THE ENFORCEMENT OF CONSENSUAL FOREIGN PLANS OF REORGANIZATION IN CHAPTER 15

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ABSTRACT

When creditors consent to a plan of reorganization, an auxiliary court can avoid the difficult challenge of balancing between accommodating foreign insolvency regimes and respecting the substantive protections offered creditors under domestic law. Different insolvency regimes use different benchmarks to assess whether creditors have consented to a plan. Some require simple majorities, while others require supermajorities. This Article argues, however, that, within broad parameters, these variations should not affect the deference that these plans should be given. Voting thresholds stand on a different footing than substantive protections such as the absolute priority rule. A plan of reorganization deemed consensual in a foreign jurisdiction should be respected under chapter 15 even if the deliberation process does not meet the supermajority thresholds the U.S. Bankruptcy Code establishes.

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INTRODUCTION

Chapter 15 of the Bankruptcy Code allows representatives of debtors that have obtained insolvency relief in a foreign jurisdiction to secure the help of bankruptcy courts in this country. The foreign representative typically asks the bankruptcy judge to enforce an order entered by a court in the foreign main proceeding. Chapter 15 generally allows bankruptcy courts to enforce those orders even if the relief would not have been available had the case originally been brought in the United States. Courts, however, have the discretion to deny such relief when doing so would violate privacy or due process rights or fundamental values embedded in the Bankruptcy Code itself.

The absolute priority rule is one of the pillars of modern reorganization law.[1] Each class of creditors has the right to insist upon being paid in full before anyone junior may receive anything. It remains an open question whether a bankruptcy court should respect plans of reorganization confirmed in foreign jurisdictions whose bankruptcy regimes do not insist on absolute priority. There is a fundamental tension between the core protection United States bankruptcy law affords creditors and the efficiencies that arise from respecting the insolvency regimes of other countries. Resolving this tension is hard.

But a chapter 11 plan can be consensually confirmed over the objection of dissenting creditors even if it violates the absolute priority rule as long as a supermajority of the affected class votes in favor of it. Consensual chapter 11

[1] The doctrine was firmly established no later than Case v. L.A. Lumber Prods. Co., 308 U.S. 106, 116–17 (1939) (describing absolute as the "'fixed principle' according to which . . . the character of reorganization plans was to be evaluated"). The Supreme Court has embraced this doctrine many times since, most recently last term in Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017).

plans that depart from absolute priority are commonplace. In some cases, a foreign plan that does not comply with the absolute priority rule is also arrived at consensually. Foreign jurisdictions similarly allow consensual departures from absolute priority, but sometimes require only a simple majority. This Article shows that deferring to a foreign jurisdiction in such a case is straightforward. No foundational bankruptcy policy is implicated when a U.S. court defers to a foreign jurisdiction's threshold for assessing consent.

The rules for assessing consent among creditors stand on an altogether different footing than the absolute priority rule itself. The absolute priority rule is an architectural feature of United States bankruptcy law. It has existed for nearly eighty years, and its origins stretch back into the nineteenth century.[2] By contrast, the current rules governing a waiver of absolute priority emerged only with the Bankruptcy Reform Act in 1978. No strong bankruptcy policy lies behind using a supermajority rather than some lower threshold.

In this respect, the supermajority requirement in chapter 11 lacks the same normative underpinning as, for example, the requirement of unanimity for most criminal convictions. Because no strong bankruptcy policy stands behind the voting thresholds, courts should defer to principles of comity when a plan has gained the support of creditors as measured by the foreign jurisdiction's rules, even if it has not gained such support to the same extent required under the chapter 11 voting thresholds.

Parts I and II of this Article set out, respectively, the structure of relief under chapter 15 and the absolute priority rule under the Bankruptcy Code. Part III reviews the relevant caselaw and presents an approach for an ancillary court to deal with different consensual approval thresholds. A short conclusion follows.

I. RELIEF UNDER A CHAPTER 15 CASE

A. The Model Law and Relief

The United Nations Commission on International Trade Law ("UNCITRAL") adopted the Model Law on Cross-Border Insolvency ("Model Law")[3] to allow courts to provide relief for debtors whose affairs crossed

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[2] *See, e.g.*, Louisville Tr. Co. v. Louisville, N. A. & C. Ry. Co., 174 U.S. 674, 683–84 (1899); N. Pac. Ry. Co. v. Boyd, 228 U.S. 482, 505 (1913).

[3] *See* U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2014) (providing a guide to enactment with the Model Law) ("Model Law").

international boundaries. It fills the gap that necessarily exists when it is not yet possible to implement an international insolvency regime that is uniform across jurisdictions.[4]

Chapter 15 under Title 11 of the United States Code ("Bankruptcy Code") gives a court the power to grant relief at the request of a foreign representative. The request usually seeks to enforce an order already rendered by a bankruptcy court in the foreign jurisdiction using that jurisdiction's own insolvency rules, rather than a topic that the court must assess as a matter of first impression.

Adopted by the UNCITRAL in 1997, the Model Law consists of a proposed uniform system for cooperation in international insolvency cases.[5] Designed to provide effective mechanisms for dealing with cross-border insolvency cases, the Model Law promotes legal certainty, cooperation between courts and authorities in different jurisdictions, and the fair and efficient administration of cross-border cases.[6] More than forty jurisdictions have adopted its terms.[7] The Model Law brings about coordination by allowing the court that oversees the

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[4] *See* HON. SAMUEL L. BUFFORD, UNITED STATES INTERNATIONAL INSOLVENCY LAW § 1.04 (2d ed. 2015) ("[O]ne may well wonder why international bankruptcy problems are not dealt with by international treaty. The reason is that the dustbin of history is filled with unsuccessful efforts to negotiate and adopt a generally accepted international treaty on bankruptcy . . . . Given the general lack of success, especially on a timely basis, for multilateral bankruptcy treaties, UNCITRAL decided to try a different approach. It drafted a model law that could be adopted as internal legislation by each country that wanted to benefit from international cooperation in bankruptcy cases."). The respect for different rules across the insolvency regime and its unwillingness to unify the respective rules are expressly provided in the purpose section of the Model Law. *See* Model Law, *supra* note 3, at 19 ("The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency").

[5] For the history of UNCITRAL involvement with the issue of cross-border insolvency, *see* BOB WESSELS ET AL., INTERNATIONAL COOPERATION IN BANKRUPTCY AND INSOLVENCY MATTERS 197–99 (2009).

[6] *See* Model Law, *supra* note 3, at 19 ("The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency. Those instances include cases where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. In principle, the proceeding pending in the debtor's center of main interests is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs.").

[7] For a list of countries that have adopted the Model Law, *see* U.N. COMM'N ON INT'L TRADE LAW, *Status UNCITRAL Model Law on Cross-Border Insolvency* (1997), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Feb. 26, 2018).

main insolvency proceeding to render decisions that will be enforced in the ancillary court, where a debtor's assets or creditors are located.[8]

Chapter 15 implements much of the Model Law's form and substance. Congress enacted it as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[9] Divided into five subchapters, chapter 15 comprises the general provisions and rules governing (a) the access of foreign representatives and creditors to local courts; (b) the recognition of a foreign proceeding and relief; (c) cooperation with foreign courts and foreign representatives; and (d) concurrent proceedings.

Section 1515 provides that a foreign representative[10] may apply to the court to recognize a foreign proceeding.[11] An order recognizing the foreign proceeding must be entered if (a) the proceeding qualifies as a foreign main proceeding[12] or a foreign non-main proceeding;[13] (b) the foreign representative is properly appointed; and (c) the petition containing the request meets the respective legal requirements.[14]

Where relief is urgently needed to protect the assets of the debtor or the interests of creditors, § 1519 allows a court to grant relief requested by the foreign representative on a provisional basis even before the court recognizes the foreign proceeding. Section 1519(a) provides that this provisional relief may

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8 *See* Model Law, *supra* note 3, at 29 ("A basic principle of the Model Law is that the relief considered necessary for the orderly and fair conduct of a cross-border insolvency should be available to assist foreign proceeding, whether on an interim basis or as a result of recognition . . . .").

9 Bankruptcy Abuse Prevention & Consumer Protection Act ("BAPCPA") of 2005, Pub. L. No. 109-8, § 801(a), 119 Stat. 23, 141 (2005).

10 *See* 11 U.S.C. § 101(24) (2018) ("'foreign representative' means 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 or to act as a representative of such foreign proceeding").

11 *See id.* § 101(23) ("'foreign proceeding' means 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 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").

12 *See id.* § 1502(4) ("'foreign main proceeding' means a foreign proceeding pending in the country where the debtor has the center of its main interests"). For the definition of center of main interest ("COMI") and an analysis of the interpretation by the U.S. and European courts on the term, *see* Alexandra CC Ragan, Comment, *COMI Strikes a Discordant Note: Why U.S. Courts are Not in Complete Harmony Despite Chapter 15 Directives*, 27 EMORY BANKR. DEV. J. 117, 167 (2010) (concluding that "while the operative language of chapter 15 and the EC Regulation are nearly identical, decisions across the Atlantic are coming out differently" and "[t]o remedy this problem Congress should amend the statue to include the same evidence/proof language that appears in the EC Regulation").

13 *See* 11 U.S.C. § 1502(5) (2018) ("'foreign nonmain proceeding' means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment").

14 *See id.* § 1517.

include a stay of execution against a debtor's assets. In addition, it may entrust the administration or realization of the assets to the foreign representative or other person authorized by the court. The court may also restrain the debtor's ability to dispose of its assets. Moreover, a court may examine witnesses, take evidence, or deliver information about a debtor's assets, affairs, rights, obligations, or liabilities. Finally, the court may, with some exceptions, grant the relief that is ordinarily available to a trustee.[15]

Most importantly, recognizing a foreign main proceeding entails certain automatic effects on the debtor's property in the United States. Section 1520(a) establishes that the Bankruptcy Code's adequate protection and automatic stay provisions apply in proceedings brought under chapter 15. The rules governing the use, sale, or lease of property and post-petition transactions will also govern a debtor's property rights. Further, the foreign representative may operate a debtor's business as the trustee would under the Bankruptcy Code. Finally, the limitations regarding the attachment of a security interest in property acquired post-petition apply automatically.[16]

Upon recognizing a foreign main or non-main proceeding, a court also enjoys extensive latitude to grant relief the foreign representative requests.[17] Section 1521(a) authorizes relief necessary to achieve chapter 15's purposes and to protect the debtor's assets or the creditor's interest. Such relief might complement the automatic relief granted under § 1520(a) or extend the provisional relief granted under § 1519. A court may also examine witnesses, take evidence, or deliver information about a debtor's assets, affairs, rights, obligations, and liabilities. The relief may also entrust the realization or distribution of a debtor's property in the United States to the foreign representative or to any other person the court authorizes.[18]

But there are limitations to the relief a court may provide. Relief cannot be based on the Bankruptcy Code's avoidance power provisions,[19] and the court

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[15] *See id.* § 1519(a).

[16] *See* 11 U.S.C. § 1520(a) (2018).

[17] *See In re* SPhinX, Ltd., 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006) ("[C]hapter 15 maintains—and in some respects enhances—the 'maximum flexibility,' that section 304 provided bankruptcy courts . . . . in light of principles of international comity and respect for the laws and judgments of other nations." (internal citation omitted)). *See also infra* Part III for a more comprehensive analysis of the parameters regarding acceptance of a relief request under a chapter 15 case.

[18] *See* 11 U.S.C. § 1521(a) (2018).

[19] *See id.* § 1521(a)(7). To pursue relief related to avoidance actions, the foreign representative will have to file a proper and independent action under the appropriate chapter of the Bankruptcy Code, as the case may be. *See id.* § 1523(a) (2018).

cannot enjoin a police or governmental regulatory act.[20] A court must also respect the Bankruptcy Code's safe harbors for swaps, repos, and other qualified financial contracts.[21] Further, the relief entrusting asset distribution to the foreign representative or other court-authorized person can be granted only if the court is satisfied that the interests of creditors in the United States are sufficiently protected.[22]

The court should entrust the administration of a debtor's property to a foreign representative under a foreign *non-main* proceeding only if the court is satisfied that, under the laws of the United States, it should be administered there.[23] In addition, § 1522 also establishes two relevant catchall provisions. The court may grant a relief under § 1519 or § 1521 only if the interest of the creditors and other interested entities are sufficiently protected,[24] and also may in its discretion impose conditions on such relief, such as the debtor providing security or filing a bond.[25]

In addition to the relief established in § 1519, § 1520, and § 1521, the foreign representative may also request additional court assistance under § 1507(a).[26] Section 1507(b)[27] provides that this additional assistance, consistent with comity principles, is conditional on fulfilling certain requirements. A court must reasonably assure that all claim holders are receiving just treatment, that United States claim holders are being protected against prejudice and inconvenience in processing their claims, that the preferential or fraudulent disposal of a debtor's property has been prevented, and that the distribution of a debtor's property is substantially in accordance with the order prescribed in the Bankruptcy Code.[28]

Section 1506 provides that a U.S. Bankruptcy Court retains the authority to deny relief deemed contrary to United States public policy.[29] Thus, any relief can be barred by applying the exemption under § 1506. This provision, however,

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20 *See* 11 U.S.C. § 1521(d) (2018).

21 *See id.* § 1521(f).

22 *See id.* § 1521(b).

23 *See id.* § 1521(c).

24 *See* 11 U.S.C. § 1522(a) (2018). The Model Law employs the term *adequately protected* rather than *sufficiently protected*. Chapter 15 adopted the term *sufficiently* rather than *adequately* to not create confusion with the well settled Bankruptcy Code *adequate protection* term.

25 *See id.* § 1522(b).

26 *See id.* § 1507(a).

27 Model Law does not contain a section corresponding to § 1507(b).

28 *See* 11 U.S.C. § 1507(b) (2018). *See also* § 1507(b)(5) for additional requirements for cases of individual bankruptcy (in case the foreign insolvency proceeding concerns an individual, the court should also, where appropriate, assure that the debtor is afforded a fresh start).

29 *See id.* § 1506.

should be interpreted narrowly[30] and informed by UNCITRAL.[31] In practice, U.S. courts have applied the public policy exemption rarely.[32] But relief has been denied under this section in order to protect privacy and due process rights.[33] Violation of the automatic stay,[34] discharge of third-party guarantees,[35] and patent licenses[36] have also been found as grounds for denial.

B. The Interplay Between § 1521 and § 1507

Sections 1507 and 1521 overlap. For example, § 1521 establishes that a court may grant "any appropriate relief." This relief would presumably include the "additional assistance" contemplated in § 1507. Therefore, it is unclear where § 1521 ends and where § 1507 begins.[37] This may lead to situations in which the

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30 *See* H.R. REP. NO. 109-31(I), at 109 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 172. ("The word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States.").

31 *See* Model Law, *supra* note 3, at 52 ("The purpose of the expression 'manifestly', used also in many other international legal texts as a qualifier of the expression 'public policy,' is to emphasize that public policy exemptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental important for the enacting State.").

32 *See* BUFFORD, *supra* note 4, at § 3.07 ("U.S. circuit courts have generally applied the public policy provision of § 1506 in the restrictive manner intended in the Model Law. Several appellate court decisions have recognized that the phrase 'manifestly contrary' requires a narrow construction of the public policy exception: 'the exception is intended to be invoked only under exceptional circumstances concerning matter of fundamental importance for the United States.'"). *See* Michael A. Garza, *When is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy*, 38 FORDHAM INT'L L.J. 1587, 1591 (2015) (arguing "that the Public Policy Exception of Chapter 15 should be invoked only as a last resort and that, going forward, courts should engage in an analysis of § 1506 only when no other provision in Chapter 15 supports a decision to deny relief").

33 *See, e.g., In re* Toft, 453 B.R. 186 (Bankr. S.D.N.Y. 2011) (denying the German foreign representative request to access debtor's e-mails stored in U.S. based servers because such an act would violate local privacy of electronic communication laws); *In re* Sivec Srl, 2011 Bankr. LEXIS 3206 (Bankr. E.D. Okla. Aug. 18, 2011) (denying the relief requested by an Italian foreign representative to stay a lawsuit filed by a U.S. creditor because the U.S. creditor had not received proper notice to present a proof of claim before the Italian proceeding).

34 *See In re* Gold & Honey, Ltd., 410 B.R. 357 (Bankr. E.D.N.Y. 2009) (denying recognition to an Israeli receivership proceeding because it was commenced in violation of the stay of a chapter 11 case commenced in the United States).

35 *See* Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (*In re* Vitro, S.A.B. de C.V.), 473 B.R. 117 (Bankr. N.D. Tex. 2012). This case is discussed in Part II.A. below.

36 *See In re* Qimonda AG, 462 B.R. 165 (Bankr. E.D. Va. 2011) (finding that termination of the patent agreements as determined within the German insolvency proceeding violates U.S. public policy).

37 *See* Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, 82 AM. BANK. L.J. 269, 317 (2008) ("What is not clear is whether a foreign representative can pick and choose which section to proceed under in order to take advantage of different standards for affording relief or burdens of proof."). The rationale for having both provisions is not clear. Section 1507(b) reflects the requirements contained in the former section § 304 of the Bankruptcy Code (repealed when chapter 15 was included in the Bankruptcy Code), and some argue that the intent of § 1507 is to direct courts to look at case law under § 304 when analyzing whether additional assistance should be granted. *See* BUFFORD, *supra* note 4, at § 3.08 (explaining the purpose of § 1507). *See also* 8 COLLIER ON BANKRUPTCY, ¶ 1507.01 ("Some members of the United States Advisory Group viewed this section as a means to incorporate section 304 jurisprudence into

foreign representative is unsure whether to ground a request in § 1507 or § 1521. Courts can face a similar issue when deciding the basis for the relief.[38]

Some courts have found that § 1507 applies only when relief is otherwise not available under chapter 15. Thus, a foreign representative should base a request on § 1507 only when relief is unavailable under § 1521.[39] *Vitro* was one of the first cases to explore the relationship between § 1507 and § 1521 in this fashion.[40] When the foreign representative asked for the enforcement of a *concurso* plan approved in Mexico, the court provided a three-step framework for identifying the role that § 1507 and § 1521 play. First, the court must ask whether the relief falls under the explicit categories enumerated in § 1521(a) and (b). This analysis should come first; not only do those provisions explicitly provide for certain types of relief, but also "specific terms prevail over the general."[41]

If the relief sought is not contemplated in the enumerated provisions of § 1521(a) and (b), the court must ask whether the request falls more generally under the "any appropriate relief" language in § 1521. In *Vitro*, the court suggests this analysis should consider whether a similar relief had been granted

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chapter 15 notwithstanding the repeal of section 304 while others viewed it as an invitation to circumvent the specific requirements for relief under chapter 15. Section 1507 embodies both perspectives: on the one hand, additional assistance is 'subject to the specific limitations stated elsewhere in this chapter' and can only happen upon recognition of the foreign proceeding and, on the other hand, the court must review the former section 304(c) factors as part of its deliberation.").

38 *See* George W. Shuster, Jr., *The Trust Indenture Act and International Debt Restructurings*, 14 AM. BANKR. INST. L. REV. 431, 455 ("Because it is unclear where section 1521 ends and where section 1507 begins, it is also unclear which of these paths the court will follow—whether it will consider entry of an order enforcing a foreign discharge as 'appropriate relief' under section 1521 or as 'additional assistance' under section 1507."). *See In re* Atlas Shipping A/S, 404 B.R. 726, 741 (Bankr. S.D.N.Y. 2009) ("The interplay between the relief available under §§ 1507 and 1521 is far from clear. Nevertheless, the legislative history confirms that Congress expected courts to interpret the provisions consistently with prior law under § 304.").

39 *See* BUFFORD, *supra* note 4, at § 3.08 ("This section is an available basis for relief only with respect to relief that is not otherwise available under another provision of chapter 15. Thus this section must be read in conjunction with § 1520 (the effects of recognizing a foreign main proceeding) and § 1521 (discretionary relief that may be granted upon recognition), as well as the other provisions of chapter 15.").

40 *See* Ad Hoc Group of Vitro Noteholders v. Vitro SAB De CV (*In re* Vitro SAB De CV), 701 F.3d 1031 (5th Cir. 2012).

41 *See id.* at 1056 ("First, because § 1521 lists specific forms of relief, a court should initially consider whether the relief requested falls under one of these explicit provisions").

under former § 304[42] and whether that relief would otherwise be available in other chapters of the Bankruptcy Code.[43]

Finally—and only if the relief request does not fall into the above-mentioned alternatives—the court should examine whether the relief would be appropriate as "additional assistance," as provided in § 1507.[44] Because this would be a more extraordinary relief (not contemplated under the preceding and more ordinary provisions), the test should be more rigorous.[45]

C. The Enforcement of a Foreign Plan of Reorganization Confirmation Order

Ordinarily, the core of a plan of reorganization consists of the discharge of a debtor's payment obligations. Once the foreign main proceeding court confirms the plan, the foreign representative may apply for the plan's enforcement in the foreign jurisdiction. Under a chapter 15 proceeding, the relief will typically consist of recognizing, in the U.S., the discharge of a debtor's payment obligations, as established in the plan of reorganization.

The discharge of a foreign debtor's obligation is not explicitly contemplated under § 1521(a) or (b) categories. Following the test established in *Vitro*, it should then be analyzed whether the relief can be granted under the "any appropriate relief" authority in § 1521—that is, whether the requested relief had been granted under former § 304 and is also available under U.S. law. Courts have found that granting a discharge is the sort of relief that falls within § 1521's

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[42] *See id.* at 1056–57 ("This, in turn, requires consideration of whether such relief has previously been provided under § 304. [. . . .] This latter consideration aligns with Congress's intent that § 1521 was not intent to 'expand or reduce the scope of relief' previously available under other provisions, including § 304."). This seems inconsistent (or at least represents an additional overlap) with the idea that § 1507 incorporates former § 304 case law. *See Shuster supra* note 38, at 455.

[43] *See* Vitro, 701 F.3d at 1057 ("A court should also consider whether the requested relief would otherwise be available in the United States"); BUFFORD, *supra* note 4, at § 5.07 ("Section 1521(a)(7) authorizes the court to grant 'additional relief' upon the recognition of a foreign proceeding, whether as a main proceeding or as a nonmain proceeding. Such relief may include any relief available to a trustee under a plenary case, except for relief under §§ 522, 544, 545, 547, 548, 550, and 724(a). The 'additional relief' available under § 1521 is very broad.").

[44] *See* Vitro, 701 F.3d at 1054 ("We conclude that a court confronted by this situation should first consider the specific relief enumerated under § 1521(a) and (b). If the relief is not explicitly provided for there, a court should then consider whether the requested relief falls more generally under § 1521's grant of any appropriate relief. We understand 'appropriate relief' to be relief previously available under chapter 15's predecessor, § 304. Only if a court determines that the requested relief was not formerly available under § 304 should a court consider whether relief would be appropriate as 'additional assistance' under § 1507.").

[45] *See id.* at 1057 ("This approach recognizes that relief under § 1507 'is in nature more extraordinary' than that provided under § 1521, as a result of which 'the test for granting that relief is more rigorous'").

broad authority. In *Rede Energia*,[46] for example, the foreign representative sought the enforcement of a Brazilian plan of reorganization that provided for the discharge of the debtor's payment obligations.[47] The court recognized that this relief is properly situated under § 1521's broad authority because similar relief had been granted under former § 304 and such a discharge is a feature also established within the Bankruptcy Law.[48]

II. THE ABSOLUTE PRIORITY RULE AND THE CONSENSUAL THRESHOLD

Under the Bankruptcy Code, the court may confirm a reorganization plan that each class accepts as long as each member of the class receives at least as much as it would have received in a chapter 7 liquidation.[49] In addition to such consensual plans, a court also has the power to confirm a plan even if one or more classes object.[50] Section 1129(b) provides that a court may cramdown dissenting classes if the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."[51]

The "fair and equitable" language in § 1129(b) embodies the absolute priority rule, the idea that a reorganization plan will preserve the priorities of those holding rights against the debtor entity under non-bankruptcy law.[52] Thus,

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[46] *See In re* Rede Energia S.A., 515 B.R. 69, 88 (Bankr. S.D.N.Y. 2014). For a more detailed analysis of the case, *see* section II below.

[47] *See In re* Rede Energia S.A., 515 B.R. at 92 (". . . the Foreign Representative has requested that the Court grant the additional Plan Enforcement Relief, which consists of the following: (i) an order granting full faith and credit to the [Confirmation Decision] and the Brazilian Reorganization Plan, and an injunction of acts in the U.S. in contravention of that order; and . . . .").

[48] *See id.* at 93 ("The request by the Foreign Representative that the Court (i) enforce the Brazilian Reorganization Plan and the Confirmation Decision and (ii) enjoin acts in the U.S. in contravention of the Confirmation Decision is relief of a type that courts have previously granted under section 304 of the Bankruptcy Code and other applicable U.S. law. *See, e.g.*, Bd. Of Dirs. of Telecom Arg., 528 F.3d at 174-76; *see also In re* Petition of Garcia Avila, 296 B.R. 95, (Bankr. S.D.N.Y. 2003); *see generally* 11 U.S.C. § 1141(d)(1)(A) (2018) (granting discharge to chapter 11 debtor upon confirmation except as otherwise provided for in the plan); 11 U.S.C. § 524(a) (describing the effect of a discharge)").

[49] *See* 11 U.S.C. § 1129(a)(7) (2018).

[50] *See* 11 U.S.C. § 1129(a)(8)(A)-(B) (2018). Other requirements for confirmation of the plan are set out in § 1129(a)(1)-(9). For the rationale behind allowing "cramdown" of nonconsenting classes, *see* 7 COLLIER ON BANKRUPTCY ¶ 1129.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2018) ("Congress also anticipated that, for diverse reasons, confirmation may be desirable when one or more classes refuse to accept the plan. This will most often be the case when a junior class—such as equity interests—is eliminated; an eliminated class is conclusively presumed to reject the plan, and thus no such plan can satisfy section 1129(a)(8). To confirm such a plan, the proponent must thus proceed under the nonconsensual confirmation provisions of section 1129(b)").

[51] *See* 11 U.S.C. § 1129(b)(1) (2018).

[52] *See* Douglas G. Baird, ELEMENTS OF BANKRUPTCY 69-71 (Robert C. Clark et al., 6th ed. 2014) (discussing the preservation of nonbankruptcy rights under the absolute priority rule).

a senior creditor will trump a junior creditor in receiving payment distributions under the plan. Similarly, a shareholder may not retain equity unless all creditors are paid in full. [53]

Specifically, a plan is "fair and equitable" for a dissenting secured class if each claim holder retains the securing liens and receives a payment stream equivalent to the value of the collateral's discounted value.[54] Alternatively, the plan is fair and equitable for the secured class if, with the sale of the collateral, the lien attaches to the proceeds.[55] A plan will also meet the fairness standard towards the dissenting secured class if it provides for the realization of the "indubitable equivalent" of the value of the secured claim.[56] In practice, however, this last provision is read narrowly, and few nonconsensual plans are confirmed that fail to meet one of the first two tests.[57]

A plan can be confirmed over the objection of a class of unsecured creditors if each creditor receives payments equal to the amount allowed by the claim.[58] Otherwise, the fairness requirement will only be fulfilled if no junior claim "receive[s] or retain[s] under the plan on account of such [a] junior claim or interest any property."[59] The absolute priority rule, however, is again a *class-based right*. A dissenting unsecured creditor in a class that has voted in favor of the plan cannot invoke the absolute priority rule even if the plan does not pay

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[53] If a shareholder, however, provides new value to the debtor entity, it might be allowed to retain its respective (or a portion of its) equity participation. *See* Baird, *supra* note 52, at 72–73 ("Equity holders sometimes propose plans in which they receive equity in the reorganized business, even though creditors are not being paid in full and the most senior creditor is unwilling to 'gift' part of its interest to them. They justify their continuing participation on the ground that they are contributing new value. They receive new equity on account of the new capital, not 'on account of' their old interest. Hence, holders of old equity argue, notwithstanding § 1129(b), a 'new value' plan does not have to pay the unsecured claims in full.").

[54] *See* 11 U.S.C. § 1129(b)(2)(A)(i) (2018). The plan must also provide for a stream of payment that is equal to the face amount of the claim. This tends to be redundant in a scenario in which interest rates are positive. *See* Baird, *supra* note 52, at 71 ("To pass muster under § 1129(b)(2)(A)(i), a reorganization plan must meet an additional requirement to be confirmed over the objection of a class of secured claims. The plan must also provide a stream of payments equal to the face amount of the secured claim. In most cases, this requirement is redundant. In a world in which discount rates are positive, a stream of payment over time equal in value to a given amount must total more than the face amount owed.").

[55] *See* 11 U.S.C. § 1129(b)(2)(A)(ii) (2018).

[56] *See id.* § 1129(b)(2)(A)(iii).

[57] RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012).

[58] *See* 11 U.S.C. § 1129(b)(2)(B)(i) (2018).

[59] *See* 11 U.S.C. § 1129(b)(2)(B)(ii) (2018). Similar rights are granted to a dissenting class of preferred stock. In order to be considered fair and equitable, a plan must also honor in full preferred stock rights (redemption prices) prior to distributing payments to junior classes; *Id.* § 1129(b)(2)(C).

the unsecured creditors in full and gives the old equity holders a stake in the reorganized enterprise.[60]

Section 1126(b) establishes what it means for a class to consent to a plan that departs from absolute priority. It requires a super-majority. A plan is approved when it gains the support of creditors "that hold at least two-thirds in amount and more than one-half in number of the allowed claims" that vote in a particular class.[61] Benchmarking consent in this fashion creates a source of potential conflict within the cross-border insolvency arena.

In at least two recent cases, courts confronted the question whether a foreign plan of reorganization could be made effective under a chapter 15 without satisfying the absolute priority rule. In neither of these cases did the bankruptcy court directly confront the question of whether a plan that satisfied the standards for consent under the law of a foreign jurisdiction still had to satisfy the absolute priority rule. The cases nevertheless illuminate some of the relevant issues, and we address each in turn.

Vitro SAB was one of the largest Mexican corporations that manufactured glass containers and flat glass.[62] Because of the 2008 financial crisis, Vitro experienced a downturn and missed payments to its creditors. On December 31, 2010, Vitro's aggregated third-party indebtedness reached approximately $1.7 billion.[63] On December 13, 2010, seeking the "approval of a pre-package, '*concurso*' restructuring plan,"[64] Vitro filed for a voluntary judicial reorganization in Mexico, under the local *Ley de Concursos Mercantiles*.

On February 3, 2012, a Mexican court issued an order confirming the terms of the *Concurso* plan. This order discharged Vitro's debts and extinguished the guarantees provided by Vitro's third-party guarantors.[65] On March 2, 2012, Vitro's foreign representatives asked a U.S. court to enforce the *Concurso* plan confirmation order, "[p]ursuant to §§ 105(a), 1507, and 1521."[66]

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60 *See* COLLIER, *supra* note 50, ¶ 1129.03, 1129.03[4][a][i] ("The Code anticipates that not all reorganizations will proceed with the assent of all participants. The first nod in this direction is the majority rules contained in section 1126; although the consent of all impaired classes is necessary for consensual confirmation, a class need not have voted unanimously for it to have consented.").

61 11 U.S.C. § 1126(c) (2018).

62 Vitro v. ACP Master, Ltd. *(In re* Vitro, S.A.B. de C.V.), 455 B.R. 571, 574 (Bankr. N.D. Tex. 2011).

63 *Id.* at 574. Vitro also had intercompany claims of approximately $2 billion.

64 *See id.* at 575. Vitro request was initially denied by the lower Mexican court, but ultimately authorized by the respective appellate court.

65 Vitro, S.A.B. de C.V. v. ACP Master, Ltd. *(In re* Vitro, S.A.B. de C.V.), 473 B.R. 117, 120 (Bankr. N.D. Tex. 2012).

66 *See id.* at 119.

The plan contained third-party releases, and the court pointed to these when it denied the enforcement of the *Concurso* plan. According to the bankruptcy court, third-party releases prevented creditors from being paid substantially in the order provided for under the Bankruptcy Code.[67] According to the bankruptcy court, the feature weakened the protection granted to the creditors[68] and went against U.S. public policy.[69] The court never reached other objections lodged against the plan. Among other objections, the creditors argued that, because equity holders would retain a value of approximately $500 million under the plan even though certain creditors were not paid in full, the plan would violate the absolute priority rule.[70] The court signaled for the benefit of the appellate court that this was a possible meritorious objection.[71] It did this even though the plan had been approved under Mexican law's required majorities.[72] The court, however, did not explicitly consider whether to grant any deference to different voting-requirement thresholds.

Rede was one of Latin America's largest electric power holding companies. Through its subsidiaries, Rede distributed electricity to millions of customers throughout Brazil.[73] One of the purported reasons for its financial crisis was the

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[67] *See id.* at 132 ("The *Concurso* Approval Order does not provide for the distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by Title 11. *See* 11 U.S.C. § 1507(b)(4) (2018). Under a Chapter 11 plan, the noteholders would receive their distribution from the debtor and would be free to pursue their other obligors, in this case the non-debtor guarantors.").

[68] *See id.* ("One could argue that Vitro SAB, as a holding company, is trying to achieve, through its *Concurso* plan, an entrustment of the distribution of the assets of its non-debtor U.S. subsidiaries without sufficiently protecting the Objecting Creditors, pursuant to §§ 1521(b) and § 1522(a).").

[69] *See id.* ("The expression by Congress in § 524, paired with the case law in this Circuit, lead this Court to conclude that the protection of third party claims in a bankruptcy case is a fundamental policy of the United States. The *Concurso* Approval Order does not simply modify such claims against non-debtors, they are extinguished. As the *Concurso* plan does not recognize and protect such rights, the *Concurso* plan is manifestly contrary to such policy of the United States and cannot be enforced here.").

[70] *See id.* ("Under the *Concurso* plan, equity retains a value of approximately $500 million. Creditors, such as the Objecting Parties, are not paid in full. Such a plan would violate the absolute priority rule in the United States. By allowing the retention of equity, and, at the same time, not paying the Objecting Parties in full, the *Concurso* plan arguably runs afoul of § 1507 because the result is demonstrably different than would occur in Chapter 11."). Absolute priority rule was not brought in the subsequent appeals involving the case.

[71] *See id.* ("However, there are two other strong objections that this Court notes for the appellate court, but does not reach, because the Court has sustained the objection to the release of the third party claims against the non-debtor subsidiaries.").

[72] *See* Mot. of Foreign Representatives of Vitro S.A.B. De C.V. for an Order Pursuant to 11 U.S.C. §§ 105(a), 1507 and 1521 to (I) Enforce the Mexican Plan of Reorganization of Vitro S.A.B. De C.V., (II) Grant a Permanent Inj., and (III) Grant Related Relief, at 57 , No. 11-33335 (N.D. Tex. Mar. 2,2012), ECF No. 327 ("As is clear from the preceding sub-section, the Bankruptcy Code, just like the LCM [*Ley de Concurso Mercantiles*], allows equity to retain value as long as the plan has been accepted by all impaired classes. That is exactly what happened here—the *Concurso* Plan was accepted by the requisite majority of Recognized Creditors and approved by the Mexican District Court.").

[73] *See In re* Rede Energia, *supra* note 46, at 75.

company's high leverage and inability to generate cash to service the debt. In August 2012, Brazilian regulatory agencies intervened in the operational subsidiaries, cutting the only liquidity source Rede arguably had.[74] In November 2012, Rede finally filed for a Brazilian corporate restructuring proceeding (*recuperação judicial*). Its indebtedness amounted to approximately $1.8 billion,[75] of which noteholders held $496 million under an indenture governed by New York law.[76]

Rede's plan of reorganization essentially consisted of the sale of its assets (the equity it held in its subsidiaries) to third-party investor Energisa S.A., which would then invest $390 million in the operations of the subsidiaries and direct approximately $620 million to Rede's outstanding creditors.[77] Rede's controlling shareholder would transfer all of its shares to Energisa for a nominal amount.[78] Meanwhile, the remaining shareholders would retain equity (albeit subject to potential dilution).[79] In general, creditors (including the noteholders) could opt to either receive an upfront cash payment equivalent to 25% of their principal claims or have the principal amount of their claims reinstated and paid out over twenty-two years, without interest.[80]

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[74] *See* Rede Energia initial filing for *recuperação judicial*, B3: BRASIL, BOLSA, BALCAO, http://www.bmfbovespa.com.br/empresas/consbov/ArquivoComCabecalho.asp?motivo=&protocolo=358389&funcao=visualizar&site=B (last visited on Feb. 28, 2018).

[75] Based on (approximate) current exchange rate among Brazilian *Reais* and United States Dollars (US$ 1 = R$ 3.15).

[76] *See In re* Rede Energia, *supra* note 46, at 76-77 ("Pursuant to an indenture dated April 2, 2007 (the 'Indenture'), Rede issued 11.125 percent notes in the aggregate principal amount of USD$400 million that have no fixed final maturity date and are not subject to any mandatory redemption provisions (the 'Perpetual Notes'). In September 2007, Rede exercised its rights under the Indenture to issue additional Perpetual Notes in the aggregate principal amount of USD$175 million. Approximately USD$496 million of the Perpetual Notes remained outstanding as of the date of the commencement of the Brazilian Bankruptcy Proceeding on November 23, 2012 . . . . The Indenture and the Perpetual Notes are governed by New York law.").

[77] *See id.* at 84 ("Under the Brazilian Reorganization Plan, Energisa will invest R$1.2 billion in the Rede Concessionaire and R$1.95 billion to pay the creditors of the Rede Debtors.").

[78] *See id.* ("The Brazilian Reorganization Plan also requires the Controlling Shareholder of the Rede Debtors to transfer his equity interests in the Rede Group to Energisa in consideration for the symbolic price of R$1.00 . . . .").

[79] *See id.* at 85, 85 n.24 ("The Brazilian Reorganization Plan does not provide for treatment of the shareholders of the Rede Debtors as, under Brazilian bankruptcy law, shareholders cannot be deprived of their interest without their consent.") ("Although the Brazilian Reorganization Plan does not extinguish the remaining equity interests held by minority shareholders, as discussed below, such remaining minority shares will be diluted upon consummation of the Brazilian Reorganization Plan.").

[80] *See id.* at 84 ("The Brazilian Reorganization Plan generally provides that certain creditors of the Rede Debtors, including the Noteholders, will have the option to receive either (i) cash equal to 25 percent of the principal amount of their claims in return for an assignment of such claims to Energisa or (ii) reinstatement of 100 percent of the principal amount of their claims paid out over 22 years, without interest.").

By the time Rede's plan of reorganization was deliberated, creditors were divided into two classes: secured and unsecured.[81] There was only one creditor in the secured class, and it voted in favor of the plan.[82] In the unsecured class, 66.34%, in amount, and 47.7%, in number, of claims voted to accept the plan.[83] Hence, the plan was contested since it had not met the *consensual* threshold established by Brazilian bankruptcy law.[84] But under the Brazilian Bankruptcy Code's *cramdown* rules,[85] the Bankruptcy Court ultimately confirmed the plan.

In January 2014, Rede's foreign representative requested recognition of the Brazilian bankruptcy proceeding as a foreign main proceeding and, as additional relief, acknowledgment of the enforceability of Rede's reorganization plan in the United States.[86] An ad hoc group of noteholders objected to the plan of reorganization enforcement on several grounds. Among these was the plan's failure to satisfy the absolute priority rule. Rather than providing full payment for unsecured creditors, the plan imposed a significant haircut on them while, at the same time, giving value to old equity and structurally subordinated creditors.[87]

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[81] Brazilian bankruptcy code does not provide a debtor the flexibility to create classes of creditors under the plan, which should be distributed according to their claims in one of the statutory fixed classes (labor related, secured and unsecured classes). After Rede's ruling, Brazilian Congress enacted an amendment to the bankruptcy code establishing a fourth class: the small-companies class.

[82] *See id.* at 81 ("FI-FGTS voted to accept the Plan; its claim was the only voting claim in Class II, the secured creditor class . . . .").

[83] *See id.* at 104 ("Here, 74 percent of all claims, in amount, voted in favor of the Brazilian Reorganization Plan, and, in the class of unsecured claims, 66.34 percent, in amount, and 47.7 percent, in number, voted to accept.").

[84] *See* Decreto No. 11.01, de 9 de Fevereiro de 2005, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.101.2005 (Braz.) ("Brazilian Bankruptcy Law"). A plan is deemed consensual under Brazilian Bankruptcy Law when all classes have approved the plan pursuant to a simple majority of amount and number of claims (labor related and small companies class require only a simple majority of the number of claims).

[85] Under Brazilian Bankruptcy Law, *cramdown* will occur when (i) holders of a simple majority in amount of the total allowed claims vote in favor of the plan (regardless of the respective class); (ii) the simple majority is reached in the remaining voting classes; and (iii) in the dissenting class, at least 1/3 of the amount and number of claims vote in favor of the plan (the number of claims required in the labor related and small companies classes). Further, the cram down should be possible only if the plan does not entail different treatment among the creditors of the class that rejected it. Decreto No. 11.01, de 9 de Fevereiro de 2005, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.101.2005 (Braz.).

[86] *See In re* Rede Energia, *supra* note 46, at 75 ("On January 16, 2014, the Foreign Representative filed the Petition, requesting recognition of the Brazilian Bankruptcy Proceeding as a foreign main proceeding. The petition also requested additional relief, pursuant to sections 1521 and 1507 of the Bankruptcy Code, enforcing the Brazilian Reorganization Plan in the United States, including an order (i) granting full faith and credit to (a) the Brazilian Reorganization Plan and (b) the Confirmation Decision and enjoining acts in the U.S. in contravention of the Confirmation Decision; . . . .").

[87] *See id.* at 103 ("[T]he Ad Hoc Group argues that the Brazilian Reorganization Plan violates the absolute priority rule and is therefore manifestly contrary to U.S. law because it 'preserves value for equity and/or structurally subordinated creditors (FI-FGTS and BNDESPar)' and 'goes so far as to potentially call for, or at

The foreign representative responded that the unsecured class voting under Rede's plan was close enough to the threshold of a consensual plan of reorganization under the Bankruptcy Code and, therefore, the absolute priority rule limitation (retention of value by a structurally junior class) should not apply. The foreign representative also argued that the results of the unsecured class deliberation (favorable votes corresponding to 66.34% in amount and 47.7% in number) "is only 0.3% less in amount and 2.3% less in number than would be required under the Bankruptcy Code for the class to have accepted, such that the absolute priority rule would not apply." Given such a small difference, "it is difficult to see how the Brazilian Reorganization Plan could be considered manifestly contrary to U.S. public policy." The court found that argument persuasive[88] and relief was ultimately granted, making Rede's plan of reorganization effective in the United States.

III. THE CONFLICT OF RULES IN CROSS-BORDER INSOLVENCY

The Model Law embodies the concept of modified universalism. In a cross-border insolvency, the orders rendered by the main proceeding court have effects in other jurisdictions. When the debtor has assets or creditors outside of its center of main interest, other jurisdictions need to be brought into the process to ensure orderly supervision of the insolvency proceeding. Not only does concentrating the decisions in a single body reinforce legal certainty and efficiency in

least to enable, the repayment in full of one or both of such parties' at the expense of the structurally senior Noteholders.").

[88] *See id.* at 104 ("Here, 74 percent of all claims, in amount, voted in favor of the Brazilian Reorganization Plan, and, in the class of unsecured claims, 66.34 percent, in amount, and 47.7 percent, in number, voted to accept. This is only 0.3 percent less in amount and 2.3 percent less in number than would be required under the Bankruptcy Code for the class to have accepted, such that the absolute priority rule would not apply. *See* 11 U.S.C. § 1126(c) (2018). The Foreign Representative argues that, with a difference this small, it is difficult to see how the Brazilian Reorganization Plan could be considered manifestly contrary to U.S. public policy. The Court finds this argument persuasive."). The Court has also noted that equity holders would be subject to massive dilution under the terms of the plan, which seemed consistent with the objective of the absolute priority rule under the Bankruptcy Code. *See id.* ("[The] significant dilution of outstanding equity under the Brazilian Reorganization Plan is consistent with the purpose of the absolute priority rule in the U.S., which is designed to prevent shareholders from retaining equity in reorganized companies without contributing new value.").

insolvency proceedings,[89] but it also impedes potential fraudulent conduct by stakeholders.[90]

In a universalist cross-border regime, ancillary courts defer to the orders of the foreign court. In its modified variation—as adopted by the Model Law and, consequently, by chapter 15, ancillary courts retain discretion on whether to enforce a foreign court's order. Because insolvency regimes vary substantially around the world, situations arise in which the foreign law will fit poorly into another state's legal framework. Every time such a conflict happens, the local court must balance its domestic interests with principles of comity.

Under U.S. law, comity is a common law principle that derives from the constitutional concept of "full faith and credit." Article IV of the U.S. Constitution mandates that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[91] In domestic affairs states should always give full recognition and effect to another state's act, provided that certain procedural requirements are fulfilled.[92]

Such unlimited deference for another state's act, however, does not occur in the international arena. Nevertheless, states give weight to foreign decisions. Each nation creates its laws through a legislative process that takes account of its unique realities, culture, history, and economic circumstances. Deference to a foreign state law or order is important, "since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations."[93] To the extent possible,

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[89] *See* Model Law, *supra* note 3, at 20-21 ("The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investments. However, national insolvency laws by and large have not kept pace with the trend, and they are often ill-equipped to deal with cases of cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conductive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases can impede capital flow and be a disincentive to cross-border investment.").

[90] *See id.* at 21 ("Fraud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions, is an increasing problem, in terms of both its frequency and its magnitude. The modern, interconnected world makes such fraud easier to conceive and carry out. The cross-border cooperation mechanisms established by the Model Law are designed to confront such international fraud.").

[91] *See* U.S. Const. art. IV, § 1.

[92] *See* Bufford, *supra* note 4, at § 2.04[2].

[93] *See* Laker Airways, Ltd. v. Sabena, Belg. World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984). *See also* Bufford, *supra* note 4, at § 2.04[2](citing Daewoo Motor Am., Inc. v. Gen Motors Corp., 459 F.3d 1249, 1259 (11th Cir. 2006)) ("Comity advances the goal of promoting friendly relations between countries, which furthers American self-interest, especially when international trade and commerce are concerned.").

courts in one country should understand and, ideally, respect differences in the way foreign jurisdictions address similar issues.[94]

Comity is the principle that governs the appropriate weight, respect, and credit to be given to a foreign state law or order, and it is to these principles that a bankruptcy court turns when deciding whether to give deference to a foreign state bankruptcy law and court order.[95] Such "relief is largely discretionary and turns on subjective factors that embody principles of comity."[96] Comity is not a blank check that mandates deference to foreign proceedings. In the United States, for example, it may be suspended when applying foreign insolvency law or court orders violates "the laws, public policies, or rights of the citizens of the United States."[97]

Under chapter 15 cases, the relief granted in the foreign proceeding need not be the same that is available in the United States. A difference in substantive and procedural rules is not in itself a ground to deny comity.[98] Moreover, a U.S. court need not assess the correctness of the foreign court order.[99] The parameter for deference to the foreign court is flexible: the U.S. court should merely ascertain whether the foreign proceeding relief meets fundamental U.S. standards of

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94 *See* Bufford, *supra* note 4, at § 2.04[2].

95 *See, e.g.*, CT Inv. Mgmt. Co., LLC v. Cozumel Caribe, S.A. de C.V. (*In re* Cozumel Caribe, S.A., de C.V.), 482 B.R. 96, 113 (Bankr. S.D.N.Y. 2012) (Court granted comity to an order rendered by Mexican bankruptcy court that prevented a creditor to access values located in a cash management account located in New York, recognizing that "[a] central tenet of Chapter 15 is the importance of comity in cross-border insolvency proceedings."); *See In re* Atlas Shipping A/S, 404 B.R. at 738 (Court vacated maritime attachments that creditors have obtained in funds that a Danish bankrupt debtor held in New York, providing that "chapter 15 specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief.").

96 *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (S.D.N.Y. 2008). The tests for applying principles of comity lack hard edges. *See* Bufford, *supra* note 4, at § 2.04[3] (quoting Hilton v. Guyot, 159 U.S. 113, 164-65 (1895)) ("[C]omity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstance which cannot be educed to any certain rule . . . .").

97 *See In re* Hamilton, 240 F.3d 148, 157 (2d Cir. 2001) ("The principle of comity has never meant categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States.").

98 *See* Bufford, *supra* note 4, at § 2.04[3]("It is important to emphasize that mere difference between the substantive and procedural rules in the United States and those in the relevant foreign country are not grounds for denying comity.").

99 *See In re* Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697–88, 697 (Bankr. S.D.N.Y. 2010) (Court enforced a Canadian order releasing third party debtors, a relief that would not be available in a plenary case governed by the Bankruptcy Code. Court noted that "[t]he relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical. A U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court.").

fairness[100] and follows a "civilized jurisprudence."[101] In such cases and if other chapter 15 safeguards are met, U.S. courts are amenable to granting the relief foreign representatives request.[102]

A. Supermajority Voting and Corporate Reorganizations

Debtor-creditor bargaining is a keystone of modern insolvency regimes: a debtor can yield to creditors' demands in exchange for their favorable votes, and in this way, a *consensual* plan of reorganization may unfold. Absent consent, under some legal regimes, a plan can be confirmed only if certain (and sometimes costly) cramdown requirements are met. There are also jurisdictions in which, absent consent, a plan cannot be confirmed at all.[103]

In each case, much turns on how consent is measured. Once the debtor can assemble a coalition large enough to pass the relevant threshold, the remaining holdouts lose much of their power. As a consequence, in debtor-creditor bargaining, a consensual plan approval threshold is central to maintaining balance. As soon as a required majority of favorable votes is reached, the bargaining dynamics change dramatically. The debtor has little or no reason to continue negotiating with minority creditors. This does not necessarily mean, however, that the particular threshold specified in a particular insolvency regime reflects a deeply embedded normative principle.

In the abstract, a simple majority rule is a sensible starting place. A high threshold increases the chance that a resolution will not be reached. Moreover, a few holdouts can try to exploit the high voting threshold and try to capture benefits for themselves. When a minority has a veto power, there is a chance

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[100] *See In re* SLS Capital, S.A., 2015 Bankr. LEXIS 2468 at *14, *24 (Bankr. S.D.N.Y. July 20, 2015) (Court granted comity to a Luxembourg court order in connection with foreign representative standing to bring claims against third parties. Court, citing *Metcalfe*, provided that "[t]he key determination required by this Court is whether the procedures used in Luxembourg meet our fundamental standards of fairness").

[101] *See In re* RSM Richter Inc. v. Aguilar (*In re* Ephedra Prods. Liab. Litig.), 349 B.R. 333, 336 (S.D.N.Y. 2006) (Foreign representative requested enforcement of a Canadian insolvency proceeding in which the existing claims were settled through a mediation process. Relief was objected on the grounds that the procedure was contrary to U.S. public policy since deprived creditors right to due process and a jury trial. Court granted comity since, *inter alia*, "a foreign judgment should generally be accorded comity if 'its proceedings are according to the course of a civilized jurisprudence', i.e., fair and impartial.").

[102] *See* Jay Lawrence Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency*, 87 AM. BANK. L. J. 247 (2013) (empirical study "refut[ing] the notion that the United States is not welcoming to foreign petitioners; on the contrary, the overwhelming majority of petitions have led to relief for the foreign petitioners, although the reception of petitions from 'letter box' jurisdictions has been less friendly.").

[103] Under U.S. law, for example, at least one impaired class must accept the plan. *See* 11 U.S.C. § 1129(a)(10) (2018).

that no decision will be made at all. In some contexts, preserving the status quo may itself be important and this may justify requiring a supermajority. Constitutions, for example, are supposed to be stable and long-lived.[104] Hence, it is no surprise that the U.S. Constitution, like many others, may be amended only with a high supermajority.

Under some circumstances, it may make sense to require a higher threshold. A supermajority ensures that more individuals become involved in a decision. When a high level of consensus is enjoyed for a particular course of action, one can be more confident, other things equal, that this course is the correct one.[105] A stronger consensus also requires that people debate a particular issue further.[106] A bare majority may be less reliable and legitimate.

When an important value is being protected, the risk of inaction needs to be tolerated. High voting thresholds are appropriate when avoiding the *false positive* is more important than avoiding the *false negative*. In a federal criminal trial, for example, conviction requires a unanimous jury verdict: an individual's freedom is a value so fundamental that a single dissenting jury member is enough to prevent a criminal sanction.[107] In Blackstone's classic formulation, "It is better that ten guilty persons escape rather than one innocent suffer."[108]

But the stakes are radically different when similarly situated creditors are bargaining over possible plans of reorganization. The creditors as a group

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[104] *See* Jed Handelsman Shugerman, *A six-three rule: Reviving consensus and deference on the Supreme Court*, 37 GA. L. REV. 893, 933-34 (2003) ("The Article V amendment process is another good example. Because we believe that constitutional lawmaking should surpass a higher threshold, we tolerate a minority of Congress or of the states blocking a constitutional amendment.").

[105] *See id.* at 932 ("Deliberative democratic theory offers several justifications for consensus rules, and several are epistemological. While this school of thought emphasizes the idea of discourse, one argument is more statistical than philosophical. The idea is simply that two heads are better than one. Assume that an individual is more likely to make a right decision than a wrong one, but, of course, that individual is still prone to error. Then, on average, when more individuals are involved with the decision, and when a wider margin of those individuals reach that decision, it is more likely to be correct.").

[106] *See id.* at 938-39 ("It is not enough that everyone simply arrives at the same conclusion; the key is the process of dialogue and engagement itself. The source of legitimacy is not 'the prior convergence of settled ethical convictions', but procedures that promote deliberation, compromise and cooperation. Consensus rules force participants to continue their debates long after a debate resulting in a majority rule would have ended, so that these discussions are more dynamic and produce more robust deliberation.").

[107] Almost all states also require unanimity in criminal verdicts. Less than a unanimous verdict, however, is permitted in Oregon. The unanimity requirement is not constitutionally compelled. *See* Apodaca v. Oregon, 406 U.S. 404, 405 (1972).

[108] *See also* Shugerman, *supra* note 104, at 933-34 ("Because our society strongly prefers to free the guilty rather than to convict the innocent, . . . [b]ecause we are especially wary of juries convicting the innocent, we tolerate some increased chance for errors that free the guilty."). *See* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997).

confront a debtor in financial distress. Some resolution is necessary, even if it is an orderly liquidation. And a bias in favor of the status quo may lead to a worse outcome, rather than a better one.[109] If each member of a group has different bits of information about the value of the cause of action, the best estimate of the value is, other things being equal, the value estimated by the median voter. This is a standard observation from the "wisdom of crowds" literature.[110]

False positives and false negatives are both bad. It is not obvious which is worse. The best option depends on the specifics and fluid circumstances of each case. None of the potential outcomes of the deliberation seem to deserve special protection. The purpose of the voting rule is to identify which course of action best advances the interests of the creditors as a group. There is no reason in the abstract to believe any particular course of action or inaction is better or worse than another.

In some contexts, protection of minorities' rights may also make a supermajority rule sensible. The voting threshold should mitigate attempts to suppress the rights of a minority by simply imposing the majority's will. A minority may have interests different from those of the majority and, if the deliberative body is heterogeneous, a supermajority might be desirable. Such heterogeneity, however, is less likely to be an issue in a reorganization. Only creditors with substantially similar claims find themselves in the same class. As a result, each class consists of a relatively homogeneous deliberative body, and approval of all impaired classes must reach a consensual plan of reorganization. There is no clear identifiable minority to be protected.

In corporate law, both simple and supermajority rules are commonly employed and debated.[111] The trend is to adopt a simple majority instead of a supermajority in deliberations taken by a corporation's stakeholders.[112] A simple majority of the voting shareholders, for example, is usually enough to amend

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109 *See id.* at 933 ("One might object that the two-thirds rule actually increases the likelihood of error. Four justices can block five justices from invalidating the law, and statistically, four are more likely to be wrong than five.").

110 See, *e.g.*, JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW (2005).

111 *See* Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 406 (2007) ("Next, consider supermajority provisions in corporate law. Whether the change is to the bylaws, the charter, or a shareholder agreement, a question arises as to how many shareholders (or directors, for that matter) must approve a provision opting out of the legal default rule. Is a mere majority enough, or is some super-majority or unanimity required?").

112 *See id.* ("A very common approach in modern corporate law is to require a simple majority of those voting in order to opt out of a particular default rule. That, for instance, is the Model Act's rule for amending the bylaws or the charter.").

bylaws and charters. A merger, however, is a more sensitive issue, one whose approval is often contingent on a supermajority approval threshold.[113] There are at least three reasons that justify a higher threshold for mergers, but none of these reasons apply as strongly in the context of a reorganization.

First, the new legal entity that survives the merger is often incorporated under the law of a different jurisdiction. If this happens, the state default rules governing relations among a corporation's stakeholders also change. One state may have more or less shareholder-friendly rules than another. Changing the default rules (established when the entity is incorporated) arguably justifies the supermajority scrutiny.[114]

But plan negotiations take place under a single reorganization regime, one that investors could typically anticipate at the time of their original investment. The potential impairment of the claim in a bankruptcy proceeding is a risk associated with the loan as of the initial disbursement. Non-performance and eventual restructuring are natural risks associated with any investment.

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[113] *See id.* at 406-07 ("In Delaware, however, certificate and bylaw amendments and mergers must be approved by the holders of a majority of the outstanding shares. In corporations with a large and dispersed shareholder base, requiring a majority of the outstanding shares, rather than the voting shares, can be considerably more difficult and costly requirement to meet, as many shareholders do not vote due to rational apathy. Some states still require a two-thirds vote for mergers."). Initially, mergers were conditioned to unanimous approval among shareholders. The creation of appraisal rights reduced such threshold. A similar rationale was adopted under chapter 11 of the Bankruptcy Code by adoption of the bankruptcy test under § 1129(a)(7)(A)(ii). *See* David Arthur Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 VA. L. REV. 461, 492-94 (1992) ("The analogy between state corporate law voting rules and those applicable in chapter 11 also has a historical dimension. In the late nineteenth century, fundamental changes such as mergers and charter amendments required unanimous shareholder approval . . . . To enhance firms' flexibility, states replaced the unanimity requirement with majority voting. Minority shareholders were compensated for their loss of protection with appraisal rights . . . . Developments in bankruptcy law have followed a very similar pattern. As with corporations outside of bankruptcy, reorganization efforts in the nineteenth century were hampered by an inability to bind minorities . . . . The current Bankruptcy Code can be seen as compensating minority claimants for their loss of clout by providing what arguably is a counterpart to corporate law appraisal rights. Section 1129(a)(7) of the Bankruptcy Code provides that the bankruptcy court cannot confirm a reorganization plan unless the dissenting members of a class that votes in favor of the plan will receive as much or more than the amount they would receive in a liquidation.").

[114] *See* McDonnell, *supra* note 111, at 407-08 ("First, mergers are the main way in which corporations reincorporate in other states. They are also a means for changing from a corporation to another form of business association or vice versa. Mergers are thus a rather general altering rule, because through reincorporating, a corporation in one stroke succeeds in changing all of the default rules that differ between the two states. Insofar as some states have significantly less shareholder-friendly default rules than other states, such reincorporation mergers threaten to destroy shareholder value. Given rational apathy and ignorance problems in shareholders voting, it might make some sense to protect against value-destroying reincorporation mergers by imposing a supermajority requirement.").

Second, a merger may represent a drastic change in the nature of a shareholder's investment. For instance, the new entity may conduct business in a radically different way. Such a fundamental modification in the original investment also seems to justify a more robust threshold for approval.[115] Such changes seem less likely in the context of a reorganization. The need to recapitalize the firm does not require a change in the firm's underlying operations. To the extent such changes are required, they tend to take place during the course of the reorganization itself before the plan is voted upon. The discharge usually changes the repayment terms and conditions, but it does not modify the nature of the credit relation.

Finally, a merger or other control transaction may adversely affect minority shareholders. Requiring a supermajority, in this last case, can protect minority shareholders from unfair treatment.[116] This problem again seems smaller in the context of a reorganization regime. Reorganization regimes generally stipulate that claims in the same class must receive equal treatment. Unless a creditor consents, a reorganization plan cannot be confirmed if it allows similarly situated claims to be paid differently. Caution should be observed in certain specific circumstances,[117] but when a reorganization regime requires similarly situated creditors to be treated equally, the standard justifications for supermajorities in corporate law do not seem to apply.[118]

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115 *See id.* at 408 ("A merger can potentially make a huge change in the nature of a shareholder's investment. Such change is forced upon those shareholders who do not approve the merger. Lawmakers might be reluctant to allow boards to force a large percentage of shareholders to accept a new investment.").

116 *See* Skeel, *supra* note 113, at 489 ("Supermajority voting standards protect the minority shareholders of a closely held firm by giving them veto power over business decisions. A minority shareholder's major fear is that the majority shareholders may one day limit or cut off her access to the income generated by the firm.").

117 Corporate reorganizations involving debt-to-equity arrangements may need more careful scrutiny. Horizontal equal treatment commands that creditors and equity holders in the same class should receive shares of the reorganized debtor in the proportion of theirs claims and interests. The plan, however, may seek to amend existing corporate law default rules governing future shareholder's (and former creditor's) rights. For instance, the plan may seek to establish that any future deliberation among shareholders should be subject to the simple majority instead of the default supermajority threshold. In practice, this can lead to a scenario in which creditors will receive equal treatment upon approval of the plan, but, after emerging from bankruptcy, they can be stripped down from their rights such as, for instance, equal distribution of dividends based on a simple majority threshold. In such cases, it might be desirable to limit a plan of reorganization's reach upon amendment to corporate law rules, notably those governing shareholder's rights.

118 *See* Skeel, *supra* note 113, at 490 ("Minority protection comes at a price, however. A minority shareholder may also use her veto power strategically, as a weapon designed to extract concessions from the remaining shareholders. This cost is justified, and supermajority voting is thus desirable, if the actions taken by majority shareholders could have a disproportionate effect on the minority, as in a close corporation. The franchise operates very differently in Chapter 11, however. The chapter 11 vote determines whether a class accepts or rejects the terms of a particular reorganization plan. If the class votes in favor of a plan, and the plan is confirmed, every member of the class receives exactly the same distribution. … Because each member of the

Under the Trust Indenture Act, interest and principal payments can be changed only with the unanimous consent of all the bondholders. It was designed to ensure that the restructuring of debt took place inside of an insolvency proceeding because of the fear that bond restructurings that took place outside of a reorganization process were subject to advantage-taking. The policies of the Trust Indenture Act simply do not apply in the context of an insolvency proceeding where, by definition, there is a judge or other third party overseeing the process.[119]

The legislative history of the Bankruptcy Code sheds no light on why a supermajority of the claims should be required.[120] This lack of discussion suggests that the supermajority threshold was not a core principle. Little in the caselaw suggests otherwise. Precedents debating the supermajority issue are also rare and unrevealing.

In *In re Huckabee*,[121] creditors troubled by the purportedly inappropriate classification of certain claims fought confirmation. Although in this case supermajority requirements were not being disputed, the court approached "certain guidelines concerning classification, treatment, and voting which must be followed."[122] On the "acceptance of the plan based on both the size and number of claims within a class," the court asserted that it must "reflect the feelings of a sufficient number of claims of a class of a sufficient monetary amount to make it fair and equitable for all the members of the class."[123]

class is affected in the same way by the outcome of the vote, there is no need to impose supermajority voting as a protective device.").

[119] For a discussion of modern bond workouts under U.S. law, *see generally* William W. Bratton & Adam J. Levitin, *The New Bond Workouts* (Feb. 23, 2017) (Univ. of Penn, Inst for Law & Econ Research Paper No. 17-9), available at SSRN: https://ssrn.com/abstract=2909186 [http://dx.doi.org/10.2139/ssrn.2909186].

[120] *See* Scott F. Norberg, *Debtor Incentives, Agency Costs, and Voting Theory in Chapter 11*, 46 U. KAN. L. REV. 507, 534 (1998) ("The supermajority voting requirement is not explained by the legislative history to the Bankruptcy Code. It was derived from the voting requirements of Chapter X and XI of the former Bankruptcy Act, although the nature of the creditor franchise under the former Act was very different than under the present Chapter 11"). *See also* Skeel, *supra* note 113, at 488-89 ("Why then was a supermajority standard adopted for the purposes of chapter 11 voting? The legislative history sheds little light on this question, even though the two-thirds acceptance requirement deviates both from the old chapter XI voting standard and from the recommendations of the 1973 Report of the Commission on the Bankruptcy Laws, each of which provided for simple majority voting").

[121] *See In re* Huckabee Auto Co., 33 B.R. 141 (Bankr. M.D. Ga. 1981).

[122] *See id.* at 147.

[123] *See id.* at 148 ("The third guideline is acceptance of the plan based on both the size and number of claims within a class. This guideline insures that acceptance of a plan will reflect the feelings of a sufficient number of claims of a class of a sufficient monetary amount to make it fair and equitable for all the members of the class.").

Yet *In re Huckabee* did not provide a strong view on the need for the supermajority requirement, let alone that this threshold should trump the simple majority. It merely asserted that it should reflect the feelings of a "sufficient" amount of claims and monetary value. But "sufficient" is itself a subjective concept. Supermajority and simple majority can both indicate sufficient consent.

The academic commentary offers few justifications for the supermajority rule beyond generic observations to the effect that rights of dissenters need to be protected.[124] None of it suggests that the supermajority threshold is a foundational feature of the Bankruptcy Code. On the contrary, the commentary either indicates that it is unclear why the Bankruptcy Code establishes this threshold or suggests that the simple majority rule would be preferable.

Professor David Skeel, for instance, argues that a simple majority of a class should be able to approve a plan of reorganization. Even though supermajority thresholds are useful in closed corporations to preclude decisions that affect majority and minority shareholders differently, such a risk does not exist when each claim within a class must be treated the same way.[125] And while "replacing the two-thirds in amount standard with a majority requirement would sacrifice little in terms of claimant protection," this would eliminate the undesirable threat of hold-up by blocking creditors.[126] In their analysis of the voting rules in chapter

[124] *See* Norberg, *supra* note 120, at 534-35 ("The supermajority standard may be justified on several related grounds. First, it ensures that a vote to accept the plan (that is, to waive the cramdown protections) will 'reflect the feelings of a sufficient number of claims of a class of a sufficient monetary amount to make it fair and equitable for all members of the class.' In other words, the Code does not lightly bind dissenters to a decision to waive the priority entitlements of the class. Further, the rule decreases the instances in which the votes of insiders or others with additional stakes in the firm will be able to override the desires of disinterested claim holders. Because the section 1129(a)(8) vote includes all claims holders (except those disqualified on bad faith grounds), there is the potential that insider claims will dominate one or more classes and that the insiders will vote to protect their interests as shareholders and managers instead of their interests as creditors. The requirement may also be seen as a response to the collective choice problem; like shareholders in publicly held companies, creditors are often widely dispersed and therefore are not informed or do not vote on the plan."). *See also* Skeel, *supra* note 113, at 489 ("Two concerns undoubtedly played a role in the drafters' choice. First, reorganization plans effect an alteration of the pre-bankruptcy contractual rights of dissenting voters against their wishes. Although the constitutionality of the Bankruptcy Code provisions that bind dissenters to the majority will has long been settled, the drafters may have concluded as a matter of policy that a supermajority vote was needed to justify such an effect. Second, like shareholders, the creditors of a public held corporation may be small and dispersed enough so that they have insufficient incentives to cast their votes in an informed fashion for or against a reorganization proposal. Because this would give a plan proponent the upper hand, the drafters may have concluded that the proponent should be required to secure the support of two-thirds of the voters, in effect using the supermajority requirement as a partial response to voter's collective action problems.").

[125] *See* Skeel, *supra* note 113, at 515-16.

[126] *See id.* ("Supermajority voting is useful only where, as in a close corporation, there is a danger that corporate decisions will by their very nature affect majority and minority shareholders differently. This is not the case in voting on a reorganization plan, where each member of the class will receive a proportionate distribution. Thus, replacing the two-thirds in amount standard with a majority requirement would sacrifice little

11, Professors Kevin Kordana and Eric Posner also suggest there is "no normative justification" for the two-thirds supermajority requirement.[127]

In short, no general principle suggests a departure from using a simple majority vote. Minority-empowering voting regimes are appropriate only in special circumstances. Moreover, any particular threshold (i.e., any number between 50% + 1 and 99.9%) is, ultimately, merely an arbitrary imposition.[128]

For present purposes, however, it is not necessary to show that a simple majority is a better threshold than a supermajority. Some might find that a higher threshold is preferable because reorganization plan deliberations bind a dissenting minority regarding how their claims will be restructured. On the other hand, another may find that holdouts are so undesirable in plan deliberation scenarios that a simple majority is the best alternative. Among other pros and cons, there is always a risk that a majority will abuse their rights to the detriment of the minority, and there is always a risk of holdouts. Establishing a consensual approval threshold within a class of claims is also striking a balance between these two risks. There is no magic on how this balance is struck. It implicates no fundamental bankruptcy policy.

It is hard to single out the two-thirds in amount requirement as one of the Bankruptcy Code's underpinnings. This is an important element to be considered when a U.S. bankruptcy court has to decide on whether a *consensual* foreign plan of reorganization approved by a lower threshold violates the absolute priority rule limitations.

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in terms of claimant protection. Moreover, eliminating the supermajority requirement would diminish in two related ways the threat of hold-up by blocking creditors. First, the majority voting requirement would significantly increase the cost of acquiring a blocking position by necessitating the purchase of more than one-half in amount of the class. Second, a party that buys more than fifty percent of the claims in a class seems at least marginally less likely to put its investment at risk by wielding its veto in a fashion inconsistent with the best interests of the class.").

[127] *See* Kevin A. Kordana & Eric A. Posner, *A Positive Theory of Chapter 11*, 74 N.Y.U. L. REV. 161, 207 (1999).

[128] *See* Shugerman, *supra* note 104, at 939-40 ("The benchmark of fifty-percent-plus-one prevails for three reasons. First, it is the only threshold that guarantees that more individuals agree with a decision than disagree. Any higher burden actually empowers a minority to block the majority, and thus it would lead to minority rule—a generally undemocratic power that is appropriate only in special circumstances. In a related second point, any benchmark other than fifty-percent-plus-one or one hundred percent is an arbitrary mathematical choice. Two-thirds, three-fifths, and three-quarters are simple round fractions, but such choices are just as arbitrary as, say, fifty-eight percent or ninety-one percent. Thirdly, rule by a bare majority is often more practical than consensus rules, especially for larger institutions like Congress and for a nation of a quarter billion people sprawled over a continent.").

B. *The Supermajority Threshold in the Context of Cross-Border Insolvency*

The absence of a compelling argument for supermajority threshold for plan approval suggests that bankruptcy courts should enforce consensual reorganization plans from other jurisdictions. There is no magic in the precise place where the voting threshold is placed. As long as the threshold is one that is reasonably designed to capture the views of similarly situated creditors, a court should respect the decision of that group to waive such things as its right to insist on the protection of the absolute priority rule, and it should defer to the foreign insolvency regime to assess whether the group as a whole has waived the right.

Because public policy exemptions should be interpreted narrowly, the request to enforce a plan of reorganization considered consensual in the foreign jurisdiction does not implicate U.S. public policy. Foreign lawmakers may reasonably find a simple majority approval requirement appropriate even when equity holders retain value and unsecured creditors are not paid in full. The difference in the numbers established by the thresholds should be tolerated, especially when it is not a matter of an ancillary jurisdiction's public policy. A local court's refusal to enforce a foreign order because of a lower majority qualification is an inappropriate interference in foreign legal discretion.

If a plan is consensual as assessed by the laws of the jurisdiction of the main proceeding, the U.S. court should enforce it.[129] There is no need to confront the question of whether public policy requires adherence to absolute priority. From this perspective, the approach taken in *Rede* seems to have focused on the wrong question. The court should have focused on whether the foreign plan of reorganization was, according to Brazilian bankruptcy law, consensual or contested, and not whether it met the consensual approval thresholds under the Bankruptcy Code.

The logic of this approach to cross-border insolvency becomes apparent when looking at how a chapter 11 reorganization plan might be received in another jurisdiction. Assume, for example, that a U.S. debtor files for chapter 11 and its plan is deemed consensually accepted because 55% of the allowed claims and 70% of the amount of the single impaired class has approved the plan. The

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[129] Many foreign insolvency laws provide that a simple majority is sufficient for a plan be considered consensual. *See* JAY LAWRENCE WESTBROOK, CHARLES D. BOOTH, CHRISTOPH G. PAULUS & HARRY RAJAK, A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS, 155 (2010). *See also* OTTO EDUARDO FONSECA LOBO, WORLD INSOLVENCY SYSTEMS: A COMPARATIVE STUDY (2009) (analysis and description of at least 17 insolvency laws of different jurisdictions, providing that some of them require only a simple majority of favorable votes for a plan to be deemed approved).

debtor has assets and creditors in Chile. The plan would not be treated as a consensual plan that would qualify for confirmation under Chilean law, as at least two-thirds of the allowed claims must consent to a plan before it can be confirmed.[130] Under the approach suggested here, even though the plan does not qualify for confirmation under Chilean bankruptcy law, such a plan should be confirmed. The question should be not whether the plan meets the confirmation requirements according to the Chilean legal regime, but instead whether it is a consensual plan under the Bankruptcy Code.

Whether a U.S. bankruptcy court should enforce a foreign nonconsensual reorganization plan that violates the absolute priority rule is a different and significantly harder question. One cannot deny the foundational importance of the absolute priority rule. On the other hand, one can argue that courts should be deferential to the cramdown requirements and effects of the foreign jurisdiction.

Of course, the justification for deferring to the way the foreign jurisdiction assesses consent requires that other key aspects of the foreign insolvency regime mirror the Bankruptcy Code to a minimum degree. Classes should, for example, consist of similarly situated claims, and claims within each class should be treated the same way. The alternative to consent (rejection of a plan), moreover, should also have similar results; that is, a liquidation or some similar proceeding in which creditor's claims are more senior than shareholders' claims. "Consent" would not be meaningful, if the alternative to consent were treatment that was completely at odds with the rights ordinarily accorded creditors.

CONCLUSION

Deference to foreign main proceeding courts is one of the Model Law's guiding principles. It is crucial for an efficient cross-border insolvency regime. When a local jurisdiction makes foreign law and court orders applicable, a further step is taken towards the Model Law's goals of predictability and

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[130] *See* Baker McKenzie, *Global Restructuring & Insolvency Guide*, 105 (2016), http://www.bakermckenzie.com/-/media/files/expertise/banking-finance/bk_globalrestructuringinsolvencyguide_20170307.pdf?la=en ("The Creditor's Meeting decides on the proposal of Judicial Reorganization Agreement presented by the debtor. The quorum to approve it is two-thirds or more of the creditors that attend the meeting, which must comprise at least two-thirds of the total amount owed by the debtor company"). *See also* Pedro A. Jimenez, Rodolfo Pittaluga Jr. & Pablo Herrera, *INSOL International – Chile's New Insolvency Law: Restructured for Corporate Restructurings*, 8-9 (2014), https://www.insol.org/_files/TechnicalSeries/Special%20Reports/Special%20Report%20on%20Chile%20-%2026%20September%202014.pdf ("The New CBA [Chile Bankruptcy Act] expedites the plan approval process by, among other things, reducing the threshold required to approve a plan of reorganization. It provides that a plan is approved if: (a) the debtor approves the plan (b) at least two-thirds in amount of the creditors present at the vote, accept the plan, and (3) said creditor acceptances represent at least two-thirds in value of the total claims entitled to vote in each respective class.").

reliability. Putting to one side the dictates of the absolute priority rule when considering a foreign consensual plan of reorganization is consistent with the spirit of the Model Law and, more importantly, chapter 15 itself.

As long as the main proceeding's rules for assessing consent among creditor groups are reasonable, the ancillary jurisdiction has no reason to consider its own substantive requirements when these too are subject to waiver. Whether a class consents or not, is of much importance, but the benchmark by which consent is measured is not. Once all classes consent to a treatment as measured by the rules of the foreign main proceeding, the case for comity is compelling. Deference should be the rule, and there should be little room for discretion.