INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

THE MODEL LAW ON CROSS BORDER INSOLVENCY (MLCBI) IN THE US, UK AND SINGAPORE

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Presenters:

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Adoption of MLCBI in UK, US and Singapore

- Adopted in UK as Cross-Border Insolvency Regulations 2006 (CBIR)
- Adopted in US as Chapter 15 of Bankruptcy Code (Chapter 15)
- Adopted in Singapore as Third Schedule of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (IRDA)

Construction

"In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."

Model Law Art. 8; CBIR Schedule 1 Article 8; Chapter 15, section 1508; Singapore IRDA, Third Schedule, Article 8)

- has any court actually enforced Article 8?

- uniform application has not been the rule

MLCBI – Procedural Only?

- *Rubin v Eurofinance SA* [2012] UKSC 46 (paras 141-143)

"The respondents say that (a) the power under article 21 is to grant any type of relief that is available under the law of the relevant state, and that the fact that recognition and enforcement of foreign judgments is not specifically mentioned in article 21 as one of the forms of relief available, does not mean that such relief cannot be granted; (b) the recognition and enforcement of the judgments of a foreign court is the paradigm means of co-operation with that court; and (c) the examples of co-operation in article 27 are merely examples and are not exhaustive.

But the CBIR (and the Model Law) say nothing about the enforcement of foreign judgments against third parties. As Lord Mance pointed out in argument, recognition and enforcement are fundamental in international cases. Recognition and enforcement of judgments in civil and commercial matters (but not in insolvency matters) have been the subject of intense international negotiations at the Hague Conference on Private International Law, which ultimately failed because of inability to agree on recognised international bases of jurisdiction.

It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. ***Articles 21, 25 and 27 are concerned with procedural matters***. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties."

MLCBI – Procedural Only?

Singapore

- *United Securities Sdn Bhd (in receivership and liquidation) and another v United Overseas Bank Ltd* [2021] 2 SLR 950 (Court of Appeal, 10 August 2021) – procedural only (?)

- *Re Tantleff, Alan* [2023] 3 SLR 250 (General Division of the High Court, 24 June 2022) – the Singapore court recognised a US Chapter 11 Plan of liquidation and Confirmation Order as a discretionary relief granted pursuant to Article 21(1)(g).

MLCBI – Procedural Only?

Singapore

- *United Securities Sdn Bhd (in receivership and liquidation) and another v United Overseas Bank Ltd* [2021] 2 SLR 950 (Court of Appeal, 10 August 2021) – procedural only?

> *5 … **The Model Law does not lay down any substantive principles of insolvency law; those are governed by the domestic laws of the individual jurisdictions**. Instead, it provides procedural mechanisms to facilitate more efficient disposition of cases in which the insolvent debtor has assets or debts in more than one jurisdiction.*
>
> *…*
>
> *35 … the basic approach of the Model Law, which is not to "attempt a substantive unification of insolvency law" but to **provide a "framework for cooperation between jurisdictions"** in order to "facilitate and promote a uniform approach to cross-border insolvency" (see the Guide at para 3; The Judicial Perspective at paras 9 and 27).*

Public Policy Exception (*ordre publique*)

"Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."

Model Law Art. 6; CBIR Schedule 1 Article 6; chapter 15 sec. 1506; Singapore omits the word "manifestly"

In the US four appellate decisions hold that the public policy exception is to be construed very narrowly; see for example, In re Vitro.

Public Policy Exception (UK)

- The term "manifestly" raises the threshold considerably higher than merely "contrary to English public policy" [see ***Agrokor*-case**]

- A breach of "full and frank disclosure obligations" towards the court can amount to an "abuse of process" and as such justify the denial of a requested recognition based on the public policy exception.

  Nordic Trustee A.S.A. & anr v OGX Petroleo e Gas SA [2016] EWHC 25 (Ch)

  Cherkasov & Ors v Olegovich [2017] EWHC 3153 (Ch)

Public Policy Exception

Singapore

- IRDA:

Article 6. Public policy exception

Nothing in this Law prevents the Court from refusing to take an action governed by this Law, if the action would be ~~manifestly~~ contrary to the public policy of Singapore.

Public Policy Exception

Singapore

- ***Re Zetta Jet Pte Ltd and others*** **[2018] 4 SLR 801** (General Division of the High Court, 24 January 2018)

  - Bankruptcy proceedings were filed against the Zetta Entities in the US Bankruptcy Court, upon which a worldwide moratorium came into effect. Shortly after the US proceedings commenced, an injunction was obtained from the Singapore High Court by a shareholder of a Zetta entity, to prevent further steps to be taken in the US proceedings ("**Singapore Injunction").** The US bankruptcy trustee sought the Singapore court's recognition of the US proceedings.

  - Due to the Singapore Injunction, the Singapore High Court granted only limited recognition of the US proceedings, for the purpose of allowing the US bankruptcy trustee to apply to set aside or otherwise appeal the Singapore Injunction.

Public Policy Exception

Singapore

- ***Re Zetta Jet Pte Ltd and others*** **[2018] 4 SLR 801** (General Division of the High Court, 24 January 2018) (continued)

  - Non-compliance with a Singapore court order would undermine the administration of justice and justified denial of a requested recognition based on the public policy exception ([25]).

  - Not clear whether this would lead to a significant divergence from other jurisdictions ([23]).

Public Policy Exception

Singapore

- ***Re PT Garuda Indonesia (Persero) TBK and another matter* [2024] SGHC(I) 1** (Singapore International Commercial Court, 18 January 2024)
  - The Singapore International Commercial Court (with a bench comprising Judge Christopher Sontchi, Justice Kannan Ramesh and Judge Anselmo Reyes), determined that the word "manifestly" was merely incorporated in the Model Law to emphasise the existing intention that public policy exceptions should be determined restrictively.
  - The Court did not take the view that the omission of the word "manifestly" created a lower public policy standard for denial of recognition.

Definition of Foreign Proceeding

In the US, Title 11, US Code, section 101(23), adds "adjustment of debt" to definition in Model Law Article 2, as follows:

"The term 'foreign proceeding' means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation."

This definition easily includes an English scheme and other "pre-insolvency" proceedings under the EU Regulation. Query: does it include, for example, an Australian voluntary winding up. See *In re Betcorp Ltd*., 400 B.R. 266 (Bankr. Ct. D. Nev. 2009).

“Foreign Proceeding” Definition (UK)

- ***Sturgeon Central Asia Balanced Fund Ltd* -case** (First instance decision 17 May 2019 [2019] 1215 (Ch) / Appeal decision 27 January 2020 [2020] EWHC 123 (Ch)) – solvent winding-up excluded?

- ***Stanford International Bank Limited* (SIB) case** (Court of Appeal [2010] EWCA 137) – US receivership excluded? (paras 16-29)

“Foreign Proceeding” Definition

- ***In the Matter of Agrokor DD***, [2017] 2791 (Ch)

- The ***PJSC Bank Case (Ms Svitlana Vasylivna Groshova (in her capacity as authorised officer of the liquidation of PJCS Bank Finance and Credit) and the Deposit Guarantee Fund of Ukraine)***, [2021] EWHC 1100 (Ch)

"Foreign Proceeding" Definition

- **The Nilza Case (*Re Industria De Alimentos Nilza SA and other companies Leite v Amicorp* (UK) Ltd)** [2020] EWHC 3560 (Ch)

"by (i) adopting the rationale applied by HHJ Matthews in Agrokor, that would create a significant hole in the range of possible options for international recognition if the English courts were not prepared to recognise proceedings affecting a distinct company with a form of "group proceedings" that is unfamiliar to this jurisdiction, and (ii) taking into account the court's willingness, in extreme and unusual circumstances, to permit a liquidator to pool assets of two or more insolvent entities, I am satisfied that the likely pooling of Buglin and Endipa's assets to meet claims of Nilza's creditors does not preclude the Extension Proceedings from being "collective proceedings" for purposes of the CBIR".

Definition of "foreign proceeding"

Singapore

- Similar to the US, the Third Schedule of the Singapore Insolvency, Restructuring & Dissolution Act 2018 **("Singapore IRDA")** adds the words "adjustment of debt" to the definition in MLCBI Article 2(h), as follows:

Article 2. Definitions

(h) "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or *adjustment of debt* in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;

Definition of "foreign proceeding"

Singapore

- ***United Securities Sdn Bhd (in receivership and liquidation) and another v United Overseas Bank Ltd*** **[2021] 2 SLR 950** (Court of Appeal, 10 August 2021) – holds that there are at least four cumulative attributes of a "foreign proceeding" (at [53]):

  - The proceeding must involve creditors collectively.
  - The proceeding must have its basis in a law relating to insolvency.
  - The court must exercise control or supervision of the property and affairs of the debtor in the proceeding.
  - The purpose of the proceeding must be the debtor's reorganisation or liquidation.

Definition of “foreign proceeding”

Singapore

- ***Re Tantleff, Alan*** **[2022] 3 SLR 250** (General Division of the High Court, 24 June 2022)
  - (obiter) while a final determination was not made, the court was amenable to recognising a Chapter 11 Plan of liquidation and Confirmation Order as foreign proceedings (at [56]).

- ***Re Ascentra Holdings, Inc (In Official Liquidation)*** **[2023] SGHC 82** (General Division of the High Court, 3 April 2023)
  - A “foreign proceeding” does not include members voluntary liquidation or insolvency proceedings involving companies which are not insolvent.

Definition of "foreign proceeding"

- ***Ascentra Holdings Inc v SPGK Pte Ltd*** **[2023] SGHC 82** (General Division of the High Court, 3 April 2023)
  - The Singapore Court of Appeal disagreed.
  - It took the view, overturning the decision of the High Court, that a solvent official liquidation could be recognised as a foreign main proceeding under Singapore law.
  - Singapore's adaptation of the UNCITRAL Model Law (the "SG Model Law") differs from the UNCITRAL Model Law in a significant aspect. The UNCITRAL Model Law defines a foreign proceeding as "a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceedings the assets and affairs of the debtor are subject to the control or supervision by a foreign court, for the purposes of reorganisation or liquidation".

Definition of "foreign proceeding"

Singapore

- ***Ascentra Holdings Inc v SPGK Pte Ltd* [2023] SGHC 82** (General Division of the High Court, 3 April 2023) **(continued)**

  - The definition provided at section 2(h) of the SG Model Law, however, included the words "or adjustment of debt …" after the words "pursuant to a law relating to insolvency …". This brought the Singapore position closer to the position in section 101(23) of the US Bankruptcy Code, indicating a desire to move Singapore closer to the approach adopted in the USA, i.e. the inclusion of proceedings that would involve a restructuring without insolvency as a prerequisite.

  - The Court of Appeal did not think that this undermined the provisions of the UNCITRAL Model Law. It also noted that this approach was consistent with the approach taken in jurisdictions such as the US, Australia and New Zealand.

Center of Main Interests (COMI) (US)

In re Fairfield Sentry Ltd.
(2d Cir. Ct. Appeals 2013)

- "Feeder fund" to Madoff Investment Securities, investing 95% of its assets ($7 billion) with Madoff, who was operating a Ponzi scheme and misappropriated the funds.

- BVI was location only of Fund's registered office; day-to-day operations were carried out in US, where its investment manager was located

- Starting in December 2008, after Madoff's arrest, Fund began a wind-down supervised by two independent directors (not affiliated with investment manager) and filed for liquidation in July 2009. BVI liquidator filed for Chapter 15 recognition in June 2010; recognition opposed by US customer who had lawsuit pending against Fund.

In re Fairfield Sentry (continued)

- Court of Appeals held:
  - Date for COMI determination is date of opening of chapter 15 case, provided that a court may examine the period between the commencement of the filing and the chapter 15 opening to determine whether the debtor has manipulated its COMI in bad faith;
  - Court rejected authority holding that date for recognition purposes should be date of opening of the foreign proceeding and rested its opinion principally on use of present tense in the statute ("foreign proceeding shall be recognised … as a foreign main proceeding if it *is pending* in the country where the debtor has the center of main interests."

In re Fairfield Sentry (continued)

- Court of Appeals noted that European case law focuses on whether COMI is regular and ascertainable by creditors, but gave little attention to this factor and found that the EU Regulation was not a useful analogue in construing chapter 15 (Model Law)

- Court should consider "any relevant activities, including liquidation activities and administrative functions … in the COMI analysis"

- Recognition should not be denied under public policy exception; BVI proceedings are not "manifestly contrary" to US law even though BVI does not allow "unfettered public access to court records"

Change of COMI – Bad Faith

In re Ocean Rig UDW Inc.
(Bankr. S.D.N.Y. 2017)

- Drilling rig company incorporated in Marshall Islands and three of its subsidiaries purported to move their COMI to Cayman Islands, where they filed schemes of arrangement.

  - Parent had changed place of incorporation to Caymans and all debtors had established bank accounts, books and records and personnel in the Caymans; evidence was that they had never done any business in the Marshall Islands and had no COMI elsewhere.

  - Chapter 15 recognition was opposed on ground that change of COMI was ineffective

In re Ocean Rig UDW (continued)

--- Bankruptcy Court found that COMI change had been made with creditor support and knowledge and granted recognition; in subsequent proceedings, US courts enforced the Cayman Scheme.

- Court said the Debtors' actions "were not taken in bad faith. There is no evidence in the record pointing to any 'insider exploitation, untoward manipulation, [and] overt thwarting of third party expectations' [and that the Debtors] had a legitimate, good faith purpose for shifting their COMI …."

---Appeal was dismissed on other grounds

Determination of COMI (UK)

- **How?**

Eurofood test: COMI has to be identified by reference to factors that are both "objective and ascertainable" by third parties. Factors ascertainable by third parties are confined to matters already in the public domain and what a typical third party would learn as a result of dealing with the company and excluded those which might be ascertained on enquiry. [See **SIB-case** (para 56)]

- **When?**

While the so-called "commencement approach" is generally applied **(SIB-case, *Re Videology Ltd*** *[2018] BPIR 1795, and* ***The Trustees in bankruptcy of Li Shu Chung v Li Shu Chung*** [2021] EWHC 3346 (Ch) [UK]), there also is an unreported decision applying the so-called "filing approach" (***Re Toisa Limited*****,** decision of 29 March 2019 by ICC Judge Catherine Burton)

Determination of COMI – timing

Singapore

- ***Re Zetta Jet Pte Ltd and others*** **[2019] 4 SLR 1343** (General Division of the High Court, 4 March 2019) – date for determining the COMI is the date of filing the application for recognition.

- Reasons given by the court that militate in favour of adopting the US position:
  - [56]: The definitions in Article 2 of the Singapore Model Law used the present tense, indicating that the situation at the time of the application for recognition.
  - [57]: Facilitated COMI shifts to allow for restructuring in an appropriate forum, even where such shifts took place after the date of the foreign application commencing foreign insolvency proceedings (ie, the operative date under the English and European positions).

Determination of COMI – factors

Singapore

- ***Re Zetta Jet Pte Ltd and others*** **[2019] 4 SLR 1343** (General Division of the High Court, 4 March 2019) (cont'd)
  - Rebuttable presumption that the COMI is the place of the company's registered office (at [76])
  - COMI factors should be those that are **objectively ascertainable by third parties generally, with a focus on creditors and potential creditors,** following the English, European and Australian positions (at [76]).
  - Cited *Eurofood* with approval (at [77])
  - Recognised that there should be an element of settled or intended permanence in the factors considered, though a change in COMI would be tolerated (at [79]).
  - Did not consider the company's "nerve centre" (which is the US approach) to be determinative (at [80])
  - In relation to the factor of where the foreign representative was operating from, the court did not consider the factor to be relevant. In that respect, the Singapore court differed from the approach of the US courts in cases such as *Fairfield* (at [103]).

Determination of COMI – factors

Singapore

Some cases:

- ***Re Zetta Jet Pte Ltd and others*** **[2019] 4 SLR 1343** (General Division of the High Court, 4 March 2019) – COMI was found to be in the US. Singapore-incorporated company conducted its operations in Singapore, but marketed on its website as being based in the US. The management was also in the US.

- ***Re Rooftop Group International Pte Ltd and another (Triumphant Gold Ltd and another, non-parties)*** **[2020] 4 SLR 680** (General Division of the High Court, 3 December 2019) – COMI was found to be in Singapore. Singapore-incorporated company sold toys in the US and managed from the US, but it had not represented anywhere that it was a US based entity. Its creditors were located in Asia and its loan agreements were governed by Singapore or Hong Kong law.

Determination of COMI

- In 2023 several law professors proposed that UNCITRAL adopt a new method of determining COMI. A business enterprise would designate its COMI in its governing document (certificate of incorporation, charter, etc.) and this would be binding. Others reject this notion as simply a new version of “contractualism” that gives too much power to lenders to arrange a COMI that will be to the prospective disadvantage of other creditors.

Discretionary Relief

Model Law Art. 21

- Upon recognition of a foreign main or non-main proceeding, in order to effectuate purposes of chapter 15, or to protect debtor's assets or creditors' interests, court may "grant any appropriate relief, including:
  - Staying individual actions or proceedings to the extent not automatically stayed under section 1520
  - Providing for discovery concerning the debtor's assets, affairs, rights, obligations or liabilities
  - Entrusting administration or realisation of US assets to the foreign representative or to another person, including an examiner
  - Granting any additional relief that may be available to a US trustee, except the power to bring avoidance actions under US law
- Assets may be entrusted to foreign representative for distribution in foreign proceeding, provided that court is satisfied that interests of creditors in the United States are adequately protected [US substituted "sufficiently protected"].

Limits to Relief (UK)

- ***Rubin v Eurofinance SA* [2012] UKSC 46**

English Supreme court concluded that the enforcement of an insolvency-related *in personam* default judgment is not covered by the CBIR

- ***Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch)**

English first instance court concluded – in effect – that applying foreign insolvency law to an English law governed contract is outside the scope of appropriate relief

- ***In the Matter of OJSC International Bank of Azerbaijan and the CIBR 2006 – Bakshiyeva v Sberbank of Russia* (the IBA appeal case) [2018] EWCA Civ 2802**

English court of appeal determined that it did not have jurisdiction to grant the Azeri foreign representative of a foreign main proceeding opened in Azerbaijan an indefinite continuation of the automatic moratorium that resulted from an earlier recognition order

Limits to Relief

Singapore

- ***United Securities Sdn Bhd (in receivership and liquidation) and another v United Overseas Bank Ltd*** **[2021] 2 SLR 950** (Court of Appeal, 10 August 2021)
  - Automatic stay granted under Article 20(1) is subject to Article 20(2), ie it must be the same in scope and effect as if the debtor had been wound up in Singapore, and subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under Singapore law in such a situation.
  - Singapore Court of Appeal declined to grant a stay of parallel Singapore proceedings notwithstanding recognition of winding up proceedings in Malaysia as a foreign main proceeding, as the Singapore proceedings were directed at allowing the secured creditor to establish its purported rights against the debtor company. Under Singapore law, it is well established that leave will readily be granted to secured creditors to proceed with enforcing their security, notwithstanding any stay of proceedings that arises upon the winding up of the debtor.

- Cf ***Re Tantleff, Alan*** **[2023] 3 SLR 250** (General Division of the High Court, 24 June 2022)
  - Subject to the scrutiny of the Singapore courts in ensuring that interests of creditors and shareholders are adequately protected, the Singapore High Court concluded that recognition of a Chapter 11 plan of liquidation and Confirmation Order fell within the ambit of additional reliefs under Article 21.
  - Declined to follow UK Supreme Court decision in *Rubin*

Limits to Relief (Singapore)

Singapore

- ***Re Tantleff, Alan*** **[2023] 3 SLR 250** (General Division of the High Court, 24 June 2022)
  - The US foreign representative of 3 Singapore entities applied to the Singapore court for recognition of, amongst others, their Chapter 11 liquidation plan and its confirmation order.
  - The Singapore High Court granted the recognition as additional relief pursuant to Article 21(1)(g).
  - Preferred to adopt US position (where foreign insolvency orders and judgments may be recognised and enforced locally) to the UK position and declined to follow the UK Supreme Court decision in *Rubin* (at [70] – [76]).

Limits to Relief

Singapore

- ***Re Tantleff, Alan*** **[2023] 3 SLR 250** (General Division of the High Court, 24 June 2022) (continued)
  - Wording of Article 21(1)(g) omitted the crucial phrase "under the law of Singapore" (unlike the equivalent provision in the UK), indicating that the Singapore Parliament intended to align the Singapore position with that of the US, and for an expansive view to be taken (at [77] – [78]).

Singapore	UK
Article 21. Relief that may be granted upon recognition of a foreign proceeding 1. Upon recognition of a foreign proceeding, whether a foreign main proceeding or a foreign non-main proceeding, where necessary to protect the property of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including – … (g) granting any additional relief that may be available to a Singapore insolvency officeholder, including any relief provided under section 96(4) of this Act.	**Article 21. Relief that may be granted upon recognition of a foreign proceeding** 1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary 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, including– … (g) granting any additional relief that may be available to a British insolvency officeholder ***under the law of Great Britain***, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986.

Limits to Relief

Singapore

- ***Re Tantleff, Alan*** **[2023] 3 SLR 250** (General Division of the High Court, 24 June 2022) (continued)

  - However, the Singapore court cautioned that it is not merely acting as a rubber stamp, but "*must carefully scrutinise the circumstances in which the foreign order was granted and ensure that interested parties were given an opportunity to be heard and that the relevant creditors and shareholders are adequately protected*" (at [81]).

  - Adequate protection came in the form of supervision and approval by the US Bankruptcy Court, as well as sufficient notice to creditors (at [82]- [83]).

Relief available in US

- Relief in a Chapter 15 case is not limited to relief available under US Bankruptcy Code or under US law
  - In *Rede Energia*, plan provisions were recognised even though they would not be available under US Bankruptcy Code
  - In *Vitro*, third-party releases recognised although they would not be approved under local US law
  - How far can this be stretched? Could a US company with a majority of its assets or operations abroad obtain sanction for an English plan or scheme that would not be confirmable under chapter 11 and then obtain recognition and enforcement of that plan or scheme under chapter 15? (Syncreon, hibu)

Relief available in US (continued)

In re Rede Energia S.A. (Bankr. S.D.N.Y. 2014)

- Debtors were one of largest electric power suppliers in Brazil, serving millions of customers
  - Five members of the corporate group filed for reorganisation in Brazil; they were mainly holding companies that had issued debt; largest creditors were foreign bondholders (mostly in US); operating subsidiaries in Brazil (concessionaires) did not file.
  - Debtors sought recognition under chapter 15 and enforcement of their plan of reorganisation (bind US creditors, require US indenture trustee to pay bondholders their partial distribution under the plan and acknowledge that US law debt was discharged).

In re Rede Energia (continued)

- Bondholders receiving distribution of approximately 25% of their claim objected to plan, claiming inter alia that
  - the marketing process for the debtors' assets was unfair,
  - the plan resulted in improper substantive consolidation of members of the group,
  - cramdown of the plan, which left the shareholders with value, violated US absolute priority rule, and
  - payment in full of creditors of concessionaires (operating companies) resulted in unfair discrimination which would be prohibited under US law

In re Rede Energia (continued)

- Bankruptcy Court found:
  - Relief was "appropriate" under § 1521 (and creditors were "sufficiently protected" under § 1522) and also proper "additional assistance" under § 1507 in that
    - marketing process and consolidation of the cases were carried out fairly and not targeted against US creditors, who received a fair hearing in Brazil
    - plan was approved by 66.34% in amount and 47.7% in number of creditors (requisite majorities in Brazil) and did not have to satisfy US absolute priority rule to be approved, even under a cramdown procedure

In re Rede Energia (continued)

- Bankruptcy Court further found
  - The fact that the plan provided better treatment to a class of concessionaire creditors was supported by a valid business purpose
  - Brazilian procedures were fair and impartial and provided a comprehensive process for orderly and equitable distribution of assets
  - Plan was not manifestly contrary to US public policy (bondholders' principal contention)

Additional Assistance (US)
Model Law Art. 7

- Court may grant "additional assistance," to a foreign representative under the Bankruptcy Code or "under other laws of the United States," subject to any specific limitations in chapter 15
    - US variation of Model Law Article 7

- Provides that court shall consider whether additional assistance, consistent with principles of comity, will reasonably assure:
    (1) Just treatment of all holders of [claims or interests];
    (2) Protection of claim holders in United States against prejudice and inconvenience . . . ;
    (3) Prevention of preferential or fraudulent dispositions . . . ;
    (4) Distribution of proceeds of the debtor's property substantially [in the] order prescribed by Bankruptcy. Code;
    (5) If appropriate, the provision of an opportunity for a fresh start [for an individual debtor in the foreign proceeding].

    These are the same factors, along with comity, that a court was directed to consider in deciding whether to grant a petition under former section 304 of the Bankruptcy Code

In re Vitro S.A.B. de C.V.
(5th Cir. 2012)

- Mexican debtor (holding company of large glass conglomerate) obtained order of recognition of a Mexican proceeding and then moved to enforce a provision in a confirmed Mexican *concurso* (reorganisation plan) that gave creditors a partial recovery against the parent but also released the holding company's non-debtor operating subsidiaries that had not filed bankruptcy cases in Mexico or elsewhere.

- US creditors holding more than US$ 1 billion in debt were creditors of both the holding company (that had guaranteed the subsidiary debt) and its non-debtor operating subsidiaries; they objected, asserting that "third party" [non-debtor] releases granted to the subsidiaries violated US bankruptcy principles; creditors also asserted they had been outvoted and the *concurso* had been adopted in Mexico only because the debtor had been able to vote the alleged claims of the debtor's own subsidiaries (ie, intercompany claims that themselves appeared to be of suspect validity).

In re Vitro (continued)

- US appellate court held that sections 1521(a) and (b) ("relief that may be granted upon recognition") did not extend to the release of non-debtor subsidiaries (third-party releases) and that such relief was available, if at all, under section 1507 as "Additional Assistance"
- Court found such relief, while sometimes available in US cases, was conditioned on the existence of extraordinary circumstances that were not shown in the record; as a result, enforcement of releases would violate section 1507(b)(4), requiring distribution of debtor's property "substantially" in accordance with US law
- Also found in a footnote that enforcing the Mexican decree would deprive creditors of "sufficient [adequate] protection" under section 1522
- However, appellate court did not affirm lower court's holding that third-party releases would be "manifestly contrary to US public policy" within the meaning of section 1506 (Article 6 of MLCBI).

Relief Available (US) (continued)

- Extensive relief is available under Chapter 15
- *In re Hellas Telecommunications*
  - Liquidators of Greek company incorporated in Luxembourg that had filed insolvency proceedings in the UK obtained Chapter 15 recognition of the UK case
  - Liquidators brought proceedings in Chapter 15 case against directors and others to set aside fraudulent conveyances under New York law and (later) under UK law and for damages alleging defendants' breach of fiduciary duty and unjust enrichment
  - In a series of decisions US Bankruptcy Court held
    - Plaintiff lacked standing to pursue claims under New York law (no aspect of the challenged transactions took place in the United States)

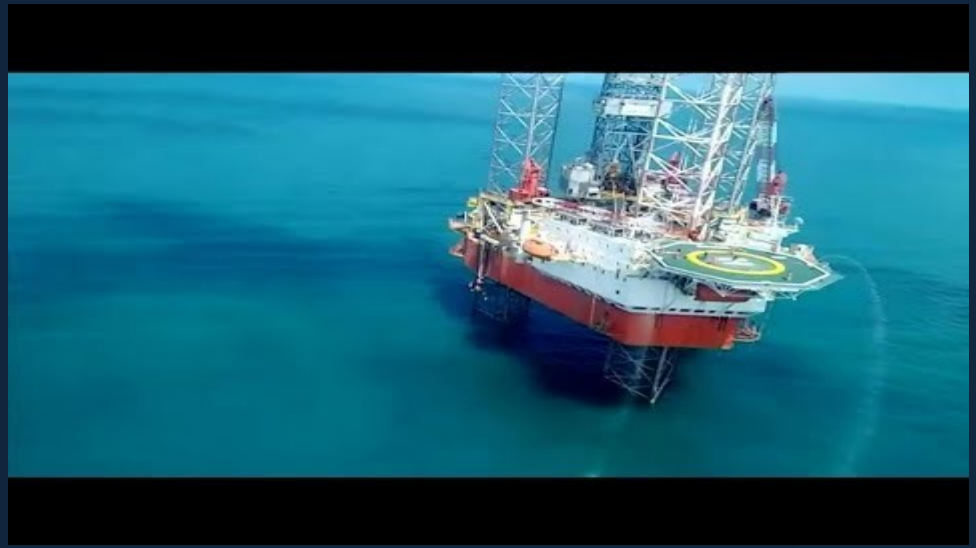
In re Hellas Telecommunications (continued)

- Plaintiff could pursue similar claims under governing law of the UK
- Claims were plausible
- Action against some of the defendants would be dismissed for lack of personal jurisdiction over the defendant
- Eventually, after the plaintiff had filed a similar case in the UK and the remaining defendants consented to jurisdiction in the UK, US Bankruptcy Court dismissed the US case in preference to UK case under doctrine of *forum non conveniens*

In re Perforadora Oro Negro

"Battle for Mexico's Oro Negro Heats Up as Creditors Attempt to Seize Oil Rigs" - WSJ

"Police Reportedly Fly In Helicopters Against A Bankrupt Oil Company"



"Negro Stops Rig Seizure By Bondholders After Standoff"

Discharge of Debt – Gibbs Rule

- In *In re Agrokor* DD, 591 B.R. 163 (Bankr. S.D.N.Y. 2018), the Court considered a complex reorganisation plan of a Croatian company that had issued debt governed by English as well as US (New York) law.
  - Court recognised foreign proceeding as a foreign main proceeding and that it would be appropriate to enforce discharge of debt notwithstanding the law that governed the debt.
  - Court explicitly rejected the rule in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux*, (1890) 25 QBD 399.

US Rejection of *Gibbs* Rule

- In a later decision, the Court reiterated its decision in *Agrokor* and took notice of the decision of the Hong Kong court in *In the Matter of Rare Earth Magnesium Technology Group Holdings Ltd.*, [2022] HKCFI 1686, where the Court had asserted that "[r]ecognition does not appear as a matter of United States' law to discharge the debt." (¶ 36)

- The US court explicitly disagreed with this construction of its prior decision in *Agrokor*. See, *In re Modern Land (China) Co., Ltd.*, 641 B.R. 768, 776-77 (Bankr. S.D.N.Y. 2022).

The *Gibbs* rule in Singapore

- The Singapore court has heavily criticised the rule in *Gibbs* in ***Re Pacific Andes Resources Development Ltd and other matters*** **[2018] 5 SLR 0125** (General Division of the High Court, 27 September 2016).

  - [47]: insolvency policy necessarily overrides contracts because insolvency law is not about a bilateral bargain.
  - [48]: commended Professor Ian Fletcher's reformulation of the *Gibbs* principle, that if one of the parties to a contract was the subject of insolvency proceedings in a jurisdiction with which he had an established connection, it should be recognised that the possibility of such proceedings would have entered into the parties' reasonable expectations in entering their relationship, and as such might furnish a ground for the discharge to take effect under the applicable law.
  - [51]: *Gibbs* principle is an impediment to good forum shopping.

- It remains to be seen whether the Singapore courts will rule conclusively on disapplying or rejecting *Gibbs* in Singapore.

Protection of Creditors and Others

Model Law Art. 22

- Court may grant relief under Articles 19 and 21 only if "interests of creditors and other interested entities, including the debtor, are adequately protected" (section 1522(a)
  - US version uses "sufficiently protected" without a change of substance.

- Court may impose conditions, including security or a bond, depending on relief granted and on whether the foreign representative is permitted to operate the debtor's business
  - Court may also appoint an examiner under US law

Jaffe v. Samsung Electronics (In re Qimonda AG), 4th Cir. 2013

- German bankruptcy trustee of a technology company that had licensed parties in the US obtained chapter 15 recognition and sought an order recognising his right to reject patent licenses; German law provided that patent licenses could be rejected like other contracts.
- A special provision of the US Bankruptcy Code, however, gave US licensees the right to retain their licenses, provided they continued to pay the licensor;
- Bankruptcy Court found that permitting the trustee to reject the licenses would "severely impinge an important statutory protection accorded licensees of US patents and thereby undermine a fundamental US public policy promoting technological innovation" and would be manifestly contrary to US public policy. It also found that such relief would deprive the US licensees of "sufficient [adequate] protection" required by section 1522(a).

Jaffe v. Samsung Electronic (continued)

- Appellate court did not reach "public policy" issue; agreed that application of German law on rejection of contracts (patent licenses) would deprive the US creditors of "sufficient [adequate] protection" and that the Bankruptcy Court had reasonably balanced the rights of the German trustee and the US creditors
  - Court rejected the argument that under the UNCITRAL Guide to Enactment, the requirement in section 1522(a) of providing creditors with "sufficient [adequate] protection" is not designed to protect creditors in one nation but is designed to protect creditors generally, and it disregarded the fact that the result in the case was to prefer US creditors and arguably provide inadequate protection to creditors elsewhere

Cooperation and Communication

US sections 1525-27; Model Law Art. 25-27

- Cooperation and Direct Communication with Foreign Courts and Foreign Representatives by the Court (§ 1525) or by the Trustee (§ 1526)
  - 1525(a): "[T]he court shall [may] cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee."
- Forms of Cooperation (§ 1527)
  - (1) Appointment of an examiner
  - (2) Communication by means approved by the Court
  - (3) Coordination of administration of assets and affairs
  - (4) Agreements concerning coordination of proceedings
  - (5) Coordination of concurrent proceedings for a single debtor
- Based on common law principle of comity
- Applies to single debtor; query whether it applies to groups of companies
- No express requirement of recognition

Lehman Brothers (LBHI) v. BNY Corp. Trust Services (Bankr. S.D.N.Y. 2010)

- English court held that certain clauses in derivative contracts were enforceable under English law
- Debtor sought declaratory judgment in US Chapter 11 case that agreements were unenforceable under US law
- Bankruptcy court concluded that the clauses were prohibited as *ipso facto* clauses under Bankruptcy Code §§ 365(e)(1) and 541(c)(1)(B)
  - US court did not extend comity because result depended on interpretation of US law
  - Enforcement of the agreements would violate the automatic stay under § 362(a)

  -- Court recognised that concurrent cases led to potential conflicts and urged the parties to cooperate in the spirit of comity

Implementation on two other UNCITRAL Model Laws on Insolvency

UNCITRAL, which developed the MLCBI, has approved two other model laws -- on the Recognition and Enforcement of Insolvency Related Judgments and on Enterprise Group Insolvency.

Neither has been adopted; however, on 10 July 2023 the UK government published the outcome of a consultation (7 July 2022) regarding the possible implementation by the UK of the two model laws. The outcome can be accessed through the following link:

https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/outcome/implementation-of-two-uncitral-model-laws-on-insolvency-summary-of-consultation-responses-and-government-response