Inaugural Survey of Chapter 15 of the Bankruptcy Code

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The ABA Business Law Section presents its first-ever survey of chapter 15 of the Bankruptcy Code, which concerns cross-border restructurings. Part I features informal judicial commentary regarding cross-border restructuring regimes and general rule of law principles. Part II surveys key statutory provisions implicated under chapter 15. Part III surveys key cases that arose under chapter 15. Section A addresses cases related to the prerequisites to achieving recognition of a foreign proceeding and provides some insight into the nuances of certain key procedural requirements to obtain recognition. Sections B–D trace important decisions regarding post-recognition relief. Section B highlights significant decisions relating to financial restructuring elements under chapter 15. Section C explores approaches to asset sales under chapter 15. Section D presents notable cases involving litigation elements. Lastly, to provide insight into a foreign jurisdiction, Section E addresses certain key cross-border cases decided by Singapore courts.

I. Judges' Views Regarding Preserving and Promoting the Rule of Law in Cross-Border Restructuring and Insolvency Cases[1]

Chief Judge Martin Glenn (S.D.N.Y. Bankr.); Chief Judge David Jones (S.D. Tex. Bankr.); Justice Anna Elizabeth de Vos (District Court of Amsterdam); Justice Kannan Ramesh (Supreme Court of Singapore); Justice Christopher Sontchi (Singapore International Commercial Court)

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The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

1. Part I reflects the collective views of the judicial authors who are interested in honoring and promoting the rule of law and the consistent application of the Model Law. This part merely conveys the authors' general viewpoints regarding cross-border insolvency and restructuring proceedings. Nothing in this part or this survey should be construed as the judicial authors' opinion or view of any particular legal issue or factual matter.

On May 30, 1997, the Secretariat of the United Nations Commission on International Trade Law ("UNCITRAL") issued the Model Law on Cross-Border Insolvency ("Model Law"), which serves as template text for coordination and regulation of insolvency and financial distress involving individuals and entities with assets, operations, or creditors in multiple jurisdictions around the world. The Model Law is not intended to create a substantive unification of restructuring regimes, but to provide solutions that help facilitate and promote a uniform approach to cross-border restructuring proceedings. In short, the Model Law provides a comprehensive scheme for recognizing and giving effect to foreign proceedings. As of May 30, 2022—the twenty-fifth anniversary of the adoption of the Model Law—fifty jurisdictions had adopted a version of the Model Law.[2] And, since 1997, the explosion of cross-border bankruptcy and insolvency cases prompted UNCITRAL to formulate other model laws designed to provide a framework for recognizing and enforcing insolvency-related judgments (e.g., the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018) (the "IRJ Model Law")) and to equip implementing nations with legislation addressing domestic and cross-border bankruptcies or insolvencies of enterprise groups (e.g., the Model Law on Enterprise Group Insolvency (2019) (the "EGI Model Law")).

Increasingly, companies of all sizes either conduct business across borders or are connected to businesses engaged in the global economy. Inherent in the promotion and facilitation of cross-border trade and investment is the premise of greater legal certainty. To be sure, legal stability and a vibrant rule of law assist companies in dealing with the unpredictability inherent in any business environment, but particularly in multi-national restructuring proceedings. The cooperation between and among courts and related functionaries contemplated by the Model Law provides greater legal certainty for the benefit of the global economy. Indeed, the Model Law enhances the rule of law because debtors, creditors, and other interested parties can expect that their established legal rights will be respected, such that they can participate in a cross-border reorganization process and trust that it will ultimately lead to a fair outcome as a result of principles of fairness and due process. Courts have implemented tools to facilitate interested-party participation, including the Judicial Insolvency Network's Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters (2016) and Modalities of Court-to-Court Communication (2019).[3]

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2. *See* Scott Adkins & John Martin, *The Model Law on Cross-Border Insolvency Turns 25*, Norton Rose Fulbright (May 2022) [https://perma.cc/9VSX-LNUQ].

3. In addition to the Model Law and court-directed initiatives, there are also regional efforts concerning cross-border insolvencies. For example, the European Insolvency Regulation (the "EIR") governs the cross-border effects of insolvency proceedings opened in an EU Member State in other Member States. *See* Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast), 2015 O.J. (L 141) 19, 29 (excluding Denmark). In principle, it does not govern the effects in relation to non–Member States. Like its predecessor, the EIR is aimed at ensuring efficient and effective conduct in cross-border insolvency proceedings, to the benefit of the European Union's internal market. *See id.* at 19; Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1, 1; Case C-341/04, Eurofood IFSC Ltd.,

Unlike most statutory texts, the Model Law includes a preamble with background and explanatory information regarding the international origin of the Model Law. The preamble articulates the need to promote a relatively consistent application of the Model Law across adopting jurisdictions. In addition, UNCITRAL has issued various guides with respect to the Model Law, including the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (2011), the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) (the "2009 Guide"), and the Guide to Enactment of the UNCITRAL Law on Cross-Border Insolvency (2014) (the "2014 Guide" and, collectively, the "Guides"). Courts have looked to the preamble of the Model Law and the Guides to assist with the development and implementation of fair, efficient, and cooperative precedent and procedures that maximize the value of the debtor's assets for distribution. Such guiding principles coupled with cross-border protocols facilitate collaboration and cooperation between and among courts in far flung jurisdictions. As a result, restructuring proceedings are more efficient and less costly. Recent technological advancements—many due to the COVID pandemic—make it easier for courts to hold virtual (sometimes simultaneous) hearings and allow parties greater access to proceedings. These advances facilitate more meaningful participation by all interested parties instead of merely those with the resources to secure foreign counsel or travel to participate.

II. Statutory Survey

A. General Overview of Chapter 15

The following definitions will be helpful in navigating chapter 15, generally, and this survey, in particular:

(1) A "debtor" means "an entity that is the subject of a foreign proceeding."[4]

(2) A "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

ECLI:EU:C:2006:281, ¶ 48 (May 2, 2000); Case C-116/11, Bank Handlowy v. Christianapol sp. z o.o., ECLI:EU:C:2012:739, ¶ 45 (Nov. 22, 2012). The EIR is binding and has direct effect in the relevant EU Member State and as such does not require implementation in national laws. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 47, 171. The EIR is applicable concerning debtors whose center of main interests ("COMI") is located in one of the relevant Member States and provides for rules on jurisdiction, recognition, applicable law and cross-border communication, cooperation, and coordination. *See* EIR, *supra*, 2015 O.J. (L 141) 19, 31 (Article 3). Based on the COMI assessment, the EIR prescribes which Member States' courts have jurisdiction to open insolvency proceeding with universal effect and which are automatically recognized in other Member States. *See id.* at 31, 36, 40 (Articles 3, 19, 32). Insolvency proceedings that fall within the scope of the EIR are governed by the law of the Member State in which the proceedings have been opened. *See id.* at 33 (Article 7, the Lex Concursus). Finally, the EIR also contains rules on the application of synthetic proceedings, as well as cross-border communication, cooperation, and coordination amongst courts and insolvency practitioners involved in parallel proceedings concerning the same debtor and proceedings concerning members of the same group of companies. *See id.* at 43–45 (Articles 41–47); *id.* at 47–54 (Articles 56–77).

4. 11 U.S.C. § 1502(1) (2018).

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."[5]

(3) A "foreign main proceeding" means "a foreign proceeding pending in the country where the debtor has its COMI."[6] COMI is presumed to be the location of "the debtor's registered office or habitual residence in the case of an individual."[7]

(4) A "foreign nonmain proceeding" means "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."[8] "Establishment" means "any place of operations where the debtor carries out a nontransitory economic activity."[9]

(5) A "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."[10]

(6) "Recognition" means "the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under [chapter 15]."[11]

Chapter 15, which replaced section 304 of the Bankruptcy Code,[12] is unlike its sister Bankruptcy Code chapters in that it has a declared purpose: "to provide effective mechanisms for dealing with cases of cross-border insolvency."[13] In keeping with the Model Law, chapter 15 is intended to promote and facilitate "cooperation between United States courts, trustees, examiners, debtors, and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses."[14] Congress drafted chapter 15 by incorporating many elements of the Model Law and including provisions to ensure integration

5. *Id.* § 101(23).
6. *Id.* § 1502(4).
7. *See id.* § 1516(c).
8. *Id.* § 1502(5).
9. *Id.* § 1502(2).
10. *Id.* § 101(24).
11. *Id.* § 1502(7).
12. *See* Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, § 802, 119 Stat. 23, 145–46 (2005).
13. 11 U.S.C. § 1501(a) (2018).
14. *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 126 (Bankr. S.D.N.Y. 2007) (citing 11 U.S.C. § 1501(a)(1)–(5); *In re* SPhinX, Ltd., 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y 2007)).

of the Model Law with existing U.S. precedent.[15] Since its enactment in 2005, a robust jurisprudence has emerged to interpret the various elements of chapter 15 cases.

As a general matter, a non-U.S. debtor (through its foreign representative) commences a chapter 15 case to achieve recognition of the foreign proceeding as either a foreign main or foreign nonmain proceeding. Similar relief is available under either of those proceedings but the proceedings give rise to differing entitlements: Recognition of a foreign main proceeding gives rise to certain immediate mandatory relief, whereas, after recognition of a foreign nonmain proceeding, relief must be specifically requested by the foreign representative and may be afforded in the U.S. bankruptcy court's discretion. For example, the automatic stay provided by section 362 of the Bankruptcy Code applies immediately upon recognition of a foreign main proceeding,[16] whereas, in a foreign nonmain proceeding, such relief must be specifically requested by the foreign representative.[17] After recognition, a foreign representative may seek additional relief from the bankruptcy court under sections 1507 and 1521 of the Bankruptcy Code, and the court has significant discretion to grant such relief.

B. Overview of Specific Components and Procedures of Chapter 15

The basic requirements for recognition under chapter 15 are outlined in section 1517(a), namely: (i) the proceeding must be "a foreign main proceeding or foreign nonmain proceeding" within the meaning of section 1502; (ii) the "foreign representative" applying for recognition must be a "person or body"; and (iii) the petition must satisfy the requirements of section 1515, including that it is supported by the documentary evidence specified in section 1515(b). More than one bankruptcy or insolvency proceeding may be pending with respect to the same foreign debtor in different countries. Chapter 15 therefore contemplates recognition in the United States of both a foreign main proceeding and foreign nonmain proceedings.

Pending its decision on a petition for recognition, the bankruptcy court is empowered to grant certain kinds of provisional relief. Section 1519(a) authorizes the court, "where relief is urgently needed to protect the assets of the debtor or the interests of the creditors," to stay any execution against the debtor's assets, entrust the administration of the debtor's assets to a foreign representative, or

15. *In re* Al Zawawi, 634 B.R. 11 (Bankr. M.D. Fla. 2021) (citing Iida v. Kitahara (*In re* Iida), 377 B.R. 243, 256 (B.A.P. 9th Cir. 2007)), *aff'd*, 637 B.R. 663 (M.D. Fla. 2022), *appeal docketed*, No. 22-11024 (11th Cir. Mar. 31, 2022).

16. 11 U.S.C. § 1520(a)(1) (2018) ("Upon recognition of a foreign proceeding that is a foreign main proceeding—sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States . . . .").

17. *See id.* § 1521(a) ("Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief . . . .").

suspend the right to transfer, encumber, or otherwise dispose of any of the debtor's assets. Any provisional relief granted pending approval of a request for recognition terminates at such time that the bankruptcy court rules on the recognition request, unless the court expressly orders otherwise.[18]

Section 1520(a)(3) gives a foreign representative, in a recognized chapter 15 case, the power to operate the debtor's business and to exercise the rights and powers of a bankruptcy trustee under section 363, which governs the use, sale, or lease of estate property, and section 552, which governs the enforceability of prepetition liens on property acquired by the estate or the debtor postpetition.

Pursuant to sections 1520(c) and 1528, the foreign representative can also commence a full-fledged bankruptcy case under any other chapter of the Bankruptcy Code, so long as the foreign debtor is eligible to file for bankruptcy in the United States under that chapter. The foreign representative may, pursuant to section 1524, intervene in any court proceedings in the United States in which the foreign debtor is a party and, pursuant to section 1509(b)(1), sue and be sued in the United States on the foreign debtor's behalf.

Section 1507(a) of the Bankruptcy Code provides that, upon recognition of a main or nonmain proceeding, the bankruptcy court may provide "additional assistance" to a foreign representative "under [the Bankruptcy Code] or under other laws of the United States." However, the court must consider whether any such assistance, "consistent with principles of comity," will reasonably assure that: (i) all stakeholders are treated fairly; (ii) U.S. creditors are not prejudiced or inconvenienced by asserting their claims in the foreign proceeding; (iii) the debtor's assets are not preferentially or fraudulently transferred; (iv) proceeds of the debtor's assets are distributed substantially in accordance with the order prescribed by the Bankruptcy Code; and (v) if appropriate, an individual foreign debtor is given the opportunity for a fresh start.[19]

Section 1509(b) provides that, if a U.S. bankruptcy court recognizes a foreign proceeding, the foreign representative may apply directly to another U.S. court for appropriate relief, and a U.S. court "shall grant comity or cooperation to the foreign representative." Section 1509(c) accordingly specifies that a foreign representative's request for comity or cooperation from another U.S. court "shall be accompanied by a certified copy of an order granting recognition" under chapter 15. According to the legislative history, these provisions, which differ from the Model Law, make clear that "chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings."[20]

If a U.S. bankruptcy court denies a petition for recognition of a foreign proceeding, section 1509(d) authorizes the court to "issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation" from other U.S. courts. However, a foreign representative's failure to

18. *Id.* § 1519(b).
19. *See id.* § 1507(b).
20. H.R. Rep. No. 109-31, at 110 (2005).

commence a chapter 15 case or to obtain recognition does not prevent the foreign representative from suing in a U.S. court "to collect or recover a claim which is the property of the debtor."[21]

Following recognition of a foreign main or nonmain proceeding, the bankruptcy court may grant "any appropriate relief" to the extent not already in effect and "where necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors."[22] Such relief may include a stay of any action against the debtor or its U.S. assets not covered by the automatic stay, as well as an order suspending the debtor's right to transfer or encumber its U.S. assets.[23] Upon the request of the foreign representative, such relief may also include an order "providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities."[24]

Under section 1521(a)(7), the court may also "grant[] any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)." These exclusions authorize a bankruptcy trustee to, among other things, avoid and recover transfers that are fraudulent under the Bankruptcy Code. However, these avoidance powers are expressly conferred upon a foreign representative if the debtor commences a proceeding under another chapter of the Bankruptcy Code. Section 1523 authorizes the bankruptcy court to order relief necessary to avoid acts that are "detrimental to creditors," providing that, upon recognition of a foreign proceeding, a foreign representative has "standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a)."

Under section 1521(b), the court may entrust the distribution of the debtor's U.S. assets to the foreign representative or another person, provided the court is satisfied that the interests of U.S. creditors are "sufficiently protected."

Section 1522(a) provides that the bankruptcy court may exercise its discretion to order the relief authorized by sections 1519 and 1521 upon the commencement of a case for recognition of a foreign proceeding "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."

Section 1506 of the Bankruptcy Code sets forth a general public policy exception to any relief requested by a foreign representative in chapter 15: "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be *manifestly contrary* to the public policy of the United States."[25] As detailed in Part III, such exception is rarely invoked and is difficult to satisfy.

21. 11 U.S.C. § 1509(f) (2018).
22. *Id.* § 1521(a).
23. *Id.*
24. *Id.* § 1521(a)(4).
25. *Id.* § 1506 (emphasis added).

To promote comity and cooperation among courts presiding over cross-border bankruptcies, chapter 15 provides that "the court shall cooperate to the maximum extent possible with a foreign court or a foreign representative."[26] Section 1527 specifies "[f]orms of cooperation," including, but not limited to: (i) the appointment of a person or entity to act at the court's direction; (ii) the communication of information by any appropriate means; (iii) coordination of the administration of the debtor's assets and affairs; (iv) implementation of agreements concerning the coordination of proceedings; and (v) coordination of concurrent proceedings involving the same debtor.

III. Survey of Cases

Case Management

Debtor Eligibility

1. *In re Barnet*, 737 F.3d 238 (2d Cir. 2013) (requiring a chapter 15 debtor to have a U.S. residency, assets, or a place of business to be considered a "debtor" for purposes of commencing a chapter 15 case)
2. *In re Octaviar Admin. Pty Ltd*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014) (holding that some U.S. property meets chapter 15 debtor eligibility requirements, including claims or causes of action and undrawn retainers for counsel)
3. *In re Berau Cap. Res. Pte Ltd*, 540 B.R. 80 (Bankr. S.D.N.Y. 2015) (holding that some U.S. property meets chapter 15 debtor eligibility requirements, including retainers for counsel and debt indentures or contract rights)
4. *In re OAS S.A.*, 533 B.R. 83 (Bankr. S.D.N.Y. 2015) (holding that, as long as a chapter 15 debtor retained complete control over its business and assets, it will be deemed to be a debtor-in-possession)
5. *In re Mood Media Corp.*, 569 B.R. 556 (Bankr. S.D.N.Y. 2017) (holding that entities will not be considered chapter 15 "debtors" if they are not subject to the authority or orders of the foreign court presiding over a proceeding for which chapter 15 recognition is sought)
6. *In re Al Zawawi*, 634 B.R. 11 (Bankr. M.D. Fla. 2021) (holding that, to be eligible as a chapter 15 debtor, foreign debtors need not meet the debtor eligibility requirements under section 109 applicable to debtors under other chapters of the Bankruptcy Code: they need only be "the subject of a foreign proceeding"), *aff'd*, 637 B.R. 663 (M.D. Fla. 2022), *appeal docketed*, No. 22-11024 (11th Cir. Mar. 31, 2022)

26. *Id*. § 1525(a).

COMI Analysis

1. *In re Modern Land (China) Co., Ltd.*, 641 B.R. 768 (Bankr. S.D.N.Y. 2022) (recognizing, as a foreign main proceeding under chapter 15, a Cayman Islands proceeding regarding a debtor that operated principally in China but maintained a corporate office in the Caymans and finding that debt governed by New York law could be modified or discharged in a Cayman proceeding)
2. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325 (S.D.N.Y. 2008) (holding that section 1516(c) creates a rebuttable presumption that a debtor's COMI is the place of its registered office)
3. *In re Tradex Swiss AG*, 384 B.R. 34 (Bankr. D. Mass. 2008) (holding that, if the COMI presumption is rebutted, the foreign representative must show, by a preponderance of the evidence, that COMI is in the presumed location)
4. *In re Ran*, 607 F.3d 1017 (5th Cir. 2010) (holding that COMI is determined as of the chapter 15 petition date and, in the case of an individual debtor, there is a rebuttable presumption that the debtor's COMI is his or her habitual residence)
5. *In re Fairfield Sentry Ltd.*, 714 F.3d 127 (2d Cir. 2013) (holding that, in determining a debtor's COMI, a court may consider the time period between the initiation of the foreign proceeding and the filing of the chapter 15 petition to offset any COMI manipulation)
6. *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (holding that a potential chapter 15 debtor may shift its COMI if it can establish that the shift was done for legitimate reasons and was not manipulated in bad faith)

Foreign Representative

In re Vitro, S.A.B. de C.V., 470 B.R. 408 (N.D. Tex. 2012) (holding that a foreign representative appointed by a corporation engaged in a foreign bankruptcy case is considered validly appointed under section 101(24), even if that foreign representative was not directly approved by the relevant foreign court)

Injunctive Relief

1. *In re Cozumel Caribe, S.A. de C.V.*, 482 B.R. 96 (Bankr. S.D.N.Y. 2012) (distinguishing between the principle of direct access to U.S. courts and a request for relief from U.S. courts, such that different analyses must be conducted to grant each)

2. *In re Worldwide Educ. Servs., Inc.*, 494 B.R. 494 (Bankr. C.D. Cal. 2013) (applying the standard of proof for a party seeking a preliminary injunction to a foreign representative's request to grant recognition to a foreign proceeding in order to receive the benefit of the automatic stay during the gap period between the petition date and the recognition date)
3. *In re ABC Learning Centres Ltd.*, 728 F.3d 301 (3d Cir. 2013) (holding that, when the requirements of section 1517 are satisfied, recognition must be granted, and the automatic stay, which came into effect upon recognition, applies to debtor's encumbered property in the United States)

Financial Restructuring—Releases

1. *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018) (holding that third-party non-consensual releases can be appropriate under chapter 15 when sanctioned by the foreign court)

2. *In re PT Bakrie Telecom TBK*, 628 B.R. 859 (Bankr. S.D.N.Y. 2021) (holding that third-party releases may not be appropriate if the foreign proceeding did not abide by fundamental standards of procedural fairness as demonstrated by a clear and formal record)

Operational Restructuring—Asset Sales

1. *In re Grand Prix Assocs. Inc.*, No. 09-16545, 2009 WL 1850966 (Bankr. D.N.J. June 26, 2009) (holding that the standard for approving a settlement under chapter 15 is the same standard applied in other chapters of the Bankruptcy Code)

2. *In re Elpida Memory, Inc.*, No. 12-10947, 2012 WL 6090194 (Bankr. D. Del. Nov. 20, 2012) (holding that chapter 15 imports the same standards applicable to a section 363 sale in other chapters of the Bankruptcy Code and that chapter 15 merely requires a court to grant comity to the foreign representative, not the foreign court or foreign orders issued by such court)

3. *In re Fairfield Sentry Ltd.*, 539 B.R. 658 (Bankr. S.D.N.Y. 2015) (holding that comity values underlying Chapter 15 do not compel deference to the foreign court to the exclusion of any section 363(b) review), *aff'd*, No. 15 Civ. 9474 (AKH) (S.D.N.Y. June 2, 2016), *aff'd*, 690 F. App'x 761 (2d Cir. 2017)

Litigation Elements

Avoidance

1. *In re Condor Ins. Ltd.*, 601 F.3d 319 (5th Cir. 2010) (holding that section 1521(a) does not expressly bar avoidance actions under applicable foreign law and that such actions can be litigated in a chapter 15 case)
2. *In re Massa Falida do Banco Cruzeiro do Sul S.A.*, 567 B.R. 212 (Bankr. S.D. Fla. 2017) (holding that chapter 15 does not prohibit a foreign representative from filing avoidance claims "if the basis of such relief is non-bankruptcy law and the foreign representative, under non-bankruptcy law, has standing to seek the relief")
3. *In re Bankr. Est. of Norske Skogindustrier ASA*, 629 B.R. 717 (Bankr. S.D. N.Y. 2021) (holding that, in a chapter 15 case, section 108(a) tolls both state law claims and claims arising under foreign bankruptcy law so long as such claims were ripe as of the chapter 15 petition date)

Automatic Stay

In re JSC BTA Bank, 434 B.R. 334 (Bankr. S.D.N.Y. 2010) (holding that the stay arising in a chapter 15 case "applies to the debtor within the United States for all purposes and may extend to the debtor as to proceedings in other jurisdictions for purposes of protecting property of the debtor that is within the territorial jurisdiction of the United States")

Discretionary Relief

1. *In re Qimonda AG*, 433 B.R. 547 (E.D. V.A. 2010) (holding that a bankruptcy court's decision to defer to foreign law under comity principles must be reviewed for abuse of discretion, and that section 365 of the Bankruptcy Code provides discretionary relief under section 1521, not mandatory relief under section 1520)
2. *Jaffe v. Samsung Elecs. Co., Ltd.*, 737 F.3d 14 (4th Cir. 2013) (holding that, when granting discretionary relief under section 1521, section 1522 *requires* a bankruptcy court to "*ensure sufficient protection of creditors*, as well as the debtor," and further holding that section 1506, "which covers any action under Chapter 15, authorizes a bankruptcy court to refuse to take an action manifestly contrary to U.S. public policy")
3. *In re Condor Flugdienst GmbH*, 627 B.R. 366 (Bankr. N.D. Ill. 2021) (holding that a foreign representative's request that a foreign confirmation order be implemented in the United States should be analyzed under section 1521 as guided by section 1522, and a U.S. creditor

may be permanently enjoined from pursuing its claims against a debtor after the recognition of a foreign reorganization plan)

Discovery Disputes

1. *SNP Boat Servs. S.A. v. Hotel Le St. James*, 483 B.R. 776 (S.D. Fla. 2012) (explaining that a U.S. court can order a party subject to its jurisdiction to produce evidence even though the production may violate a foreign statute, and that, although a U.S. court may determine whether foreign law complies with U.S. due process requirements generally, courts may not examine whether the specific foreign proceeding complied with U.S. due process)
2. *In re Platinum Partners Value Arbitrage Fund L.P.*, 583 B.R. 803 (Bankr. S.D.N.Y. 2018) (holding that foreign law does not preclude the availability of additional relief under chapter 15, even if this relief is contrary to foreign law, because comity does not require that the relief available in the United States be identical to the relief sought in the foreign proceeding)

Singapore Cases

1. *In re Eagle Hospitality Real Estate Inv. Trust*, [2022] SGHC 147 (holding that Singapore courts are empowered to enforce U.S. foreign insolvency orders and judgments and identifying various factors to be evaluated to determine COMI)
2. *In re CFG Peru Invs. Pte. Ltd.*, Case No. HC/OS 665/2021 (Sing. High Ct.) (noting that Singapore's adoption of the Model Law is designed to ensure seamless recognition and enforcement of foreign orders and judgments)
3. *United Sec. Sdn Bhd v. United Overseas Bank Ltd*, [2021] SGCA 78 (providing guidance regarding the scope of the automatic stay and attributes for a proceeding to be recognized as a "foreign proceeding")
4. *In re United Sec. Sdn Bhd*, Case No. HC/OS 780/2020 (Sing. High Ct.) (providing guidance regarding the scope of the automatic stay and attributes for a proceeding to be recognized as a "foreign proceeding")
5. *In re Rooftop Grp. Int'l. Pte Ltd*, [2019] SGHC 280 (holding that assistance to foreign nonmain proceedings is discretionary and, in determining whether to exercise such discretion, Singapore courts will consider whether the assistance will ensure the orderly and equitable distribution of assets and facilitate the overall restructuring)
6. *In re Zetta Jet Pte Ltd*, [2018] SGHC 16 (holding that a recognition application will be denied on public policy grounds if the foreign insolvency proceeding was enjoined by a Singapore court and that the standard for refusing to recognize a foreign proceeding on policy grounds is

lower in Singapore than in jurisdictions that adopted, as written, Article 6 of the Model Law)

7. *In re Zetta Jet Pte Ltd*, [2019] SGHC 53 (holding that the starting point to assess COMI is the debtor's registered office, but COMI analysis requires a review of where the company's primary decisions were made, where control and administration were based, and where creditors and third parties understood its business to be based)
8. *In re Pac. Andes Res. Dev. Ltd.*, [2016] SGHC 210 (holding that Singapore does not have extraterritorial jurisdiction to restrain creditors in Singapore from commencing or continuing proceedings against the foreign company elsewhere)

A. Case Management

The case summaries in this section provide an overview of preliminary matters to address in anticipation of filing a chapter 15 case and in the early days of such a proceeding. First, the foreign debtors must be "eligible" for relief under chapter 15 and there are different standards for such eligibility depending on the venue in which the chapter 15 case is commenced. Second, the debtor's COMI may determine whether certain initial relief under chapter 15 is automatic or discretionary. Third, notwithstanding the seemingly straightforward definition of the term "foreign representative," there is some flexibility on exactly who may qualify as a foreign representative by looking to non-U.S. law. Lastly, certain injunctive relief is immediately available upon the commencement of a chapter 15 case, but it is subject to various standards and requirements.

Debtor Eligibility

(1) In re Barnet[27]

A liquidation proceeding was commenced by court order against the debtor, Octaviar Administration Pty Ltd ("Octaviar"), in Australia in 2009. In 2012, foreign representatives (one of whom was Katherine Barnet) petitioned the U.S. bankruptcy court for an order recognizing the Australian Octaviar liquidation proceeding as a foreign main proceeding.

The Second Circuit held that, before recognition of a foreign proceeding can be granted, the foreign debtor must meet the requirements of section 109(a) of the Bankruptcy Code, which provides that "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." The court explained that, because section 103(a) makes the entirety of chapter 1 applicable to chapter 15, the threshold

27. Drawbridge Special Opportunities Fund LP v. Barnet (*In re* Barnet), 737 F.3d 238 (2d Cir. 2013). *But see In re* Al Zawawi, 634 B.R. 11 (Bankr. M.D. Fla. 2021) (concluding that section 109(a) does not apply in proceedings under chapter 15), *aff'd*, 637 B.R. 663 (M.D. Fla. 2022), *appeal docketed*, No. 22-11024 (11th Cir. Mar. 31, 2022). *In re Al Zawani* is discussed below.

requirement of debtor eligibility under section 109(a) must be met before recognition can be granted. The case was vacated and remanded to the U.S. bankruptcy court for further proceedings consistent with the Second Circuit's reasoning.

> *Takeaway*: At least in the Second Circuit, a chapter 15 debtor must have, in accordance with section 109 of the Bankruptcy Code, U.S. residency, assets, or a place of business to be considered a debtor for purposes of commencing a chapter 15 case.

(2) *In re Octaviar Admin. Pty Ltd*[28]

A liquidation proceeding was commenced by court order against the debtor, Octaviar Administration Pty Ltd ("Octaviar"), in Australia in 2009. In 2012, the debtor's foreign representatives petitioned the U.S. bankruptcy court for an order recognizing the Australian Octaviar liquidation proceeding as a foreign main proceeding. In 2014, Drawbridge Special Opportunities Fund LP ("Drawbridge"), a defendant in litigation that Octaviar's liquidators sought to pursue in the United States, objected to Octaviar's petition for recognition, asserting, among other things, that Octaviar did not qualify as a debtor under section 109(a) of the Bankruptcy Code.

The U.S. bankruptcy court held that Octaviar satisfied the debtor eligibility requirements in section 109(a) because it had property in the United States in the form of claims and causes of action. The causes of action that Octaviar asserted against Drawbridge and other U.S. entities constituted intangible property located in the United States.

Additionally, the court held that Octaviar had property located in the United States in the form of a $10,000 undrawn retainer in the possession of the foreign representatives' counsel in a non-interest bearing client trust account in a New York bank. Addressing Drawbridge's argument that the funds in the account were transferred strategically to confer eligibility status on Octaviar, the court interpreted section 109(a) to mean "simply, that the debtor must have property; it says nothing about the amount of such property nor does it direct that there be any inquiry into the circumstances surrounding the debtor's acquisition of the property."[29] The fact that Octaviar had property in the United States in the form of a retainer prior to filing the chapter 15 petition was sufficient to satisfy debtor eligibility under section 109(a).

> *Takeaway*: Much like a chapter 11 debtor, *Octaviar* stands for the proposition that a chapter 15 foreign debtor will satisfy the requirements of section 109 of the Bankruptcy Code by having at least some property—e.g., an attorney retainer or a cause of action—in the jurisdiction in which the chapter 15 petition was filed.

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28. 511 B.R. 361 (Bankr. S.D.N.Y. 2014).
29. *Id*. at 373 (footnote omitted).

(3) In re Berau Cap. Res. Pte Ltd[30]

The debtor filed an insolvency proceeding in Singapore, the location of its headquarters. The debtor's foreign representative subsequently sought recognition of the Singapore proceeding as a foreign main proceeding under chapter 15.

The U.S. bankruptcy court deemed the attorney retainer held by the foreign representative's New York counsel sufficient to satisfy debtor eligibility, following *Octaviar*, but also held that the debtor's debt indenture would satisfy the debtor eligibility requirements under section 109(a). The $450 million debt indenture was governed by New York law and included a New York choice of forum provision. The court explained that the indenture created property rights, which are considered intangible property of the debtor, and as state law governs property rights in bankruptcy cases, the inclusion of the New York choice of law and forum provisions in the indenture made New York the situs of the debtor's property. Therefore, the debtor had property in the United States and satisfied the debtor eligibility requirements under section 109(a).

> *Takeaway*: Much like a chapter 11 debtor, in accordance with *Berau Capital* stands for the proposition that a chapter 15 foreign debtor will satisfy the requirements of section 109 of the Bankruptcy Code by having at least some property—e.g., an attorney retainer or a contract right—in the jurisdiction in which the chapter 15 petition was filed.

(4) In re OAS S.A.[31]

Three foreign entities (collectively, the "OAS Debtors") were debtors in judicial reorganization proceedings in Brazil. In 2015, the debtors' foreign representative sought recognition of the Brazilian proceedings as foreign main proceedings under chapter 15. Recognition was challenged on the basis that the OAS Debtors could not, as a matter of law, appoint the foreign representative required for recognition as they were not debtors-in-possession.

The U.S. bankruptcy court acknowledged that the Model Law does not define the characteristics of a debtor-in-possession, but noted that the 2014 Guide states that it "includes a debtor that retains 'some measure of control over its assets' although under court supervision."[32] Further, the 2009 Guide defines a "debtor-in-possession" as a debtor that "retains full control over the business, with the consequence that the court does not appoint an insolvency representative."[33]

The court held that the OAS Debtors were debtors-in-possession "within the meaning of the Model Law as amplified by the [2014] Guide and the [2009] Guide" because the OAS Debtors' management retained complete control over

30. 540 B.R. 80 (Bankr. S.D.N.Y. 2015).
31. 533 B.R. 83 (Bankr. S.D.N.Y. 2015).
32. *Id.* at 95 (quoting UNCITRAL, Guide to Enactment of the Model Law on Cross-Border Insolvency paras. 71, 74 (2014)).
33. *Id.* (quoting UNCITRAL, Practice Guide on Cross-Border Insolvency Cooperation para. 13(j) (2009)).

their business and assets, subject to court supervision in the pending Brazilian proceedings.[34] The court also noted that the creditors had, in another court, previously argued that existing management of the OAS Debtors remained in control and the limited powers of the judicial administrator did not permit interference in that control, such that the creditors were estopped from asserting otherwise.

> *Takeaway*: A chapter 15 debtor will be deemed to be a debtor-in-possession if its management retains complete control over the debtor's business and assets, subject to the supervision of the foreign court presiding over a pending foreign proceeding.

(5) In re Mood Media Corp.[35]

Mood Media Corporation ("MMC"), a Canadian company, filed for insolvency proceedings in Canada. Fourteen of MMC's direct and indirect U.S. subsidiaries (collectively, the "Subsidiaries"), each of which also claimed to be a debtor in the Canadian insolvency proceedings, sought recognition of the Canadian proceedings under chapter 15 as foreign nonmain proceedings.

The U.S. bankruptcy court ruled that the Subsidiaries were not "debtors" under chapter 15 because none of them was under the authority of or subject to the orders of the Canadian court, which, in turn, did not exercise any control over or give any direction to the Subsidiaries. According to the U.S. bankruptcy court, there was no foreign proceeding to recognize as the Subsidiaries were essentially beneficiaries of orders related to the restructuring of their parent company. The Subsidiaries "may thereby be affected by the Canadian proceeding, in the same way that a third-party releasee may be affected by a confirmed chapter 11 plan in the United States[, b]ut that release of the guarantee is not enough to make the U.S. [Subsidiaries] 'debtors' in the foreign case."[36]

> *Takeaway*: The fact that certain U.S. entities are subsidiaries of a parent company in a foreign insolvency proceeding, without more, is an insufficient basis to grant recognition of the foreign proceeding. An entity will not be considered a chapter 15 "debtor" if it is not subject to the authority or orders of the foreign court presiding over a proceeding for which recognition is sought.

(6) In re Al Zawawi[37]

The foreign debtor was an individual who resided outside of the United States. The question before the U.S. bankruptcy court was whether the foreign debtor was subject to the same eligibility requirements as a debtor in a non-chapter 15

34. *Id.*
35. 569 B.R. 556 (Bankr. S.D.N.Y. 2017).
36. *Id.* at 561.
37. 634 B.R. 11 (Bankr. M.D. Fla. 2021), *aff'd*, 637 B.R. 663 (M.D. Fla. 2022), *appeal docketed*, No. 22-11024 (11th Cir. Mar. 31, 2022).

bankruptcy case. The court held that the foreign debtor was not subject to such requirements.

The bankruptcy court explained that a plain language interpretation of section 1502 of the Bankruptcy Code indicates that the chapter 15–specific definitions are exceptions to the general definitions found in chapter 1 that apply to bankruptcies under other chapters of the Bankruptcy Code. "Accordingly, the subject of a foreign proceeding is only a 'debtor' as that term is used in chapter 15 and is not a debtor as that term is used in [section] 109."[38] The court noted that, because international uniformity is the chief aim of chapter 15 and in each case a foreign proceeding has already been commenced in another country prior to the filing of a chapter 15 petition, to define a chapter 15 debtor as "the subject of a foreign proceeding" is the only logical reading of section 1502. To interpret the provision otherwise, the court emphasized, would always require a waiver by a court of other requirements stated in section 109 (i.e., the credit counseling requirement for all "debtors") or an exception to apply before a foreign debtor could obtain recognition, which could contravene the stated purpose of chapter 15.

The U.S. District Court for the Middle District of Florida affirmed the ruling on appeal for substantially the same reasons articulated by the bankruptcy court. Al Zawawi has appealed to the U.S. Court of Appeals for the Eleventh Circuit.

> *Takeaway*: To be eligible for chapter 15 relief, a foreign debtor must be "the subject of a foreign proceeding," but does not have to meet the debtor eligibility requirements under section 109 of the Bankruptcy Code.

COMI Analysis

(1) In re Modern Land (China) Co., Ltd.[39]

Incorporated in the Caymans and listed on the Hong Kong Stock Exchange, Modern Land (China) Co., Ltd. ("Modern Land") is a holding company for a large group of real estate development businesses, most of which are incorporated in the Caymans or the British Virgin Islands. Virtually all the operations and $12.49 billion in assets of such entities were principally or exclusively in the People's Republic of China. Modern Land's debt totaled $4.32 billion as of June 2021, approximately $1.2 billion of which consisted of certain New York law–governed notes (the "NY Notes"). After defaulting on the NY Notes, Modern Land entered into a restructuring support agreement with holders of approximately 80 percent of the NY Notes. In April 2022, Modern Land commenced a reorganization proceeding in a Cayman court under the Cayman Islands Company Act of 2022 (the "Cayman Proceeding") seeking to confirm a scheme of arrangement and, as required by the restructuring support agreement, asking the Cayman court to appoint a foreign representative to seek chapter 15 recognition of the scheme in the United States with the Caymans as Modern Land's COMI.

38. *Id.* at 19.
39. 641 B.R. 768 (Bankr. S.D.N.Y. 2022).

The scheme contemplated releasing claims on account of the NY Notes in exchange for each holder receiving (i) approximately $22 million in cash, and (ii) new New York law–governed notes (the "New Notes") to replace the cancelled NY Notes. The scheme would also cancel the guarantees provided under the NY Notes and release Modern Land and its affiliates from claims by holders of the NY Notes. The proposed scheme was overwhelmingly approved.

Before examining whether chapter 15 recognition of the Cayman Proceeding was appropriate, the U.S. bankruptcy court addressed a pair of decisions by a Hong Kong court suggesting that a U.S. court, in accordance with the *Gibbs* Rule,[40] could not enforce a scheme of arrangement sanctioned by a foreign court that modified or discharged U.S. law–governed debt. The bankruptcy court explained, "[w]ith great respect [to] the Hong Kong court," that prior decisions were misinterpreted and that, so long as a foreign court properly exercises jurisdiction over a foreign debtor in an insolvency proceeding and the foreign court's procedures comport with "broadly accepted" principles of due process, "a decision of the foreign court approving a scheme or plan that modifies or discharges New York governed debt is enforceable" under chapter 15.[41] The court noted that such an "unremarkable proposition" has been firmly established in U.S. precedent for more than a century.[42]

40. The *Gibbs* Rule emerged from *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux*, [1890] 25 Q.B.D. 399 (Eng. Ct. App.), where the court ruled that an English creditor could sue in England for damages arising from the breach of an English-law-governed asset purchase contract even though the claim was effectively discharged in the purchaser's French liquidation proceeding. The ruling has since been construed to render unenforceable in Commonwealth jurisdictions any discharge or modification of U.K.-law-governed debt in connection with a foreign court proceeding, even after the U.K. adopted its version of the Model Law in 2006. *See, e.g.*, Bakhshiyeva v. Sberbank of Russia, [2018] EWHC 59 (Eng. Ch.) (ruling that, under the *Gibbs* Rule, the court would refuse to grant the application of the foreign representative of an Azerbaijan bank debtor for a permanent stay of creditors' enforcement of claims in England under an English-law-governed contract, contrary to the terms of the bank's Azeri insolvency proceeding, even though the proceeding had been recognized in England under the Model Law), *aff'd*, [2018] EWCA Civ 2802 (Eng. Ct. App.) (holding that the Model Law is merely procedural and cannot impair substantive English-law contract rights protected by the *Gibbs* Rule). Because it is inconsistent with the modified universalist approach underpinning modern cross-border bankruptcy legislation, the *Gibbs* Rule has frequently been criticized as an anachronism that should be consigned to the dregs of history. *See, e.g.*, Pac. Andes Res. Dev. Ltd., [2016] SGHC 210 (Sing. High Ct.) (discussing various academic criticisms of the *Gibbs* Rule's continued application and explaining that a fundamental problem with the rule in international insolvency cases is that it mischaracterizes the discharge of debt as a contractual issue, rather than an issue of bankruptcy law, which gives primacy to policy over contractual rights). In 2018, UNCITRAL published its final version of the new IRJ Model Law. The IRJ Model Law creates a framework for the recognition and enforcement of judgments in foreign bankruptcy and insolvency proceedings. It is intended to supplement and complement the Model Law. If adopted by the U.K., the IRJ Model Law would presumably abrogate the *Gibbs* Rule. Until then, however, it persists as an impediment to the enforcement of non-U.K. insolvency judgments impairing English-law contract rights. In July 2022, the U.K. Insolvency Service launched a public consultation to consider the adoption of the EGI Model Law and the IRJ Model Law as well as revisions to the Model Law. *See Implementation of Two UNCITRAL Model Laws on Insolvency Consultation*, U.K. INSOLVENCY SERV. (July 7, 2022), https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation.

41. *In re Mod. Land*, 641 B.R. at 776.

42. *Id.* (citing Can. S. Ry. Co. v. Gebhard, 109 U.S. 527 (1883)).

Regarding recognition, the bankruptcy court analyzed whether the Cayman Proceeding was a foreign main or foreign nonmain proceeding. In concluding that the Cayman Proceeding was a foreign main proceeding and that Modern Land's COMI was in the Caymans, the court determined that foreign main recognition was consistent with creditor expectations because the NY Notes contained provisions that required any restructuring in the Caymans, and Modern Land's restructuring was overwhelmingly supported by creditors. Further, Modern Land's pre-scheme and restructuring activities (e.g., Modern Land held itself out to the public as a Cayman entity; nearly half its wholly owned subsidiaries were Cayman entities; Modern Land maintained its registered office in the Caymans; and on the chapter 15 petition date, restructuring activities were Modern Land's primary business activity and the vast majority of restructuring activities took place in the Caymans) supported a finding of COMI in the Caymans. Lastly, unlike cases involving bad-faith COMI manipulation, the bankruptcy court determined that Modern Land's foreign representatives sought chapter 15 recognition in good faith.

The bankruptcy court separately determined that the Cayman Proceeding was not a foreign nonmain proceeding. In reaching this conclusion, the court determined that such recognition would be inconsistent with the goals of foreign nonmain proceedings, and that, because Modern Land did not engage in any non-transitory economic activity in the Caymans, it did not impact the local Cayman marketplace.

> *Takeaway*: *Modern Land* is a significant ruling for at least two reasons. First, unlike jurisdictions following the *Gibbs* Rule, U.S. courts will, under appropriate circumstances, enforce the terms of a foreign court–sanctioned restructuring plan that modifies or discharges U.S. law–governed debt. Second, a debtor's COMI analysis involves examining multiple factors, and merely because a debtor's COMI shifted prior to the chapter 15 petition date does not mean that the shift was effected in bad faith.

(2) *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*[43]

The foreign representatives for limited liability companies sought recognition of winding-up proceedings pending in the Caymans as either foreign main or nonmain proceedings. Even though no party objected, the U.S. bankruptcy court denied chapter 15 recognition, holding that the debtors' COMI was in the United States, rather than the Caymans. On appeal, the U.S. District Court for the Southern District of New York affirmed the decision, ruling that the Cayman proceedings qualified as neither foreign main nor nonmain proceedings under chapter 15.

43. 389 B.R. 325 (S.D.N.Y. 2008).

Tracking the bankruptcy court's decision below, the district court noted that, while section 1516(c) creates a presumption that a debtor's COMI is the place of its registered offices, that presumption can be rebutted with evidence to the contrary, even in a case where the petition for recognition is unopposed. Although the debtors' registered office was in the Caymans and millions of dollars in cash were directed to Caymans accounts after the chapter 15 petition was filed, contrary evidence overcame the presumption that the debtors' COMI was in the Caymans, including: (i) the debtors had no employees or managers in the Caymans; (ii) the debtors' investment manager was located in New York; (iii) the debtors' books and records were in the United States prior to commencement of the insolvency proceedings; and (iv) all of the debtors' liquid assets were located in the United States. Because the debtors' COMI was in New York and the debtors did not even have an establishment in the Caymans, the district court ruled that the bankruptcy court properly denied the petition for recognition of the Cayman proceeding as either a foreign main or a foreign nonmain proceeding.

> *Takeaway*: Although section 1516(c) creates a presumption that a debtor's COMI is the place of its registered offices, that presumption can be rebutted with evidence to the contrary, even in a case where the petition for chapter 15 recognition is unopposed.

(3) In re Tradex Swiss AG[44]

The Swiss Federal Banking Commission (the "SFBC"), the chief regulator of banks and securities brokers in Switzerland, commenced a liquidation proceeding against Tradex Swiss AG ("Tradex"), a Swiss-registered internet-based foreign exchange trading company with offices in both Switzerland and Massachusetts. Tradex was also a debtor in an involuntary chapter 7 case filed in a U.S. bankruptcy court. Claiming to be Tradex's "foreign representatives," two individuals appointed by the SFBC to investigate Tradex's affairs filed a chapter 15 petition seeking recognition of the SFBC liquidation under chapter 15 as a foreign main proceeding as well as consolidation of the chapter 7 case with the chapter 15 case.

The U.S. bankruptcy court recognized the SFBC liquidation as a foreign nonmain proceeding. The court explained that, although COMI is not defined by the Bankruptcy Code, it has been compared to the concept of a principal place of business, and there is a rebuttable presumption that a debtor's COMI is the location of its registered office. Although Tradex's registered offices were in Switzerland, the COMI presumption was rebutted with evidence that the location of Tradex's trading platform was in Boston, where trades were confirmed. Tradex had assets and a significant number of creditors in the United States, and signatory authority for trades was designated to the manager of its Boston office. The court further explained that, after contrary evidence rebuts the COMI

44. 384 B.R. 34 (Bankr. D. Mass. 2008).

presumption, the foreign representative bears the burden to show, by a preponderance of the evidence, that COMI is in the presumed location. Here, Tradex's foreign representatives were unable to satisfy that burden. The court accordingly recognized the SFBC liquidation under chapter 15, but as a foreign nonmain proceeding because it determined that Tradex maintained an establishment in Switzerland. The U.S. bankruptcy court also declined to dismiss the chapter 7 case, noting that section 303(b)(4) of the Bankruptcy Code authorizes a foreign representative to file an involuntary petition and that dismissal of the case would not be in the interests of Tradex's creditors.

Takeaway: If contrary evidence is offered to rebut the COMI presumption, the foreign representative bears the burden to show, by a preponderance of the evidence, that COMI is in the presumed location.

(4) In re Ran[45]

The debtor was an Israeli businessman who once held a controlling interest in Israel Credit Lines Supplementary Financial Services Ltd. ("Credit Lines"), a public company that was being liquidated in an Israeli bankruptcy proceeding. Credit Lines' receiver asserted multimillion dollar claims against the debtor. In 1997, an involuntary bankruptcy was commenced in Israel against the debtor, who had previously left Israel and resided in the United States. In 2006, the receiver filed a petition for recognition of the Israeli bankruptcy proceeding under chapter 15. The U.S. bankruptcy court denied the petition and a U.S. district court affirmed.

On appeal, the U.S. Court of Appeals for the Fifth Circuit explained that, in the case of an individual debtor, there is a rebuttable presumption that the debtor's COMI is his or her "habitual residence."[46] Other relevant factors include (i) the location of the debtor's primary assets, (ii) the location of the majority of the debtor's creditors, and (iii) the jurisdiction whose law would apply to most disputes.[47]

Analyzing the totality of the circumstances, the Fifth Circuit concluded the debtor's COMI was located in the United States, where the debtor and his family resided, where he was employed, and where his assets were located. The Fifth Circuit also held that the plain language of section 1502 dictates that the relevant time period to determine COMI is the chapter 15 petition date. According to the Fifth Circuit, determining COMI as of the foreign-proceeding filing date would lead to a "meandering and never-ending inquiry into the debtor's past interests [that] could lead to a denial of recognition in a country where a debtor's interests are truly centered, merely because he conducted past activities in a country at some point."[48] The court further noted that the debtor's COMI should be

45. 607 F.3d 1017 (5th Cir. 2010).

46. *Id.* at 1022 (quoting 11 U.S.C. § 1516(c)).

47. *Id.* at 1024 (citing *In re* Loy, 380 B.R. 154, 162 (Bankr. E.D. Va. 2007) (applying factors to determine a corporate debtor's COMI to the determination of an individual debtor's COMI)).

48. *Id.* at 1025.

ascertainable by third parties and that third-party understanding of the laws of the jurisdiction in which the debtor operates is relevant to determining a debtor's COMI.

Takeaway: In the Fifth Circuit, the relevant time period to determine COMI is the chapter 15 petition date and, in the case of an individual debtor, there is a rebuttable presumption that the debtor's COMI is his or her "habitual residence."

(5) In re Fairfield Sentry Ltd.[49]

The debtor, the largest of the "feeder funds" that invested with Bernard L. Madoff Investment Securities LLC, was the subject of a liquidation proceeding in the British Virgin Islands ("BVI"). Its liquidators, as foreign representatives, sought chapter 15 recognition of the BVI liquidation as a foreign main proceeding. The U.S. bankruptcy court granted the petition, examining the period between when the debtor stopped doing business and the chapter 15 petition date, and finding that the debtor's COMI was in the BVI. A U.S. district court affirmed on appeal and one of the debtor's shareholders appealed to the U.S. Court of Appeals for the Second Circuit, which also affirmed.

The only disputed issue on appeal was whether the BVI liquidation was a foreign main or nonmain proceeding, which hinged on the location of the debtor's COMI. The Second Circuit held that a debtor's COMI should be determined as of the chapter 15 petition date, but "[t]o offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the [c]hapter 15 petition."[50] The Second Circuit rejected the shareholder's argument that the court should consider the debtor's entire operational history. Instead, the court explained, a plain reading of section 1517, which provides that a "foreign proceeding shall be recognized . . . as a foreign main proceeding if it *is pending* in the country where the debtor *has* the center of its main interests," dictates that the chapter 15 petition date should anchor the COMI analysis.[51] The Second Circuit further held that "any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis."[52]

Takeaway: Like the Fifth Circuit, the Second Circuit determines a debtor's COMI as of the chapter 15 petition date but, to offset COMI manipulation, a court may also examine the time period between the commencement of the foreign proceeding and the filing of the chapter 15 petition.

49. Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127 (2d Cir. 2013).
50. *Id.* at 133.
51. *Id.* at 134 (quoting 11 U.S.C. § 1517(b)(1) (emphases added)).
52. *Id.* at 137.

(6) *In re Ocean Rig UDW Inc.*[53]

The joint provisional liquidators of four debtors involved in Cayman liquidation proceedings, as the debtors' foreign representatives, sought recognition of the restructuring proceedings under chapter 15 as foreign main or nonmain proceedings. Faced with significant debt payments and anticipating payment defaults, the debtors decided to restructure in the Caymans and had migrated their COMI to the Caymans from the Republic of the Marshall Islands for this purpose. One of the debtor's shareholders objected to recognition, arguing, among other things, that the COMI shift was invalid. The U.S. bankruptcy court recognized the Cayman proceeding as foreign main proceedings in four jointly administered chapter 15 cases.

The court held that the debtors established, by a preponderance of the evidence, that each debtor's COMI was in the Caymans as of the chapter 15 petition date. The court found that the debtors' COMI shift "was done for legitimate reasons, motivated by the intent to maximize value for their creditors and preserve their assets [and that the debtors'] COMI was not manipulated in bad faith."[54] According to the court, the evidence established that the debtors: (i) incorporated in the Caymans in 2016; (ii) were managed and operated in the Caymans; (iii) had offices in the Caymans; (iv) held board meetings in the Caymans; (v) had officers who resided in the Caymans; (vi) maintained bank accounts in the Caymans; (vii) maintained their books and records in the Caymans; (viii) conducted restructuring activities from the Caymans; (ix) provided notice of their relocation to the Caymans to paying agents, indenture trustees, administrative and collateral agents, and investment service providers; and (x) stated in federal securities law filings that their offices were in the Caymans.[55]

The court also found that, because the debtors' ocean-rig business was primarily conducted on the high seas, and thus "generally . . . outside of any jurisdiction in which it was managed[,] . . . the Cayman Islands [was] the site of the Debtors' 'main interests'—it [was] the site where their business is run."[56] It accordingly recognized the Cayman proceedings as foreign main proceedings.

Takeaway: A potential chapter 15 debtor may shift its COMI if it can establish, by a preponderance of the evidence, that the shift occurred prior to their chapter 15 filing date, was done for legitimate reasons, and does not represent bad faith manipulation.

53. 570 B.R. 687 (Bankr. S.D.N.Y. 2017).
54. *Id.* at 707.
55. *Id.* at 695, 704.
56. *Id.* at 706 (quoting 11 U.S.C. § 1516(c)).

Foreign Representative

In re Vitro, S.A.B. de C.V.[57]

In 2010, the debtor, a Mexican holding company whose subsidiaries constituted one of the world's largest glass manufacturing concerns, appointed two individuals to file a Mexican bankruptcy case on its behalf, as well as a petition seeking chapter 15 recognition of its Mexican bankruptcy case. The U.S. bankruptcy court entered an order recognizing the debtor's Mexican bankruptcy case as a foreign main proceeding even though the debtor's foreign representatives were not appointed by the Mexican court. An ad hoc group of the debtor's noteholders appealed, arguing that the foreign representatives did not satisfy section 101(24) of the Bankruptcy Code, which provides that a foreign representative must be "authorized in a foreign proceeding." Because neither representative was directly approved by the Mexican bankruptcy court, the ad hoc noteholders asserted that recognition must be denied.

The U.S. District Court for the Northern District of Texas affirmed. The district court interpreted the language of section 101(24) more broadly "to mean authorized *in the context of* a foreign bankruptcy proceeding."[58] Foreign representatives appointed by a corporation engaged in a foreign bankruptcy case, the court reasoned, would therefore be considered "authorized in a foreign proceeding." The district court noted that case law suggests a debtor is permitted to appoint its own foreign representative and that, under Mexican law, a debtor—like a chapter 11 debtor-in-possession ("DIP")—is generally authorized to manage its business during a bankruptcy case.[59]

According to the district court, although there are differences between the two nations' concept of a DIP, the difference is not so great as to preclude the debtor from appointing its own foreign representative under section 101(24). The court also emphasized that the question of whether a foreign representative is qualified is a matter of U.S. law. The district court concluded that the debtor's appointment of its foreign representatives satisfied the requirements of section 101(24) and that recognition of the Mexican bankruptcy case was also proper.

> *Takeaway*: A foreign representative appointed by a corporation that is engaged in a foreign bankruptcy case is considered valid under section 101(24), even if that foreign representative was not directly approved by the relevant foreign court.

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57. Ad Hoc Grp. of Noteholders v. Vitro, S.A.B. de C.V. (*In re* Vitro, S.A.B. de C.V.), 470 B.R. 408 (N.D. Tex. 2012).

58. *Id.* at 411.

59. *Id.* at 412 (citing, among other cases, *In re* Compania Mexicana de Aviacion, No. 10-14182, 2010 WL 10063842 (Bankr. S.D.N.Y. Nov. 8, 2010)).

Injunctive Relief

(1) In re Cozumel Caribe, S.A. de C.V.[60]

The debtor, a Mexican hotel and tourism company, filed for bankruptcy in Mexico in 2010. Pursuant to a pre-bankruptcy secured loan agreement under which the debtor and certain non-debtor affiliates were co-obligors, the debtor and its affiliates deposited hotel revenues into a cash management account located in New York. Upon default of the loan, the special servicer of the account sought to apply the funds in it to satisfy the debt. The Mexican court entered an *ex parte* order enjoining collection of the loan debt from property of the debtor or its non-debtor affiliates, including funds held in the cash management account.

The debtor's foreign representative sought chapter 15 recognition of the debtor's Mexican bankruptcy, as well as an order enjoining any act to collect from the cash management account. The U.S. bankruptcy court granted the petition. Afterward, the special servicer commenced an adversary proceeding seeking a declaratory judgment that funds in the cash management account were not the debtor's property and therefore not subject to the automatic stay. It also sought authority to exercise its rights to the funds under New York-law–governed loan documents. The foreign representative responded by requesting a stay of the adversary proceeding on the grounds of international comity. The U.S. bankruptcy court stayed the adversary proceeding, but it directed the debtor and the foreign representative to file an appropriate proceeding in the Mexican court to determine who owned the funds.

The U.S. bankruptcy court explained that, although section 1509(b) gives foreign representatives access to U.S. courts, the "principle of direct access does not dictate the relief that must be accorded to the foreign representative."[61] "Granting comity to a *foreign representative* by providing access to courts in the United States," the court wrote, "is very different from granting *the request* by the foreign representative to extend comity to a foreign law, court order or judgment."[62] Further, the court noted, Section 1522 permits the court to impose conditions on relief to ensure that "the interests of the creditors . . . are sufficiently protected," and, under section 1506, relief must be denied if it would be manifestly contrary to U.S. public policy.

In this case, the court explained, the relief sought was expressly available under section 1521(a)(7). The court concluded that the special servicer was sufficiently protected as long as the funds in the management account remained in the United States and that staying the adversary proceeding would not be manifestly contrary to U.S. public policy.

Takeaway: The court distinguished between the principle of direct access to U.S. courts and the request for relief from U.S. courts, such that different analyses must be conducted in determining whether to grant each kind of relief.

60. CT Inv. Mgmt. Co. v. Cozumel Caribe, S.A. de C.V. (*In re* Cozumel Caribe, S.A. de C.V.), 482 B.R. 96 (Bankr. S.D.N.Y. 2012).

61. *Id.* at 109.

62. *Id.* at 110.

(2) *In re Worldwide Educ. Servs., Inc.*[63]

Despite winding down operations in 2010 and having negligible remaining assets, Worldwide Education Services, Inc. ("Worldwide"), a company originally organized in the United States but re-domiciled in the British Virgin Islands (the "BVI"), continued to be named as a defendant in various lawsuits in the United States. In an effort to halt such litigation, Worldwide commenced voluntary liquidation proceedings under the BVI Companies Act of 2004 (the "BVI Liquidation"). Principally to receive the benefit of the automatic stay, Worldwide's court-appointed liquidator sought chapter 15 recognition of the BVI Liquidation as a foreign main proceeding or nonmain proceeding in the U.S. Bankruptcy Court for the Central District of California.

Contemporaneously with the filing of the petition, the liquidator asked the U.S. bankruptcy court to provisionally impose the automatic stay on the plaintiffs in the litigation during the period between the chapter 15 petition date and the hearing to determine whether the BVI Liquidation should be recognized—referred to as the "gap period."

Section 1519 authorizes a U.S. bankruptcy court to provide provisional relief during the gap period where such relief is "urgently needed to protect the assets of the debtor or the interests of creditors" and provides that "[t]he standards, procedures, and limitations applicable to an injunction shall apply to relief under this section." In *In re Pro-Fit International, Ltd.*,[64] a different bankruptcy judge in the Central District of California held that a motion for temporary application of the automatic stay does not need to meet the procedural or substantive requirements for injunctive relief (i.e., a likelihood of success on the merits, irreparable harm absent such relief, and the balance of equities and public interest favoring the moving party).

In *Worldwide Education Services*, the bankruptcy court analyzed section 1519 and determined that the *Pro-Fit International* decision was "flatly inconsistent with the plain and unambiguous language of Section 1519" and that the "express language of [section 1519]" requires a movant to satisfy the standard of proof for a preliminary injunction to benefit from provisional relief during the gap period.[65] The bankruptcy court concluded that the liquidator failed to satisfy the standard for injunctive relief.

In so ruling, the court found: (i) no likelihood of success absent any evidence of any burden (financial or otherwise) on Worldwide in defending itself in the litigation; (ii) no evidence of irreparable harm to Worldwide; (iii) the balance of equities tipped in favor of the plaintiffs, who would be unduly prejudiced by imposition of the automatic stay because they were ready to go to trial after extensive pretrial litigation and discovery; and (iv) no indication that granting provisional relief would be in the public interest because the liquidator

63. 494 B.R. 494 (Bankr. C.D. Cal. 2013).
64. *In re* Pro-Fit Int'l, Ltd., 391 B.R. 850 (Bankr. C.D. Cal. 2008).
65. *In re* Worldwide Educ. Servs., Inc., 494 B.R. at 498.

argued only that section 1519 "relief should always be granted in Chapter 15 cases because [such provisional relief] would further the goals of Chapter 15."[66]

> *Takeaway*: The standard of proof for a party seeking a preliminary injunction is the appropriate standard to apply to a foreign representative's request to grant recognition to a foreign proceeding in order to receive the benefit of the automatic stay in the gap period between the filing of a chapter 15 petition and the recognition hearing date.

(3) In re ABC Learning Centres Ltd.[67]

ABC Learning Centres Ltd. ("ABC") was a publicly traded Australian company that provided childcare and educational services in Australia, the United States, and other countries through its subsidiaries. After commencing voluntary administration proceedings in Australia (the "Australian Proceeding"), which constituted a material default of secured lender agreements, liquidators were appointed to wind down ABC's operations, sell unencumbered assets, investigate and possibly challenge the validity of secured creditor liens, make pro-rata distributions among creditors of the same priority, and receive any excess collateral-disposition proceeds from secured creditors. Unlike in U.S. chapter 11 cases, in Australian liquidation proceedings, secured creditors are entitled to appoint a receiver to realize the value of their collateral and work alongside liquidators. The receiver represents the interests of secured creditors, whereas the liquidators represent the interest of all creditors. A U.S. bankruptcy court granted a petition filed by ABC's liquidators for chapter 15 recognition of the Australian Proceeding as a foreign main proceeding, which triggered the automatic stay of actions against ABC's property in the United States.

As of the chapter 15 petition date, ABC was a defendant in state court litigation in the United States with RCS Capital Development LLC ("RCS"). Because ABC's liquidators filed the chapter 15 petition before a verdict in favor of RCS was rendered into a judgment against ABC, RCS sought relief from the automatic stay for this purpose. The bankruptcy court granted RCS's motion. RCS also objected to recognition under chapter 15, claiming that the Australian Proceeding was not a foreign main proceeding and that the automatic stay should not apply to a foreign debtor's encumbered property. The bankruptcy court entered an order recognizing the Australian Proceeding and ruled that the automatic stay applied to ABC's encumbered property in the United States. After the district court affirmed on appeal, RCS appealed to the U.S. Court of Appeals for the Third Circuit.

The Third Circuit also affirmed. It analyzed the history and policies underlying the Model Law and chapter 15 and emphasized that a main purpose of both laws is "to direct creditors and assets to the foreign main proceeding for orderly and fair distribution of assets [and] avoid[] the seizure of assets by creditors

66. *Id.* at 501; *see id.* at 499–502.
67. 728 F.3d 301 (3d Cir. 2013).

operating outside the jurisdiction of the foreign main proceeding."[68] In concluding that it was appropriate to recognize the Australian Proceeding as a foreign main proceeding, the Third Circuit dismissed RCS's argument that ABC's receivers, rather than the liquidators, controlled the Australian Proceeding because ABC's assets were fully encumbered. The Third Circuit held that, provided the requirements of section 1517 are satisfied, recognition must be granted because "[c]hapter 15 makes no exceptions when a debtor's assets are fully leveraged."[69]

The Third Circuit also determined that the public policy exception in section 1506 did not prevent recognition merely because Australian legislators established a different way to prioritize secured creditors compared to U.S. laws and policies. According to the Third Circuit, "allowing RCS to use U.S. courts to circumvent the [Australian Proceeding] would undermine the core bankruptcy policies" of orderly and fair distribution of assets in the foreign main proceeding.[70]

Lastly, the Third Circuit rejected RCS's argument that the automatic stay should not apply to fully encumbered property because ABC merely retained legal title to the encumbered property. The court reasoned that ABC retained certain equitable property interests constituting property subject to the automatic stay, including: (i) the right to receive surplus proceeds from the sale of encumbered assets; (ii) the option under Australian law to redeem the security upon payment to the secured creditor of the collateral's estimated value; and (iii) the right to challenge the validity of the secured creditor's liens.

> *Takeaway*: According to the Third Circuit, when the requirements of section 1517 are satisfied, recognition must be granted and the automatic stay triggered upon chapter 15 recognition applies to a debtor's encumbered property in the United States. In addition, the public policy exception in section 1506 does not prevent recognition merely because foreign law prioritizes secured creditors differently than U.S. law.

B. Financial Restructuring—Releases

The case summaries in this section provide an overview of matters that may be addressed after filing a chapter 15 case and in the relatively early days of such a case, including, for example, requests by a foreign representative to enforce a restructuring plan approved by a foreign court that may include non-debtor releases. Although there are difficulties associated with the validity of non-consensual third-party releases in U.S. chapter 11 cases, such releases may be recognized and enforced in the United States as part of a chapter 15 case if sanctioned by a foreign court. However, recognition and enforcement in the United States may not be appropriate if the applicable foreign law does not contemplate such releases or, even if it does, there is an inadequate evidentiary record demonstrating the need for such releases.

68. *Id*. at 306.
69. *Id*. at 308.
70. *Id*. at 311.

(1) In re Avanti Commc'ns Grp. PLC[71]

In *In re Avanti Communications Group PLC*, a U.S. bankruptcy court issued an order: (i) recognizing, under chapter 15, a proceeding commenced under the U.K. Companies Act of 2006 (the "U.K. Proceeding") with respect to Avanti Communications Group plc ("Avanti"); and (ii) enforcing a scheme of arrangement for Avanti approved by a U.K. court that included third-party releases. Even though no party objected to the chapter 15 petition or the relief requested by Avanti's foreign representative, the U.S. bankruptcy court issued a decision explaining its reasoning.

The scheme proposed to deleverage Avanti by means of a debt-for-equity swap involving Avanti's outstanding 2023 notes. As part of the scheme, Avanti and certain affiliated non-debtor guarantors of the notes would be released from liability. Investors holding 98.3 percent of the aggregate value of the 2023 notes voted in favor of the scheme. The U.K. court approved the scheme and the guarantor releases, which bound minority non-voting impaired creditors under U.K. law.

In enforcing the scheme, the U.S. bankruptcy court acknowledged that the validity of non-consensual third-party releases under U.S. law is controversial. However, the court noted that it had "exceedingly broad" discretionary authority pursuant to section 1521(a) of the Bankruptcy Code to grant "any appropriate relief" that would "further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors."[72] Moreover, it explained, "in the exercise of comity[,] appropriate relief under section 1521 or additional assistance under 1507 may include recognizing and enforcing a foreign plan confirmation order."[73] According to the bankruptcy court:

> The Supreme Court has held that a foreign judgment should not be challenged in the US if the foreign forum provides: '[A] full and fair trial abroad before a court of competent jurisdiction, conducting a trial upon regular proceedings, after due citation or voluntary appearance by the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it [is] sitting . . . .'[74]

The bankruptcy court concluded that recognition and enforcement of the scheme was warranted because: (i) third-party non-debtor releases are common in schemes sanctioned under U.K. law, particularly releases of affiliate guarantors; (ii) Avanti's creditors had a full and fair opportunity to vote on, and be heard in connection with, the scheme; (iii) the U.K. Proceeding and the U.K. courts afford creditors a full and fair opportunity to be heard in a manner

71. 582 B.R. 603 (Bankr. S.D.N.Y. 2018).

72. *Id.* at 612 (quoting, in the first instance, Leif M. Clark, Ancillary and other Cross-Border Insolvency Cases Under Chapter 15 of the Bankruptcy Code § 7[2], at 70 (2008), and, in the second instance, 11 U.S.C. § 1521(a)).

73. *Id.* at 616.

74. *Id.* (quoting Hilton v. Guyot, 159 U.S. 113, 202 (1895)).

consistent with U.S. due process; (iv) the 2023 noteholders overwhelmingly voted in support of the scheme, and with such support, U.K. law bound the entirety of the class of creditors; and (v) the failure to recognize and enforce the scheme could result in prejudicial treatment of creditors to the detriment of Avanti's reorganization efforts and prevent a fair and efficient administration of its restructuring.

> *Takeaway*: The dispute regarding the validity of non-consensual non-debtor releases under U.S. law in chapter 11 cases does not preclude the enforcement of such releases (as part of a foreign restructuring plan or otherwise) in the United States as part of the relief granted in a chapter 15 case under appropriate circumstances.

(2) In re PT Bakrie Telecom TBK[75]

Indonesian telecommunications company PT Bakrie Telecom TBK ("PTB") negotiated a debt restructuring proposal with its creditors, but objecting noteholders sued PTB in a New York state court for breach of contract and fraud in connection with the issuance of the notes, which were issued under an indenture governed by New York law. An Indonesian creditor then commenced a suspension-of-payments (Penundaan Kewajiban Pembayaran Utang ("PKPU")) proceeding against PTB in Indonesia to give PTB an opportunity to restructure its debts. An Indonesian court approved the PKPU plan and closed the proceeding. Several years later, PTB's foreign representative sought recognition of the PKPU proceeding under chapter 15, as well as an order enforcing the PKPU plan as a form of additional post-recognition relief under sections 1521 and 1507 of the Bankruptcy Code.

The bankruptcy court entered an order recognizing the PKPU proceeding under chapter 15 as a foreign main proceeding. However, the court denied the request for additional post-recognition relief, explaining that the PKPU plan included what was effectively a "third-party non-debtor release of claims relating to the Notes."[76]

In declining to grant the additional relief, the bankruptcy court explained that "relief under either section 1507 or . . . 1521 is within the discretion of the Court and depends upon principles of comity."[77] However, comity is not the only consideration. The court considered "whether [enforcing] such a third-party release [would be] appropriate when viewed through the prism of comity" and "whether the foreign proceeding abided by fundamental standards of procedural fairness as demonstrated by a clear and formal record."[78] In this case, the court noted, the evidentiary record did not demonstrate: (i) "whether or how the foreign court considered the rights of creditors when considering this third-party release"; (ii) whether the third-party release was presented to the Indonesian

75. 628 B.R. 859 (Bankr. S.D.N.Y. 2021).
76. *Id.* at 875.
77. *Id.* at 877.
78. *Id.* at 884.

court for consideration; (iii) whether any creditors had the ability to be or were heard regarding the third-party releases; and (iv) any justification for third-party releases.[79] Therefore, without ruling on the propriety of third-party releases under Indonesian law, the court declined to enforce the PKPU plan as a matter of comity. The court invited the foreign representative to submit evidence supporting his request for additional relief, but he never did so and the chapter 15 case was later closed.

> *Takeaway*: Although third-party non-consensual releases in a foreign debtor's court-approved restructuring plan can be enforced in a chapter 15 case, enforcement may not be appropriate if the foreign proceeding did not abide by fundamental standards of procedural fairness as demonstrated by a clear and formal record.

C. Operational Restructuring—Asset Sales

The case summaries in this section provide an overview of post-chapter 15 recognition issues, including settlements, asset sales, contract issues, and related concepts. For example, the standard for approving a settlement under chapter 15 is the same standard applied to proposed settlements in cases under other chapters of the Bankruptcy Code. In addition, chapter 15 imports the same "sound business justification"[80] standard applicable in other chapters to the approval of a non-ordinary course use, sale, or lease of assets under section 363(b) of the Bankruptcy Code. Comity principles underlying chapter 15 do not compel deference to a foreign court to the exclusion of any review under that standard.

(1) In re Grand Prix Assocs. Inc.[81]

British Virgin Islands ("BVI") investment fund Grand Prix Associates Inc. and its affiliates ("Grand Prix") commenced insolvency proceedings in the BVI ("BVI Proceedings"). Grand Prix's court-appointed foreign representatives sought chapter 15 recognition of the BVI Proceeding for the purpose of enjoining creditors' efforts to foreclose on Grand Prix's U.S. assets, which would prevent it from meeting future capital calls. After the chapter 15 petition date, but before the U.S. bankruptcy court held a hearing on recognition or the foreign representative's provisional requests, certain creditors commenced litigation against Grand Prix in New York state court. The U.S. bankruptcy court granted the provisional injunctive relief and established an expedited briefing and discovery schedule to adjudicate whether it should recognize the BVI Proceedings as foreign main proceedings. It ultimately entered an order of recognition.

Grand Prix's foreign representative reached a global settlement with creditors that would resolve the objections of all U.S. and BVI creditors, dismiss the state

79. *Id.*; *see id.* at 884–85.
80. 3 Collier on Bankruptcy ¶ 363.02 (16th ed. 2022).
81. No. 09-16545, 2009 WL 1850966 (Bankr. D.N.J. June 26, 2009).

court litigation, transfer certain Grand Prix assets, and conclude both the chapter 15 case and the BVI Proceedings.

The bankruptcy court approved the global settlement, ruling that: (i) the settlement furthered the goal of cooperation stated in sections 1525 and 1527 of the Bankruptcy Code because it fully resolved and concluded the BVI Proceedings and the chapter 15 case; (ii) section 1520(a)(2) and (a)(3) authorized the court to approve the settlement and, by specifically incorporating section 363, authorized the court to approve the asset sale component of the settlement; and (iii) in accordance with section 1521, the purposes of chapter 15 were furthered because the settlement promoted the efficient administration of the proceedings and protected the interests of the debtors and creditors.

In determining whether a settlement and asset sale should be approved in a chapter 15 case, the bankruptcy court applied the same standards applied to proposed settlements and sales in cases under other chapters of the Bankruptcy Code. In particular, the court concluded that the settlement should be approved because it was negotiated at arm's length and in good faith, reflected a sound exercise of the business judgment of Grand Prix's foreign representatives, and provided substantial savings to Grand Prix by obviating the need for continued complicated and costly litigation regarding a multitude of issues.

> *Takeaway*: The standard for approving a settlement in a chapter 15 case is the same standard applied to proposed settlements in cases under other chapters of the Bankruptcy Code, i.e., whether the settlement was: (i) negotiated at arm's length and in good faith; (ii) reflected a sound exercise of business judgment; and (iii) provided substantial savings to the debtor by obviating the need for continued complicated and costly litigation.

(2) In re Elpida Memory, Inc.[82]

In February 2012, Elpida Memory, Inc. ("Elpida") commenced a reorganization proceeding under Japan's Corporate Reorganization Act in the Tokyo District Court (the "Tokyo court"). In March 2012, Elpida's court-appointed trustees, as its foreign representatives, obtained an order from a U.S. bankruptcy court recognizing the Japanese reorganization as a foreign main proceeding under chapter 15. The foreign representatives then sought the bankruptcy court's authorization to enter into certain transactions involving the sale or transfer of substantially all of Elpida's U.S. assets. The sale transaction had been approved by the Tokyo court as part of the reorganization proceeding in Japan.

Certain Elpida bondholders objected to the sale transaction, and the U.S. bankruptcy court was asked to determine, as a matter of first impression, "what legal standard applies in a Chapter 15 case to the transfer of assets located in the United States pursuant to a 'global' transaction previously approved by another Court in a foreign main proceeding."[83]

82. No. 12-10947, 2012 WL 6090194 (Bankr. D. Del. Nov. 20, 2012).
83. *Id.* at *1.

The bankruptcy court examined the plain meaning and legislative intent of section 1520(a) of the Bankruptcy Code and the comity implications involved. It explained that "Section 1520(a) unequivocally states that 'sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States *to the same extent that the sections would apply to property of an estate*.'"[84] As such, the court concluded, a "debtor may sell assets outside the ordinary course of business when it has demonstrated that the sale of such assets represents the sound exercise of business judgment."[85] Chapter 15, therefore, imports the same standard applicable to approval of a section 363 sale in cases under other chapters of the Bankruptcy Code.

Examining the legislative history of section 1520(a), the bankruptcy court noted that, notwithstanding the U.S. Supreme Court's admonition that statutes should be interpreted in accordance with their plain meaning, "one could argue that in Chapter 15 cases plain meaning should be subservient to the legislative history or more general principles of comity" because the principles underlying the corresponding Model Law articles are intended to facilitate a local court's interpretation that promoted a consistent application of the Model Law in every jurisdiction.[86] The court also examined the legislative history of the Model Law, as discussed in the 2014 Guide, noting that the Model Law "expressly imposes the laws of the ancillary forum—not those of the foreign main proceeding—on the debtor with respect to transfers of assets located in such ancillary jurisdiction."[87]

The court stated that principles of comity have never meant "categorial deference to foreign proceedings" and that complete deferral to the Tokyo court's approval of the sale transaction was inappropriate.[88] The court noted that section 1509(b)(3) merely requires a court to grant comity to a foreign representative, not a foreign court or its orders.

> *Takeaway*: Chapter 15 imports the same standard applicable to a sale of assets under section 363 that applies in other chapters of the Bankruptcy Code. In addition, chapter 15 merely requires a court to grant comity to a foreign representative, not a foreign court or its orders.

(3) *In re Fairfield Sentry Ltd.*[89]

Fairfield Sentry Limited ("Fairfield") was a fund established for the purpose of investing in Bernard L. Madoff Investment Securities ("BLMIS"). Shortly after

84. *Id.* at *5 (quoting 11 U.S.C. § 1520(a) (emphasis added)).
85. *Id.*
86. *Id.*
87. *Id.* at *7.
88. *Id.* at *8 (quoting Bank of N.Y. v. Treco (*In re* Treco), 240 F.3d 148, 157 (2d Cir. 2001)).
89. 484 B.R. 615 (Bankr. S.D.N.Y. 2013), *aff'd*, No. 13 Civ. 1524 (AKH), 2013 BL 370732 (S.D.N.Y. July 3, 2013), *vacated*, 768 F.3d 239 (2d Cir. 2014), *remanded to* 539 B.R. 658 (Bankr. S.D.N.Y. 2015), *aff'd*, No. 15 Civ. 9474 (AKH) (S.D.N.Y. June 2, 2016), *aff'd*, 690 F. App'x 761 (2d Cir. 2017).

BLMIS collapsed, Fairfield was placed into liquidation in a British Virgin Islands ("BVI") court. A U.S. bankruptcy court later issued an order recognizing the BVI proceeding as a foreign main proceeding under chapter 15.

Following an auction, Fairfield's foreign representative accepted an offer from Farnum Place, LLC ("Farnum") to purchase $230 million in claims against BLMIS for thirty-two cents on the dollar. After the auction, the assets available for distribution to BLMIS customers in its stockbroker liquidation case were significantly increased, leading to a sharp increase in the prices offered for claims against BLMIS. The BVI court approved the sale and Fairfield's foreign representative sought approval from the U.S. bankruptcy court.

The bankruptcy court held that review of the sale was not warranted under section 1520(a)(2)—notwithstanding its express cross-reference to section 363, which requires court approval of any non-ordinary course sale of assets—because the property was not "within the territorial jurisdiction of the United States." The court held that, "according to applicable non-bankruptcy law," in this case, New York law, the situs of the intangible claims was the BVI.[90] The court also held that the BVI court had the paramount interest in the sale of the claims, and comity dictated deference to the BVI court and its judgment approving the sale.

After the district court affirmed, the U.S. Court of Appeals for the Second Circuit vacated the orders and remanded the case to the bankruptcy court. According to the Second Circuit, the bankruptcy court's analysis was incomplete because section 1502(8) deems "any property subject to attachment or garnishment that may be properly seized or garnished by an action in a Federal or State court in the United States" to be "within the territory of the United States."[91] The Second Circuit concluded that the claims were subject to attachment or garnishment and could be properly seized by an action in a U.S. federal or state court. Therefore, the court ruled that: (i) the situs of the claims was in the United States; (ii) the sale of the claims was a "transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States" under section 1520(a)(2); and (iii) pursuant to section 1520(a)(2), the bankruptcy court was obligated to apply section 363 to the sale.

On remand, the bankruptcy court ruled that, because the foreign representative provided a "sound business reason" for disapproving the sale,[92] the liquidator of Fairfield's estate should be permitted to retain the claims and receive recoveries for the fund's creditors, or to sell the claims at a much higher price. The district court affirmed on appeal. Farnum again appealed to the Second Circuit.

The Second Circuit rejected Farnum's argument that the bankruptcy court erred in disapproving the sale because the court had previously entrusted the administration of Fairfield's assets within the United States to the foreign

90. *Id.* at 623.
91. *In re Fairfield Sentry Ltd.*, 768 F.3d at 244.
92. *In re Fairfield Sentry Ltd.*, 539 B.R. at 672.

representative, and principles of comity should have been a dispositive factor in the section 363 review. The Second Circuit explained it had rejected these arguments in its previous ruling requiring the bankruptcy court to conduct a section 363 review of the sale and "reject[ing] the notion that comity values underlying Chapter 15 compelled deference to the BVI court's approval of the [s]ale to the exclusion of any [section] 363(b) review."[93]

Takeaway: Although comity underpins chapter 15, it does not compel deference to a foreign court to the exclusion of any review under section 363 of the Bankruptcy Code.

D. Litigation Elements

The case summaries in this section provide an overview of general litigation matters that may arise before, during, and after the commencement of a chapter 15 case, including: (i) avoidance actions; (ii) litigation regarding the scope of the automatic stay; (iii) discretionary relief; and (iv) discovery disputes. These court rulings indicate that chapter 15 does not bar avoidance actions under applicable foreign law, and chapter 15 does not prohibit a foreign representative from filing avoidance claims "if the basis of such relief is non-bankruptcy law and the foreign representative, under non-bankruptcy law, has standing to seek the relief."[94] Also, in a chapter 15 case, section 108(a) of the Bankruptcy Code tolls both state law claims and claims arising under foreign bankruptcy law, so long as such claims were ripe as of the commencement of the chapter 15 case. Chapter 15 also provides for both mandatory and discretionary relief, and contains certain requirements governing discretionary relief. Regarding discovery, foreign law does not preclude a U.S. court from ordering a party subject to its jurisdiction to provide discovery even though production may violate a foreign law. In addition, although a U.S. court may determine whether a foreign law generally complies with U.S. due process, it may not examine whether specific foreign proceedings complied with due process.

Avoidance Litigation

(1) In re Condor Insurance Ltd.[95]

Condor Insurance Ltd. ("Condor") was an insurer incorporated in the Federation of Saint Kitts and Nevis ("Nevis"). Certain of Condor's creditors filed a winding up proceeding against Condor in Nevis, and the Nevis court appointed joint liquidators for the company. As Condor's foreign representatives, the liquidators sought chapter 15 recognition of the Nevis proceeding in a U.S. bankruptcy court. After the court granted the petition, the foreign representatives commenced an adversary proceeding seeking to recover, under Nevis law,

93. *In re Fairfield Sentry Ltd.*, 690 F. App'x at 766–67.
94. *See infra* Part III.D.2.
95. Fogerty v. Petroquest Res., Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319 (5th Cir. 2010).

more than $300 million in assets that were allegedly fraudulently transferred to a Condor affiliate—Condor Guaranty, Inc. ("CG"). CG moved to dismiss the adversary proceeding, arguing that avoidance actions under both U.S. and Nevis law cannot be commenced in a chapter 15 case. The bankruptcy court granted the motion and the district court affirmed on appeal. Condor's foreign representatives appealed to the U.S. Court of Appeals for the Fifth Circuit.

The Fifth Circuit reversed and remanded. In considering whether chapter 15 prohibits avoidance actions under U.S. law as well as the law of the foreign main proceeding, the Fifth Circuit explained that section 1521(a) authorizes a bankruptcy court to grant to a foreign representative "any additional relief that may be available to a trustee," except relief under the Bankruptcy Code's transfer avoidance and recovery provisions. However, the Fifth Circuit noted the provision does not expressly bar avoidance actions under applicable foreign law, and Congress would have done so expressly had it intended to bar such avoidance actions.

> *Takeaway*: Although section 1521(a) authorizes a bankruptcy court to grant to a foreign representative "any additional relief that may be available to a trustee," except relief under the Bankruptcy Code's transfer avoidance and recovery provisions, this provision does not expressly bar avoidance actions under applicable foreign law, and thus, such actions can be commenced in a chapter 15 case.

(2) In re Massa Falida do Banco Cruzeiro do Sul S.A.[96]

Banco Cruzeiro do Sul, S.A. ("BCSUL"), a Brazilian bank, was placed into extrajudicial liquidation in Brazil by the Central Bank of Brazil. In 2014, BCSUL, through its Florida counsel, filed a petition in a U.S. bankruptcy court seeking recognition of the Brazilian liquidation proceeding under chapter 15. The bankruptcy court granted the petition, after which a Brazilian court entered a bankruptcy decree against BCSUL and appointed a trustee for BCSUL's estate. As BCSUL's foreign representative, the trustee commenced an adversary proceeding in the bankruptcy court against certain principals, officers, and directors of BCSUL (the "defendants"), seeking to recover various U.S. assets acquired with funds fraudulently transferred by the bank at the defendants' behest. The complaint included causes of action for constructive trust, equitable lien, fraudulent transfer under New York law, breach of fiduciary duties, aiding and abetting breach of fiduciary duties, and various infractions of Brazilian law. The defendants moved to dismiss, arguing, among other things, that a foreign representative is barred from bringing an avoidance action in a chapter 15 case.

The bankruptcy court denied the motion in part. Among other things, it ruled that section 1521(a)(7) does not prohibit a foreign representative from filing avoidance claims "if the basis of such relief is non-bankruptcy law and the

96. Laspro Consultores LTDA v. Alinia Corp. (*In re* Massa Falida do Banco Cruzeiro do Sul S.A.), 567 B.R. 212 (Bankr. S.D. Fla. 2017).

foreign representative, under non-bankruptcy law, has standing to seek the relief."[97] In this case, because the foreign representative's avoidance claims, constructive trust and equitable lien claims arose under New York law, rather than bankruptcy law, and he had standing under Brazilian law to assert such claims, the claims were not barred by section 1521(a)(7).

> *Takeaway*: Chapter 15 does not prohibit a foreign representative from filing avoidance claims "if the basis of such relief is non-bankruptcy law and the foreign representative, under non-bankruptcy law, has standing to seek the relief."

(3) In re Bankr. Est. of Norske Skogindustrier ASA[98]

Norwegian wood pulp and paper company Norske Skogindustrier ASA ("NSA") filed a bankruptcy petition in Norway. As its foreign representative, NSA's bankruptcy trustee filed a chapter 15 petition in a New York bankruptcy court seeking recognition of the Norwegian bankruptcy as a foreign main proceeding. After the bankruptcy court granted the petition, NSA's foreign representative filed an adversary proceeding seeking to avoid as fraudulent transfers more than 30 million in payments made to various entities as part of a 2016 restructuring. The complaint included causes of action for avoidance of the alleged fraudulent transfers under the Norwegian Recovery Act (the "Recovery Act"), for damages under the Norwegian Public Limited Liability Companies Act and Norwegian common law, and for unjust enrichment.

The defendants moved to dismiss, arguing that NSA's claims were not timely under Norwegian law. NSA countered that section 108(a) of the Bankruptcy Code tolled the relevant limitations period for its avoidance claims because the claims would have been timely when the bankruptcy court first granted recognition in NSA's chapter 15 case. The defendants responded that section 108(a) did not toll the limitations period because the Recovery Act "is part of Norway's bankruptcy regime" and section 108(a) applies only if "applicable nonbankruptcy law . . . fixes a period within which the debtor may commence an action."[99]

The bankruptcy court ruled that section 108(a) applied to NSA's claims against the defendants and rendered them timely. The court explained that section 108 applies in a chapter 15 case, and a foreign representative is afforded the benefits of the provision. In addition to tolling state law avoidance claims and unjust enrichment claims under New York law, the court held, section 108(a) also applied to claims arising under the foreign bankruptcy law (in this case, the Recovery Act), as the court ruled in *In re Massa Falida do Banco Cruzeiro do Sul S.A.*[100]

97. *Id.* at 222.
98. 629 B.R. 717 (Bankr. S.D.N.Y. 2021).
99. *Id.* at 738 (quoting, in the first instance, Defendants' Reply Memorandum of Law at 15–16, and, in the second instance, 11 U.S.C. § 108(a)).
100. *Id.* at 739 (citing *In re Massa Falida do Banco Cruzeiro do Sul S.A.*, 567 B.R. at 227–29).

Due to the existence of disputed issues of fact, the bankruptcy court refused to decide whether the payments made to the defendants were protected from avoidance by the Bankruptcy Code's safe harbor in section 546(e) for certain prepetition transfers made in connection with securities contracts, commodity contracts, or forward contracts.

Takeaway: In a chapter 15 case, section 108(a) of the Bankruptcy Code tolls both state law claims and claims arising under foreign bankruptcy law so long as such claims were ripe as of the commencement of the chapter 15 proceeding.

Scope of the Automatic Stay

In re JSC BTA Bank[101]

JSC BTA Bank ("JSC") was a debtor in a reorganization proceeding filed in a court in the Republic of Kazakhstan. In 2010, a U.S. bankruptcy court recognized the Kazakh proceeding as a foreign main proceeding under chapter 15. Later that year, JSC's foreign representatives filed a motion in the bankruptcy court for an order holding the Swiss branch of a French bank ("BIC-BRED") in contempt for willfully violating the automatic stay that arose upon chapter 15 recognition by continuing to participate in a 2008 Swiss commercial arbitration proceeding between BIC-BRED and JSC. JSC's foreign representatives argued that chapter 15 recognition granted "a worldwide stay of judicial and arbitration proceedings including the proceeding in Geneva."[102]

The bankruptcy court denied the motion. The court examined, as a matter of first impression, whether the automatic stay arising upon recognition under section 1520(a)(1) bars proceedings against the debtor in foreign jurisdictions. It concluded that section 1520(a)(1) only "stays actions against a foreign debtor within the United States and applies in other countries only to the extent that such actions affect property of the debtor that is 'within the territorial jurisdiction of the United States.'"[103]

In examining the purpose of chapter 15, the court concluded that construing section 1520(a)(1) to stay a pending foreign proceeding without any connection to the United States or not involving U.S. property would disregard chapter 15's essential purpose of promoting cooperation in cross-border bankruptcies.[104] The court further explained that allowing chapter 15 to interfere with foreign pending proceedings would lead to absurd results with far-reaching consequences not intended by Congress (e.g., staying even the foreign main proceeding recognized by the court under chapter 15).[105] In illustrating the equitable and practical concerns associated with the court's interpretation of the automatic stay, the court noted that allowing a chapter 15 case to interfere with ordinary,

101. 434 B.R. 334 (Bankr. S.D.N.Y. 2010).
102. *Id.* at 336.
103. *Id.* at 340 (quoting 11 U.S.C. § 1520(a)(1)).
104. *Id.* at 342.
105. *Id.* at 346.

pending proceedings unrelated to the United States would "lead to needless intervention by the bankruptcy court."[106]

The bankruptcy court accordingly held that the stay arising in a chapter 15 case "applies to the debtor within the United States for all purposes and may extend to the debtor as to proceedings in other jurisdictions for purposes of protecting property of the debtor that is within the territorial jurisdiction of the United States."[107]

> *Takeaway*: The automatic stay arising in a chapter 15 case "applies to the debtor within the United States for all purposes and may extend to the debtor as to proceedings in other jurisdictions for purposes of protecting property of the debtor that is within the territorial jurisdiction of the United States," but does not extend to ordinary, pending proceedings unrelated to the United States.

Discretionary Relief

(1) In re Qimonda AG[108]

Qimonda AG and its affiliates (collectively, "Qimonda") manufactured computer chips. Qimonda held thousands of U.S. patents and patent applications, and was party to various joint venture and cross-licensing agreements with international electronics companies (the "licensees"). In 2009, Qimonda commenced an insolvency proceeding in Germany. Its foreign representative obtained recognition of Qimonda's insolvency proceeding as a foreign main proceeding under chapter 15. The U.S. bankruptcy court also granted the foreign representative's request for certain discretionary relief under section 1521 of the Bankruptcy Code, including the application of section 365 and other various provisions of the Bankruptcy Code (the "1521 Order"). The foreign representative then notified the licensees that Qimonda was electing, under German law, not to perform the joint venture and cross-licensing agreements. The licensees objected, arguing that their rights were governed by section 365 of the Bankruptcy Code and that section 365(n) does not permit a foreign representative to elect nonperformance. Instead, the licensees claimed, section 365(n) gave them the option of either retaining their rights under the license agreements or accepting termination of the license agreements and suing for damages.

In light of the licensees' opposition, the foreign representative asked the bankruptcy court to modify the 1521 Order to remove references to section 365(n) and allow German law to govern the disposition of the license agreements. The bankruptcy court granted the request as a matter of comity and the licensees appealed to the U.S. district court.

The U.S. district court held that: (i) "the Bankruptcy Court's decision to defer to German law under comity principles must be reviewed for an abuse of

106. *Id.* at 347.
107. *Id.* at 343.
108. Micron Tech., Inc. v. Qimonda AG (*In re* Qimonda AG), 433 B.R. 547 (E.D. Va. 2010).

discretion";[109] (ii) procedural rules do not limit a bankruptcy court's power to modify an interlocutory judgment or order;[110] (iii) section 365 of the Bankruptcy Code is discretionary relief under section 1521, not mandatory relief under section 1520;[111] and (iv) the bankruptcy court, on remand, should determine whether deferring to German law violated section 1506 as being contrary to fundamental U.S. public policies.[112]

The district court examined the history of the public policy exception in section 1506 and identified three guiding principles: (i) "[t]he mere fact of conflict between foreign law and U.S. law, absent other considerations, is insufficient to support the invocation of the public policy"; (ii) "[d]eference to a foreign proceeding should not be afforded in a Chapter 15 proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections"; and (iii) "[a]n action should not be taken in a Chapter 15 proceeding where taking such action would frustrate a U.S. court's ability to administer the Chapter 15 proceeding and/or would impinge severely a U.S. constitutional or statutory right, particularly if a party continues to enjoy the benefits of the Chapter 15 proceeding."[113]

Examining whether the 1521 Order revisions were within the scope of the section 1506 public policy exception, the district court analyzed the legislative history of section 365(n). According to the court:

> [I]t is clear that Congress carefully considered *Lubrizol*'s public policy implications and, by overturning *Lubrizol*, took affirmative steps to protect patent licensees from debtors' termination of patent licenses in bankruptcy proceeding. Whether [section] 365(n) embodies the public policy of the United States such that its non-application would be "manifestly contrary to the public policy of the United States" under [section] 1506 is the comity merits issue [for the bankruptcy court to address on remand].[114]

> *Takeaway*: A U.S. bankruptcy court's decision to defer to foreign law under comity principles must be reviewed for an abuse of discretion standard and section 365 of the Bankruptcy Code provides discretionary relief under section 1521, rather than mandatory relief under section 1520.

(2) Jaffe v. Samsung Elecs. Co., Ltd.[115]

On remand from *In re Qimonda AG*, which was analyzed in the preceding subsection, the U.S. bankruptcy court held a four-day evidentiary hearing and received testimony regarding the likely effects of applying section 365(n) to

109. *Id.* at 556.
110. *Id.*
111. *Id.* at 560.
112. *Id.* at 571.
113. *Id.* at 570.
114. *Id.* at 567 (citing Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043 (4th Cir. 1985) (holding that, when an intellectual property license is rejected in bankruptcy, the licensee is deprived of the ability to use any licensed copyrights, trademarks, and patents)).
115. 737 F.3d 14 (4th Cir. 2013).

licenses under Qimonda's U.S. patents. The foreign representative claimed that applying section 365(n) would render Qimonda's U.S. patents worthless and violate principles of comity. The foreign representative offered to re-license the patent portfolio to the licensees at a purportedly de minimis royalty fee and claimed that such commitment would not unduly impair their rights. The licensees countered that applying Germany's equivalent of section 365, but without the protections of section 365(n), would "destabiliz[e] the system of licensing[,]" "reduce investment, innovation, [and] competition" and "harm U.S. productivity growth and U.S. consumers as well as worldwide productivity and consumers."[116] The licensees presented evidence indicating that the royalty fee would not be de minimis and, worse, that there would be a "danger that [the foreign representative] would subsequently sell the patent portfolio to an entity that might itself file for bankruptcy" and extinguish the licenses again.[117]

After balancing the interests of creditors and the debtors, as required by section 1522, the bankruptcy court concluded that section 365(n) applied to the foreign representative's administration of the U.S. patent assets. The court also determined that deferring to German insolvency law on such license issues would be manifestly contrary to U.S. public policy and that section 1506 provided independent grounds to require the application of section 365 to Qimonda's U.S. patent assets. The foreign representative appealed the court's ruling directly to the U.S. Court of Appeals for the Fourth Circuit.

The Fourth Circuit determined that:

> [Section 1522] *requires* that a bankruptcy court, when granting discretionary relief authorized by [section] 1521, *ensure sufficient protection of creditors*, as well as the debtor. And, at a more general level, [section] 1506, which covers any action under Chapter 15, authorizes a bankruptcy court to refuse to take an action that would be manifestly contrary to U.S. public policy.[118]

The Fourth Circuit rejected the foreign representative's argument that section 1522 did not apply because he never specifically requested section 365 relief when seeking recognition and that section 365 was included in the 1521 Order *sua sponte* by the bankruptcy court. The Fourth Circuit reasoned that, because the foreign representative requested certain discretionary relief under section 1521, even if not section 365 specifically, "as a prerequisite to awarding *any [section] 1521 relief*, the court was *required* to ensure sufficient protection of the creditors and debtors."[119] As such, the Fourth Circuit determined that the bankruptcy court's consideration of section 1522 was "undoubtedly appropriate" when authorizing any relief under section 1521.[120]

The Fourth Circuit examined both the legislative history of section 1522 and the 2014 Guide, concluding that the analysis required by section 1522 is

116. *Id*. at 22 (quoting Dr. Jerry Hausman, the licensees' economist).
117. *Id*. (citing Dr. Hausman).
118. *Id*. at 32.
119. *Id*. at 26.
120. *Id*. at 27.

"logically best done by balancing the respective interests [of the creditors and the debtor] based upon the relative harms and benefits in light of the circumstances presented."[121] The Fourth Circuit also noted that the 2014 Guide provides that it is appropriate for a court to consider the elements of section 1506 and, in balancing interests, whether requested relief is manifestly contrary to the public policy of the enacting state.

Lastly, the Fourth Circuit found the bankruptcy court's balancing analysis to be comprehensive and reasonable, and affirmed the bankruptcy court's exercise of discretion in balancing the various interests, as required by section 1522.

> *Takeaway*: When granting discretionary relief under section 1521, section 1522 *requires* a U.S. bankruptcy court to "*ensure sufficient protection of creditors*, as well as the debtor." Also, section 1506, "which covers any action under Chapter 15, authorizes a bankruptcy court to refuse to take an action that would be manifestly contrary to U.S. public policy."

(3) In re Condor Flugdienst GmbH[122]

In 2019, a German court entered an order commencing a liquidation proceeding for Germany-based airline Condor Flugdienst GmbH ("Condor"). In October 2020, Condor's foreign representatives obtained chapter 15 recognition of the liquidation proceeding as a foreign main proceeding. After recognition, the U.S. bankruptcy court entered an order pursuant to section 1521(a)(1) staying collection efforts against Condor's U.S. assets to augment the automatic stay triggered by recognition.

In November 2020, the liquidation proceeding concluded with the German court's entry of an order confirming Condor's Insolvenzplan. Thereafter, Condor's foreign representatives asked the U.S. bankruptcy court for an order implementing the confirmation order in the United States and closing the chapter 15 case. Several U.S. creditors objected. In overruling the objections, the bankruptcy court determined it was expressly authorized, under section 1521 of the Bankruptcy Code, to recognize and enforce the confirmation order. The court also permanently enjoined the continuation of litigation commenced by the creditors prior to the commencement of the chapter 15 case.

In analyzing the foreign representatives' request, the court explained that three forms of discretionary relief, each with their own constraints, are available: (i) section 1507(a), which allows a U.S. bankruptcy court to provide "additional assistance" consistent with the principles of comity; (ii) section 1521, which allows a U.S. bankruptcy court to "grant any appropriate relief," subject to the court determining, in accordance with section 1522, that the interests of the debtor, creditors, and other interested parties are sufficiently protected; and (iii) section 105(a), which allows a U.S. bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions"

121. *Id.* at 27–28.
122. 627 B.R. 366 (Bankr. N.D. Ill. 2021).

of the Bankruptcy Code. After analyzing precedent from other jurisdictions regarding each of the foregoing avenues of relief, in particular *In re Vitro S.A.B. de C.V.*,[123] the U.S. bankruptcy court determined that the foreign representatives' requests should be analyzed under section 1521 as guided by section 1522. This analysis required the court to determine whether the relief requested impinged excessively on any particular party's interests by balancing the relative harm and benefits.[124]

The bankruptcy court found that the interests of Condor, its U.S. creditors, and other interested parties were sufficiently protected, and that enforcement of the confirmation order was appropriate because: (i) the German liquidation proceeding and the confirmation order afforded relief "akin to that available in United States bankruptcy proceedings";[125] (ii) U.S. creditors' recoveries were determined in accordance with German law, which did not treat U.S. creditors (or any other creditors) differently than German creditors; (iii) nothing inhibited or prevented the U.S. creditors from asserting claims in the liquidation proceeding; (iv) the liquidation proceeding was just, unprejudiced, and not unduly inconvenient; (v) U.S. creditors were afforded notice consistent with German and U.S. law, and they had an opportunity to appear and be heard in both proceedings; and (vi) certain procedural differences between U.S. and German law did not result in the U.S. creditors being treated unfairly during the liquidation proceeding.

The foreign representatives raised concerns that the U.S. creditors could simply wait for the conclusion of the chapter 15 case to recommence their litigation. For this reason, the bankruptcy court permanently enjoined them from doing so, writing that, "[i]n the same way that a creditor may be enjoined from pursuing its claims against a debtor after confirmation of its plan, a [U.S.] creditor may be enjoined through foreign plan recognition from doing the same."[126] According to the court, such an injunction was consistent with the purposes of chapter 15 because permitting continuation of the litigation could "threaten, frustrate, delay, and ultimately jeopardize the Foreign Proceeding and implementation of the Plan."[127] Moreover, the court wrote, such an injunction would force the U.S. creditors to participate in the liquidation proceeding's claims reconciliation process, which "is entirely within the spirit and express power of chapter 15" and would not be unduly burdensome to the U.S. creditors.[128]

> *Takeaway*: A foreign representative's request for implementation in the United States of a foreign confirmation order should be analyzed under section 1521, as guided by section 1522, with the court balancing the relative

123. Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (*In re* Vitro S.A.B. de C.V.), 701 F.3d 1031 (5th Cir. 2012).

124. *Condor*, 627 B.R. at 375 (citing *Jaffe*, 737 F.3d at 26–28; *In re Vitro S.A.B. de C.V.*, 701 F.3d at 1060).

125. *Id.* at 376.

126. *Id.* at 377 (citing 11 U.S.C. §§ 524(g), 1507, 1521(a)).

127. *Id.* at 378.

128. *Id.*

harm and benefits to all parties. In addition, U.S. creditors in a chapter 15 case may be permanently enjoined from pursuing claims against a foreign debtor after a U.S. court recognizes and enforces a foreign plan.

Discovery Disputes

(1) SNP Boat Serv. S.A. v. Hotel Le St. James[129]

SNP Boat Service S.A. ("SNP"), a French corporation that designs luxury boats and provides boat services, entered into a contract with Hotel Le St. James ("St. James"), a Canadian corporation. A contract dispute between SNP and St. James ensued in Canadian court. SNP then filed a *sauvegarde* proceeding in France and the French court entered an automatic stay with international effect on all legal proceedings initiated by SNP's creditors.

SNP failed to defend itself in the Canadian litigation, and the Canadian court entered a default judgment for St. James. St. James domesticated the Canadian judgment in Florida and a Florida sheriff seized two of SNP's vessels. Before the vessels were sold, however, SNP's foreign representatives obtained chapter 15 recognition of the *sauvegarde* as a foreign main proceeding. The U.S. bankruptcy court ordered a stay with respect to SNP's U.S. property.

The foreign representative asked the bankruptcy court to determine that the SNP vessels were subject to the French court's jurisdiction and to entrust the vessels with the foreign representative. In connection with that motion, St. James requested discovery from SNP, including certain documents and depositions of SNP representatives. No such discovery ever took place because SNP argued that a "French blocking statute" prevented discovery outside the Hague Convention.[130]

St. James filed a motion for sanctions, arguing that SNP was intentionally delaying the proceedings and subverting discovery. It argued the French blocking statute did not preclude discovery in connection with the chapter 15 case.

The U.S. bankruptcy court ordered SNP to provide discovery regarding whether due process was afforded to St. James in the *sauvegarde* proceeding. As a sanction for SNP's dilatory tactics, the court denied the foreign representative's motion for custody of the vessels and dismissed the chapter 15 case. SNP appealed that ruling to a U.S. district court.

The district court held that the bankruptcy court: (i) acted within its discretion in disregarding the French blocking statute and ordering that representatives of SNP be deposed; (ii) abused its discretion by ordering discovery to determine whether St. James' interests were sufficiently protected in the French *sauvegarde* proceeding; and (iii) abused its discretion by dismissing SNP's chapter 15 case as a sanction.[131]

In holding that the bankruptcy court acted within its discretion in disregarding the French blocking statute to order discovery, the district court explained

129. 483 B.R. 776 (S.D. Fla. 2012).
130. *Id.* at 779.
131. *Id.* at 788.

that "[i]t is well settled that [the French blocking statute does] not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."[132]

In holding that the bankruptcy court abused its discretion by directing discovery into the French *sauvegarde* proceeding, the district court explained that, although a U.S. bankruptcy court may examine whether foreign law complies with U.S. due process generally, it may not consider whether a specific proceeding complies with due process.[133]

The district court analyzed sections 1521 and 1522, explaining that a U.S. bankruptcy court can authorize a foreign representative to collect property in the United States, but can only allow a foreign representative to distribute such property in the foreign proceeding "if the bankruptcy court is satisfied that that 'the interests of creditors in the United States are sufficiently protected.'"[134] Here, consistent with the Model Law's commentary regarding protection of local creditors, the U.S. district court held that discovery for the purposes of determining whether St. James' interests were sufficiently protected in the specific SNP *sauvegarde* proceeding was an abuse of discretion. According to the district court, the only relevant inquiry should have been whether French *sauvegarde* proceedings in general are sufficient to protect creditors' interests.

Finally, the district court explained that dismissing a chapter 15 case as a sanction is appropriate only as a last resort, and the bankruptcy court failed to consider whether a lesser sanction would have ensured compliance by SNP.[135]

> *Takeaway*: Foreign law does not deprive a U.S. court of the power to order a party subject to its jurisdiction to produce evidence, even though the act of production may violate that foreign law. Additionally, although a U.S. bankruptcy court may determine whether foreign laws at issue comply with U.S. due process requirements generally, it may not examine whether a specific foreign proceeding complies with due process.

(2) In re Platinum Partners Value Arbitrage Fund L.P.[136]

A series of hedge funds (the "Funds") previously managed by New York–based Platinum Management (NY) LLC ("Platinum Management"), an affiliate of Cayman Islands–based Platinum Partners Value Arbitrage Fund L.P. ("Platinum Partners"), were placed into liquidation proceedings in the Cayman Islands (the "Cayman proceedings"), with each case managed by a separate liquidator (collectively, the "liquidators"). Shortly after the commencement of the Cayman proceedings, certain executives at Platinum Management were indicted on charges of conspiracy, securities fraud, investment advisor fraud, and wire fraud in

132. *Id.* at 787 (quoting Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 544 n.29 (1987)).

133. *Id.* at 785.

134. *Id.* at 783 (quoting 11 U.S.C. § 1521(b)).

135. *Id.* at 787.

136. 583 B.R. 803 (Bankr. S.D.N.Y. 2018).

connection with the operation of the Funds. The U.S. Securities and Exchange Commission also filed a civil complaint against Platinum Management and the same executives seeking various forms of relief in connection with an alleged multi-pronged fraudulent scheme.

The executives invoked their Fifth Amendment rights against self-incrimination when questioned about their conduct in connection with Platinum Management. Foreign representatives for each of the Funds obtained chapter 15 recognition of the Cayman proceedings as foreign main proceedings, which were consolidated for procedural purposes. The chapter 15 recognition order authorized the liquidators to, among other things, examine witnesses, take evidence, and seek discovery within the territorial jurisdiction of the United States regarding the Funds' assets, affairs, rights, obligations, or liabilities.

The Funds' former auditors were the target of the liquidators' subpoenas, which requested documents regarding audit services provided in the two years preceding the commencement of the Cayman proceedings. The auditors' relationship with the Funds was governed by an engagement letter with a New York choice of law provision and an arbitration clause.

After the auditors refused to provide certain requested documents, the liquidators sought to compel compliance. The auditors objected, arguing that: (i) the liquidators were seeking discovery not permitted under Cayman law and were not, as a matter of comity, entitled to broader discovery rights under U.S. law; (ii) the liquidators should have first sought discovery in connection with the Cayman proceeding; and (iii) the arbitration clauses in the engagement letter controlled the liquidators' discovery rights.

The U.S. bankruptcy court concluded that Cayman law regarding the type of discovery sought by the liquidators was, at best, unsettled. It accordingly held that "the argument that comity prohibits granting [the motion to compel] fails" because there was no evidence establishing that Cayman law prohibits the discovery sought.[137] According to the court:

> Foreign law does not preclude the availability of additional relief under chapter 15, particularly when granting such relief does not run contrary to the public policy of the foreign jurisdiction . . . [because] it is well-established that comity does not require that the relief available in the United States be identical to the relief sought in the foreign bankruptcy proceeding; it is sufficient if the result is comparable and that the foreign laws are not repugnant to [U.S.] laws and policies.[138]

Further, the court explained, U.S. bankruptcy courts have routinely presided over Cayman-based chapter 15 cases in which Cayman courts were "receptive to evidence obtained through U.S. discovery procedures, even if such evidence may not be discoverable under Cayman law."[139] Thus, the bankruptcy court

137. *Id.* at 815.

138. *Id.* (citing, among other cases, Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (*In re* Vitro S.A.B. de C.V.), 701 F.3d 1031, 1044 (5th Cir. 2012) (collecting cases)).

139. *Id.* at 816 (citing Lyxor Asset Mgmt. S.A. v. Phoenix Meridian Equity Ltd., 2009 CILR 553 (Ct. App.)).

concluded, because Cayman law neither prohibited nor was hostile to the liquidators' discovery, principles of comity "decisively weigh in favor" of granting the motion to compel.[140]

According to the bankruptcy court, the auditors "cannot, on the one hand, object to discovery under U.S. laws by arguing that the [l]iquidators should have first sought discovery in the Caymans, and on the other hand, argue that such relief would not be permissible under Cayman law."[141] The court also noted that the arbitration clause did not preclude the requested discovery because the dispute did not involve the auditors' services and the liquidators merely sought access to information for which they had no other source, particularly given prior managers' invocation of their Fifth Amendment rights and the alleged fraud involved in the Funds' operation. According to the court, an acute need for the requested discovery is at the heart of a significant objective of chapter 15: providing judicial assistance to foreign representatives enabling them to comply with their foreign law duties.

Takeaway: Foreign law does not preclude the availability of additional relief under chapter 15, even if this relief is contrary to foreign law, because comity does not require that the relief available in the United States be identical to the relief sought in the foreign bankruptcy proceeding.

E. Key Singapore Cases

(1) In re Eagle Hospitality Real Estate Inv. Trust[142]

As foreign representative of three U.S. entities, Alan Tantleff brought an application before the Singapore courts for recognition of U.S. Chapter 11 Proceedings, Chapter 11 Liquidation Plan and Confirmation Order pursuant to Singapore's Insolvency, Restructuring and Dissolution Act 2018 ("IRDA"), which largely adopted the Model Law.

The three U.S. entities, Eagle Hospitality Real Estate Investment Trust ("EH-REIT"), Eagle Hospitality Trust S1 Pte Ltd ("S1"), and Eagle Hospitality Trust S2 Pte Ltd ("S2") (collectively, the "Singapore Chapter 11 Entities") were part of a group of companies that operate and invest in hospitality businesses in the United States. EH-REIT was identified as a collective investment scheme that was recognized as an entity under U.S. laws, while S1 and S2 were identified as investment holding companies incorporated in Singapore.[143]

For foreign proceedings to be recognized in Singapore, the entities in question must first identify as "corporate entities" under the Model Law as adopted by Singapore's IRDA.[144] Under the IRDA, a Real Estate Investment Trust ("REIT") is not identified as a corporate legal entity. Consequently, the Singapore High

140. *Id.* at 817.
141. *Id.* at 818.
142. [2022] SGHC 147.
143. *Id.* at paras. 7, 25.
144. *Id.* at paras. 25–27.

Court refused to recognize EH-REIT's U.S. Chapter 11 Proceedings as EH-REIT did not fall within the definition of "debtor" under the Model Law.[145]

The position was contrary to English common law where business trusts may be identified as "debtors" under the Model Law enacted in the United Kingdom.[146] In this regard, the Singapore High Court held that EH-REIT's U.S. Chapter 11 Proceedings could be recognized under common law if the application had been made by its trustee, DBS Trustee Limited, instead of Alan Tantleff as its foreign representative.[147] The Singapore court held that EH-REIT's U.S. Chapter 11 Proceedings would require a separate application for recognition under common law instead.

As S1 and S2 were incorporated in Singapore, they were recognized as corporate entities under the Model Law. However, the presumption of Singapore being the COMI was rebutted as S1 and S2 were part of a group of companies that had their main operations and assets in the United States. In finding that the COMI was the United States, the court emphasized that the largest creditors of S1 and S2 were in the United States, and that the governing law of the agreements between relevant parties was U.S. law.[148] The Singapore High Court clarified that a debtor's registered office is not necessarily its COMI. Instead, COMI may be a different location if it can be objectively ascertained by third parties, importantly by creditors and potential creditors of the debtor company.

The U.S. Chapter 11 Proceedings with respect to S1 and S2 were recognized as foreign main proceedings under the Model Law. The Chapter 11 Liquidation Plan and the Confirmation Order in relation to S1 and S2 were granted as additional relief under Article 21(1)(g) of the Model Law. With respect to allowing the additional relief, the Singapore High Court preferred the U.S. position and held that it is empowered by Article 21(1)(g) of the Model Law to recognize and enforce foreign insolvency–related orders and judgments from the United States.[149]

> *Takeaway*: Application for recognition of foreign insolvency proceedings will be refused if the entity does not fall within the scope of the Model Law as adopted by that jurisdiction. In determining COMI, various factors should be weighed when rebutting the presumption that COMI is the jurisdiction of the registered office. Singapore courts are empowered to enforce U.S. foreign insolvency orders and judgments.

(2) In re CFG Peru Invs. Pte. Ltd.[150]

CFG Peru Investments Pte. Ltd. ("CFG Peru"), a Singapore-registered company, together with its foreign representative, Michael E. Foreman, applied to

145. *Id.* at para. 28.
146. *Id.* at para. 29 (citing Rubin v. Eurofinance SA, [2010] 1 All E.R. (Comm.) 81 (Eng.)).
147. *Id.* at para. 31.
148. *Id.* at para. 43.
149. *Id.* at para. 78.
150. Case No. HC/OS 665/2021 (Sing. High Ct.).

the Singapore courts for recognition of CFG Peru's Chapter 11 Proceedings in the United States, including its Chapter 11 Plan and Confirmation Order.

The Singapore court granted CFG Peru's application and ordered that the Chapter 11 Plan and the Confirmation Order be recognized under the Model Law. In addition to being recognized by the Singapore court and in Singapore as the foreign representative of CFG Peru, Michael E. Foreman was entrusted with the administration and realization of all of CFG Peru's assets in Singapore to implement the Chapter 11 Plan and Confirmation Order. In relation to CFG Peru's assets, he was granted the powers he would have under the U.S. Bankruptcy Code, the Chapter 11 Plan, and the Confirmation Order.

In addition, the court empowered the foreign representative to cause CFG Peru to take steps or file applications in the Singapore court as and when necessary to implement the Chapter 11 Plan and Confirmation Order.

The Singapore court further ordered that any actions and proceedings in relation to CFG Peru's properties, assets, and undertakings, including exercise of security, cannot be commenced against CFG Peru unless leave of court had been granted.

> *Takeaway*: The Model Law, as adopted by Singapore, ensures seamless recognition and enforcement of foreign orders and judgments, which allows for efficient administration of liquidating assets found in different jurisdictions and consequently protecting all of the company's creditors.

(3) *United Sec. Sdn Bhd v. United Overseas Bank Ltd*[151]

United Overseas Bank Ltd ("UOB") and United Securities Sdn Bhd ("USSB") entered into a loan agreement to provide USSB with credit facilities. USSB executed a debenture with a fixed charge over shares of its beneficially owned company, CCSB, in UOB's favour. Subsequently, USSB defaulted and parallel proceedings were begun by both parties in Singapore and Malaysia.

Prior to the parallel proceedings, USSB and CCSB were both wound up by the Malaysian courts (the "Malaysia Winding Up Proceedings"). Following the Malaysia Winding up Proceedings, CCSB sold off its assets and had remaining funds after paying off its debts (the "Surplus Funds"). USSB applied to the Malaysian courts, *inter alia*, for a declaration that the Surplus Funds were not subject to the fixed charge (the "Malaysia Proceedings"). UOB applied to the Singapore courts, *inter alia*, for a declaration that it had rights to the CCSB shares and therefore the Surplus Funds (the "Singapore Proceedings").

UOB applied to the Malaysian courts for a stay of the Malaysian Proceedings, while USSB applied to the Singapore courts to stay the Singapore Proceedings. The Malaysian Court of Appeal found that Singapore was the proper forum for the dispute and allowed the application. The Singapore court declined to stay the Singapore Proceedings. USSB then commenced an application to seek the Singapore court's recognition of the Malaysia Winding up Proceedings and the Malaysia Proceedings as foreign proceedings under the Model Law. Consequently,

151. [2021] SGCA 78.

USSB sought a stay of the Singapore Proceedings following recognition of the Malaysia Proceedings. USSB's application was partially dismissed as addressed in the next subsection, and it appealed the High Court decision.

There was no dispute that the Malaysian Winding up Proceedings did constitute foreign main proceedings under the Model Law and warranted an automatic stay of proceedings in relation to a debtor's assets and rights.[152] Under the Model law, the automatic stay had the same effect and scope as it would in the case of a debtor being wound up in Singapore. However, under Singapore insolvency law, an automatic stay does not affect a creditor's right to enforce security over the debtor's assets.[153]

Singapore courts tend to allow secured creditors to enforce their securities regardless of any stay of proceedings resulting from winding up applications.[154] It was sufficient for UOB to show that it had a *prima facie* case, as a secured creditor of USSB that was entitled to the Surplus Funds as a result of the debenture.[155] The Singapore Court of Appeal granted UOB leave to proceed with the Singapore Proceedings notwithstanding the automatic stay under the Model Law.

The Malaysia Proceedings were not recognized as foreign main proceedings or foreign nonmain proceedings as the said proceedings did not involve all creditors, did not have a basis in insolvency law, did not involve the court exercising control over the debtor's assets, and did not pertain to the debtor's re-organization or liquidation.[156]

> *Takeaway*: The Model Law provides a procedural framework for Singapore courts to recognize foreign proceedings and grant appropriate relief. The Singapore Court of Appeal provided guidance in determining the scope of an automatic stay under the Model Law, protected the rights of secured creditors in winding up matters, and set out attributes for a proceeding to be recognized as a "foreign proceeding."

(4) *In re United Sec. Sdn Bhd*[157]

As discussed in the preceding subsection, following the Singapore's court refusal to grant a stay of the Malaysia Proceedings, USSB commenced an action in the High Court for recognition of the Malaysian Winding Up Proceedings, the Malaysia Proceedings, and consequently for an automatic or discretionary stay of the Singapore Proceedings.

USSB's application was allowed in part. The Singapore courts granted recognition of the Malaysian Winding Up Order but, for reasons previously discussed, limited the reach of the automatic stay and the powers of the foreign insolvency representative.

152. *Id.* at paras. 31–38.
153. *Id.* at paras. 39–48.
154. *Id.*
155. *Id.* at para. 47.
156. *Id.* at paras. 49–76.
157. Case No. HC/OS 780/2020 (Sing. High Ct.).

The application for the recognition of the Malaysia Proceedings as foreign proceedings was dismissed. Similarly, the alternative application for a discretionary stay was dismissed, as UOB was a secured creditor. Dissatisfied with the High Court's decision, USSB appealed to the Court of Appeal, which dismissed the appeal, as analyzed in the preceding subsection.[158]

Takeaway: The Model Law provides a procedural framework for Singapore courts to recognize foreign proceedings and grant appropriate relief. The Singapore Court of Appeal provided guidance in determining the scope of an automatic stay under the Model Law, protected the rights of secured creditors in winding up matters, and set out attributes for a proceeding to be recognized as a "foreign proceeding."

(5) In re Rooftop Grp. Int'l Pte Ltd[159]

After filing for Chapter 11 in the United States, Rooftop Group International Pte Ltd ("Rooftop"), a Singapore-incorporated company, applied to the Singapore courts for recognition of the Chapter 11 case as a foreign main proceeding and assistance under the Model Law.

The Singapore High Court held that the Chapter 11 case would be recognized as a foreign nonmain proceeding as Singapore was Rooftop's COMI. The fact that Rooftop was incorporated in Singapore led to a presumption that its COMI was located in Singapore.[160] The primary difference in respect of assistance granted to foreign main and foreign nonmain proceedings is that a moratorium automatically operates in respect of the former whereas stays and other orders would be discretionary in respect of the latter.[161]

In exercising its discretion, the High Court did not conclude that the fact that the enforcement of a share charge by a creditor might result in a change in control in Rooftop was a reason to grant a moratorium against the enforcement proceeding. Assistance under the Model Law, the High Court explained, is designed to ensure the orderly and equitable distribution of assets and facilitate the process of restructuring where possible. It was not intended to protect or preserve a party's position within the company in the case of a dispute between shareholders, or to prevent a different view being taken subsequently in the foreign proceedings about the direction of the restructuring.[162]

Takeaway: Assistance granted to foreign nonmain proceedings is discretionary. In exercising this discretion, the court will consider whether the assistance will ensure the orderly and equitable distribution of assets and facilitate the process of restructuring.

158. *See supra* III.B.3.
159. [2019] SGHC 280.
160. *Id*. at paras. 1, 12, 22.
161. *Id*. at paras. 25–26.
162. *Id*. at paras. 31–39.

(6) In re Zetta Jet Pte Ltd[163]

Chapter 11 cases were filed against Zetta Jet Pte Ltd ("Zetta Jet"), a Singapore-incorporated company, and Zetta Jet USA, Inc. (collectively, the "Zetta Entities") in the United States. Shortly afterward, the Singapore High Court granted an injunction enjoining Zetta Jet from carrying out any further steps in the U.S. bankruptcy cases, which continued notwithstanding the injunction. The Chapter 11 cases were subsequently converted to Chapter 7 liquidations.

The Singapore High Court refused to grant recognition of the U.S. Chapter 7 cases. Under Article 6 of the Singapore Model Law, which adopted the Model Law with modifications, the court can refuse recognition of foreign insolvency proceedings if such recognition is contrary to the public policy of Singapore. Article 6 of the Singapore Model Law differs from Article 6 of the Model Law in that the word "manifestly" was deliberately omitted from the former.[164] Non-compliance with an injunction granted by a Singapore court, the High Court reasoned, undermined the administration of justice. An application for recognition would therefore be rejected on the public policy ground under Article 6 of the Singapore Model Law if the foreign representative was appointed pursuant to proceedings that had been enjoined by a Singapore court. The same result would follow even if the higher standard under Article 6 of the Model Law was applied.[165]

Nevertheless, the High Court wrote, a balance had to be "struck between protecting the integrity of administration of justice in Singapore on the one hand, with fairness to the [Chapter 7] trustee. This balance [could] be achieved by granting limited recognition to the Chapter 7 trustee only for the purposes of applying to set aside or appeal the . . . injunction" or any matter directly related thereto.[166] According to the High Court, only if the Chapter 7 trustee succeeded that far should the question of general recognition be revisited.

> *Takeaway*: The standard for refusal of recognition on public policy grounds in Singapore is lower than in jurisdictions that adopted, as written, Article 6 of the Model Law. An application for recognition will be rejected on the public policy ground if the foreign insolvency proceedings have been enjoined by a Singapore court.

(7) In re Zetta Jet Pte Ltd[167]

After the decision analyzed in the preceding subsection, the injunction preventing Zetta Jet from carrying out any further steps in the U.S. bankruptcy cases was

163. [2018] SGHC 16.
164. *Id.* at para. 11.
165. *Id.* at para. 26.
166. *Id.* at para. 34.
167. [2019] SGHC 53.

discharged by consent. The parties revisited the issue of recognition, focusing on the location of Zetta Jet's COMI.

Under Article 16(3) of the Model Law, the Singapore High Court initially presumed the debtor's COMI was the jurisdiction of its registered office. However, the court did not require the party seeking to overcome that presumption "to prove on the balance of probabilities that the presumption [did] not apply."[168] Instead, the court allowed "the presumption to be rebutted simply on the presence of proof, i.e. evidence, to the contrary."[169] The court focused on where the debtor's primary commercial decisions were made.[170] The relevant date for determining COMI was the date the application for recognition was filed.[171] The Article 16(3) presumption would be rebutted if it was shown that the place of the debtor's central administration and other factors pointed to another location. COMI factors should be objectively ascertainable by third parties generally, and creditors and potential creditors in particular. According to the Court, the COMI factors should have "an element of settled or intended permanence," with a "focus . . . on actual facts on the ground rather than on legal structures" and corporate identities.[172]

On the facts of the case, even though Zetta Jet's registered office was in Singapore, the Singapore High Court held that Zetta Jet's COMI was in the United States because control and direction of Zetta Jet were administered there. Additionally, at least half of its creditors were in the United States and third parties understood the Zetta Entities to be U.S.-based, due to their representations.[173] The Chapter 7 trustee was thus recognized as a foreign representative with automatic stay relief to follow. Orders were also granted to empower the Chapter 7 trustee, among other things, to properly conduct the Singapore insolvency proceedings and the U.S. bankruptcy cases and to entrust him with the realization of the Zetta Entities' assets in Singapore.[174]

> *Takeaway*: In determining a company's COMI, its registered office operates as a starting point. This starting point may be rebutted depending on where the company's primary commercial decisions were made, where control and direction of the company was administered, and where its creditors and third parties understood its business to be based.

(8) In re Pac. Andes Res. Dev. Ltd.[175]

Pacific Andes Resources Development Ltd. ("PARD") and its subsidiaries (collectively, the "Applicants") were part of a cluster of companies described as the Pacific Andes Group. None of the Applicants were incorporated in Singapore, though

168. *Id.* at para. 30.
169. *Id.* at para. 31.
170. *Id.* at paras. 104–07.
171. *Id.* at paras. 39–61
172. *Id.* at paras. 77, 82.
173. *Id.* at paras. 91, 97.
174. *Id.* at paras. 126–31.
175. [2016] SGHC 210.

PARD was listed on the Singapore Exchange and carried out business activity in Singapore. In an attempt to formulate a rescue plan, bankruptcy/insolvency proceedings were commenced in the United States and Peru. In the Singapore High Court, the Applicants, under section 210(10) of the Companies Act, sought moratoria against proceedings brought or to be brought against them by their creditors in Singapore and elsewhere. The court temporarily granted the requested moratoria.

In subsequently setting aside parts of and varying other parts of the orders for moratoria, the Singapore High Court held, among other things, that section 210(10) of the Companies Act did not confer on the court extra-territorial jurisdiction.[176] The High Court explained that it had subject matter jurisdiction under section 210 over foreign companies. In exercising subject matter jurisdiction over the scheme, creditors who were within the jurisdiction or participating in the scheme and whose debts were legitimately subject to the scheme would be subject to the *in personam* jurisdiction of the court. "The court, having subject matter jurisdiction over the scheme and *in personam* jurisdiction over these creditors, [was] then able to exercise its powers to restrain such creditors only within the limits of [section] 210(10)," i.e., within Singapore.[177] The court further explained that it had no jurisdiction under section 210(1) (or under its inherent jurisdiction) to prevent creditors in Singapore from commencing or continuing proceedings elsewhere. This is in contrast to the position in liquidation or administration whereby the court is compelled to assist its officer in the discharge of his statutory obligations, and therefore exercise its inherent jurisdiction to restrain creditors from commencing proceedings elsewhere. A scheme of arrangement, on the other hand, is essentially a debtor-in-possession regime. "There is no officer of the court appointed nor is there a statutory scheme governing the insolvency."[178]

In any event, the High Court emphasized, in relation to foreign companies, only those with a substantial connection and sufficient nexus with Singapore have the *locus standi* to make an application under section 210(1) of the Companies Act. PARD, while incorporated in Bermuda, was listed and conducted economic activity in Singapore. The same could not be said of the subsidiaries, which were unable to point to any assets within the jurisdiction or any nexus that they might have with Singapore. Therefore, the High Court ruled, save for PARD, the Applicants did not have *locus standi* to present applications under section 210.[179]

> *Takeaway*: Only foreign companies with a substantial connection and sufficient nexus with Singapore have the *locus standi* to apply to a Singapore court for a moratorium in support of a scheme of arrangement. In hearing the application, a Singapore court does not have extra-territorial jurisdiction to restrain creditors in Singapore from commencing or continuing proceedings against the foreign companies elsewhere.

176. *Id.* at paras. 15–29.
177. *Id.* at para. 19.
178. *Id.* at para. 24.
179. *Id.* at para. 53.