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TAILOR CORPORATION

Jurisdiction Shopping

United States:

The company has shareholders in the United States and a loan facility from the syndicate of international bankers with the lead banker being based in New York. Tailor Corporation has a bank account with the lead banker in which there is a credit balance of US\$5,200.00. It also deposited the share certificates for the shares in some of its subsidiaries with the lead banker of that syndicate by way of security for the loan facility.

Revisiting the decision of the Board of Tailor Corporation to appoint a provisional liquidator under Australian law, is there a sufficient connection between Tailor Corporation and the United States for it to seek relief under the US Bankruptcy Code by way of its initial application for the establishment of a formal insolvency administration?

If not, are there further steps which could be taken so as to put Tailor Corporation into a position of being able to make such an application under the US Bankruptcy Code?

Could that application be for relief either under Chapter 11 of that Code or by way of ancillary proceedings?

Would that relief be such as to enable universal protection of Tailor Corporation's assets against actions by creditors?

United Kingdom:

In the UK, our aspirations for control are more modest in that we only want to ensure that Tailor Corporation's assets in Europe are under control. Those assets include its woollen mill in Germany owned and operated by TC GmbH and its treasury operation in London. Those assets including the shares in GmbH are owned by a wholly owned subsidiary of Tailor Corporation, TC Europe Ltd, which is incorporated in England and employs Tailor Corporation's European senior management. The treasury operation is conducted from leased premises. However, TC Europe Ltd, by reason of its treasury operation, is owed AU\$10.5 billion by other companies in the Tailor Corporate Group and owes creditors AU\$12.8 billion. Where those creditors are external to the Group their claims are guaranteed by all material companies in the Group. The woollen mill operates on land leased from TC Europe Ltd which, with the mill, is valued at AU\$95 million. The mill has annual sales of AU\$80 million from which it earned a profit in the last financial year of AU\$9.5 million.

Can the provisional liquidator of Tailor Corporation approach one court in Europe to get control of all of its assets in that jurisdiction?

Can a choice be made between courts?

On what basis?

Hong Kong:

Tailor Corporation has manufacturing assets, which are owned and operated by a Chinese subsidiary and an IT company in Hong Kong.

What are the options for gaining control of the Chinese manufacturing assets, either directly from Australia or through some other jurisdiction, including Hong Kong?



INSOL International Forum Shopping Tailor Corporation Germany

Dr. Eberhard Braun
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Tailor Corporation – Key Facts for Germany

- woollen mill in Germany owned and operated by german entity (TC GmbH)
- shares in TC GmbH are held by TC Europe Ltd. incorporated in England
- TC Europe Ltd. is a wholly owned subsidiary of Tailor Corporation, Australia
- TC Europe Ltd. employs Tailor Corporation's European senior management



Tailor Corporation – Key Facts for Germany (continued)

- TC Europe Ltd. has mainly intercompany receivables (AU\$10.5 billion) and owes external creditors AU\$12.8 billion
- External creditor claims of TC Europe Ltd. are guaranteed by all material companies in the Group (including GmbH)



Tailor Corporation – Key Facts for Germany (continued)

- GmbH's woollen mill operates on land leased from TC Europe Ltd. (valued AU\$95 million)
- woollen mill has annual sales of AU\$80 million and profit in the last financial year of AU\$9.5 million



Tailor Corporation – Key Facts

- board decision of Tailor Corporation to appoint a provisional liquidator under Australian law



Tailor Corporation – summary for German TC GmbH

- profitable business
- not cash insolvent
- intercompany related debts:
 - lease, TC Europe Ltd. owning german real estate of mill
 - management fees; European senior management employed in England
 - Guarantee for Ltd's external debts



Tailor Corporation – summary for German TC GmbH (continued)

- financial status in regard to intercompany receivables and guarantees has to be re-evaluated for overindebtedness
- Assumption: no overindebtedness therefore: no reason and no possibility to file in Germany for main proceeding for TC GmbH



Tailor Corporation - Options in Germany

- preservation measures during foreign provisional proceeding
- German secondary proceeding over German assets under German Insolvency law
- main proceeding TC Europe Ltd. under German Insolvency law



Tailor Corporation – preservation measures

- generally provisional administrator appointed abroad may request court order for measures which appear necessary to preserve the assets to be covered by a German secondary insolvency proceeding
- aim: to avoid any detriment to the financial status of the debtor for the creditors



Tailor Corporation – preservation measures (detailed)

- insolvency court may in particular:
 - impose a general prohibition of transfers on the debtor or
 - order a restriction or temporary restriction on measures of execution against the debtor unless immovables are involved; or
 - order a temporary interception of the debtor's mail



Tailor Corporation – preservation measures

- but: Australian entity and related insolvency estate has NO assets in Germany
- Possible UK proceeding over Ltd. typically not provisional
- preservation measures in Germany for foreign provisional proceeding not applicable



Tailor Corporation – UK proceeding for TC GmbH

- main proceeding under UK insolvency law acc. to Art. 3 EIR possible
- automatic recognition in Germany because of Art. 16 EIR
- entry into German company's register and land register with insolvency court with jurisdiction acc. to Art. 21 and 22 EIR



Tailor Corporation – UK proceeding for TC GmbH

- but: influence to assets in Germany limited
- land lease contract will be treated purs. to German law (exception for immovable, Art. 8 EIR)
- employment agreements under German law (acc. to Art. 10 EIR)



Tailor Corporation – German secondary proceeding for TC GmbH

- administrator appointed abroad is entitled to file for secondary proceeding over assets in Germany
- secondary proceedings can be opened without need to determine the reason for opening acc. to German law.
- but: only liquidation accepted for secondary proceedings
- secondary proceeding not recommendable



Tailor Corporation – German main proceeding for UK Ltd.

- commencement of main proceeding over TC Europe Ltd. before German insolvency court acc. to Art. 3 EC Regulation possible
- arguments for centre of main interest in Germany:
 - operative business of European group in Germany, UK Ltd is only financial and administrative “department”
 - real estate in Germany



Taylor Corporation – Merits German main proceeding

- use of “selfadministration” (DIP) elements in German code:
- direct control over TC Europe Ltd. for Australian provisional liquidator
- no administrator necessary if proofed, that no disadvantage for proceeding and creditors
- only German “Sachwalter” (like US-Examiner) will be appointed for control purposes



Taylor Corporation – Result for Germany

- Assuming: TC GmbH is profitable and solvent
- No need and no possibility to protect German entity and assets in this stage of crisis

- German proceeding in “self administration” for entities with Center of Main Interest should be considered



A Brief Note on Common Problems facing Administrators of Insolvent Foreign Estates dealing with Equity Joint Ventures (“EJV”) in the Peoples’ Republic of China (“PRC”)

Nick Hill

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The following is a brief introduction to the subject only and care should be taken in applying these comments to all situations. Although there is an extensive PRC legal framework on which to rely, the interpretation of the legislation will vary by location and the individual circumstances faced will often have a significant effect upon the outcome.

- *Foreign Administrators (including those from Hong Kong) are not recognised by the PRC Court.*

A. *Hong Kong after 1 July 1997: Article 95 of the Basic Law*

The Hong Kong Special Administrative Region may, through consultations and in accordance with the law, maintain judicial relations with the judicial organs of other parts of the country (ie the PRC), and they may render assistance to each other.

B. *WTO*

There are no specific provisions in the various agreements concluded between the PRC and the WTO which provide any assistance. The removal of trade barriers is expected to help to speed up reciprocity between foreign Courts and the Courts in the PRC.

C. *Articles 267 & 268, PRC Civil Procedure Law*

There are two grounds for recognition of Foreign Court Orders:

1. Pursuant to an International Treaty to which China is a party
2. Under the principle of reciprocity

Currently there are no treaties on cross-border insolvency, so reciprocity between Courts is the only possibility. In general terms, the PRC Courts will recognize orders of a foreign Court if the relevant foreign Court recognizes, in turn, similar orders made by PRC Courts. In practice, reciprocity is not an option at present.

In order to bypass the issue of formal recognition, which would be costly, time-consuming and unpredictable, Foreign Administrators often proceed by exercising the Foreign Administrator’s rights as a shareholder in accordance with PRC Company Law, the Shareholders’ Agreement and Articles of the enterprises.

In broad terms a Foreign Administrator is likely to pursue two separate strategies.

1. Remove the existing directors and appoint his own nominees in accordance with the Articles and the Shareholders’ Agreement (directors are entitled to review the minutes and resolutions of previous board meetings).

2. Engage a local (at present mostly Hong Kong-based) qualified accounting firm, at its own cost, to review the accounts of the enterprise and find out other matters of relevance from management.

In a scenario where the Foreign Administrator controls more than 50% of the shares, he is likely to be able to control the board under the Articles and the Shareholders' Agreement provided the local management of the EJV are co-operative. If for example, the foreign shareholder held 70% he might typically have the right to appoint three of the five board members, including the Chairman of the board, who will also be the Legal Representative of the EJV. (This is a common term used in the PRC for the person who is legally responsible for the company as opposed to a lawyer representing the company.)

The replacement of directors by Foreign Administrators (in the capacity of foreign shareholder) may be subject to other procedural limitations caused by the requirements of the local authorities (such as the Ministry of Commerce ("MOFCOM")). These procedural limitations will often include requiring the consent of the existing board of directors for their removal and the appointment of new directors to the board. In the event that the existing directors refuse to cooperate and, as a result their failure to cooperate, MOFCOM is unwilling to register and recognise the replacement directors, the Foreign Administrators will have to consider taking the matter to an appropriate court in PRC and obtaining an order for specific performance against the directors.

The local courts in the PRC are often subject to the influence of local government and other well-connected individuals. The quality and conduct of judges in the PRC can also vary substantially. To avoid the risk of local protectionism, Foreign Administrators should consider taking legal proceedings in a forum outside any local influence (such as in a provincial High Court or the Beijing Supreme Court). PRC provincial High Courts accept cases involving substantial monetary disputes (ie disputes involving over RMB100million) but these Courts charge substantial court fees calculated as a percentage (at least 0.5%) of the disputed amount so the risks and cost-benefit of taking legal proceedings in a provincial High Court is a key issue for Foreign Administrators to consider. In light of this, Foreign Administrators will normally only take legal proceedings as a last resort.

A Legal Representative enjoys the power to bind the company under a contract without the use of the "company chop" (the official stamp of the company – carrying less weight than the seal but often required to operate bank accounts etc) or a board resolution. However a Legal Representative may attract personal liability when things go wrong. For example, if people were injured or killed by a fire at the EJV's premises, the Legal Representative might be exposed to criminal charges relating to the inadequate fire and safety precautions (a common problem when cash flow is tight or the fire escapes are locked for security reasons etc).

Controlling the board will not give complete power to the Foreign Administrator. The Articles of most EJVs will stipulate that major decisions by the board require a two-thirds or three-quarters majority; the percentage requirement having been negotiated by the parties at the time the EJV was being set up. In addition, it will normally be a requirement that at least one director from each party be in attendance to constitute a quorum at board meetings.

In summary, due to the problems of cross-border recognition and the lack of judicial assistance, the attitude of the local management of the EJV becomes crucial. I set out below four simplified scenarios as an illustration.

| Foreign Management | PRC Management | Remarks |
|--------------------|----------------|--|
| Cooperative | Cooperative | If there are likely to be some returns or benefits for all the parties from a restructuring or sale, the Foreign Administrator will normally be able to preserve and realise the company's investment in the EJV. |
| Cooperative | Uncooperative | The local shareholder(s) will try to take advantage of the situation by creating legal and non-legal hurdles for the Foreign Administrator. The Foreign Administrator will in most cases wish to proceed with steps to install his nominees on the board (or secure his existing nominees' cooperation). In addition, the Foreign Administrators should identify what he can offer the local shareholder(s) in return for gaining their cooperation. |
| Uncooperative | Cooperative | Although fairly rare, there are cases where the foreign management is not cooperating, perhaps because they are implicated in a fraud, but the local shareholder(s) are willing to assist, perhaps because they have lost faith with original partner and wish to change partners through a restructuring. In these circumstances the new investor will often be known to, and may have had previous dealings with, the local shareholder(s). This may have an adverse effect on the value realized by the Foreign Administrator but exercising his shareholder's rights is unlikely to be a problem. |
| Uncooperative | Uncooperative | Where management has a personal interest in the PRC investment they will often seek to obstruct the Foreign Administrator, frequently through keeping the local shareholder(s) onside. In such a case, the Foreign Administrator will have no option but to replace his directors immediately and convince the PRC management that he is now in charge. Obtaining information will be difficult. Basic information such as the company's Articles will have to be obtained through public searches; formal notice in accordance with the Articles will need to be served on the company; legal proceedings may be necessary. |

In summary, practical steps will often be more fruitful than resorting to legal remedies.

- *Realisation / disposal of equity interest in PRC subsidiaries by the Foreign Administrators*

A standard clause in most Shareholders' Agreements and Articles of EJVs give other shareholder(s) a pre-emptive right in the event that one of the shareholders wishes to sell its shares.

This often creates hurdles. Where a Foreign Administrator is trying to realise a PRC investment, the PRC shareholder(s) can use his pre-emptive rights as leverage against the Foreign Administrators to give them a say in the choice of their new partner or to acquire the Foreign Administrator's equity interest at a lower price.

This problem is to some extent avoided where the Foreign Administrator is selling shares not in the EJV but in the intermediate holding company (which in turn owns shares in the EJV). However some Shareholders' Agreements and Articles require the registration (ie local government approval) of any change of beneficial owner and in this situation there remains obstacles to a sale.

In practice of course, a purchaser will do its own due diligence to ensure the local shareholders are cooperative and trustworthy before entering into any agreement with the Foreign Administrator.

- *Bankruptcy or insolvent liquidation of the foreign shareholder may trigger early termination of the EJV*

Another common term of Shareholders' Agreements and Articles of EJVs is the automatic determination of the EJV in the event of the insolvency of one of its shareholders.

Ideally a petitioner of a foreign shareholder of an EJV should conduct sufficient and appropriate investigations into the affairs of the debtor company's investments in the PRC before making a decision to proceed with winding-up proceedings in the foreign shareholder's home country. Where a profitable EJV with substantial assets is forced to close down due to the technical default of its foreign shareholder, it is often likely that the only party who benefits is the local shareholder.

This will not be an issue where the legal owner (eg an intermediate holding company) does not go into liquidation. In practice however, when the news that the foreign shareholder has "gone bankrupt" reaches the EJV and the local community this will send very negative signals to the local workers and banking creditors.

- *Reaction of local government*

The major concern of PRC local governments is social stability. Government officials do not want to see hundreds of angry workers protesting outside the Labour Bureau or local government buildings demanding compensation.

Many EJVs are situated in the South of the PRC, but are staffed by labour from the North. This will give rise to a high staff turnover rate and less cohesion within the workforce. Considerable time can be saved if an agreement can be reached with the workers before they file a formal complaint with the Labour Bureau.

It is also worth noting that employees in some industries can find another job more easily than those in others. For example, garment industry workers are likely to be less concerned about losing their jobs than those employed at power plants, toll roads or other infrastructure projects. Furthermore, employees of private enterprises, as opposed to State Owned Enterprises, will understand that the government will not bail out the factory so there is less incentive to protest.

Where the local government is concerned with the insolvency of an EJV because of the effect on its workers or on public interest or any other grounds, the only way to address these concerns is to open a dialogue with the relevant government officials. As the world over, PRC government officials are mostly conservative and bureaucratic. It will be the Administrator's job to establish an effective line of communication with the local government and, where necessary, to educate the relevant officials that it is time for the EJV to be restructured. The bankruptcy of a foreign investor also provides an opportunity for the EJV to find a replacement investor with solid financial backing. Securing the government's cooperation will be half the battle.

- *Conclusion*

The necessary laws are available in the PRC and can be used to enforce legal rights but the legal process is lengthy and uncertain. In practice the best approach will nearly always be to make contact with the local management (and frequently the government) as quickly as possible to identify their concerns and stabilise the situation. Once this is achieved, realising value becomes much easier.



**INSOL International
Forum Shopping
Tailor Corporation
United States**

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**Tailor Corporation - Key Facts
Related to the U.S.**

- No business in United States
- Lead bank for loan facility from syndicate of banks located in New York
- No other creditors located in U.S.
- No litigation pending or threatened in the U.S.
- Some shareholders located in U.S.
- Bank account with lead bank located in New York -- credit balance of \$5,200.00
- Stock certificates of certain Tailor Corp. subsidiaries held by lead bank in New York as security for loan



**Tailor Corporation - Key Facts
Related to the U.S. (continued)**

- Has significant assets/operations in the United Kingdom, Germany, Hong Kong, and Australia either directly or through its subsidiaries
- Tailor Corp. is incorporated in Australia
- Tailor Corp.'s subsidiaries not incorporated in U.S. and have no other contact with the U.S.



Taylor Corporation - U.S. Insolvency Options

- Plenary proceeding (full U.S. bankruptcy proceeding)
- Ancillary proceeding (proceeding under 11 U.S.C. § 304 in aid of a foreign proceeding)



Taylor Corporation - Chapter 11 Proceeding

Benefits to Filing a Plenary Bankruptcy Case in the US

- Stayed Creditor Actions (possibly)
- Avoidance Powers
- Discharge of Debts



Taylor Corporation - Chapter 11 Proceeding

Limitations in Filing a Plenary Case

- Foreign creditors may not be subject to the U.S. Court's jurisdiction
- Foreign courts may not be willing to enforce U.S. court orders upon foreign creditors
- Can be costly, complicated, and time consuming



Taylor Corporation - Chapter 11 Proceedings

Important Considerations:

- Even if personal jurisdiction exists, a U.S. bankruptcy court has discretion to dismiss or abstain from presiding over the filing by a foreign debtor
- Section 305 of the Bankruptcy Code permits a court to dismiss or suspend a bankruptcy case if:
 - (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or
 - (2)(A) there is pending a foreign proceeding; and (B) the factors specified in § 304(c) warrant dismissal or suspension



Taylor Corporation - Chapter 11 Proceedings

Important Considerations (continued):

- Even if a U.S. court decides to maintain jurisdiction, if foreign proceedings are occurring contemporaneously, the U.S. court will need to facilitate cooperation with the foreign court through
 - comity, and/or
 - adopting private protocols



Taylor Corporation - Chapter 11 Proceeding

Who May Be A Debtor Under The U.S. Bankruptcy Code?

- Section 109 of the Bankruptcy Code provides that only a person or entity that *resides* or has a *domicile, place of business, or property* in the U.S. or municipality may be a debtor
- A "person" is defined as an individual, partnership, or corporation. 11 U.S.C. § 101(41)
- Section 109 specifies which entities can be persons eligible to be debtors, which vary slightly for chapter 7 (liquidation) and chapter 11 (reorganization)



Taylor Corporation - Chapter 11 Proceeding

Who May Be A Debtor Under The U.S. Bankruptcy Code? (continued)

- A foreign entity that meets the requirements under Section 109 may commence a plenary bankruptcy case in the U.S. notwithstanding the pendency of a proceeding overseas

See, e.g., Banque de Financement v. First Nat'l Bank of Boston, 568 F.2d 911 (2d Cir. 1977)



Taylor Corporation - Chapter 11 Proceeding

Who May Be A Debtor Under The U.S. Bankruptcy Code? (continued)

- Taylor Corp. does not have
 - residence
 - domicile; or
 - a place of business in the United States
- thus, Taylor Corp. is only eligible to be a debtor in the U.S. under chapter 11 (or chapter 7) on the basis of its property in the United States assuming its property qualifies



Taylor Corporation - Chapter 11 Proceeding

Who May Be A Debtor Under The U.S. Bankruptcy Code? (continued)

Property As An Eligibility Basis

- Must be actual property and not merely "remote or inchoate claim[s] against property that is in the United States."

In re Head, 223 B.R. 648, 652 (Bankr. W.D.N.Y. 1998)



Tailor Corporation - Chapter 11 Proceeding

Who May Be A Debtor Under The U.S. Bankruptcy Code – Property As An Eligibility Basis (continued)

- Otherwise, property requirement is very broad
- No statutory requirement as to the property's minimum value
In re Paper I Partners L.P., 283 B.R. 661 (Bankr. S.D.N.Y. 2002)
- Location of a company's original business documents in the United States also satisfies the Section 109 property requirement
In re Paper I Partners, 283 B.R. 661, 674 (Bankr. S.D.N.Y. 2002) (domestic parent holding the books and records of foreign affiliate domestically will allow the affiliate eligibility to file as a debtor in the U.S.)



Tailor Corporation - Chapter 11 Proceeding

Conclusions For Tailor Corp.

- Tailor Corp. qualifies as a debtor in the U.S. based on having property located in the U.S.
 - \$5,600 in NY bank account
 - stock certificates of certain subsidiaries in NY bank
- Amount of property is irrelevant
- Location of creditor (NY bank as part of syndicate for loan facility) and location of shareholders in U.S. not relevant to whether Tailor Corp. can be a debtor
 - may be relevant in the context of competing proceedings and decisions to abstain or dismiss, or motions to transfer venue



Tailor Corporation - Section 304 Ancillary Proceedings

- An alternative to a “full blown” bankruptcy proceeding in the U.S. is an ancillary proceeding under Section 304 of the Bankruptcy Code
- Section 304 of the U.S. Bankruptcy Code permits an insolvent company's foreign representative to file a petition in a U.S. bankruptcy court to commence a case *ancillary* to a foreign bankruptcy proceeding
- A foreign debtor may only commence an ancillary proceeding if that debtor is already involved in a bankruptcy proceeding in a foreign country



Taylor Corporation - Section 304 Ancillary Proceedings

Who is eligible to file a Section 304 proceeding?

- Courts disagree whether a foreign debtor must meet the eligibility requirements for general bankruptcy relief in the U.S. as a prerequisite for the commencement of an ancillary proceeding

See, e.g., *In Angulo v. Kedzep, Ltd.*, 29 B.R. 417 (S.D. Tex., 1983) (court granted section 304 petition in part because the debtor was eligible for chapter 11 relief); but see *In re Goerg*, 844 F.2d 1562 (11th Cir., 1988), cert. denied, 488 U.S. 1034 (1989) (foreign entity need not be generally eligible for bankruptcy relief in the U.S.); *In re Brerly*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992) (same)



Taylor Corporation - Section 304 Ancillary Proceedings

Who is eligible to file a Section 304 proceeding? (continued)

- Courts also disagree regarding what constitutes a "foreign proceeding" under Section 304 (cont'd)
 - If the foreign action cannot be deemed a "proceeding," then it is not possible to institute an ancillary proceeding in the U.S.
 - See, e.g., *In re Petition of Tam*, 170 B.R. 838, 844 (Bankr. S.D.N.Y. 1994) (holding that a voluntary wind up of a Cayman Islands Corporation is not a foreign "proceeding" to allow the foreign liquidator to commence an ancillary proceeding in a U.S. Bankruptcy Court); but see *In re Petition of Ward*, 201 B.R. 357 (Bankr. S.D.N.Y. 1996) (court found a foreign proceeding to exist and denied a motion to dismiss a section 304 proceeding where a court-sanctioned liquidator with fiduciary-like duties and responsibilities was overseeing a voluntary winding-up of a Zambian company)



Taylor Corporation - Section 304 Ancillary Proceedings

Who is eligible to file a Section 304 proceeding (continued)?

- Disagreement re "foreign proceeding" (continued)
 - In addition, section 101(23) of the Bankruptcy Code defines "foreign proceeding" as one that takes place in a country where "the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding."



Tailor Corporation - Section 304 Ancillary Proceedings

U.S. Legislative History:

- Goals of a 304 Ancillary Proceeding
 - Prevent U.S. creditors from dismembering U.S. assets piecemeal without the need to commence a full blown Chapter 11 bankruptcy case
 - Afford worldwide creditors the opportunity to receive a share of the debtor's U.S. assets

H.R. Rep. No. 595, 95th Cong., 1st Sess. 324 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6281; S. Rep. No. 989, 95th Cong., 2nd Sess. 35 (1978), reprinted in 1978 U.S.S.C.A.N. 5787, 5821.



Tailor Corporation - Section 304 Ancillary Proceedings

Court's Discretion to Grant Section 304 Relief:

- Factors to Consider Enumerated in Section 304 include:
 - just treatment of all holders of claims against or interests in such estate;
 - protection of claimholders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
 - prevention of preferential or fraudulent dispositions of property of such estate;
 - distribution of proceeds of such estate substantially in accordance with the order prescribed by [title 11]
 - comity; and
 - if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns



Tailor Corporation - Section 304 Ancillary Proceedings

Benefits:

- Tailored for limited relief
- Control for Foreign Representative
- Efficient
- Preserves Assets



Tailor Corporation - Section 304 Ancillary Proceedings

Limitations:

- Does not trigger the automatic stay/may not trigger U.S. avoidance powers

See, e.g., *In re Maxwell Communications Corp.*, 186 B.R. 807, 819 (S.D.N.Y. 1993), *aff'd*, 93 F.3d 1036 (2d Cir. 1996)

- Does not create an estate

See, e.g., 11 U.S.C. § 541(a) ("the commencement of a case under section 301, 302, or 303 of this title creates an estate")

- Does not provide for a discharge of debts



Tailor Corporation - Section 304 Ancillary Proceedings

Venue

- Section 1410 of title 28 of the U.S. Code specifically provides for venue in Section 304 ancillary proceedings, whereas Section 1408 of title 28 of the U.S. Code provides for venue considerations in plenary proceedings
- Unlike Section 1408 which is straightforward, Section 1410 is fairly complex and produces inconsistent results
- For example, under Section 1410, venue could be proper in multiple jurisdictions and multiple Section 304 proceedings in such jurisdictions could be commenced concurrently



Tailor Corporation - Section 304 Ancillary Proceedings

Venue (continued):

- However, where venue may be proper in numerous jurisdictions, various courts have emphasized the need for a single section 304 proceeding to fairly administer the estate, and the need for "economical and expeditious" administration may override the literal application of the statute

See, e.g., *Victrix S.S. Co. v. Salen Dry Cargo, A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987) ("the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding. . .")



Taylor Corporation - Section 304 Ancillary Proceedings

Important Considerations Involving 304 Proceedings

- Typically, U.S. courts will enjoin all actions by creditors against property of the debtor located in the U.S. so long as the laws of the foreign jurisdiction are not repugnant to our own

- In re Rubin*, 160 B.R. 269, 283 (Bankr. S.D.N.Y. 1993) (granting the 304 relief for liquidators for a reinsurance company based in Israel); *In re Hourani*, 180 B.R. 58 (Bankr. S.D.N.Y. 1995) (denying section 304 application to a Jordanian debtor because the court determined that the foreign liquidation procedures lacked minimum safeguards and protections for creditors because of Jordanian laws' weak notice requirements to creditors)



Taylor Corporation - Section 304 Ancillary Proceedings

Important Considerations Involving 304 Proceedings

- Even if the laws of a foreign jurisdiction are not "repugnant" to the U.S. laws, the U.S. court may favor its own laws
- Recently, the Second Circuit ruled that section 304(c)(4) protects secured creditors whose security interest would be substantially affected by subordination in a foreign proceeding
 - Treco v. Bank of New York*, 240 F.3d 148 (2d. Cir. 2001)
- Treco*, however, does not stand for the proposition that comity will be denied in all cases where foreign insolvencies treat secured claims differently than in the U.S., but rather such decisions must be made on a case-by-case basis. *Id.* at 161



Taylor Corporation - Section 304 Ancillary Proceedings

Conclusions for Taylor Corp.

- A foreign representative may opt to initiate a Section 304 proceeding in New York in order to protect the assets located there for distribution available to all creditors
- Venue would only be proper in New York because the assets are located only in New York and Taylor Corp. has no other contacts with the U.S. (thus, complications arising under 28 U.S.C. § 1410 are not present here)
- The U.S. court would need to consider the relief sought, applicable laws, and comity concerns



Taylor Corporation - Section 304 Ancillary Proceedings

Uncertainty in Section 304 Proceedings

- No guidance on how to apply Section 304 factors or what relative weight to give to each factor
- Questions arise as to choice of law to be applied
- Discretionary recognition of what constitutes "foreign proceedings"
- Venue statute is complex and produces inconsistent results
- Ambiguity as to avoidance powers
- Unequal application of comity principles



Taylor Corporation - Proposed Chapter 15 of the Bankruptcy Code

- Proposed legislation based on UNCITRAL's Model Law could replace Section 304 and bring more procedural clarity to cross-border insolvencies in the U.S.
- The legislation has been approved by both houses of Congress and if signed into law by the President, it would be enacted as a new Chapter 15 of the Bankruptcy Code



Taylor Corporation - Proposed Legislation

Proposed Legislation (continued)

- The Model Law, incorporated into proposed Chapter 15 of the U.S. Bankruptcy Code, would, among other things,
 - remove the issue posed by section 101(23) of the Bankruptcy Code mandating that a "foreign proceeding" be recognized in countries other than the debtor's home country
 - reduce a U.S. Court's discretion in deciding to grant relief to a foreign representative, requiring recognition of any foreign proceeding, subject only to domestic public policy concerns
 - apply comity concerns with greater consistency and with greater importance over other "304 factors"
- It remains to be seen whether Chapter 15 will be signed into law as the Bankruptcy Reform Legislation has been stalled for the last few years


