a person that does not have a residence, domicile or place of business here. 11 U.S.C. § 109(a).[37]

The foregoing considerations supported Judge Gropper's determination to dismiss the involuntary Chapter 11 against Multicanal because it had "virtually no property in the United States, as well as no residence, domicile or place of business" and the U.S. noteholders had not suggested any way to assert effective jurisdiction over Multicanal.[38] Judge Gropper also rejected the suggestion of U.S. noteholders that a Chapter 11 Trustee be appointed[39] because "[i]t would be inconsistent with the goal of [Bankruptcy Code Sections 304 and 305] of cooperation in international insolvencies to place a foreign company in Chapter 11 for the sole purpose of appointing a trustee to take action that would not otherwise be appropriate in the home jurisdiction of the enterprise."[40] Thus, Judge Gropper dismissed the involuntary Chapter 11 case for "objective futility" where the putative debtor "is steadfastly opposed to a U.S. Chapter 11 case, where there are assets worth only $9,500 over which the Court could assume jurisdiction, and where the principals of the debtor have no nexus to the United States," and where the Court believed it would be unable to force the rehabilitation of Multicanal over its objection."[41]

In *In re Globo Comunicacoes e Participacoes S.A.*, a case unrelated to *Multicanal*, District Court Judge Victor Marrero disagreed with one of Judge Gropper's legal conclusions

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37 *Id*. (citation omitted).

38 *Id*.

39 *See* 11 U.S.C. § 1104(a).

40 314 B.R. at 523.

41 314 B.R. at 522-523.

supporting the decision to dismiss the involuntary Chapter 11 case in *Multicanal.*[42] According to Judge Marrero, Judge Gropper's analysis "inverts the proper consideration of a bankruptcy court faced with an uncooperative foreign debtor by focusing on the current location of the debtor's assets rather than the nature and extent of the debtor's contacts with the United States."[43] Judge Marrero observed that the Supreme Court's recent decision in *Tennessee Student Assistance Corp. v. Hood*[44], cited by Judge Gropper, "was premised on jurisdiction over the *debtor* as well as the debtor's estate, and concluded further that a reorganization could be effective even if the Bankruptcy Court could not assert personal jurisdiction over, or obtain cooperation from, all creditors."[45] It appears that Judge Marrero's comments extended only to the finding of "objective futility" by Judge Gropper based upon the limited amount of Multicanal assets in the United States. Judge Gropper's decision to dismiss the involuntary Chapter 11 case was also based on the availability of another forum, and the conclusion that the time and cost of commencing a new proceeding under Chapter 11 would hinder rather than advance equitable distribution. Thus, although Judge Marrero disagreed with one of Judge Gropper's legal conclusions in *Multicanal*, it is not clear that Judge Marrero would disagree with the decision to dismiss the involuntary Chapter 11 case.[46]

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42 317 B.R. 235, 252 (S.D.N.Y. 2004). The District Court vacated the Bankruptcy Court's order dismissing an involuntary Chapter 11 petition filed against a holding company organized under the laws of Brazil because the Bankruptcy Court did not develop a factual record sufficient for the District Court to evaluate the arguments presented on appeal. *Id.* at 240-241.

43 *Id.* at 252.

44 541 U.S. 440, 446-447 (2004).

45 317 B.R. at 252 (emphasis in original).

46 As Bankruptcy Judge Burton R. Lifland has pointed out (in a soon-to-be published paper in conjunction with the International Chamber of Conference Cross-Border Insolvency and Conflict of Jurisdictions Programme in Paris, June 12, 2006), Bankruptcy Code Sections 305 ("Abstention") and 306 ("Limited Appearance") remain "on the books" to permit a foreign representative to seek abstention, dismissal or suspension of potentially disruptive U.S. proceedings without exposing the foreign representative to potential counterclaims.

B. In re Board of Directors of Telecom Argentina S.A.

Telecom Argentina, a *sociedad anonima* organized under Argentine law, provides public telecommunications services in Argentina. As of December 31, 2001, Telecom Argentina was the obligor on approximately $3.3 billion in debt ("Old Debt").[47] In January 2004 Telecom Argentina announced its restructuring proposal under an APE and solicited consents to the APE proposal in multiple countries, including the United States and Italy.

Telecom Argentina negotiated with its creditors and noteholders, including an *ad hoc* creditors' committee. After amending the APE in a manner satisfactory to the committee, Telecom Argentina publicized the APE solicitation by issuing press releases; mailing solicitation statements; hiring a proxy service; holding meetings in Buenos Aires; and marketing the proposal through a road show in Miami, New York and London.[48] The proposed APE offered holders of Old Debt three consideration options, including a mix of fixed rate, floating rate and pay-in-kind debt securities ("New Notes") and a cash alternative.[49] At the end of the solicitation period, Telecom Argentina announced that approximately 94.4% in principal face amount and 82.4% in number of holders of Old Debt consented to the APE proposal.[50] Accordingly, Telecom Argentina executed the APE on August 26, 2004. In October 2004, Telecom Argentina submitted the APE to the National Commercial Court in Buenos Aires and commenced a proceeding under Chapter VII, Title II of Law No. 24,522, which is the Argentine Insolvency Law.[51] The National Commercial Court ordered Telecom Argentina to convene a meeting of

47 *In re Bd. of Dirs. of Telecom Argentina S.A.*, 2006 WL 686867 at *2 (Bankr. S.D.N.Y. Feb. 24, 2006).

48 *Id.* at * 4-5.

49 *Id.* at *4.

50 *Id.* at *5.

51 *Id.* at *6.

noteholders to vote on the APE and select a consideration option; designated examiners to verify the consents and oversee the outcome; and directed the publication of notices in Argentina, the United States, the United Kingdom, Belgium and Italy.[52] In February 2005, after conducting an examination of the procedural fairness and verifying the accuracy of the voting process, the National Commercial Court approved the APE as duly and validly approved by the majorities required under the Argentine Insolvency Law.

Argo Fund Ltd. ("Argo"), a Cayman Island entity, held $560,000 in notes issued by Telecom Argentina in the United States in Europe (the "Old Notes") prior to Telecom Argentina's announcement of the APE proposal. Argo eventually acquired $35 million in Old Notes, including more than $28 million during the solicitation period. In September 2004 Argo wrote to the indenture trustee for the Old Notes, requested the indenture trustee to refuse to exchange Argo's Old Notes, and informed the indenture trustee that Argo would take all actions necessary to enforce its rights under the Old Notes in the United States.[53] Argo wrote to the indenture trustee again in January 2005 indicating its refusal to support the APE or to elect any of the consideration options.[54] Prior to approving the APE, the Argentine Court considered and overruled various creditor objections; however, neither Argo nor the indenture trustee raised objections in the Argentine Court. Threatened by legal action from Argo, the indenture trustee agreed to cancel only the Old Notes held by consenting creditors, but indicated that it would not cancel the Old Notes held by non-consenting creditors, such as Argo, absent an order from a United States court.[55]

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52 *Id.*

53 *Id.* at 5-6.

54 *Id.* at *6.

55 *Id.* at *9.

In response, on September 13, 2005, Telecom Argentina filed a petition under Section 304 of the United States Bankruptcy Court for the Southern District of New York. Telecom Argentina filed the Section 304 petition to obtain a judgment by a United States court that the Argentine Court's order approving the APE should be given full force and effect in the United States. If the APE bound U.S. creditors, the Old Notes held by non-consenting U.S. noteholders could be extinguished and cancelled. The petition was assigned to Bankruptcy Judge Burton R. Lifland.

On October 11, 2005, Argo filed a motion in the United States District Court to withdraw the reference of the Section 304 petition from the Bankruptcy Court to the District Court. That motion was denied by the District Court.[56]

In December 2005 Judge Lifland held a trial to determine whether to grant relief under Section 304 and considered testimony from Telecom Argentina's finance director, Argo's chief executive, and Drs. Javier Lorente and Julio César Rivera, two Argentine Insolvency Law experts.[57] Judge Lifland then issued extensive findings of fact[58] and conclusions of law, including the following:

- No evidence was offered to show that U.S. creditors suffered any prejudice or inconvenience in their ability to participate in the Argentine proceedings or that U.S. creditors could not participate in the APE on exactly the same terms as all other affected creditors.[59] Moreover, Judge Lifland found no evidence that any U.S. creditor was prejudiced or inconvenienced.[60] "On the contrary,

56 *In re Bd. of Dirs. of Telecom Argentina S.A.*, 2005 WL 3098934 (S.D.N.Y. Nov. 18, 2005). See discussion in part I.C., *infra*.

57 2006 WL 686867 at *12.

58 Such extensive findings of fact are essential in the wake of *In re Globo Comunicacoes e Participacoes S.A.*, 317 B.R. 235 (S.D.N.Y. 2004). In that case, the District Court vacated the Bankruptcy Court's decision to dismiss an involuntary Chapter 11 case pursuant to Bankruptcy Code Section 305(a)(1) for failure to "develop a factual record sufficient for [the appellate court] to properly evaluate many of the arguments presented . . . on appeal." *Id.* at 240-241.

59 2006 WL 68687 at *24.

60 *Id.* at *19.

Argo seeks to force better terms than other creditors – and in any event, it is not clear that the Cayman Island-based Argo is a U.S. claimholder entitled to protection."[61]

- $ Under the approved APE, all affected creditors were treated equally and justly, in a manner consistent with the applicable provisions of the U.S. Bankruptcy Code.[62]
- $ There was no dispute that Telecom Argentina's APE proceeding provided holders of all affected claims with notice, due process and an opportunity to participate in negotiations and voting.[63] In fact, to ensure that U.S. creditors received appropriate information, Telecom Argentina filed a registration statement with the Securities and Exchange Commission describing the APE.[64]
- $ Creditors had "ample opportunity" to object to Approval of the APE in the Argentine Courts on all of the grounds raised by Argo in the Bankruptcy Court. [65]
- $ Thus, Argo could have objected to Telecom Argentina's ability to file its APE as a pre-confirmation objection, and to the fairness or abusiveness of the substantive provisions of the APE.[66] Argo's objections in the Bankruptcy Court therefore constituted a collateral attack on the Argentine Court's findings. [67]
- $ Under Argentine Insolvency Law, an APE that has obtained final court confirmation is entitled to *res judicata* effect, and an Argentine Court would not enforce a subsequent order from another court that was inconsistent with the order approving the APE. [68]
- $ If Telecom Argentina were required to treat Argo or other non-consenting creditors differently from those who took the consideration offered under the APE, this would constitute a breach of the APE and would put Telecom Argentina in jeopardy of immediate liquidation under Argentine Insolvency Law. [69]

As in *Multicanal*, the evidence and record demonstrated that an Argentine APE

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61 *Id.* at *24.

62 *Id.* at *19.

63 *Id.* at * 24.

64 *Id.*

65 *Id.* at * 18.

66 *Id.* at * 19.

67 *Id.*

68 *Id.* at * 21.

69 *Id.*

proceeding is entitled to comity. In this case (which was filed prior to the effective date of Chapter 15 and thus governed by Section 304) Judge Lifland commented: "The importance of comity is well noted in the newly enacted chapter 15 of the Bankruptcy Code that has incorporated concepts of section 304(c)(2) with the major difference that comity is elevated as the prime consideration for the grant of ancillary relief to a foreign representative."[70] U.S. courts normally grant comity to foreign insolvency proceedings upon a finding that the foreign court is a court of competent jurisdiction, and that neither the laws of U.S. citizens nor public policy will be violated.[71] Judge Lifland found comity to be "especially appropriate where, as here, the Argentine Court has issued a final judgment that the APE meets the requirements of Argentine Insolvency Law, and that judgment is final and binding on all affected creditors as a matter of Argentine law."[72] In granting comity, the Court overruled four objections from Argo:

- First, Argo argued that comity should not be granted because Telecom Argentina was not insolvent.[73] Judge Lifland observed that there is no requirement in the Bankruptcy Code that a debtor must be insolvent to be eligible to file; this reason was therefore insufficient to deny comity.[74] Moreover, the Argentine Court expressly found that the restructuring was undertaken for the purpose of responding to a business crisis, and that the APE was not abusive, fraudulent or discriminatory. The Argentine Court's ruling was a finding that Telecom Argentina "met the financial eligibility requirements to file an APE" which was not contested by Argo in the Argentine Court, and could not be collaterally attacked in the Bankruptcy Court.[75]
- Second, Argo claimed that Telecom Argentina could have paid more.[76] The bankruptcy court answered: "[W]hether a debtor could have paid more is not a basis for withholding comity."[77] Although equity holders were permitted to retain their

70 *Id.* at *26 (citing 11 U.S.C. § 1507(b)).

71 *Id.* at * 25 (citing cases).

72 *Id.* at * 26.

73 *Id.* at * 27.

74 *Id*.

75 *Id*.

76 *Id*.

77 *Id.* at * 28.

interests under the APE, the evidence before the Argentine Court demonstrated that if the equity interests were not retained, Telecom Argentina would have lost its license, leaving liquidation as the only option.[78] Furthermore, "[g]iven the extremely high vote in favor of the APE, U.S. law would favor approval whether or not the absolute priority rule were met."[79]

- Third, as to Argo's assertion that the APE was not consistent with the Trust Indenture Act, Judge Lifland agreed with the decisions in *Multicanal*[80], holding that "a grant of comity does not depend upon adherence to the Trust Indenture Act, which would prevent most reorganizations where a debtor has issued public debt."[81]
- Finally, Argo argued that the APE process did not permit adequate bases for objecting to an APE.[82] Judge Lifland referred to amendments to the Argentine Insolvency Law in 2002 that enable creditors to object to the confirmation of an APE on grounds that the APE is abusive or fraudulent and impose an obligation on the Argentine Court to review the APE for abusiveness.[83] The concept of "abusiveness" is defined broadly in the Argentine Insolvency Law and is a fact-specific inquiry that must be determined on a case-by-case basis.[84] The experts that testified before Judge Lifland agreed that the term "abuse" in the Argentine Insolvency Law "was an umbrella for a wide variety of objections."[85] As noted above, Argo did not raise an objection before the Argentine Court and was precluded from doing so in opposition to granting comity.[86]

C. In re Cablevision S.A.[87]

Cablevision, an entity that provided cable television and Internet services in Argentina, was owned by two United States entities. Cablevision filed an APE proceeding in Argentina, and then filed an ancillary proceeding in the United States under Section 304 of the Bankruptcy Code. A U.S. investment group that held many of Cablevision's notes objected to Cablevision's

78 *Id*.

79 *Id*. (referring to the "absolute priority" requirement in Bankruptcy Code Section 1129(b)(2)(B)(ii) for confirming a Chapter 11 plan over the objection of a class of unsecured creditors, a tactic commonly referred to as "cramdown".)

80 *See* the discussion in Part I.A., *supra*.

81 2006 WL 68687 at * 28.

82 *Id.* at * 27.

83 *Id.* at * 16.

84 *Id.* at * 16-17.

85 *Id.* at * 28.

86 *Id*.

87 315 B.R. 818 (S.D.N.Y. 2004).

plan to cancel all of the notes and exchange them for roughly 50% of their value in the APE. The noteholders alleged that this proposed restructuring would violate the Trust Indenture Act and also violated tender offer rules under the Trust Indenture Act and the Williams Act of 1968. The noteholders asked the United States District Court to withdraw reference of the Section 304 petition from the United States Bankruptcy Court so that the controversy would be decided in the District Court. Under United States law, bankruptcy cases are automatically referred by the District Courts to be administered by Bankruptcy Courts, but this reference must be withdrawn under the circumstances listed in title 28 § U.S.C. 157(d) of the United States Code, where "substantial and material consideration of non-Bankruptcy Code and federal statutes is necessary for the resolution of the proceeding," and where the matters "require the bankruptcy court to substantially interpret federal statutes which affect interstate commerce."

Although in *Multicanal* (discussed above), Judge Gropper found that there was no real conflict between the Trust Indenture Act and Section 304[88], in the *Cablevision* case, District Judge Shirley Wohl Kram ruled:

> The very existence of a dispute as to whether the rights of [noteholders] under the [Trust Indenture Act] and Williams Act supersede Section 304 or whether the Bankruptcy Code overrides the [Trust Indenture Act], regardless of the ultimate resolution of such dispute, mandates withdrawal. In other words, to determine whether Cablevision or [the noteholders are] correct, a court would be required to substantially and materially consider non-Bankruptcy code federal statutes . . . and the interaction of those statutes with the Bankruptcy Code.[89]

Judge Kram noted that "[t]he case for mandatory withdrawal is further bolstered by the fact that it appears that no Article III court has ever resolved the apparent tension between Section 304 and the [Trust Indenture Act]."[90] In Judge Kram's view, whether "304 and its deference to

88 307 B.R. at 391-392.

89 315 B.R. at 821.

90 *Id.* at 821, n. 4. Bankruptcy judges are sometimes referred to as "Article I judges" because their power is

foreign insolvency proceedings" overrides the Trust Indenture Act "is a determination for an Article III Court, not the bankruptcy court."[91]

Fortunately, the uncertainty for Bankruptcy Courts implicit in Judge Kram's decision was softened by District Judge Shira A. Scheindlin's subsequent decision in the *Telecom Argentina* case.[92] Judge Scheindlin put to rest the perceived tension between Section 304 and the Trust Indenture Act. As noted above, in the *Telecom Argentina* case, Argo, a creditor, moved for withdrawal of the reference because consideration of Telecom Argentina's petition would require substantial and material consideration of the Trust Indenture Act. Judge Scheindlin denied Argo's argument, and refused to withdraw the petition for either the mandatory or discretionary reasons set forth in 28 U.S.C. § 157(d).[93] Judge Scheindlin agreed with Judge Gropper's holding in *Multicanal*, *supra*, that there is no conflict between the Trust Indenture Act and Section 304:

> A noteholder's rights under the [Trust Indenture Act] are not inviolate – rights under a [Trust Indenture Act]-qualified indenture can be impaired by a U.S. bankruptcy case. If a foreign insolvency proceeding is entitled to comity under section 304, there is no principled basis for concluding that a noteholder's rights under the [Trust Indenture Act] should trump that proceeding. Foreign debtors need not grant recalcitrant minority noteholders absolute rights under the [Trust Indenture Act] that those noteholders would not have in a bankruptcy case in the United States.[94]

The critical issue in Judge Scheindlin's view was a matter of bankruptcy law: whether the

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derived from Congress and Article I of the U.S. Constitution. District judges are "Article III judges" because they are appointed under that article of the U.S. Constitution that defines the powers of the judiciary branch.

91 *Id*. at 822.

92 *In re Bd. of Dirs. of Telecom Argentina S.A.*, 2005 WL 3098934 (S.D.N.Y. Nov. 18, 2005).

93 28 U.S.C. § 157(d) states:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

94 *Id.* at *2.

APE should be afforded recognition under Section 304.[95] "Inquiries such as whether the APE procedures are 'substantially in accordance' with United States bankruptcy law fall squarely within the expertise of the bankruptcy court."[96]

Continuing tension between the Trust Indenture Act and cross-border insolvency cases remains a possibility. Judge Scheindlin's ruling is not binding on other Article III judges or on bankruptcy judges in other districts, and absent a ruling by a Circuit Court or the United States Supreme Court, a district judge considering the issue is free to follow or reject Judge Scheindlin's ruling in the *Telecom Argentina* case. If a District Court takes a contrary view to Judge Scheindlin, the implications are not clear, but depending on the court's reasoning, the reference could be withdrawn,[97] or the court might refuse to grant certain relief or recognition to a foreign proceeding under Chapter 15. [98]

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95 *Id.*

96 *Id.*

97 For example, by order dated January 20, 2006, U.S. District Judge Jed S. Rakoff withdrew the reference of *In re Muscletech Research and Development Inc. et al.*, a case filed under Chapter 15 of the Bankruptcy Code that sought recognition of foreign main proceedings under Canada's Companies' Creditors Arrangement Act pending in the Ontario Superior Court of Justice (Commercial List). Judge Rakoff's decision to withdraw the reference of that case was based upon its relation to the Ephedra Products Liability Litigation pending in the District Court for the Southern District of New York as part of a Multidistrict Litigation proceeding.

98 Under Bankruptcy Code Section 1522(a) a court may only grant relief to a foreign representative (under Bankruptcy Code Section 1519) or recognition of a foreign proceeding (under Bankruptcy Code Section 1521) if "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." In addition, Bankruptcy Code Section 1507 permits a U.S. court to grant "additional assistance" after recognition of a foreign proceeding:

> In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure –
>
> (1) just treatment of all holders of claims against or interests in the debtor's property;
> (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 the debtor;
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

II. Recognition of *Concurso Preventivos* Under the United States Bankruptcy Code

In re Petition of Board of Directors of Compañía General de Combustibles ("Solfina") [99]

In September 2000, Solfina, S.A. and several of its affiliates (Sociedad Comercial del Plata, S.A. ("SCP"), Compañía General de Combustibles ("CGC"), and Tren de la Costa ("TDC") filed petitions for the commencement of *Concurso Preventivos*, which is similar to Chapter 11 reorganization under the Bankruptcy Code. At the time of the filing, it was the largest reorganization proceeding in Argentine history.

In December 2000, the boards of directors of SCP and CGC filed ancillary cases in New York under Section 304 of the Bankruptcy Code, and moved for an order in the Bankruptcy Court enjoining all persons from continuing or commencing any action against SCP or CGC or their property in the United States. U.S. creditors Reef Exploration, Inc. ("Reef") and Hess Energy Trading Company LLC ("Hess") opposed the injunctions. The Bankruptcy Court overruled the objections and granted the injunctions.

To support their arguments, Reef and Hess relied upon *Bank of New York v. Treco (In re Treco)*, 240 F.3d 148 (2d Cir. 2001), a decision by the United States Court of Appeals for the Second Circuit. Judge Lifland, the Bankruptcy Judge assigned to the Solfina cases, distinguished the facts in *Treco* because in *Treco* there was "substantial maladministration by foreign liquidators of a foreign proceeding".[100] The Circuit Court in *Treco* found that the distribution of proceeds in the foreign proceeding would not be "'substantially in accordance with the order

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11 U.S.C. § 1507(b).

99 269 B.R. 104 (Bankr. S.D.N.Y. 2001).

100 269 B.R. at 109.

prescribed by' the Bankruptcy Code."[101] In Treco, all administrative expenses in the Bahamian proceeding were given priority over secured creditors (unlike in the United States where only expenses directly benefiting the secured creditor are given priority). Also, administrative expenses were paid without notice to creditors or review by a judge and at a premium rate of 50% above the liquidators' usual rates.[102]

Judge Lifland acknowledged that there were several possible readings of *Treco*, but he believed the most reasonable interpretation was that relief under Section 304 of the Bankruptcy Code should be denied only "where there is clear evidence of maladministration or corruption."[103]

In the Solfina cases, there was no evidence of the incompetent or corrupt administration that marked the *Treco* case. Instead, the objecting creditors in Solfina argued that they were entitled to identical treatment under Argentine law. Hess argued that Section 304 relief should not be granted in Solfina because Argentine law does not provide special provisions for swap agreements as the United States allows in Section 560 of the Bankruptcy Code.[104] Judge Lifland answered: "Section 304(c)(4) does not require that the foreign bankruptcy law provide *identical* treatment of a claim to that treatment provided under United States law in order to extend comity."[105] This "extreme approach" would "effectively end cooperation among countries because special interest priority schemes vary greatly around the world."[106]

According to Judge Lifland, the fact that swap transactions are treated differently under

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101 *Id*. at 110 (quoting *Treco*, *supra*, 240 F.3d at 151).

102 *Id.*

103 *Id*. at 111.

104 *Id.* at 111-112.

105 *Id.* at 112.

106 *Id.*

Argentine law did not justify denial of relief under Section 304 of the Bankruptcy Code:

> The policy underlying the swap transaction provisions of the Bankruptcy Code is not to protect the rights of United States creditors entering into swap transactions with foreign corporations, but rather those of creditors (including foreign creditors) of United States counterparties that may be subject to the United States bankruptcy laws.[107]

Judge Lifland reviewed the legislative history of the Bankruptcy Code and determined that: "Congress was not seeking to protect a fundamental right of swap participants, but was seeking to ensure access to the swap market for United States borrowers and stabilize United States domestic markets."[108] Also, the court found that other aspects of Argentine Bankruptcy Law "actually provide[] greater protection to the non-debtor party to an executory contract".[109]

Finally, the court turned to Reef's argument that relief under Section 304 would prejudice it because it had a final judgment against CGC in the United States District Court for the District of Texas. However, Reef obtained the judgment against CGC after CGC had commenced an *Inhibitoria de Competencia*, an *ex parte* proceeding under Argentine law to resolve a jurisdictional dispute between the courts, rather than between the parties. Because Reef would be given the same opportunity as any other creditor to present full evidence of its claim, there was nothing fundamentally unfair about the way that Reef's claim would be treated in the *Concurso Preventivos*.

On appeal District Judge Kimba M. Wood affirmed Judge Lifland's ruling in *Solfina* in part, but Reef's objection to the injunction was remanded so that the Bankruptcy Court could determine "at the first instance: whether Reef actually will suffer prejudice or inconvenience in the processing of its claim in the Concursos Preventivos; if so, how that prejudice or

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107 *Id.*

108 *Id.* at 113.

109 *Id.*

inconvenience affects the § 304(c) balance; and why."[110] Judge Wood observed: "It appears that Reef may suffer some prejudice or inconvenience of its claim in the Concursos Preventivos, because, if the Argentine courts do not recognize the *res judicata* effect of the Texas Judgment, Reef will have to reargue the merits of that Judgment in Argentina."[111] Judge Wood noted, however, that even if Judge Lifland did determine on remand that Reef would be prejudiced or inconvenienced, such a finding would not necessarily "tip the § 304 balance in favor of vacating the injunction."[112]

Conclusion

Given the U.S. market's continuing appetite for investments in foreign companies, the U.S. Bankruptcy Courts' role as arbitrator of disputes between U.S. creditors and Argentine companies in distress will be ongoing. Because much of the precedent under the now-repealed Bankruptcy Code Section 304 remains relevant to the Model Law on Cross-Border Insolvency, codified in Bankruptcy Code Chapter 15, practitioners and judges have a starting point when navigating the labyrinth of multi-country cases.

Chapter 15's new rules and procedures carry through Section 304's fundamental rule as a method for a foreign representative to maintain control of the foreign insolvency proceeding as an ancillary proceeding in the United States and are, critically, entitled to recognition. Bankruptcy Courts have placed full confidence in the assumption that U. S. citizens and corporations investing in an Argentine company knowingly subject themselves to the laws and policies of Argentina. In addition, if the foreign proceeding meets general due process standards by allowing creditors of the same class to be treated equally in a distribution scheme, an ancillary

110 *Hess Energy Trading Co., LLC v. Bd. of Dirs. of Compañía General de Combustibles, S.A. (In re Bd. of Dirs. of Compañía General de Combustibles, S.A.)*, No. 01- 10167 (S.D.N.Y. filed Oct. 11, 2002).

111 *Id.* at 18.

112 *Id.* at 19.

proceeding would be recognized without the need for the more burdensome and expensive requirement of commencing a case under Chapter 11 of the Bankruptcy Code and seeking confirmation of a plan of reorganization.

Still challenging is the misease between the Trust Indenture Act and cross-border insolvency cases. The ruling by Judge Scheindlin in the *Telecom Argentina* case, while of precedent value, is not binding on all U.S. courts that may be asked to decide the issue in the future. Another court may take another approach, leaving a possible jurisdictional conflict when the Trust Indenture Act is implicated in an ancillary insolvency proceeding.

The cases studied in this article address critical issues that might influence a court's decision whether to recognize a foreign proceeding. As jurisprudence continues to evolve under Chapter 15, the unique facts of each case will continue to be paramount. The cases discussed are good templates for anyone trying to view the interplay of the U.S. bankruptcy system and Argentine insolvency proceedings. An important lesson learned from the cases is that the record presented to the bankruptcy court must be extensive and detailed if it is going to be sufficient to warrant a finding that the foreign insolvency proceeding meets the standards for recognition, including due process, the U.S. standard of equality for treatment of similarly situated creditors, and public interest.

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