INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE (ONLINE)

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Module B: Session 12 Materials – US Chapter 15

CONTENTS

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Distinguished by In re Oi Brasil Holdings Cooperatief U.A., Bankr.S.D.N.Y., December 4, 2017 Brief It Brief It

Original Image of 570 B.R. 687 (PDF)

In re Ocean Rig UDW Inc.

United States Bankruptcy Court, S.D. New York. | August 24, 2017 | 570 B.R. 687 | *(Approx. 18 pages)*

S.D. New York.

IN RE OCEAN RIG UDW INC., et al., Debtors in Foreign Proceedings.

Case No. 17–10736 (MG)
Signed: August 24, 2017

Synopsis

Background: In jointly administered Chapter 15 cases, joint provisional liquidators and authorized foreign representatives of foreign corporate debtors petitioned for recognition of four proceedings pending before Cayman Islands court as foreign main or nonmain proceedings.

Holdings: The Bankruptcy Court, Martin Glenn, J., held that:
1 attorney retainer held by foreign debtors' New York counsel qualified as property of foreign debtor which was present in the United States;
2 joint provisional liquidators and authorized foreign representatives appointed by Cayman Islands court were proper “foreign representatives”;
3 Cayman Islands provisional liquidation proceedings were “foreign proceedings”;
4 center of main interests (COMI) of foreign debtors was the Cayman Islands; and
5 recognition of Cayman Islands proceedings would not be manifestly contrary to United States policy.

Petitions granted.

West Headnotes (11)

Change View

Change View

1 **Contracts** Effect in general; enforcement in general
Contracts create property rights for the parties to the contract.

2 **Bankruptcy** Effect of state law in general
Bankruptcy Rights under contracts
Contract rights are intangible property of the debtor, and those property rights can be and typically are tied to the location of the governing law of the contract.

3 **Bankruptcy** Cases Ancillary to Foreign Proceedings
Attorney retainer held by foreign corporate debtors' New York counsel qualified as property of foreign debtor which was present in the United States, and not only satisfied statutory requirement for debtor to be eligible for Chapter 15 relief, but enabled foreign representative to commence Chapter 15 proceedings in New York, as place where venue was proper. 11 U.S.C.A. § 109(a); 28 U.S.C.A. § 1410.

1 Case that cites this headnote

4 **Bankruptcy** Cases Ancillary to Foreign Proceedings
Joint provisional liquidators and authorized foreign representatives of foreign corporate debtors appointed by Cayman Islands court and authorized by that court to seek relief under Chapter 15 and seek recognition of their appointment in any jurisdiction they deemed necessary were proper "foreign representatives" under Bankruptcy Code. 11 U.S.C.A. § 101(24).

5 **Bankruptcy** Cases Ancillary to Foreign Proceedings
Cayman Islands provisional liquidation proceedings were "foreign proceedings" under Chapter 15. 11 U.S.C.A. §§ 101(23), 1517(a).

1 Case that cites this headnote

6 **Bankruptcy** Cases Ancillary to Foreign Proceedings
Center of main interests (COMI) of foreign corporate debtors, holding companies that owned non-debtor companies that directly or indirectly owned a fleet of deepwater oil drilling rigs leased to exploration oil and gas companies, was the Cayman Islands; debtors conducted their management and operations in the Cayman Islands, had offices in the Cayman Islands, held their board meetings in the Cayman Islands, had officers with residences in the Cayman Islands, had bank accounts in the Cayman Islands, maintained their books and records in the Cayman Islands, and conducted restructuring activities from the Cayman Islands. 11 U.S.C.A. §§ 1502(4), 1516(c).

7 **Bankruptcy** Cases Ancillary to Foreign Proceedings
Among other factors that may be considered in the center of main interests (COMI) analysis for determining foreign main proceeding status are the location of headquarters, decision-makers, assets, creditors, and the law applicable to most disputes. 11 U.S.C.A. §§ 1502(4), 1516(c).

1 Case that cites this headnote

8 **Bankruptcy** Cases Ancillary to Foreign Proceedings
In deciding foreign main proceeding status, courts determine whether a debtor's center of main interests (COMI) is in fact regular and ascertainable and not easily subject to tactical removal. 11 U.S.C.A. §§ 1502(4), 1516(c).

1 Case that cites this headnote

9 **Bankruptcy** Cases Ancillary to Foreign Proceedings
Foreign debtor's center of main interests (COMI) is determined as of the filing date of Chapter 15 petition, without regard to the debtor's historic operational activity. 11 U.S.C.A. §§ 1502(4), 1516(c).

10 **Bankruptcy** Cases Ancillary to Foreign Proceedings
Recognition of Cayman Islands provisional liquidation proceedings would not be manifestly contrary to United States policy, as required for recognition of proceedings as foreign main proceeding under Chapter 15. 11 U.S.C.A. §§ 1506, 1517(a).

11 **Bankruptcy** Cases Ancillary to Foreign Proceedings
Public policy exception to recognition of foreign main proceeding under Chapter 15 is narrowly construed. 11 U.S.C.A. §§ 1506, 1517(a).

Attorneys and Law Firms

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2001 WL 34355261
In re: PETRIE RETAIL, INC., Debtor. Luan Investment S.E., Appellant, v. Franklin 145 Corp., Cruz-Ponce Corp., Marianne, Ltd., formerly known as Urban Aquisition Corp., G & G Retail, Inc., Appellees.
United States Court of Appeals, Second Circuit.
Dec. 17, 2001

...Luan Investment, S. E., the appellant in this matter, submits the following statement of corporate interests and affiliations for the use of the judges of this Court: 1. Luan Investment, S. E. is a spe...

See More Briefs

Trial Court Documents

In re Penton Business Media Holdings, Inc.

2011 WL 5195760
In re PENTON BUSINESS MEDIA HOLDINGS, INC., et al., Debtors.
United States Bankruptcy Court, S.D. New York.
Oct. 24, 2011

...FN1. The Debtors are the following nine entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Penton Business Media Holdings, Inc. (9837); Penton Me...

In re Excel Maritime Carriers, Ltd.

2013 WL 5312527
In re: EXCEL MARITIME CARRIERS, LTD., et al., Debtors.
United States Bankruptcy Court, S.D. New York.
Aug. 06, 2013

...Excel Maritime Carriers Ltd. ("Excel") and certain of its affiliates, each as a debtor and debtor-in-possession (collectively, the "Debtors") in the above captioned chapter 11 cases (collectively, the ...

In re The Brown Pub. Co.

2010 WL 8033147
In re: THE BROWN PUBLISHING COMPANY, Dan's Papers, Inc., Brown Media Holdings Company, Boulder Business Information Inc., Brown Business Ledger, LLC, Brown Publishing Inc., LLC, Business Publications, LLC, the Delaware Gazette Company, SC Biz News, LLC, Texas Community Newspapers, Inc., Texas Business News, LLC, Troy Daily News, Inc., Upstate Business News, LLC, Utah Business Publishers, LLC, Arg, LLC, Debtors.
United States Bankruptcy Court, E.D. New York.
July 02, 2010

...Chapter 11 Upon consideration of the Motion for Order (A) Authorizing Debtors to Obtain Post-Petition Financing and Grant Security Interests and Superpriority Administrative Expense Status Pursuant to ...

See More Trial Court Documents

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Opinion

MEMORANDUM OPINION GRANTING RECOGNITION OF FOREIGN DEBTORS' CAYMAN ISLANDS PROCEEDINGS AS FOREIGN MAIN PROCEEDINGS

MARTIN GLENN, UNITED STATES BANKRUPTCY JUDGE

In these four jointly administered chapter 15 cases, Simon Appell and Eleanor Fisher, the joint provisional liquidators and authorized foreign representatives (the "JPLs") of Ocean Rig UDW Inc. ("UDW"), Drill Rigs Holdings Inc. ("DRH"), Drillships Financing Holding Inc. ("DFH") and Drillships Ocean Ventures Inc. ("DOV") (UDW, DRH, DFH and DOV, together, the "Foreign Debtors"), seek recognition in this Court as foreign main proceedings or foreign nonmain proceedings of four proceedings pending before the Grand Court of the Cayman Islands (the "Cayman Court"). The four proceedings in the Cayman Court are Financial Services Division Cause Nos. FSD0057/2017 (UDW), FSD0059/2017 (DRH), FSD0056/2017 (DFH) and FSD0058/2017 (DOV) (the "Cayman Provisional Liquidation Proceedings"). The Foreign Debtors are each holding companies, with UDW owning each of the other three Foreign Debtors and they, in turn, owning a large group of non-debtor companies that directly or indirectly own a fleet of deepwater oil drilling rigs that are generally leased to exploration oil and gas companies. UDW stock is publicly traded in the U.S. and elsewhere. The sharp decline in oil and gas prices over the last few years has taken a major toll on the finances of the Foreign Debtors, with most of their drilling rigs currently not in operation.

The JPLs' goal is to have the Cayman Court sanction four schemes of arrangement (one for each of the Foreign Debtors) negotiated and proposed by the Foreign ***690** Debtors, and then, if sanctioned by the Cayman Court, have this Court recognize and enforce the schemes in these chapter 15 cases. The four schemes propose a major restructuring of the Foreign Debtors' financial debt, issuing new debt and cash and converting much of their fixed debt into equity, very substantially diluting the current equity ownership of UDW. The Cayman Court authorized the Foreign Debtors to convene creditors' meetings and vote on the four proposed schemes. The creditors' meetings took place on August 11, 2017, and according to a status report filed in this Court by the JPLs, the creditors voted to support the four schemes. [1] Sanction hearings are scheduled in the Cayman Court on September 4, 5, and 6, 2017. *See Fourth Status Report of Joint Provisional Liquidators and Foreign Representatives Simon Appell and Eleanor Fisher* (ECF Doc. # 109).

At least one substantial UDW creditor, Highland Capital Management LP ("Highland"), is expected to oppose sanctioning of the UDW scheme. If the Cayman Court nevertheless sanctions the schemes, this Court anticipates that Highland will oppose recognition and enforcement of the UDW scheme in this Court. Highland previously objected to recognition of the UDW proceeding as a foreign main or nonmain proceeding, but Highland dropped that objection, reserving its right to contend that the UDW scheme should not be recognized and enforced by this Court if it is sanctioned by the Cayman Court. But after Highland withdrew its objection to recognition, Tally M. Wiener, Esq. ("Wiener"), a lawyer who asserts that she is a shareholder of UDW, filed an objection to recognition. The Court held an evidentiary hearing on the contested recognition motion on August 16, 2017. Until sometime in 2016, each of the Foreign Debtors had its center of main interests ("COMI") in the Republic of the Marshall Islands ("RMI"). It is the shift in COMI from the RMI to the Cayman Islands, where the provisional liquidation and scheme of arrangement proceedings are pending, that is the focus of the issues that must be addressed in determining whether to recognize the foreign proceedings as foreign main, or in the alternative, foreign nonmain proceedings.

For the reasons explained below, the Court concludes that each the four Cayman Court proceedings should be recognized as a foreign main proceeding.

I. BACKGROUND [2]

The JPLs commenced chapter 15 cases for each of the Foreign Debtors (collectively, the

“Chapter 15 Cases”) by filing the *Verified Petition of Ocean Rig UDW Inc., et al. (in Provisional Liquidations) and Motion of the Joint Provisional Liquidators for (A) Recognition of the Cayman Proceedings as Foreign Main Proceedings or, in the Alternative, as Foreign Nonmain Proceedings, and (B) Certain Related Relief* (ECF Doc. # 1) (together with each Foreign Debtor's Form of Voluntary Petition, the “Verified Petition”). The JPLs seek (i) entry of an order granting recognition of (a) the Cayman Provisional Liquidation Proceedings and (b) subsequent applications for the sanctioning of schemes of arrangement in respect of the Foreign Debtors under section 86 of Part ***691** IV of the Companies Law (the “Cayman Schemes,” and, together with the Cayman Provisional Liquidation Proceedings, the “Cayman Proceedings”) as foreign main proceedings or, in the alternative, as foreign nonmain proceedings, and (ii) certain related relief. In support of the Verified Petition, the JPLs submitted a Memorandum of Law (ECF Doc. # 3). The JPLs supported their requested relief with the *Declaration of Simon Appell Pursuant to 28 U.S.C. § 1746 and Statements and Lists Required by Bankruptcy Rule 1007(a)(4)* (the “Appell Declaration,” ECF Doc. # 4), the *Declaration of Antonios Kandylidis Pursuant to 28 U.S.C. § 1746* (the “Kandylidis Declaration,” ECF Doc. # 5), the *Declaration of Rachael Reynolds in Support of the Verified Petition* (the “Reynolds Declaration,” ECF Doc. # 6)[3] and the *Declaration of Dennis Reeder Pursuant to 28 U.S.C. § 1746* (the “Reeder Declaration,” ECF Doc. # 7). On July 10, 2017, Wiener filed an objection to the JPLs' recognition request. *See Objection to the Motion of the Joint Provisional Liquidators of Ocean Rig UDW Inc. et al. for Recognition of Foreign Main or Nonmain Proceedings* (“Wiener Objection,” ECF Doc. # 89). The Wiener Objections asserts that Wiener is a shareholder of Ocean Rig UDW Inc., an assertion she has never backed up with any evidence. (*Id.* at 1.)

As directed by the Court, the counsel for the JPLs and Wiener prepared a *Recognition Hearing Joint Pretrial Order* (“Pretrial Order”) that was approved and entered by the Court on July 26, 2017. (ECF Doc. # 102.) The Pretrial Order identified the issues to be tried, and included the JPLs' witness list (with direct evidence offered by declaration and with in-court cross examination), and the list of trial exhibits that each side proposed to offer. The JPLs identified four trial witnesses, but based on a stipulation between counsel, only three of the witnesses—Simon Appell, Antonios Kandylidis, and Rachel Reynolds—testified at trial with direct testimony by declaration (Appell Declaration, PX–5; Kandylidis Declarations, PX–6 and PX–10 and exhibits; and Reynolds Declaration, PX–8). Wiener objected to portions of the Appell, Kandylidis and Reynolds Declarations; the Court ruled on the objections at the final pretrial conference on August 14, 2017. As limited by the stipulation of the parties and the Court's ruling on Wiener's objections, the Appell, Kandylidis and Reynolds Declarations were admitted in evidence as the witnesses' direct testimony. Wiener cross-examined each of these witnesses during the trial. Wiener did not identify any witnesses in the Pretrial Order or call any witnesses during the trial. Numerous exhibits offered by both sides were admitted in evidence during the trial as well.

In a letter to the Court dated August 15, 2017, Wiener challenged whether venue of these chapter 15 cases in the Southern District of New York is proper. (ECF Doc. # 112.) The JPLs responded to and opposed Wiener's venue argument in a letter also filed on August 15, 2017. (ECF Doc. # 114.) Venue was not identified as an issue for trial in the Pretrial Order. In any event, as set forth below, Wiener's venue argument is simply wrong; venue properly lies in this Court.

While Wiener asserted in her Objection that she is a UDW Inc. shareholder, she in fact offered no evidence at trial supporting that contention. Therefore, Wiener failed to establish that she is a party-in-interest with standing to contest recognition of the ***692** Foreign Debtors' Cayman Proceedings. Because this Court nevertheless must find that the JPLs have established that recognition is proper in order to grant the recognition motion, the Court will treat Wiener's Objection as if she had established her standing to object to recognition and rule on her arguments on the merits.

A. The Businesses of the Foreign Debtors

UDW is the holding company of the Ocean Rig Group (the “Group”) and the direct parent of the three other Foreign Debtors (DFH, DOV and DOH (collectively, the “Subsidiary Debtors”)).

UDW registered in April 2016 as an exempted company limited by shares under § 202 of the Cayman Companies Law. Before then, UDW was registered as a non-resident corporation in the RMI. The Subsidiary Debtors are registered as non-resident corporations in the RMI and are registered as foreign companies under § 186 of the Cayman Companies Law. UDW and the Subsidiary Debtors maintain their only offices in the Cayman Islands.

None of the Foreign Debtors has ever conducted operations or directed their affairs from the RMI. (Kandylidis Decl. ¶ 4.)

The Group is composed of four separate operating divisions. Each of the Subsidiary Debtors is a holding company and the parent of one of three of these operating Subsidiary Debtors' divisions. [4] Each of the operating divisions has its own financing, but UDW has guaranteed that debt and has pledged the shares of the applicable Subsidiary Debtor to secure its respective guaranty obligations (*e.g.*, the shares of DRH have been pledged to secure the DRH facility). (*Id.* ¶ 5.)

B. The Financial Debt of the Group

UDW and the Subsidiary Debtors incurred the following financial debt:

1. The DRH Facility

DRH issued US $800 million of 6.5% Senior Secured Notes due 2017 (the “SSNs”), pursuant to an indenture dated September 20, 2012 (as amended by a supplemental indenture dated January 23, 2013) (as amended, the “DRH Indenture”). U.S. Bank National Association is the Indenture Trustee under the DRH Indenture and Deutsche Bank Trust Company Americas is the collateral trustee. The SSNs are guaranteed by UDW (the “DRH Indenture Guaranty”) and certain of DRH's direct and indirect subsidiaries (the “DRH Subsidiary Guarantors”). UDW pledged the shares of DRH to secure the DRH Indenture Guaranty, and DRH and the DRH Subsidiary Guarantors have pledged their assets (including shares of their subsidiaries) to secure their obligations in respect of the DRH Indenture. All pledged shares are held by the collateral trustee in the United States. Approximately US $460 million remains outstanding under the DRH Indenture. (*Id.* ¶ 6(a).)

2. The DFH Facility

DFH is a borrower under a US $1.9 billion Credit Agreement dated July 12, 2013 (as amended and restated from time to time, including on February 7, 2014) between, amongst others, DFH and Drillships Projects Inc., as borrowers and Deutsche Bank AG New York Branch, as administrative and collateral agent (the “DFH Credit Agreement”). The DFH Credit Agreement has been guaranteed by UDW (the “DFH Credit Agreement Guaranty”) and certain of DFH's direct and indirect subsidiaries (the “DFH Subsidiary ***693** Guarantors”). UDW pledged the shares of DFH to secure the DFH Credit Agreement Guaranty, and DFH and the DFH Subsidiary Guarantors have pledged their assets (including shares of their subsidiaries) to secure their obligations in respect of the DFH Credit Agreement. All pledged shares are held by the collateral agent in the United States. Approximately US $1.83 billion remains outstanding under the DFH Credit Agreement. (*Id.* ¶ 6(b).)

3. The DOV Facility

DOV is a borrower under a US $1.3 billion Credit Agreement dated July 25, 2014 between, amongst others, DOV and Drillships Ventures Projects Inc., as borrowers, and Deutsche Bank AG New York Branch, as administrative and collateral agent (the “DOV Credit Agreement” and, together with the DFH Credit Agreement, the “Credit Agreements”). The DOV Credit Agreement has been guaranteed by UDW (the “DOV Credit Agreement Guaranty”) and certain of DOV's direct and indirect subsidiaries (the “DOV Subsidiary Guarantors”). UDW has pledged the shares of DOV to secure the DOV Credit Agreement Guaranty, and DOV and the DOV Subsidiary Guarantors have pledged their assets (including shares of their subsidiaries) to secure their obligations in respect of the DOV Credit Agreement. All pledged shares are held by the collateral agent in the United States. Approximately US $1.27 billion remains outstanding under the DOV Credit Agreement. (*Id.* ¶ 6(c).)

4. The UDW Facility

UDW issued US $500 million of 7.25% Senior Unsecured Notes due 2017 (the “SUNs”), pursuant to an indenture dated March 26, 2014 (the “SUN Indenture”). Deutsche Bank Trust Company Americas is the Indenture Trustee under the SUN Indenture. The SUNs are not guaranteed by any member of the Group. Approximately US $131 million of unsecured notes remain outstanding under the SUN Indenture. The amounts outstanding in respect of the SUN Indenture, the DRH Indenture and the Credit Agreements are collectively referred to as the “Scheme Indebtedness.” (*Id.* ¶ 6(d).)

C. The Business of the Group

The Group operates as an international offshore oil drilling contractor, owner and operator of drilling rigs. It provides drilling services for offshore oil and gas exploration, development and production, and specializes in the ultra-deepwater and harsh-environment segments of the offshore drilling industry. Through various subsidiaries, the Group operates 11 ultra-deepwater offshore drilling units, the details of which are set forth in the Kandylidis Declaration and will not be repeated here. (*See id.* ¶ 8.) Additionally, the Group has contracted for the construction of an additional three so-called seventh generation drilling units with a major shipyard in South Korea. The delivery dates for these new vessels were previously scheduled for 2017, 2018, and 2019, respectively, but the delivery dates of two vessels have been postponed, and construction on the third vessel has been suspended. UDW's guarantees in respect of these drilling rigs have also been released. (*Id.* ¶ 9.)

The Group employs the drilling rigs to drill wells for customers primarily on a "day rate" basis for periods of between two months and six years. Payments are set at a fixed amount for each day that the rig is operating under a contract at full efficiency. A higher "day rate" is charged on days when actual drilling operations are being undertaken; lower rates are charged during periods of mobilization, or when drilling operations are interrupted or restricted by equipment breakdowns, adverse environmental conditions or other ***694** conditions beyond the company's control. Contracts are generally obtained through a competitive bidding process with other contractors. The Group's customers are typically major oil companies, integrated oil and gas companies, state-owned national oil companies and independent oil and gas companies. (*Id.* ¶ 10.)

Currently, the Group's revenues are dependent on five drilling rigs, operating offshore near Norway, Brazil, and Angola; six other rigs are currently uncontracted and have been laid-up. Only one rig is under a long term contract, expiring in September 2020; two rigs are under contracts that expire during the second half of 2017, and two rigs are under contracts that expire during the first half of 2018. Laid-up rigs must be deactivated and either "cold stacked" or "warm stacked" to preserve the rigs pending reactivation. Rig deactivation costs are approximately $5 million per unit. The daily costs for "warm stacked" rigs are approximately $40,000 per day; the daily costs for "cold stacked" rigs are approximately $5,000 per day. (*Id.* ¶ 12.)

D. The Group's Financial Situation

The oil and gas drilling industry is currently in a down-cycle. Crude oil prices have fallen during the past several years, falling from over $100 per barrel in March 2014, to approximately $52 per barrel in March 2017. UDW's share price has fallen from a high of $19.87 on June 20, 2014, to $0.73 as of March 24, 2017. UDW expects that the significant decrease in oil prices will continue to reduce customer demand in the industry during 2017. Many of the Groups' customers have revised their budgets, decreasing projected expenditures for offshore drilling. "Day rates" and rig utilization have declined, putting severe financial pressure on the Group. UDW does not expect that its inactive rigs will begin work under new contracts until January 2020 at the earliest. Deepwater rig demand, currently at a utilization rate of only approximately 45% of available rigs, is not expected to begin to improve until 2019. Rig utilization rates are expected to remain below 60% of rig availability until the first quarter of 2020. (*Id.* ¶ 13.)

E. The Foreign Debtors' Decision to Restructure

The Foreign Debtors had significant debt payments due during 2017. They did not expect to have sufficient cash available to make these payments without further borrowing. Failure to make any of these payments when due would trigger cross-default provisions under the Credit Agreements. Faced with expected payment defaults and cross-defaults, the Foreign Debtors explored restructuring alternatives. The parties stipulated that the RMI, where these Foreign Debtors previously maintained their COMI, does not have a statute or any procedures permitting reorganization, making liquidation the likely outcome. The Cayman Islands, however, does have statutory laws and procedures permitting restructuring. It is the premise of chapter 11 of the Bankruptcy Code, and the law of an increasing number of jurisdictions, that reorganization of a potentially viable entity (as opposed to liquidation) may be value maximizing, benefitting creditors, employees faced with the prospect of loss of employment, and other public and private interests.

Increasingly, foreign jurisdictions—including the United Kingdom, Hong Kong, Singapore, and the Cayman Islands—provide statutory authority for schemes of arrangement as a way of permitting companies in financial distress to restructure their financial debt, as these Foreign Debtors are attempting to do here. While the U.S. Bankruptcy Code does not currently ***695** include provisions authorizing schemes of arrangement, [5] U.S. bankruptcy courts, including this Court, have found that a foreign scheme of arrangement proceeding (including in the Cayman Islands) may satisfy section 101(23)'s definition of a collective judicial proceeding providing for the adjustment of debt that qualifies for recognition.

The Foreign Debtors in these proceedings acted prudently in exploring their restructuring alternatives. The Court finds that the directors of the Foreign Debtors properly concluded that changing their COMI to the Cayman Islands, and, if necessary, commencing restructuring proceedings there, and also commencing chapter 15 proceedings in the U.S., offered them the best opportunity for successful restructuring and survival under difficult financial conditions.

Of course, more than good intentions are required before a U.S. bankruptcy court can recognize a foreign proceeding as either a foreign main or foreign nonmain proceeding. For example, a so-called "letter box company," with no real establishment or other required indicia for its proposed COMI, cannot support recognition. *See In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129–31 & n.8 (Bankr. S.D.N.Y.), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2007) (stating that "the COMI presumption may be overcome particularly in the case of a 'letterbox' company not carrying out any business" in the country where its registered office is located) (citation omitted). The question that must be addressed here is whether the Foreign Debtors' change of COMI from the RMI to the Cayman Islands satisfies the requirements of the Bankruptcy Code, permitting this Court to recognize the Cayman Proceedings as a foreign main proceeding. A U.S. bankruptcy court that is asked to recognize a foreign proceeding as a foreign main proceeding must decide where a foreign debtor has its center of main interest.

F. The Debtors' Move to and Current Connections with the Cayman Islands

As previously noted, UDW is now a Cayman Islands registered corporation. UDW migrated from the RMI, where it had been a non-resident domestic corporation, on April 14, 2016. The Subsidiary Debtors are each wholly-owned direct subsidiaries of UDW. They are RMI non-resident domestic corporations; they registered as foreign companies in the Cayman Islands on October 18, 2016. Each of the Foreign Debtors is a holding company whose primary assets are the equity interests in their respective subsidiaries. Each Foreign Debtor maintains its head office in the Cayman Islands in office space provided by an affiliate, Ocean Rig SEZ Co. (defined below). (Kandylidis Decl. ¶ 23.)

UDW was previously a tax resident of Cyprus, but it ceased being a tax resident there effective December 31, 2016. UDW no longer maintains any presence in Cyprus. UDW also maintains a "law 89 establishment" in Greece. Law 89 permits foreign commercial and industrial companies to maintain an establishment in Greece exclusively for the provision of limited types of services for head offices or affiliates outside of Greece. (*Id.* ¶ 24.)

***696** Foreign companies with a law 89 license in Greece are required to spend US $50,000 per year in Greece. UDW established its "law 89 establishment" with the intention of providing ship-brokerage services to affiliates, but the brokerage services were never provided as intended. As a result, the company is in the process of having its law 89 establishment license terminated. Affiliates of the Foreign Debtors also maintain offices in Norway, Angola, Brazil and Jersey. (*Id.*)

The evidence establishes that none of the Foreign Debtors have ever conducted operations or directed their affairs from the RMI, have ever maintained administrative, management or executive offices in the RMI, have ever had any directors who were residents or citizens of the RMI, or have ever held a meeting of its directors or shareholders in the RMI. Public notice of the opening of UDW's head office in the Cayman Islands was provided by SEC Form 6–K on September 27, 2016 and the Foreign Debtors gave notice of their registration in the Caymans by subsequent press release. (*Id.* ¶ 25.) Other indicia likewise support the *bona fides* of the COMI shift to the Cayman Islands. The Court concludes with no difficulty that the Foreign Debtors have established by a preponderance of the evidence that each of their COMIs, as of the filing of the chapter 15 petitions, was the Cayman Islands. The Court summarizes the evidence supporting this conclusion:

1. Directors and Board Meetings

Michael Pearson, one of six members of the board of directors of UDW, has his primary residence in the Cayman Islands. The other five UDW directors reside in Monaco and Greece. Two of four directors of DRH, Michael Pearson and Casey McDonald, have their primary residences in the Cayman Islands. The boards of directors of DFH and DOV each has three directors, one of whom, Michael Pearson, has his primary residence in the Cayman Islands, and the other two directors have residences in the Cayman Islands. (*Id.* ¶ 26.)

UDW board meetings have been held exclusively in the Cayman Islands since a regular meeting held in the Cayman Islands on November 17, 2016. Meetings of the UDW board were also held in the Cayman Islands on February 3, 2017, February 21, 2017 and March 23, 2017. Meetings of a special committee of the UDW board were held in the Cayman Islands on March 7, 2017 and March 16, 2017. Board meetings of the Subsidiary Debtors have been held exclusively in the Cayman Islands since February 3, 2017. Meetings of the boards of the Subsidiary Debtors were also held in the Cayman Islands on February 21, 2017 and March 23, 2017, and meetings of special committees of each of the Subsidiary Debtors were held in the Cayman Islands on March 7, 2017 and March 16, 2017. As noted, no directors have ever been located in the RMI and no directors' meetings ever took place there. (*Id.* ¶ 27.)

2. Company Officers

The President and Chief Financial Officer, the Company Secretary, and the Vice President of Business Development of UDW have residences in the Cayman Islands and work in the Cayman Islands in office space provided by Ocean Rig SEZ Co. pursuant to the terms of their Zone Employment Certificates. All of the officers of the Subsidiary Debtors have residences in the Cayman Islands and work in the Cayman Islands in office space provided by Ocean Rig SEZ Co. pursuant to the terms of their Zone Employment Certificates. Each of these officers use mobile phones with Cayman Islands phone numbers. (*Id.* ¶ 28.)

***697** *3. Notice of Relocation to Cayman Islands*

a) Paying Agents

The paying agent under the SUNs issued by UDW was notified on November 1, 2016 to address all future invoices for payment to the registered office of Ocean Rig SEZ Co. in the Cayman Islands. The paying agent under the SSNs issued by DRH was notified on November 2, 2016 to address all future invoices for payment to the registered office of Ocean Rig SEZ Co. in the Cayman Islands. The paying agent under the DFH Credit Agreement was notified on January 23, 2017 to address all future invoices for payment to the registered office of Ocean Rig SEZ Co. in the Cayman Islands. The paying agent under the DOV Credit Agreement was notified on January 23, 2017 to address all future invoices for payment to the registered office of Ocean Rig SEZ Co. in the Cayman Islands. (*Id.* ¶ 29(a).)

b) Indenture Trustees, Administrative and Collateral Agents

The Indenture Trustee under the SUN Indenture was notified on February 6, 2017 to direct all notices for UDW to the registered office of Ocean Rig SEZ Co. in the Cayman Islands. The Indenture Trustee and the Collateral Agent, Registrar and Paying Agent under the DRH Indenture were notified on February 6, 2017 to direct all notices for UDW and DRH to the registered office of the Ocean Rig SEZ Co. in the Cayman Islands. The Administrative Agent and the Collateral Agent under the DFH Credit Agreement was notified on February 6, 2017 to direct all notices for UDW and DFH to the registered office of the Ocean Rig SEZ Co. in the Cayman Islands. The Administrative Agent and the Collateral Agent under the DOV Credit Agreement was notified on February 6, 2017 to direct all notices for UDW and DOV to the registered office of the Ocean Rig SEZ Co. in the Cayman Islands. (*Id.* ¶ 29(b).)

c) Investment Service Providers

Investment service providers, including Moody's Investors Service, Inveshare, Broadridge and Standard & Poor Global Ratings, were notified of UDW's change of address in November 2016 and have remitted invoices, as directed, to the company in the Cayman Islands. (*Id.* ¶ 29(c).)

d) Public Notice and General Recognition of Relocation

On September 27, 2016, UDW filed a Form 6–K report with the SEC updating the address of its principal executive offices to its registered office in the Cayman Islands. On February 6, 2017, each of the Debtors issued a press release advising that it had relocated its principal place of business to the Cayman Islands and that the address for all postal communications to the companies should be directed to Ocean Rig SEZ Co. in the Cayman Islands. Also on February 6, 2017, UDW announced that its 2017 Annual General Meeting would be held on April 24, 2017 at the company's business office in the Cayman Islands. The contact details for the Debtors on the Group's website list the Foreign Debtors' Cayman Islands address. Media reports have been published acknowledging the relocation of UDW's principal executive offices to the Cayman Islands. The Company has been served in an English legal proceeding in the Cayman Islands. (*Id.* ¶ 29(d).)

4. Location of Operations

The Foreign Debtors' subsidiaries do business throughout the world, principally on the high seas. Head office and administrative service functions for the Foreign Debtors, formerly performed by an affiliate located in Cyprus, are now performed by an affiliate, Ocean Rig SEZ Co., in the Cayman Islands. Ocean Rig SEZ Co. is ***698** licensed to operate and is located in the Maritime Park in the Special Economic Zone at Cayman Enterprise City in the Cayman Islands, where it provides office space and administrative support services to the Foreign Debtors. One of the employees of Ocean Rig SEZ Co. has her primary residence in the Cayman Islands. All of the other employees of Ocean Rig SEZ Co. have residences in the Cayman Islands. The Services Agreement between Ocean Rig SEZ Co. and the Foreign Debtors is governed by Cayman Islands law. (*Id.* ¶ 30.)

5. Location of Assets

Each of the Foreign Debtors is a holding company. The share certificates of DRH, DFH and DOV are pledged to secure the UDW Guarantees and are held by the respective collateral agents and collateral trustee in the United States. The share certificates of the subsidiary guarantors under the DRH Indenture, the DFH Credit Agreement and the DOV Credit Agreement are also held by the respective collateral agents and collateral trustee. The share certificates of other subsidiaries are unpledged and represent valuable interests in these subsidiaries' cash and rigs. These certificates are held in the Cayman Islands. (*Id.* ¶ 31.)

6. Location of Bank Accounts

Each of the Foreign Debtors has a bank account in the Cayman Islands. The paying agents for the Foreign Debtors' financial indebtedness have been instructed to address all invoices for payment due to the office of Ocean Rig SEZ Co. in the Cayman Islands. Payments to professionals have been made from the Cayman accounts, including a retainer of $250,000 paid by each of the Foreign Debtors (total $1 million) to the Foreign Debtors' U.S. restructuring counsel, Orrick, Herrington & Sutcliffe LLP. These retainers are being held in their counsel's client trust account at Citibank Private Bank in New York. (*Id.* ¶ 32.)

7. Books and records

The minute book of UDW has been maintained in the Cayman Islands since November 2016. The minute books of each of the Subsidiary Debtors have been maintained in the Cayman Islands since January 2017. (*Id.* ¶ 33.)

8. Restructuring Activities

Face-to-face creditor meetings were held in the Cayman Islands on November 21–23, 2016 and February 7–9, 2017. Numerous conference calls with creditors have been hosted by the Foreign Debtors from the Cayman Islands. The Foreign Debtors' have also met frequently in the Cayman Islands with their legal and financial advisers. (*Id.* ¶ 34.)

II. DISCUSSION

A. Standards for Recognition of Foreign Main and Nonmain Proceedings

The Second Circuit has held that foreign debtors seeking chapter 15 relief must satisfy the debtor eligibility requirements set forth in section 109(a) of the Bankruptcy Code. *See Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 247–51 (2d Cir. 2013). As explained below, each of the Foreign Debtors satisfies the requirements of section 109(a). The remaining requirements for recognition of a foreign proceeding under chapter 15 are set forth in section 1517(a). Subject to section 1506, a foreign proceeding must be recognized if the following requirements are met:

(1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;

***699** (2) the foreign representative applying for recognition is a person or body; and

(3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a); *see also In re Millard*, 501 B.R. 644, 651 (Bankr. S.D.N.Y. 2013) (stating that section 1517 provides a " 'statutory mandate' that recognition be granted upon compliance with the requirements of section 1517(a)(1), (2) and (3)") (citing *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1021 (5th Cir. 2010)); *see also In re ABC Learning Centres Ltd.*, 728 F.3d 301, 306 (3d Cir. 2013) (stating that recognition is mandatory when an insolvency proceeding meets the criteria of section 1502).

B. The Debtors Satisfy Section 109(a)

1 2 Section 109(a) 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 the Code. 11 U.S.C. § 109(a). Where a foreign debtor does not have a place of

business in the United States, the question often arises whether the foreign debtor has "property in the United States" as a condition precedent to eligibility under section 1517. *See In re Cell C Proprietary Ltd.*, Case No. 17-11735 (MG), 571 B.R. 542, 550–52, 2017 WL 3190568, at *6–7 (Bankr. S.D.N.Y. July 27, 2017). Section 109(a) does not address how much property must be present or when or how long property must have a situs in the United States. As this Court recently explained in *In re U.S. Steel Canada Inc.*, Case No. 17-11519 (MG), 571 B.R. 600, 2017 WL 3225914 (Bankr. S.D.N.Y. July 31, 2017):

> Some courts, including this one, have held that an undrawn retainer in a United States bank account qualifies as property in satisfaction of section 109(a). *See, e.g.*, [*In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361, 372–73 (Bankr. S.D.N.Y. 2014)] ("There is a line of authority that supports the fact that prepetition deposits or retainers can supply 'property' sufficient to make a foreign debtor eligible to file in the United States.") (citing *In re Cenargo Int'l PLC*, 294 B.R. 571, 603 (Bankr. S.D.N.Y. 2003)); *see also In re Berau Capital Resources Pte Ltd.*, 540 B.R. 80, 82 (Bankr. S.D.N.Y. 2015) ("The Court is satisfied that the retainer provides a sufficient basis for eligibility in this case."); *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000) (holding that a $400,000 retainer paid on behalf of the debtors to bankruptcy counsel in that case qualifies as sufficient property in the United States under section 109(a)).
>
> Further, "[c]ontracts create property rights for the parties to the contract. A debtor's contract rights are intangible property of the debtor." *Berau Capital*, 540 B.R. at 83 (citing *U.S. Bank N.A. v. Am. Airlines, Inc.*, 485 B.R. 279, 295 (Bankr. S.D.N.Y. 2013), *aff'd*, 730 F.3d 88 (2d Cir. 2013)). Those property rights can be and typically are tied to the location of the governing law of the contract. *See id.* at 84 (holding that the situs of intangible property rights governed by New York law was New York). Accordingly, debt subject to a New York governing law clause and a New York forum selection clause constitutes property in the United States. *See In re Inversora Eléctrica de Buenos Aires S.A.*, 560 B.R. 650, 655 (Bankr. S.D.N.Y. 2016) ("[D]ollar-denominated debt subject to New York governing law and a New York forum selection clause is independently sufficient to form the basis for jurisdiction.") (citation omitted); *Berau Capital*, 540 B.R. at 84 ("The Court concludes that the presence of the New York choice of law and forum selection ***700** clauses in the Berau indenture satisfies the section 109(a) 'property in the United States' eligibility requirement.") (footnote omitted).

Id. at 609–11, 2017 WL 3225914 at *7–8; *see also In re Suntech Power Holdings Co.*, 520 B.R. 399, 412–13 (Bankr. S.D.N.Y. 2014) (concluding that establishment of a bank account in New York prior to commencement of the chapter 15 proceeding was sufficient to satisfy section 109(a)); *In re Paper I Partners, L.P.*, 283 B.R. 661, 674 (Bankr. S.D.N.Y. 2002) (finding that debtors' maintenance of original business documents in the United States constituted "property in the United States" under section 109).

In *Berau Capital*, 540 B.R. at 83, this Court held that New York governing law and forum selection clauses in a debtor's indenture satisfied the "property in the United States" requirement in section 109(a). *See id.* at 84 ("The Court concludes that the presence of the New York choice of law and forum selection clauses in the Berau indenture satisfies the section 109(a) 'property in the United States' eligibility requirement.").

3 The Foreign Debtors satisfy section 109(a)'s requirement of property in the United States. Each of the four Foreign Debtors paid its New York counsel a separate $250,000 retainer, for a total of $1 million, currently held in counsel's client trust account in New York, where they will remain pending final billing in these proceedings. (Kandylidis Decl. ¶ 32; Appell Declaration ¶ 32(f).) The indebtedness that is the subject of the Debtors' restructuring efforts consists of approximately $4.5 billion face amount of U.S. dollar denominated debt, with approximately $3.7 billion outstanding on the Petition Date. (*Id.* at ¶ 6.) This debt is governed by four instruments, each of which was admitted in evidence at the hearing (PX–11, PX–12, PX–13 and PX–14), and each of those debt instruments is governed by New York law. (PX–11 § 12.06, PX–12 § 13.06, PX–13 § 6, and PX–14 § 10.08.) The two term loan agreements, accounting for $3.2 billion face amount of the $4.5 billion total indebtedness, include exclusive New York forum selection provisions. (PX–13 § 6, PX–14 § 10.08; *see also* Kandylidis Declaration ¶ 6.)

The Foreign Debtors' debt instruments governed by New York law also satisfy the venue requirements for these proceedings in the Southern District of New York. The Foreign Debtors have no substantial assets in the United States other than the New York law governed debt. The venue requirement in 28 U.S.C. § 1410 to maintain these chapter 15 cases in the Southern District of New York is satisfied. *See Berau Capital*, 540 B.R. at 82 n.1.

C. The Verified Petition Meets the Requirements of Section 1515

These chapter 15 cases were properly commenced in accordance with sections 1504, 1509 and 1515. The Verified Petition for recognition of foreign proceedings was filed pursuant to section 1515(a), and were accompanied by all documents and information required by sections 1515(b) and (c) and the relevant Bankruptcy Rules.

D. Each of the JPLs Qualifies as a "Foreign Representative"

A chapter 15 case is commenced by the filing of a petition for recognition (and related documents) by the "foreign representative." *See* 11 U.S.C. 1504, 1509(a), 1515(a). A bankruptcy court may presume that the person petitioning for chapter 15 recognition is a foreign representative if the decision or certificate from the foreign court so indicates. 11 U.S.C. § 1516(a). The Bankruptcy Code defines "foreign representative" as "a person or body, including ***701** a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24).

4 The Cayman Court appointed the JPLs as "the duly authorised foreign representative[s] of the [Foreign Debtors]" and authorized the JPLs "to seek relief under Chapter 15 of Title 11 of the United States Bankruptcy Code, and to take such steps arising in connection therewith that the JPLs may consider appropriate." (PX–3 (the "Cayman Orders") ¶ 3.) The Cayman Court granted the JPLs the power to "seek recognition of their appointment in any jurisdiction the JPLs deem necessary." (*Id.* ¶ 5(e); *see also* Reynolds Declaration ¶ 53.) The JPLs are each proper "foreign representatives" of the Foreign Debtors within the meaning of section 101(24). (*See also* Appell Declaration ¶¶ 23–26; Reynolds Declaration ¶¶ 52–53.)

E. The Cayman Proceedings Are "Foreign Proceedings"

The Cayman Proceedings are "foreign proceedings" as required for recognition under section 1517(a) of the Bankruptcy Code. *See* 11 U.S.C. 1517(a)(1). A "foreign proceeding" is defined as

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

11 U.S.C. § 101(23).

5 The Cayman Provisional Liquidation Proceedings and the proposed Cayman Schemes are "collective judicial proceedings" commenced under Parts V and IV, respectively, of the Cayman Companies Law. The statute is applicable to corporate insolvencies (in the case of the provisional liquidations) or the adjustment of debt (in the case of the contemplated schemes)—it is a "law relating to insolvency or adjustment of debt." (*See* Reynolds Decl. ¶ 51.) Under the Cayman Companies Law, a Cayman Court may (i) give regard to the wishes of creditors for all matters related to the winding up of an insolvent company, (ii) make all debts payable on a contingency basis and all present or future, certain or contingent claims against the company admissible in the proceeding, (iii) appoint a liquidator who is required to convene meetings of the creditors, and (iv) apply the property of the debtor in satisfaction of its liabilities *pari passu* and distribute such property to creditors according to their rights and interests. (*See* SX–3 (the "Companies Law") §§ 105, 115, 139(1), 140(1).) The JPLs are "[o]fficers of the [Cayman] Court," and subject to the control of the Cayman Court. The JPLs or any creditor may apply to the Cayman Court for an order for the continuation of the winding up under the supervision of the Cayman Court. (*See* Companies Law §§ 108(2), 104(4), 131–133; *see also* Reynolds Decl. ¶¶ 31, 34.) A Cayman debtor's assets and affairs are subject to the control or supervision of the Cayman Court in both provisional liquidation proceedings and proceedings seeking sanctioning of schemes of arrangement. (*See id.* ¶ 51.) The purpose of the Cayman Provisional Liquidation Proceedings is reorganization or, should the reorganization fail, liquidation; the purpose of the contemplated Cayman Schemes is reorganization by way of an adjustment of debt. (*See generally* Cayman Orders; Reynolds Decl. ¶ 51.)

This Court and others have previously held that insolvency or debt adjustment proceedings (including provisional liquidations) ***702** and schemes of arrangement under Cayman

Islands law qualify as foreign proceedings under chapter 15 of the Bankruptcy Code. *See, e.g.*, *In re Suntech Power Holdings Co.*, 520 B.R. 399 (Bankr. S.D.N.Y. 2014) (provisional liquidation); *In re Platinum Partners Value Arbitrage Fund et al.*, No. 16–12925 (SCC) (Bankr. S.D.N.Y. Nov. 23, 2016) (ECF Doc. # No. 27) (official liquidation); *In re Ardent Harmony Fund, Inc.*, No. 16–12282 (MG) (Bankr. S.D.N.Y. Sept. 1, 2016) (official liquidation) (ECF Doc. # 17); *In re Caledonian Bank Ltd.*, No. 15–10324 (MG) (Bankr. S.D.N.Y. Mar. 17, 2015) (ECF Doc. # 39) (official liquidation); *In re LDK Solar Co.*, No. 14–12387 (PJW) (Bankr. D. Del. Nov. 21, 2014) (ECF Doc. # 43, 44) (provisional liquidation and scheme of arrangement). In response to a question from the Court during trial, Wiener could not point to any case in which a U.S. bankruptcy court found that a Cayman liquidation or scheme proceeding did not satisfy the requirements of section 101(23) as a collective insolvency or debt adjustment proceeding subject to judicial control.

F. The Cayman Proceedings Are “Foreign Main Proceedings”

The Cayman Proceedings are “foreign main proceedings” within the meaning of section 1502(4) of the Bankruptcy Code because each Debtor's COMI is the Cayman Islands.

1. Each Debtor's COMI is in the Cayman Islands

6 The Bankruptcy Code defines a “foreign main proceeding” as “a foreign proceeding pending in the country where the debtor has the center of its main interests.” *See* 11 U.S.C. § 1502(4). A foreign proceeding “shall be recognized” as a foreign main proceeding if it is pending where the debtor has its COMI. [6] *See* ***703** 11 U.S.C. § 1517(b)(1). While the Bankruptcy Code does not define “center of main interests,” section 1516(c) provides that, in the absence of evidence to the contrary, a debtor's registered office or habitual residence “is presumed to be the center of the debtor's main interests.” *See* 11 U.S.C. § 1516(c); *see also* *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 76 (Bankr. S.D.N.Y. 2011), *aff'd*, 474 B.R. 88 (S.D.N.Y. 2012) (“The party seeking to rebut a statutory presumption must present enough evidence to withstand a motion for summary judgment”); *In re ABC Learning Centres Ltd.*, 445 B.R. 318, 333 (Bankr. D. Del. 2010), *aff'd*, 728 F.3d 301 (3d Cir. 2013) (holding that debtor's registered jurisdiction was its COMI where no objection was raised or evidence presented rebutting the section 1516 presumption). The legislative history indicates that this presumption was “designed to make recognition as simple and expedient as possible” in cases where COMI is not controversial. H. Rep. No. 109–31, Pt. 1, 109th Cong., 1st Sess. 112–13 (2005). “This presumption is not a preferred alternative where there is a separation between a corporation's jurisdiction of incorporation and its real seat.” *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 128 (emphasis added) (citation omitted). In this case, the Foreign Debtors shifted their COMI from the RMI to the Cayman Islands. The Court finds that the Foreign Debtors' COMI shift was done for proper purposes to facilitate a value-maximizing restructuring of the Foreign Debtors' financial debt. The Foreign Debtors' COMI shift to the Cayman Islands was “real,” satisfying the factors or indicia considered by courts in determining a foreign debtor's COMI.

Courts have identified several additional factors that may be considered in a COMI analysis, including:

> the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.

In re SPhinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006); *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 128. While each of these factors is a “helpful guide” in determining a debtor's COMI, the factors are not exclusive, and none of the factors is required nor dispositive. *See* *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013) (explaining that “consideration of these specific factors is neither required nor dispositive” and warning against mechanical application).

7 8 The Second Circuit and other courts often examine whether a chapter 15 debtor's COMI would have been ascertainable to interested third parties, finding “the relevant principle ... is that the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties .... Among other factors that may be considered are the location of headquarters, decision-makers, assets, creditors, and the

law applicable to most disputes." *704 In re Fairfield Sentry, 714 F.3d at 130. As the Second Circuit explained, by examining factors "in the public domain," courts are readily able to determine whether a debtor's COMI is in fact "regular and ascertainable [and] not easily subject to tactical removal." *Id.* at 136–37; *see also In re British Am. Ins. Co.*, 425 B.R. 884, 912 (Bankr. S.D. Fla. 2010) ("The location of a debtor's COMI should be readily ascertainable by third parties."); *In re Betcorp Ltd.*, 400 B.R. 266, 289 (Bankr. D. Nev. 2009) (looking to ascertainability of COMI by creditors).

9 In assessing these factors, a chapter 15 debtor's COMI is determined as of the filing date of the chapter 15 petition, without regard to the debtor's historic operational activity. *See In re Fairfield Sentry*, 714 F.3d at 137 ("[A] debtor's COMI should be determined based on its activities at or around the time the chapter 15 petition is filed, as the statutory text suggests."). However, as discussed in greater detail below, to the extent that a debtor's COMI has shifted prior to filing its chapter 15 petition, courts may engage in a more holistic analysis to ensure that the debtor has not manipulated COMI in bad faith.

The JPLs submit that, as of the Petition Date, each Debtor's "center of main interests" within the meaning of chapter 15 of the Bankruptcy Code was in the Cayman Islands and that COMI was not manipulated prior to the filing in bad faith. As explained more fully below, the Court agrees. The Court concludes that the Cayman Proceedings are foreign main proceedings based on the facts discussed at considerable length in Section F. of the Background section (I.) above. Those facts establish that, among other things, the Foreign Debtors (i) conduct their management and operations in the Cayman Islands, (ii) have offices in the Cayman Islands, (iii) hold their board meetings in the Cayman Islands, (iv) have officers with residences in the Cayman Islands, (v) have bank accounts in the Cayman Islands, (vi) maintain their books and records in the Cayman Islands, (vii) conducted restructuring activities from the Cayman Islands, (viii) provided notices of relocation to the Cayman Islands to paying agents, indenture trustees, administrative and collateral agents, and investment service providers, and (ix) filed a Form 6–K with the SEC showing that their office was in the Cayman Islands.

2. Each Debtor Established its COMI in the Cayman Islands Prior to the Petition Date

As described above, the Foreign Debtors are holding companies of the Group and conduct their business throughout the world, principally on the high seas. (*See* Kandylidis Decl. ¶ 30.) Accordingly, the nature of the Group's business and the mobility of their assets complicate the COMI analysis.

However, the Foreign Debtors have engaged in various activities supporting their COMI in the Cayman Islands for almost a year—beginning with the incorporation of UDW in the Cayman Islands in April 2016. Among other things, the Foreign Debtors have (i) hosted meetings with creditors and advisors in relation to the proposed restructuring in the Cayman Islands, (ii) provided specific notice of relocation to paying agents, parties to the SUN Indenture, DRH Indenture, DFH Credit Agreement and DOV Credit Agreement, and investment service providers, and, perhaps most importantly, (iii) provided public notice and general recognition of relocation through UDW's Form 6–K report with the SEC, press releases and media reports. (*See generally* Kandylidis Decl. ¶¶ 23–34.) Additionally, the Foreign Debtors' boards of directors and officers have been actively managing the Debtors from the Cayman *705 Islands by, among other things, convening regular and special meetings in the Cayman Islands over the last few months. (*See id.* ¶¶ 24–26.) The Cayman Orders specifically grant them the authority "to continue to exercise all powers of management conferred on them by the [Foreign Debtors] and conduct the ordinary, day-to-day, business operations of the [Foreign Debtors]." (Cayman Orders ¶ 6.) Courts have found activities such as these to establish a debtor's COMI. *See In re Suntech*, 520 B.R. at 418 ("Centered in the Cayman Islands, the JPLs took the necessary steps to centralize the administration of the Foreign Proceeding there. They published notices of the Foreign Proceeding directing interested parties to contact [management] in the Cayman Islands. They changed the Debtor's address on SEC filings and informed the Debtor's lenders to send future notices to their offices in the Cayman Islands. They conducted Board meetings and creditor meetings, largely through telephonic participation, from the Cayman Islands and appointed a Cayman Island[s] director."). Thus, the Foreign Debtors' COMI was clearly the Cayman Islands before and on the Petition Date. (*See also* Appell Decl. ¶ 31.)

Moreover, it does not matter that the Subsidiary Debtors are registered as non-resident corporations in the RMI. While section 1516(c) creates a presumption that a debtor's COMI is the situs of its registered office, such presumption is rebuttable and should only be invoked "[i]n the absence of evidence to the contrary." 11 U.S.C. § 1516(c); *see also In re*

Fairfield Sentry Ltd., 440 B.R. 60, 64 (Bankr. S.D.N.Y. 2010) ("[A]s the Objectors have advanced evidence in support of their position that New York is the proper COMI, the Court cannot rely solely upon this presumption, but rather must consider all of the relevant evidence."); *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. at 335 ("However, section 1516(c) creates no more than a rebuttable evidentiary presumption, which may be rebutted notwithstanding a lack of party opposition.... Such a rebuttable presumption at no time relieves a petitioner of its burden of proof/risk of non-persuasion.") (citation omitted); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48–49 (Bankr. S.D.N.Y. 2008) (declining to presume that the debtor's COMI is where its registered office is located because there is enough "evidence to the contrary" to rebut section 1516(c)). The Subsidiary Debtors are *also* registered as foreign companies under the Companies Law in the Cayman Islands where, together with UDW, they maintain offices. (*See* Kandylidis Decl. ¶ 4.) Thus, section 1516(c) does not indicate that the Subsidiary Debtors' COMI is the RMI.

It also does not matter that UDW is classified as "exempted" under the Cayman Companies Law, even though "exempted" company status appears to limit that company's activities in the Cayman Islands. Section 163 of the Cayman Companies Law provides: "Any proposed company applying for registration under this Law, *the objects of which are to be carried out mainly outside the Islands*, may apply to be registered as an exempted company." (Companies Law § 163 (emphasis added); *see also id.* § 174 (prohibiting exempted companies from trading in the Cayman Islands except in furtherance of its business outside the Cayman Islands).) The vast majority of Cayman companies are incorporated as exempted companies under the Companies Law. (*See* Reynolds Decl. ¶ 16.) While exempted companies are prohibited from *trading* in the Cayman Islands, except in furtherance of their business outside the Cayman Islands, they may still be *managed* from there:

> ***706** Section 174 clarifies that it is not to be construed so as to prevent the exempted company from effecting and concluding contracts in the Cayman Islands and exercising in the Cayman Islands all of its powers necessary for the carrying on of its business outside the Cayman Islands. An exempted company can therefore, for example, maintain premises and employ staff and appoint directors and other agents who are resident in the Cayman Islands, in furtherance of the company's business outside the Cayman Islands.

Id. ¶ 18; *cf. In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. at 338 (mentioning the debtors' status as exempted companies in discussing the debtors' lack of activities in the Cayman Islands); *In re Basis Yield*, 381 B.R. at 49 (finding that the debtor was not entitled to the presumption under section 1516(c) because "there is at least a *question* in the Court's mind as to whether this exempted company ... would have its COMI in the Cayman Islands") (emphasis added). Because the business of the Ocean Rig Group is primarily conducted on the high seas, the Court finds that the Group's business is generally conducted outside of any jurisdiction in which it was managed. Accordingly, the Cayman Islands is the site of the Debtors' "main interests"—it is the site where their business is run.

No evidence in the record suggests any other potential location for the Foreign Debtors' COMI. First, the RMI is not the COMI for the Foreign Debtors—even the Subsidiary Debtors. The trial evidence shows that the Foreign Debtors never conducted operations or directed their affairs from the RMI; they never maintained administrative, management or executive offices in the RMI; never had any directors who were residents or citizens of the RMI; and never held a meeting of its directors or shareholders in the RMI. (*See* Kandylidis Decl. ¶¶ 4, 25.)

Second, although UDW was previously a tax resident of Cyprus, it has not been a tax resident there since December 2016 and it no longer maintains any presence there. (*See id.* ¶ 24.) The mobile nature of the Foreign Debtors' business, and the majority of COMI factors, point to the Cayman Islands as their COMI. The Court expressly finds that the Foreign Debtors had their COMI in the Cayman Islands before the Petition Date and that it remains there today. *See In re Millennium Glob.*, 458 B.R. at 79 ("In addition to the fact that Bermuda was the only COMI reasonably ascertainable by third parties, *there is insufficient evidence in this case that establishes the COMI in a location other than Bermuda.... On this record, the proof does not establish an alternative COMI*. Since every entity has a center of main interests, the fact that the evidence does not disclose a COMI other than Bermuda operates in favor of granting recognition of the Bermuda proceedings as foreign main proceedings.") (emphasis added) (internal citation omitted).

3. The Debtors Have Not Manipulated COMI in Bad Faith

"In any proceeding for foreign recognition, of great concern to the Court is the potential for mischief and COMI manipulation.... Thus, even courts that have recently relegated the COMI focus to the time of the petition for recognition ... would likely support a totality of the circumstances approach where appropriate." *In re Fairfield Sentry*, 440 B.R. at 65–66 (internal citations omitted). The Court finds that the Foreign Debtors purposefully established the Cayman Islands as their COMI before the Petition Date. The Foreign Debtors' actions in doing so were not taken in bad faith. There is no evidence in the record pointing to any "insider exploitation, untoward manipulation, [and] overt ***707** thwarting of third party expectations," that would support denying recognition here. *See id.* The evidence establishes that the Foreign Debtors had a legitimate, good faith purpose for shifting their COMI from the RMI to the Cayman Islands.

Although UDW was a non-resident corporation incorporated in the RMI until April 2016, and DRH, DFH and DOV are still non-resident corporations in the RMI, the RMI has not adopted a bankruptcy law or other insolvency statute. (*See Stipulation as to Republic of Marshall Islands Law* (ECF Doc. # 115) ("The RMI has not adopted the federal Bankruptcy Code, has no bankruptcy or insolvency statute currently in force, and has no statutory, regulatory, or administrative provisions regarding corporate restructuring. In addition, there is no judicial process under RMI law equivalent to a United States Chapter 11 or a Cayman scheme of arrangement.").) The only provisions under RMI law that address financially distressed corporations—the Business Corporations Act and the Uniform Foreign Money–Judgments Recognition Act—contemplate dissolution and, therefore, any insolvency process in the RMI would invariably result in a value-destroying liquidation process. Accordingly, the Foreign Debtors' COMI shift to the Cayman Islands was done for legitimate reasons, motivated by the intent to maximize value for their creditors and preserve their assets. The Court finds that the Foreign Debtors' COMI was not manipulated in bad faith.

G. Recognition of the Cayman Proceedings Would Not Be Manifestly Contrary to United States Policy

10 11 Section 1506 provides that a bankruptcy court may decline to grant relief requested if the action would be "manifestly contrary to the public policy of the United States." 11 U.S.C. §§ 1506, 1517(a). This public policy exception is narrowly construed. *In re Sino–Forest Corporation*, 501 B.R. 655, 665 (Bankr. S.D.N.Y., 2013) (explaining that section 1506's "public policy exception is narrowly construed"); *In re Toft*, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011) ("[T]hose courts that have considered the public policy exception codified in [section] 1506 have uniformly read it narrowly and applied it sparingly."); *see also Armada (Singapore) Pte Ltd. v. Shah (In re Ashapura Minechem Ltd.)*, 480 B.R. 129, 139 (S.D.N.Y. 2012); *In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006). Granting recognition of the Cayman Proceedings advances the public policy objectives of sections 1501(a) and 1508; nothing that has transpired here trenches upon the policy concerns underlying section 1506.

III. CONCLUSION

For the reasons explained above, following an evidentiary hearing, the Court finds and concludes that the Foreign Representatives established by a preponderance of the evidence that each of the four Foreign Debtors' proceedings pending in the Cayman Court is entitled to recognition as a foreign main proceeding.

If the Cayman Court sanctions the Foreign Debtors' schemes of arrangement, upon application of the Foreign Representatives, the Court will proceed to determine whether each scheme of arrangement should be recognized and enforced by this Court.[7]

***708** A separate order recognizing the Foreign Debtors' Cayman Islands Proceedings as foreign main proceedings will be entered.

All Citations

570 B.R. 687

Footnotes

1 The specific terms of the four schemes of arrangement are not at issue at this time. The only issues currently before the Court concern recognition of the

four Cayman Court proceedings.

2 The Background section includes the Court's findings of fact pursuant to FED. R. BANKR. P. 7052, which incorporates FED. R. CIV. P. 52.

3 Reynolds is a lawyer who practices law in the Cayman Islands. Her declaration was offered and admitted in evidence supporting an explanation of Cayman Islands law pursuant to FED. R. CIV. P. 44.1.

4 The parent holding company of the fourth operating division, Drillship Alonissos Shareholders Inc. ("DAS") is not a debtor herein or a part of the restructuring.

5 The National Bankruptcy Conference has recommended adoption of a new chapter 16 of the Bankruptcy Code that would permit restructuring of bond and credit agreement debt, similar to foreign schemes of arrangement. See http://nbconf.org/our-work/2015 December 18 Proposed Amendments to Bankruptcy Code to Facilitate Restructuring of Bond and Credit Agreement Debt.

6 The construct of the "center of main interests" was first used in insolvency laws in countries in the European Union. UNCITRAL's Model Law on Cross–Border Insolvency ("Model Law") incorporated the construct in the Model Law. Article 2 (Definitions) of the Model Law provides that "*(b)* 'Foreign main proceeding' means a foreign proceeding taking place in the State where the debtor has the centre of its main interests ...." The UNCITRAL Guide to Enactment of the Model Law explains that "[t]he Model Law does not define the concept 'centre of main interests'. However, an explanatory report (the Virgos–Schmit Report), prepared with respect to the European Convention, provided guidance on the concept of 'main insolvency proceedings' and notwithstanding the subsequent demise of the Convention, the Report has been accepted generally as an aid to interpretation of the term 'centre of main interests' in the EC Regulation. Since the formulation 'centre of main interests' in the EC Regulation corresponds to that of the Model Law, albeit for different purposes ..., jurisprudence interpreting the EC Regulation may also be relevant to interpretation of the Model Law." *UNCITRAL Model Law on Cross Border Insolvency with Guide to Enactment and Interpretation* ¶ 82 (2014).

The terms "center of main interests" is used but not defined in chapter 15 of the Bankruptcy Code. *See* 11 U.S.C. §§ 1502(4), 1516(c), 1517(b)(1). "Center of main interests," included within chapter 15, is not used in other chapters of the Bankruptcy Code; eligibility to file under chapters 7 or 11, for example, is controlled by section 109(a), discussed elsewhere in this Opinion. Section 1508 directs a court interpreting chapter 15 to "consider its international origin, and the need to promote application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 U.S.C. § 1508. It is therefore appropriate for U.S. bankruptcy courts to consider interpretations from other international jurisdictions that have adopted the Model Law. The Cayman Islands has not adopted the Model Law, and it does not appear that center of main interests provides a standard for eligibility to file in the Cayman Islands. To the extent that a determination of center (or "centre," as spelled elsewhere) of main interests is relevant to eligibility to file proceedings in other countries, and has been decided by the foreign court, it may well be appropriate for a U.S. bankruptcy court to give deference or comity to the determination of the foreign court in the jurisdiction in which the foreign proceeding is filed. But since the Cayman Court has not decided the issue here, no issue of deference or comity arises.

7 Nothing in this Opinion addresses any of the issues that may need to be resolved if the Cayman Court sanctions the four schemes and this Court is asked to recognize and enforce the schemes. Highland, for one, has indicated that it will oppose recognition and enforcement of the UDW scheme if it is sanctioned by the Cayman Court. At the same time, nothing in this Opinion is intended to express any reasons why this Court will not recognize and enforce any of the schemes if they are sanctioned by the Cayman Court.

End of Document

UBS's arguments and concludes that UBS has failed to carry its burden to persuade this Court that abstention is warranted. Therefore, the Court will not abstain from hearing this case under permissive abstention principles.

C. The Court Has Authority to Enter This Order, Which Is Not a Final Order

[14] There is a split in authority whether a motion to remand is itself a "core" proceeding, or whether the "proceeding" referenced in 28 U.S.C. § 157 is the underlying lawsuit subject to a remand motion. *See Residential Capital,* 488 B.R. at 571–72 (discussing split in authority). In two prior cases, without resolving the issue, this Court submitted proposed findings of fact and conclusions of law to the district court, recommending remand of a state court action. *See id.*; *Sealink Funding Ltd. v. Deutsche Bank AG (In re Residential Capital, LLC),* 489 B.R. 36, 43–44 (Bankr.S.D.N.Y.2013). In those cases, where motions to withdraw the reference were pending, this Court's decision to grant the remand motions would have removed the cases from federal court on a final basis, rendering the withdrawal of the reference motions moot. *See Residential Capital,* 488 B.R. at 572; *Residential Capital,* 489 B.R. at 43–44. This Order *denying* the Remand Motion, however, is an interlocutory order, and not a final judgment, since the case will continue in front of this Court. *See, e.g., O'Toole v. McTaggart (In re Trinsum Grp., Inc.),* 467 B.R. 734, 740 (Bankr.S.D.N.Y.2012) ("In adversary proceedings, orders dismissing fewer than all claims are considered to be interlocutory."); *see also LTV Steel Co., Inc. v. United Mine Workers of Am. (In re Chateaugay Corp.),* 922 F.2d 86, 90 (2d Cir. 1990) ("Orders in bankruptcy cases may be immediately appealed if they resolve discrete disputes within the larger case. The disposition of a discrete dispute is generally considered to be the resolution of an adversary proceeding within the bankruptcy action." (internal citations omitted)). Therefore, the Court has authority to enter this Order, and is not limited to submitting proposed findings of fact and conclusions of law to the district court. *See Trinsum Grp.,* 467 B.R. at 740 (holding that, after *Stern,* bankruptcy judges have the authority to enter interlocutory orders in non-core proceedings and in core proceedings as to which the bankruptcy court may not enter final orders or judgment consistent with Article III absent consent). This Order is still subject to discretionary review by the district court under 28 U.S.C. § 158(a)(3). *See id.* at 741.

III. CONCLUSION

For all of the foregoing reasons, the Motion is **DENIED.**

IT IS SO ORDERED.

IN RE: REDE ENERGIA S.A.,[1] Debtor in a Foreign Proceeding.

Case No. 14-10078 (SCC)

United States Bankruptcy Court,
S.D. New York.

Signed August 27, 2014

Background: Foreign representatives of debtors that were the subject of reorgani-

1. The last four digits of the Debtor's Brazilian Corporate Taxpayer Registration Number are 01–49. The Debtor's executive headquarters are located at Avenida Paulista, 2439, 5th

zation case which was pending in Brazil, and which had been recognized as foreign main proceeding, requested relief in aid of plan that had been confirmed in foreign bankruptcy proceedings.

Holdings: The Bankruptcy Court, Shelley C. Chapman, J., held that:

(1) relief requested by foreign representatives, consisting of order from United States Bankruptcy Court enforcing the foreign plan confirmation order, enjoining acts in contravention of order, and requiring action necessary to carry out terms of plan, while not specifically enumerated in provision of Chapter 15 dealing with relief that may be granted upon recognition, was type of relief appropriately granted under this provision;

(2) relief was also available as additional assistance under provision of Chapter 15 allowing such assistance, consistent with principles of comity, if certain enumerated fairness factors were satisfied; and

(3) requested relief could not be denied as "manifestly contrary to United States public policy."

Relief granted.

1. Bankruptcy ⚷2341

Central tenet of Chapter 15 of the Bankruptcy Code is the importance of comity in cross-border insolvency proceedings.

2. Bankruptcy ⚷2341

Relief granted to foreign representative under provision of Chapter 15 authorizing court to provide any "additional assistance" available under the Bankruptcy Code or under "other laws of the United States" must be consistent with principles of comity, and must satisfy fairness considerations as set forth in this provision. 11 U.S.C.A. § 1507.

3. Bankruptcy ⚷2341

Chapter 15 of the Bankruptcy Code provides courts with broad, flexible rules to fashion relief that is appropriate to effectuate objectives of the Chapter in accordance with comity.

4. Bankruptcy ⚷2341

Assistance available to foreign representative upon recognition of foreign proceeding is largely discretionary and turns on subjective factors that embody principles of comity. 11 U.S.C.A. §§ 1507, 1521.

5. Bankruptcy ⚷2341

Relief granted in foreign proceeding and relief available in the United States in proceeding ancillary to foreign case under Chapter 15 of the Bankruptcy Code need not be identical.

6. Bankruptcy ⚷2341

Principle of comity, as embodied in Chapter 15 of the Bankruptcy Code, has never meant categorical deference to foreign proceedings; implicit in the concept is that deference should be withheld where appropriate to avoid violation of laws, public policies or rights of citizens of the United States.

7. Bankruptcy ⚷2341

All relief under Chapter 15, including the additional relief or assistance available following recognition of foreign proceeding, is subject to limitation that permits court to decline to take any action if such action would be "manifestly contrary" to public policy of the United States. 11 U.S.C.A. §§ 1506, 1507, 1521.

Floor, Cerqueira Cesar, City of São Paulo, State of São Paulo, Brazil. The Debtor was formerly known as Caiuá Serviços de Eletricidade S.A. and Rede Empresas de Energia Elétrica S.A.

8. Bankruptcy ⚷2341

"Public policy" exception to Chapter 15 is drafted in narrow terms to apply only when requested relief would be "manifestly contrary" to public policy of the United States and is to be applied sparingly. 11 U.S.C.A. § 1506.

9. Bankruptcy ⚷2341

Foreign judgments are generally granted comity in proceeding ancillary to foreign case under Chapter 15 of the Bankruptcy Code, as long as the proceedings in foreign court were "according to the course of a civilized jurisprudence," i.e., fair and impartial.

10. Bankruptcy ⚷2341

Relief requested by foreign representatives of debtors that were the subject of reorganization case which was pending in Brazil and which had been recognized as foreign main proceeding, consisting of order from United States Bankruptcy Court enforcing the foreign plan confirmation order, enjoining acts in contravention of order, and requiring indenture trustee to take action necessary to carry out terms of confirmed plan by executing assignment and making payments to beneficial noteholders, while not specifically enumerated in provision of Chapter 15 dealing with relief that may be granted upon recognition, was type of relief that was available prior to enactment of Chapter 15 in case ancillary to foreign proceeding, as well as type of relief routinely granted under United States bankruptcy law, and was appropriately granted under this provision; refusal to grant such relief would mean that Brazilian reorganization plan, which had already been substantially consummated, could not be fully implemented, and that distributions to noteholders would be prevented or substantially delayed, simply to allow objecting party another chance to renegotiate terms of plan with no evidence that its efforts in this regard would be successful. 11 U.S.C.A. § 1521.

11. Bankruptcy ⚷2341

Relief requested by foreign representatives of debtors that were the subject of reorganization case which was pending in Brazil and which had been recognized as foreign main proceeding, consisting of order from United States Bankruptcy Court enforcing the foreign plan confirmation order, enjoining acts in contravention of order, and requiring indenture trustee to take action necessary to carry out terms of confirmed plan by executing assignment and making payments to beneficial noteholders, was available as additional assistance under provision of Chapter 15 allowing such assistance, consistent with principles of comity, if certain enumerated fairness factors were satisfied; creditors were given access to information and a meaningful opportunity to be heard in the Brazilian bankruptcy proceeding, Brazilian law provided a comprehensive procedure for orderly and equitable distribution of debtors' assets to creditors, there was no prejudice to United States creditors in processing of claims in the Brazilian bankruptcy proceeding nor any evidence of preferential or fraudulent property distributions, and Brazilian law, while not recognizing an "absolute priority" rule identical to that applicable under United States law to prevent equity holders from retaining interest if creditors were not paid in full, provided for distribution of debtors' assets in manner "substantially in accordance with United States law." 11 U.S.C.A. § 1507.

12. Bankruptcy ⚷2341

Foreign representative generally satisfies the "just treatment" factor, as required for grant of additional assistance under provision of Chapter 15 providing for such relief, consistent with principles of comity, only if certain enumerated fairness factors are met, upon showing that the applicable foreign law provides a comprehensive procedure for the orderly and equitable distribution of debtor's assets among all of its creditors. 11 U.S.C.A. § 1507(b)(1).

13. Bankruptcy ⚷2341

Courts hold that foreign proceeding does not satisfy the "just treatment" factor, as required for grant of additional assistance under provision of Chapter 15 providing for such relief, consistent with principles of comity, only if certain enumerated fairness factors are met, where the foreign proceeding fails to provide creditors with access to information and an opportunity to be heard in meaningful manner, or where the proceeding would not recognize creditor as claim holder. 11 U.S.C.A. § 1507(b)(1).

14. Bankruptcy ⚷2341

Foreign insolvency regime need not contain an "absolute priority" rule identical to that of United States bankruptcy law in order for distribution of proceeds of foreign debtor's property under this foreign insolvency regime to be "substantially in accordance with the Bankruptcy Code," as required for grant of additional assistance under provision of Chapter 15 providing for such relief, consistent with principles of comity, only if certain enumerated fairness factors are met. 11 U.S.C.A. § 1507(b)(4).

15. Bankruptcy ⚷2341

Relief requested by foreign representatives of debtors that were the subject of reorganization case which was pending in Brazil and which had been recognized as foreign main proceeding, consisting of order from United States Bankruptcy Court enforcing the foreign plan confirmation order, enjoining acts in contravention of order, and requiring indenture trustee to take action necessary to carry out terms of confirmed plan, could not be denied under public policy exception to Chapter 15 as "manifestly contrary to United States public policy"; neither the process by which debtors' assets were marketed, which involved competitive bidding and resulted in evolution and improvement of return to unsecured creditors, nor Brazilian court's decision to substantively consolidate debtors for plan purposes, relief that may, in appropriate circumstances, be granted in Chapter 11 cases under United States law, rendered the Brazilian proceedings manifestly contrary to United States law, and mere fact that plan was crammed down, on acceptance of single secured creditor, while equity holders retained interest in reorganized debtors and unsecured creditors received less than full payment on their claims, was insufficient to trigger application of public policy exception, especially where equity holders' interest would be vastly diluted upon confirmation, and where plan, which was accepted by 66.34% in amount and 47.7% in number of unsecured creditors, fell short only 0.3% in amount and 2.3% in number of what would have been required under the Bankruptcy Code to find that plan was accepted by unsecured class. 11 U.S.C.A. § 1506.

16. Bankruptcy ⚷2341

Bankruptcy court will not decline, on public policy grounds, to extend comity and grant additional relief to foreign representative of debtor that is the subject of bankruptcy proceedings in foreign country simply because foreign bankruptcy law is not identical to United States bankruptcy law. 11 U.S.C.A. § 1506.

17. Bankruptcy ⚷2341

Mere fact that, under reorganization plan confirmed in Brazilian bankruptcy proceedings, certain unsecured creditors, concessionaires that provided utility service to consumers in Brazil and that were barred by Brazilian law from filing for bankruptcy relief, would receive full payment on their claims, while other unsecured creditors would receive only a 25% distribution on their claims, did not preclude grant of foreign representatives' request for post-recognition assistance in aid of plan, as allegedly being manifestly contrary to United States public policy; such disparate treatment was necessary as result of law validly adopted by Brazilian government in exercise of its regulatory powers to preclude concessionaires from filing for bankruptcy, and different treatment of groups of unsecured creditors was not uncommon under United States bankruptcy law. 11 U.S.C.A. § 1506.

18. Bankruptcy ⚷2341

Party challenging relief requested by foreign representatives of debtors that were the subject of bankruptcy proceedings in Brazil in aid of reorganization plan confirmed by Brazilian court failed to show that grant of such relief would be manifestly contrary to public policy of the United States, on theory that Brazilian law allegedly discriminated against United States creditors, where Brazilian law required that Brazilians and foreigners be treated equally before the law and required that foreign creditors receive a full and fair opportunity to participate in the Brazilian bankruptcy proceedings, and where there was only a single United States creditor that had not voted in favor of plan, and party declined to present any evidence that Brazilian bankruptcy proceedings targeted this lone dissenting creditor. 11 U.S.C.A. § 1506.

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Bingham McCutchen LLP, 399 Park Avenue, New York, New York 10022, By: Timothy B. DeSieno, Esq., Mark W. Deveno, Esq., Attorneys for Ad Hoc Group of Rede Noteholders

In a Case Under Chapter 15
of the Bankruptcy Code

MEMORANDUM DECISION GRANTING PLAN ENFORCEMENT RELIEF PURSUANT TO CHAPTER 15 OF THE BANKRUPTCY CODE

SHELLEY C. CHAPMAN, UNITED STATES BANKRUPTCY JUDGE

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In this proceeding brought pursuant to chapter 15 of the Bankruptcy Code, José Carlos Santos, the Foreign Representative of Rede Energia S.A., seeks this Court's assistance, pursuant to sections 1507 and 1521, in enforcing the terms of Rede's Brazilian reorganization plan. Specifically, the Foreign Representative requests the following relief: (i) an order granting full faith and credit to (a) the Brazilian reorganization plan and (b) the Brazilian court order confirming the plan, including a continuation of the injunction of acts in the United States in contravention of the confirmation order, and (ii) an order authorizing and directing the Indenture Trustee for Rede's 11.125 percent perpetual notes and the Depository Trust Company to take the actions necessary to carry out the terms of the Brazilian reorganization plan, including making payments to Rede's noteholders. Certain of Rede's noteholders object to the relief as being contrary to public policy of the United States and urge the Court to allow them to return to Brazil and negotiate for an improvement on the distribution they are to receive under the Brazilian reorganization plan. These noteholders allege that what the Foreign Representative describes as a proceeding that indisputably comports with fundamental principles of U.S. bankruptcy law and civilized jurisprudence is in fact a wholesale trampling of their rights that was conceived of and executed by the Brazilian government and rubberstamped by the Brazilian bankruptcy court. While there are certainly aspects of the Brazilian proceeding that differ in form and substance from what might occur in the United States, the Court nonetheless concludes, for the reasons set forth herein, that Rede's Foreign Representative is entitled to the relief requested.

FACTUAL BACKGROUND

An understanding of the structure of Rede Energia S.A. ("*Rede*" or the "*Debtor*"), the events leading to Rede's Brazilian bankruptcy proceeding (the "*Brazilian Bankruptcy Proceeding*"), and the Brazilian Bankruptcy proceeding itself, including the terms of Rede's reorganization plan and its treatment of Rede's creditors, is essential to the Court's consideration and analysis of the relief requested by José Carlos Santos, the authorized foreign representative of Rede (the "*Foreign Representative*") and the objections to such relief. The uncontroverted facts and summary of applicable Brazilian law set forth below are taken from (i) the Stipulation of Facts for Purposes of a Hearing on the Objection by the Ad Hoc Group of Rede Noteholders to Relief Related to Recognition of a Foreign Proceeding [Docket No. 26] ("*Stipulation of Facts*" or "*Fact Stip.*") and (ii) the Stipulation of Brazilian Law for Purposes of a Hearing on the Objection by the Ad Hoc Group of Rede Noteholders to Relief Related to Recognition of Foreign Proceeding [Docket No. 27] ("*Stipulation of Law*" or "*Law Stip.*").[2]

I. The Rede Group

Rede is one of the largest electric power companies in Brazil; it is the parent company of a group of operating and non-operating subsidiary entities (collectively, with Rede, the "*Rede Group*"). (Foreign Representative's Petition for Recognition of Brazilian Bankruptcy Proceeding and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. § 105(a), 1507(a), 1509(b), 1515, 1517, 1520 and 1521) [Docket No. 2] (the "*Petition*" at 3.) Through its operating subsidiaries, the Rede Group distributes electricity to millions of customers throughout Brazil, including customers in the States of São Paulo, Minas Gerais, Paraná, Mato Grosso, and Tocantins. (Petition at 3.) By 2012, the Rede Group had become one of Brazil's largest electricity distributors, providing electricity to 578 municipalities in seven states in Brazil, serving approximately five million consumer units, 165 indigenous villages, and 787 rural settlements. (Fact Stip. at ¶ 1.)

Five members of the Rede Group are debtors in the Brazilian Bankruptcy Pro-

2. The Stipulation of Facts and the Stipulation of Law were admitted into evidence at the hearing on May 9, 2014.

ceeding (collectively, the "*Rede Debtors*"), consisting of:

- Rede, an intermediate holding company, holding interests in fourteen subsidiaries;
- Empresa de Eletricidade Vale Paranapanema S.A. ("*EEVP*"), a holding company that is the direct parent and controlling shareholder of Rede;
- Denerge Desenvolvimento Energético S.A. ("*Denerge*"), another holding company that is the direct parent and controlling shareholder of EEVP and the indirect parent of Rede;
- Companhia Técnica de Comercialização de Energia ("*CTCE*"), an electricity-trading subsidiary of Rede; and
- QMRA Participações S.A., a subsidiary of Rede and the former intermediate holding company parent of Centrais Elétricas Do Pará S.A. ("*CELPA*").[3]

(Fact Stip. at ¶ 2.)

The Rede Debtors have eight electricity distribution operating subsidiaries, known as the "Rede Concessionaires,"[4] that are not debtors in the Brazilian Bankruptcy Proceeding.[5] (Fact Stip. at ¶ 3.) Rede holds the equity in the Rede Concessionaires, and substantially all of the Rede Group's business activities are conducted through them. The electricity distribution activities of the Rede Concessionaires are subject to extensive regulation by the Brazilian government through various regulatory authorities, including Agência Nacional de Energia Elétrica ("*ANEEL*"). (Fact Stip. at ¶ 8.)

II. Rede Issues the Perpetual Notes

Pursuant to an indenture dated April 2, 2007 (the "*Indenture*"), Rede issued 11.125 percent notes in the aggregate principal amount of USD$400 million[6] that

3. CELPA commenced judicial reorganization proceedings under Brazilian bankruptcy law in February 2012. (Fact Stip. at ¶ 13.) On November 9, 2012, CELPA's foreign representative sought chapter 15 recognition in this Court of CELPA's Brazilian judicial reorganization proceeding as a foreign main proceeding, along with certain relief to enforce the confirmed plan of reorganization. (Fact Stip. at ¶ 15.) The plan enforcement relief sought by the foreign representative of CELPA was similar to the relief sought here and included a request that the indenture trustee and the Depository Trust Company be directed and authorized to take actions to assign the notes to the plan sponsor pursuant to CELPA's Brazilian plan of reorganization. (Fact Stip. at ¶ 15.) No party in interest challenged the chapter 15 relief sought by CELPA's foreign representative. (Fact Stip. at ¶ 16.) On December 12, 2012, this Court entered an order granting recognition and the requested plan enforcement relief. *In re Centrais Elétricas Do Pará S.A.—EM Recuperação Judicial*, Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief, Case No. 12–14568(SCC) [Docket No. 19]. At the time the Court entered such order, transfer of the shares contemplated under CELPA's plan had already closed, and appeals of the order confirming CELPA's plan were pending with the Brazilian appellate courts. (Fact Stip. at ¶ 17.) As of March 17, 2014, such appeals were still pending in Brazil. (Fact Stip. at ¶ 17.)

4. The Rede Concessionaires consist of the following eight electricity distribution subsidiaries: CEMAT, CELTINS, ENERSUL, Caiuá Distribuição de Energia S.A., Empresa Elétrica Bragantina S.A., Companhia Nacional de Energia Elétrica ("*CNEE*"), Companhia Força e Luz do Oeste, and Empresa de Distribuição de Energia Vale Paranapanema S.A. (Fact Stip. at ¶ 10.)

5. Four other subsidiaries of Rede (that are not Rede Concessionaires) also are not debtors in the Brazilian Bankruptcy Proceeding. (Fact Stip. at ¶ 3.)

6. For the purposes of this decision, all amounts will be indicated in either U.S. Dollars ("*USD$*") or Brazilian Real ("*R$*") and have not been converted except where specified.

have no fixed final maturity date and are not subject to any mandatory redemption provisions (the "*Perpetual Notes*"). (Fact Stip. at ¶ 4.) In September 2007, Rede exercised its right under the Indenture to issue additional Perpetual Notes in the aggregate principal amount of USD$175 million. Approximately USD$496 million of the Perpetual Notes remained outstanding as of the date of the commencement of the Brazilian Bankruptcy Proceeding on November 23, 2012. (Fact Stip. at ¶ 4.)

The Perpetual Notes are general unsecured obligations of Rede and are not guaranteed by any of Rede's operating subsidiaries or other affiliates. (Fact Stip. at ¶ 5.) The notes are held in global note form (the "*Global Note*") with the Depository Trustee Company ("*DTC*"). The Bank of New York Mellon is the indenture trustee for the Perpetual Notes (the "*Indenture Trustee*"). Interest payments on the Perpetual Notes historically have been made by Rede to the Indenture Trustee in New York and have been distributed to the beneficial owners of the Perpetual Notes (the "*Noteholders*") through DTC. The Indenture and the Perpetual Notes are governed by New York law.[7] (Fact Stip. at ¶¶ 5–6.)

The members of the Ad Hoc Group of Rede Noteholders (the "*Ad Hoc Group*") in the aggregate hold approximately 37 percent of the Perpetual Notes. (Fact Stip. at ¶ 80.) The members of the Ad Hoc Group are Merrill Lynch Pierce, Fenner & Smith Incorporated ("*Merrill*"); Finanzas Y Negocios Internacional Inc.; and multiple funds managed by Moneda Asset Management. (Fact Stip. at 31 n.16.) The majority of the members of the Ad Hoc Group are based in Latin America. (Fact Stip. at ¶ 80.) Only one of its members, Merrill (which holds approximately 8.1 percent of the Perpetual Notes), is based in the United States. (Fact Stip. at ¶¶ 79–80; 5/9/14 Tr. at 23:19–24:4.)

III. Events Leading to the Brazilian Bankruptcy Proceeding

On August 29, 2012, the Brazilian government passed and published Provisional Measure No. 577 ("*MP 577*"),[8] which permitted ANEEL, among other things, to intervene and take operational control of an electricity distribution concessionaire "to ensure its proper performance and to ensure compliance with the relevant contractual, regulatory and legal standards." (Fact Stip. at ¶ 18.) MP 577 also provided that electricity distribution concessionaires are no longer permitted to commence judicial and extrajudicial restructuring proceedings under Brazilian bankruptcy law prior to termination of the concession.[9]

7. The Indenture contains a permissive jurisdiction clause that would allow, absent a court order to the contrary, any holder of the Perpetual Notes to commence an action in the United States against Rede to recover on the Perpetual Notes. (Fact Stip. at ¶ 6.)

8. MP 577 subsequently became Law 12,-767/2012, which was published on December 27, 2012. (Fact Stip. at n.6.)

9. The Legislative History of MP 577 explains that

> The electric power sector currently faces a situation of having a concessionaire under judicial intervention [*i.e.,* CELPA], on the verge of bankruptcy, making regulatory action that is within the power of the granting authority once this event occurs urgent. Moreover, to keep any other similar situation from occurring, there is an urgent need to derogate from judicial and nonjudicial reorganization of public electric power concessionaires (or permit holders), as it is understood conducting this type of reorganization by means of intervention, which the provisions of this measure seek to do, better suits the specific considerations of these public electric power concessionaires (or permit holders).

(Fact Stip. at ¶ 19 (citing Ex. F, a Correct Copy and Certified Translation of MP 577 and its official legislative history).) The Ministério

(Fact Stip. at ¶ 19.) Within two days of publication of MP 577, on August 31, 2012, ANEEL intervened and seized operational control of the Rede Concessionaries. (Fact Stip. at ¶ 22.) Pursuant to MP 577, Rede was required to provide ANEEL with a plan, over which ANEEL had unilateral approval rights, to correct the failures and infractions that led to ANEEL's intervention and which demonstrated Rede's economic and financial viability (the "*Correctional Plan*"). (Fact Stip. at ¶ 27.) In order to lift its intervention, ANEEL required that the Rede Debtors adequately capitalize the Rede Concessionaires to ensure the provision of electric service to consumers. (Fact Stip. at ¶¶ 24–27.)

The Ad Hoc Group alleges that (i) the timing of MP 577's passage; (ii) the timing of the seizure of the Rede Concessionaires by ANEEL; (iii) the treatment of FI–FGTS's claim (defined and discussed below); and (iv) the end result for creditors of the Rede Concessionaires (who were not forced to restructure claims in bankruptcy) suggest that the protection of local interests may have been involved in both the passage of MP 577 and in ANEEL's activities. The Rede Debtors dispute such allegations and believe the evidence is to the contrary. (Fact Stip at ¶ 24.)

Following ANEEL's intervention, the Rothschild Group ("*Rothschild*"), whom Rede had previously hired as its financial advisor, began marketing the shares of the Rede Group while calling for any purchaser to make a capital injection in the Rede Concessionaries and pay an additional amount that could be used to fund distributions to the creditors of the Rede Debtors. (Fact Stip. at ¶¶ 26–29.) Rothschild received two binding offers by the October 11, 2012 deadline, and Rede selected the joint bid submitted by CPFL Energia ("*CPFL*") and Equatorial Energia ("*Equatorial,*" and together with CPFL, "*Equatorial–CPFL*").[10] (Fact Stip. at ¶ 30.) Rede also developed a Correctional Plan that was submitted to ANEEL on October 26, 2012.[11] (Fact Stip. at ¶ 31.)

On November 22, 2012, Fundo de Investimento do Fundo de Garantia por Tempo de Serviço ("*FI–FGTS*"), an investment fund wholly-owned by an employee severance payment guarantee fund created by the Brazilian government, exercised a "put" right under its 2010 investment agreement with Rede. (Fact Stip. at ¶¶ 64–65.) Pursuant to the investment agreement, FI–FGTS held 37.1 percent of the shares of EEVP and a right to "put" such shares to Denerge [12] in return for a secured debt claim. Accordingly, by exercising its put right one day before the Rede Debtors filed for bankruptcy in Brazil, FI–FGTS obtained a secured claim against Denerge, one of the Rede Debtors, in an amount of R$712.5 million. (Fact Stip. at

de Minas e Energia ("*MME*"), the Brazilian government's primary regulator of the power industry, issued a press release on August 31, 2012, which explained that the main objective of MP 577 was to give more security to the energy supply in Brazil, and MP 577's rules regarding intervention "were inspired by the practices applicable to the financial system, another sector that deserves special attention from regulators and the [Brazilian government], for its relevance in the life of the citizen and Brazilian economy." (Reply at ¶ 20 (citing Exhibit G, a certified translation of the MME Press Release).)

10. Rothschild sent invitations to at least ten potential buyers (both foreign and domestic) and granted seven credentialed groups access to a dataroom. (Fact Stip. at ¶ 29.)

11. On November 20, 2012, ANEEL revoked the license granted to Rede's electricity trading subsidiary, CTCE, to market and trade electricity. (Fact Stip. at ¶ 32.)

12. As discussed above, Denerge is a holding company that is the direct parent and controlling shareholder of EEVP and is the indirect parent of Rede. (Fact Stip. at ¶ 2.)

¶ 66.) As further described below, the Ad Hoc Group contends that, as of the petition date, FI–FGTS remained a shareholder and should not be treated as a secured creditor entitled to vote on the Brazilian Reorganization Plan (as defined below).

On November 23, 2012, the Rede Debtors voluntarily filed petitions for judicial reorganization under Brazilian bankruptcy law.[13] None of the Rede Concessionaires filed a petition. (Fact Stip. at ¶ 33.)

IV. The Brazilian Bankruptcy Proceeding

A. Competing Plans Are Submitted

On December 19, 2012, the Second Court of Bankruptcies and Judicial Restructuring Court of the Central Civil Court of the City of São Paulo, State of São Paulo (the "*Brazilian Bankruptcy Court*") granted the Rede Debtors' request to commence reorganization proceedings. (Fact Stip. at ¶ 34.) On March 15, 2013, the Rede Debtors presented a reorganization plan to the Brazilian Bankruptcy Court based on an investment and share purchase agreement (the "*Equatorial–CPFL SPA*") executed between the Rede Debtors and Equatorial–CPFL (the "*Equatorial–CPFL Plan*"), which provided for Mr. Jorge Queiroz de Moraes Junior (the "*Controlling Shareholder*") of the Rede Group to transfer his stock in the Rede Group to Equatorial–CPFL. (Fact Stip. at ¶¶ 34–35.) The Equatorial–CPFL SPA also prohibited the Rede Debtors from marketing the company to other potential bidders until June 30, 2013, at which time the agreement could be terminated by either party.[14] (Fact Stip. at ¶ 34.) The Equatorial–CPFL Plan provided that certain creditors of the Rede Debtors, including the Noteholders, would receive their choice of either: (i) cash equal to fifteen percent of the principal amount of their claim in return for assignment of such claim to Equatorial–CPFL or (ii) reinstatement of 65 percent of the principal amount of their claim paid out over 27 years, without interest. (Fact Stip. at ¶ 35.)

On April 4, 2013, the Indenture Trustee and the Ad Hoc Group filed petitions with the Brazilian Bankruptcy Court objecting to a number of issues related to the Equatorial–CPFL Plan, including (i) the proposed substantive consolidation of the Rede Debtors for plan purposes and (ii) the voting rights of FI–FGTS under the Equatorial–CPFL Plan, based on the Ad Hoc Group's belief that FI–FGTS qualified as an insider (as more fully discussed *infra*). (Fact Stip. at ¶ 56.) Interested parties COPEL and Energisa S.A. also filed a petition with the Brazilian Bankruptcy Court challenging the exclusivity that had been granted to Equatorial–CPFL under the Equatorial–CPFL SPA and requesting access to the dataroom for purposes of forming a competing bid. (Fact Stip. at ¶ 36.)

13. Under Brazilian law, a debtor retains the right to administer its assets and affairs and may continue to run its business once a judicial reorganization has commenced. A judicial administrator is appointed by the court and is responsible for, among other things, overseeing the debtor's management of its day-to-day affairs and managing the claims verification process. (Law Stip. at ¶ 8.) On December 19, 2012, the Brazilian Court appointed Deloitte Touche Tohmatsu Consultores Ltda. (the "*Judicial Administrator*") as the independent judicial administrator for the Rede Debtors' judicial reorganization case. (Fact Stip. at ¶ 48.)

14. COPEL and Energisa had access to the dataroom from approximately December 2011 until February 2012, and again for several days prior to the October 11, 2012 bid deadline. (Fact Stip. at ¶ 36.)

On May 14, 2013, the Judicial Administrator published a preliminary official list of claims, listing FI–FGTS as holding a secured claim against Denerge.[15] (Fact Stip. at ¶ 67.) On May 27, 2013, FI–FGTS informed the Brazilian Bankruptcy Court that the put option that it held pursuant to its 2010 investment agreement had been exercised one day prior to the bankruptcy filing, and it offered the shares to the Brazilian Bankruptcy Court to dispose of them.[16] (Fact Stip. at ¶ 66.)

On May 27, 2013, the Brazilian Bankruptcy Court ruled on eleven issues, including those raised by the Ad Hoc Group on April 4, 2013, finding, among other things, that FI–FGTS was a secured creditor.[17] (Fact Stip. at ¶¶ 5 8, 71.) The Indenture Trustee then sought an expedited appeal of such order and an injunction of the solicitation of the Equatorial–CPFL Plan with the São Paulo State Court of Appeals (the "*Brazilian Court of Appeals*"). The Brazilian Court of Appeals denied the request for an injunction and the appeal remains pending. (Fact Stip. at ¶ 60.)

On May 29, 2013, COPEL and Energisa (together, "*COPEL–Energisa*") publicly announced a competing bid to purchase certain assets of the Rede Debtors (the "*COPEL–Energisa Proposal*"). (Fact Stip. at ¶ 37.) The COPEL–Engerisa Proposal provided, among other things, for the purchase of the Rede Concessionaires' stock held by Rede for approximately R$3.2 billion. (Fact Stip. at ¶ 37.) The COPEL–Energisa Proposal was not a plan of reorganization; it neither (i) provided for allowance or distribution to particular claims nor (ii) opined on the consolidation of the Rede Debtors. (Fact Stip. at ¶ 37.) Although the Ad Hoc Group supported the COPEL–Energisa Proposal, the Rede Debtors rejected it on June 5, 2013, the date of the first Rede creditors' meeting (discussed *infra*), reasoning, among other things, that (i) the proposal was not binding, as it required certain condition precedents to be met; (ii) it did not satisfy the restructuring requirements imposed by ANEEL; (iii) the estimated creditor recoveries it promised were inflated; and (iv) it would strip the Rede Debtors of their business activity and/or assets. (Fact Stip. at ¶ 38.)

On June 5, 2013, the first Rede creditors' meeting was held and an official committee of creditors was formed.[18] (Fact

15. Under Brazilian bankruptcy law, creditors have ten days to object to a claim's allowance after publication of the preliminary official list. (Fact Stip. at ¶ 68.) In general, however, creditors may separately object to a claimant's right to vote on a plan of reorganization outside of this timeframe. (Fact Stip. at ¶ 68.) The parties dispute whether the ten-day objection deadline should have applied to any objection to FI–FGTS's claim and its right to vote as a secured creditor. (Fact Stip. at ¶ 68.)

16. FI–FGTS's shares of EEVP were never returned to EEVP in connection with the exercise of FI–FGTS's put right. (Fact Stip. at ¶ 66.)

17. The Brazilian Bankruptcy Court reasoned that,

> There can be no doubt that this fund [FI–FGTS] is a creditor of the companies under reorganization; however, in the past, it had been a shareholder, but since it validly exercised a sale option prior to joining the legal reorganization proceedings, it no longer has the status of shareholder. Proof of notification of exercise of the option has been provided, which is an undisputed fact in the case files ... Its vote was completely valid in its status as secured creditor.

(Fact Stip. at ¶ 71 (citing Exhibit P (Decision of the Brazilian Bankruptcy Court, dated May 27, 2013) at 4 (changes in original)).)

18. The official committee of creditors had the duty to obtain and inform all creditors of information regarding the Rede Debtors. (Fact Stip. at ¶ 49.) The members of the creditors' committee were (i) FI–FGTS, act-

Stip. at ¶ 49.) The meeting was discontinued prior to creditors voting on the Equatorial–CPFL Plan. (Fact Stip. at ¶ 40.) On June 12, 2013, COPEL–Energisa withdrew the COPEL–Engerisa Proposal due to lack of information necessary to confirm the proposal and tight deadlines for its confirmation. (Fact Stip. at ¶ 41.)

On July 2, 2013, one day prior to the second creditors' meeting, Energisa submitted a revised proposal and plan of reorganization that largely mirrored the structure of the Equatorial–CPFL SPA and the Equatorial–CPFL Plan (the "*Revised Energisa Proposal* "). (Fact Stip. at ¶¶ 41–43.) On July 3, 2013, the second creditors' meeting was held, but this meeting was also discontinued prior to voting on any plan of reorganization. (Fact Stip. at ¶ 44.)

B. Creditors Vote on the Brazilian Reorganization Plan

Prior to the third creditors' meeting, the Brazilian Bankruptcy Court suggested that it would not allow a vote on both the Revised Energisa Proposal and the Equatorial–CPFL Plan. (Fact Stip. at ¶ 45.) As a result, at the third creditors' meeting held on July 5, 2013, representatives of Energisa and Equatorial–CPFL presented their respective plans to creditors of the Rede Debtors, after which the Rede Debtors adjourned the meeting and requested that the creditors tell them informally which plan they preferred. (Fact Stip. at ¶ 45.) The Ad Hoc Group and the Indenture Trustee did not participate in the poll due to, among other things, their view that both plans contained inappropriate consolidation of the debtor entities. The majority of the remaining creditors who did participate indicated a preference for the Revised Energisa Proposal. (Fact Stip. at ¶ 45.) Accordingly, Equatorial–CPFL withdrew its bid, and, upon resuming the third creditors' meeting, the Rede Debtors proposed a plan embodying the Revised Energisa Proposal (the "*Brazilian Reorganization Plan* " or "*Plan* ") and the final votes of the Rede Debtors' creditors on the Plan were solicited.

Secured creditor FI–FGTS voted in favor of the Brazilian Reorganization Plan.[19] (Fact Stip. at ¶ 69.) Each of the members of the Ad Hoc Group voted to reject the Brazilian Reorganization Plan. (Fact Stip. at ¶ 98.) Having obtained a ruling from the Brazilian Bankruptcy Court that the Indenture Trustee would be permitted to vote, the Indenture Trustee, on behalf of all Noteholders other than the members of the Ad Hoc Group (including those Note-

ing through its attorney-in-fact, Cassio Viana de Jesus, representing itself as the sole voting secured creditor, and (ii) Moneda Deuda LatinoAmericana Fondo de Inversion ("*Moneda* "), acting through its counsel Eduardo Augusto Mattar, representing the class of unsecured creditors. (Fact Stip. at ¶ 49.) Moneda is a Chilean investment fund and the largest member, by holdings, of the Ad Hoc Group. (Fact Stip. at ¶ 49.)

19. The other secured creditor, Banco Nacional de Desenvolvimento Econômico e Social ("*BNDES*"), was not permitted to vote on the Brazilian Reorganization Plan because its subsidiary, BNDES Participações S.A. ("*BNDESPar* "), is a minority shareholder in the Rede Debtors. (Fact Stip. at ¶ 63.) Brazilian bankruptcy law prevents shareholders, affiliates, controlling and controlled companies of the debtor or entities which have a partner or shareholder with an equity interest above ten percent in the debtor's capital stock, or in the capital stock of which the debtor or any of his partners have an equity interest exceeding ten percent, from voting on account of claims against the debtor. (Law Stip. at ¶ 16.) BNDES held a claim that was allowed against Rede in the amount of R$134.5 million and was secured by, among other things, Rede's equity interests in one of the Rede Concessionaires, CNEE. (Fact Stip. at ¶ 63.)

holders who did not direct or authorize the Indenture Trustee to vote on their behalf), also voted to reject the Brazilian Reorganization Plan. (Fact Stip. at ¶ 99.) On July 15, 2013, Rede appealed to the Brazilian Court of Appeals and sought injunctive relief and reconsideration of the Brazilian Bankruptcy Court's decision allowing the Indenture Trustee to vote, but the Brazilian Court of Appeals denied this request. (Fact Stip. at ¶ 100.)

At the time of the third creditors' meeting, several objections to the treatment of claims or the right of certain creditors to vote remained pending before the Brazilian Bankruptcy Court, including the Ad Hoc Group's objection to FI–FGTS's status as a secured creditor. (Fact Stip. at ¶ 5 1.) While all creditors on the official list of creditors (the "*Creditors' List*") were permitted to attend the general meetings of creditors and to vote on the Brazilian Reorganization Plan, in many cases in which a dispute remained outstanding with respect to a creditor's right to vote, the Brazilian Bankruptcy Court ordered that the applicable creditor be permitted to cast a provisional vote. The Brazilian Bankruptcy Court then instructed the Judicial Administrator to make two calculations of voting results: one considering all such provisional votes and one disregarding such provisional votes. (Fact Stip. at ¶ 51.)

On July 26, 2013, after the final votes were solicited, the Ad Hoc Group objected to confirmation of the Brazilian Reorganization Plan, again raising an objection to consolidation of the Rede Debtors; Rede and Energisa filed replies. (Fact Stip. at ¶ 61.)

On September 9, 2013, the Brazilian Bankruptcy Court entered its decision confirming the Brazilian Reorganization Plan. (Fact Stip. at ¶ 61.) As part of this decision, the Brazilian Bankruptcy Court reversed its prior decision and held that that the Indenture Trustee could not vote on behalf of those Noteholders from whom it did not receive direction or authorization, finding that under the terms of the Indenture, the Indenture Trustee did not have the power, without the consent of each of the individual beneficial holders of Perpetual Notes, to effect any alteration to the values, charges, conditions, or maturity dates of the Perpetual Notes. (Fact Stip. at ¶ 100.) The Brazilian Bankruptcy Court determined that the Brazilian Reorganization Plan should nevertheless be confirmed because, even without the vote of the Indenture Trustee, both the secured and unsecured creditor classes had voted to accept the Brazilian Reorganization Plan. (Fact Stip. at ¶ 101.)

C. The Brazilian Reorganization Plan is Approved Via Cram–Down

On September 24, 2013, the Ad Hoc Group filed an objection to the Brazilian Bankruptcy Court's September 9, 2013 order confirming the Brazilian Reorganization Plan, arguing that (i) the vote of Denerge and EEVP-level creditors should not be permitted to control the outcome of the Rede-level assets and (ii) FI–FGTS's vote should not be counted because FI–FGTS remained a shareholder of EEVP (and thus, an insider ineligible to vote) due to the fact that, at the time the Rede Debtors filed for reorganization, FI–FGTS's exercise of its put right had not been perfected by a share transfer in the appropriate corporate books. (Fact Stip. at ¶ 70.) The Brazilian Bankruptcy Court overruled the Ad Hoc Group's objections, and the Ad Hoc Group appealed. (Fact Stip. at ¶¶ 70–73.)

On November 14, 2013, after determining that it had miscalculated the voting results, the Brazilian Bankruptcy Court entered an order clarifying its September

9, 2013 order (together, the "*Confirmation Decision*"). The November 14, 2013 order clarified that, even after disregarding the vote of the Indenture Trustee, the unsecured creditor class had narrowly missed the numerosity requirement for confirming the Brazilian Reorganization Plan;[20] therefore, the Brazilian Bankruptcy Court had confirmed the Brazilian Reorganization Plan pursuant to the cram-down provisions of Brazilian bankruptcy law.[21] (Fact Stip. at ¶¶ 101–02.)

The Rede Debtors have appealed the Confirmation Decision, arguing that the Brazilian Reorganization Plan was approved by both the secured and unsecured creditor classes by consensual means and without the need for cram-down. (Fact Stip. at ¶ 104.) Specifically, the Rede Debtors have appealed the Confirmation Decision's denial of Rede's argument that the votes of parties arguably related to Equatorial and CPFL—which together held seven votes—should be designated because such parties were related to the losing bidders, competitors of the Rede Debtors who had publicly declared that they were interested in investing in the Rede Debtors if the Brazilian Reorganization Plan was rejected. (Fact Stip. at ¶ 104.) The Ad Hoc Group also has appealed, arguing (i) that the Indenture Trustee had the right to vote on behalf of all Noteholders and (ii) that FI–FGTS did not have a right to vote as a secured creditor. (Fact Stip. at ¶ 102.) Both parties' appeals remain pending with the Brazilian Court of Appeals. (Fact Stip. at ¶¶ 61, 104.)

20. Approval of a plan under Brazilian law may be obtained in one of two ways: (1) through a "regular creditor majorities" procedure or (2) through a "cram-down" procedure. Approval of a plan through the regular creditor majorities procedure requires that the plan be approved by each class of claims. In Classes II and III, the plan must be approved by (i) more than 50 percent of the creditors present at the creditors' meeting, in number, in each class and (ii) creditors that hold more than 50 percent in amount of the allowed claims present at the creditors' meeting, in each class. All such 50 percent thresholds are calculated only over the base of creditors who, cumulatively, (a) are present at the meeting; (b) are allowed to vote; and (c) actually do so (*i.e.,* do not voluntarily abstain from voting). (Law Stip. at ¶ 17.) Here, at least four more accepting votes from unsecured creditors in Class III in the Brazilian Reorganization Plan were required for such class to accept the Plan. (Fact Stip. at ¶ 104.)

21. If the required majorities are not met for acceptance of the plan under Brazilian law, the plan may still be approved via a cram-down of the rejecting class. Approval of a plan through the cram-down procedure requires the court to approve the plan if the following cumulative requisites are met: (1) holders of a simple majority (more than 50 percent) in amount of the total allowed claims who (a) are present at the creditors' meeting, (b) are allowed to vote, and (c) actually do so, vote for approval of the plan; (2) the required majorities are met in one class of claims (if there are only two classes of claims); and (3)(a) if the required majorities are not met in Class II or in Class III, more than one-third (1/3) of the creditors that (i) are present at the creditors' meeting, (ii) are allowed to vote, and (iii) actually do so, in number, in such class, must have voted in favor of the plan and, cumulatively, creditors that hold more than one-third (1/3) in amount of the allowed claims and that (a) are present at the creditors' meeting, (b) are allowed to vote, and (c) actually do so, in such class, must have voted in favor of the plan. In addition, Brazilian bankruptcy law expressly provides that confirmation via cram-down is only possible if the plan does not entail different treatment among the creditors of the class that rejected it. The parties disagree regarding whether Brazilian law permits cram-down where the plan provides different treatment to creditors in the dissenting class under some circumstances if done for a fair and valid justification (*e.g.,* to enforce subordination rights or legislative priority). This issue has been extensively briefed by the parties and is currently on appeal in Brazil. (Law Stip. at ¶ 18.)

If the Rede Debtors are successful on appeal and the Brazilian Court of Appeals otherwise affirms the Confirmation Decision, the Brazilian Reorganization Plan may be deemed approved by both the secured and unsecured creditor classes by consensual means (without the need for cram-down under Brazilian bankruptcy law). If the Ad Hoc Group prevails in its appeal with respect to the right of the Indenture Trustee to vote, the unsecured class would reject the Brazilian Reorganization Plan by amount, notwithstanding the results with respect to numerosity. Moreover, if the Ad Hoc Group also prevails in its appeal with respect to FI–FGTS's right to vote, the Brazilian Reorganization Plan will be unable to satisfy the requirement of a consenting class for cram-down purposes. Finally, if the Ad Hoc Group prevails in its appeal with respect to consolidation, the Brazilian Reorganization Plan will be unable to satisfy any requirement for either ordinary confirmation or confirmation by cram-down under Brazilian bankruptcy law. (Fact Stip. at ¶ 104.)

V. The Terms and Provisions of the Brazilian Reorganization Plan

Under the Brazilian Reorganization Plan, Energisa will invest R$1.2 billion in the Rede Concessionaires and R$1.95 billion to pay the creditors of the Rede Debtors. The investment in the Rede Concessionaires may be derived from a variety of sources, including the sale of one or more Rede Concessionaires by Energisa, although Energisa has announced that no such sale is contemplated in the foreseeable future.

The Brazilian Reorganization Plan generally provides that certain creditors of the Rede Debtors, including the Noteholders, will have the option to receive either (i) cash equal to 25 percent of the principal amount of their claims in return for an assignment of such claims to Energisa or (ii) reinstatement of 100 percent of the principal amount of their claims paid out over 22 years, without interest. (Fact Stip. at ¶ 43.) The Brazilian Reorganization Plan also requires the Controlling Shareholder of the Rede Debtors to transfer his equity interests in the Rede Group to Energisa in consideration for the symbolic price of R$1.00, and it requires the assumption by Energisa of certain guarantees of the debts of the Rede Group that had been provided by the Controlling Shareholder of the Rede Debtors. (Fact Stip. at ¶ 43.)

A. Substantive Consolidation of the Rede Debtors

The Brazilian Reorganization Plan is premised on the consolidation of the assets and liabilities of all five Rede Debtors for voting and distribution purposes. (Fact Stip. at ¶ 55.) The Brazilian Reorganization Plan does not result in the actual corporate consolidation or merger of the Rede Debtors. (Fact Stip. at 23 n.13.) However, the Plan permits Energisa to modify the corporate structure of the Rede Group after the consummation of the transaction. (Fact Stip. at 23 n.13 (citing Ex. L (Brazilian Reorganization Plan) § 3.5).) In addition, Article 9.7.2 of the Brazilian Reorganization Plan specifies means for payment of all intercompany claims other than claims held by the Rede Concessionaires. (Fact Stip. at 23 n.13.) As described above, the Ad Hoc Group and the Indenture Trustee filed petitions with the Brazilian Bankruptcy Court objecting to, among other things, the presentation of a consolidated plan. (Fact Stip. at ¶¶ 58–61.) On May 27, 2013, the Brazilian Bankruptcy Court issued a decision finding that the consolidation of the Rede Debtors was appropriate and permitting the joint processing and consolidation of the Rede

Debtors for plan purposes. The Brazilian Bankruptcy Court found that the consolidation of the Rede Debtors was appropriate because,

> The "Rede" group, subject to reorganization, is in fact organized as a corporate group, with a common controlling company and credit inter-dependence, as loans exist between the companies that comprise the group, and cross corporate guarantees to honor obligations to third parties. Moreover, the plan is based on the joint cash flow of all the companies, in such a way to find an effective means of reorganization.[22]

On July 26, 2013, the Ad Hoc Group renewed its objection to consolidation in its objection to the confirmation of the Brazilian Reorganization Plan. (Fact Stip. at ¶ 61.) The substantive consolidation of the Rede Debtors is one of the infirmities of the Brazilian Reorganization Plan that is cited by the Ad Hoc Group as a reason to deny the relief requested by the Foreign Representative in this Court.[23]

B. Classification of Claims Generally

There were 111 claims asserted against the five Rede Debtors, totaling approximately R$3.990 billion and USD$655 million. Of those claims, 33 were asserted against multiple Rede Debtors. (Fact Stip. at ¶ 53.) Under Brazilian bankruptcy law, claims are divided into three classes: (i) labor related claims ("*Class I* "); (ii) secured claims ("*Class II* "); and (iii) unsecured claims, claims entitled to general and special privilege, and subordinated claims ("*Class III* "). (Law Stip. at ¶ 16.) No Class I claims were asserted against the Rede Debtors. Class II (secured) claims were filed by two creditors: (i) FI–FGTS, which asserted a R$712.5 million Class II secured claim against Denerge, secured by equity interests in other Rede Debtors, and (ii) BNDES, which asserted a R$135.5 million Class II secured claim against Rede. (Fact Stip. at ¶ 53.) Most of the Class III unsecured and other claims, totaling approximately R$1.89 million plus USD$655 million, were asserted against Rede. (Fact Stip. at ¶ 53.) Approximately R$775 million in claims were owed by certain Rede Debtors to other Rede Debtors, and, if netted, would result in R$500 million owing to Rede from other Rede Debtors. (Fact Stip. at ¶ 53.)

The Brazilian Reorganization Plan does not provide for treatment of the shareholders of the Rede Debtors as, under Brazilian bankruptcy law, shareholders cannot be deprived of their interests without their consent.[24] (Fact Stip. at ¶ 93.)

C. Treatment of Secured Claims

Under the Brazilian Reorganization Plan, secured claim holders were permitted to choose from three options for the treatment of their claims.[25] (Fact Stip. at

22. Fact Stip. at ¶ 58 (citing Ex. P (Decision of the Brazilian Bankruptcy Court, dated May 27, 2013) at 1–3).

23. The May 27, 2013 decision by the Brazilian Court did not address factors that, according to the Ad Hoc Group, would ordinarily be considered by a United States court considering the issue of substantive consolidation. Such factors include: disregard of corporate separateness, creditor confusion about which entity with which they were doing business, intermingling of funds, or fraud. (Fact Stip. at ¶ 59.)

24. Although the Brazilian Reorganization Plan does not extinguish the remaining equity interests held by minority shareholders, as discussed below, such remaining minority shares will be diluted upon consummation of the Brazilian Reorganization Plan. (Fact Stip. at ¶¶ 94–95.)

25. The three options consisted of:

¶¶ 74–75.) BNDES chose to assign its debt to Energisa in return for a 25 percent cash distribution paid on the closing date.[26] (Fact Stip. at ¶ 74.) FI–FGTS chose a 22–year note bearing four percent interest in exchange for committing to provide future financing to the Rede Debtors. (Fact Stip. at ¶ 76.) FI–FGTS is to provide future financing to the Rede Debtors in an amount equal to 90 percent of its claim, for a minimum period of payment of twenty years, with (i) at least a twelve-year period without the payment of principal; (ii) monthly amortization after the twelve-year period; and (iii) a maximum interest rate of seven percent per year, payable as agreed between the parties, as adjusted annually.[27] (Fact Stip. at ¶ 76.)

D. Treatment of Unsecured Claims

Although all unsecured claims are contained in one class under the Brazilian Reorganization Plan, the Plan distinguishes among three types of unsecured claims:

1. *Concessionaire Creditor Claims:* unsecured guaranty, surety, or joint claims against the Rede Debtors where the creditor's underlying principal claim is against one or more of the non-debtor Rede Concessionaires;
2. *Subsidiary Concessionaire Claims*: claims of non-debtor Rede Concessionaires; and
3. *General Unsecured Claims*: all unsecured claims (other than Concessionaire Creditor Claims and Subsidiary Concessionaire Claims), including claims by Noteholders.

(Fact Stip. at ¶ 77.) As more fully described below, under the Brazilian Reorganization Plan, Concessionaire Creditor Claims and Subsidiary Concessionaire Claims will be satisfied in full, whereas General Unsecured Claims, including claims of Noteholders, are entitled to a 25 percent recovery. The Ad Hoc Group maintains that such "disparate" treatment is a basis for denying the Plan Enforcement Relief (as defined below).

1. Treatment of Concessionaire Creditor Claims

There are eleven allowed Concessionaire Creditor Claims on the Creditors' List, totaling approximately R$421 million. (Fact Stip. at ¶ 83.) The holders of these claims, the "*Concessionaire Creditors,*"[28] were permitted to vote on the Brazilian

(A) retention of security interest and restatement [sic] of the principal amount of its debt in full to be paid over 22 years at a two percent interest rate, with a balloon principal payment in year 22;
(B) if the secured creditor chooses to commit to future financing of the reorganized companies on terms set forth in section 1.2.22 of the Plan, retention of security interest and restatement [sic] of the principal amount of its debt in full to be paid over 22 years at a four percent interest rate, with a balloon payment in year 22; and
(C) the secured creditor may assign its debt to Energisa in return for a 25 percent cash distribution paid on the closing date.

Fact Stip. at ¶ 74 (citing Ex. L (Brazilian Reorganization Plan) at Articles 6 and 8).

26. BNDESPar, a subsidiary of BNDES and the holder of 15.9 percent of the shares of Rede, held a right to sell its Rede shares to EEVP in return for a debt claim of R$390 million, which right was never exercised. (Fact Stip. at ¶ 91.) As a result, BNDESPar did not have a claim listed on the Creditors' List and will not receive a new distribution as a claimant under the Brazilian Reorganization Plan. (Fact Stip. at ¶ 91.) However, BNDESPar's claim for the exercise of the put remains a contingent liability for which Energisa may ultimately be responsible. (Fact Stip. at ¶ 92.)

27. Fact Stip. at ¶ 76 (citing Ex. L (Brazilian Reorganization Plan) at § 1.2.22).

28. A U.S.-based entity, the Inter–American Development Bank ("*IADB*") holds the ma-

Reorganization Plan because they hold guarantee or surety claims against one or more of the Rede Debtors (and therefore, the Rede Debtors are jointly and severally liable for the payment of such claims). (Fact Stip. at ¶ 83.)

While the Concessionaire Creditors were permitted to choose from the three Plan treatment options available to holders of General Unsecured Claims (discussed *infra*), if a Concessionaire Creditor agreed not to take further enforcement actions and waived all defaults, fines, and penalties against the Rede Concessionaires and the Rede Debtors, such Concessionaire Creditor (i) will receive (within 60 days of the closing date) payment in full of any portion of its obligations that have already matured pursuant to their original schedule and (ii) will have its surety, guarantee, or joint obligations replaced by Energisa on the same terms and conditions thereof. (Fact Stip. at ¶ 85.)

2. Treatment of Subsidiary Concessionaire Claims

Each of the eight Rede Concessionaires holds a Subsidiary Concessionaire Claim against the Rede Debtors, which, in the aggregate, total approximately R$504 million. (Fact Stip. at ¶ 87.) None of these parties was permitted to vote on the Brazilian Reorganization Plan, as the Rede Concessionaires are affiliates of the Rede Debtors. (Fact Stip. at ¶ 87.)

The Brazilian Reorganization Plan provides that holders of Subsidiary Concessionaire Claims will have their claims satisfied in full pursuant to the ANEEL Plan.[29] (Fact Stip. at ¶¶ 88–89.) As discussed above, Energisa has committed to invest at least R$1.2 million in the Rede Concessionaires under the ANEEL Plan; a significant portion of such amount will be used to cause the Rede Debtors to settle the Subsidiary Concessionaire Claims. (Fact Stip. at ¶ 90.)

3. Treatment of General Unsecured Claims

There are 109 General Unsecured Claims against the Rede Debtors,[30] including those of the Noteholders, totaling approximately R$3.142 billion plus approximately USD$655 million. (Fact Stip. at ¶ 78.) The Brazilian Reorganization Plan offers three plan treatment options to holders of General Unsecured Claims,[31]

jority in amount of the Concessionaire Creditor Claims, holding approximately USD$151 million against the Rede Concessionaires, CEMAT and CELTINS, which claims are guaranteed by Rede. (Fact Stip. at ¶ 84.) The remaining Concessionaire Creditors are Brazilian-based entities. (Fact Stip. at ¶ 84.)

29. To satisfy ANEEL's requirements, the Rede Debtors originally submitted their Correctional Plan to ANEEL on October 26, 2012, and such plan was subsequently revised. Among other things, this plan laid out Energisa's proposal for the assumption and reorganization of the Rede Concessionaires (as amended on October 1, 2013 and presented by the Rede Debtors and Energisa, the *"ANEEL Plan"*).

30. Except for certain holders of the Perpetual Notes and the IADB, all known holders of the General Unsecured Claims are Brazilian-based entities. (Fact Stip. at ¶ 78.) Because the Perpetual Notes are held in global note form with DTC, neither the Rede Debtors nor the Ad Hoc Group knows with certainty the identities or nationalities of the beneficial holders of the Perpetual Notes (other than the members of the Ad Hoc Group). The Ad Hoc Group purports to have been in contact with other holders of Perpetual Notes, one or more of which are also based in the U.S. The Perpetual Note claims were issued only to (i) non-U.S. persons in accordance with Regulation S of the U.S. Securities Act of 1933, as amended (the *"Securities Act"*) and (ii) qualified institutional buyers in accordance with Rule 144A of the Securities Act. (Fact Stip. at ¶ 79.)

31. The three plan treatment options available to a holder of an allowed General Unsecured Claim are:

(A) restatement [sic] of the principal amount of its debt in full to be paid over 22 and it provides that the type of consideration chosen by the majority of Noteholders (in principal amount) who indicated a preference for a type of consideration would govern the form of consideration provided to all Noteholders.[32] (Fact Stip. at ¶ 82.) After the Brazilian Reorganization Plan was approved, in response to the Rede Debtors' solicitation of Noteholders' preference, a majority in principal amount of the Noteholders (including all members of the Ad Hoc Group) chose Option C—to assign their claims to Energisa in return for a 25 percent cash distribution to be paid on the closing date. (Fact Stip. at ¶ 82.)

VI. The Foreign Representative Commences a Chapter 15 Proceeding in the United States

On January 16, 2014, the Foreign Representative filed the Petition, requesting recognition of the Brazilian Bankruptcy Proceeding as a foreign main proceeding.[33] The Petition also requested additional relief, pursuant to sections 1521 and 1507 of the Bankruptcy Code, enforcing the Brazilian Reorganization Plan in the United States, including an order (i) granting full faith and credit to (a) the Brazilian Reorganization Plan and (b) the Confirmation Decision and enjoining acts in the U.S. in contravention of the Confirmation Decision; and (ii) authorizing and directing the Indenture Trustee and DTC to take actions to carry out the terms of the Brazilian Reorganization Plan, including assigning the Global Note to Energisa and making the associated payments to the beneficial Noteholders (collectively, the "*Plan Enforcement Relief*").[34] According to the Foreign Representative, the latter is necessary because the Indenture Trustee has indicated that it will not assign the Global Note to Energisa (in accordance with the Confirmation Decision) without obtaining a directive from this Court. (Fact Stip. at ¶ 117.) In addition, the Foreign Representative has stated that, while Energisa may deposit funds with the Brazilian Bankruptcy Court for the benefit of the holders of the Perpetual Notes, Energisa is unlikely to fund the distribution directly to the Indenture Trustee without assurance of such assignment. (Fact Stip. at ¶ 117.)

The Ad Hoc Group did not object to entry of an order recognizing (i) the Brazilian Bankruptcy Proceeding as a foreign main proceeding pursuant to chapter 15 of the Bankruptcy Code and (ii) José Carlos Santos, the Petitioner, as Rede's Foreign Representative. Accordingly, the parties agreed to, and the Court approved, a stipulated order granting recognition to the Brazilian Bankruptcy Proceeding as a foreign main proceeding.[35] Then, on February 25, 2014, the Ad Hoc Group filed an objection to the requested Plan Enforce-

years at a one percent interest rate, with a balloon principal payment in year 22;

(B) if the unsecured creditor chooses to commit to future financing of the reorganized companies on terms defined in section 1.2.23 of the Plan, restatement [sic] of the principal amount of its debt in full to be paid over 22 years at a one percent interest rate, subject to annual monetary adjustment on the value of the principal balance, with a balloon payment in year 22; and

(C) the unsecured creditor may assign its claim(s) to Energisa in return for a 25 percent cash distribution paid on the closing date.

(Fact Stip. at ¶ 81 (citing Ex. L (Brazilian Reorganization Plan) at Articles 7 and 8).)

32. Fact Stip. at ¶ 81 (citing Ex. L (Brazilian Reorganization Plan) at § 7.1.4).

33. Petition at ¶ 35.

34. Petition at ¶¶ 53–68.

35. Order Granting Recognition of Foreign Main Proceeding [Docket No. 18].

ment Relief (the "*Objection*"),[36] arguing that (i) the Foreign Representative is not entitled to relief under sections 1521 or 1507 of the Bankruptcy Code and (ii) granting the Plan Enforcement Relief would be manifestly contrary to U.S. public policy and should be denied pursuant to section 1506.[37] In particular, the Ad Hoc Group argues that the Brazilian Reorganization Plan has been "fraught with infirmities," including (i) a significant extraction of value for shareholders; (ii) disparate treatment of similarly situated creditors; (iii) targeting of such disparate treatment at U.S.-based creditors; (iv) protection of local creditor interests by fiat; and (v) the use of "phantom" consolidation and a single insider vote to cram down an otherwise unconfirmable plan.[38]

On May 2, 2014, the Foreign Representative filed a reply to the Objection (the "*Reply*"),[39] arguing that the Brazilian Bankruptcy Proceeding was not administered in a manner manifestly contrary to U.S. principles and that the requested relief is proper under sections 1521 and 1507 of the Code.[40] Although both the Foreign Representative and the Ad Hoc Group were entitled to an evidentiary hearing on the propriety of the Plan Enforcement Relief, the parties instead agreed to file the Stipulation of Facts and the Stipulation of Law rather than conduct an evidentiary hearing. On May 9, 2014, the Court heard argument on whether the Plan Enforcement Relief requested by the Foreign Representative should be granted.

DISCUSSION

I. Applicable Law

[1] Chapter 15 of the Bankruptcy Code, which adopted the substance and most of the text of the United Nations Commission on International Trade Law's ("*UNCITRAL*") Model Law on Cross–Border Insolvency, provides a framework for recognizing and giving effect to foreign insolvency proceedings. *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 132 (2d Cir. 2013). A central tenet of chapter 15 is the importance of comity in cross-border insolvency proceedings. *In re Cozumel Caribe S.A. de C.V.*, 482 B.R. 96, 114–15 (Bankr. S.D.N.Y.2012). If a foreign case is recognized as a foreign main proceeding, as it was here, certain relief automatically goes into effect, pursuant to 11 U.S.C. § 1520, and, under section 1521, a bankruptcy court may grant "any appropriate relief" in order to "effectuate the purpose of this chapter [15] and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521(a). Such relief expressly includes:

> (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
>
> (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);

36. Objection of Ad Hoc Group of Rede Noteholders to Foreign Representative's Petition for Recognition of Brazilian Bankruptcy Proceeding and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. §§ 105(a), 1509(b), 1515, 1517, 1520 and 1521 [Docket No. 16].

37. Objection at 14–21.

38. Objection at 2.

39. Foreign Representative's Reply to Objection of Ad Hoc Group of Rede Noteholders to Foreign Representative's Motion for Order Granting Plan Enforcement [Docket No. 29].

40. Reply at ¶¶ 24–42; *see also* Petition at ¶¶ 57–88.

(3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);

(4) 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;

(5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;

(6) extending relief granted under section 1519(a); and

(7) granting 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).

11 U.S.C. § 1521(a).

There are nonetheless certain restrictions. The court may grant relief under section 1521(a) "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected," [41] and it may subject any relief granted under section 1521 to "conditions it considers appropriate." 11 U.S.C. § 1522(b). One court has observed that the policy underlying section 1522 is that there should be "a balance between relief that may be granted to the foreign representative and the interests of the person that may be affected by such relief." *In re Int'l Banking Corp. B.S.C.,* 439 B.R. 614, 626 (Bankr.S.D.N.Y.2010) (citing GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY); *see also* H.R.Rep. No. 109–31, at 116 (2005).

[2] In addition to the types of relief enumerated in section 1521, section 1507(a) of the Bankruptcy Code provides that "[s]ubject to the specific limitations stated elsewhere in this chapter[,] the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States." 11 U.S.C. § 1507(a); *see also* H.R.Rep. No. 109–31 (2005). Pursuant to section 1507, the court is authorized to grant any "additional assistance" available under the Bankruptcy Code or under "other laws of the United States," provided that such assistance is consistent with the principles of comity and satisfies the fairness considerations set forth in section 1507(b).[42] *In re Toft,* 453 B.R. 186, 190 (Bankr. S.D.N.Y.2011). As noted in *Toft,* however, the relationship between sections 1507 and 1521 "is not entirely clear." *Id.* The Fifth Circuit in *In re Vitro S.A.B. de C.V.,* 701 F.3d 1031, 1054 (5th Cir.2012), considered, as a matter of first

41. 11 U.S.C. § 1522(a).

42. Section 1507(b) of the Bankruptcy Code provides that,

In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 1507(b).

impression, whether a foreign representative may independently seek relief under either section 1521 or section 1507 and whether a court may itself determine under which provision such relief would fall. The *Vitro* court concluded that a court confronted by this situation should first consider the specific relief enumerated under section 1521(a) and (b), and, if the relief is not provided for there, the court should then consider whether the requested relief falls more generally under section 1521's grant of any appropriate relief. *Id.* at 1054. "Appropriate relief," the Fifth Circuit concluded, is "relief previously available under Chapter 15's predecessor, § 304." *Id.* "Only if a court determines that the requested relief was not formerly available under § 304," the Fifth Circuit continued, "should a court consider whether relief would be appropriate as 'additional assistance' under § 1507." *Id.* It remains to be seen whether the three-part analysis crafted by the *Vitro* court is embraced by other courts.

[3, 4] Chapter 15 thus provides courts with broad, flexible rules to fashion relief that is appropriate to effectuate the objectives of the chapter in accordance with comity. *See In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.,* 389 B.R. 325, 333–34 (S.D.N.Y. 2008); *In re SPhinX, Ltd.,* 351 B.R. 103, 112 (Bankr.S.D.N.Y.2006) ("chapter 15 maintains—and in some respects enhances—the 'maximum flexibility' . . . that section 304 provided bankruptcy courts in handling ancillary cases in light of principles of international comity and respect for the laws and judgments of other nations") (citations omitted), *aff'd,* 371 B.R. 10 (S.D.N.Y.2007). While the interplay between the relief available under sections 1507 and 1521 is far from clear, it is evident that recognition assistance of the types available under those sections is "largely discretionary and turns on subjective factors that embody principles of comity." *Toft,* 453 B.R. at 190 (citing *Bear Stearns High–Grade Structured Credit Strategies Master Fund,* 389 B.R. at 333, *aff'g* 374 B.R. 122 (Bankr.S.D.N.Y.2007)).

[5, 6] Of particular significance to the case at bar is the well-established principle that the relief granted in a foreign proceeding and the relief available in the United States do not need to be identical. *In re Metcalfe & Mansfield Alt. Invs.,* 421 B.R. 685, 697 (Bankr.S.D.N.Y.2010). On the other hand, it is also clear that "[t]he principle of comity has never meant categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States." *Bank of New York v. Treco (In re Treco),* 240 F.3d 148, 157 (2d Cir.2001); *see also Argo Fund Ltd. v. Bd. of Dirs. of Telecom Arg., S.A. (In re Bd. of Dirs. of Telecom Arg., S.A.),* 528 F.3d 162, 171–73 (2d Cir.2008); *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru,* 109 F.3d 850, 854 (2d Cir.1997); *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.,* 825 F.2d 709, 713 (2d Cir.1987); *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB,* 773 F.2d 452, 457 (2d Cir.1985); *Toft,* 453 B.R. at 190–191.

[7] Moreover, all relief under chapter 15, including relief requested under either section 1521 or section 1507, is subject to the limits in section 1506, which permits a court to decline to take any action, including granting additional relief pursuant to section 1521 or additional assistance pursuant to section 1507 of the Bankruptcy Code, if such action would be "manifestly contrary" to the public policy of this country.[43] *Toft,* 453 B.R. at 193 (citing 11 U.S.C. § 1506).

[8, 9] However, the public policy exception is clearly drafted in narrow terms and "the few reported cases that have analyzed [section] 1506 at length recognize that it is to be applied sparingly." *Toft,* 453 B.R. at 193; *see In re Ephedra Prods. Liab. Litig.,* 349 B.R. 333, 336 (S.D.N.Y.2006) (the public policy exception embodied in section 1506 should be "narrowly interpreted, as the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States") (citing H.R.Rep. No. 109–31(I), at 109, *reprinted in* 2005 U.S.C.C.A.N. 88, 172) (grammatical changes omitted); *see also Fairfield Sentry,* 714 F.3d at 139–40; *Bd. of Dirs. of Telecom Arg. S.A.,* No. 05–17811, 2006 WL 686867, at *25 (Bankr. S.D.N.Y. Feb. 24, 2006) ("the foreign law ... must not be repugnant to the American laws and policies") (citing *In re Brierley,* 145 B.R. 151, 166 (Bankr.S.D.N.Y. 1992)), *aff'd,* 528 F.3d 162 (2d Cir.2008); *In re Culmer,* 25 B.R. 621, 631 (Bankr. S.D.N.Y.1982); *see also In re Sino–Forest Corp.,* 501 B.R. 655, 664–665 (Bankr. S.D.N.Y.2013). Foreign judgments "are generally granted comity as long as the proceedings in the foreign court 'are according to the course of a civilized jurisprudence, *i.e.* fair and impartial.'" *Toft,* 453 B.R. at 194 (citing *In re Ephedra Prods. Liab. Litig.,* 349 B.R. at 336 (citing and quoting the seminal case on comity, *Hilton v. Guyot,* 159 U.S. 113, 205–06, 16 S.Ct. 139, 40 L.Ed. 95 (1895))); *see also Metcalfe,* 421 B.R. at 697 (the key determination required under section 1506 is whether the procedures used in the foreign jurisdiction "meet our fundamental standards of fairness").

As described in detail above, the Foreign Representative has requested that the Court grant the additional Plan Enforcement Relief, which consists of the following:

> (i) an order granting full faith and credit[44] to the [Confirmation Decision] and the Brazilian Reorganization Plan, and an injunction of acts in the U.S. in contravention of that order; and (ii) an order authorizing and directing the Indenture Trustee and DTC to take the necessary actions to carry out the terms of the Brazilian Reorganization Plan, including assigning the Global Note to Energisa and making the associated payments to the beneficial Noteholders.

(Reply at ¶ 11.) For the reasons that follow, the Court finds that the requested Plan Enforcement Relief is proper under both sections 1521 and 1507 of the Bankruptcy Code and should not be denied pursuant to the public policy exception in section 1506, and it therefore grants the Plan Enforcement Relief.

II. The Plan Enforcement Relief is Proper Under Section 1521 of the Bankruptcy Code

[10] The Plan Enforcement Relief requested by the Foreign Representative is "appropriate relief" of a type not specifically enumerated in the non-exhaustive list set forth in section 1521(a), which the Foreign Representative asserts is nonetheless proper because it is the type of relief that was "available under section 304 [of the

43. Section 1506 of the Bankruptcy Code provides that "[n]othing 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." 11 U.S.C. § 1506.

44. As a technical matter, the Confirmation Decision and the Brazilian Reorganization Plan are not entitled to "full faith and credit" inasmuch as these are words taken from Article IV of the Constitution of the United States and are inapplicable to foreign judgments.

Bankruptcy Code] and is routinely granted under U.S. law." (Reply at ¶¶ 25–26 (citing *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1054 (5th Cir.2012)).) The Foreign Representative asserts that requests for an order (i) enforcing a foreign confirmation order, including the request for an injunction of acts in contravention of such order, and (ii) directing the Indenture Trustee and DTC to take steps to assign the Global Note and make payments to the Noteholders, are each types of requested relief that were available under section 304 of the Bankruptcy Code and are types of relief typically granted in chapter 11 plenary proceedings as well. (Reply at ¶¶ 26–27.) Accordingly, the Foreign Representative maintains, such relief is available under section 1521.

The Court agrees. The request by the Foreign Representative that the Court (i) enforce the Brazilian Reorganization Plan and the Confirmation Decision and (ii) enjoin acts in the U.S. in contravention of the Confirmation Decision is relief of a type that courts have previously granted under section 304 of the Bankruptcy Code and other applicable U.S. law. *See, e.g., Bd. of Dirs. of Telecom Arg.*, 528 F.3d at 174–76; *see also In re Petition of Garcia Avila*, 296 B.R. 95, 114–15 (Bankr.S.D.N.Y.2003); *see generally* 11 U.S.C. § 1141(d)(1)(A) (granting discharge to chapter 11 debtor upon confirmation except as otherwise provided for in the plan); 11 U.S.C. § 524(a) (describing the effect of a discharge). Similarly, the Foreign Representative's request for an instruction directing the Indenture Trustee and DTC to take the actions necessary to carry out the terms of the Brazilian Reorganization Plan, including assigning the Global Note to Energisa and making payments to beneficial Noteholders, is also relief of a type available under U.S. law. *See, e.g.*, 11 U.S.C. § 1142(b) (providing that a court "may direct ... any ... necessary party to execute or deliver or join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act ... that is necessary for the consummation of the plan"); *In re Washington Mut., Inc.*, No. 08–12229, 2012 WL 1563880 at *38 (Bankr.D.Del. Feb. 24, 2012) (directing indenture trustee to make distributions in order to effectuate plan transactions).

The Ad Hoc Group does not challenge the Foreign Representative's position that the Plan Enforcement Relief is available under section 1521 of the Bankruptcy Code. Rather, the Ad Hoc Group asserts that the Court should consider the particular facts of the case at hand and balance the equities of the requested relief against those facts. The Ad Hoc Group believes that the Foreign Representative cannot meet his burden with respect to the applicable balancing tests and factors [45] and

45. The Ad Hoc Group contends that a "very similar set of factors are to be considered when granting relief under either section 1521 or 1507." (Objection at 16.) As noted in *Sino–Forest*, "[t]he factors listed in section 1507(b)(1)-(5), to be considered in deciding whether to extend comity under section 1507, are not included in section 1521(a).... [S]ection 1522 places limitations on the relief under section 1521: relief may be granted 'only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.'" *Sino–Forest Corp.*, 501 B.R. at 664 n.4; *see also In re Atlas Shipping A/S*, 404 B.R. 726, 740 (Bankr. S.D.N.Y.2009) (noting that the relief under section 1521(b), entrusting the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, may be granted only if the interests of local creditors are "sufficiently protected," but making no mention that the other balancing factors listed in section 1507(b) apply to the relief available under section 1521(a)). *See infra* for a discussion of whether the Plan Enforcement Relief may be urges that the Court exercise its discretion and deny the requested Plan Enforcement Relief. (Objection at 14–17.)

As discussed above, relief under section 1521 may be granted "only if the interests of creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a); *Int'l Banking Corp.,* 439 B.R. at 626. Section 1522 requires the bankruptcy court to ensure the protection of both the creditor(s) and the debtor(s). The Court finds that the interests of the Rede Debtors and their creditors, including the members of the Ad Hoc Group, will be sufficiently protected by the granting of the Plan Enforcement Relief. Enforcement of the Confirmation Decision—and ordering an injunction against actions the Ad Hoc Group may pursue in the United States in contravention of such decision—will allow the Rede Debtors to reorganize and to make distributions to creditors (including to the 63 percent of Noteholders who are not members of the Ad Hoc Group and who are not contesting any aspect of the Brazilian Reorganization Plan), consistent with the Brazilian Reorganization Plan. The Brazilian Reorganization Plan contemplates, as a condition precedent to its full implementation, this Court's approval of the Plan Enforcement Relief. In fact, the Foreign Representative has represented that the Indenture Trustee will likely decline to make the assignment of the Global Note without the directive of this Court. The Court's refusal to grant the Plan Enforcement Relief would thus mean that the Brazilian Reorganization Plan, which has already been substantially consummated, could not be fully implemented and the distributions to Noteholders would be prevented or substantially delayed. Denying the relief would also mean that the Ad Hoc Group would likely return to Brazil to attempt to renegotiate and seek a higher distribution, or would commence lawsuits against the Debtor in the United States to recover further on its claims. In short, the Ad Hoc Group simply wants another chance to renegotiate the terms of the Brazilian Reorganization Plan and offers no evidence that its efforts would be successful. Moreover, the Plan Enforcement Relief does not prevent the Ad Hoc Group from continuing to assert its rights under Brazilian law in the pending appeals of the decisions of the Brazilian Bankruptcy Court. In balancing the interests of the Rede Debtors against those of the Ad Hoc Group, the Court concludes that the Plan Enforcement Relief passes muster under section 1522(a) and is relief that is proper under section 1521.

III. The Plan Enforcement Relief is Also Proper Under Section 1507 of the Bankruptcy Code

[11] As discussed above, if recognition is granted, the bankruptcy court may grant "additional assistance" to a foreign representative under chapter 15 or under other laws of the United States, pursuant to section 1507 of the Code. Section 1507(b) directs the Court to "consider whether such assistance, consistent with principles of comity, will reasonably assure" the following:

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

granted as "additional assistance" under section 1507.

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 1507(b)(1)-(5). These provisions embody the protections that were previously contained in section 304 of the Bankruptcy Code, "with one critical exception: the principle of comity was removed as one of the factors and elevated to the introductory paragraph." *Atlas Shipping,* 404 B.R. at 740.

Although the Court need not reach the issue,[46] the Court has also considered whether the Plan Enforcement Relief would be available as "additional assistance" under section 1507 and concludes that it is. The Court has determined that granting the Plan Enforcement Relief meets the requirements of section 1507(b) inasmuch as it reasonably assures (a) the just treatment of creditors; (b) protection of U.S. creditors against prejudice or inconvenience in the processing of their claims; (c) prevention of preferential or fraudulent transfers; and (d) distribution of proceeds substantially in accordance with the Code's priority scheme. Thus, the Plan Enforcement Relief also may be granted as "additional assistance" pursuant to section 1507.

A. Creditors Were Treated Justly in Brazil

[12, 13] Section 1507(b)(1) requires that additional relief only be granted if the just treatment of creditors is ensured. 11 U.S.C. § 1507(b)(1). The "just treatment" factor is generally satisfied upon a showing that the applicable law "provides for a comprehensive procedure for the orderly and equitable distribution of [the debtor]'s assets among all of its creditors." *Bd. of Dirs. of Telecom Arg.,* 528 F.3d at 170 (citations omitted and grammatical changes in original) (discussing the "just treatment" factor under 11 U.S.C. § 304(c)). The court in *Board of Directors of Telecom Argentina* explained that instances in which a court has held that a foreign proceeding does not satisfy this factor include where the proceeding "fails to provide creditors 'access to information and an opportunity to be heard in a meaningful manner,' which are '[f]undamental requisites of due process,' " or where the proceeding "would not recognize a creditor as a claimholder." *Id.* (citations omitted).

Here, the Foreign Representative has demonstrated that creditors were given access to information and a meaningful opportunity to be heard in the Brazilian Bankruptcy Proceeding and that Brazilian law provides for a "comprehensive procedure" for the orderly and equitable distribution of the Rede Debtors' assets to creditors. Specifically, the Brazilian Bankruptcy Proceeding provided creditors with ample opportunity to obtain information about the Rede Debtors and the terms of the various plan proposals. It also provided creditors with the right and ability to vote on a plan of reorganization, to submit proofs of claim, and to file objections to and appeals of the decisions of the Brazilian Bankruptcy Court. It is clear that the Brazilian Reorganization Plan provides for equitable distribution of the Rede Debtors' assets based on the claims that creditors submitted, once the Brazilian Reorganization Plan becomes fully im-

46. *See Atlas Shipping,* 404 B.R. at 741 (granting relief under section 1521 and concluding that it was unnecessary to determine whether "additional assistance" was available under section 1507).

plemented.[47] As such, the Court finds that the Plan Enforcement Relief meets the requirements of section 1507(b)(1) to reasonably assure the just treatment of creditors.

B. There is No Prejudice to U.S. Creditors in the Processing of Claims in Brazil

The second factor of section 1507(b) requires that U.S. creditors be protected against "prejudice and inconvenience in the processing of claims" in the foreign proceeding. 11 U.S.C. § 1507(b)(2). Straining to find a basis to fit its arguments within this factor, the Ad Hoc Group argues that U.S. creditors were prejudiced in the processing of Noteholders' votes because the Indenture Trustee had the "rug pulled out from [under] it during the voting process" and voting on an individual basis by Noteholders required the satisfaction of various procedural hurdles. (Objection at 17.) The Foreign Representative points out, however, that all Noteholders who wished to appear at the creditors' meetings and vote independently of the Indenture Trustee were permitted to do so after submitting documentation verifying their identity and holdings. (Reply at ¶ 36.) Moreover, in evaluating the propriety of the Indenture Trustee's vote, the Brazilian Bankruptcy Court recognized the right of individual Noteholders to vote. Indeed, the entire issue is a red herring inasmuch as the Ad Hoc Group admits that the vote of the Indenture Trustee was rendered irrelevant because the unsecured class voted against the Brazilian Reorganization Plan, notwithstanding the elimination of the Indenture Trustee's vote.[48] (Objection at 18.) To the extent that the Ad Hoc Group invites the Court to draw an inference that the Brazilian Bankruptcy Court acted in a prejudicial, result-oriented fashion by reversing its own determination on the Indenture Trustee's right to vote, the Court declines the invitation. Nothing in the record supports such an inference. As such, the Court finds that the second factor of section 1507(b) is satisfied.

C. There Were No Preferential or Fraudulent Property Distributions in the Brazilian Bankruptcy Proceeding

The third factor of section 1507(b) requires that the additional assistance reasonably assure the "prevention of preferential or fraudulent dispositions of property of the debtor." 11 U.S.C. § 1507(b)(3). The Ad Hoc Group argues summarily that the Brazilian Reorganization Plan would promote, rather than prevent, fraudulent dispositions of property by permitting FI–FGTS and BNDESPar to recover significant value on their claims, notwithstanding that such recovery will flow from equity

47. In arguing that creditors were not treated justly in Brazil, the Ad Hoc Group also points to the fact that the Brazilian Reorganization Plan provides different treatment to certain types of unsecured claims. For the reasons discussed at section IV.C., *infra*, the Court finds that the disparate treatment of the claims of the Rede Concessionaires and the Concessionaire Creditors under the plan was necessary in order to comply with ANEEL's requirement that the Rede Concessionaires be adequately capitalized before ANEEL would lift its intervention. As the Foreign Representative points out, had ANEEL refused to lift its intervention and instead terminated the Rede Concessionaires' concession agreements with the Brazilian government, the Rede Group would be left with only "an unprecedented and lengthy litigation claim against the Brazilian government," the recoveries of which have already been partially assigned to secure certain debts of the Rede Concessionaires. (Reply at ¶¶ 32–33.)

48. Moreover, indenture trustees are not entitled to vote on chapter 11 plans in the United States.

and/or structurally subordinated positions. (Objection at 18.) It is not at all apparent that this was the intent of this subsection of section 1507. In any event, the record is devoid of evidence indicating fraudulent dispositions of property to either FI–FGTS or BNDESPar. As the record clearly demonstrates, the Brazilian Bankruptcy Court determined that FI–FGTS is a secured creditor, even though it exercised its put right to obtain a secured claim against Denerge one day prior to the date that the Rede Debtors filed for bankruptcy. (Fact Stip. at ¶¶ 64–65.) Therefore, the distribution it receives on account of its secured claim cannot be considered fraudulent. BNDESPar, on the other hand, is a minority shareholder, owning 15.9 percent of the shares of the Rede Debtors. (Fact Stip. at ¶¶ 63, 91.) BNDESPar held a right to sell its Rede shares to EEVP in return for a debt claim of R$390 million, but it never exercised such right. As a result, BNDESPar will not receive any new distribution under the Brazilian Reorganization Plan, though it will retain its Rede shares. (Fact Stip. at ¶ 9 1.) While equity cannot be extinguished under Brazilian bankruptcy law, the record indicates that BNDESPar's Rede shares will be substantially diluted as a result of Energisa's substantial capital investment in the Rede Group as required by the ANEEL Plan. Any distribution to BNDESPar cannot be considered a fraudulent or preferential disposition of property. The Court finds, therefore, that the third factor under section 1507(b) has been satisfied.

D. The Distribution of Proceeds Under the Brazilian Reorganization Plan Was Substantially in Accordance With U.S. Law

[14] The fourth factor of section 1507(b) requires that the additional assistance provided to a foreign representative will reasonably assure the "distribution of proceeds of the debtor's property substantially in accordance with the [Bankruptcy Code]." 11 U.S.C. § 1507(b)(4). The Ad Hoc Group argues that the distribution of the Rede Debtors' property violates the Bankruptcy Code because the Brazilian Reorganization Plan runs afoul of the absolute priority rule [49] by preserving value for equity and/or structurally subordinated creditors FI–FGTS and BNDESPar, and that the Confirmation Decision wrongly approved such treatment through "cram-down," exactly when the absolute priority rule should protect creditors. (Objection at 19.)

As discussed in sections IV.B. and IV.C. below, the cram-down provisions of Brazilian bankruptcy law provide meaningful protections that are similar to the protections embodied in U.S. law and the Plan's different treatment of certain unsecured creditors has a reasonable basis and was necessary to consummate the Plan. As such, proceeds under the Brazilian Reorganization Plan are being distributed substantially in accordance with U.S. law pursuant to section 1507(b)(4).[50]

49. A foreign insolvency regime need not contain an absolute priority rule identical to that of U.S. law. *Garcia Avila,* 296 B.R. at 111; *see also Bd. of Dirs. of Telecom Arg.,* 528 F.3d at 173.

50. Moreover, both the Rede Debtors and the Ad Hoc Group have appealed the confirmation of the Brazilian Reorganization Plan, which was approved via cram-down. If, after all appeals are taken by the parties in Brazil, the cram-down requirements are not found to have been satisfied, the Brazilian Reorganization Plan will be rejected and a liquidation proceeding will be commenced.

IV. With Respect to Section 1506, the Brazilian Bankruptcy Proceeding Was Administered in a Manner Consistent With U.S. Public Policy

[15] The centerpiece of the Ad Hoc Group's objection is that the Plan Enforcement Relief would be fundamentally inconsistent with U.S. public policy, and accordingly, runs afoul of section 1506 of the Bankruptcy Code. The Ad Hoc Group specifically cites to five aspects of the Brazilian Reorganization Proceeding that it asserts violate U.S. public policy: (i) an unfair marketing process; (ii) the use of "phantom" consolidation and a single insider vote to cram down an otherwise unconfirmable plan; (iii) a significant extraction of value for shareholders which is violative of the distribution scheme under U.S. law; (iv) disparate treatment of similarly situated creditors; and (v) targeting of that disparate treatment at U.S.-based creditors, including to protect local creditor interests. (Objection at 2.)

As discussed above, the public policy exception embodied in section 1506 of the Bankruptcy Code is to be narrowly construed and applied "sparingly." *Toft,* 453 B.R. at 193 ("the few reported cases that have analyzed [section] 1506 at length recognize that it is to be applied sparingly"). The Court finds that neither the Brazilian Reorganization Plan nor the Brazilian bankruptcy law concepts which are the bases of the Confirmation Decision are manifestly contrary to U.S. public policy. Brazilian bankruptcy law meets our fundamental standards of fairness and accords with the course of civilized jurisprudence. Accordingly, the public policy exception reflected in section 1506 does not provide a basis for denial of the Plan Enforcement Relief.

A. The Marketing Process of the Rede Debtors' Assets, the Consolidation of the Rede Debtors, and the Confirmation of the Brazilian Reorganization Plan Did Not Violate Creditors' Due Process Rights and Were Not Manifestly Contrary to U.S. Public Policy

While the members of the Ad Hoc Group complain about virtually every aspect of the Brazilian Bankruptcy Proceeding from start to finish, their chief complaints center around the process by which the Brazilian Reorganization Plan was approved; *i.e.,* the manner in which the Rede Debtors' assets were marketed; the determination by the Brazilian Bankruptcy Court that the Rede Debtors' assets and liabilities could be consolidated for plan purposes; and the voting process, which they argue was procedurally unfair and violated creditors' due process rights. The Court considers these arguments in turn.

1. The Marketing Process of the Rede Debtors' Assets

The Ad Hoc Group asserts that the marketing process of the Rede Debtors' assets was flawed and favored local stakeholders and insiders. In particular, the Ad Hoc Group argues that the Rede Debtors initially chose the Equatorial–CPFL Plan without competitive bidding and then inappropriately granted the bidder exclusivity, such that Energisa was only able to submit a competing proposal after a contest at the second creditors' meeting. (Objection at 9.) The Ad Hoc Group also contends that it was improper for the Rede Debtors to refuse to accept the first Energisa proposal, alleging that it would have resulted in a materially better recovery for Noteholders and for all structurally senior creditors. (Objection at 9.) [51]

51. Specifically, the Ad Hoc Group asserts that the original proposal submitted by Energisa (that offered to purchase operating subsidiaries directly from Rede) would have caused the

The record reflects otherwise. The Rede Debtors' assets were widely marketed through a competitive bidding process. Rothschild obtained a number of binding offers, including the joint bid by CPFL and Equatorial which was initially selected by the Rede Debtors and was presented to the Brazilian Bankruptcy Court in the form of the Equatorial–CPFL Plan. (Fact Stip. at ¶¶ 28–30; 34–35.) Though the Ad Hoc Group contends that the Equatorial–CPFL SPA improperly prohibited the Rede Debtors from marketing the company to other potential bidders for some time, such a prohibition is recognized in large chapter 11 cases. *See, e.g., In re Global Crossing, Ltd.*, 295 B.R. 726, 741 n.55 (Bankr.S.D.N.Y.2003) (approving debtor's compliance with a no-shop provision in a purchase agreement that included a carve-out for communications required for the debtors to comply with their fiduciary duties). Furthermore, the record illustrates that COPEL–Energisa was eventually able to make not one, but two competing bids, the first of which the Rede Debtors evaluated but ultimately rejected for various valid reasons, including that it was inferior to the Equatorial–CPFL proposal. (Fact Stip. at ¶¶ 37–42.)

The Ad Hoc Group offers no evidence to substantiate its arguments that the Rede Debtors should not have rejected the original Energisa proposal and that it would have resulted in a better recovery for Noteholders. The bald assertion that a party should have or could have received a higher distribution, especially without supporting evidence as to how much more creditors should have or could have received, is insufficient to make a showing that the requested ancillary relief should be denied or that creditors' due process rights were violated. *See generally Bd. of Dirs. of Telecom Arg.*, 528 F.3d at 173 (creditor's argument that court should not grant comity because creditors may receive a smaller distribution in the foreign jurisdiction than they would receive in the United States was irrelevant if the other factors under former section 304(c) of the Bankruptcy Code were met, as the Bankruptcy Code "does not require that the amount of a distribution in a foreign insolvency proceeding be equal to the hypothetical amount the creditor would have received in a proceeding under U.S. law").

Moreover, when Energisa submitted its revised proposal, the Rede Debtors presented it to creditors along with the Equatorial–CPFL Plan. Rede's creditors preferred the revised Energisa proposal to the Equatorial–CPFL Plan because it raised unsecured creditor recoveries from fifteen percent (under the Equatorial–CPFL Plan) to 25 percent (under the Energisa proposal which became the Brazilian Reorganization Plan). (Fact Stip. at ¶ 43.) The marketing process of the Rede Debtors' assets and the resulting evolution and improvement of the return to unsecured creditors resemble chapter 11 processes and section 363 sales that take place routinely in U.S. bankruptcies. *See, e.g., In re Boston Generating, LLC*, 440 B.R. 302, 310–313 (Bankr.S.D.N.Y.2010) (discussing the extensive marketing and sale process of a 363 sale of a debtor, in which the debtor set a bid deadline that permitted competing bidders to submit competing bids in the form of chapter 11 plans of reorganization). Accordingly, the Court finds that the marketing process was not manifestly contrary to U.S. public policy.

purchase price to flow solely to Rede's creditors, thus maximizing creditor value. (Objection at 9.)

2. The Determination by the Brazilian Bankruptcy Court That the Rede Debtors' Assets and Liabilities Could be Consolidated for Plan Purposes

The Ad Hoc Group next argues that the Brazilian Bankruptcy Court erred, as a matter of Brazilian law, when it allowed the substantive consolidation of the Rede Debtors for plan purposes and that a United States court would not, under *Union Savings Bank v. Augie/Restivo Baking Company, Ltd. (In re Augie/Restivo Baking Company, Ltd),* 860 F.2d 515 (2d Cir. 1988), grant substantive consolidation under similar circumstances. In addition to arguing that substantive consolidation was inappropriate as a matter of law, the Ad Hoc Group contends that substantive consolidation inappropriately enabled the confirmation of an otherwise unconfirmable plan as a result of FI–FGTS's vote. (Objection at 11.)

As a threshold matter, substantive consolidation for plan purposes, in and of itself, is not manifestly contrary to U.S. public policy, and while not routinely granted, substantive consolidation of certain debtors in appropriate circumstances has been approved by courts in chapter 11 cases. *See, e.g., Augie/Restivo,* 860 F.2d at 518–21; *FDIC v. Colonial Realty Co.,* 966 F.2d 57 (2d Cir.1992) (affirming district court's decision that the bankruptcy court properly directed substantive consolidation of the bankruptcy estates over the objection of creditors); *In re Drexel Burnham Lambert Group, Inc.,* 138 B.R. 723, 764 (Bankr.S.D.N.Y.1992) (approving plan with substantive consolidation of debtors and stating that "[t]he equitable doctrine of substantive consolidation permits a Court in a bankruptcy case involving one or more related corporate entities, in appropriate circumstances, to disregard the separate identity of corporate entities, and to consolidate and pool their assets and liabilities and treat them as though held and incurred by one entity"); *In re Value City Holdings, Inc.,* No. 08–14197, 2010 WL 4916389, at *7 (Bankr.S.D.N.Y. May 17, 2010) (confirming a plan that involved substantive consolidation of the debtors).

Here, the Brazilian Bankruptcy Court made specific findings that substantive consolidation of the Rede Debtors was appropriate for plan purposes. The Brazilian Bankruptcy Court found that the Rede debtors were "organized as a corporate group, with a common controlling company and credit inter-dependence" as a result of loans that exist between the companies in the group and cross-corporate guarantees to third parties. (Fact Stip. at ¶ 58.) Though the Ad Hoc Group argues that the Brazilian Bankruptcy Court did not address factors which may "ordinarily" be considered by a United States court confronted with the issue of substantive consolidation, it is not appropriate for this Court to superimpose requirements of U.S. law on a case in Brazil or to second-guess the findings of the foreign court. *See In re Cozumel Caribe,* 508 B.R. 330, 337 (Bankr.S.D.N.Y.2014) ("To inquire into a specific foreign proceeding is not only inefficient and a waste of judicial resources, but more importantly, necessarily undermines the equitable and orderly distribution of a debtor's property by transforming a domestic court into a foreign appellate court where the creditors are always provided the proverbial 'second bite at the apple.' ") (citation omitted). Moreover, the record is clear that the Ad Hoc Group exercised its due process rights to object to the Brazilian Bankruptcy Court's decision to allow substantive consolidation of the Rede Debtors and, later, its right to appeal such decision. For the foregoing reasons, the Court finds that substantive consolidation of the Rede Debtors for plan purposes was not manifestly contrary to U.S. public policy.

3. The Voting Process and Approval of the Plan Through Cram–Down

The next set of arguments raised by the Ad Hoc Group is that the creditors' due process rights were violated because the Brazilian Bankruptcy Court excluded the Indenture Trustee's vote on the Brazilian Reorganization Plan and that the Plan was approved through cram-down in a procedurally unfair manner. We address these arguments in turn.

The Ad Hoc Group argues that it was improper for the Brazilian Bankruptcy Court to exclude the Indenture Trustee's vote on the Brazilian Reorganization Plan, focusing on the fact that the Brazilian Bankruptcy Court first ruled that the Indenture Trustee would be permitted to vote on the Brazilian Reorganization Plan, and then "reconsidered" and reversed that ruling after the Indenture Trustee had voted against the Plan. (Objection at 10, 20.) Such action, combined with the "arbitrary" consolidation of the Rede Debtors, the Ad Hoc Group argues, operated to deprive Noteholders of a "meaningful opportunity to be heard (or at least to vote) in the Brazilian Bankruptcy Proceeding." (Objection at 20.)

Despite the inferences that the Ad Hoc Group wishes the Court to draw, there is no evidence that the Brazilian Bankruptcy Court disregarded the Indenture Trustee's vote *because* it voted against the Brazilian Reorganization Plan. Rather, there is ample evidence that the Brazilian Bankruptcy Court determined that, based on the terms of the Indenture, the Indenture Trustee did not have the power, without the consent of each of the individual beneficial holders of the Perpetual Notes, to vote on the Plan. (Fact Stip. at ¶¶ 99–102.) Notably, the Ad Hoc Group does not contend that this decision was wrong as a matter of U.S. law; it is well-accepted that indenture trustees do *not* vote on chapter 11 plans. In any event, the Ad Hoc Group admits that, although the Indenture Trustee was not permitted to vote on the Plan, its vote "proved largely irrelevant," as the unsecured class lacked the requisite votes to accept the Plan, and the Brazilian Bankruptcy Court eventually approved the Plan through cram-down procedures. (Objection at 10.)

The Ad Hoc Group next argues that the Brazilian cram-down procedures were not properly followed by the Brazilian Bankruptcy Court. Specifically, the Ad Hoc Group contends that, because the affirmative vote of the secured creditor class required for cram-down purposes was cast by FI–FGTS, which was not a secured creditor, but rather, an affiliated entity (*i.e.*, a shareholder), the requirements for cram-down were not satisfied, and the Plan was approved in a procedurally unfair manner. (Objection at 18.)

Assuming *arguendo* that this Court can review the decision of a Brazilian court on an issue of Brazilian law, and it cannot, the record is clear with respect to (i) the determination that FI–FGTS is a secured creditor and (ii) the Brazilian Bankruptcy Court's compliance with cram-down pursuant to Brazilian law. FI–FGTS held a put option to sell its shares in exchange for a secured claim against Denerge, one of the Rede Debtors, pursuant to an investment agreement signed in 2010, over two years prior to the Brazilian Bankruptcy Proceeding. (Fact Stip. at ¶ 65.) Although FI–FGTS's shares were not returned to EEVP in connection with the exercise of FI–FGTS's put right prior to the filing, FI–FGTS filed a petition with the Brazilian Bankruptcy Court showing that the put option had been exercised prior to the bankruptcy filing and offering those shares to the Brazilian Bankruptcy Court to dispose of them. (Fact Stip. at ¶ 66.) The Judicial Administrator then made a determination that FI–FGTS had a secured claim against Denerge in the amount R$712.5 million. After the Ad Hoc Group objected to this determination, the Brazilian Bankruptcy Court ordered that the votes be counted both with and without FI–FGTS's affirmative vote, pending resolution of the dispute. (Fact Stip. at ¶ 67.) In its Confirmation Decision, the Brazilian Bankruptcy Court subsequently concluded that FI–FGTS had validly exercised its put option prior to the filing of the Brazilian Bankruptcy Proceeding and was therefore a secured creditor. (Fact Stip. at ¶ 7 1.) FI–FGTS voted to accept the Plan; its claim was the only voting claim in Class II, the secured creditor class,[52] and the Plan was confirmed via cram-down based on the acceptance of such class.[53]

The Court finds that the Brazilian Bankruptcy Court properly followed cram-down procedures and did not violate creditors' due process rights. There is no showing that the Brazilian Bankruptcy Court ignored the Ad Hoc Group's concerns; rather it counted the results of the vote both with and without FI–FGTS's vote. The court later determined that FI–FGTS had become a secured creditor prior to the time that the Rede Debtors filed for bankruptcy, and the vote of FI–FGTS enabled the Plan to be confirmed in accordance with cram-down procedures.

In any event, the Ad Hoc Group cannot plausibly assert that cram-down was a sham based on FI–FGTS' validly exercised put right, as the Ad Hoc Group voluntarily entered a capital structure that permitted FI–FGTS to obtain and exercise the put option which gave it the right to obtain a secured claim. The Ad Hoc Group had the opportunity to contest the status of FI–FGTS as a secured creditor during the pendency of the Brazilian Bankruptcy Proceeding, and it also has exercised its right to appeal the Confirmation Decision, which appeal is still pending. If the Ad Hoc Group prevails on appeal with respect to FI–FGTS's right to vote, the Brazilian Reorganization Plan will be unable to satisfy the requirement of a consenting class for cram-down purposes—but that is an issue for the Brazilian Bankruptcy Court, rather than this Court, to decide. The record here is clear that, notwithstanding its disappointment with the outcome of the Brazilian Bankruptcy Proceeding, due process has been afforded to the Ad Hoc Group;

52. Fact Stip. at ¶ 69. The Ad Hoc Group also asserts that the term ''secured creditor class'' is a ''misnomer'' because such class only consisted of *one single voting creditor,* FI–FGTS. (Objection at 11.) The Court notes that, even under U.S. bankruptcy law, it is not uncommon for certain classes of creditors, particularly a class of secured claims, to contain only one claim. The fact that the secured creditor class under the Brazilian Reorganization Plan contained only one secured claim does not establish unfairness or manipulation of the vote, as the Ad Hoc Secured Group alleges.

53. As explained in footnote 21, *supra*, approval of a plan through the cram-down procedure under Brazilian law requires the court to approve the plan if holders of a simple majority (more than 50 percent) in amount of the total allowed claims vote for approval of the plan (here, 74 percent of all creditors voted to approve the Plan); (2) the required majorities are met in one of the two classes of claims (here, the secured class); and (3)(a) if the required majorities are not met in Class II or in Class III, more than one-third (1/3) of the creditors that (i) are present at the creditors' meeting, (ii) are allowed to vote, and (iii) actually do so, in number, in such class, must have voted in favor of the plan and, cumulatively, creditors that hold more than one-third (1/3) in amount of the allowed claims and that (a) are present at the creditors' meeting, (b) are allowed to vote, and (c) actually do so, in such class, must have voted in favor of the plan.

the voting and cram-down process was not, as the Ad Hoc Group maintains, "fraught with procedural infirmities." (Objection at 10.)

B. The Distribution Scheme in the Brazilian Reorganization Plan is Not Manifestly Contrary to U.S. Public Policy

The Ad Hoc Group asserts that the Brazilian Reorganization Plan results in distributions that are manifestly contrary to priority rules in the United States. Under section 304, courts recognized that a foreign proceeding must produce results that are "substantially" in accordance with the priority rules of the Bankruptcy Code, but "the priority rules of the foreign jurisdiction need not be identical to those of the United States." *Bd. of Dirs. of Telecom Arg.,* 528 F.3d at 170 n.9 (stating that the fourth factor of former section 304(c) of the Bankruptcy Code—assurance of just treatment of creditors—"looks to whether the priority rules of the foreign jurisdiction are 'substantially in accordance' with U.S. priority rules"); *see, e.g., Garcia Avila,* 296 B.R. at 111–12 (Bankr.S.D.N.Y.2003) (in granting a preliminary injunction, overruling an objection that a foreign plan violated the absolute priority rule, noting that the provisions of Mexican insolvency law "largely mirror" section 1129(b) of the Bankruptcy Code); *In re Axona Int'l Credit & Commerce Ltd.,* 88 B.R. 597, 610 (Bankr.S.D.N.Y.1988); *In re Schimmelpenninck,* 183 F.3d 347, 365 (5th Cir.1999). In any event, the Ad Hoc Group cites no authority that an insolvency scheme is manifestly contrary to U.S. public policy because it fails to mirror U.S. insolvency law.

Despite its lack of authority, the Ad Hoc Group argues that the Brazilian Reorganization Plan violates the absolute priority rule and is therefore manifestly contrary to U.S. law because it "preserves value for equity and/or structurally subordinated creditors (FI–FGTS and BNDESPar)" and "goes so far as to potentially call for, or at least to enable, the repayment in full of one or both of such parties" at the expense of the structurally senior Noteholders. (Objection at 19.) Citing *Treco,* 240 F.3d at 159, the Ad Hoc Group argues that, in cases where foreign bankruptcy law does not provide protections similar to those found in U.S. law, the U.S. bankruptcy court has denied the ancillary relief requested.

The Ad Hoc Group's citation to *Treco* in this context is unpersuasive. In *Treco,* liquidators of a bank incorporated in the Bahamas and undergoing bankruptcy proceedings there filed a petition under section 304(a) of the Bankruptcy Code, seeking the turnover of certain funds held by Bank of New York and other entities located in the United States. *Id.* at 151. The bankruptcy court and the district court held that turnover was appropriate under section 304(c)(4), irrespective of whether Bank of New York's claim to the funds held by it was secured. *Id.* The Second Circuit disagreed, vacated the district court's judgment, and remanded the case, holding that, to the extent that the Bahamian proceeding subordinated Bank of New York's secured claim to administrative expenses, such treatment directly conflicted with the priority rules prescribed by U.S. law and thus violated section 304(c)(4). *Id.* at 159. *Treco* did not suggest that Bahamian law was manifestly contrary to U.S. public policy, which is the issue under section 1506. It involved the rights of a secured creditor claiming a security interest in assets in the United States created under U.S. law. Chapter 15 also has special protection for this class of creditors, requiring that their interests be sufficiently protected before the collateral can be entrusted to the foreign representative for distribution. *See* 11 U.S.C. § 1521(b).

Brazilian bankruptcy law's cram-down requirements provide protections against junior stakeholders receiving or retaining value when dissenting senior stakeholders are not paid in full; such protections are similar (but not identical) to those in the United States. Under Brazilian bankruptcy law, a plan may only be crammed down if, among other things, (i) the dissenting class approves by at least one-third in amount and at least one-third in number and (ii) all classes, in the aggregate, approve by a majority in amount. (Law Stip. at ¶ 18.) Here, 74 percent of all claims, in amount, voted in favor of the Brazilian Reorganization Plan, and, in the class of unsecured claims, 66.34 percent, in amount, and 47.7 percent, in number, voted to accept.[54] This is only 0.3 percent less in amount and 2.3 percent less in number than would be required under the Bankruptcy Code for the class to have accepted, such that the absolute priority rule would not apply. *See* 11 U.S.C. § 1126(c). The Foreign Representative argues that, with a difference this small, it is difficult to see how the Brazilian Reorganization Plan could be considered manifestly contrary to U.S. public policy. The Court finds this argument persuasive.[55]

With respect to the treatment of shareholders, although Brazilian law does not permit the cancellation of equity without the consent of shareholders, Rede equity holders do not retain meaningful value under the Plan at the expense of the Rede Debtors' unsecured creditors. The remaining minority shares will be vastly diluted upon consummation of the Brazilian Reorganization Plan. First, the Rede Debtors will make a capital call to repay Energisa approximately R$498 billion for the amount Energisa paid to the creditors of the Rede Debtors in exchange for the assignment of their approximately R$2 billion in claims, within one year of such assignment and with 12.5 percent interest. (Fact Stip. at ¶ 95.) Under the Plan, Energisa will also assume certain guarantees of the debts of the Rede Group that had been provided by the Controlling Shareholder. (Fact Stip. at ¶ 43.) In addition, pursuant to the ANEEL Plan, Energisa will invest a minimum of R$1.2 billion in the Rede Concessionaires, which Energisa anticipates accomplishing by flowing such funds through the Rede Debtors via a series of capital calls. (Fact Stip. at ¶ 95.) This significant dilution of outstanding equity under the Brazilian Reorganization Plan is consistent with the purpose of the absolute priority rule in the U.S., which is designed to prevent shareholders from retaining equity in reorganized companies without contributing new value. *See Case v. Los Angeles Lumber Prods. Co.,* 308 U.S. 106, 121–22, 60 S.Ct. 1, 84 L.Ed. 110 (1939). Moreover, approval of such treatment here also was obtained from the dissenting unsecured class according to a Brazilian procedure designed to protect creditors' rights.

[16] Therefore, although Brazilian bankruptcy law does indeed differ from U.S. law in certain respects, the Foreign Representative has successfully demonstrated that the distribution scheme in the Brazilian Reorganization Plan is not manifestly contrary to the public policy of the United States. This Court will not decline to extend comity and grant additional relief simply because Brazilian bankruptcy law is not identical to U.S. bankruptcy law. *See Ackermann v. Levine,* 788 F.2d 830,

54. Fact Stip. at 22 n.12 (citing Ex. R (chart providing voting results as calculated by the Brazilian Bankruptcy Court)).

55. *See also supra* note 49.

842 (2d Cir.1986) ("'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.'") (quoting *Loucks v. Standard Oil Co. of N.Y.*, 224 N.Y. 99, 110–11, 120 N.E. 198 (1918) (Cardozo, J.)).

C. Differing Treatment of Similarly Situated Creditors by the Brazilian Reorganization Plan Was For a Valid Purpose and is Not Inconsistent With U.S. Law

[17] The Ad Hoc Group argues that the Brazilian Reorganization Plan discriminates unfairly among the Class III (Unsecured) creditors, pointing to the Plan's disparate treatment of the Class III claims: Noteholders are receiving a 25 percent recovery while other Class III creditors, the holders of Subsidiary Concessionaire Claims and Concessionaire Creditor Claims, are being paid in full or essentially left unimpaired. (Objection at 17.)[56] However, the Ad Hoc Group ignores the fact that this favorable treatment is necessary, and indeed required, under Brazilian law. Pursuant to MP 577, the Brazilian government, in a valid exercise of its regulatory powers, prohibits all concessionaires, including the Rede Concessionaires (*i.e.*, the Rede Debtors' nondebtor operating subsidiaries in which ANEEL intervened), from entering bankruptcy; therefore, the Rede Concessionaires' claims against the Rede Debtors must be paid in full[57] under the Correctional Plan approved by ANEEL before ANEEL will lift its intervention in the Rede Concessionaires.[58] (Reply at ¶ 10.) As the Foreign Representative makes clear, although certain Class III (Unsecured) members may be treated differently under the Brazilian Reorganization Plan, such disparate treatment is justified where, as here, a government regulator charged with protecting the resources in its country has required different treatment of a creditor involved in reorganization proceedings. Indeed, different treatment of groups of unsecured creditors is not uncommon under chapter 11.

The question before this Court is only whether such treatment of similarly situated claims is wholly at odds with U.S. public policy. The Court finds that it is not. *See, e.g., JPMorgan Chase Bank, N.A. v.*

56. Specifically, the Ad Hoc Group criticizes the "special" treatment of two groups of Class III Claims: (i) intercompany claims owed to non-debtor subsidiaries that are electricity distribution concessionaires (the Rede Concessionaires), which claims are being paid in full under the Plan and (ii) obligations of electricity distribution concessionaires (the Subsidiary Concessionaires) that are also joint obligations of a Rede Debtor, which obligations are required to be brought current and then assumed by Energisa under the Brazilian Reorganization Plan (*i.e.*, paid in full). *See* Objection at 6.

57. In addition to the claims of the Rede Concessionaires, under the Brazilian Reorganization Plan, the claims of the Concessionaire Creditors (*i.e.*, the creditors of the Rede Concessionaires that also hold guarantee or surety claims against one or more of the Rede Debtors) are entitled to the same treatment as all other general unsecured creditors, but, if the Concessionaire Creditors agree to waive further enforcement rights, defaults, and penalties against the Rede Concessionaires and the Rede Debtors, such creditors will have their surety or guarantee claims replaced by Energisa.

58. In order to lift its intervention in the Rede Concessionaires, ANEEL required that Energisa (or any potential investor in the Rede Debtors) address and mitigate the risks of potential defaults under the concession agreements with the Brazilian government by adequately capitalizing the Rede Concessionaires, including by settling the debts owed to the Rede Concessionaires by the Rede Debtors, curing the Rede Concessionaires' outstanding defaults, and assuming or paying down the Rede Concessionaires' outstanding debts. (Fact Stip. at ¶ 86.)

Charter Commc'ns Operating, LLC (In re Charter Commc'ns Corp.), 419 B.R. 221, 267 (Bankr.S.D.N.Y.2009) (holding that plan did not unfairly discriminate against unsecured noteholder class receiving 32.7 percent recovery while awarding general unsecured creditors a 100 percent recovery because differing treatment was justified); *In re Adelphia Commc'ns,* 368 B.R. 140, 246–47 (Bankr.S.D.N.Y.2007) (permitting differing treatment of unsecured creditors when done for a valid purpose, including to separate liquidated and unliquidated claims); *see also In re LightSquared Inc.,* 513 B.R. 56, 82–83 (Bankr.S.D.N.Y.2014).

Accordingly, the different treatment of the Class III (Unsecured) creditors under the Brazilian Reorganization Plan is not manifestly contrary to U.S. public policy, where the Rede Debtors have demonstrated that such treatment is reasonable due to ANEEL's intervention and where such treatment is necessary in order to confirm the Plan.

D. To the Extent That There is Disparate Treatment, Such Treatment is Not Targeted at U.S.-Based Creditors and There is No Evidence of Protection of Local Creditors to the Detriment of U.S.-Based Creditors

[18] Finally, the Ad Hoc Group attempts to demonstrate that U.S.-based creditors, including U.S.-based Noteholders, were the targets of prejudice or mistreatment in the Brazilian Bankruptcy Proceeding. The facts are to the contrary. As described in the Law Stipulation, the Brazilian Constitution requires that Brazilians and foreigners be treated equally before the law. (Law Stip. at ¶ 24.) In accordance with the laws of Brazil, and as provided in the Stipulation of Facts, all of the Rede Debtors' creditors, including the Ad Hoc Group and U.S.-based creditors, received a full and fair opportunity to participate in the Brazilian Bankruptcy Proceeding by, among other things, objecting to the bankruptcy filing; filing proofs of claim; filing motions concerning substantive consolidation of the Rede Debtors for plan purposes; attending creditors' meeting and having a representative appointed to the creditors' committee; voting on the Plan; and filing numerous objections, motions for clarification, appeals, and requests for stays pending appeal. There is no evidence that U.S.-based creditors failed to receive notice of the Brazilian Bankruptcy Proceeding or were prevented from participating in the Brazilian Bankruptcy Proceeding. No proof of mistreatment of U.S.-based creditors has been provided to the Court.

More importantly, however, it appears that only two of the Rede Debtors' known creditors, including known Noteholders, are located in the United States: (i) Merrill, a member of the Ad Hoc Group, which holds approximately 8.1 percent of the Perpetual Notes (worth approximately USD$40 million in face amount) [59] and (ii) the IADB, the holder of the majority in amount of the Concessionaire Creditor Claims, which is not a member of the Ad Hoc Group and which supported confirmation of the Brazilian Reorganization Plan. (Reply at ¶ 37.) In any event, the members of the Ad Hoc Group hold, in the aggregate, only 37 percent of the outstanding Perpetual Notes, and Merrill is the only Ad Hoc Group member located in the United States. (Fact Stip. at ¶ 80.) In essence, the Ad Hoc Group is complaining of mistreatment directed at U.S.-based creditors generally, but Merrill is the sole U.S. creditor that does not support the Brazilian Reorganization Plan. There is no evidence in the record that demonstrates that Merrill or any other U.S.-based credi-

59. 5/9/14 Tr. at 23:19–24:4.

tor was targeted, and the Ad Hoc Group declined the opportunity to present evidence to the Court to support this contention.

The Ad Hoc Group also argues that, in adopting MP 577, which prohibits bankruptcy filings by electricity distribution concessionaires, the Brazilian government and ANEEL attempted to ensure that "local creditors, primarily at the operating level, would be unimpaired by any restructuring process." (Objection at 8.) The Ad Hoc Group argues that MP 577 did so by "shift[ing] all the risk to a much smaller (in number) pool of financial creditors at the holding company level." (*Id.*) Creditors at the holding company level always have greater risk than creditors of the operating companies, as they have no right of payment before subsidiary debt is paid in full. Moreover, the Ad Hoc Group fails to demonstrate that the purpose of MP 577 was to protect local, operating level creditors. Rather, the Stipulation of Facts makes clear that the main objective of the Brazilian government in passing the MP 577 legislation was to give more security to the energy supply in Brazil. (Fact Stip. at ¶ 20 (discussing press release issued by the MME of Brazil).) The legislative history of MP 577 also indicates that the Brazilian government passed the measure in order to prevent public electric power concessionaires or permit holders from entering into bankruptcy, as CELPA did. (Fact Stip. at ¶ 19.) The Brazilian government's exercise of its regulatory power in this manner is not manifestly contrary to U.S. public policy. As in Brazil, electricity distribution utilities in the United States are heavily regulated by U.S. state and federal governmental regulators in order to protect the public interest. U.S. regulators routinely engage in various activities designed to regulate electricity distribution utilities, including by setting the rates such utilities charge customers, licensing market entrants, approving the utilities' financial transactions, and setting service quality standards. Accordingly, the Court finds no evidence of targeted mistreatment of U.S.-based creditors by the passage of MP 577.

The public policy exception embodied in section 1506 permits a court to decline to take any action, including granting additional relief or assistance pursuant to section 1521 and 1507 of the Bankruptcy Code, if such action would be manifestly contrary to the public policy of this country. Where, as here, the proceedings in the foreign court progressed according to the course of a civilized jurisprudence and where the procedures followed in the foreign jurisdiction meet our fundamental standards of fairness, there is no violation of public policy.

CONCLUSION

Based on the foregoing, the Plan Enforcement Relief is granted. The parties are directed to submit an order granting the Plan Enforcement Relief in accordance with this Decision.

IN RE: LONGVIEW POWER,

In the Matter of VITRO S.A.B. DE C.V., Debtor.

Ad Hoc Group of Vitro Noteholders, Appellant,

v.

Vitro S.A.B. de C.V., Appellee.

In the Matter of Vitro S.A.B. de CV, Debtor.

Vitro S.A.B. de C.V., Appellant,

v.

Ad Hoc Group of Vitro Noteholders; Wilmington Trust, National Association, solely in its capacity as indenture trustee; U.S. Bank National Association, Appellees.

In the Matter of Vitro S.A.B. de C.V., Debtor.

Fintech Investments, Limited, Appellant,

v.

Ad Hoc Group of Vitro Noteholders; Wilmington Trust, National Association, solely in its capacity as indenture trustee; U.S. Bank National Association, Appellees.

Nos. 12–10542, 12–10689 and 12–10750.

United States Court of Appeals, Fifth Circuit.

Nov. 28, 2012.

Decision Abridged and Pages Renumbered from Official Reporter

Background: Mexican holding company filed Chapter 15 petition for recognition of its Mexican bankruptcy proceeding as foreign main proceeding. Ad hoc group of noteholders objected to petition. The United States Bankruptcy Court for the Northern District of Texas, Harlin DeWayne Hale, J., granted petition, and noteholders appealed. The District Court, A. Joe Fish, Senior District Judge, 470 B.R. 408, affirmed, and noteholders appealed. In separate proceeding, foreign representatives moved for post-recognition relief in nature of enforcement of judgment entered by Mexican court, which not only modified debts owed by foreign debtor, but novated and extinguished guarantees of foreign debtor's indebtedness by its nondebtor subsidiaries. The Bankruptcy Court, Harlin DeWayne Hale, J., 473 B.R. 117, denied motion, and foreign representatives appealed directly to the Court of Appeals, where appeal was consolidated with prior appeal by noteholders.

Holdings: The Court of Appeals, King, Circuit Judge, held that:

(1) individuals were not disqualified from serving as "foreign representatives" of company that was the subject of Mexican reorganization proceeding merely because they were designated as representatives by company's board of directors, and not officially appointed by Mexican court;

(2) as matter of apparent first impression, court had to consider availability of post-recognition relief first under provision of Chapter 15 authorizing "any appropriate relief," before employing provision authorizing "additional assistance";

(3) unavailability of non-debtor releases in reorganization cases under United States bankruptcy law did not neces- sarily mean that foreign representa- tives of debtor that was reorganizing under Mexican law could not obtain enforcement of such releases; but

(4) bankruptcy court did not abuse its discretion in denying enforcement motion.

Affirmed.

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Appeals from the United States Bankruptcy Court for the Northern District of Texas.

Before KING, SMITH and BARKSDALE, Circuit Judges.

KING, Circuit Judge:

Consolidated before us are three cases relating to the Mexican reorganization proceeding of Vitro S.A.B. de C.V., a corporation organized under the laws of Mexico. The Ad Hoc Group of Vitro Noteholders, a group of creditors holding a substantial amount of Vitro's debt, appeal from the district court's decision affirming the bankruptcy court's recognition of the Mexican reorganization proceeding and Vitro's appointed foreign representatives under Chapter 15 of the Bankruptcy Code. Vitro and one of its largest third-party creditors, Fintech Investments, Ltd., each appeals directly to this court the bankruptcy court's decision denying enforcement of the Mexican reorganization plan because the plan would extinguish the obligations of non-debtor guarantors. For the following reasons, we affirm the district court's judgment recognizing the Mexican reorganization proceeding and the appointment of the foreign representatives. We also affirm the bankruptcy court's order denying enforcement of the Mexican reorganization plan.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Vitro S.A.B. de C.V. and the 2008 Financial Crisis

Vitro S.A.B. de C.V. ("Vitro") is a holding company that, together with its subsidiaries, constitutes the largest glass manufacturer in Mexico. Originally incorporated in 1909, Vitro operates manufacturing facilities in seven countries, as well as distribution centers throughout the Americas and Europe, and exports its products to more than 50 countries worldwide. Vitro employs approximately 17,000 workers, the majority of whom work in Mexico. Between February 2003 and February 2007, Vitro borrowed a total of approximately $1.216 billion, predominately from United States investors. Vitro's indebtedness is evidenced by three series of unsecured notes. The first series was issued on October 22, 2003 and consisted of $225 million aggregate principal amount of 11.75% notes due 2013; the second and third series were issued on February 1, 2007, and consisted of $300 million of 8.625% notes due 2012 and $700 million of 9.125% notes due 2017 (collectively the "Old Notes").

Payment in full of the Old Notes was guaranteed by substantially all of Vitro's subsidiaries (the "Guarantors"). The guaranties provide that the obligations of the Guarantors will not be released, discharged, or otherwise affected by any settlement or release as a result of any insolvency, reorganization, or bankruptcy proceeding affecting Vitro. The guaranties further provide that they are to be governed and construed under New York law and include the Guarantors' consent to litigate any disputes in New York state courts. The guaranties state that "any rights and privileges that [Guarantors] might otherwise have under the laws of Mexico shall not be applicable to th[e] Guarant[ies]."

In the latter half of 2008, Vitro's fortunes took a turn for the worse when the global financial crisis significantly reduced demand for its products. Vitro's operating income declined by 36.8% from 2007 to 2008, and an additional 22.3% from 2008 to 2009. In February of 2009, Vitro announced its intention to restructure its debt and stopped making scheduled interest payments on the Old Notes.

B. Vitro Restructures Its Obligations

After Vitro stopped making payments on the Old Notes, it entered into a series of transactions restructuring its debt obligations. On December 15, 2009, Vitro entered into a sale leaseback transaction with Fintech Investments Ltd. ("Fintech"), one of its largest third-party creditors, holding approximately $600 million in claims (including $400 million in Old Notes). Under the terms of this agreement, Fintech paid $75 million in exchange for the creation, in its favor, of a Mexican trust composed of real estate contributed by Vitro's subsidiaries. This real estate was then leased to one of Vitro's subsidiaries to continue normal operations. The agreement also gave Fintech the right to acquire 24% of Vitro's outstanding capital or shares of a subholding company owned by Vitro in exchange for transferring Fintech's interest in the trust back to Vitro or its subsidiaries.

Partly as a result of these transactions, Vitro generated a large quantity of intercompany debt. Previously, certain of Vitro's operating subsidiaries directly and indirectly owed Vitro an aggregate of approximately $1.2 billion in intercompany debt. As a result of a series of financial transactions in December of 2009, that debt was wiped out and, in a reversal of roles, Vitro's subsidiaries became creditors to which Vitro owed an aggregate of approximately $1.5 billion in intercompany debt. Despite requests by holders of Old Notes, Vitro did not disclose these transactions. In August of 2010, Fintech purchased claims by five banks holding claims against Vitro and its subsidiaries and extended the maturity of various promissory notes issued by Vitro's subsidiaries. Pursuant to a "Lock-up Agreement" completed between Fintech and Vitro, Fintech also agreed not to transfer any debt it held in Vitro unless such transfer was in line with the terms of that agreement.

Only in October of 2010, approximately 300 days after completing the transactions with its subsidiaries, did Vitro disclose the existence of the subsidiary creditors. This took the transactions outside Mexico's 270–day "suspicion period," during which such transactions would be subject to addi- tional scrutiny before a business enters bankruptcy.

C. Vitro Commences a *Concurso* Proceeding in Mexican Court

Between August 2009 and July 2010, Vitro engaged in negotiations with its creditors and submitted three proposals for reorganization. Each was rejected by creditors. After the last proposal, the Ad Hoc Group of Vitro Noteholders (the "Noteholders"), a group of creditors holding approximately 60% of the Old Notes, issued a press release "strongly recommend[ing]" that all holders of the Old Notes deny consent to any reorganization plan that the Noteholders had not approved. On November 1, 2010, Vitro disclosed its intention to commence a voluntary reorganization proceeding in Mexico, together with a pre-packaged plan of reorganization. On December 13, 2010, Vitro initiated in a Mexican court a *concurso* proceeding under the Mexican Business Reorganization Act, or *Ley de Concursos Mercantiles* ("LCM").[1]

The Mexican court initially rejected Vitro's filing on January 7, 2011, because Vitro could not reach the 40% creditor approval threshold necessary to file a *concurso* petition without relying on intercompany claims held by its subsidiaries. On April 8, 2011, that decision was overruled on appeal and Vitro was then declared to be in bankruptcy, or *concurso mercantil.* Pursuant to Mexican law, Javier Luis Navarro Velasco was appointed as *conciliador.*[2]

The *conciliador* was tasked with filing an initial list of recognized claims and mediating the creation of a reorganization plan. The *conciliador* did so, and on August 5, 2011, filed a proposed final list of recognized creditors, which included those subsidiaries holding intercompany debt. The *conciliador* then negotiated terms of a reorganization plan between Vitro and the recognized creditors to submit to the Mexican court for approval. Throughout this process, the parties were apparently in frequent contact with the Mexican court on an ex parte basis.

1. Terms of the *Concurso* Plan

On December 5, 2011 the *conciliador* submitted to the Mexican court a proposed restructuring plan (the "*Concurso* plan" or "Plan") substantially identical to the one Vitro had originally proposed. Under the

1. A *concurso* proceeding is the Mexican equivalent of a voluntary judicial reorganization proceeding under United States law.

2. A *conciliador* is an individual appointed by the *Instituto Federal de Especialistas de Con- cursos Mercantiles*—the Federal Institute of Specialists of Insolvency Procedures—to serve as a quasi-judicial officer with certain responsibilities in a *concurso* proceeding, including filing an initial list of recognized claims, mediating a plan, and, if necessary to protect the debtor's estate, managing the debtor's business. A *conciliador's* pay is based on the number of recognized claims in a *concurso* proceeding, a fact the Noteholders argue encouraged him to recognize intercompany claims. The Noteholders also point out that, in this case, the *conciliador's* law firm provided legal services to Vitro since 2001, and that the *conciliador* retained, as his financial advisor, a firm that also acted as Vitro's internal auditor.

terms of the Plan, the Old Notes would be extinguished and the obligations owed by the Guarantors would be discharged. Specifically, the Plan provides that:

> [O]nce this Agreement is approved by the Court TTT this Agreement TTT will substitute, pay, replace and terminate the above obligations, instruments, securities, agreements and warranties in which were agreed upon Approved Credits and, therefore TTT will terminate personal guarantees granted a third and/or direct and indirect subsidiaries [sic] of Vitro with regards to the obligations, instruments, securities and agreements that gave rise to the Approved Credits.

The Plan further provides that Vitro would issue new notes payable in 2019 (the "New 2019 Notes"), with a total principal amount of $814,650,000. The New 2019 Notes would be issued to Vitro's third-party creditors (not including those subsidiaries holding intercompany debt, who would forgo their *pro rata* share of the Plan's consideration and instead receive other promissory notes). The New 2019 Notes would bear a fixed annual interest rate of 8.0%, but would "not have TTT payments of principal during the first 4 (years) years [sic] TTT and from the fifth year of operation and until the seventh year TTT will have repayments or payments of [a] total principal amount of $23,960,000.00 USD TTT payable semiannu- ally on June 30 and December 31 of each year and the remaining balance upon due date." The New 2019 Notes would also "be unconditionally and supportively guar- anteed for each of the Guarantors." Pay- ment under the New 2019 Notes would go into a third-party payment trust, which would deliver payment to those creditors who had consented to the Plan. A second trust would be created to pay non-consenting creditors upon their written agreement to the terms of the Plan. In addition to the New 2019 Notes, Vitro would also provide to the holders of the Old Notes $95,840,000 aggregate principal amount of new mandatory convertible debt obligations ("MCDs") due in 2015 with an interest rate of 12%, convertible into 20% equity in Vitro if not paid at full maturity. Finally, the Plan also provided cash consideration of approximately $50 per $1000 of principal of Old Notes.

2. The *Concurso* Plan is Approved

Under Mexican law, approval of a reorganization plan requires votes by creditors holding at least 50% in aggregate principal amount of unsecured debt. As distinguished from United States law, Mexico does not divide unsecured creditors into interest-aligned classes, but instead counts the votes of all unsecured creditors, including insiders, as a single class. As a result, although creditors holding 74.67% in aggregate principal amount of recognized claims voted in favor of the plan, over 50% of all voting claims were held by Vitro's subsidiaries in the form of intercompany debt. The 50% approval threshold could not have been met without the subsidiaries' votes. After the initial approval, the LCM provides a period during which objecting creditors can veto the plan. A veto requires agreement by recognized creditors holding a minimum of 50% in aggregate principal amount of debt or by recognized creditors numbering at least 50% of all unsecured creditors. As only 26 of the 886 recognized creditors sought to veto the *Concurso* plan, and as those creditors held less than 50% of the aggregate recognized debt, the veto failed.[3]

The Mexican court approved the *Concurso* plan on February 3, 2012. On February 23, 2012, the Plan went into effect,

3. Of the creditors resisting veto of the Plan, approximately 360 were Vitro employees to each of whom Vitro had issued a note in the amount of $1,000 prior to the Plan's filing.

and Vitro issued New 2019 Notes and MCDs and paid restructuring cash into two third-party payment trusts, one for consenting creditors and the other for non-consenting creditors. The *Concurso* plan approval order has been appealed, and such appeal has been accepted by, and is currently pending in, the Mexican judicial appellate system; no stay of effectiveness of the *Concurso* plan was entered.[4]

D. Objecting Creditors Resist Enforcement

While objecting to the *concurso* proceeding in Mexico, creditors dissatisfied with Vitro's reorganization efforts attempted to collect on the Old Notes and guaranties in a variety of ways. By April 2010, Vitro had received acceleration notices for all the Old Notes. On November 17, 2010, involuntary Chapter 11 petitions were filed against fifteen Guarantors domiciled in the United States.[5] Various holders of Old Notes also commenced two substantially identical lawsuits in New York state court against Vitro and 49 Guarantors, resulting in orders of attachment with respect to any property located in New York.

Parallel to the *concurso* proceeding, in August 2011, Wilmington Trust, National Association ("Wilmington"), the indenture trustee for the Old Notes due in 2012 and 2017, filed suit in New York state court against various of the Guarantors, seeking a declaratory judgment confirming the Guarantors' obligations under the related indentures. The state court granted partial summary judgment in Wilmington's favor on December 5, 2011. The court held that New York law applied to the dispute and that under the unambiguous terms of the relevant Old Notes, "any non-consensual release, discharge or modification of the obligations of the Guarantors TTT is prohibited." *Wilmington Trust v. Vitro Automotriz, S.A. De C.V.,* 33 Misc.3d 1231, 943 N.Y.S.2d 795 (table), 2011 WL 6141025, at *6 (N.Y.Sup.Ct. Dec. 5, 2011). The court went on to find, however, that "whether such prohibitive provisions may be modified or eliminated by applicable Mexican laws is not at issue here." *Id.* at *5.[6] A separate suit brought by U.S. Bank National Association ("U.S. Bank"), the indenture trustee for the Old Notes due in 2013, achieved the same outcome.

E. Vitro Commences a Chapter 15 Proceeding in the United States

On October 29, 2010, Vitro's Board of Directors appointed Alejandro Sanchez–Mujica to act as Vitro's foreign representa-

4. Letters submitted to this court demonstrate that substantially all of the issues relating to enforcement of the Plan before us are also being appealed in Mexican courts.

5. This matter proceeded to trial on March 31, 2011. As a result of this proceeding, four of Vitro's subsidiaries requested permission to sell substantially all their assets. Vitro's sub- sidiaries continued resisting the Noteholders' efforts and, initially, received favorable judg- ments that they were generally paying their debts as they became due or that no demand for payment had been made at the time the involuntary proceedings were commenced. That decision was appealed and, on August 28, 2012, the United States District Court for the Northern District of Texas held that the bankruptcy court erred in its findings and vacated that court's order.

6. Wilmington and other creditors then sought a temporary restraining order directing the Guarantors to withdraw their consent to the *Concurso* plan. The state court granted the TRO, but that order was stayed by the bankruptcy court on the basis that the TRO interfered with Vitro's rights in a lockup agreement between it and its subsidiaries, and the *concurso* proceeding. That order was separately appealed and is before another panel of this court, Case No. 11–11239.

Objecting creditors also took further legal action to resist Vitro's reorganization efforts, including involuntary *concurso* proceedings in Mexico.

tive. On April 14, 2011, Sanchez-Mujica commenced a Chapter 15 proceeding in United States bankruptcy court by filing a petition for recognition of the Mexican *concurso* proceeding.[7] The petition was originally filed in the United States Bankruptcy Court for the Southern District of New York, but, on May 13, 2011, by motion of objecting creditors, venue was transferred to the United States Bankruptcy Court for the Northern District of Texas. Because Sanchez-Mujica could not leave Mexico—a result of certain travel restrictions imposed by the Mexican court because of his role in Vitro's restructuring—Vitro filed a supplemental petition to recognize Javier Arechavaleta-Santos, another appointee of Vitro's Board of Directors, as "co-foreign representative."[8] The bankruptcy court, over objections, held that the Mexican reorganization proceeding was a "foreign main proceeding" and approved the petition confirming Sanchez-Mujica and Arechavaleta-Santos as foreign representatives pursuant to 11 U.S.C. § 1515 and § 1517.[9] The United States District Court for the Northern District of Texas affirmed the bankruptcy court's order. *In re Vitro, S.A.B. de C.V.*, 470 B.R. 408 (N.D.Tex.2012) (*Vitro I*). That decision has been appealed, Case No. 12-10542, and is one of the cases consolidated in this appeal.

On March 2, 2012, Vitro's foreign representatives filed a motion in bankruptcy court entitled "Motion of Foreign Representatives of Vitro S.A.B. de C.V. for an Order Pursuant to 11 U.S.C. §§ 105(a), 1507 and 1521 to (I) Enforce the Mexican Plan of Reorganization of Vitro S.A.B. de C.V., (II) Grant a Permanent Injunction, and (III) Grant Related Relief" (the "Enforcement Motion"). The Noteholders, Wilmington, and U.S. Bank (collectively, the "Objecting Creditors") objected, and the matter proceeded to trial on June 4, 2012. Following a four-day trial, in which hundreds of exhibits were presented and several witnesses testified, the bankruptcy court denied the Enforcement Motion. *In re Vitro, S.A.B. de C.V.*, 473 B.R. 117 (Bankr.N.D.Tex.2012) (*Vitro II*). As part of that ruling, the court also denied Vitro's motion to enjoin the Objecting Creditors from initiating litigation against the Guarantors.[10] To permit Vitro time to appeal, the bankruptcy court did, however, extend a previously issued temporary restraining order. Vitro and Fintech have appealed the bankruptcy court's decision, which has been certified for direct appeal, and Case Nos. 12-10689 (Vitro's appeal) and 12-10750 (Fintech's appeal) were subsequently consolidated with the other case before us.[11] Vitro subsequently sought, and was

7. This filing actually constituted Vitro's second filing of a petition for recognition under Chapter 15. Vitro first filed such a petition on December 14, 2010, but, by agreement of the parties, withdrew that petition after the Mexican court initially denied Vitro's entry into *concurso mercantil*.

8. The travel restrictions on Sanchez-Mujica were later lifted, permitting him to travel to the United States and testify at trial.

9. A "foreign main proceeding" is "a foreign proceeding pending in the country where the debtor has the center of its main interests," 11 U.S.C. § 1502(4), and is to be distinguished from a foreign nonmain proceeding, which is "a foreign proceeding TTT pending in a country where the debtor has an establishment," *id.* § 1502(5). Depending on whether a proceeding is a foreign main or a foreign nonmain, certain Chapter 15 relief will be automatic or discretionary. *See In re Ran*, 607 F.3d 1017, 1026 (5th Cir.2010).

10. Previously, on June 24, 2011, the bankruptcy court had issued a preliminary injunction in Vitro's favor to protect its assets, but denied such relief as to the guarantors.

11. Although brought under separate case numbers, the only substantive difference between the cases is that Vitro is the appellant

granted on June 28, 2012, an order by this court staying the expiration of the bankruptcy court's temporary restraining order.

II. CHAPTER 15

The dispute before us arises under Chapter 15 of the Bankruptcy Code and broadly involves two issues: recognition of the foreign representatives and enforcement of the *Concurso* plan. As to the first, on April 14, 2011, Sanchez-Mujica and Arechavaleta-Santos, as co-foreign representatives, filed a petition seeking recognition of the *concurso* proceeding under Chapter 15. The Noteholders objected that Sanchez-Mujica and Arechavaleta-Santos were not properly appointed as foreign representatives because they were not appointed by the Mexican court and because Vitro did not have the powers of a debtor in possession. The bankruptcy court granted recognition of the *concurso* proceeding as a foreign main proceeding under 11 U.S.C. § 1517. On appeal, the district court affirmed, holding that it was sufficient that Sanchez-Mujica and Arechavaleta-Santos were authorized as co-foreign representatives in the context of a foreign bankruptcy proceeding and that Vitro retained sufficient control over its business to be a debtor in possession. The Noteholders appeal, raising substantially the same arguments before us that they raised in the lower courts.

Because recognition of a proceeding under Chapter 15 is a precondition for the more substantive relief Vitro seeks in the Enforcement Motion, we will resolve the recognition issue first. We hold that the bankruptcy court and the district court correctly interpreted Chapter 15 as not requiring official court appointment. We further find that the term "foreign representatives" was intended to include debtors in possession, including those that may not meet Chapter 11's definition of debtors in possession, and that Vitro retained enough authority over its affairs to be a debtor in possession and could thus appoint Sanchez-Mujica and Arechavaleta-Santos as foreign representatives. Accordingly, we affirm the district court's ruling affirming the bankruptcy court's order.

We then address the Enforcement Motion. On March 2, 2012, Vitro's co-foreign representatives filed a motion seeking "to 1) give full force and effect in the United States to the *Concurso* Approval Order, 2)

in Case No. 12-10689, while Fintech is the appellant in Case No. 12-10750.

grant a permanent injunction prohibiting certain actions in the United States against Vitro SAB, as well as its non-debtor subsidiaries, and 3) grant certain related relief." *Vitro II,* 473 B.R. at 120–21 (quotation marks omitted). The bankruptcy court denied relief under 11 U.S.C. §§ 1507, 1521, and 1506 because approval of the Plan would extinguish claims held by the Objecting Creditors against the subsidiaries. *Id.* at 131. Vitro and Fintech appeal this decision solely on the issue of whether the bankruptcy court erred as a matter of law in refusing to enforce the *Concurso* plan because the Plan novated guaranty obligations of non-debtor parties. While the relief available under Chapter 15 may, in exceptional circumstances, include enforcing a foreign court's order extinguishing the obligations of non-debtor guarantors, Vitro has failed to demonstrate that comparable circumstances were present here. Because Vitro has not done so, we affirm the bankruptcy court's decision denying the Enforcement Motion.

A. Chapter 15 of the United States Bankruptcy Code

This case concerns a foreign bankruptcy proceeding for which recognition and enforcement are sought under Chapter 15 of the United States Bankruptcy Code. Chapter 15 was enacted in 2005 to implement the Model Law on Cross-Border Insolvency ("Model Law") formulated by the United Nations Commission on International Trade Law ("UNCITRAL"), and replaced former 11 U.S.C. § 304.[12] *See In re Ran,* 607 F.3d at 1020; *In re Iida,* 377 B.R. 243, 256 (B.A.P. 9th Cir.2007).[13] It was intended "to provide effective mechanisms for dealing with cases of cross-border insolvency," 11 U.S.C. § 1501(a), as well as to be "the exclusive door to ancillary assistance to foreign proceedings," thus "concentrat[ing] control of these questions in one court." H.R.Rep. No. 109–31, pt. 1, at 110 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 178. It was also intended to increase legal certainty, promote fairness and efficiency, protect and maximize value, and facilitate the rescue of financially troubled businesses. 11 U.S.C. § 1501(a).

[5–7] Central to Chapter 15 is comity. Comity is the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other per-

12. As Professor Jay Lawrence Westbrook has previously explained, the Model Law, along with the European Union Insolvency Regula- tion ("EU Regulation"), and the American Law Institute's Principles of Cooperation in Transnational Insolvency Cases Among Mem- bers of the North American Free Trade Agree- ment ("ALI Principles"), was a response to international trade and "the growth of multi- national enterprise," as well as "the increased incidence of multinational financial failure." Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation,* 76 Am. Bankr. L.J. 1, 1–2 (2002). Of the three, the EU Regulation "served as the source of some of the key concepts adopted in both the Model Law and the ALI Principles." *Id.* at 2. The ALI Principles, by contrast, were the last to be approved, and thus "in some important respects represent the next generation of reform." *Id.*

13. While § 304 has been replaced by Chapter 15, caselaw applying that section remains relevant to evaluating requests for relief. *See In re Atlas Shipping A/S,* 404 B.R. 726, 738 (Bankr.S.D.N.Y.2009); Leif M. Clark & Karen Goldstein, *Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies,* 46 Tex. Int'l L.J. 513, 524 (2011) ("Not surprisingly, the case law under former § 304 is still relevant to the interpretation of Chapter 15, especially as it concerns the remedies available to a foreign representative once recognition has been granted.").

sons who are under the protections of its laws." *Hilton v. Guyot,* 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895). "It is not a rule of law, but one of practice, convenience, and expediency." *Overseas Inns S.A. P.A. v. United States,* 911 F.2d 1146, 1148 (5th Cir.1990) (quotation marks and citation omitted). Within the context of Chapter 15, however, it is raised to a principal objective. Section 1501(a) begins by listing, as one of Chapter 15's goals, the furtherance of cooperation between domestic and foreign courts in cross-border insolvency cases. Section 1508 goes on to provide that Chapter 15's provisions shall be interpreted by considering "its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 U.S.C. § 1508. Comity considerations are explicitly included in the introduction to § 1507, and § 1509(b)(3) further provides that our courts "shall grant comity or cooperation to the foreign representative" of a foreign proceeding.

Such a foreign representative must first petition a United States bankruptcy court for recognition of a foreign proceeding. 11 U.S.C. §§ 1504, 1515. Chapter 15 defines such a foreign proceeding as:

> [A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

11 U.S.C. § 101(23).

Only after a United States court recognizes a proceeding can "the foreign representative TTT apply directly to a court in the United States for appropriate relief in that court." 11 U.S.C. § 1509(b)(2); *see also United States v. J.A. Jones Constr. Grp., LLC,* 333 B.R. 637, 638 (E.D.N.Y. 2005).

[8] Chapter 15 provides for a broad range of relief. This includes the ability to sue and be sued in United States courts, to apply directly to a United States court for relief, to commence a non-Chapter 15 case, and to intervene in any United States case to which the debtor is a party. *In re Condor Ins. Ltd.,* 601 F.3d 319, 324 (5th Cir.2010). Section 1520 also provides for certain automatic relief upon recognition of a foreign main proceeding, like the one here, including an automatic stay and the power to prevent transfers of the debtor's property. A bankruptcy court is also empowered under § 1521(a) to "grant any appropriate relief" necessary to "effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors." Finally, § 1507(a) gives a court authority to provide "additional assistance," subject to certain restrictions imposed by Chapter 15 and § 1507(b).

[9, 10] In considering whether to grant relief, it is not necessary that the result achieved in the foreign bankruptcy proceeding be identical to that which would be had in the United States. It is sufficient if the result is "comparable." *In re Schimmelpenninck,* 183 F.3d at 364; *Overseas Inns,* 911 F.2d at 1149; *see also In re Sivec SRL,* 476 B.R. 310, 324 (Bankr. E.D.Okla.2012) ("The fact that priority rules and treatment of claims may not be identical is insufficient to deny a request for comity."); *In re Qimonda AG,* 462 B.R. 165, 184 n. 17 (Bankr.E.D.Va.2011); *In re Petition of Garcia Avila,* 296 B.R. 95, 112 (Bankr.S.D.N.Y.2003). "[T]he foreign laws need not be identical to their counterparts under the laws of the United States; they merely must not be repugnant to our laws and policies." *In re Schimmelpenninck,* 183 F.3d at 365.

[11] But as discussed, whether any relief under Chapter 15 will be granted is a separate question from whether a foreign proceeding will be recognized by a United States bankruptcy court. The consolidated cases before us arise from decisions addressing each of these issues. We first turn to whether Vitro's co-foreign representatives were properly recognized.

Discussion
Omitted

Accordingly, we conclude that Vitro had the powers of a debtor in possession for purposes of § 101(24) and affirm the district court's decision affirming the bankruptcy court's order that Sanchez–Mujica and Arechavaleta–Santos are properly appointed foreign representatives under Chapter 15.

B. Enforcement of the Plan

1. Vitro's Request for Relief

In the Enforcement Motion, Vitro sought broad relief pursuant to 11 U.S.C. §§ 105(a), 1507, and 1521. Specifically, Vitro sought an order giving full force and effect in the United States to the Mexican court's order approving the *Concurso* plan. Vitro further sought a permanent injunction prohibiting certain actions in the United States against itself and its non-debtor subsidiaries, specifically:

> [A] permanent injunction enjoining all persons from initiating or continuing any suit, action, extra-judicial proceeding or other proceeding (including [already commenced actions in New York state court]) or any enforcement or collection process (including pursuant to any judgment, notices of attachment or [levies, restraining notices, or similar documentation]) in any jurisdiction within the United States or its territories TTT against Vitro SAB and/or the Old Guarantors TTT or their Property TTT except as permitted under the *Concurso* Plan or the *Concurso* Approval Order.

If Vitro were to succeed in obtaining all the relief that it requested, actions, executions, attachments, or other collection or enforcement processes currently pending against Vitro or its subsidiaries would be "permanently stayed, suspended, discharged, and dismissed." Judgments already rendered against it or its subsidiaries would be declared "null and void and of no further force or effect." Moreover, any entity having withheld payment to Vitro or its subsidiaries as a result of Vitro's default would immediately remit such payments to the applicable party. Finally, Vitro and its subsidiaries would be released from all liabilities with respect to any claims discharged under the *Concurso* plan. Of course, the bankruptcy court could grant some, but not all, of the relief requested.

The bankruptcy court held that the *Concurso* plan "which extinguishes the guarantee claims of the Objecting Creditors that were given under an indenture issued in the United States against non-debtor entities that are subsidiaries of Vitro, should not be accorded comity to the extent it provides for the extinguishment of the non-debtor guarantees of the indentures." *Vitro II,* 473 B.R. at 132. The bankruptcy court specifically denied enforcement under §§ 1507, 1521, and 1506. It denied relief under § 1507 because the Mexican court's approval order did "not provide for the distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by Title 11 [of the Bankruptcy Code]." *Id.* "The *Concurso* plan provides drastically different treatment in that the noteholders receive a fraction of the amounts owed under the indentures from Vitro SAB and their rights against the other obligors are cut off." *Id.* Relief under § 1521 was inappropriate because the Mexican court's approval order "neither sufficiently protects the interests of creditors in the United States, nor does it provide an appropriate balance between the interests of creditors and Vitro SAB and its non-debtor subsidiaries." *Id.* Finally, the relief sought would not be allowed under Chapter 15 because "the protection of third party claims in a bankruptcy case is a fundamental policy of the United States" and "the *Concurso* plan does not recognize and protect such rights." *Id.*

The circumstances under which the Plan was approved and the treatment creditors received raise many questions that are not before us about whether such a plan could be enforced under Chapter 15. The bankruptcy court explicitly dealt with some of these questions, while flagging others for our consideration without itself reaching them. Thus, for example, the bankruptcy court considered whether, as alleged by the Objecting Creditors, the Mexican judicial system and the *concurso* proceeding were corrupt, and should not be granted comity for this reason. Addressing the Objecting Creditors' expert—Dr. Stephen D. Morris—who testified to a series of "suspicious circumstances" and "red flags" in the *concurso* proceeding, the bankruptcy court held that, although the witness was knowledgeable and qualified to speak on corruption in Mexico generally, his analysis of what impact such corruption had on this proceeding was unpersuasive. The bankruptcy court therefore concluded that it "ha[d] not seen evidence that the Mexican Proceeding [was] the product of corruption, or that the LCM itself is a corrupt process," and rejected the Objecting Creditors' argument. *Id.* at 130. The bankruptcy court reached a similar conclusion as to whether, as argued by the Objecting Creditors, enforcement would have an adverse impact on credit markets. The court ultimately concluded that, while testimony by Dr. Elaine Buckberg, a former economist at the International Monetary Fund, was credible, her testimony did not quantify the negative effects of enforcing the Plan, and thus the court could not conclude that enforcement would adversely affect credit markets. *Id.* The bankruptcy court also considered, but rejected, the argument that relief should not be granted because the Mexican proceeding was "unfair." *Id.* at 130–31. The bankruptcy court observed that although there had been ex parte meetings, such meetings were had by both sides and were, in fact, common in Mexico. *Id.* at 131. Responding to the Objecting Creditors' allegations that they were not permitted to raise certain arguments in the Mexican court and that the *conciliador* was biased, the bankruptcy court held that such arguments were better left for the Mexican court system.[22] *Id.*

The bankruptcy court did not reach two other arguments it described as "[p]ossibl[y] [m]eritorious [o]bjections." *Id.* at 132. These were that insiders were allowed to vote in favor of the Plan, and that the *Concurso* plan violates the absolute priority rule. Other arguments the bankruptcy court did not explicitly address, but which might be subsumed under its other holdings, are that the *Concurso* plan imposed a kind of "death trap" provision that precluded non-consenting creditors from recovering anything. Another such argument is that Mexico's single-class voting made no distinctions between creditors with adverse interests. Finally, a third

22. The Objecting Creditors' briefs reiterate many of the factual allegations they made in the bankruptcy court, without addressing the bankruptcy court's holdings on those allegations. Because we affirm the bankruptcy court's ultimate holding denying enforcement to the Plan, we do not address those allegations further.

such argument challenges the propriety of Vitro's orchestrating a balance transfer of several billion dollars between itself and its subsidiaries, turning those subsidiaries into creditors, prior to entering into the *concurso* proceeding and failing promptly to disclose the existence of these newly minted insider creditors.

We need not concern ourselves with the vast majority of these issues, as Vitro and Fintech have framed their appeal in terms of only one:

> Whether the Bankruptcy Court erred as a matter of law when, after it concluded that the *Concurso* Approval Order was the product of a process that was not corrupt or unfair to the Appellees, it refused to enforce the *Concurso* Approval Order solely because the *Concurso* plan novated guarantee obligations of non-debtor parties and replaced them with new obligations of substantially the same parties?

The issue Vitro and Fintech identify underpins the bankruptcy court's entire opinion. As that court summarized, "the *Concurso* plan approved in this instance TTT extinguishes the guarantee claims of the Objecting Creditors that were given under an indenture issued in the United States against non-debtor entities that are subsidiaries of Vitro TTTT Such order manifestly contravenes the public policy of the United States and is also precluded from enforcement under §§ 1507, 1521 and 1522 of the Bankruptcy Code," and would not be accorded comity. *Id.* at 133.

2. Chapter 15's Framework for Granting Relief

[18, 19] As already discussed, "[a] central tenet of Chapter 15 is the importance of comity in cross-border insolvency proceedings." *In re Cozumel Caribe, S.A. de C.V.,* 482 B.R. 96 (Bankr.S.D.N.Y.2012). "The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call the comity of nations." *Hilton,* 159 U.S. at 164, 16 S.Ct. 139. In applying the principles of comity, we "take[ ] into account the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law." *In re Artimm, S.r.L.,* 335 B.R. 149, 161 (Bankr.C.D.Cal.2005). Accordingly, Chapter 15 provides courts with broad, flexible rules to fashion relief appropriate for effectuating its objectives in accordance with comity. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.,* 389 B.R. 325, 333–34 (S.D.N.Y.2008); *In re SPhinX, Ltd.,* 351 B.R. 103, 112 (Bankr.S.D.N.Y. 2006) ("[C]hapter 15 maintains—and in some respects enhances—the 'maximum flexibility,' that section 304 provided bankruptcy courts TTT in light of principles of international comity and respect for the laws and judgments of other nations." (citation omitted)).

[20] Given Chapter 15's heavy emphasis on comity, it is not necessary, nor to be expected, that the relief requested by a foreign representative be identical to, or available under, United States law. *In re Metcalfe & Mansfield Alternative Investments,* 421 B.R. 685, 697 (Bankr.S.D.N.Y. 2010) ("The relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical."); *see also Artimm,* 335 B.R. at 160 n. 11. We have previously cautioned that the mere fact that a foreign representative requests relief that would be available under the law of the foreign proceeding, but not in the United States, is not grounds for denying comity. *See In re Condor,* 601 F.3d at 327.

Nevertheless, Chapter 15 does impose certain requirements and considerations that act as a brake or limitation on comity, and preclude granting the relief requested by a foreign representative. In this case, the bankruptcy court rested on three of Chapter 15's sections, §§ 1521, 1507, and 1506, each of which it found precluded the relief Vitro sought. *Vitro II,* 473 B.R. at 133. Vitro's appeal predominantly rests on finding relief under § 1507 and, only in the alternative, under § 1521. Vitro argues that it would be inappropriate to deny its request for comity under § 1507, simply because the relief might not meet the requirements of § 1521. The Objecting Creditors, in turn, argue extensively that the relief Vitro requests, to the extent it is available at all, must fall under § 1521(a)(1) and (b), and that the bankruptcy court was correct to deny enforcement because of the limitations imposed by § 1522.

Thus, while comity should be an important factor in determining whether relief will be granted, we are compelled by the bankruptcy court's decision and the parties' arguments to get into the weeds of Chapter 15 to determine whether a foreign representative may independently seek relief under either § 1521 or § 1507, and whether a court may itself determine under which of Chapter 15's provision such relief would fall. Both appear to be questions of first impression.

[21] We conclude that a court confronted by this situation should first consider the specific relief enumerated under § 1521(a) and (b). If the relief is not explicitly provided for there, a court should then consider whether the requested relief falls more generally under § 1521's grant of any appropriate relief. We understand "appropriate relief" to be relief previously available under Chapter 15's predecessor, § 304. Only if a court determines that the requested relief was not formerly available under § 304 should a court consider whether relief would be appropriate as "additional assistance" under § 1507.[23]

We start by acknowledging that "[t]he relationship between § 1507 and § 1521 is not entirely clear." *In re Toft,* 453 B.R. at 190; *see also In re Atlas Shipping A/S,*[24] 404 B.R. at 741. This leaves litigants uncertain as to which provision they should rely on for relief. Indeed, Vitro itself acknowledges that its decision to seek relief under § 1507 and, only in the alternative, § 1521 was motivated, in part, by the fact that every other foreign representative requesting enforcement of a *concurso* plan under Chapter 15 has cited both § 1507 and § 1521.

23. Although this approach—first considering relief under § 1521(a) and (b) and then proceeding to § 1507—has not been explicitly mandated in this circuit, this three-step approach, as we explain below, finds support in the statutory language and in Congress's express intent in crafting § 1507.

24. *See generally* Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases,* 82 Am. Bankr. L.J. 269, 317 (2008) ("What is not clear is whether a foreign representative can pick and choose which section to proceed under in order to take advantage of different standards for affording relief or burdens of proof."); George W. Shuster, Jr., *The Trust Indenture Act and International Debt Restructurings,* 14 Am. Bankr. Inst. L.Rev. 431, 455 ("Because it is unclear where section 1521 ends and where section 1507 begins, it is also unclear which of these paths the court will follow—whether it will consider entry of an order enforcing a foreign discharge as 'appropriate relief' under section 1521 or as 'additional assistance' under section 1507.").

Section 1521(a) empowers a court to "grant any appropriate relief" at the request of the foreign representative when necessary to "effectuate the purpose of [Chapter 15] and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521(a). In addition, § 1521 lists a series of non-exclusive forms of relief. These include:

> (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
>
> (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
>
> (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
>
> (4) 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;
>
> (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;
>
> (6) extending relief granted under section 1519(a); and
>
> (7) granting 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).

11 U.S.C. § 1521(a).

Additionally, under § 1521(b), "the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative TTT provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected." Section 1522 provides an important limiting factor: relief under § 1521 may be granted "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected," and a court may impose appropriate conditions on relief. 11 U.S.C. § 1522(a)-(b).

Unlike § 1521's "any appropriate relief" language, § 1507 gives courts the authority to provide "additional assistance." Section 1507 "was added to the Bankruptcy Code because Congress recognized that Chapter 15 may not anticipate all of the types of relief that a foreign representative may require and which would otherwise be available to such foreign representative." 8 Collier on Bankruptcy ¶ 1507.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012) (Collier).[25] A court determining whether to provide additional assistance under § 1507 considers the factors listed under subsection (b),[26] which provides that:

> (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with principles of comity, will reasonably assure

25. The Model Law's analog to § 1507 "was designed to insure access to relief that might be available under law other than the insolvency law." 8 Collier, *supra,* ¶ 1507.01.

26. These factors are identical to those formerly found under § 304(c), with the exception that comity has been elevated from a factor to the introductory text.

1) just treatment of all holders of claims against or interests in the debtor's property;
2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
3) prevention of preferential or fraudulent dispositions of property of the debtor;
4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 1507(b).[27]

We are thus faced with two statutory provisions that each provide expansive relief, but under different standards. To clarify our resolution of requests for relief under Chapter 15 we adopt the following framework for analyzing such requests.

First, because § 1521 lists specific forms of relief, a court should initially consider whether the relief requested falls under one of these explicit provisions. *In re Read,* 692 F.3d 1185, 1191 (11th Cir.2012) (specific terms prevail over the general (quoting *D. Ginsberg & Sons, Inc. v. Popkin,* 285 U.S. 204, 208, 52 S.Ct. 322, 76 L.Ed. 704 (1932))); *see also* 1 Collier, *supra,* ¶ 13.07[2]; Ranney–Marinelli, *Overview, supra,* at 317 (arguable that foreign representatives should be bound by those provisions specifically providing the relief sought). Other courts have held that, where the requested relief is explicitly provided for under § 1521, it is unnecessary to consider § 1507. *In re Atlas Shipping A/S,* 404 B.R. at 740 ("Whatever the outer bounds of discretionary relief chapter 15 allows, this case does not push the boundaries. The relief sought by the foreign representative is expressly provided for in §§ 1521(a)(5) and 1521(b). The Court need not venture into the area of 'additional assistance,' 'consistent with principles of comity' under § 1507."); *In re Int'l Banking Corp. B.S.C.,* 439 B.R. 614, 626 n. 10 (Bankr.S.D.N.Y.2010).

Second, if § 1521(a)(1)-(7) and (b) does not list the requested relief, a court should decide whether it can be considered "appropriate relief" under § 1521(a). This, in turn, requires consideration of whether such relief has previously been provided under § 304. *See In re Condor,* 601 F.3d at 329 (observing that avoidance actions under foreign law were permitted under § 304 and reading § 1521(a)(7) to permit such relief). This latter consideration aligns with Congress's intent that § 1521 was not intended to "expand or reduce the

27. Because of § 1521's broad reach, § 1507's scope is uncertain. *See* Lesley Salafia, *Cross–Border Insolvency Law in the United States and Its Application to Multinational Corporate Groups,* 21 Conn. J. Int'l L. 297, 322 (2006) (section 1507 "might not have been necessary," given expansive relief available under other parts of Chapter 15); 8 Collier, *supra,* ¶ 1507.01 ("In light of this display of [§ 1521's] weaponry, it is not clear what section 1507 adds to the arsenal."). Scholarly commentary has speculated that § 1507 was merely intended to incorporate § 304's jurisprudence. 8 Collier, *supra,* ¶ 1507.01. Further muddying § 1507's role is that, although § 304(c)'s factors are included under § 1507, a court may nevertheless consider those factors under § 1521. "It would be anomalous to suggest that in determining whether creditor interests are sufficiently protected for purposes of TTT [§] 1521, a court could not consider evidence of procedural or substantive prejudice to non-domestic creditors in the foreign proceeding or a significant deviation between the distribution scheme in the foreign proceeding and the distribution scheme prescribed by the Code." Paul L. Lee, *Ancillary Proceedings under Section 304 and Proposed Chapter 15 of the Bankruptcy Code,* 76 Am. Bankr. L.J. 115, 193 (2002).

scope of relief" previously available under other provisions, including § 304. H.R.Rep. No. 109–31, pt. 1, at 116. A court should also consider whether the requested relief would otherwise be available in the United States. *Cf. Artimm,* 335 B.R. at 160 n. 11 (section 1507 authorizes relief beyond that provided for in Bankruptcy Code or United States law).

[22, 23] Third, only if the requested relief appears to go beyond the relief previously available under § 304 or currently provided for under United States law, *Artimm,* 335 B.R. at 160 n. 11, should a court consider § 1507. *See* H.R.Rep. No. 109–31, pt. 1, at 109 ("Subsection (2) [of § 1507] makes the authority for additional relief (*beyond that permitted under section*[ ] TTT *1521,* below) subject to the conditions for relief heretofore specified in United States law under section 304 TTTT" (emphasis added)). This approach recognizes that relief under § 1507 "is in nature more extraordinary" than that provided under § 1521, as a result of which "the test for granting that relief is more rigorous." Leif M. Clark, *Chapter 15 Bankruptcy Strategies: Leading Bankruptcy Experts on Understanding the Filing Process and Achieving Successful Outcomes in Cross–Border Insolvency Cases—Advice for Handling Cross–Border Bankruptcy Cases Effectively* (Aspatore Sept. 2012), *available at* 2012 WL 3279175, at *10. It also acknowledges that, while § 1507's broad grant of assistance is intended to be a "catch-all," it cannot be used to circumvent restrictions present in other parts of Chapter 15, nor to provide relief otherwise available under other provisions. *In re Int'l Banking Corp. B.S.C.,* 439 B.R. at 626 n. 10; 1 Collier, *supra,* ¶ 13.07[2] n. 34 (section 1507 should not be used "to eviscerate limitations placed within chapter 15 itself").

We believe this framework provides foreign representatives with the clearest path by which to seek Chapter 15 relief. *See* Clark, *supra,* at *10 (advising attorneys to consult § 1507 if the relief under § 1521 is insufficiently broad). This framework also conforms to Congress's intent that courts should not deny Chapter 15 relief for failure to meet the requirements of § 1507, which, in any case, "is not to be the basis for denying or limiting relief otherwise available under this chapter." H.R.Rep. No. 109–31, pt. 1, at 109; *see also* Ranney–Marinelli, *Overview, supra,* at 316 n. 267. Under this framework, courts will also "not construe the range of relief under § 1507 to be bound by the same limitations that apply in § 1521," with the exception of those limitations specifically provided for. Clark & Goldstein, *Sacred Cows, supra,* at 529.

At the same time, this approach means that, by first considering § 1521 relief—which we deem co-extensive with that previously available under § 304—courts begin their analysis in familiar territory. Ranney–Marinelli, *Overview, supra,* at 317 n. 274 (noting that, compared to other sections, § 1507's standard of proof is unclear). This prevents all-encompassing applications of § 1507 and avoids prematurely expanding the reach of Chapter 15 beyond current international insolvency law. H.R. Rep. No. 109–31, pt. 1, at 109 (purpose of § 1507 is "to permit the further development of international cooperation begun under section 304"); Clark & Goldstein, *Sacred Cows, supra,* at 529 (whether a "court [would] ever dare to employ § 1507 as a substitute for (or worse, an end-around of) § 1521" is an open question).

3. Availability of Relief under § 1521 and § 1507

Applying our analytic framework to Vitro's request for relief, the bankruptcy court did not err in denying relief. Sections 1521(a)(1)-(7) and (b) do not provide for discharging obligations held by non-debtor guarantors. Section 1521(a)'s general grant of "any appropriate relief" also does not provide the necessary relief because our precedent has interpreted the Bankruptcy Code to foreclose such a release, and because when such relief has been granted, it has been granted under § 1507, not § 1521. Even if the relief sought were theoretically available under § 1521, the facts of this case run afoul of the limitations in § 1522. Finally, although we believe the relief requested may theoretically be available under § 1507 generally, Vitro has not demonstrated circumstances comparable to those that would make possible such a release in the United States, as contemplated by § 1507(b)(4).

(a) Step 1: Section 1521's enumerated provisions

[24] The bankruptcy court denied relief under § 1521(b) and § 1522(a), observing that "[o]ne could argue that Vitro SAB, as a holding company, is trying to achieve, through its *Concurso* plan, an entrustment of the distribution of the assets of its non-debtor U.S. subsidiaries without sufficiently protecting the Objecting Creditors." *Vitro II*, 473 B.R. at 132. Vitro concedes that § 1507, on which it primarily relies, does not explicitly provide for a "discharge" of non-debtors, and thus injunctive relief is a necessary by-product of granting enforcement, but Vitro argues that this fact alone does not mean that it must satisfy the requirements of § 1522.[28] The Objecting Creditors respond that the relief Vitro seeks is addressed by § 1521(a)(1) and (b), and thus Vitro is bound by the limitations in § 1521 and § 1522 that any relief must ensure that the interests of creditors and other interested parties are sufficiently protected.

Contrary to the Objecting Creditors' assertion and the bankruptcy court's finding, the requested relief is not available under any of § 1521's specific provisions because none of the types of relief enumerated under § 1521(a) or § 1521(b) matches the type of relief Vitro seeks. The closest provision is § 1521(a)(1), which provides for "staying the commencement or continuation of an individual action or proceeding *concerning* the debtor's assets, rights, obligations or liabilities." 11 U.S.C. § 1521(a)(1) (emphasis added).[29] But Vitro is not merely seeking a stay. Rather, Vitro seeks to permanently enjoin actions brought against its subsidiaries and, moreover, to discharge obligations and liabilities owed by those subsidiaries. We reject the bankruptcy court's suggestion to treat the assets of Vitro's subsidiaries as Vitro's

28. Vitro also argues that § 1521 only applies during the pendency of a foreign insolvency proceeding, and not after the foreign court approves a reorganization plan, and Vitro cites in support *In re Daewoo Logistics Corp.*, 461 B.R. 175, 179–80 (Bankr.S.D.N.Y.2011). That case only states that "relief may be available after close of the foreign proceeding under section 1507." *Id.* at 180. It does not create a categorical rule and § 1521 does not include such a limitation.

29. Scholarly commentary has suggested that § 1521(a)(1)'s use of the word "concerns" "indicates that a stay of actions against someone other than the debtor or the debtor's assets is a possibility," including "a stay of litigation against a third party with indemnification rights against the debtor, or with shared liability TTT on the theory that the litigation so stayed *concerns* the debtor's rights, obligations or liabilities." 1 Collier, *supra*, ¶ 13.07[2] & n. 37 (emphasis in original). However, the situation in this case is different. The worry is not that Vitro will be harmed by creditors collecting from the subsidiaries who will in turn come looking for Vitro. Instead, Vitro's subsidiaries are guarantors, and thus it was Vitro's defaulting on its obligations which now endangers the subsidiaries by triggering the guaranties.

"assets" for this purpose. *In re Guyana Dev. Corp.,* 168 B.R. 892, 905 (Bankr. S.D.Tex.1994) ("As a general rule, property of the estate includes the debtor's stock in a subsidiary but not the assets of the subsidiary."). As the Objecting Creditors repeatedly remind us, most of Vitro's subsidiaries have not gone into bankruptcy. Vitro's subsidiaries are also its creditors. Thus, there is no basis to conclude that § 1521(a)(1) adequately responds to the type of relief Vitro seeks.[30]

For substantially the same reason, we reject the bankruptcy court's suggestion that § 1521(b) applies. Section 1521(b) provides that "the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative TTT provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected." Because the subsidiaries' assets are not Vitro's, § 1521(b) does not apply.[31]

(b) Step 2: Section 1521(a)'s grant of "any appropriate relief"

[25] Having determined that none of the enumerated forms of relief listed under § 1521 provides the range of relief Vitro seeks, we proceed to consider whether the relief sought fits into the court's more general power to grant "any appropriate relief." We conclude that the requested relief falls outside § 1521(a)'s grant of authority for two reasons.

First, the relief Vitro seeks, a non-consensual, non-debtor release through a bankruptcy proceeding, is generally not available under United States law. Indeed, this court has explicitly prohibited such relief. *In re Pac. Lumber Co.,* 584 F.3d 229, 251–52 (5th Cir.2009) (discharge of debtor's debt does not affect liability of other entities on such debt and denying non-debtor release and permanent injunction); *In re Zale Corp.,* 62 F.3d 746, 760 (5th Cir.1995) ("Section 524 prohibits the discharge of debts of nondebtors."). Because our law prohibits the requested discharge, a request for such relief more properly falls under § 1507, which was included to address such circumstances.

Second, our conclusion is bolstered by the fact that in the one case where a foreign proceeding's non-debtor discharge

30. We are aware that under the older § 304(b)(1) a bankruptcy court could "enjoin actions against the debtor with regard to property *involved in* such foreign proceeding" and that "against the debtor" has been understood to include non-debtors "when failure to enjoin the action would jeopardize the success of the bankruptcy process or cause irreparable harm to the debtor's estate and its creditors." *In re Schimmelpenninck,* 183 F.3d at 362 (internal quotation marks and citation omitted). However, under 11 U.S.C. § 362(a)(1), which includes the same "against the debtor" language as § 304(b), stays against non-debtors were reserved for "very limited situations." *Matter of S.I. Acquisition, Inc.,* 817 F.2d 1142, 1147 (5th Cir.1987). Moreover, unlike in a case such as *In re Schimmelpenninck,* we are not dealing with creditors attempting to recover on a debt under an alter ego and single business enterprise theory. 183 F.3d at 363. Instead, the Objecting Creditors are trying to recover from the subsidiaries under guaranties that were triggered only as a result of Vitro's default. Vitro is not seeking a temporary injunction, but a permanent discharge of the Guarantors' obligations. Vitro itself points out that injunctive relief is only incidental to the broader relief it seeks.

31. We also note that the Enforcement Motion does not seek relief under § 1521(b). Instead, the Enforcement Motion refers to § 1521(a)(1), (a)(2), (a)(5), and (a)(7). Neither Vitro's nor Fintech's brief argues how these other provisions would apply and they actually appear to present reasons for why the requested relief might not be available under § 1521.

was approved by a United States court, it was under § 1507, not § 1521. In *Metcalfe,* the court recognized that "a third-party non-debtor release 'is proper only in rare cases.' " 421 B.R. 685, 694 (Bankr. S.D.N.Y.2010) (quoting *In re Metromedia Fiber Network, Inc.,* 416 F.3d 136, 141 (2d Cir.2005)). The court nevertheless found that approval was not precluded under § 1507. *Id.* at 697.[32]

[26] Finally, we note that the bankruptcy court's decision was proper under § 1522, which requires that the relief contemplated under § 1521 balance the interests of the creditors and debtors. *See In re Tri–Cont'l Exch. Ltd.,* 349 B.R. at 637 (analysis of § 1522 "emphasize[s] the need to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another"). Because the bankruptcy court also found that the *Concurso* plan did not provide for an appropriate balance among the interests of Vitro, its creditors, and the Guarantors under § 1521 and § 1522, we observe that even were we to agree that the requested relief is provided for under § 1521, the bankruptcy court did not abuse its discretion in denying it. Because the reasons for which the bankruptcy court denied relief under § 1521 are largely identical, however, we jointly address those reasons under our discussion of § 1507. We proceed to consider whether, as Vitro and Fintech argue, the relief was available under § 1507, and whether the bankruptcy court properly denied it.

(c) Step Three: Section 1507's "additional assistance"

The bankruptcy court denied relief under § 1507 because the Plan "does not provide for the distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by Title 11," contrary to § 1507(b)(4). *Vitro II,* 473 B.R. at 132.

> Under a Chapter 11 plan, the noteholders would receive their distribution from the debtor and would be free to pursue their other obligors, in this case the non-debtor guarantors. The *Concurso* plan provides drastically different treatment in that the noteholders receive a fraction of the amounts owed under the indentures from Vitro SAB and their rights against the other obligors are cut off.

Id.

Vitro challenges the bankruptcy court's holding predominantly on the ground that it accorded insufficient weight to comity. The Objecting Creditors point to disparities between the *Concurso* plan and a similar proceeding in United States bankruptcy court. They also assert that the Mexican court's disregard for a relevant decision in New York state court precludes extending comity to its decision.

We conclude that § 1507 theoretically provides for the relief Vitro seeks because it was intended to provide relief not otherwise available under United States law. But the devil is in the details, and in this case, the bankruptcy court correctly determined that relief was precluded by § 1507(b)(4). Under that provision, the bankruptcy court had to consider whether the relief requested was comparable to that available under the Bankruptcy Code. We conclude below that, although a non-consensual, non-debtor discharge would not be available in this circuit, it could be available in other circuits. We also hold

32. While we agree with the bankruptcy court that *Metcalfe* is ultimately distinguishable, *Vitro II,* 473 B.R. at 131, we nevertheless find it instructive in determining which part of Chapter 15 would provide the requested relief.

that because Vitro has failed to show the presence of the kind of comparable ex- traordinary circumstances that would make enforcement of such a plan possible in the United States, the bankruptcy court did not abuse its discretion in denying relief.

i. Availability of non-consensual, non- debtor discharges under § 1507

Discussion Omitted

[27] The decisions of these courts demonstrate disagreement among the circuits as to when, if ever, a non-debtor discharge is appropriate. We conclude that, although our court has firmly pronounced its opposition to such releases, relief is not thereby precluded under § 1507, which was intended to provide relief not otherwise available under the Bankruptcy Code or United States law. *See Artimm,* 335 B.R. at 160 n. 11.

ii. Appropriateness of non-consensual, non-debtor discharges under § 1507

[28] Having determined that the relief Vitro seeks is theoretically available under § 1507, we turn to whether the bankruptcy court abused its discretion in determining that such relief was not appropriate in this case. The bankruptcy court held a four-day trial, involving hundreds of exhibits and testimony by witnesses from both sides. It concluded that the requested relief did not substantially conform to the order of distribution under Title 11 because the *Concurso* plan provided creditors with a substantially reduced recovery, while cutting off their ability to pursue relief against the Guarantors.

Vitro contends that the bankruptcy court incorrectly denied enforcement because the *Concurso* plan did not provide creditors with exactly what they would have received under Chapter 11.[33] Vitro further challenges the applicability of § 1507(b)(4) because the bankruptcy court based its decision on the discharge of non-debtors' obligations, and not the distribution of Vitro's property. Finally, Vitro argues that whatever concerns this case implicates, the bankruptcy court erred in concluding that they outweighed the interests of comity.[34,35]

The Objecting Creditors respond that the evidence presented at trial demonstrated that, under the *Concurso* plan, they would recover only around 40% of the Old Notes' value, while Vitro's shareholders would retain equity interests worth $500 million.[36] They also point to various

33. Vitro also argues that the bankruptcy court erred in treating § 1507(b)'s subsections as prongs of a test, as opposed to mere considerations, and did not consider the totality of the circumstances. Although it is not necessary for a plan to meet all § 1507(b) factors, *see In re Bd. of Dirs. of Telecom Arg. S.A.,* 528 F.3d 162, 169 n. 7 (2d Cir.2008) (noting that "Chapter 15 dispenses with the explicit requirement that courts consider the five factors listed in § 304(c) [now § 1507(b)] as part of an application for recognition of foreign insolvency proceedings"), failure to meet any one of these can suffice to deny enforcement, *see In re Treco,* 240 F.3d at 158–61 (denying enforcement because of violation of § 304(c)(4) (now § 1507(b)(4))).

34. Fintech also argues that failure to enforce the Plan would encourage investors to resort to litigation, instead of negotiating compromises with a debtor in bankruptcy. Given our very limited holding on the facts of this case we find this to be a slight risk. Even were it otherwise, we are bound to apply the statutory provisions of Chapter 15 faithfully irrespective of whether the effect will be to spur further litigation.

35. The parties dispute whether we need to consider the traditional factors of comity. In *International Transactions, Ltd.* we enumerated five requirements that would make a foreign court's judgment on a matter conclusive in federal court. 347 F.3d at 594. Section 1507 explicitly incorporates comity, however, and thus, given our reasoning above, we assume that comity would be granted were the Plan to also reasonably address the concerns enumerated in § 1507(b)(1)-(4). *See In re Treco,* 240 F.3d at 158 (observing that § 304(c) (now § 1507(b)) supplants federal common law analysis).

36. The Objecting Creditors' briefs largely omit any discussion of how the distributions under the *Concurso* plan, including the New 2019 Notes, the MCDs, and the cash consideration, resulted in this amount. The Objecting Creditors' witness, Dan Gropper, a managing director of one of the Noteholders, testified as a fact witness on this issue. Gropper was uncertain of what worth, for example, the MCDs, which convert into 20% equity in Vitro upon Vitro's default, would have, given the questionable value of equity in a defaulting company. The bankruptcy court made no specific factual findings in his regard, and thus we are left with the court's more general observation that creditors would, under the Plan, receive a fraction of what they would have received under the Old Notes.

The Objecting Creditors also make much of testimony by their expert witness, Dr. Joseph W. Doherty, that there was only a 10,000 to 1 chance that Vitro would have received a distribution in United States bankruptcy court like that resulting from the *concurso* proceeding. But this calculation was not based on any case-by-case comparison between Vitro and other bankruptcies. Instead, it was based on a sample of cases drawn from an incomplete database of bankruptcy proceedings, which, at the time, contained 108 relevant cases, of which 37 involved any distributions of equity. Doherty himself admitted that the database was still in the process of being compiled and presently contained only cases with information easily available on the Public Access to Court Electronic Records database ("PACER"). Statistical evidence of this variety is, to say the least, of limited value when considering the complexities of bankruptcy proceedings of this scale. The bankruptcy court acknowledged that Doherty testified as to "[t]he wide variance in return to creditors from what would be expected in a Chapter 11 plan," but only found that testimony "credible," without making any specific factual findings, and only made his credibility finding within the scope of arguments the court did not reach.

parts of the Plan that do not conform with Chapter 11. These include that guarantor obligations cannot be discharged over the objections of creditors, creditors would not have been grouped for voting purposes into a single class together with parties having adverse interests, and insider votes would not count towards the Plan's approval. The Objecting Creditors further argue that comity does not weigh in favor of enforcement of this plan because the Mexican court, which approved it, ignored a ruling by a New York state court holding that the indentures expressly prohibited modification of the Guarantors' obligations.

We conclude that the evidence Vitro presented at trial does not support the presence of circumstances comparable to those necessary for effectuating the release of non-debtor guarantors in those of our sister circuits that allow such a release. *See In re Schimmelpenninck,* 183 F.3d at 364.

We begin our analysis, as we must, by considering comity. 11 U.S.C. § 1507 (court may grant "additional assistance TTT consistent with principles of comity"). In revising Chapter 15's predecessor, § 304, Congress elevated comity from a factor under § 304(c) to the introductory text of § 1507 "to make it clear that it is the central concept to be addressed." H.R.Rep. No. 109–31, pt. 1, at 109. Vitro is thus correct to focus its argument on comity, and we agree with Vitro that comity is the rule under Chapter 15, not the exception. It is thus necessary to first address the Objecting Creditors' most direct challenge to that principle, namely that the Mexican court failed to extend comity to the decision of a New York state court on issues central to this case. *See United States ex rel. Saroop v. Garcia,* 109 F.3d 165, 170 (3d Cir.1997) (reciprocity is condition for honoring foreign country's judicial decrees); *Remington Rand Corp.–Del. v. Bus. Sys. Inc.,* 830 F.2d 1260, 1273 (3d Cir.1987) (describing comity as a "two-way street").[37]

The New York state court addressed a declaratory judgment action brought by Wilmington, which sought a confirmation of Vitro's obligations under the indentures. *Wilmington Trust,* 2011 WL 6141025, at *1. The state court carefully parsed the issues before it and determined that "any declaratory relief in this court can only be in the context of determining the rights and obligation of the parties under the Indentures." *Id.* at *5. The court next determined that the indentures were governed by New York law and that "pursuant to the relevant provisions of the Indentures TTT any non-consensual TTT release, discharge or modification of the Guarantors' obligations is prohibited." *Id.* The court was clear, however, that its authority went no further. "Whether such rights and obligations can or cannot be novated, substituted, released or modified under the Mexican bankruptcy law is an issue for the Mexican Court." *Id.* To remove all doubt, the court explicitly stated that "granting a declaratory judgment in favor of [the Objecting Creditors], to the extent stated herein, will not interfere with the Mexican Court proceeding, which is the proper jurisdiction to determine the issues that may arise in connection with the approval of the Concurso Plan, pursuant to applicable Mexican law." *Id.* The court concluded by stating that "whether any Concurso Plan that is ultimately approved by the Mexican Court may be enforced in the United States is an issue for the feder-

37. We found the discussion on this issue in the amicus curiae brief filed by the United Mexican States of assistance.

al courts, including the Bankruptcy Court." *Id.*

The Mexican court was presented with the opportunity to consider the New York decision and its impact on the *concurso* proceeding. Although the Mexican court does not appear to have provided specific reasons, we infer from its decision that it did not find that the indentures precluded Mexican law from novating the obligations contained therein. Because the New York court explicitly set aside this issue for the Mexican court, reciprocity was not offended by the Mexican court's subsequent decision of that very issue. We thus do not view this as a ground for denying comity. Our decision comports with the approach adopted by the court in *Metcalfe*, which, while recognizing that a third-party non-debtor release might be inappropriate under United States law, left it to the Canadian courts to determine whether they had the jurisdiction to grant such relief. 421 B.R. at697–700.

We next consider whether the bankruptcy court erred in basing its decision on § 1507(b)(4).[38] Section 1507(b)(4) provides that a court should consider whether to grant additional assistance to a foreign representative by considering the "distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title." Vitro asserts that the bankruptcy court's opinion was based on the distribution of non-debtor's property, that of Vitro's subsidiaries, and thus § 1507(b)(4) is inapplicable. But the focus of § 1507(b)(4) is on the plan of distribution, and Vitro ignores that the Plan it seeks to enforce premises distribution of its assets on the discharge of obligations owed by non-debtors who are also Vitro's creditors. The respective amounts that Vitro pays under the Plan to the Objecting Creditors and to its subsidiaries are inescapably dependent on the discharge of the non-debtor Guarantors. That the detriment of this distribution falls on the Objecting Creditors, whose rights are extinguished in exchange for their distribution under the Plan, in no way subtracts from the fact that the release affects how the proceeds of Vitro's property are distributed.

We turn finally to whether the evidence Vitro has presented in favor of comity and enforcement so outweighed the bankruptcy court's concerns under § 1507(b)(4) that it was an abuse of discretion for the bankruptcy court to deny relief. Vitro's primary witness was its foreign representative, Sanchez-Mujica. He testified that the *conciliador* persuaded Vitro to offer more favorable terms to third-party creditors in the *Concurso* plan. These included a 5% increase—from 15% to 20%—of the equity available on default under the MCDs, and that consent payments, previously made to only some of the creditors, be extended to all consenting creditors. But this hardly shows that the result of the *concurso* proceeding is in line with what would be available under Chapter 11, much less that this case features the unique circumstances that would warrant a general release of the non-debtor subsidiaries. Sanchez-Mujica also testified that over 74% of recognized creditors approved the plan. But this ignores that recognized creditors holding over 50% of all unsecured debt who voted in favor of the Plan were Vitro subsidiaries.

Vitro's second witness, Luis Mejan—an expert in Mexican bankruptcy law—was

38. Because the bankruptcy court did not discuss whether § 1507(b)(1)-(3) weighed in favor of, or against, granting relief, and because we find that relief was properly denied on other grounds, we do not reach the Objecting Creditors' argument that the *Concurso* plan violated § 1507(b)'s other subsections.

cross-examined at trial, and his expert report and expert rebuttal were introduced in lieu of direct examination. Mejan's expert report provides a comprehensive breakdown of the LCM and how it operates in the *concurso* context. This merely establishes, however, that the LCM is a process comparable to that of the United States, a fact which no party seriously disputes. The bankruptcy court also had to consider whether the results yielded under the LCM, on the facts of this case, were comparable to the result likely in the United States. *See In re Treco,* 240 F.3d at 159 ("A court must consider the effect of the difference in the law on the creditor in light of the particular facts presented."); *In re Sivec SRL,* 476 B.R. at 324 ("The fact that priority rules and treatment of claims may not be identical is insufficient to deny a request for comity. What this Court must consider is the effect of that difference on the creditor in light of the existing facts."). Mejan's expert report extensively describes Mexican law, but does not explain how the results achieved in this case would compare to those in a United States bankruptcy proceeding. When asked if he had considered "whether other plans that had been approved or enforced in the United States were comparable to Vitro in terms of what happened in the Mexican proceedings," Mejan conceded that he "did not conduct a specific search in order to make [that] comparison."[39] This failure is especially troubling given Vitro's request for relief which, under United States law, would not be available in this circuit, and would only be available under the narrowest of circumstances in some of our sister circuits.[40]

In summary, although extensive testimony was taken before the bankruptcy court that the LCM's legal framework is substantially in accordance with our own, this does not end the analysis of whether to grant comity. *See In re Treco,* 240 F.3d at 158–61 (bankruptcy court abused its discretion by affording comity to Bahamian bankruptcy proceeding without considering effects on creditor's claim). The bankruptcy court correctly observed that we have "largely foreclosed non-consensual non-debtor releases and permanent injunctions outside of the context of mass tort claims being channeled toward a specific pool of assets." *Vitro II,* 473 B.R. at 131. There appears little dispute that, under United States law, non-debtor releases, while possible in other circuits, are only appropriate in extraordinary circumstances. To that end, Vitro was required to show that something comparable to such circumstances was present here. The mere fact that the *concurso* proceeding complied with the relevant provisions of the LCM is not, in itself, sufficient.

39. Mejan's rebuttal report also seeks to undermine the Objecting Creditors' claim that there is a debate in the Mexican legal community as to whether insiders are allowed to vote. Regardless of whether such a debate exists, or whether the LCM permits it or not, it is surely the case that in the United States insider voters cannot themselves push through a plan where there is a class of dissenting creditors. *See CIBC Bank & Trust Co. (Cayman) Ltd. v. Banco Cent. do Brasil,* 886 F.Supp. 1105, 1114 (S.D.N.Y.1995) (citing 11 U.S.C. § 1129(a)(10)) (Bankruptcy Code "prevents 'insiders' from voting on whether a reorganization plan will be accepted by a class of impaired creditors"). As we have explained previously, the Bankruptcy Code requires that at least one impaired class of creditors approve a plan, where the class is made up of claims that are substantially similar or share the impaired creditors' interests. *In re Save Our Springs (S.O.S.) Alliance, Inc.,* 632 F.3d 168, 174 (5th Cir.2011).

40. Vitro also called as a rebuttal witness Claudio Del Valle, Vitro's chief financial and restructuring officer. That witness testified as to the amount of default interest recognized in the *concurso* proceeding.

Were it otherwise, we would be treating the extraordinary relief available under § 1507 with the casual indifference we have already rejected in the context of recognition determinations under Chapter 15. *See In re Ran,* 607 F.3d at 1021 (recognition determination is not a "rubber stamp exercise"). We would also be disregarding the considerations and safeguards Congress included in § 1507(b).

To that end, we observe that many of the factors that might sway us in favor of granting comity and reversing the bankruptcy court to that end are absent here. Vitro has not shown that there existed truly unusual circumstances necessitating the release. To the contrary, the evidence shows that equity retained substantial value. The creditors also did not receive a distribution close to what they were originally owed. Moreover, the affected creditors did not consent to the Plan, but were grouped together into a class with insider voters who only existed by virtue of Vitro reshuffling its financial obligations between it and its subsidiaries. It is also not the case that the majority of the impacted group of creditors, consisting predominantly of the Objecting Creditors, voted in favor of the Plan. Nor were non-consenting creditors given an alternative to recover what they were owed in full.[41]

Vitro cannot rely on the fact that a substantial majority of unsecured creditors voted in favor of the Plan. Vitro's majority depends on votes by insiders. To allow it to use this as a ground to support enforcement would amount to letting one discrepancy between our law and that of Mexico (approval of a reorganization plan by insider votes over the objections of creditors) make up for another (the discharge of non-debtor guarantors). *Cf. CIBC Bank & Trust Co. (Cayman) Ltd.,* 886 F.Supp. at 1114.[42]

Vitro argues that there would be financial chaos as a result of the Plan not being enforced. We are aware of the adverse consequences that may ensue from the decision not to enforce the Plan. But Vitro's reasoning seeks to justify a prior bad decision on the basis that not enforcing it now would lead to further negative consequences.[43] Worse, the harm from those consequences would predominantly affect Vitro, the party responsible for bringing about this state of affairs in the first place. Vitro cannot propose a plan that fails to substantially comply with our order of distribution and then defend such a plan by

41. Vitro stresses that the Objecting Creditors are sophisticated parties, and that many noteholders did not purchase notes until after Vitro had defaulted, the implication being that creditors knew what they were getting into. As a preliminary matter, it appears to us that all the parties involved are "sophisticated." We also do not understand why an investor's background should excuse a plan's failure to substantially adhere to our law's order of distribution.

We similarly reject the argument that because the Objecting Creditors participated in the *concurso* proceeding they are now estopped from resisting Vitro's Chapter 15 action. Chapter 15's protections address a separate set of concerns beyond what may have been litigated in a foreign proceeding.

42. For the same reasons we conclude that, even if § 1521 did provide the broad relief Vitro seeks, enforcement of this Plan would be precluded under § 1522 for failing to provide an adequate "balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief." *In re Int'l Banking Corp. B.S.C.,* 439 B.R. at 626 (quoting Model Law Guide, *supra,* ¶ 161); *see also In re Sivec SRL,* 476 B.R. at 323.

43. Sanchez-Mujica's declaration only states that "Vitro's business, as well as those who have an interest in seeing Vitro's business succeed, such as its customers and creditors, will continue to suffer immense harm" if the Plan is not enforced.

arguing that it would suffer were it not enforced. Vitro's two-wrongs-make-a-right reasoning is unpersuasive.

Those cases Vitro points to in which a similar discharge of non-debtor obligations was allowed are inapposite. The closest factual analog to this case is the bankruptcy court's decision in *Metcalfe.* As here, the central issue in *Metcalfe* was "[t]he enforceability of the non-debtor release and injunction on private civil actions in the United States" contained in a Canadian court order approving a restructuring plan. 421 B.R. at 687–88 n. 1. Recognizing that "a third-party non-debtor release 'is proper only in rare cases,' " *id.* at 694 (quoting *Metromedia,* 416 F.3d at 141), the court nevertheless found that approval was not precluded under § 1507, *id.* at 697. The only explanation the court provided was that the non-debtor release and injunction provisions "treat[ed] all claimants in the Canadian Proceedings similarly" and that "[n]o objections ha[d] been lodged that inclusion of these provisions adversely affects any claimant's treatment against any of the debtors' property." *Id.* The bankruptcy court distinguished *Metcalfe* because, in that case, "there was near unanimous approval of the plan by the creditors, who were not insiders of the debtor TTTT the plan was negotiated between the parties and there appears not to have been a timely objection TTTT [and] the release was not complete like the one in the present case." *Vitro II,* 473 B.R. at 131.

We agree that *Metcalfe* is distinguishable. The fact that the Plan approved here was the result of votes by insiders holding intercompany debt means that, although under *Metcalfe* non-debtor releases may be enforced in the United States under Chapter 15, the facts of this case exceed the scope of that decision. We further observe that in that case the Canadian court's decision to approve the non-debtor release "reflect[ed] similar sensitivity to the circumstances justifying approving such provisions," a sensitivity we find absent in the Mexican court's approval of the Plan. 421 B.R. at 698. The Canadian court's decision was also the result of "near-cataclysmic turmoil in the Canadian commercial paper market following the onset of the global financial crisis." *Id.* at 700. As already discussed, Vitro's evidence on this point largely emphasizes the turmoil only Vitro would be exposed to.

Vitro also relies on our decision in *Republic Supply Co. v. Shoaf,* 815 F.2d 1046 (5th Cir.1987). In that case, "we address[ed] the question whether [the] bankruptcy court's confirmation order which, beyond the statutory grant of the [Bankruptcy] Code, expressly released a third-party guarantor, [was] to be given *res judicata* effect." *Id.* at 1047. We held that once a reorganization plan passed the appeal stage it could not be challenged even though it violated the Bankruptcy Code's prohibition on such discharges. *Id.* at 1050. Aside from the fact that *Republic Supply Co.* was a case about the effects of res judicata and has been distinguished for not addressing the legality of non-debtor releases, *see In re Pacific Lumber Co.,* 584 F.3d at 252 n. 27, we have also emphasized the "limited nature" of that decision, *In re Applewood Chair Co.,* 203 F.3d 914, 918 (5th Cir.2000). For example, *Republic Supply Co.* involved a reorganization plan in which a third-party guarantor and creditor were specifically discharged. 815 F.2d at 1051–54. We have distinguished other cases for including general, as opposed to specific, releases. *Applewood Chair,* 203 F.3d at 919. As a result, *Republic Supply Co.* provides no guidance where, as here, we are confronted not by a specific release, but by a general release of all the non-debtor subsidiaries. *See id.*[44],[45]

On the basis of the foregoing analysis, we hold that Vitro has not met its burden of showing that the relief requested under the Plan—a non-consensual discharge of non-debtor guarantors—is substantially in accordance with the circumstances that would warrant such relief in the United States. In so holding, we stress the deferential standard under which we review the bankruptcy court's determination. It is not our role to determine whether the above-summarized evidence would lead us to the same conclusion. Our only task is to determine whether the bankruptcy court's decision was reasonable. *See Friends for Am. Free Enter. Ass'n v. Wal–Mart Stores, Inc.,* 284 F.3d 575, 578 (5th Cir.2002) (" 'Generally, an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court.' " (quoting *Dawson v. United States,* 68 F.3d 886, 896 (5th Cir.1995))); *Bear Stearns,* 389 B.R. at 333 (relief under § 1521 and § 1507 is largely discretionary). Having reviewed the record and relevant caselaw, we conclude that the bankruptcy court's decision was reasonable.

4. Section 1506's Bar to Relief

The bankruptcy court concluded that "the protection of third party claims in a bankruptcy case is a fundamental policy of the United States" and held that even if Chapter 15 relief were appropriate, it would be barred under § 1506 because "the *Concurso* plan does not recognize and protect such rights." *Vitro II,* 473 B.R. at 132.

[29–32] Section 1506 provides that "[n]othing in [Chapter 15] 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." 11 U.S.C. § 1506. The narrow public policy exception contained in § 1506 "is intended to be invoked only under exceptional circumstances concerning matters of fundamental importance for the United States." *In re Ran,* 607 F.3d at 1021. "The key determination required by this Court is whether the procedures used in [the foreign proceeding] meet our fundamental standards of fairness." *Metcalfe,* 421 B.R. at 697. A court need not engage in an "independent determination about the propriety of individual acts of a foreign court." *Id.* Furthermore, even the absence of certain procedural or constitutional rights will not itself be a bar under § 1506. *See In re Ephedra Prods. Liab. Litig.,* 349 B.R. 333, 336 (S.D.N.Y.2006) ("Federal courts have enforced against U.S. citizens foreign judgments rendered by foreign courts for whom the very idea of a jury trial is foreign.").

As already discussed, this court holds that the Bankruptcy Code precludes non-consensual, non-debtor releases. *In re Pac. Lumber Co.,* 584 F.3d at 252. Nevertheless, not all our sister circuits agree, and we recognize that the relief potentially available under § 1507 was intended to be expansive. At the same time, § 1506 was intended to be read narrowly, a fact that does not sit well with the bankruptcy court's broad description of the fundamen-

44. Presumably, Vitro is arguing that the Mexican court's decision is the prior action and, thus, the bankruptcy court and this court are required to recognize that foreign court's holding and confer it res judicata effect. Such reasoning conflates the difference between a foreign ruling and the bankruptcy court's decision to grant relief pursuant to Chapter 15, and is rejected.

45. The other cases Vitro and Fintech cite in support appear to have involved consensual agreements between the parties and are thus inapposite.

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tal policy at stake as "the protection of third party claims in a bankruptcy case." *Vitro II,* 473 B.R. at 132. Because we conclude that relief is not warranted under § 1507, however, and would also not be available under § 1521, we do not reach whether the *Concurso* plan would be manifestly contrary to a fundamental public policy of the United States.[46]

III. CONCLUSION

For the aforementioned reasons, we AFFIRM in all respects the judgment of the district court affirming the order of the bankruptcy court in No. 12-10542, and we AFFIRM the order of the bankruptcy court in Nos. 12-10689 and 12-10750. The temporary restraining order originally entered by the bankruptcy court, the expiration of which was stayed by this court, is VACATED, effective December 14, 2012. Each party shall bear its own costs.

46. For the same reason, we do not reach the Objecting Creditors' arguments that the Plan violates a fundamental public policy for infringing on the absolute priority rule, the Contract Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 1, the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa, *et seq.,* or the interests of the United States in protecting creditors from so called "bad faith schemes."

In the Matter of FAIRFIELD SENTRY LIMITED, Debtor,

Morning Mist Holdings Limited, Miguel Lomeli, Appellants,

v.

Kenneth Krys, Christopher Stride, Appellees.

Docket No. 11–4376.

United States Court of Appeals, Second Circuit.

Argued: Nov. 19, 2012.

Decided: April 16, 2013.

Background: Foreign representatives of debtors who were currently being liquidated in accordance with British Virgin Islands (BVI) law filed petition for recognition of BVI proceedings as "foreign main proceedings," or in alternative as "foreign nonmain proceedings,'' and for grant of ancillary relief. The Bankruptcy Court, Burton R. Lifland, J., 440 B.R. 60, granted the petition. Shareholder appealed. The United States District Court for the Southern District of New York, Daniels, J., 2011 WL 4357421, affirmed. Shareholder appealed.

Holdings: The Court of Appeals, Dennis Jacobs, Chief Judge, held that:

(1) debtor's center of main interests (COMI) should be determined based on its activities at or around the time the Chapter 15 petition is filed, but a court may consider the period between the commencement of the foreign insolvency proceeding and filing of petition to ensure that debtor has not manipulated its COMI in bad faith;

(2) recognizing British Virgin Islands (BVI) liquidation as foreign main pro- ceeding was warranted;

(3) ''public policy'' exception to cross-border insolvencies did not apply.

Affirmed.

1. Bankruptcy ⚪2341

Before: JACOBS, Chief Judge, WINTER, Circuit Judge, SWAIN, District Judge.*

DENNIS JACOBS, Chief Judge:

The question presented is where the debtor in this bankruptcy proceeding had its "center of main interests" within the meaning of Chapter 15 of the Bankruptcy Code (enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005). The answer determines whether the pending foreign bankruptcy proceeding is a "foreign main proceeding," in which event U.S. proceedings against the debtor are stayed. Morning Mist Holdings Limited and Miguel Lomeli (col- lectively, "Morning Mist") appeal from the judgment of the United States District Court for the Southern District of New York (Daniels, *J.*), affirming the order of the United States Bankruptcy Court for the Southern District of New York (Lif- land, *J.*), which determined that the debt- or, Fairfield Sentry Limited ("Sentry"), had its "center of main interests" in Brit-

* The Honorable Laura Taylor Swain, United States District Judge for the Southern District of New York, sitting by designation.

ish Virgin Islands ("BVI"), and therefore recognized Sentry's liquidation in the BVI as a "foreign main proceeding" under 11 U.S.C. § 1517. For the following reasons, we affirm.

To determine the proper "center of main interests" ("COMI," as the term is abbreviated by the parties and other courts), we consider the relevant time period for weighing the interests, and the principles and factors for determining which jurisdiction predominates. We conclude (as did the bankruptcy court and the district court) that the relevant time period is the time of the Chapter 15 petition, subject to an inquiry into whether the process has been manipulated. The relevant principle (for which we consult foreign law, as di- rected by the statute) is that the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties. The statute includes a presumption that the COMI is where the debtor's registered office is found. Among other factors that may be considered are the location of headquarters, decision-mak- ers, assets, creditors, and the law applica- ble to most disputes.

BACKGROUND

Sentry was organized in 1990 as an International Business Company under the laws of the BVI. From 1990 until Bernard Madoff's arrest on December 11, 2008, Sentry was the largest of the "feeder funds" that invested with Bernard L. Madoff Investment Securities LLC ("BLMIS"). Roughly 95% of Sentry's assets were invested with BLMIS, totaling over $7 billion.

Pursuant to its Memorandum of Association, Sentry administered its business interests from the BVI, where its registered office, registered agent, registered secretary, and corporate documents, among other things, were located. Sentry's Board of Directors oversaw the management, with day-to-day operations handled by an investment manager, Fairfield Greenwich Group ("FGG"), based in New York.[1] Sentry's three directors, Walter Noel, Jr., Jan Naess, and Peter Schmid, resided in New York, Oslo, and Geneva, respectively.

When Madoff was arrested, Sentry's two independent directors, Naess and Schmid, suspended all share redemptions. (Noel was recused from that meeting as the own- er and principal of FGG, Sentry's invest- ment manager.) Over the ensuing months, Naess and Schmid focused on winding down Sentry's business and pre- serving assets in anticipation of litigation and bankruptcy. From December 2008 to July 2009 (when Sentry entered liquidation in the BVI), they participated in approxi- mately 44 teleconference board meetings initiated by Sentry's registered agent in the BVI. During this time, Naess and Schmid advised Sentry's shareholders as to measures being taken in response to the Madoff scandal. That correspondence is- sued from Sentry's address in the BVI, as shown on the letterhead.

In February 2009, Naess and Schmid constituted themselves as a litigation committee with the authority to (among other things) consider, commence, and settle litigation to be taken by or against Sentry. Sentry would subsequently become engulfed in lawsuits.

In May 2009, Morning Mist, a Sentry shareholder, filed a derivative action in New York state court, claiming that Sen- try's directors, management, and service

1. Fairfield Greenwich (Bermuda) Ltd., a member company of FGG, served try's invest- ment manager. We refer to those entities collectively as "FGG."

providers breached duties to Sentry (the "derivative action").[2]

Back in the BVI, ten of Sentry's shareholders applied for the appointment of a liquidator. On July 21, 2009, the High Court of Justice of the Eastern Caribbean Supreme Court (the "BVI court") entered an order which commenced Sentry's liquidation proceedings under the Virgin Islands Insolvency Act of 2003. The order appointed Kenneth Krys and Christopher Stride (from the BVI liquidation firm of Krys and Associates) as liquidator,[3] and gave the liquidator "custody and control of all the assets of the Company."

On June 14, 2010, pursuant to an order of the BVI court, the liquidator petitioned the United States Bankruptcy Court in the Southern District of New York (Lifland, *J.*) for recognition of the BVI liquidation proceedings under Chapter 15 of the Bankruptcy Code (the "Chapter 15 petition").[4]

As of that date, Sentry's liquid assets consisted of approximately $73 million in Ireland, $22 million in the United Kingdom, and $17 million in the BVI. Its other assets were claims and causes of action, including claims for approximately: $6 billion in customer funds under the Securities Investor Protection Act; $3 billion from Madoff customers who profited from redemptions in New York; and $150 million in similar redemption claims in the BVI. Other proceedings were commenced in the Netherlands and Ireland. The litigations were undertaken under the supervision of the BVI court and with the assistance of the liquidator's BVI-based counsel.

On July 22, 2010, the bankruptcy court granted the liquidator's Chapter 15 recognition petition. In determining Sentry's COMI for purposes of Chapter 15, the bankruptcy court examined the period between December 2008, when Sentry stopped doing business, and June 2010, when the Chapter 15 petition was filed. The bankruptcy court determined that Sentry's "COMI for the purpose of recognition as a main proceeding is in the BVI, and not elsewhere," and therefore recognized the BVI liquidation as a "foreign main proceeding" under 11 U.S.C. § 1517(b)(1). Modified Bench Mem. & Order Granting Chapter 15 Petitions of Fairfield Sentry Ltd., Fairfield Sigma Ltd. & Fairfield Lambda Ltd. for Recognition of Foreign Proceedings, *In re Fairfield Sentry Ltd.*, No. 10–13164(BRL), at 6 (Bankr. S.D.N.Y. July 30, 2010) (hereinafter "Bankr. Order").

Pursuant to 11 U.S.C. § 1520, recognition of the BVI liquidation as a foreign main proceeding imposed an automatic stay on any other proceedings against Sentry in the United States—including the derivative action brought by Morning Mist. *Id.* at 9 (recognizing automatic stay); *see also* 11 U.S.C. § 1520(a)(1) (imposing automatic stay from 11 U.S.C. § 362). The bankruptcy court concluded in the alternative that even if the BVI liquidation was a "nonmain" proceeding (in which a stay would not be automatic), a stay of the derivative action was appropriate under 11 U.S.C. § 1521, which allows for such relief. Bankr. Order at 9–11.

2. Later that month, Sentry would file a direct lawsuit in New York state court against its investment manager, FGG, and FGG's affiliates.

3. Stride later resigned and was replaced by Joanna Lau, who herself then resigned. Krys is currently Sentry's sole liquidator and the appellee in this case (hereafter referred to as the "liquidator").

4. Recognition of a foreign proceeding under Chapter 15 can have the effect of staying all other actions against the debtor in the United States, as explained in Part I below.

Morning Mist appealed the bankruptcy court's order to the district court. On September 16, 2011, the United States District Court for the Southern District of New York (Daniels, *J.*) affirmed, holding that the bankruptcy court properly consid- ered Sentry's administrative activities in its COMI analysis, and correctly consid- ered Sentry's COMI as of the filing of the Chapter 15 petition (not over its 18 year operational history). Mem. Decision & Or- der, *In re Fairfield Sentry Ltd.,* No. 10 Civ. 7311(GBD), at 7–12 (S.D.N.Y. Sept. 16, 2011). Morning Mist had argued there (as it argues here) that recognition of the BVI liquidation would be manifestly con- trary to U.S. public policy, and was there- fore barred by 11 U.S.C. § 1506, because the court records in the BVI liquidation were sealed. The argument was rejected on the ground that the right of public access to court records is not absolute. *Id.* at 14–17.

Imposition of the automatic stay was affirmed, including the stay of Morning Mist's derivative action against Sentry. *Id.* at 18. Morning Mist timely appealed.

DISCUSSION

I

Chapter 15 of the Bankruptcy Code was enacted in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23 (codified at 11 U.S.C. §§ 1501–1532). Its goal ''is to incorporate the Model Law on Cross–Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency,'' while promoting international cooperation, legal certainty, fair and efficient adminis- tration of cross-border insolvencies, pro- tection and maximization of debtors' as- sets, and the rescue of financially troubled businesses. 11 U.S.C. § 1501(a).

Chapter 15 is derived from the Model Law promulgated by the United Nations Commission on International Trade Law (''UNCITRAL''), and it instructs that ''[i]n interpreting [Chapter 15], the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.'' 11 U.S.C. § 1508. The legislative history accompanying the passage of Chapter 15 recommends the Guide to Enactment of the Model Law, promulgated by UNCITRAL, ''for guidance as to the meaning and purpose of [the Model Law's] provisions.'' H.R.Rep. No. 109–31, pt. 1, at 106 n. 101 (2005), 2005 U.S.C.C.A.N. 88 (hereinafter ''House Report'').[5]

The recognition of foreign proceedings is governed by Sections 1515 through 1524. Under Section 1517, ''an order recognizing a foreign proceeding shall be entered if—
(1) such foreign proceeding TTT is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
(2) the foreign representative apply- ing for recognition is a person or body;

5. *See also id.* at 109–10 (''Uniform interpretation will also be aided by reference to CLOUT, the UNCITRAL Case Law On Uniform TextsTTTT Not only are these sources persuasive, but they advance the crucial goal of uniformity of interpretation. To the extent that the United States courts rely on these sources, their decisions will more likely be regarded as persuasive elsewhere.'').

and (3) the petition meets the requirements of section 1515.'' 11 U.S.C. § 1517(a). There is no dispute that the second and third requirements are met here. The only point at issue is whether the BVI liquidation qualifies as a foreign main or nonmain proceeding.

Section 1502 defines a foreign main proceeding as a ''foreign proceeding pending in the country where the debtor has the center of its main interests,'' and defines a foreign nonmain proceeding as a ''foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.''[6] 11 U.S.C. § 1502(4)-(5). The statute does not define COMI. It does, however, establish a presumption: ''In the absence of evidence to the contrary, the debtor's registered office TTT is presumed to be the center of the debtor's main interests.'' 11 U.S.C. § 1516(c).

Upon recognition of a foreign main proceeding, Section 1520 provides certain automatic, nondiscretionary relief, including an automatic stay of all proceedings against the debtor in the United States. 11 U.S.C. § 1520(a). A discretionary stay is also available under Section 1521, re- gardless of whether a foreign main pro- ceeding is recognized. 11 U.S.C. § 1521(a).

Finally, Section 1506 provides an overriding public policy exception to all of Chapter 15: ''Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the ac- tion would be manifestly contrary to the public policy of the United States.'' 11 U.S.C. § 1506.

II

Few courts have considered the meaning of COMI under Chapter 15, especially with respect to the time frame and the factors that bear on the question.[7]

A. Relevant Time Period

[2, 3] Morning Mist argues that the bankruptcy court should have looked at Sentry's entire operational history, while the liquidator advocates affirmance of the determinations that COMI should be considered as of the filing of the chapter 15 petition. To identify the time frame rele- vant to the COMI determination, we con- sider: (1) the text of the statute; (2) guid- ance from other federal courts; and (3) international sources. We conclude that a debtor's COMI is determined as of the time of the filing of the Chapter 15 peti- tion. To offset a debtor's ability to manip- ulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition.

6. ''Establishment'' is defined as ''any place of operations where the debtor carries out a nontransitory economic activity.'' 11 U.S.C. § 1502(2).

7. We have only mentioned Chapter 15 in cases where Section 304 of the Bankruptcy Code, the predecessor provision to Chapter 15, applied. *See, e.g., In re Bd. of Dirs. of Telecom Arg., S.A.*, 528 F.3d 162, 169 (2d Cir.2008) (noting that Section 304 controls because the bankruptcy petition was filed pri- or to Chapter 15's effec

* * *

We therefore hold that a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition is filed, as the statutory text suggests. But given the EU Regulation and other international interpretations, which focus on the regularity and ascertainability of a debtor's COMI, a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith.

B. COMI Factors

[4] The parties also dispute what factors are relevant for locating a COMI. Morning Mist argues that Sentry's liquidation activities are irrelevant to the COMI determination; the liquidator re- sponds that these activities and the fact of the BVI proceedings are the kind of objec- tive criteria that can be ascertained by third parties, and are therefore critical. We hold that any relevant activities, in- cluding liquidation activities and adminis- trative functions, may be considered in the COMI analysis.

[5] Chapter 15 creates a rebuttable presumption that the country where a debtor has its registered office will be its COMI: ''In the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests.'' 11 U.S.C. § 1516(c). But federal courts have focused on a variety of other factors as well. The United States Bankruptcy Court for the Southern District of New York has devel- oped a widely adopted list of COMI fac- tors—warning, however, against mechani- cal application:

> Various factors, singly or combined, could be relevant to such a determina- tion: the location of the debtor's head- quarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the loca- tion of the majority of the debtor's creditors or of a majority of the credi- tors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.

In re SPhinX, Ltd., 351 B.R. 103, 117 (Bankr.S.D.N.Y.2006). This nonexclusive list is a helpful guide, but consideration of these specific factors is neither required nor dispositive.

The *SPhinX* court and other federal courts have also turned to international law, as directed by Congress. *See, e.g., In re SPhinX, Ltd.,* 351 B.R. at 118; *In re Tri–Continental Exch. Ltd.,* 349 B.R. 627, 634 (Bankr.E.D.Cal.2006). As discussed in Part II.A above, the EU Regulation enacting the European Union Convention on Insolvency explains that COMI ''should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.'' EU Regula- tion, Preamble ¶ 13. While this guidance may have been of limited utility in resolv- ing the timing question discussed in Part II.A, it underscores the importance of fac- tors that indicate regularity and ascertainability.[10]

[6] The absence of a statutory defini- tion for a term that is not self-defining signifies that the text is open-ended, and invites development by courts, depending on facts presented, without prescription or limitation.

III

[7] Applying the principles set out above, we affirm the decision of the district court (which affirmed the bankruptcy court) recognizing the BVI liquidation as a foreign main proceeding.

In a nutshell: for a proceeding to be recognized as a ''foreign main proceeding,'' it must be ''pending in the country where the debtor has the center of its main inter- ests.'' 11 U.S.C. § 1517(b)(1). That de- termination is based on a debtor's COMI at the time the Chapter 15 petition is filed. A court may look at the period between the commencement of the foreign proceed- ing and the filing of the Chapter 15 peti- tion to ensure that a debtor has not manip- ulated its COMI in bad faith, but there is no support for Morning Mist's contention that a debtor's entire operational history should be considered. The factors that a court may consider in this analysis are not limited and may include the debtor's liqui- dation activities.

The bankruptcy court made factual findings that place Sentry's COMI in the BVI during the relevant time period:

> Upon the revelation of the notorious Madoff fraud in December of 2008, the Debtors discontinued the transfer of funds for investment with BLMIS in New York, which comprised 95% of Sen- try's investments. The board of representatives at the Debtors' New York-based investment managers, [FGG], resigned shortly thereafter, and the Debtors' contracts with FGG were severed in 2009, still long before the filing of the Petition. As a result, the Debtors have no place of business, no management, and no tangible assets located in the United States. Rather, the Debtors' ac- tivities for an extended period of time have been conducted only in connection with winding up the Debtors' busi- nessTTTT The Court finds that the facts now extant provide a sufficient basis for finding that the Debtors' COMI for the purpose of recognition as a main pro- ceeding is in the BVI, and not else- where.

8. As mentioned above, the bankruptcy court in *In re Millennium Global* employed the concept of ''principal place of business'' to guide its COMI analysis. Accordingly, it applied the Supreme Court's recent definition of that concept, which looks at a corporation's ''nerve center,'' *i.e.,* ''where a corporation's officers direct, control, and coordinate the corporation's activities.'' *Hertz Corp. v. Friend,* 559 U.S. 77, 130 S.Ct. 1181, 1192, 175 L.Ed.2d 1029 (2010). Given Congress's choice to use COMI instead of ''principal place of business,'' that concept does not control the analysis. But to the extent that the concepts are similar, a court may certainly consider a debtor's ''nerve center,'' including from where the debtor's activities are directed and controlled, in determining a debtor's COMI.

Bankr. Order at 5–6. The court went on to find that, even though Sentry had assets in other jurisdictions, the administration of its affairs in the relevant time was orchestrated from the BVI. *Id.* at 6. There was no finding of bad-faith COMI manipulation: ''the record here as to the relevant time period beginning December 2008, which straddles the Liquidators' appointment dates, does not support a finding of an opportunistic shift of the Debtors' COMI or any biased activity or motivation to distort factors to establish a COMI in the BVI.'' *Id.* at 8.

The bankruptcy court's factual findings are not clearly erroneous and support the conclusion that Sentry's COMI was in the BVI at the time of the Chapter 15 petition, and that Sentry did not manipulate its COMI in bad faith between the initiation of the BVI proceeding and the filing of the Chapter 15 petition. True, the relevant time period was when the Chapter 15 petition was filed (with a look backward to thwart manipulation), whereas the bankruptcy court looked at a longer period (beginning with Madoff's arrest), but the difference is not material. We therefore affirm.[11]

IV

[8] Finally, Morning Mist argues that the bankruptcy court should have applied the public policy exception available under 11 U.S.C. § 1506, because the BVI proceedings, which are in the main confidential, were ''cloaked in secrecy.'' Appellants' Br. 25.

Section 1506 provides: ''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.'' 11 U.S.C. § 1506. This Court has not had occasion to discuss the application of Section 1506.

[9] The statutory wording requires a narrow reading. Section 1506 does not create an exception for *any* action under Chapter 15 that may conflict with public policy, but only an action that is ''*manifestly* contrary.'' 11 U.S.C. § 1506 (emphasis added). The legislative history confirms:

> [Section 1506] follows the Model Law article 5 exactly, is standard in UNCITRAL texts, and has been *narrowly interpreted on a consistent basis in courts around the world*. The word ''manifestly'' in international usage restricts the public policy exception to *the most fundamental policies of the United States*.

House Report at 109 (emphases added). The UNCITRAL Guide further explains that the exception should be read ''restrictively'' and invoked only ''under exceptional circumstances concerning matters of fundamental importance for the enacting State.'' UNCITRAL Guide ¶ 89. Federal courts in the United States have adopted this view. *See, e.g., In re Vitro S.A.B. de CV,* 701 F.3d 1031, 1069–70 (5th Cir.2012); *In re Iida,* 377 B.R. 243, 259 (B.A.P. 9th Cir.2007); *In re Ephedra Prods. Liab. Litig.,* 349 B.R. 333, 336 (S.D.N.Y.2006); *In re Toft,* 453 B.R. 186, 193 (Bankr.S.D.N.Y. 2011); *In re Metcalfe & Mansfield Alt. Invs.,* 421 B.R. 685, 697 (Bankr.S.D.N.Y. 2010).[12]

9. Morning Mist also claims that the bankruptcy court erroneously stayed the derivative action that it brought against Sentry. Appellants' Br. 36–37. Because we affirm the recognition of the BVI liquidation as a foreign main proceeding, the stay was automatic. *See* 11 U.S.C. § 1520(a) (imposing automatic stay on U.S. proceedings against debtor upon recognition of foreign main proceeding).

10. Even beyond the bankruptcy context, we apply public policy exceptions sparingly. For example, in the judgment enforcement context, a foreign judgment ''is unenforceable as

The confidentiality of BVI bankruptcy proceedings does not offend U.S. public policy. Although the BVI liquidation has proceeded under seal, Morning Mist's as- sertion that they are ''shrouded in secrecy'' is overwrought. Appellants' Br. 7. The BVI court did seal the various applications and orders in the liquidation, but public summaries have been made available. *See, e.g.,* J.A. 445–46 (summarizing applica- tions and orders before BVI court). Such restricted access to court documents is not unusual in the BVI, as the liquidator ex- plains, because only certain limited records are typically available to non-parties. Ap- pellees' Br. 12–13. And in all cases in the BVI, including this liquidation, any non- party may apply to the court for access to sealed documents. *Id.*

[10] In any event, Morning Mist cannot establish that unfettered public access to court records is so fundamental in the United States that recognition of the BVI liquidation constitutes one of those exceptional circumstances contemplated in Sec- tion 1506. ''[T]he right to inspect and copy judicial records is not absolute.'' *Nixon v. Warner Commc'ns, Inc.,* 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). In *Lugosch v. Pyramid Co. of Onondaga,* we discussed at length the common law and constitutional rights to public access of court documents. *Lugosch v. Pyramid Co. of Onondaga,* 435 F.3d 110, 119–20 (2d Cir.2006). The right to access court documents is not absolute and can easily give way to ''privacy inter- ests'' or other considerations. *Id.* at 120; *see also United States v. Amodeo,* 44 F.3d 141, 146 (2d Cir.1995) (''Although there is a presumption favoring access to judicial records, the fact that a document is a judicial record does not mean that access to it cannot be restricted.'' (internal cita- tion omitted)).

Important as public access to court documents may be, it is not an exceptional and fundamental value. It is a qualified right; and many proceedings move for- ward in U.S. courtrooms with some documents filed under seal, including many cases in this Court. There is no basis on which to hold that recognition of the BVI liquidation is manifestly contrary to U.S. public policy.

CONCLUSION

For the foregoing reasons, we affirm.

against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the State where enforce- ment is sought,'' but that ''standard is high, and infrequently met.'' *Ackermann v. Levine,* 788 F.2d 830, 841 (2d Cir.1986) (internal quotation marks omitted).

INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

US Chapter 15

Allan Gropper, United States Bankruptcy Judge
Southern District of New York (Retired) , USA

Chapter 15, Ancillary and Other Cross-Border Cases

- Effective October 17, 2005, codified as 11 U.S.C. sections 1501-1532
- Adopts UNCITRAL Model Law on Cross-Border Insolvency (with some amendments)
- Replaces former § 304, Cases ancillary to foreign proceedings

Objectives of Chapter 15

Model Law, Preamble; Section 1501(a)

- To provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of…
- Cooperation between courts/authorities in cross-border insolvency cases
- 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
- Protection and maximization of the value of the debtor's assets; and
- Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment

Scope of Chapter 15

Model Law Art. I; Section 1501(b)

- Chapter 15 applies where:
  - Assistance is sought in the U.S. by a foreign court or foreign representative in connection with a foreign proceeding;
  - Assistance is sought in a foreign country in connection with a case under the Bankruptcy Code;
  - A foreign proceeding **and** a case under the Bankruptcy Code with respect to the **same debtor** are pending concurrently; or
  - Creditors or other interested parties in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under the Bankruptcy Code.

§1501(c). Limitation on scope

- (c) This chapter does not apply to –
  - (1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b) [a foreign bank that has a branch or agency in the U.S.];
  - (2) an individual, or an individual and such individual's spouse, who have debts within the limits specified in section 109(e) [$465,275 unsecured; $1,395,875 secured; effective 4/1/22] and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States; or

- (c) This chapter does not apply to –
  - (3) an entity subject to a proceeding under the Securities Investor Protection Act of 1970 ("SIPA"),a stockbroker, or a commodity broker, both of which are subject to special provisions of the Bankruptcy Code
  - Moreover, chapter 15 has no specific provisions that apply where no foreign proceeding is pending, except those relating to the admission of claims of foreign creditors
  - Further, there are no specific provisions relating to groups of companies, except the general rules of coordination and cooperation
    - Provisions relating to groups are now provided in a Model Law on Enterprise Group Insolvency approved by the UNCITRAL Commission in 2019 available at www.uncitral.org under Texts and Status and Insolvency

Model Law on Enterprise Group Insolvency

Drafted by UNCITRAL Working Group V on insolvency law, which also drafted the Model Law on Cross-Border Insolvency

- Contemplates that members of an enterprise group that had filed separate insolvency proceedings would cooperate in a "planning proceeding" for the purpose of creating a "group insolvency solution" for the reorganization, sale or liquidation of some or all of the operations or assets of the group members, with the goal of enhancing the overall combined value of the group;
- A group representative would be appointed to act as a representative of the planning proceeding

11 U.S.C §101. Definitions

Model Law Article 2

- (23) 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 reorganization or liquidation.
- (24) The term "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.

§1502 Definitions

For the purposes of this chapter, the term –

- (1) "debtor" means an entity that is the subject to a foreign proceeding;
- (2) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity [Model Law Art. 2(f)];
- (3) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding [Model Law Art. 2(e)];

- (4) “foreign main proceeding” means a foreign proceeding pending in the country where the debtor has the center of its main interests [Model Law Art. 2(b)];
- (5) “foreign nonmain proceeding” means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment [Model Law Art. 2(c)];
- (6) “trustee” includes a trustee, a debtor in possession in a case under any chapter of this title, or a debtor under chapter 9 of the Bankr. Code;

- (7) “recognition” means the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter; and
- (8) “within the territorial jurisdiction of the United States”, when used with reference to property of a debtor, refers to tangible property located within the territory of the United States…

Chapter 15, Construction

In interpreting chapter 15, the court must consider its international origin and the goal of uniform application among adopting countries [Section 1508; Model Law Art. 8]

International obligations of the United States will prevail if they conflict with chapter 15 [Section 1503; Model Law Art. 3]

The Court may decline to take an action under chapter 15 "if the action would be **manifestly** contrary to the public policy of the United States" [Section 1506; *see* Model Law Art. 6 – *ordre publique*]

In re Ephedra Product Liability Litigation (Muscletech) (S.D.N.Y 2006)

- Company (Muscletech) headquartered in Canada, filed case under Companies' Creditors Arrangement Act
- Monitor (foreign representative) sought recognition as foreign main proceeding
- Muscletech was among defendants in U.S. product liability litigation involving drug Ephedra, a diet drug that allegedly caused heart attacks and strokes
- Monitor in Canada filed chapter 15 petition to stay US litigation; Canadian case recognized as foreign main proceeding and automatic stay applied

- Monitor sought approval of Canadian claims resolution procedure; U.S. court questioned whether summary procedures in Canada would satisfy due process; procedures were modified to include estimation and liquidation of claims by "Claims Officer" who would hear parties, take evidence
- U.S. creditors still objected, claiming procedure was "manifestly contrary to public policy" in light of denial of constitutional right to jury trial for personal injury claim
- Objection denied; comity requires only that claimants receive a fair and impartial hearing, not all of the rights they would have in the U.S.

Recognition of Foreign Proceeding

- A Chapter 15 case is commenced by filing a petition for recognition of a foreign proceeding under § 1515(1) [Model Law Art. 15]

- A foreign representative can file the petition for recognition directly with the court

- Court shall decide on the application for recognition "at the earliest possible time" [Section 1517(c); Model Law Art. 17(3)]

Recognition Procedure: Evidence

- The petition must be accompanied by
  (1) evidence of the existence of the foreign proceeding and of the appointment of the foreign representative and (2) a statement identifying all other known foreign proceedings of the debtor (all translated into English)
  [Section 1515(b), (c) and (d); Model Law Art. 15];

Main vs. Nonmain Recognition

- Recognition order enters if foreign proceeding is a foreign main proceeding or a foreign non-main proceeding
- A foreign proceeding in the country where the debtor has the center of its main interests is a foreign main proceeding
- A foreign proceeding in a country where the debtor has an establishment (place of non-transitory business operations) is a foreign non-main proceeding; presence of assets alone may be insufficient for eligibility
- In absence of *evidence* [proof] to the contrary, debtor's registered office presumed to be COMI [Section 1516(c); Model Law Art. 16(3)]
  - Burden of proof remains on foreign representative
  - What if no objections but evidence shows COMI elsewhere?

Tri-Continental Exchange

(Bankr. E.D. Cal. 2006)

- Liquidators in St. Vincent and Grenadines (SVG) filed chapter 15
- Sought recognition as a foreign main proceeding pending in debtor's center of main interests (COMI); sought use of U.S. funds
- COMI presumed to be place of registration (SVG) but can be rebutted by evidence
- COMI equates to principal place of business

- Debtor ran insurance scam in U.S. and Canada from SVG
  - Inexpensive insurance for high risk clients
  - Failed to pay most claims
- Liquidators identified assets around the world, trying to collect
- Creditor asserted that COMI should be U.S., location of most creditors and insureds
  - Creditor claimed a lien by attachment
- Court found that SVG was the COMI as the place where the debtor operated, even though fraudulently; liquidators were recognized as foreign representatives

- COMI should be interpreted consistently with interpretation by other countries
    - Serves goal of uniformity
    - UNCITRAL Guide provides persuasive guidance
- Recognized as a foreign main proceeding
    - Assets turned over to liquidators to realize and use for administration; however, mindful of need to "sufficiently protect" interests of U.S. creditors, particularly creditor who claimed a lien and security interest in assets, court required U.S. property to remain in U.S. and deferred question of repatriation of assets to SVG

In re Bear Stearns High Grade Structured Credit Strategies Master Fund Ltd. (S.D.N.Y. 2008)

- Cayman Island registered hedge fund in liquidation in Cayman Islands
  - Funds were early victims of sub-prime crisis, unable to meet margin calls
  - Filed for winding up in Cayman Islands
  - Sought chapter 15 recognition, obtained preliminary injunctive relief
- Liquidators sought recognition of Cayman case as a foreign main proceeding or, in the alternative, as a foreign nonmain proceeding
  - No objections filed

- Court denied recognition as either foreign main or non-main proceeding
  - Fund did not have a place of business or operations in the Caymans, as it was an "exempted company" under Cayman law, unable to do business there
- Fund's investment manager, administrator and liquid assets were all in U.S. and its COMI was in the United States
- Presumption that COMI is in place of registration is rebuttable even if there is no creditor opposition
- Nonmain recognition precluded as Fund did not have an "establishment" in the Caymans

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
- BVI was location of Fund’s registered office; day-to-day operations were carried out in NYC, where its investment manager was located
- Dec. 2008 to July 2009, after Madoff’s arrest, Fund began a wind-down supervised by two independent directors (not affiliated with investment manager)

In re Fairfield Sentry (contd.)

- July 2009 BVI proceeding opened and Liquidators appointed
- June 2010 Liquidators petitioned for chapter 15 recognition; at that time principal assets included $102 million in funds in Ireland, UK and BVI; and claims of $6 billion against U.S. Securities Investor Protection Act insurance, $3 billion in claims against Madoff customers who had redeemed in New York
- Recognition opposed by customer with lawsuit against Fund in New York

In re Fairfield Sentry (contd.)

- Bankruptcy Court had recognized proceeding as a foreign main proceeding
  - Where was COMI? Found that COMI was in the BVI principally because it was the “center of main interests” because it was the place where the liquidation had been taking place for almost a year when the chapter 15 petition for recognition was filed
  - Date for determination of COMI was the date on which the chapter 15 petition was filed

In re Fairfield Sentry (contd.)

- Court of Appeals affirmed
  - Date for 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 case holding that date for recognition purposes should be date of opening of the foreign proceeding
  - rested its opinion principally on use of present tense in the statute ("foreign proceeding shall be recognized … 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 (contd.)

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

In re Pirogova

Individual Debtor -- born in Belarus/USSR but holder of U.S. green card (and may have a condo in Florida); subject to arrest in Russia if she returned

In 2015, VTB Bank commenced an involuntary bankruptcy proceeding against Debtor in Russia based on alleged debt of RUB 1.05 billion (US$16 million today)

VTB Bank had been sanctioned in other proceedings for various violations of law

In 2018, Foreign Representative in the Russian proceeding filed a petition seeking recognition under chapter 15

<u>In re Pirogova</u> (cont'd.)

- Recognition would give VTB Bank the power to pursue the Debtor's assets in the U.S. Would it be manifestly contrary to U.S. public policy to give green light to a sanctioned Russian bank?-- Issue not reached

Other complications

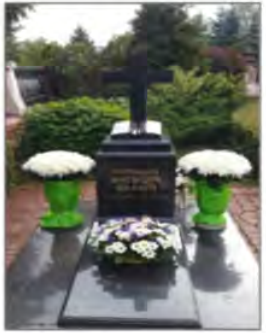
COMI of an individual is his/her "habitual residence." Scant case law on COMI in individual Chapter 15 cases

Unusual factual predicate asserted for a Russian COMI or an establishment in Russia (allowing for nonmain recognition)

Moscow apartment? (evidence: utility bills), "yacht club" membership, clandestine trips from Belarus into Russia)

In re Pirogova (cont'd.)

41. Accordingly, in September, 2017, when I entered Russia to pray and lay flowers at the grave of Archpriest Fesyuk, I was arrested shortly thereafter. Below is a picture of the flowers which I laid at the grave Archpriest Fesyuk during my prayers for the salvation of my mother.[8]



[8] My counsel advises that praying at the grave of Archpriest Fesyuk does not constitute the transaction of nontransitory economic activities to have this Chapter 15 proceeding recognized as a foreign nonmain proceeding.

In re Pirogova (cont'd.)

- Recognition denied:
- "Regardless of whether or not Ms. Pirogova engaged in fraudulent or criminal activity, the allegations relate to activity well prior to the Petition Date and have no bearing on the Debtor's COMI as of the Petition Date [the date for determining COMI under applicable Second Circuit authority]" – COMI not in Russia and main recognition denied
- "Foreign Representative's scant evidence and conclusory allegations are insufficient to prove that Ms. Pirogova carried out any nontransitory economic activity in Russia at the time of the Petition Date such that Russia could be considered her 'establishment.'" Nonmain recognition denied.
- Bankruptcy Court decision affirmed on appeal on January 9, 2020.

Drawbridge Special Oppty. Fund v. Barnet (2d Cir. 2013)

- In another case the Second Circuit Court of Appeals also held, based on the wording of a section of the Bankruptcy Code outside of Chapter 15, that a place of incorporation or "property" in the United States is a prerequisite to the filing of a Chapter 15 petition, as it is to the filing of a plenary bankruptcy case under other chapters of the Code
  - Many believe decision is wrong but it has survived, mostly in 2d Circuit
  - Lower courts to date have held condition may be satisfied by the presence of minimal property, such as a retainer held by counsel for the foreign representative

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 (contd.)

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

--- Court found that 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 …."

---Appeals were dismissed

- In In re Gold & Honey, Ltd. (Bankr. E.D. New York 2009), Court denied recognition of Israeli receivership
  - Receivership was not collective but was a collection remedy of a single bank
  - Recognition also denied as manifestly contrary to public policy since Bank continued receivership proceeding in violation of automatic stay created when debtor filed a U.S. chapter 11 case
  - However, the Court limited the effects of the chapter 11 cases to assets of the debtors in the United States and found that "the most efficient and most sensible cross-national use of judicial and parties' resources is to have the Israeli court decide what the debtor-creditor relationships are

    . . . and how to effectuate each parties' rights and remedies," especially as the U.S. cases were liquidating; most of the assets were in Israel; governing law in agreements was Israeli.

In re Oi Brasil Holdings Cooperatief UA
(Bankr. S.D.N.Y. 2017)

- Dutch finance subsidiary of Brazilian telecommunications company obtained recognition under chapter 15 as a foreign main proceeding with its COMI in Brazil, along with many affiliates
- After an insolvency case had been filed in the Netherlands, the Dutch trustee moved to revoke recognition of the Brazilian case and obtain recognition of the Dutch proceeding as the foreign main proceeding for the finance subsidiary; trustee acted under strong pressure from U.S. hedge fund creditor

In re Oi Brasil Holdings Cooperatief (cont'd.)

- U.S. Court held that Dutch trustee had not demonstrated grounds for Court to exercise its discretion under §1517(d) [Model Law, Article 17(4)] permitting modification or termination of an order of recognition if grounds have ceased to exist
  - Debtor's status as a special purpose vehicle wholly controlled by the parent was central to Court's conclusion
  - Debtor was not judicially estopped from maintaining that its COMI was in Brazil and comity did not require a different result

In re Servicos de Petroleo Constellation S.A.

- 10 members of integrated Brazilian group filed Chapter 15 petitions seeking recognition and ultimate enforcement of a jointly administered judicial reorganization proceeding in Brazil
    - Parent company was incorporated in Netherlands and had some business there; most of operating subsidiaries were incorporated in British Virgin Islands (BVI) although they did business in Brazil

In re Servicos de Petroleo Constellation S.A. (cont'd.)

- After an exhaustive analysis of facts, Bankruptcy Court found COMI of parent corporation in Netherlands, COMI of BVI subsidiaries in Brazil despite their formation in BVI and the fact that there were "soft-touch" insolvency proceedings opened in BVI
- Although COMI of Parent in Netherlands, Court nonetheless recognized Parent case from Brazil as nonmain proceeding and noted that under sections 1520 and 1521 it could grant all relief available in a main proceeding in a nonmain proceeding

Pre-Recognition Relief

Section 1519; Model Law, Art. 19

- Limited emergency relief between date of petition for recognition and entry of order granting recognition
- May stay execution against debtor's assets; suspend right to transfer, encumber or otherwise dispose of assets; permit discovery and additional relief available to a trustee
- Assets that are perishable, susceptible to devaluation or otherwise in jeopardy may be delivered to foreign representative

Automatic Relief on Recognition of Foreign Main Proceeding

Section 1520; Model Law Art. 20

- Bankruptcy Code automatic stay takes effect
- Code sections on use, sale or lease of property, avoidance of post-petition effect of security interests apply
- Principles of adequate protection of interests in property apply
- Foreign representative can operate debtor's business unless court orders otherwise

§362 Automatic Stay

- "(a) Except as provided [otherwise in] this section, a petition filed under section 301, 302, or 303 of this title,…operates as a stay, applicable to all entities, of –
  - (1) the commencement or continuation…of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
  - (2) the enforcement, against the debtor . . ., of a judgment obtained before the commencement of the case . . . ;
  - (3) any act to obtain possession of property of the estate or to exercise control over property of the estate;

Automatic stay (contd.)

General exceptions to automatic stay include:

-- actions to enforce police and regulatory powers (e.g., antitrust violation investigation by International Trade Commission)

-- actions to close out, terminate or net most derivative contracts

Exceptions specific to chapter 15 include:

--commence action in foreign country to preserve claim

--commence U.S. bankruptcy case, or file a claim or take action in such a case

ISDA Credit Determinations Committee

- The EMEA Credit Determinations Committee of the International Swap and Derivatives Assn. ruled in 2020 that a request for foreign main proceeding relief under chapter 15 would constitute a bankruptcy credit event (and trigger a credit default swap) because the automatic stay would go into effect, but a request for nonmain recognition without a request for a stay would not (in the Thomas Cook insolvency).

Nortel Networks Corp. (3d Cir. Dec. 29, 2011)

- Chapter 11 proceedings of U.S. subsidiaries of Canadian company were pending in Delaware; parent proceedings were pending in Canada and the U.K. and other subsidiaries had filed in the U.K.
- U.S. Court recognized Canadian and U.K. proceedings as "foreign main proceedings" under Chapter 15
- U.K. Pension Regulator sought to adjudicate pension liabilities of up to $3.1 billion in U.K. proceedings
- U.S. automatic stay held to block regulatory proceedings in U.K. without relief from the stay
- U.K. Pension regulator not considered eligible for "police power" exemption as he stood in shoes of creditors
- Orderly reorganization required enforcement of stay

Discretionary Relief

Section 1521; 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 realization of U.S. assets to the foreign representative or to another person, including an examiner
  - Granting any additional relief that may be available to a U.S. trustee, except the power to bring avoidance actions under U.S. 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 sufficiently protected [U.S. substitution of term for Model Law's "adequately protected"]

Protection of Creditors and Others

Section 1522; Model Law Art. 22

- Court may grant relief under sections 1519 or 1521 only if "interests of creditors and other interested entities, including the debtor, are sufficiently protected" (section 1522(a))
  - Model Law uses term "adequately protected" but no change is intended in U.S. variation
- 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 U.S. 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 U.S. obtained chapter 15 recognition and sought an order recognizing his right to reject patent licenses; German law provided that patent licenses could be rejected like other contracts.
- A special provision of the U.S. Bankruptcy Code, however, gave U.S. 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 U.S. patents and thereby undermine a fundamental U.S. public policy promoting technological innovation" and would be manifestly contrary to U.S. public policy. It also found that such relief would deprive the U.S. licensees of "sufficient [adequate] protection" required by section 1522(a).

Jaffe v. Samsung Electronic (contd)

- Appellate court did not reach "public policy" issue; agreed that application of German law on rejection of contracts (patent licenses) would deprive the U.S. creditors of "sufficient [adequate] protection" and that the Bankruptcy Court had reasonably balanced the rights of the German trustee and the U.S. creditors
  - Court rejected the argument that under the UNCITRAL Guide to Enactment [as well as the statutory language], 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 U.S. creditors and arguably provide inadequate protection to creditors elsewhere

Additional Assistance

Section 1507; 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
  - U.S. 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* (reorganization 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.

- U.S. 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 U.S. 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 (i.e., intercompany claims that themselves appeared to be of suspect validity).

In re Vitro (contd.)

- U.S. 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 U.S. 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 U.S. 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 U.S. public policy" within the meaning of section 1506

In re Metcalfe & Mansfield Alt. Invs. (Bankr. S.D.N.Y. 2010)

- By contrast, court enforced third-party releases contained in a Canadian plan that restructured C$32 billion in asset-backed commercial paper after "near- cataclysmic turmoil in the Canadian commercial paper market following the onset of the global financial crisis" in 2008-2009.

- Court found such third-party releases might not be enforceable under U.S. bankruptcy law but that Canadian releases were not "manifestly contrary to U.S. public policy," were justified by the scope of the settlement at issue and could be enforced as "Additional Assistance" under section 1507 and under principles of comity and recognition of foreign judgments

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 in Brazil; they were mainly holding companies; largest creditors were foreign bondholders (mostly in U.S.); regulated operating subsidiaries in Brazil (concessionaires) did not file
  - Debtors filed under chapter 15 and sought to enforce their plan of reorganization in the U.S. (bind U.S. creditors, require US indenture trustee to execute assignments, pay bondholders their partial distribution under the plan, carry out terms of plan)

In re Rede Energia (cont'd)

- 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 U.S. absolute priority rule, and
  - payment in full of creditors of concessionaires (operating companies) resulted in unfair discrimination which would be prohibited under U.S. law

In re Rede Energia (cont'd)

- 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 and did not have to satisfy US absolute priority rule to be approved, even under a cramdown procedure

<u>In re Rede Energia</u> (cont'd)

- 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)

In re Suntech Power Holdings Co. Ltd. (Cayman)

- Holding company formed in Cayman Islands that was owned by Chinese interests in turn owned Chinese subsidiaries that manufactured solar systems in China and U.S. subsidiaries that sold same in U.S.; principal U.S. subsidiary was located in San Francisco
- Holding company, with support of principal financial creditors, filed a scheme of arrangement in Caymans to reduce (adjust) debt; joint liquidators were appointed

In re Suntech (contd.)

- Joint liquidators brought Chapter 15 in New York bankruptcy court to enforce scheme
  - Opposed by U.S. company engaged in litigation with group in California; U.S. company claimed that debtor did not do business in Caymans and that COMI of Cayman company was in China; that COMI had been manipulated

In re Suntech (contd.)

- Court held
  - COMI was in Caymans at time chapter 15 case was filed by the liquidators
  - Liquidators did not manipulate COMI but merely carried out their duties; shutting door on chapter 15 would prevent a restructuring agreed to by principal creditors;
  - Based on testimony at trial, filing in China would not be prudent

In re Sivec SRL (Bankr. E.D. Okla. 2012)

- Italian debtor in *concordato preventivo* in Italy obtained order of recognition from U.S. bankruptcy court and sought to recover a warranty retainage of U.S. $953,000 held in the U.S. by a U.S. purchaser of goods under a supply contract
- U.S. purchaser claimed breach of contract damages of $1,744,000 against Italian debtor; sought to set off or recoup the warranty retainage against its damage claim and remit nothing to Italy
- Italian liquidator asked U.S. court to give "comity" to Italian proceedings by requiring U.S. company to turn over the retainage to the Italian estate and try its breach of contract claim in Italy
- However, Italian liquidator failed to provide information as to whether the U.S. company would have a timely claim in Italy or whether it had received reasonable notice of the Italian bankruptcy filing

In re Sivec (contd)

- Automatic stay was vacated to permit trial in U.S. of contract issues; jury awarded U.S. company $1,744,043 on its breach of contract claim, Italian debtor $952,840 on its warranty retainage claim
- Court held that, notwithstanding requests for comity and deference to the Italian proceedings, there was no showing that U.S. creditor's setoff rights would be "sufficiently protected" in Italy and that basic elements of due process had been lacking, and that it would exercise what it called its "broad latitude to fashion the appropriate relief in this case" by authorizing the setoff or recoupment
- Court did not perform choice of law analysis as to the law that ought to apply to the setoff or recoupment issue

SNP Boat Service, S.A. v. Hotel St. James (S.D. Fla. 2012)

- Debtor in French *sauvegarde* insolvency proceeding obtained recognition and sought to repatriate U.S. funds to France
- Canadian creditor objected, arguing that its interests would not be "sufficiently protected" in the French proceedings
- U.S. Bankruptcy Judge had authorized broad discovery related to question whether the Canadian creditor had received "sufficient protection" in the French case

SNP Boat Serv. v. Hotel St. James (contd)

- District Court on appeal reversed the Bankruptcy Court's order providing for discovery. Canadian creditor had not complained about fairness of the French proceeding generally. Court found that U.S. judicial inquiry into treatment of an individual creditor would turn the U.S. court into an appellate court judging a foreign proceeding

- District Court said, broadly: "a bankruptcy court is without jurisdiction to inquire whether a particular creditor's interests are sufficiently protected in any specific foreign proceeding."

- Court also distinguished between "sufficient protection" required under section 1522(a) and sufficient protection to creditors "in the United States" under section 1521(b) when "entrusting the distribution of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative…"

<u>In re Tradex Swiss</u> (Bankr D.Mass. 2008)

- Securities firm registered in Switzerland had relocated bulk of operations and assets to Boston
- Swiss regulators put company into bankruptcy and appointed liquidators
- Involuntary chapter 7 (liquidation) filed in U.S by U.S. creditors; three weeks later, Swiss liquidators sought chapter 15 recognition
- U.S. creditors asserted that Swiss proceeding was not a foreign proceeding, opposed recognition altogether; Swiss liquidators in turn moved for dismissal of chapter 7 case

Tradex Swiss (contd.)

- Court concluded that Swiss proceeding qualified as an administrative proceeding in a foreign country under a law relating to insolvency
  - Swiss regulator qualified as an authority competent to supervise a foreign proceeding
  - Liquidators, however, were unable to prove COMI in Switzerland
  - Swiss proceeding recognized as a foreign non-main proceeding

- However, Court also held that dismissal of the chapter 7 case would not be in best interests of creditors; purposes of Chapter 15 best served by permitting Chapter 7 to proceed;
  - Chapter 7 trustee would collect assets and otherwise protect the interests of U.S. creditors but Swiss proceeding would be recognized to the extent appropriate

§ 1523. Actions to avoid acts detrimental to creditors (avoidance proceedings)

- (a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 548, 550, 553, and 724(a)
- However, court cannot grant relief under the avoidance provisions of the U.S. Bankruptcy Code (§ 1522(a)(7)). In order to bring avoidance claim under U.S. Bankruptcy Code, e.g., an action for a preference or a fraudulent conveyance (transaction at an undervalue) a plenary U.S. case must be filed
  - In such an action, the U.S. court would have to make a choice of law decision as to whether U.S. or another country's preference law should apply, especially if a foreign proceeding were pending
  - This U.S. amendment to Model Law Article 23 was prompted by the *Maxwell Communications* case and the view that it would be more appropriate to make the choice of law decision in a plenary bankruptcy case rather than in a Chapter 15 proceeding

In re Awal Bank (Bankr. S.D.N.Y. 2011)

- Foreign representative of Bahrain bank filed a chapter 15 petition, obtained recognition, and then filed a chapter 11 case (acting as debtor in possession); sole purpose of chapter 11 filed was to bring an action under U.S. Bankruptcy Code to set aside a prepetition setoff as preferential; Bahrain law had no avoidance provisions, but setoff had taken place in U.S.
- Recipient of setoff moved to dismiss avoidance action; Court denied motion and also held that it could relieve the Bahrain debtor of compliance with certain chapter 11 disclosure obligations (e.g., identity of all creditors) due to Bahrain confidentiality principles
- Thereafter preference action was settled, and chapter 11 case was dismissed; settlement payment was remitted for distribution in Bahrain case; chapter 15 case continued

In re Maxwell Communications. Corp. (2d Cir. 1996)(pre-chapter 15)

- U.K. holding co. with significant subsidiaries in U.K. and U.S. filed U.S. chapter 11 case
- UK Administration opened soon after and Joint Administrators appointed; U.S. debtor in possession came under their control
- Chapter 11 case proceeded; an "examiner" was appointed to represent U.S. interests
- U.S. debtor brought U.S. law preference complaint against three banks located in London; it was assumed that there was an excellent chance of recovery against the English banks under U.S. law but a negligible chance of recovery under the more stringent U.K. preference law

- One bank filed a motion in the U.K. case to enjoin the U.K. administrators from using U.S. law to sue it.
- Injunction was denied on appeal by (then) Mr. Justice Hoffmann, who said:
  - choice of law was an issue for the U.S. courts to decide; *see Barclays Bank PLC v. Homan*, [1993] BCLC 680, appeals dismissed.
- U.S. courts eventually held that U.K. law should apply
  - Case based on provision of comity to the English administration proceeding but the underlying analysis was essentially a choice of law analysis
  - English law should control where banks located in London were repaid debt incurred there by an English borrower pursuant to transactions governed by English law; there was no reason for the parties to conclude that U.S. law would apply
- U.S. suit was eventually discontinued.

Avoidance Claims under foreign law

- Foreign representative cannot use U.S. law to avoid transfer without opening a plenary U.S. proceeding
- Does this mean that representative cannot use the law of the foreign jurisdiction to avoid a transaction under chapter 15?
  - In re Condor Ins. Ltd.,Court held that foreign representative could sue defendants located in U.S. in a chapter 15 case and use foreign law to recover property avoidable under foreign law
  - **What about other claims under foreign law?**

In re Hellas Telecomm. (Luxem.) (Bankr. S.D.N.Y. 2015-2016)

- Liquidators of Greek company incorporated in Luxembourg that had filed insolvency proceedings in the U.K. obtained Chapter 15 recognition of the U.K. case
- Liquidators brought proceedings in Chapter 15 case against directors and others to set aside fraudulent conveyances under New York law and (later) under U.K. law and for damages alleging defendants' breach of fiduciary duty and unjust enrichment
- In a series of decisions U.S. 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 (cont'd.)

- Plaintiff could pursue similar claims under governing law of the U.K.
- 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 U.K. and the remaining defendants had consented to jurisdiction in the U.K., U.S. Bankruptcy Court dismissed the U.S. case in preference to U.K. case under doctrine of *forum non conveniens*

In re Perforadora Oro Negro

- Mexican oil rig companies, Integradora and Perforadora, initiate voluntary insolvency proceedings in Mexico

-- Integradora is a holding company and sole owner of Oro Negro Drilling Pte. Ltd, a Singaporean holding company that owns five SPVs which each own rigs leased to Perforadora through "bareboat charters" governed by New York law.

In re Perforadora Oro Negro (cont'd)

Perforadora then contracts with Pemex, Mexico's state-owned oil company, to deliver oil produced by the rigs; Pemex falls into financial difficulties and bonds dependent on Pemex payments default

- Bonds (issued by Oro Negro Drilling) are governed by Norwegian law secured by charge on the stock of the operating companies and mortgages on the rigs; share charge is governed by Singaporean law and the mortgages are governed by Panamanian law

In re Perforadora Oro Negro (cont'd)

Concurso mercantil – September 2017, Perforadora initiates voluntary insolvency proceeding in Mexico.

- In March 2018, Bondholders sue Perforadora in SDNY seeking to repossess rigs; in April 2018, in response, Foreign Representative in Perforadora's *concurso* proceeding files petition for recognition in SDNY Bankr. Court; recognition granted May 17, 2018
- Mexican criminal case – October 2018, Mexican authorities initiate criminal action against Perforadora; Mexican judge issues *ex parte* order authorizing Bondholders to take over rigs

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"

"Oro Negro Stops Rig Seizure By Bondholders After Standoff"

§ 1509. Right of Direct Access

- (a) A foreign representative may commence a case under section 1504 by filing directly with the bankruptcy court a petition for recognition of a foreign proceeding under section 1515.
- (b) If the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter –
    - (3) a court in the United States shall grant comity or cooperation to the foreign representative.
        - Subsection (b) is a U.S. addition to the Model Law; most courts have construed it as providing that recognition under Chapter 15 is a prerequisite to the foreign representative's ability to sue or appear in a judicial proceeding in the United States, although not to take corporate action outside of the courts

Wanachek Mink Ranch v. Alaska Brokerage
(W.D. Wash. 2009)

- Defendant, a debtor in administration (reorganization) proceedings in London
  - Sought stay of U.S. litigation based on comity to U.K. proceeding
  - Plaintiffs opposed, arguing that Chapter 15 was sole avenue to relief
- Court denied stay, acknowledged Chapter 15 recognition was a pre-requisite to comity or other relief in the U.S. courts
  - Defendant can file a petition for recognition
  - If recognition is granted, court can then fashion appropriate relief

Katsumi Iida (BAP 9th Cir. 2007)

- Mr. Iida, a Japanese citizen, owned Hawaiian corporations that held valuable hotel and resort properties; declared bankrupt in Japan in 2004 and a trustee became sole shareholder of Hawaii corporations, restructured management, removed individual debtor from control
- Trustee obtained authority from Japanese bankruptcy court to sell one of the properties; debtor started proceeding in Hawaii to enjoin distribution of sales proceeds; trustee countered with Chapter 15 proceeding and obtained recognition; removed U.S. directors and officers using usual U.S. corporate law procedures; debtor objected, arguing U.S. bankruptcy court approval needed in order to remove U.S. directors
- Objection overruled; trustee could act out-of-court without bankruptcy court approval; court approval and recognition is needed only to take judicial action

§ 305. Abstention

- (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if–
  - (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or
  - (2)(A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and
    - (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.
- (b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

Cooperation and Communication

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 U.S. Chapter 11 case that agreements were unenforceable under U.S. law
- Bankruptcy court concluded that the clauses were prohibited as *ipso facto* clauses under
  Bankruptcy Code §§ 365(e)(1) and 541(c)(1)(B)
    - U.S. court did not extend comity because result depended on interpretation of U.S. law
    - Enforcement of the agreements would violate the automatic stay under § 362(a)

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

In re Nortel Networks Ltd.

- Company had headquarters in Canada and subsidiaries in 105 countries; the parent filed in Canada, the U.S. subsidiaries filed in Delaware and the English subsidiaries (as well as some other European subsidiaries) filed in England.
- The U.S. Bankruptcy Court granted Chapter 15 recognition to the Canadian and English proceedings, respectively, as foreign main proceedings of entities with COMIs in Canada and England.
- Representatives of the three major estates managed to cooperate and sell the group's assets (primarily patents and other intellectual property). for more than US$6 billion; funds were placed in escrow in New York.
- Before the sale the companies had not agreed on a distribution of assets and there then began years of contention, unsuccessful mediation and litigation over division of proceeds; litigation included allegations that parent had routinely underpaid English subsidiaries and left English pension plans underfunded, and that affiliates were liable for pension obligations of their English affiliate.

In re Nortel Networks (cont'd)

- U.S. and Canadian debtors eventually held a joint trial before the Canadian and Delaware courts through the medium of television to establish legal principles for division of proceeds; the English estate participated
- In separate but coordinated decisions based on their respective national laws, Canadian and US judges found that enterprise was highly integrated and that it was impossible to distribute the funds on the basis of the identity of the companies that owned the patents or other assets, the contribution that the patents had made to the corporate profits of the various companies, prepetition agreements regarding the patents, etc.
- Courts found that fund should be distributed equally among all of the creditors of the companies – that is, an individual debtor's recovery from the fund should not recognize guarantees of another debtor's debt because that would provide the guaranteed creditor with a "duplicate" recovery from the fund and violate the principle of equality; however, guarantees were not voided and could be filed against multiple estates

In re Nortel Networks (cont'd)

- US creditors with guarantees by Canadian parent viewed decisions as a major defeat and filed appeals; appeals against the judgments were dismissed in Canada and eventually settled in the United States
  - Costs of litigation exceeded $1.5 billion
- Two issues should be distinguished:
  - Who should control the division of the joint fund?
    - One court? Arbitration?
  - What should be the substantive rule of distribution?

United States District Court,
S.D. New York.
In re EPHEDRA PRODUCTS LIABILITY LITIGATION.
In re Muscletech Research and Development Inc., et al.; Foreign Applicants in Foreign Proceedings.
In re RSM Richter Inc., as Foreign Representative of Muscletech Research and Development Inc. and Its Subsidiaries, Plaintiff,
v.
Sharon Aguilar, an individual; et al., Defendants.

Nos. 04 MD 1598(JSR), 06 Civ. 538(JSR), 06 Civ. 539(JSR).
Aug. 11, 2006.

Background: In multi-district products liability litigation brought by consumers of products that contained ephedra, monitor appointed in insolvency proceeding in Canadian court for Canadian company that marketed products containing ephedra in the United States moved for recognition and enforcement of Canadian court's order, which approved claims resolution procedure designed to speedily assess and value all claims of Canadian company's creditors, including the consumers.

Holding: The District Court, Rakoff, J., held that Canadian court's order was entitled to recognition and enforcement.

Motion granted.

West Headnotes

Bankruptcy 51 2341

51 Bankruptcy
51III The Case
51III(H) Cases Ancillary to Foreign Proceedings
51k2341 k. In General. Most Cited Cases

Canadian court's order in insolvency proceeding, which approved claims resolution procedure designed to speedily assess and value all claims of Canadian company's creditors, was entitled to recognition and enforcement in multi-district products liability litigation in the United States against Canadian company, where the order fell within purview of Bankruptcy Code sections providing for appropriate relief upon the recognition of a foreign proceeding and issuance of any necessary or appropriate order, and the procedure afforded claimants a fair and impartial proceeding. 11 U.S.C.A. §§ 105(a), 1521(a).

***333** Daniel Joseph Guyder, Allen & Overy, LLP, New York, NY, for Muscletech Research and Development, Inc.

Ken Coleman, Allen & Overy LLP, New York, NY, Daniel Joseph Guyder, Allen & Overy, LLP, New York, NY, Barry Edward Newman, Spohrer Wilner, Maxwell, ***334** and Matthews, Jacksonville, FL, for Plaintiffs.

John D. Goldsmith, Tampa, FL, Angela L. Milch, Smith Mazure, New York City, NY, for Defendants.

OPINION AND ORDER

RAKOFF, District Judge.

Before the substance known as ephedra was banned by the U.S. Food and Drug Administration in 2004, a Canadian-based company named Muscletech Research and Development, Inc. (here referred to, along with its subsidiaries, as "Muscletech") marketed products containing ephedra in the United States. Some of the consumers suffered severe injuries, such as heart attacks and strokes, and eventually more than thirty civil actions for personal injuries and wrongful deaths allegedly caused by ephedra were filed against Muscletech in state and federal courts in the United States. As part of the *In re Ephedra Products Liability Litigation,* the federal cases were subsequently transferred to this Court.

Early in 2006, Muscletech commenced an insolvency proceeding in Ontario Superior Court pursuant to Canada's Companies' Creditors Arrangement Act. The Ontario Court appointed RSM Richter, Inc. as Monitor, and the Monitor, in turn, appeared in this Court as the designated foreign representative of the Ontario Court. Acting pursuant to the recently enacted Chapter 15 of the Bankruptcy Code, 11 U.S.C. §§ 1501 *et seq.*,[FN1] this Court eventually granted, following several hearings, the Monitor's motion for an order recognizing the Canadian proceeding as a "foreign main proceeding," *i.e.*, "a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502; *see* Order, Mar. 2, 2006. Thereafter, the state cases against Muscletech were transferred to this Court pursuant to 28 U.S.C. § 157(b)(5) and consolidated with the previously transferred federal cases. *See* Case Management Order No. 25 ¶ 4, May 22, 2006.

FN1. Chapter 15, which took effect in October 2005, was derived from the Model Law on Cross–Border Insolvency drafted by the United Nations Commission on International Trade Law ("UNCITRAL").

Meanwhile, in Canada, the Monitor and other interested parties negotiated a Claims Resolution Procedure (the "Procedure") designed to speedily assess and value all creditor claims, including the claims of the plaintiffs in the Muscletech actions in the United States, who by this time had filed claims and otherwise appeared in the Ontario insolvency proceeding. The Procedure was approved by the Ontario Court, with the consent of the vast majority of claimants, on June 8, 2006 (the "June 8 Order"). On June 16, 2006, the Monitor moved pursuant to 11 U.S.C. §§ 105(a) and 1521 for an order recognizing and enforcing the June 8 Order within the United States. Four claimants filed papers in opposition. On July 12, 2006, after briefing and oral argument, the Court granted the Monitor's motion, contingent on the Ontario Court's approving certain amendments to the Procedure designed to assure greater clarity and procedural fairness. The Ontario Court approved these amendments on August 1, 2006 (the "August 1 Order"). Accordingly, this Court now grants the Monitor's motion to recognize and enforce in the United States the August 1 Order approving the amended Procedure. The reasons for this ruling are as follows:

Section 1521(a) of the Bankruptcy Code permits this Court, "[u]pon the recognition ***335** of a foreign proceeding," to grant, at the foreign representative's request, "any appropriate relief" "necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521(a). Section 105(a) of the Bankruptcy Code similarly provides, in relevant part, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *Id.* § 105(a). In the instant application, the Monitor asks the Court to recognize and enforce a foreign procedure that implements a claims resolution process that easily falls within the purview of §§ 105(a) and 1521(a).

Section 1506 of the Bankruptcy Code provides, however, that "[n]othing 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." The June 8 Order and the August 1 Order embodying the amended Procedure provide for mandatory mediation and, if the mediation results in a plan approved by specified majorities of creditors, for the estimation and liquidation of the remaining claims by a Claims Officer appointed by the Ontario Court. *See* Notice of Motion, Jun. 16, 2006, Exh. B (the June 8 Order); Notice of Entry, Aug. 1, 2006, Exh. A (the August 1 Order). Primarily on the basis of § 1506, the four objectors ask this Court to refuse to recognize and enforce the Procedure, arguing that it is manifestly contrary to the public policy of the United States in that it deprives the objectors of due process and trial by jury.

As to due process, while most of the objectors' objections are frivolous, there were various paragraphs of the June 8 Order that conceivably could have been read as permitting the Claims Officer to refuse to receive evidence and to liquidate claims without granting interested parties an opportunity to be heard. At this Court's initiative, the Monitor proposed amendments to the June 8 Order that entirely cured these problems. The Ontario Court promptly adopted these amendments in its August 1 Order, and it is only as a result that this Court now gives its approval to recognition and enforcement of the Procedure.

As for the objection that enforcement of the Procedure effectively denies the objecting plaintiffs the right to jury trial that they would have retained if their cases went to trial in the United States, it may well be the case, as the Monitor argues, that the objectors waived this objection when they filed their claims in the Ontario Court and appeared there to argue the same objections they here make.[FN2] *See* Reply Mem. of Law of RSM Richter Inc. 7; Tr. 7/6/2006, at 54, 57–58. But the Court does not reach the waiver issue because it finds that, in any event, neither § 1506 nor any other law[FN3] prevents a United States ***336** court from giving recognition and enforcement to a foreign insolvency procedure for liquidating claims simply because the procedure alone does not include a right to jury.

FN2. Although it might also be argued that the objection to the denial of a jury trial is premature because, at this stage, the Claims Officer has not begun the liquidation process, the Court agrees with the objectors that denial of a jury trial impacts their bargaining position at every stage of the implementation of the Procedure.

FN3. The objectors also purport to rely on 11 U.S.C. § 1507, which, however, adds nothing to the arguments made under § 1506. Although none of the objectors relied on, or even cited, 28 U.S.C. § 1411 –which provides that, except in the case of involuntary bankruptcies, "this chapter and *title 11* do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim," 28 U.S.C. § 1411(a) (emphasis added)-nevertheless, the Court, *sua sponte*, raised § 1411 at the time of oral argument and gave the objectors ample opportunity to address its relevance. *See* Tr., 7/6/2006, at 9–75.

In adopting Chapter 15, Congress instructed the courts that the exception provided therein for refusing to take actions "manifestly contrary to the public policy of the United States" should be "narrowly interpreted," as "[t]he word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." H.R.Rep. No. 109–31(I), at 109, *as reprinted in* 2005 U.S.C.C.A.N. 88, 172. This is the standard meaning accorded the word "manifestly" in international law when it refers to a nation's public policy. Indeed, the official Guide to the Enactment of the Model Law on Cross–Border Insolvency (from which Chapter 15 derives) expressly states that

> [t]he purpose of the expression "manifestly," used also in many other international legal texts as a qualifier of the expression "public policy," is to emphasize that public policy exceptions should be interpreted restrictively and that article 6[FN4] is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

FN4. "Article 6" refers to Article 6 of the Model Law, from which section 1506 is taken virtually verbatim.

United Nations General Assembly, Guide to Enactment of the UNCITRAL Model Law on Cross–Border Insolvency, ¶ 89, U.N. Doc A/CN.9/442 (1997). This takes on even added relevance when one recognizes that the House Judiciary

Committee, in enacting Chapter 15, specifically indicated that the Guide "should be consulted for guidance as to the meaning and purpose of [Chapter 15's] provisions." H.R.Rep. No. 109–31(I), at 106 n. 101, *as reprinted in* 2005 U.S.C.C.A.N. 169 n. 101.

Determining what foreign procedures are "manifestly contrary to the public policy of the United States" is, moreover, familiar territory to federal courts, who have long had to confront similar issues when determining whether or not to enforce foreign judgments rendered on the basis of foreign proceedings that were plainly fair but that did not include some commonplace of American practice. As early as 1895, in the leading case of *Hilton v. Guyot,* 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895), the Supreme Court determined that a foreign judgment should generally be accorded comity if "its proceedings are according to the course of a civilized jurisprudence," *i.e.,* fair and impartial. *Hilton,* 159 U.S. at 205–06, 16 S.Ct. 139. More recently, in *Ackermann v. Levine,* 788 F.2d 830 (2d Cir.1986), the Second Circuit expressly reaffirmed "[t]he narrowness of the public policy exception to enforcement [of foreign judgments]," adding that, "[a]s Judge Cardozo so lucidly observed: 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.' " *Ackermann,* 788 F.2d at 842 (quoting *Loucks v. Standard Oil Co.,* 224 N.Y. 99, 110–11, 120 N.E. 198 (1918) (Cardozo, J.)).

Accordingly, federal courts have enforced against U.S. citizens foreign judgments rendered by foreign courts for whom the very idea of a jury trial is foreign. Only last year, for example, the district court for the Northern District of Ohio granted summary judgment to a plaintiff seeking to enforce against a U.S. company a foreign judgment given by the Supreme Court of the Republic of Korea. ***337** *See Samyang Food Co. v. Pneumatic Scale Corp.,* No. 05 Civ. 636, 2005 WL 2711526 (N.D.Ohio Oct. 21, 2005). Against defendant's argument that the Korean judgment should not be recognized because South Korea did not afford defendant a jury trial, the district court held that all that was required was a fair and impartial hearing and that, despite the absence of jury trial, the Korean procedure was eminently fair. *Samyang Food,* 2005 WL 2711526, at *6–*7. As the district court noted, "[t]he Korean judicial system provides substantially the same substantive and procedural due process protections as those afforded by Ohio," *viz.,* "notice, the right to ... legal counsel, the right to present evidence and witnesses and to examine evidence offered against them, and a right to appeal to a higher court." *Samyang Food,* 2005 WL 2711526, at *6. All these protections are likewise present in the Ontario Court.

Similarly, federal courts, in the Second Circuit and elsewhere, have regularly dismissed U.S. cases in favor of foreign forums despite the objection that the foreign forum provides no trial by jury. *See, e. g., Lockman Found. v. Evangelical Alliance Mission,* 930 F.2d 764, 768 (9th Cir.1991) (finding, in affirming forum non conveniens dismissal, that fact that Japan would not conduct jury trial to resolve dispute "does not render Japanese courts an inadequate forum"); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal,* 809 F.2d 195, 199, 202 (2d Cir.1987) (affirming district court's forum non conveniens dismissal based on finding that Indian courts were adequate forum despite, *inter alia,* absence of juries).

Obviously, the constitutional right to a jury trial is an important component of our legal system, and § 1411 stresses its importance in the context of personal injury cases. But the notion that a fair and impartial verdict cannot be rendered in the absence of a jury trial defies the experience of most of the civilized world. Indeed, England, where the jury concept originated, has long since limited jury trials in civil proceedings to only those cases involving allegations of libel, slander, malicious prosecutions, fraud, and false imprisonment. *See* Richard L. Marcus, *Putting American Procedural Exceptionalism*

Into a Globalized Context, 53 Am. J. Comp. L. 709, 712–13 (2005) (internal quotation omitted). The historic function of the jury to stand as a bulwark against government abuse plainly has limited application in the civil arena, and it is difficult to detect what unfairness a plaintiff suffers from having a civil case decided by a judge rather than a jury. Here, the objectors' primary claim of "prejudice" from the absence of a right to jury trial is simply that it will give them less of a bargaining position in negotiating a settlement of their claims than they would have if a jury—which, unlike the Claims Officer, would have no knowledge of competing claims—were asked to value their claims. *See* Tr., 7/6/2006, at 37, 40. Deprivation of such bargaining advantage hardly rises to the level of imposing on plaintiffs some fundamental unfairness.

In any event, the Procedure here in issue, as amended, plainly affords claimants a fair and impartial proceeding. Nothing more is required by § 1506 or any other law.

Accordingly, for the foregoing reasons, the Court hereby recognizes and enforces the Claims Resolution Procedure initially promulgated by the Ontario Superior Court on June 8, 2006 and amended and adopted by the Ontario Superior Court on August 1, 2006.

S.D.N.Y.,2006.
In re Ephedra Products Liability Litigation
349 B.R. 333, 56 Collier Bankr.Cas.2d 734

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thereby leaving the grand jury's access to the evidence unimpaired." 767 F.2d at 30.

In short, Punn's claim can be adequately vindicated upon appeal from a final judgment. The nature of Punn's interest in preventing the enforcement of the grand jury subpoenas is not the kind "whose legal and practical value will be destroyed if not vindicated on collateral review," *In re Local 478,* 708 F.2d at 72, such as a claim of privilege, as to which "appellate courts cannot always repair the error once the 'cat is out of the bag.'" *Lavender,* 583 F.2d at 632. As in *Lavender,* if Punn's arguments continue to fail before the district court, purportedly ill-gotten evidence or its fruits are admitted at his trial, and conviction results, appellate review will be available at that point. Should this Court then determine that the subpoenas were issued for the sole or dominant purpose of preparing for Punn's trial, it may order a new trial without the use of the ill-gotten evidence, or whatever additional remedies are necessary to ensure that Punn's legitimate interests are fully preserved.

CONCLUSION

Accordingly, we hold that the district court's orders denying Punn's motion to quash the grand jury subpoenas directed to Sippy and Jesse Punn, and denying reconsideration of that motion, do not fall within the small class of rulings encompassed by the collateral order doctrine and are not otherwise final. Because they are not final decisions within the meaning of 28 U.S.C. § 1291, they are not immediately appealable. The appeal from the district court's orders is therefore DISMISSED.

Michael JAFFÉ, Insolvency Administrator, Plaintiff–Appellant,

v.

SAMSUNG ELECTRONICS COMPANY, LIMITED; Infineon Technologies AG; International Business Machines Corporation; Hynix Semiconductor, Inc.; Intel Corporation; Nanya Technology Corporation; Micron Technology, Defendants–Appellees.

United States of America, Amicus Curiae,

Verband Insolvenzverwalter Deutschlands E.V., Amicus Supporting Appellant,

The Federation of German Industries, a/k/a Bundesverband Der Deutschen Industrie; Intellectual Property Owners Association; Semiconductor Industry Association; Chamber of Commerce of the United States of America; National Association of Manufacturers; Business Software Alliance, Amici Supporting Appellees.

No. 12–1802.

United States Court of Appeals, Fourth Circuit.

Argued: Sept. 17, 2013.

Decided: Dec. 3, 2013.

Background: Following entry of order granting foreign representative's petition for recognition of pending German insolvency proceeding of manufacturer of memory chips for computers, foreign representative moved for determination as to inapplicability to foreign debtor of provision of the Bankruptcy Code that prevented debtors from unilaterally terminating the rights of licensees of their intellectual property by rejecting licensing agreements, so as to allow foreign representative to reject licenses for debtor's United States patents and to compel licensees to negotiate new licensing agreements at more favorable rates. Semiconductor manufacturers with which foreign debtor had executed various joint venture and patent cross-licensing agreements objected. The bankruptcy court, Robert G. Mayer, J., 2009 WL 4060083, granted the foreign representative's motion, and objectors appealed. The district court, 433 B.R. 547, affirmed in part and remanded in part. On remand, the United States Bankruptcy Court for the Eastern District of Virginia, Stephen S. Mitchell, J., 462 B.R. 165, entered order denying motion, and foreign representative appealed. The United States District Court for the Eastern District of Virginia, T.S. Ellis III, J., 470 B.R. 374, certified issue for direct appeal to the Court of Appeals. The Court of Appeals authorized the direct appeal.

Holdings: The Court of Appeals, Niemeyer, Circuit Judge, held that:

(1) bankruptcy court was required, even without specific request by recognized foreign representative, to ensure sufficient protection of creditors and foreign debtor when it granted discretionary relief to representative;

(2) requirement for sufficient protection of the "interests of the creditors and other interested entities, including the debtor" warranted particularized balancing; and

(3) bankruptcy court reasonably exercised its discretion in balancing interests of patent portfolio cross-licensees against interests of foreign debtor.

Affirmed.

Wynn, Circuit Judge, filed opinion concurring in the judgment:

1. Bankruptcy ⚷2341

In case ancillary to foreign proceeding, bankruptcy court was required, even without specific request by recognized foreign representative, to ensure sufficient protection of creditors and foreign debtor when it granted discretionary relief to representative, among which was privilege to have bankruptcy court entrust him with "administration or realization of all or part of the assets of [debtor] within the territorial jurisdiction of the United States," specifically identifying debtor's United States patents as among the United States assets he sought to control. 11 U.S.C.A. §§ 365, 1521, 1522.

2. Bankruptcy ⚷2341

When granting discretionary relief to a recognized foreign representative in a case ancillary to foreign proceeding, requirement for sufficient protection of the "interests of the creditors and other interested entities, including the debtor" warranted particularized balancing; the provision for public policy exceptions was an additional, more general protection of United States interests that could be evaluated apart from the particularized analysis of the sufficient protection requirement. 11 U.S.C.A. § 1522(a).

3. Bankruptcy ⚷2341

In a case ancillary to a foreign proceeding, a bankruptcy court must ensure that the discretionary relief a recognized foreign representative requests does not impinge excessively on any one entity's interests, which implies that each entity must receive at least some protection; the analysis required to protect creditors and other interested persons therefore logically is best done by balancing the respective interests based on the relative harms and benefits in light of the circumstances presented, thus inherently calling for application of a balancing test. 11 U.S.C.A. §§ 1521, 1522.

4. Bankruptcy ⚷2341

In a case ancillary to a foreign proceeding, a United States bankruptcy court, in considering a recognized foreign representative's request for discretionary relief, must consider the costs that awarding such relief would impose on others under the rule provided by the substantive law of the State where the foreign insolvency proceeding is pending; the governing provision anticipates particularized protection. 11 U.S.C.A. §§ 1506, 1522.

5. Bankruptcy ⚷2341

In case ancillary to foreign proceeding, bankruptcy court reasonably exercised its discretion in balancing interests of patent portfolio cross-licensees against interests of foreign debtor and finding that application of provision that limited trustee's ability to unilaterally reject licenses to debtor's intellectual property by giving licensees option to retain their rights under licenses was necessary to ensure licensees under debtor's United States patents were sufficiently protected; hardship to foreign debtor of depriving it of opportunity to negotiate new licensing agreements at higher rates was outweighed by substantial detriment to licensees that had made very substantial investments in research and manufacturing facilities. 11 U.S.C.A. §§ 365(n), 1522(a).

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Before NIEMEYER, WYNN, and FLOYD, Circuit Judges.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge FLOYD joined. Judge WYNN wrote a separate opinion concurring in Parts I, II, and III and the judgment.

NIEMEYER, Circuit Judge:

This appeal presents the significant question under Chapter 15 of the U.S. Bankruptcy Code of how to mediate between the United States' interests in recognizing and cooperating with a foreign insolvency proceeding and its interests in protecting creditors of the foreign debtor with respect to U.S. assets, as provided in 11 U.S.C. §§ 1521 and 1522.

Qimonda AG, a German corporation that manufactured semiconductor devices and was, for a brief time, one of the world's largest manufacturers of dynamic random access memory ("DRAM"), filed for insolvency in Munich, Germany, in January 2009. The principal assets of Qimonda's estate consisted of some 10,000 patents, about 4,000 of which were U.S. patents. These patents were subject to cross-license agreements with Qimonda's competitors, as was common in the semiconductor industry to avoid infringement risks caused by the "patent thicket" resulting from the overlapping patent rights of some 420,000 patents in the semiconductor industry.

Ancillary to the German insolvency proceeding, Dr. Michael Jaffé, the insolvency administrator appointed by the Munich court, filed an application in the Bankruptcy Court for the Eastern District of Virginia under Chapter 15 of the U.S. Bankruptcy Code, petitioning the U.S. court to recognize the German insolvency proceeding as a "foreign main proceeding" in order to obtain an array of privileges available under Chapter 15. Among other relief, Jaffé specifically requested that the bankruptcy court entrust to him, pursuant to 11 U.S.C. § 1521(a)(5), the administration of all of Qimonda's assets within the territorial jurisdiction of the United States, which largely consisted of the 4,000 U.S. patents.

Contemporaneously with the Chapter 15 proceeding, Jaffé sent letters to licensees of Qimonda's patents under its cross-license agreements, declaring that, under § 103 of the German Insolvency Code, the licenses granted under Qimonda patents "are no longer enforceable," including the licenses under the company's 4,000 U.S. patents. As Jaffé later indicated to the bankruptcy court, he intended to re-license Qimonda's patents for the benefit of Qimonda's creditors, replacing licenses paid for in-kind with cross-licenses with licenses paid for with cash through royalties.

The bankruptcy court entered an order recognizing the German insolvency proceeding as a foreign main proceeding and a separate order granting Jaffé the discretionary relief he requested under § 1521(a)(5). But, following a four-day evidentiary hearing, it conditioned the § 1521 relief with the requirement that Jaffé afford the licensees of Qimonda's U.S. patents the treatment they would have received in the United States under 11 U.S.C. § 365(n), which limits a trustee's ability to reject unilaterally licenses to the debtor's intellectual property by giving licensees the option to retain their rights under the licenses. After balancing the interests of Qimonda's estate with the interests of the licensees of its U.S. patents, the bankruptcy court concluded that the application of § 365(n) was necessary to ensure, as required by § 1522(a), that the licensees were "sufficiently protected," even though it would adversely affect Qimonda's estate. The bankruptcy court also concluded, pursuant to 11 U.S.C. § 1506, that allowing Jaffé to cancel unilaterally Qimonda's licenses of U.S. patents "would be manifestly contrary to the public policy of the United States," recognizing "a fundamental U.S. public policy promoting technological innovation," which would be undermined if it failed to apply § 365(n) to the licenses under Qimonda's U.S. patents.

In this direct appeal from the bankruptcy court, Jaffé challenges both of these conclusions, arguing that the court erred in its construction of Chapter 15 and abused its discretion in applying it.

We conclude that the bankruptcy court properly recognized that Jaffé's request for discretionary relief under § 1521(a) required it to consider "the interests of the creditors and other interested entities, including the debtor" under § 1522(a) and that it properly construed § 1522(a) as requiring the application of a balancing test. Moreover, relying on the particular facts of this case and the extensive record developed during the four-day evidentiary hearing, we also conclude that the bankruptcy court reasonably exercised its discretion in balancing the interests of the licensees against the interests of the debtor and finding that application of § 365(n) was necessary to ensure the licensees under Qimonda's U.S. patents were sufficiently protected. Accordingly, we affirm.

I

The German insolvency proceeding

Qimonda AG filed an application to open a preliminary insolvency proceeding in the Munich Insolvency Court on January 23, 2009, which was converted to a final proceeding on April 1, 2009. Upon converting the proceeding to a final one, the court appointed Dr. Michael Jaffé to serve as the estate's insolvency administrator, a position akin to a bankruptcy trustee under U.S. law. Subsequently, Qimonda ceased all manufacturing operations and began to liquidate its estate. The principal assets of the estate consisted of its approximately 10,000 patents, including about 4,000 U.S. patents. Most of these patents covered products or processes related to DRAM, but some covered other types of semiconductor technology.

The "patent thicket" and the practice of cross-licensing

At the time Qimonda opened its insolvency proceeding, its patents were subject to numerous cross-license agreements with other semiconductor manufacturers, including Infineon Technologies AG (from which Qimonda had spun off in 2006), Samsung Electronics Company, International Business Machines Corporation ("IBM"), Intel Corporation, Hynix Semiconductor, Inc., Nanya Technology Corporation, and Micron Technology, Inc. While some of these cross-license agreements were designed to facilitate specific joint ventures, most simply reflected the strategy widely adopted in the semiconductor industry in response to infringement risks arising from the industry's "patent thicket"—a term used to describe "a dense web of overlapping intellectual property rights." Carl Shapiro, Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting, *in* 1 *Innovation Policy and the Economy* 119, 120 (Adam B. Jaffé et al. eds., 2001). As the bankruptcy court in this case aptly explained and all parties agreed, there are so many patents implicated by any new semiconductor product that "it would be all but impossible to design around each and every" one. *In re Qimonda AG,* 462 B.R. 165, 175 (Bankr.E.D.Va.2011). "Indeed, such is the number of potentially applicable patents that it is not always possible to identify which ones might cover a new product...." *Id.*

The problem of the patent thicket is exacerbated by the enormous costs incurred to bring a new semiconductor product to market. According to one expert, the price of building a new semiconductor fabrication facility can now exceed $5 billion. These sunk costs could create a classic "holdup" problem if a new product were ultimately found to infringe someone else's patent, with the patent's owner being able to extract a substantially higher royalty after the investment had been made than if a license had been negotiated beforehand. Thus, to avoid this holdup premium and enhance their design freedom, competitors in the semiconductor industry have routinely entered into broad, non-exclusive cross-license agreements with each other, "sometimes with the addition of equalizing payments (either upfront payments or so-called running royalties) to account for differences in the size and breadth of the respective patent portfolios." *In re Qimonda AG,* 462 B.R. at 175.

Consistent with this industry practice, Qimonda had patent cross-license agreements with nearly every other major semiconductor manufacturer at the time it opened its insolvency proceeding.

The Chapter 15 proceeding

Jaffé commenced this Chapter 15 proceeding on June 15, 2009, for recognition of the German insolvency proceeding as a "foreign main proceeding" under 11 U.S.C. § 1517. Jaffé's petition identified Qimonda's known assets in the United States as including its "active patents and patent applications filed with the United States Patent and Trademark Office," and it sought relief designed to "give effect to the German Proceedings in the U.S., protect the U.S. Assets, and to prevent creditors in the U.S. from taking actions that [might] frustrate the German Proceedings." Jaffé also sought an order entrusting to him, under § 1521(a)(5), "[t]he administration or realization of all or part of the assets of [Qimonda] within the territorial jurisdiction of the United States" and further declaring that the "German Proceedings ... be granted comity and [be] given full force and effect" in the United States.

The bankruptcy court granted the relief Jaffé requested, entering an order granting recognition of the German insolvency proceeding as a "foreign main proceeding" under § 1517. At the same time, it also entered a separate Supplemental Order "grant[ing] further relief under 11 U.S.C. § 1521." The Supplemental Order made Jaffé "the sole and exclusive representative of Qimonda AG in the United States" and, as requested, specifically gave him the power to "administer the assets of Qimonda AG within the territorial jurisdiction of the United States." It authorized Jaffé "to examine witnesses, take evidence, seek production of documents, and deliver information" concerning Qimonda. Finally, it specified that, "in addition to those sections [of the Bankruptcy Code] made applicable pursuant to § 1520," a number of other provisions of the Bankruptcy Code would be "applicable in this proceeding," including 11 U.S.C. § 365. That provision gives a bankruptcy trustee power to assume or reject any of the debtor's executory contracts. But one subsection, § 365(n), limits the trustee's ability to unilaterally reject licenses *to the debtor's intellectual property,* reserving to the licensees the option to elect to retain their rights under the licenses.

Shortly after the bankruptcy court entered its Supplemental Order, Jaffé began sending letters to companies that had cross-license agreements with Qimonda, invoking § 103 of the German Insolvency Code and declaring that the licenses under Qimonda's patents were "no longer enforceable." Section 103 of the German Insolvency Code, much like § 365 of the U.S. Bankruptcy Code, permits an insolvency administrator to decide whether to continue to perform the debtor's executory contracts. But, unlike § 365, which includes the § 365(n) exception, § 103 does not specifically address intellectual property licenses. In Jaffé's view, however, the licenses under Qimonda's patents fell within the scope of § 103, and it was his duty, as insolvency administrator, not to recognize them since they provided no useful compensation to Qimonda's estate.

After receiving these letters, Samsung and Elpida Memory, Inc., responded with letters, taking the position that 11 U.S.C. § 365(n) protected their licenses under Qimonda's U.S. patents and announcing that they were electing to retain their rights under the licenses.

The letters from Samsung and Elpida prompted Jaffé to move to amend the bankruptcy court's July 22, 2009 Supplemental Order to delete entirely its reference to § 365. Alternatively, Jaffé asked the court to add a proviso to the Supplemental Order specifying that "Section 365(n) applies only if the Foreign Representative rejects an executory contract pursuant to Section 365 (rather than simply exercising the rights granted to the Foreign Representative pursuant to the German Insolvency Code)." Several companies that had licenses under Qimonda's U.S. patents through cross-license agreements—namely, Infineon, Samsung, Micron, Nanya, IBM, Intel, and Hynix (hereafter, the "Licensees")—opposed Jaffé's motion to amend the Supplemental Order.[1]

By an opinion dated November 19, 2009, the bankruptcy court granted Jaffé's motion, stating that its inclusion of § 365 was "improvident." The court explained that consistent with Chapter 15's goal of "providing a systematic and consistent resolution to cross-border insolvencies," the fate of the patent cross-license agreements should be decided in the German insolvency proceeding by applying German law. The court accordingly amended its Supplemental Order to include the alternative proviso that Jaffé had requested as an amendment.

The appeal to the district court and its remand order

The Licensees appealed the bankruptcy court's amended order to the district court, which thereafter remanded the case back to the bankruptcy court to consider 11 U.S.C. § 1522(a)'s requirement that the

1. Infineon, Samsung, Micron, Nanya, and Elpida originally objected to the motion, while IBM, Intel, and Hynix were later allowed to intervene as objectors. Elpida, which also had elected to enforce its licenses from Qimonda under § 365(n), subsequently reached a settlement with Jaffé and therefore is not an objecting Licensee.

bankruptcy court ensure that "the interests of the creditors and other interested entities, including the debtor, [were] sufficiently protected." The district court explained that § 1522(a) required the bankruptcy court "to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another." *In re Qimonda AG Bankr. Litig.,* 433 B.R. 547, 557 (E.D.Va.2010) (emphasis omitted) (quoting *In re Tri–Cont'l Exch. Ltd.,* 349 B.R. 627, 637 (Bankr.E.D.Cal.2006)). The court found it "unclear on [the] somewhat anemic record whether the Bankruptcy Court adequately balanced the parties' interests, as required by § 1522," noting that the bankruptcy court had not adequately explained why the application of § 365(n) would unduly prejudice Jaffé or, conversely, fully considered "whether cancellation of licenses for [Qimonda's U.S. patents] would put at risk [the Licensees'] investments in manufacturing or sales facilities in this country for products covered by the U.S. patents." *Id.* at 558.

As a separate basis for remand, the district court also found that the bankruptcy court had failed to consider "whether § 365(n) embodies the fundamental public policy of the United States, such that subordinating § 365(n) to German Insolvency Code § 103 is an action 'manifestly contrary to the public policy of the United States,'" under 11 U.S.C. § 1506. 433 B.R. at 565. The district court concluded that there were two primary circumstances in which a bankruptcy court should invoke § 1506: *first,* when "the foreign proceeding was procedurally unfair;" and *second,* when "the application of foreign law or the recognition of a foreign main proceeding under Chapter 15 would severely impinge the value and import of a U.S. statutory or constitutional right, such that granting comity would severely hinder United States bankruptcy courts' abilities to carry out . . . the most fundamental policies and purposes of these rights." *Id.* at 568–69 (internal quotation marks omitted). Finding the application of that standard "unclear on [the] record," the court also directed the bankruptcy court on remand to consider "whether conditioning the applicability of § 365(n) was a prohibited action 'manifestly contrary to the public policy of the United States' under § 1506." *Id.* at 570–71.

On remand to the bankruptcy court

On remand, Jaffé filed papers in the bankruptcy court in which he committed to re-license Qimonda's patent portfolio to the Licensees at a reasonable and nondiscriminatory ("RAND") royalty. He stated that he was prepared to "enter into good faith negotiations" with the Licensees to set the royalty rates and, if necessary, to submit the rate amounts to arbitration before the World Intellectual Property Organization ("WIPO").[2]

2. RAND royalties are relatively common in high-tech industries because of the role played by standard-setting organizations, which help ensure the interoperability of products, among other functions. To avoid the holdup problem in this context, standard-setting organizations typically require their members to agree in advance to license any patent identified as necessary to a standard at RAND terms. Both Qimonda and the Licensees belong to such an organization. Nonetheless, the Federal Trade Commission has observed that "there is much debate over whether such RAND . . . commitments can effectively prevent patent owners from imposing excessive royalty obligations on licensees," noting complaints by industry representatives that the term RAND is "vague and ill-defined-particularly with regard to what royalty rate is 'reasonable.'" Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 192–93 (2011).

In March 2011, the bankruptcy court held a four-day evidentiary hearing, receiving testimony regarding the likely effects of applying § 365(n) to licenses under Qimonda's U.S. patents. Jaffé testified at the hearing that a ruling applying § 365(n) would render "the central assets of [Qimonda's] estate, that is [its] U.S. patents ... largely worthless." He also said that such a ruling would "violate the principle of equal treatment of creditors under German law" by giving the Licensees preferential treatment over Qimonda's other creditors.

Jaffé also presented the expert testimony of Dr. William Kerr, an economist, who concluded that based on his review of existing licenses and licensing practices in the semiconductor industry, Qimonda's estate would receive approximately $47 million per year if Jaffé were allowed to re-license Qimonda's U.S. patents covering DRAM products at RAND terms. Observing that $47 million would represent a small fraction of what the Licensees spend on research and development every year, Kerr gave his opinion that "discontinuance of the cross-licenses at issue [and subsequent re-licensing at a RAND rate] would not unduly impair the function of the semiconductor industry or the [Licensees]."

By contrast, the Licensees' witnesses testified to the harm that would befall the Licensees, as well as the semiconductor industry as a whole, if the reference to § 365(n) were removed from the Supplemental Order. For example, Dr. Jerry Hausman, the Licensees' economist, gave his opinion that "[b]y destabilizing the system of licensing that has enabled the extraordinary success of the semiconductor industry and other industries, failure to apply Section 365(n) would reduce investment, innovation, and competition, which would harm U.S. productivity growth and U.S. consumers as well as worldwide productivity and consumers." Hausman also disputed Kerr's calculation of the likely RAND royalty rates, forecasting significantly higher sums and arguing that the holdup threat could not be eliminated. Moreover, in Hausman's view, Jaffé's offer to re-license the U.S. patents at RAND terms could not "provide adequate protection for the interests of the [Licensees]," in part because of the danger that Jaffé would subsequently sell the patent portfolio to an entity that might itself file for bankruptcy, thus "extinguish[ing] the [Licensees'] licenses once again."

The bankruptcy court's decision on remand

At the conclusion of the hearing, the bankruptcy court issued a memorandum opinion denying Jaffé's motion to amend the Supplemental Order and confirming "that § 365(n) applies with respect to Qimonda's U.S. patents." *In re Qimonda AG,* 462 B.R. at 185. The court assumed for the purpose of its analysis that Jaffé's interpretation of German law was correct and that § 103 of the German Insolvency Code would authorize him to terminate the Licensees' right to practice Qimonda's patents. With that assumption, the court concluded that "the balancing of debtor and creditor interests required by § 1522(a) ... weighs in favor of making § 365(n) applicable to Dr. Jaffé's administration of Qimonda's U.S. patents." *Id.* at 182.

Explaining its balancing analysis, the bankruptcy court recognized that its ruling would "result in less value. being realized by the Qimonda estate" but noted that Qimonda's patents would "by no means be rendered worthless." 462 B.R. at 182. On the other hand, the court found that a contrary ruling would create a "very real" "risk to the very substantial investment the [Licensees] ... [had] collectively made in research and manufacturing facilities in the United States in reliance on the design freedom provided by the cross-license agreements." *Id.* at 182–83. The court acknowledged that Jaffé's offer to re-license Qimonda's patents on RAND terms would lessen the holdup risk, but observed that, because of the Licensees' "sunk costs, [they would] not have the option of avoiding royalties altogether by designing around the patent." *Id.* at 181–82.

As an independent ground for its decision, the bankruptcy court also concluded, under 11 U.S.C. § 1506, that "deferring to German law, to the extent it allows cancellation of the U.S. patent licenses, would be manifestly contrary to U.S. public policy." 462 B.R. at 185. Referencing the legislative history of Congress's enactment of the Intellectual Property Licenses in Bankruptcy Act, Pub.L. No. 100–506, 102 Stat. 2538 (1988), the court noted that § 365(n) resulted from Congress's determination "that allowing patent licenses to be terminated in bankruptcy would 'impose[ ] a burden on American technological development.'" *In re Qimonda AG,* 462 B.R. at 184 (quoting S.Rep. No. 100–505, at 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3200). Informed by this congressional policy choice, the court reasoned that "[a]lthough innovation would obviously not come to a grinding halt if licenses to U.S. patents could be cancelled in a foreign insolvency proceeding, the court is persuaded by Professor Hausman's testimony that the resulting uncertainty would nevertheless slow the *pace* of innovation, to the detriment of the U.S. economy." *Id.* at 185. On this basis, the court concluded that "failure to apply § 365(n) under the circumstances of this case and this industry would 'severely impinge' an important statutory protection accorded licensees of U.S. patents and thereby undermine a fundamental U.S. public policy promoting technological innovation." *Id.*

The bankruptcy court thus held that "public policy, as well as the economic harm that would otherwise result to the [L]icensees, require[d] that the protections of § 365(n) apply to Qimonda's U.S. patents." 462 B.R. at 167–68.

The direct appeal to the court of appeals

Jaffé appealed the bankruptcy court's ruling and sought from the district court a certification under 28 U.S.C. § 158(d)(2) for a direct appeal to this court. The district court concluded that the bankruptcy court's order qualified for certification, and, by order dated June 28, 2012, we authorized the direct appeal. *See* 28 U.S.C. § 158(d)(2).

II

Congress enacted Chapter 15 of the Bankruptcy Code in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109–8, 119 Stat. 23, stating that its purpose was "to incorporate the Model Law on Cross–Border Insolvency," which had been developed in 1997 by the United Nations Commission on International Trade Law ("UNCITRAL"), "so as to provide effective mechanisms for dealing with cases of cross-border insolvency." 11 U.S.C. § 1501(a); *see also* H.R.Rep. No. 109–31, pt. 1, at 105 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 169. In this respect, Chapter 15 replaced former 11 U.S.C. § 304, which authorized bankruptcy courts to award appropriate relief in a case ancillary to a foreign proceeding but which was largely discretionary. *See* 11 U.S.C. § 304(c) (2000). Chapter 15 lists five specific objectives: (1) to encourage cooperation with "the courts and other competent authorities of foreign countries involved in cross-border cases;" (2) to increase "legal certainty for trade and investment;" (3) to promote the "fair and efficient administration of cross-border insolvencies" so as to "protect[ ] the interests of all creditors, and other interested entities, including the debtor;" (4) to protect and maximize "the value of the debtor's assets;" and (5) to facilitate "the rescue of financially troubled businesses." 11 U.S.C. § 1501(a); *see also* H.R.Rep. No. 109–31, pt. 1, at 105.

To further these stated objectives, Chapter 15 authorizes the representative of a foreign insolvency proceeding to commence a case in a U.S. bankruptcy court by filing a petition for recognition of the foreign proceeding. 11 U.S.C. §§ 1504, 1509(a), 1515. If the petition meets the requirements listed in § 1517, the court *must* enter an order granting recognition of the foreign proceeding. And if that foreign proceeding "is pending in the country where the debtor has the center of its main interests," it is recognized as a "foreign main proceeding." 11 U.S.C. § 1517(b)(1); *see also id.* § 1502(4). With the entry of an order recognizing a foreign main proceeding, the foreign representative of the proceeding automatically receives relief as stated in § 1520, including the automatic stay created by § 362 with respect to the debtor and its property within the United States and the ability to operate the debtor's business within the United States under § 363, as well as the right to sue and be sued and the right to "intervene in any proceedings in a State or Federal court in the United States in which the debtor is a party." *Id.* §§ 1520(a), 1509(b)(1), 1524. Moreover, the statute provides that following entry of a recognition order, "a court in the United States shall grant comity or cooperation to the foreign representative," thereby implementing a principal purpose of Chapter 15. *Id.* § 1509(b)(3).

Even before entry of the order granting recognition, § 1519 authorizes the bankruptcy court, on the foreign representative's request, to grant preliminary relief when "urgently needed to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1519.

In addition to the automatic relief that comes with the entry of an order granting recognition of a foreign main proceeding, § 1521 authorizes the bankruptcy court to grant discretionary relief. Specifically, § 1521 provides that "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." 11 U.S.C. § 1521(a). This discretionary relief may include "entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative," *id.* § 1521(a)(5), as well as "entrust[ing] the distribution of all or part of the debtor's assets located in the United States to the foreign representative," *id.* § 1521(b). The bankruptcy court, however, may only grant discretionary relief under § 1521 if it determines that "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." *Id.* § 1522(a). It may also subject the discretionary relief it grants under § 1521 "to conditions it considers appropriate, including the giving of security or the filing of a bond." *Id.* § 1522(b).

Finally, all of the actions authorized in Chapter 15 are subject to § 1506, which provides that "[n]othing 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." 11 U.S.C. § 1506.

Chapter 15 thus authorizes an "ancillary" proceeding in a United States bankruptcy court that is largely designed to complement and assist a foreign insolvency proceeding by, among other things, "bring[ing] people and property beyond the foreign main proceeding's jurisdiction into the foreign main proceeding through the exercise of the United States' jurisdiction." *In re ABC Learning Centres Ltd.,* 728 F.3d 301, 307 (3d Cir.2013); *see also* H.R.Rep. No. 109–31, pt. 1, at 106 ("Cases brought under chapter 15 are intended to be ancillary to cases brought in a debtor's home country . . ."). This structure reflects "the United States policy in favor of a general rule that countries other than the home country of the debtor, where a main proceeding would be brought, should usually act through ancillary proceedings in aid of the main proceedings, in preference to a system of full bankruptcies (often called 'secondary' proceedings) in each state where assets are found." H.R.Rep. No. 109–31, pt. 1, at 108. Notwithstanding this general policy, Chapter 15 also expressly contemplates that "[a]fter recognition of a foreign main proceeding, a case under another chapter of [the Bankruptcy Code] may be commenced . . . if the debtor has assets in the United States." 11 U.S.C. § 1528.

Thus, taken as a whole, Chapter 15—like the Model Law on which it was based—takes "several modest but significant" steps toward implementing "a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency." UNCITRAL, Guide to Enactment of the UNCITRAL Model Law on Cross–Border Insolvency, *in Legislative Guide on Insolvency Law* 307, 307 (2005) (hereinafter, "Guide to Enactment").

III

[1] Jaffé contends that the bankruptcy court erred by employing § 1522(a)'s sufficient protection requirement to subject his "right to administer [Qimonda's] U.S. patents to the . . . constraints imposed by § 365(n)," thus allowing the Licensees to elect to retain their license rights under Qimonda's U.S. patents, contrary to German law as he understands it. *In re Qimonda AG,* 462 B.R. at 183. The bankruptcy court limited the authority it conferred on Jaffé under § 1521(a)(5) by balancing the interests of the Licensees with the interests of Qimonda's estate under § 1522(a) and concluding that the Licensees should receive the protection of § 365(n). *Id.* at 180–83. In support of his challenge, Jaffé makes essentially three arguments: (1) that the district court and the bankruptcy court erred in even considering § 1522(a), because that section applies only to relief granted under § 1521, that the relief granted under § 1521 may be requested only by the foreign representative, and that he, as the foreign representative, never requested the inclusion of § 365(n) as part of the § 1521 relief; (2) that the bankruptcy court misunderstood the type of protection afforded by § 1522(a) by applying a test that balanced the debtor's interests and the creditors' interests instead of a test that placed all creditors on an equal footing; and (3) that in balancing the competing interests, the bankruptcy court overstated the risks to the Licensees, especially in view of Jaffé's offer to re-license Qimonda's patents to them, and failed to treat all creditors' interests equally. We address these points in order.[3]

3. We note as well that the United States has appeared as *amicus curiae* to express its concern that the bankruptcy court overstepped its authority below. Specifically, it criticizes the bankruptcy court as "approach[ing] this case as though it were empowered to decide whether the Foreign Administrator should be permitted to reject appellees' license agreements" based on an erroneous assumption that it could "superimpose Section 365(n) on

A

First, Jaffé argues that both the bankruptcy court and the district court erred in even considering § 1522's sufficient protection requirement because § 1522(a) applies to relief that may be granted under § 1521, and § 1521(a), in turn, provides that "the court may, *at the request of the foreign representative*, grant any appropriate relief." (Emphasis added). He asserts that he "never asked the bankruptcy court to include § 365 in its Supplemental Order or sought other relief relating to § 365(n)" such that the Licensees would have the option to retain their licenses under Qimonda's U.S. patents. Thus, according to Jaffé, because application of § 365 was not specifically requested by him, the bankruptcy court's *sua sponte* inclusion of § 365 was legal error, the correction of which must precede any consideration of § 1522(a)'s sufficient protection requirement.

We believe that Jaffé's view of the relationship between § 1521(a) and § 1522(a) is too myopic. While it is true that Jaffé "never affirmatively requested rejection authority under § 365," he did request several forms of discretionary relief under § 1521, among which was the privilege, pursuant to § 1521(a)(5), to have the bankruptcy court entrust him with "[t]he administration or realization of all or part of the assets of [Qimonda] within the territorial jurisdiction of the United States," specifically identifying the company's U.S. patents as among the U.S. assets he sought to control. And, as a prerequisite to awarding *any § 1521 relief,* the court was *required* to ensure sufficient protection of the creditors and the debtor. Section 1522(a) states this explicitly, providing in relevant part, "The court may grant relief *under section ... 1521 ... only if* the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a) (emphasis added). Additionally, the court was authorized to "subject" any § 1521 relief "to conditions it considers appropriate." *Id.* § 1522(b); *see also* H.R.Rep. No. 109–31, pt. 1, at 116 (describing § 1522 as "giv[ing] the bankruptcy court broad latitude to mold relief to meet specific circumstances, including appropriate responses if it is shown that the foreign proceeding is seriously and unjustifiably injuring United States creditors").

This is precisely what the bankruptcy court did here. It granted discretionary relief under § 1521 and, as mandated, considered the question of sufficient protection under § 1522(a). Upon such consideration, it conditioned its § 1521 relief on application of § 365(n), finding that such protection was appropriate in the circumstances presented.

To be sure, the bankruptcy court did not frame its *initial* inclusion of § 365 in the

the operation of German insolvency law in a German proceeding." The United States therefore urges us to "reverse[ ] on the threshold ground that Section 365(n) cannot constrain the operation of German insolvency law in Germany."

As already made clear, however, we take a different view of the scope of the bankruptcy court's holding. Rather than purporting to "constrain the operation of German insolvency law in Germany," the bankruptcy court conditioned its grant of power to Jaffé to "administer the assets of Qimonda AG *within the territorial jurisdiction of the United States*" with the limitation that he was taking the company's U.S. patents subject to the preexisting licenses, which he was obliged to treat in a manner consistent with § 365(n). As a result, Jaffé is precluded from rejecting the U.S. patent licenses *as a matter of U.S. law.* Although this limitation may have indirect effects in the German proceeding, it does not represent an impermissible application of U.S. law extraterritorially, which we understand to be the main concern animating the United States' position in this case.

Supplemental Order as a condition on the authority it was granting Jaffé under § 1521. Indeed, when initially faced with Jaffé's motion to amend, the court described the inclusion of § 365 as "improvident." But on the Licensees' appeal, the district court correctly recognized that it was incumbent on the bankruptcy court, on remand, to consider whether "the interests of the creditors and other interested entities, including the debtor, [would be] sufficiently protected" under § 1522(a) were the court to modify its earlier order so as to grant Jaffé control over the administration of Qimonda's U.S. patents without providing for the application of § 365(n) to the licenses on those patents. *See In re Qimonda AG Bankr. Litig.,* 433 B.R. at 557–58.

The bankruptcy court's consideration of § 1522(a) was thus undoubtedly appropriate when authorizing relief under § 1521.

B

[2] Jaffé next contends that even if the bankruptcy court was correct to consider § 1522's sufficient protection requirement in granting § 1521 relief, the court nonetheless employed the wrong test in applying § 1522(a). He maintains that the bankruptcy court's "ruling fundamentally misunderst[ood] the 'interests' § 1522(a) protects" by failing to recognize that § 1522(a) is merely a procedural protection "designed to ensure that all creditors [could] *participate* in the bankruptcy distribution *on an equal footing* " and thus should not be used to protect parties from the substantive bankruptcy law that would otherwise apply in the foreign main proceeding. (Emphasis added). He asserts that "[d]isregarding foreign law based on an open-ended balancing test under § 1522(a) is contrary to Chapter 15's basic design," which, according to Jaffé, requires U.S. courts to defer to foreign substantive law *except* only as allowed under § 1506, which provides a narrow exception when the court's action would otherwise violate "the most fundamental policies of the United States." H.R.Rep. No. 109–31, pt. 1, at 109. In sum, he argues (1) that the bankruptcy court erred by interpreting § 1522's sufficient protection requirement as incorporating a balancing test that could achieve a result that treated creditors differently and that would therefore be in tension with German law, and (2) that, to the extent § 1522(a) was implicated at all, the bankruptcy court should have limited its analysis to ensuring that the doors of the German insolvency proceeding would be open to the Licensees on *equal* footing with Qimonda's other creditors.

Jaffé's theory of how the sufficient protection requirement of § 1522(a) operates is not illogical. The text of the statute is broad and somewhat ambiguous regarding the test that courts should employ to determine "if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a). But we are not convinced that Jaffé's theory can fully be squared with the text or with Congress's intent in enacting the text.

[3] Section 1522(a) requires the bankruptcy court to ensure the protection of *both* the creditors and the debtor. 11 U.S.C. § 1522(a). The provision thus requires the court to ensure that the relief a foreign representative requests under § 1521 does not impinge excessively on any one entity's interests, implying that each entity must receive at least some protection. And because the interests of the creditors and the interests of the debtor are often antagonistic, as they are here, providing protection to one side might well come at some expense to the other. The analysis required by § 1522(a) is therefore logically best done by balancing the respective interests based on the relative harms and benefits in light of the circumstances presented, thus inherently calling for application of a balancing test.

We also find support for this interpretation in the Model Law on Cross–Border Insolvency, on which Chapter 15 was based. In enacting Chapter 15, Congress stated that it intended to codify the Model Law. *See* 11 U.S.C. § 1501(a). And, in doing so, it also indicated strongly that the Model Law, and the accompanying Guide to Enactment issued by UNCITRAL in conjunction with its adoption of the Model Law, should inform our interpretation of Chapter 15's provisions. Indeed, Chapter 15 provides that "[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." *Id.* § 1508; *see also* H.R.Rep. No. 109–31, pt. 1, at 109–10 ("Interpretation of this chapter on a uniform basis will be aided *by reference to the Guide* and the Reports cited therein, which explain the reasons for the terms used and often cite their origins as well.... To the extent that the United States courts rely on these sources, their decisions will more likely be regarded as persuasive elsewhere" (emphasis added)). Thus, the Model Law and its Guide to Enactment also provide relevant guidance in determining the appropriate meaning of Chapter 15's provisions.

The Guide to Enactment contains a number of paragraphs that bear directly on the question of how a court should assess the interests of others and protect them prior to granting the discretionary relief sought by a foreign representative. For example, the Guide acknowledges that the representative of a foreign main proceeding will "normally seek[ ] to gain control over all assets of the insolvent debtor." Guide to Enactment ¶ 158, at 347. But it stresses that the Model Law makes "[t]he 'turnover' of assets to the foreign representative discretionary," adding that "the Model Law contains several safeguards designed *to ensure the protection of local interests* before assets are turned over to the foreign representative." *Id.* ¶ 157, at 347 (emphasis added). Chief among those "safeguards" is Article 22 of the Model Law, which is largely codified as § 1522.[4] According to the Guide, "The idea underlying [A]rticle 22 is that there should be a *balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief.* This balance is essential to achieve the objectives of cross-border insolvency legislation." *Id.* ¶ 161, at 348 (emphasis added). The Guide to Enactment separately indicates that Article 22 is designed to "protect the interests of the

4. Article 22 of the Model Law provides in full:

1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.

3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

Comparing Article 22 and § 1522 reveals that Congress relied heavily on the language of the Model Law. One of the few alterations that Congress made was to change "adequately" in Article 22(1) to "sufficiently" in § 1522(a)—a modification that the legislative history indicates was made in order "to avoid confusion with ... 'adequate protection,' " "a very specialized legal term in United States bankruptcy." H.R.Rep. No. 109–31, pt. 1, at 115.

creditors (in particular local creditors), the debtor and other affected persons." *Id.* ¶ 35, at 314. Finally, the Guide states, "*[i]n addition to [Article 22's] specific provisions,*" Article 6 of the Model Law "*in a general way* provides that the court may refuse to take an action governed by the Model Law if the action would be manifestly contrary to the public policy of the enacting State." *Id.* ¶ 36, at 314 (emphasis added).

[4] Informed by the Guide to Enactment's description of the relationship between Articles 22 and 6 of the Model Law (§§ 1522 and 1506 in the U.S. Bankruptcy Code), we do not share Jaffé's view that § 1506's public policy exception forecloses use of a balancing analysis under § 1522. Contrary to Jaffé's position, Chapter 15 does not require a U.S. bankruptcy court, in considering a foreign representative's request for discretionary relief under § 1521, to blind itself to the costs that awarding such relief would impose on others under the rule provided by the substantive law of the State where the foreign insolvency proceeding is pending. Instead, Chapter 15, like the Model Law, anticipates the provision of particularized protection, as stated in § 1522(a).

We therefore conclude, through interpretation of § 1522(a)'s text and consideration of Chapter 15's international origin, that the district court correctly interpreted § 1522(a)'s sufficient protection requirement as requiring a particularized balancing analysis that considers the "interests of the creditors and other interested entities, including the debtor," 11 U.S.C. § 1522(a), and, in this case in particular, a weighing of the interests of the foreign representative (the debtor) in receiving the requested relief against the competing interests of those who would be adversely affected by the grant of such relief (here, the Licensees). And we also agree that § 1506 is an additional, more general protection of U.S. interests that may be evaluated apart from the particularized analysis of § 1522(a).

In reaching this conclusion, we join the Fifth Circuit, which interpreted § 1522(a) similarly, based largely on the language in the Guide to Enactment. *See In re Vitro S.A.B. de C.V.,* 701 F.3d 1031, 1060, 1067 n. 42 (5th Cir.2012); *see also In re Int'l Banking Corp. B.S.C.*, 439 B.R. 614, 626–27 (Bankr.S.D.N.Y.2010); *In re Tri–Cont'l Exch. Ltd.,* 349 B.R. 627, 637 (Bankr. E.D.Cal.2006).

C

[5] Finally, Jaffé contends that the bankruptcy court's balancing analysis, even if assumed appropriate, was flawed in implementation. He argues that the court dramatically overstated the risk to the Licensees' investments made in reliance on the cross-license agreements, especially in light of his offer to re-license Qimonda's U.S. patents to the Licensees at a RAND royalty rate. In this regard, he maintains that the court's balancing analysis failed to recognize that " § 1522(a) requires courts to protect the interests of *all* 'creditors and other interested entities, including the debtor'—not just one set of contracting parties."

The Licensees respond, arguing that "the bankruptcy court properly recognized that Dr. Jaffé's offer to relicense did not change the balance of harms" and that the bankruptcy court correctly "concluded that, without § 365(n) protection, the Licensees would face both the immediate harm of a hold-up and the future … destabilization of the licensing regime in the semiconductor industry." They maintain that in light of the bankruptcy court's detailed findings and careful reasoning, Jaffé simply "cannot meet his heavy burden to demonstrate that the bankruptcy court abused its discretion in its application of § 1522."

It should be noted that after hearing four days of evidence, the bankruptcy court considered the outcome of its balancing analysis to be a close one. But in the end it concluded, reasonably we believe, "that the balancing of debtor and creditor interests required by § 1522(a), Bankruptcy Code, weigh[ed] in favor of making § 365(n) applicable to Dr. Jaffé's administration of Qimonda's U.S. patents." *In re Qimonda AG,* 462 B.R. at 182. The court recognized Jaffé's claim that the "application of § 365(n) [would] result in less value. being realized by the Qimonda estate." *Id.* But it noted that "Qimonda's patent portfolio [would] by no means be rendered worthless" because the "U.S. patents [could] still be licensed to parties that [did] not already have a license, and Dr. Jaffé, to the extent permitted by German law, [would] be able to fully monetize the non-U.S. patents." *Id.* Additionally, the bankruptcy court found it significant that "[a]pplication of § 365(n) . . . [would impose] no affirmative burden on Dr. Jaffé," *id.,* but instead would merely limit his ability—and, importantly, the ability of the patents' subsequent owners—to bring infringement actions against the very entities that Qimonda had previously promised not to sue. *See Imation Corp. v. Koninklijke Philips Elecs. N.V.,* 586 F.3d 980, 987 (Fed.Cir. 2009) (characterizing a patent cross-license agreement as essentially "a promise by the licensor not to sue the licensee" for infringement (citation omitted)).

In considering and weighing the Licensees' interests, the bankruptcy court largely credited their evidence indicating that entrusting Jaffé with the right to administer Qimonda's U.S. patents without making § 365(n) applicable to the preexisting licenses under those patents would have broad-ranging ill effects. It explained that "the risk to the very substantial investment the [Licensees]—particularly IBM, Micron, Intel, and Samsung—[had] collectively made in research and manufacturing facilities in the United States in reliance on the design freedom provided by the cross-license agreements, though not easily quantifiable, [was] nevertheless very real." *In re Qimonda AG,* 462 B.R. at 182–83. While the bankruptcy court acknowledged that the Licensees had been unable "to identify specific Qimonda patents implicated by the products they manufacture[d] and s[old]," it noted that the lack of such evidence was "not at all surprising, since the whole point of portfolio cross-licenses [was] to eliminate the necessity (and in some cases impossibility) of individually analyzing each and every patent that might possibly apply to determine if a new design infringe[d] on it." *Id.* at 181. Thus, although the bankruptcy court could not, in the course of its balancing analysis, make "a finding that cancellation of the [Licensees'] right to use Qimonda's U.S. patents would have a specific dollar impact on them," it did find that it "create[d] a substantial *risk* of harm," adding that "the *threat* of infringement litigation can be as damaging as an actual finding of infringement." *Id.*

We find the bankruptcy court's thorough examination of the parties' competing interests to have been both comprehensive and eminently reasonable.

Jaffé relies heavily on the mitigation that would result from his commitment to re-license Qimonda's patents to the Licensees on RAND terms, arguing that it would provide sufficient protection for their interests. Of course, his proposal—first mentioned after the district court's remand—does weigh in his favor by decreasing the Licensees' holdup risks. But just because the RAND proposal would reduce the Licensees' risks does not mean that their interests would be sufficiently protected by Jaffé's promise to re-license. The bankruptcy court expressly recognized this, explaining that "the hold-up risk is lessened by Dr. Jaffé's offer to re-license the patents on RAND terms," but emphasizing that "even if the WIPO expert determination process were to arrive at the same figure that would have been agreed to in an 'ex ante' scenario, the [Licensees], because of their sunk costs, [would] not have the option of avoiding royalties altogether by designing around the patent." *In re Qimonda AG,* 462 B.R. at 181–82. We conclude that the bankruptcy court's findings in this regard are not unreasonable and that the bankruptcy court was justified in its skepticism of Jaffé's claim that the Licensees' interests would now be "sufficiently protected" by his commitment not to charge them an exorbitant rate during their re-licensing negotiations.

Moreover, the bankruptcy court also noted that it remained an "open question" whether any new license issued by Jaffé on RAND terms would itself be secure, expressing its concern that

> Dr. Jaffé could still sell the underlying patents to a purchaser—whether a practicing entity or a 'troll'—that might itself file for insolvency under German law or transfer the patent to a special purpose entity for the purpose of having it file for insolvency under German law.

Id. at 181–82 n. 13. The court's recognition of this concern was also reasonable, as it is far from clear whether, having once facilitated the termination of license rights in a foreign insolvency proceeding, the genie could ever be put back into the bottle. Rather, as indicated by expert testimony that the bankruptcy court credited, it would seem all too likely that such a result would introduce a dangerous degree of uncertainty to a licensing system that plays a critically important role in the semiconductor industry, as well as other high-tech sectors of the global economy.

At bottom, we affirm the decision of the bankruptcy court, finding reasonable its exercise of discretion in conducting the balancing analysis under § 1522(a) and concluding that attaching the protection of § 365(n) was necessary when granting Jaffé the power to administer Qimonda's U.S. patents. *See In re Vitro S.A.B. de C.V.,* 701 F.3d at 1069 (noting in the course of affirming a bankruptcy court's decision not to enforce the reorganization plan adopted in a foreign main proceeding that "[i]t is not our role to determine whether the above-summarized evidence would lead us to the same conclusion" and adding that "*[o]ur only task is to determine whether the bankruptcy court's decision was reasonable*" (emphasis added)).

IV

It is important, we think, to recognize, as Jaffé would have us do, the importance of Chapter 15 to a global economy, in which businesses needing bankruptcy protection increasingly have assets in various countries. In mimicking the U.N.'s Model Law on Cross–Border Insolvencies, Chapter 15 furthers a policy of the United States of cooperating with other countries in providing fair and efficient insolvency proceedings for such international businesses. Consistent with its stated purposes, Chapter 15 provides for the ready recognition of foreign insolvency proceedings, *see* 11 U.S.C. § 1517, and grants automatic relief to protect U.S. assets upon entry of an order granting recognition, *see id.* § 1520. It also provides for a broad range of discretionary relief under § 1521. Thus, it represents a full commitment of the United States to cooperate with foreign insolvency proceedings, as called for by the U.N.'s Model Law on

Cross–Border Insolvency. And at bottom, such cooperation will provide greater legal certainty for trade and business to the benefit of the global economy.

But the United States' commitment is not untempered, as is manifested in both Chapter 15 and the Model Law on which it was based. Thus, § 1522(a) *requires* that a bankruptcy court, when granting the discretionary relief authorized by § 1521, *ensure sufficient protection of creditors,* as well as the debtor. And at a more general level, § 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.

In this case, it is sufficient for us to affirm the bankruptcy court, based on its application of § 1522(a). But in doing so, we understand that, by affirming the bankruptcy court's application of § 365(n) following its balancing analysis under § 1522(a), we also indirectly further the public policy that underlies § 365(n). The Senate Report accompanying the bill that became § 365(n) explicitly recognized that licensees have a strong interest in maintaining their right to use intellectual property following the licensor's bankruptcy and that to deny them that right would "impose[ ] a burden on American technological development that was never intended by Congress." S.Rep. No. 100–505, at 1. The Report added that "[t]he adoption of this bill will immediately remove that burden and its attendant threat to the development of American Technology." *Id.* at 2.

In this case, the bankruptcy court, in weighing the respective interests of the Licensees and the debtor under § 1522(a), found that without the protection of 365(n), the risk of harm to the Licensees would be very real, impairing the "design freedom provided [them] by the cross-license agreements." *In re Qimonda AG,* 462 B.R. at 183. And as the bankruptcy court otherwise found, this potential harm to the Licensees would, in turn, threaten to "slow the pace of innovation" in the United States, to the detriment of the U.S. economy. *Id.* at 185. Thus, the court's findings, which were, to be sure, focused on the Licensees' interests, nonetheless necessarily furthered the public policy underlying § 365(n).

We thus recognize that by affirming the bankruptcy court, even though on its § 1522(a) analysis, we too necessarily further the public policy inherent in and manifested by § 365(n).

The judgment of the bankruptcy court is accordingly

AFFIRMED.

WYNN, Circuit Judge, concurring in the judgment:

The only question we need to address in this appeal concerns the bankruptcy court's discretion in ensuring that "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected" under Chapter 15 of the Bankruptcy Code, 11 U.S.C. § 1522, and whether the bankruptcy court abused that discretion here. I agree with the majority opinion that in reviewing this issue, we look not to whether the record evidence "would lead us to the same conclusion" but that "[o]ur only task is to determine whether the bankruptcy court's decision was reasonable." *In re Vitro S.A.B. de C.V.,* 701 F.3d 1031, 1069 (5th Cir.2012). Accordingly, I am happy to concur in the language in Parts I, II, and III of the majority opinion that analyzes and addresses only this issue. I do not join in Part IV because it is unnecessary dictum.

Bankruptcy Court determined, based on its knowledge of the record, the relationships of the parties and the British action, that principles of international comity did not require the adversary proceeding to be dismissed, and that the Bankruptcy Court should adjudicate the issues relating to United States bankruptcy law. This Court cannot review the Bankruptcy Court's determination regarding comity without performing the same careful study of the record, the relationships of the parties and the British action performed by the Bankruptcy Court, and thus cannot conclude that the appeal presents a controlling question of law.

Because the Court finds that there is no controlling question of law that would be appropriate to consider on an interlocutory appeal, BNY's request for leave to file an interlocutory appeal is DENIED.

III. *ORDER*

For the reasons described above, it is hereby

ORDERED that the motion (Docket No. 73) of the defendant in the underlying adversary proceeding, BNY Corporate Trustee Services Limited ("BNY"), for leave to appeal the Order of the Bankruptcy Court dated August 12, 2009 denying BNY's motion to dismiss, is DENIED.

The Clerk of Court is directed to withdraw any pending motions and to close this case.

SO ORDERED.

In re LEHMAN BROTHERS HOLDINGS INC., et al., Debtors.

Lehman Brothers Special Financing Inc., Plaintiff,

v.

BNY Corporate Trustee Services Limited, Defendant.

No. 08–13555 (JMP).
Adversary No. 09–01242 (JMP).

United States Bankruptcy Court,
S.D. New York.

Jan. 25, 2010.

Background: Adversary proceeding was brought for determination of enforceability of ipso facto clause included in transaction documents underlying certain credit-linked synthetic portfolio notes, and for determination of relative priority in collateral securing notes of noteholders and of Chapter 11 debtor, in its capacity as swap counterparty. Parties cross-moved for summary judgment.

Holdings: The Bankruptcy Court, James M. Peck, J., held that:

(1) supplemental trust deed and other documents underlying certain credit-linked synthetic portfolio notes qualified as "executory contracts," any ipso facto clause in which was subject to statutory prohibition against enforceability of such clauses in bankruptcy;

(2) bankruptcy court would not, as matter of comity, accord res judicata effect to judgment previously entered by English court, which upheld the enforceability, as matter of English common law, of ipso facto clause;

(3) debtor's contractual right, as swap counterparty, to priority vis-a-vis noteholders in collateral that secured obligations owing under certain credit-

linked synthetic portfolio notes was not already terminated, prior to its bankruptcy filing, but was included in "property of the estate";

(4) statutory prohibition against enforceability of ipso facto clauses in bankruptcy was not limited in its application solely to provisions conditioned upon commencement of bankruptcy case by debtor, but also affected enforceability of provisions conditioned upon commencement of bankruptcy case by entity related in some way to debtor;

(5) holding company that owned debtor was closely enough related under circumstances of case;

(6) ipso facto clause did not come within "safe harbor" provision of the Bankruptcy Code; and

(7) even if court were to characterize ipso facto clause as subordination agreement, Code provision specifying that subordination agreements shall be enforceable in bankruptcy to same extent that they are enforceable under nonbankruptcy law did not affect the prohibited nature of any clause that purported to trigger such a subordination on debtor's bankruptcy filing.

Debtor's motion granted; cross-motion denied.

1. Bankruptcy ⚷3109

Ipso facto clauses, which seek to modify relationships of contracting parties based on the filing of bankruptcy petition are, as general matter, unenforceable in bankruptcy. 11 U.S.C.A. §§ 365(e), 541(c)(1)(B).

2. Bankruptcy ⚷3106, 3109

Supplemental trust deed and other documents underlying certain credit-linked synthetic portfolio notes qualified as "executory contracts," any ipso facto clause in which was subject to statutory prohibition against enforceability of such clauses in bankruptcy, where documents imposed certain outstanding obligations on both the noteholders and Chapter 11 debtor, as swap counterparty asserting a competing interest in collateral that secured noteholders' claims, to make payments pursuant to swap agreement. 11 U.S.C.A. § 365(e).

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy ⚷3106

"Executory contract," as that term is used in the Bankruptcy Code, is one under which obligation of both the bankrupt and the other party to contract are so far unperformed that failure of either to complete performance would constitute a material breach, excusing performance of the other. 11 U.S.C.A. § 365.

See publication Words and Phrases for other judicial constructions and definitions.

4. Judgment ⚷830.1

Court is not obliged to recognize judgments rendered by foreign courts located outside the United States, but may choose to give res judicata effect to such foreign judgments on basis of comity.

5. Courts ⚷512

As general matter, courts will not extend comity to foreign proceedings when doing so would be contrary to policies or prejudicial to interests of the United States.

6. Judgment ⚷830.1

Bankruptcy court would not, as matter of comity, accord res judicata effect to judgment previously entered by English court, which upheld the enforceability, as matter of English common law, of ipso facto clause contained in transaction documents underlying certain credit-linked synthetic portfolio notes, when bankruptcy court considered whether, due to operation of this clause, Chapter 11 debtor's priority, in its capacity as swap counterparty, in collateral securing noteholders' claims had been reversed as result of its bankruptcy filing, which was specifically defined as event of default under swap agreement; English court did not consider any provisions of the Bankruptcy Code in connection with its decision, and neither at trial nor at appellate levels did English courts purport to bind bankruptcy court in any respect and specifically noted that result might be different under United States bankruptcy law. 11 U.S.C.A. § 365(e).

7. Bankruptcy ⚷2554

To determine whether debtor has property interest in executory contract as of commencement of bankruptcy case, such that the contract constitutes "property of the estate," courts examine whether termination of contract requires non-debtor party to undertake some affirmative postpetition act. 11 U.S.C.A. § 541(a)(1).

8. Bankruptcy ⚷2554, 3109

Chapter 11 debtor's contractual right, as swap counterparty, to priority vis-a-vis noteholders in collateral that secured obligations owing under certain credit-linked synthetic portfolio notes was not already terminated, prior to its bankruptcy filing, as result of related Chapter 11 filing of holding company that owned debtor due to ipso facto clause included in transaction documents underlying notes, but was included in "property of the estate" upon commencement of debtor's own bankruptcy case; fact that special purpose entity created to issue notes had sent termination letters to debtor identifying its own Chapter 11 filing as triggering event of default supported conclusion that it was debtor's bankruptcy, and not the earlier bankruptcy of holding company, that was operative date for purposes of application of ipso facto clause. 11 U.S.C.A. § 541(a).

9. Bankruptcy ⚷3109

Statutory prohibition against enforceability of ipso facto clauses in bankruptcy, in prohibiting modification of debtor's rights solely because of provision in agreement conditioned upon commencement of "a case" under this title, is not limited in its application solely to provisions conditioned upon commencement of bankruptcy case by debtor, but also affects enforceability of provisions conditioned upon commencement of bankruptcy case by entity related in some way to debtor. 11 U.S.C.A. § 365(e)(1).

10. Bankruptcy ⚷3109

Even assuming that "event of default," for purposes of application of ipso facto clause included in transaction documents underlying certain credit-linked synthetic portfolio notes, was broadly interpreted to include commencement of bankruptcy case not just by debtor, the swap counterparty, but by a holding company which owned debtor, holding company was closely enough related to debtor, as corporate entities that, with other affiliated entities, formed one integrated enterprise, the financial condition of each of whose parts was affected by financial condition of other parts, that this clause, to extent it required a reversal of priority that debtor otherwise enjoyed in collateral securing noteholders' claims if its parent company filed for bankruptcy relief, was unenforceable in bankruptcy, as coming within statutory bar against modification of debtor's rights solely because of provision in agreement conditioned upon commencement of "a case" under this title. 11 U.S.C.A. § 365(e)(1).

11. Bankruptcy ⚷3109

Ipso facto clause included in transaction documents underlying certain credit-linked synthetic portfolio notes, while dictating means by which proceeds of each swap agreement would be distributed, did not comprise part of swap agreements themselves, such that "safe harbor" provision of the Bankruptcy Code, which protected contractual rights of swap participants, did not affect the unenforceability of this clause, as one providing for reversal of priority that debtor otherwise enjoyed, in its capacity as swap counterparty, in collateral securing noteholders' claims in event it defaulted in its obligations under swap agreement, such as by filing for bankruptcy. 11 U.S.C.A. §§ 365(e)(1), 560.

12. Bankruptcy ⚷2970, 3109

Even if court were to characterize, as subordination agreement, the ipso facto clause included in transaction documents underlying certain credit-linked synthetic portfolio notes, which provided for reversal of priority that debtor otherwise enjoyed, in its capacity as swap counterparty, in collateral securing noteholders' claims in event it defaulted in its obligations under swap agreement by filing for bankruptcy, provision of the Bankruptcy Code specifying that subordination agreements shall be enforceable in bankruptcy to same extent that they are enforceable under nonbankruptcy law did not affect the prohibited nature of any clause that purported to trigger such a subordination on debtor's bankruptcy filing. 11 U.S.C.A. §§ 365(e)(1), 510(a).

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MEMORANDUM DECISION GRANTING MOTION FOR SUMMARY JUDGMENT AND DECLARING APPLICABLE PAYMENT PRIORITIES

JAMES M. PECK, Bankruptcy Judge.

Introduction

This is a matter arising out of a complex financial structure that includes an added layer of complexity due to the pendency of parallel and potentially conflicting legal proceedings in this Court and the United Kingdom. The litigation in England (the "English Litigation") was first commenced in the High Court of Justice, Chancery Division (the "High Court") followed by an appeal to the Court of Appeal, Civil Division (the "Court of Appeal" and, together with the High Court, the "English Courts"). At issue both here and in the English Courts is the priority of payment to beneficiaries (one a noteholder and the other a swap counterparty) that hold competing interests in collateral securing certain credit-linked synthetic portfolio notes. The swap counterparty is Lehman Brothers Special Financing Inc. ("LBSF"), one of the Lehman entities whose chapter 11 case is before this Court.

The English Litigation was filed in the High Court by Perpetual Trustee Company Limited ("Perpetual"), as holder of various credit-linked synthetic portfolio notes, against BNY Corporate Trustee Services Limited ("BNY") seeking priority payment pursuant to so-called "Noteholder Priority" (as defined below) under the terms of certain swap agreements (each a "Swap

Agreement") [1] among LBSF and Dante Finance Public Limited Company ("Dante").

LBSF intervened in the English Litigation and has participated both in the English Litigation and in this adversary proceeding.[2] After a trial, the High Court issued a judgment in which it held, *inter alia*, that LBSF's interest in the collateral securing the Swap Agreements (the "Collateral") was "always limited and conditional," and, therefore, payment pursuant to Noteholder Priority did not violate the so-called "anti-deprivation principle" under English law. (Venditto Aff. Ex. 7 at ¶¶ 45, 49–55). The High Court also noted that Noteholder Priority became effective on September 15, 2008, the date on which Lehman Brothers Holdings Inc. ("LBHI"), credit support provider for LBSF's payment obligations under each Swap Agreement, filed its petition in this Court for protection under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). (Venditto Aff. Ex. 7 at ¶¶ 24, 49).

During the pendency of the English Litigation in the High Court, on May 20, 2009, LBSF (collectively with LBHI and its affiliated debtors, the "Debtors") commenced this action by filing a two-count complaint (the "Complaint") against BNY. Count I of the Complaint seeks a declaratory judgment that the provisions in the Swap Agreements that modify LBSF's payment priority upon an event of default constitute unenforceable *ipso facto* clauses that violate Bankruptcy Code sections 365(e)(1) and 541(c)(1)(B), thereby enabling LBSF to retain its right to receive a priority payment under the Swap Agreements ("Swap Counterparty Priority"). Count II seeks a declaratory judgment from this Court that any action to enforce the provisions purportedly modifying LBSF's right to priority of payments as a result of its bankruptcy filing violates the automatic stay under Bankruptcy Code section 362(a).

The interplay between this litigation and the English Litigation has been obvious from the start, and both this Court and the English Courts have been aware of the potential for conflicting rulings due to differences in the law being applied by each tribunal to the underlying dispute. With this trans-Atlantic aspect of the cases in mind, LBSF requested and received permission to file its motion for summary judgment prior to the deadline for BNY to file a responsive pleading so that it could be used in the English Litigation. (06/03/09 Tr. 110: 1–6). LBSF filed its motion for summary judgment on June 10, 2009. On June 22, 2009, BNY filed a motion to dismiss the Complaint, arguing that Perpetual, as the real party-in-interest in this matter, is an "indispensable party" under Federal Rule of Civil Procedure 19, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7019. LBSF opposed the motion to dismiss.

At a hearing held on August 11, 2009, the Court found that BNY had the capacity to adequately represent Perpetual's interests in this litigation [3] and denied the motion to dismiss. (08/11/09 Tr. 68:11–25,

1. Each Swap Agreement consists of an ISDA Master Agreement, appurtenant schedules and written confirmation.

2. Perpetual is not a party to the adversary proceeding, and it is unclear whether Perpetual is subject to the jurisdiction of this Court.

3. At the time of this hearing, BNY was a party to another adversary proceeding involving similar issues relating to the application of the *ipso facto* provisions of the Bankruptcy Code, and so the Court considered BNY to be particularly well positioned to make the same arguments in this case in Perpetual's absence. That other case was settled prior to a hearing on dispositive motions.

69:24–70:3). Thereafter, pursuant to a briefing schedule ordered by the Court, BNY filed a cross motion for summary judgment. In addition, the official committee of unsecured creditors appointed in the Debtors' bankruptcy cases requested and received permission to intervene in this matter and has filed various statements in support of LBSF's pleadings.

LBSF filed a notice of appeal of the High Court's judgment on August 17, 2009. (Venditto Aff. Ex. 8). On November 6, 2009, the Court of Appeal issued a unanimous judgment in which it affirmed the holding of the High Court. (Venditto Supp. Aff. Ex. A). Specifically, the Court of Appeal determined that (i) the LBHI bankruptcy filing on September 15, 2008 gave rise to the application of Noteholder Priority and triggered the calculation of a subordinated Early Termination Payment (as defined below) to LBSF under Condition 44 of the Terms and Conditions of the Notes ("Condition 44"), and (ii) this was independent of the early termination of the Swap Agreements effected by Saphir Finance Public Limited Company ("Saphir"), as issuer of the credit-linked synthetic portfolio notes at issue. (Venditto Supp. Aff. Ex. A at ¶ 21). The Court of Appeal also determined that LBSF lost no property right or interest as a result of the shift to Noteholder Priority and the subordinated Early Termination Payment, because LBSF's interest in the Collateral always had been contingent. (Venditto Supp. Aff. Ex. A at ¶ 62). Stated differently, LBSF was not deprived of any right by virtue of the fact that the applicable payment priority had shifted to Noteholder Priority because it "had always been an agreed feature of that right, as a result of [an event of default on its part], LBSF had to rank behind, rather than ahead of, [Perpetual]." (Venditto Supp. Aff. Ex. A at ¶ 63). On November 13, 2009, the Court of Appeal issued an order denying LBSF's motion for leave to appeal to the Supreme Court of England and Wales. (Venditto 2d Supp. Aff. Ex. A).

Throughout these proceedings, the parties have kept the Court apprised of the progress of the English Litigation. In addition, the Court has exchanged various communications with the High Court regarding coordination of and cooperation with respect to the litigation here and in London. Most recently, this Court received a letter from the High Court (i) explaining that "[t]he English court has confined itself to making a declaration that the relevant contractual provisions are 'valid, effective and enforceable as a matter of English law as the proper law of such contracts, so as to give effect to Noteholder Priority,' " and (ii) requesting that if this Court concludes that "the relevant provisions are void or otherwise unenforceable under U.S. bankruptcy law" it "go no further at that stage than to make a declaratory judgment to that effect." At a hearing on the cross motions for summary judgment on November 19, 2009, the parties agreed that it is appropriate for this Court to determine at this time only whether declaratory relief is appropriate in this matter and to further coordinate with the High Court should it become necessary after a decision is rendered. (11/19/2009 Tr. 64: 1–3, 65: 5–11).

It is in this context that the Court has evaluated the motions for summary judgment and has decided to grant LBSF's motion for summary judgment and to deny the cross motion of BNY. This Court concludes that the relevant provisions purporting to reverse the priority of payment on account of the occurrence of a default due to commencement of a case under the Bankruptcy Code are unenforceable and violate the *ipso facto* provisions of the Bankruptcy Code.

Standard

Summary judgment is appropriate where there is "no genuine issue as to any material fact," so that the moving party is entitled to "judgment as a matter of law." Fed.R.Civ.P. 56(c). The court must view the facts in the light most favorable to the non-moving party, and must resolve all ambiguities and draw all inferences against the moving party. *Coach Leatherware Co. v. AnnTaylor, Inc.,* 933 F.2d 162, 167 (2d Cir.1991). In determining whether to grant a motion for summary judgment, the court is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. 242 at 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The parties acknowledge that there are no genuine issues of material fact and that the questions presented purely involve the application of relevant provisions of the Bankruptcy Code to undisputed facts.

Background

On October 10, 2002, BNY's predecessor entered into a Principal Trust Deed (the "Principal Trust Deed") with Dante, pursuant to which a multi-issuer secured obligation program (the "Dante Program") was established. BNY currently serves as Trustee under the Dante Program.

Under the Dante Program, Saphir, a special purpose entity created by Lehman Brothers International (Europe), issued various series of credit-linked synthetic portfolio notes. At issue for purposes of this litigation are two series of such notes held by Perpetual: (i) Series 2004–11 AUD 75,000,000 Synthetic Portfolio Notes Due 2011, and (ii) Series 2006–5 AUD 50,000,000 Synthetic Portfolio Notes due 2011 and Extendable Up to 2016 (collectively, the "Notes").

The Notes are secured by the Collateral, which BNY holds in trust for the benefit of creditors of Saphir, including Perpetual (as holder of the Notes) and LBSF (as swap counterparty). The Collateral comprises various assets and secured obligations. Each series of Notes is governed by a Supplemental Trust Deed (each, a "Supplemental Trust Deed" and collectively with all agreements underlying the Notes, the "Transaction Documents"). Each Supplemental Trust Deed, in turn, references a Swap Agreement. The events of default under each of the Swap Agreements include the bankruptcy filing of any party.

Pursuant to the terms of the Transaction Documents, the rights of LBSF in the Collateral ordinarily take priority ("Swap Counterparty Priority") over those of Perpetual. However, if an event of default occurs on the part of LBSF under a Swap Agreement, the Transaction Documents call for a reversal of priorities so that Perpetual would then be entitled to priority over amounts otherwise payable to LBSF ("Noteholder Priority"). In addition, Condition 44 modifies the calculation of the Early Redemption Amount (i.e., the amount payable upon the early redemption of a Note) in the event that LBSF defaults under the related Swap Agreement.

LBHI commenced a voluntary case under chapter 11 of the Bankruptcy Code on September 15, 2008. LBSF commenced its own voluntary case under the Bankruptcy Code on October 3, 2008 (the "LBSF Petition Date"). On November 25, 2008, counsel to the Debtors sent a letter to Bank of New York Mellon Trust Company, National Association, and Bank of New York Mellon stating that (i) any action with respect to transactions in which BNY serves as trustee may be subject to the automatic stay provisions of section 362 of the Bankruptcy Code, and (ii) any provisions purporting to subordinate any amounts payable to LBSF would be unenforceable and unlawful. (LBSF Br. Supp. Ex. G). On December 1, 2008, Saphir sent notices to LBSF terminating the Swap Agreements designating (i) the filing by LBSF of a chapter 11 petition as the relevant event of default and (ii) December 1, 2008 as the Early Termination Date under section 6(a) of each ISDA Master Agreement. (LBSF Br. Supp. Exs. H, I). Under the terms of the Principal Trust Deed, such termination obligated Saphir to redeem the Notes.

Motions for Summary Judgment

In its motion for summary judgment, LBSF argues that the contractual provisions in the Transaction Documents that modify the scheme for payment priority are unenforceable *ipso facto* clauses that inappropriately modify a debtor's interest in a contract solely because of a bankruptcy filing in violation of Bankruptcy Code sections 365(e)(1) and 541(c)(1)(B). LBSF also maintains that any attempt to modify its payment priority violates the automatic stay, in violation of Bankruptcy Code section 362(a)(3), because it improperly seeks to exercise control over the property of LBSF's estate. Finally, LBSF argues that the so-called "safe harbor" provisions of the Bankruptcy Code do not protect the purported modification of the payment priority.[4]

In its motion, BNY argues that because the Transaction Documents are to be governed by and construed in accordance with English law, this Court must defer to the determination by both the High Court and the Court of Appeal that Noteholder Priority and subordinated payment under Condition 44 became effective automatically on September 15, 2008. If the Court defers to such finding, LBSF's interests already were governed by Noteholder Priority and subordinated to the interests of Perpetual under Condition 44 as of the date it filed its chapter 11 petition. Under this theory, LBSF never had the right to claim Swap Counterparty Priority or its preferred method of calculation of the Early Redemption Amount under Condition 44. BNY maintains that LBSF cannot use its status as a bankruptcy debtor to attempt to garner any greater rights with respect to the Collateral than it possessed prepetition.

BNY also argues that even if the payment modification provisions at issue constitute unenforceable *ipso facto* clauses, inasmuch as they are the agreed mechanisms pursuant to which the parties' transactions are liquidated, the provisions fall within the scope of the protections provided by the safe harbor provisions of the Bankruptcy Code. Finally, BNY asserts that Noteholder Priority and Condition 44 constitute subordination agreements, which agreements have been found by the English Courts to be enforceable under applicable non-bankruptcy law. Given that subordination agreements are enforceable under the Bankruptcy Code "to the same extent that such agreement[s] [are] enforceable under applicable non-bankruptcy law," BNY submits that Noteholder Priority and Condition 44 are enforceable against LBSF. *See* 11 U.S.C. § 510(a).

The Court will examine in turn each of these issues—*ipso facto,* automatic stay, safe harbor and Bankruptcy Code section 510.

Ipso Facto/Automatic Stay

[1] The Bankruptcy Code of 1978 effected a change in the treatment of contract or lease clauses that would seek to modify the relationships of contracting parties due to the filing of a bankruptcy petition—so-called *ipso facto* clauses. *See Reloeb Co. v. LTV Corp. (In re Chateaugay Corp.),* 1993 WL 159969, *6 n. 3, 1993

4. The scope of the safe harbor provisions is discussed later in this opinion.

U.S. Dist. LEXIS 6130, *14 n. 3 (S.D.N.Y. 1993). It is now axiomatic that *ipso facto* clauses are, as a general matter, unenforceable. *See, e.g., Id.,* 1993 WL 159969, at *6, 1993 U.S. Dist. LEXIS 6130, at *15–*16 (S.D.N.Y.1993) (explaining that Bankruptcy Code section 365 "abrogates the power of *ipso facto* clauses" and, therefore, "[n]o default may occur pursuant to an *ipso facto* clause"). Under Bankruptcy Code section 365(e)

> an executory contract ... may not be terminated or modified, and any right or obligation under such contract ... may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract ... that is conditioned on ... the commencement of a case under this title....

11 U.S.C. § 365(e)(1).

Bankruptcy Code section 541, in addition to describing what constitutes property of the bankruptcy estate, also invalidates *ipso facto* clauses, providing that a debtor's interest in property

> becomes property of the estate ... notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law ... that is conditioned on ... the commencement of a case under this title ... and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

11 U.S.C. § 541(c)(1)(B).

The intriguing question presented is whether it is the bankruptcy filing of LBHI or the later filing of LBSF that is the relevant commencement of a case for purposes of invalidating the shifting of priorities under the Transaction Documents. Before reaching that question, the Court needs to determine whether the Transaction Documents constitute executory contracts and, therefore, whether LBSF is entitled to the protections provided by Bankruptcy Code section 365. BNY, in its papers, baldly states that "the only performance due [under the Transaction Documents]—if *any*—is payment" and, therefore, the Transaction Documents are not executory contracts. (Br. Opp'n at 7) (citing cases that found contracts were not executory where the only performance remaining was payment). BNY does not offer any additional analysis or make any further argument on the issue, relying on the assertion that Noteholder Priority and subordination under Condition 44 took effect prior to the date on which LBSF filed its bankruptcy petition. (*Id.*).

[2] Regardless of whether and when Noteholder Priority and subordination under Condition 44 took effect, there is no question that the parties' obligations under the Transaction Documents are continuing, that performance remains outstanding and that the Transaction Documents satisfy the functional definition of executory contracts.

[3] The Bankruptcy Code does not define the term "executory contract." The Second Circuit has characterized an executory contract as one "on which performance remains due to some extent on both sides," *Eastern Air Lines, Inc. v. Ins. Co. of Pa. (In re Ionosphere Clubs, Inc.),* 85 F.3d 992, 998–99 (2d Cir.1996) (quoting *Nat'l Labor Relations Bd. v. Bildisco & Bildisco,* 465 U.S. 513, 522 n. 6, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984)) (internal quotation marks omitted). In *COR Route 5 Co., LLC v. Penn Traffic Co. (In re Penn Traffic Co.),* 524 F.3d 373 (2d Cir.2008), the Second Circuit addressed the question of the extent to which performance must remain due on both sides for a contract to be treated as executory under section 365. The *Penn Traffic* court adopted the so-called "Countryman"[5] approach to its determination; that is, "an executory contract is one 'under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.'" *Id.* at 379–80.

The language and structure of the ISDA Master Agreement that forms a central part of the Swap Agreement demonstrate that these contracts are executory. Paragraph 9(c) of each ISDA Master agreement expressly provides that the obligations of the parties under the relevant Swap Agreement shall survive the termination of any transaction. (LBSF Br. Supp. Ex. E § 9(c); Ex. F § 9(c)). Given that all obligations of the parties under the ISDA Master Agreement remain outstanding, the failure of either party to complete performance would constitute a material breach excusing the performance of the other. In addition, each of LBSF and BNY has unsatisfied contractual obligations to make various payments. (*See, e.g.,* LBSF Br. Supp. Ex. C Sched. 2 Annex 3 § 3(c); Ex. D Sched. 2 Annex 3 § 3(b)). These outstanding obligations to make payments pursuant to the Swap Agreement constitute sufficient grounds to find that the contract in question is executory. *See Penn Traffic,* 524 F.3d at 379–80 (holding that a contract was executory based upon unsatisfied contractual obligation to pay). Given the foregoing, the Transaction Documents are executory contracts and the provisions of section 365 are applicable to the Swap Agreement.

This leads to an examination of how to apply the *ipso facto* prohibitions of section 365 to the unusual challenges presented by the current facts and circumstances. In particular, the Court must consider the shifting priorities under the Transaction Documents caused by the separate defaults that occurred when LBHI and LBSF filed for bankruptcy, the distribution priorities that were in effect as of the LBSF Petition Date and any impact of the *ipso facto* provisions on the legal rights of the parties to enforce those priorities. The cross-border procedural posture further complicates this already challenging question of statutory interpretation.

In its motion, BNY argues that because the Transaction Documents are to be governed by and construed in accordance with English law, under the principles of comity and *res judicata,* this Court must defer to the determination by both the High Court and the Court of Appeal that September 15, 2008 should be viewed as the operative date with respect to the reversal in payment priorities under the Transaction Documents.

[4] The English Courts authoritatively have interpreted the Transaction Documents in accordance with applicable English law. The Court, while respecting that determination as valid and binding between the parties, is not obliged to recognize a judgment rendered by a foreign court, but instead may choose to give *res judicata* effect on the basis of comity. *See Gordon and Breach Sci. Publishers S.A. v. Am. Inst. of Physics,* 905 F.Supp. 169, 178–79 (S.D.N.Y.1995). In deciding whether to recognize the decision of the English Courts in relation to the determination that Perpetual is entitled to a distribution based on Noteholder Priority, this Court will evaluate whether the English Courts, in rendering their respective deci-

5. *See* Vern Countryman, *Executory Contracts in Bankruptcy: Part I,* 57 MINN. L.REV. 439, 460 (1973).

sions, sufficiently considered the applicability and impact of section 365 of the Bankruptcy Code. It appears that the English Courts did not take into account principles of United States bankruptcy law and understood, as did the parties themselves, that the outcome of the dispute might well be different in this Court. Indeed, BNY has been concerned from the very outset of this litigation about the prospect of being caught in the middle between conflicting decisions as to the rights of Perpetual and LBSF to the Collateral. From BNY's perspective, consistent guidance from courts of competent jurisdiction on both sides of the Atlantic would be highly desirable and would avoid the unwanted result of conflicting judgments as to which party is entitled to the Collateral.

[5, 6] As a general matter, "courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States." *Pravin Banker Assoc., Ltd. v. Banco Popular Del Peru,* 109 F.3d 850, 854 (2d Cir.1997). It is relevant that in adjudicating this dispute the English Courts addressed only (i) the breadth of the English common-law anti-deprivation principle in the context of the shift in payment priorities under the Transaction Documents based on LBSF's bankruptcy filing; (ii) if such shift is invalid under the anti-deprivation principle, whether it still is applicable if LBSF is not in insolvency proceedings in England; and (iii) if such shift is invalidated under the anti-deprivation principle, whether it still is applicable if the shift in payment priorities operates on account of an event other than the bankruptcy of LBSF. (Venditto Aff. Ex. 7 at ¶ 28). Upon considering the identified issues, the High Court (as confirmed by the Court of Appeal) determined that the relevant provisions of the Transaction Documents are valid and enforceable under English law and do not violate the anti-deprivation principle. The English Courts did not consider any provisions of the Bankruptcy Code in connection with their decisions. Importantly, neither of the English Courts purported to bind this Court in any respect, and the High Court explicitly declined to "preclude any request or other application made by the ... U.S. Bankruptcy Court." (Venditto Aff. Ex. 7 at ¶ 63). Therefore, the English Courts have been most gracious in allowing room for this Court to express itself independently on matters of importance to the administration of the LBHI and LBSF bankruptcy cases. In applying the Bankruptcy Code to these facts, this Court recognizes that it is interpreting applicable law in a manner that will yield an outcome directly at odds with the judgment of the English Courts.

Despite the resulting cross-border conflict, the United States has a strong interest in having a United States bankruptcy court resolve issues of bankruptcy law, particularly in a circumstance such as this where the relevant provisions of the Bankruptcy Code provide far greater protections than are available under applicable provisions of foreign law. *See, e.g., Bank of N.Y. v. Alison J. Treco (In re Treco),* 240 F.3d 148, 159–60 (2d Cir.2001) (declining to extend comity to foreign proceeding where "special protected status that secured creditors enjoy under United States law" was lacking under applicable foreign law). Given the responsibility of the Court to interpret and apply the Bankruptcy Code, the thoughtful and otherwise binding decisions of the English Courts do not prevent this Court from examining relevant provisions of the Transaction Documents under the broad protections afforded to debtors by the Bankruptcy Code. Accordingly, the Court declines to give preclusive effect to the respective judgments rendered by the High Court and the

Court of Appeal and will apply relevant provisions of the Bankruptcy Code to determine the questions presented in the pending motions for summary judgment.

[7, 8] Under section 541, the bankruptcy estate is comprised of, *inter alia,* "all legal or equitable interests of the debtor in property *as of the commencement of the case.*" 11 U.S.C. § 541(a)(1) (emphasis added). The Second Circuit has recognized that "[t]his definition is broad and includes even strictly contingent interests." *Mid–Island Hosp., Inc. v. Empire Blue Cross & Blue Shield (In re Mid–Island Hosp., Inc.),* 276 F.3d 123, 128 (2d Cir.2002). When determining whether a debtor has a property interest in an executory contract as of the commencement of a bankruptcy case so that the contract constitutes property of the estate, courts examine whether "termination requires the non-debtor party to undertake some post-petition affirmative act." *In re Margulis,* 323 B.R. 130, 135 (Bankr.S.D.N.Y. 2005) (citations omitted); *accord In re St. Casimir Dev. Corp.,* 358 B.R. 24, 44 (S.D.N.Y.2007) (allowing assumption of contract as executory because removal of debtor as general partner of partnership required post-petition affirmative act of non-debtor party, which act was prohibited by automatic stay). BNY's position is that Noteholder Priority replaced Swap Counterparty Priority as of the date of LBHI's bankruptcy, such that the property right claimed by LBSF already was lost before the date of commencement of its own bankruptcy case. That interpretation is inconsistent with the structure of the Transaction Documents.

As of the LBSF Petition Date, the Transaction Documents required certain affirmative acts be to taken prior to the effectiveness of any modification of payment priority or method of calculation of the Early Termination Payment. No provision in any of the Transaction Documents automatically causes a change in legal rights immediately upon an event of default.

Pursuant to the terms of the Principal Trust Deeds, Noteholder Priority becomes effective only when there are amounts to be paid "in connection with the realisation or enforcement of the [Collateral]." (LBSF Br. Opp'n Ex. C § 5.5; Ex. D § 5.5). Similarly, Condition 44 requires certain payments to be made, which payments may be made only after the "sale or realisation of the Collateral." (LBSF Br. Opp'n Ex. C; Ex. D, Sched. 2). It is undisputed that the Collateral had not been sold as of October 3, 2008, nor has it been sold to date. Indeed, Perpetual commenced the English Litigation on the grounds that BNY had failed to enforce rights in the Collateral. (LBSF Mot. Sum. J. Ex. 7).

Certain other payments required by Condition 44 cannot be calculated until after termination of the relevant Swap Agreement. (*Id.*). The relevant termination events took place after commencement of the LBSF case. Saphir sent termination notices to LBSF on December 1, 2008 and such notices designated the filing of LBSF's chapter 11 petition as the triggering event of default. (LBSF Br. Supp. Exs. H, I). Given these undisputed facts, LBSF held a valuable property interest in the Transaction Documents as of the LBSF Petition Date and, therefore, such interest is entitled to protection as part of the bankruptcy estate.

[9] This sequence of events supports the conclusion that the relevant date for purposes of testing whether any shifting of priorities occurred under the Transaction Documents is the LBSF Petition Date, and not the commencement of the LBHI case on September 15, 2008. However, even if LBHI's petition date were to be considered as the operative date for a claimed reversal of the payment priority under the Transaction Documents, the *ipso facto* protections provided by sections 365(e)(1) and 541(c)(1)(B) of the Bankruptcy Code would bar the efficacy of such a change in distribution rights. Each of these sections of the Bankruptcy Code prohibits modification of a debtor's right solely because of a provision in an agreement conditioned upon "the commencement of *a case* under this title." 11 U.S.C. §§ 365(e)(1), 541(c)(1)(B) (emphasis added). Notably, the language used is not limited to the commencement of a case *by or against the debtor.* Given the legislative history, the absence of such precise limiting language is significant.

The legislative history of section 365(e)(1) and section 541(c)(1)(B) provides helpful guidance in understanding the meaning of these sections and in analyzing how to interpret the words "a case" as used in these sections. An early version of what eventually became section 365(e)(1) referred to "the commencement of a case under this Act *by or against the debtor.*" Pub.L. No. 91–354, § 4–602(b) (emphasis added). Similarly, a draft of the language that became section 541(c)(1) at one time referred to "the commencement of a case under this title *concerning the debtor.*" H.R. 6, 95th Cong. § 541(c). This initial use and later rejection of limiting language demonstrates that Congress considered, but ultimately rejected, drafting sections 365(e)(1) and 541(c)(1)(B) in a manner that would have expressly restricted their application to the bankruptcy case of the debtor counterparty.

The language used—"commencement of a case under this title"—appears simple enough at first reading, but what has been left out raises a number of questions. The plain meaning of the words applies to the commencement of a case (presumably any case that is related in some appropriate manner to the contracting parties). If the words are not tied to the case filed by the particular debtor that is party to a specified executory contract, under what circumstances is the bankruptcy case of another debtor sufficiently related to rights of the parties to such an executory contract that it is reasonable to trigger the *ipso facto* protections of these sections? Opening up the subject to cases filed by debtors other than the counterparty itself has the potential of opening up a proverbial "can of worms" that may lead to speculation as to the nature and degree of the relationship between debtors that is needed in order to properly apply the provision.[6]

[10] The Court recognizes the potential for future disputes over the interpretation of this language but declines here to make any broad pronouncements, interpret the language in the abstract or to expand on the various relationships between or among debtor entities that would make it appropriate for one debtor to invoke *ipso facto* protection due to the filing of another affiliated member of a corporate family. The description of the kind of relationship that is sufficient to trigger such protections affecting the rights of

6. For example, one possible interpretation is that multiple subsidiaries under common control are sufficiently related to permit application of the *ipso facto* protections. Another possibility, in the context of swap agreements, might treat counterparties and their credit support providers as sufficiently related to impose *ipso facto* protections if either the principal or the guarantor were to file for bankruptcy relief. This opinion identifies these possibilities, but makes no ruling as to whether any of these relationships is sufficiently close to mandate that the bankruptcy of one debtor entity necessarily would lead to the protection of property interests of any other entity.

contracting parties is best left to a case-by-case determination. With this principle of restraint in mind, the Court will apply the language of these sections of the Bankruptcy Code to the situation presented by the sequential filings of the LBHI and LBSF bankruptcy cases and confine its conclusions to the Debtors' business structure and circumstances.

This Court has been presiding over the Debtors' bankruptcy cases for just over 16 months. During the multiple hearings and status conferences that have taken place during this period, the Court has learned that the Debtors are perhaps the most complex and multi-faceted business ventures ever to seek the protection of chapter 11. Their various corporate entities comprise an "integrated enterprise" and, as a general matter, "the financial condition of one affiliate affects the others." *See JPMorgan Chase Bank, N.A. v. Charter Communications Operating, LLC (In re Charter Communications),* 419 B.R. 221, 251 (Bankr.S.D.N.Y.2009). The LBHI chapter 11 petition was filed without adequate advance planning as the first of multiple related filings, each of which necessarily impacted the Lehman corporate family. Everyone knows that together these filings constitute the largest business bankruptcy in history.

Due to the sheer size of the corporate family [7] and to the emergency, unplanned nature of the Debtors' bankruptcy cases,[8] the impact of each bankruptcy case in the Lehman chain on non-debtor affiliates has yet to be fully determined. The Debtors continue to discover that certain non-debtor affiliates need to seek the protections of the Bankruptcy Code. For example, two LBHI affiliates filed chapter 11 petitions as recently as December 21, 2009. (*See* Case Nos. 09–17503, 09–17505). Under these circumstances, the first filing at the holding company level of the corporate structure has significance, especially in the context of the *ipso facto* provisions that speak in terms of the commencement of "a" case under this title. Regardless of how this language may be interpreted in other settings, the Court is convinced that the chapter 11 cases of LBHI and its affiliates is a singular event for purposes of interpreting this *ipso facto* language. Nothing in this decision is intended to impact issues of substantive consolidation, the importance of each of the separate petition dates for purposes of allowing claims against each of the debtors or any other legal determination that may relate to the date of commencement of a case. However, for purposes of applying the *ipso facto* provisions of 365(e)(1) and 541(c)(1)(B), what happened on September 15, 2008 was a bankruptcy filing that precipitated subsequent related events. LBHI commenced a case that entitled LBSF, consistent with the statutory language, fairly read, to claim the protections of the *ipso facto* provisions of the Bankruptcy Code because its ultimate corporate parent and credit support provider, at a time of extraordinary panic in the global markets, had filed a case under the Bankruptcy Code.

The Court finds that the provisions in the Transaction Documents purporting to modify LBSF's right to a priority distribution solely as a result of a chapter 11 filing constitute unenforceable *ipso facto* clauses. Moreover, any attempt to enforce such provisions would violate the automatic

7. The Debtors, together with their non-debtor affiliates, once ranked as the fourth largest investment bank in the United States.

8. The Court is convinced the 18–day delay in filing a bankruptcy petition for LBSF never would have occurred if the markets had been more forgiving and the Debtors had enough time to devote to a coordinated process of bankruptcy planning.

stay. The stay is triggered upon the filing of a bankruptcy petition, and it operates to prevent "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Thus, any attempt by any party to enforce Noteholder Priority or subordinated payment under Condition 44 would violate the automatic stay because it would deprive LBSF and its creditors of a valuable property interest.

Safe Harbor

[11] BNY argues that if Noteholder Priority and subordination under Condition 44 are deemed not to have taken effect prior to the LBSF Petition Date, they nonetheless are enforceable as part of an integrated "swap agreement" that qualifies for the safe harbor protections set forth in section 560 of the Bankruptcy Code.

The safe harbor provisions of Section 560 of the Bankruptcy Code protect a non-defaulting swap participant's contractual rights to (i) liquidate, terminate or accelerate "one or more swap agreements because of condition of the kind specified in section 365(e)(1)" or (ii) "offset or net out any termination values or payment amounts arising under or in connection with the termination, liquidation, or acceleration of one or more swap agreements." 11 U.S.C. § 560. These provisions specifically permit termination solely "because of a condition of the kind specified in section 365(e)(1)"—that is, the insolvency or financial condition of the debtor and the commencement of a bankruptcy case. 11 U.S.C. §§ 560, 561.

BNY maintains that the Noteholder Priority provision and Condition 44 comprise part of the Swap Agreements as "terms and conditions incorporated by reference and all documents that the market deems part of the parties' transaction" in accordance with Bankruptcy Code section 101(53B)(A). (BNY Br. Supp. at 29). A review of the components of each Swap Agreement—the ISDA Master Agreement, schedules and written confirmation—reveals that there is no reference at all to the Supplemental Trust Deeds, the Noteholder Priority provision or Condition 44. The provisions at issue dictate the means by which the proceeds of each Swap Agreement will be distributed, but do not comprise part of the Swap Agreements themselves. Because the provisions of section 560 deal expressly with liquidation, termination or acceleration (not the alteration of rights as they then exist) and refer specifically to "swap agreements," it follows that the Noteholder Priority provision and Condition 44 do not fall under the protections set forth therein.

11 U.S.C. § 510

[12] BNY argues that Noteholder Priority and Condition 44 constitute subordination agreements, which agreements have been found by the English Courts to be enforceable under applicable non-bankruptcy law. Given that subordination agreements are enforceable under the Bankruptcy Code "to the same extent that such agreement[s] [are] enforceable under applicable nonbankruptcy law," then, according to BNY, Noteholder Priority and Condition 44 are enforceable against LBSF. *See* 11 U.S.C. § 510(a).

Although not defined in the Bankruptcy Code, a subordination agreement is an "agreement by which one who holds an otherwise senior interest agrees to subordinate that interest to a normally lesser interest. . . ." BLACK'S LAW DICTIONARY (8th ed.2004). The Noteholder Priority provision and Condition 44 may be construed as subordination agreements—that is, LBSF agreed that upon the occurrence of certain conditions precedent, its interest in the Collateral and in the Early Termination Payment would be subordinated to the interest of Perpetual. Nonetheless, BNY cannot overcome the shifting nature of the subordination that is being activated by reason of a bankruptcy filing. This subordination agreement differs, as result, from those enforceable agreements that establish lien or payment priorities that are permanently fixed without regard to the unenforceable future contingency of a bankruptcy filing.

Were it not for the bankruptcy filings of LBHI and LBSF, the provisions at issue in the Transaction Documents would be enforceable as expressions of the intent of the parties to allocate the priority for distributing the Collateral between them.[9] However, the shift in payment priority upon the commencement of a bankruptcy case renders unenforceable this aspect of the subordination agreement. BNY has cited no case law or provision of the Bankruptcy Code that would allow a contract that is otherwise valid under Bankruptcy Code section 510(a) to escape application of the disabling *ipso facto* provisions of sections 365 and 541.

Conclusion

The Court finds that there is no material undisputed fact with respect to unenforceability of Noteholder Priority and subordination under Condition 44 and that LBSF is therefore entitled to judgment as a matter of law. The Court will enter a declaratory judgment that (i) the provisions in the Swap Agreements that seek to modify LBSF's payment priority upon an event of default constitute unenforceable *ipso facto* clauses that violate Bankruptcy Code sections 365(e)(1) and 541(c)(1)(B) and (ii) any action to enforce such provisions as a result of LBSF's bankruptcy filing violates the automatic stay under Bankruptcy Code section 362(a). LBSF is directed to submit a draft order consistent with this decision for the Court's consideration.

The issues presented in this litigation are, as far as the Court can tell, unique to the Lehman bankruptcy cases and unprecedented. The Court is not aware of any other case that has construed the *ipso facto* provisions of the Bankruptcy Code under circumstances comparable to those presented here. No case has ever declared that the operative bankruptcy filing is not limited to the commencement of a bankruptcy case by the debtor-counterparty itself but may be a case filed by a related entity—in this instance the counterparty's parent corporation as credit support provider. Because this is the first such interpretation of the *ipso facto* language, the Court anticipates that the current ruling may be a controversial one, especially due to the resulting conflict with the decisions of the English Courts.

One of the distinguishing characteristics of the Lehman bankruptcy cases is the complexity of the underlying financial structures many of which are being analyzed for the first time from a real world bankruptcy perspective. It is to be expected, as a result, that the cases of LBHI and LBSF on occasion would break new ground as to unsettled subject matter. This is one such occasion.

9. The Court recognizes that there is an element of commercial expectation that underlies the subordination argument. LBSF was instrumental in the development and marketing of the complex financial structures that are now being reviewed from a bankruptcy perspective. The Court assumes that a bankruptcy affecting any of the Lehman entities was viewed as a highly remote contingency at the time that the Transaction Documents were being prepared. At that time, LBSF agreed to a subordination of its Swap Counterparty Priority in the hard-to-imagine event that it should be in default at some time in the future. Capital was committed with this concept embedded in the transaction. But the *ipso facto* protections of sections 365 and 541 of the Bankruptcy Code apply uniformly, regardless of prepetition market expectations. They exist and should be enforced to preserve property interests for the benefit of all creditor constituencies.

This decision places BNY in a difficult position in light of the contrary determination of the English Courts confirming that Noteholder Priority applies to claims made against it in England by Perpetual. This is a situation that calls for the parties, this Court and the English Courts to work in a coordinated and cooperative way to identify means to reconcile the conflicting judgments. The Court directs that the parties attend a status conference to be held on the next available omnibus hearing date in the Debtors' cases for purposes of exploring means to harmonize the decisions of this Court and the English Courts.

SO ORDERED.

In re ENRON CREDITORS RECOVERY CORP., et al., Reorganized Debtors.

ALFA, S.A.B. de C.V., Appellant Defendant,

v.

Enron Creditors Recovery Corp., Appellee Plaintiff.

ING VP Balanced Portfolio, Inc. and ING VP Bond Portfolio, Inc., Appellant Defendants,

v.

Enron Creditors Recovery Corp., Appellee Plaintiff.

Bankruptcy No. 01–16034 (AJG). Adversary Nos. 03–92677(AJG), 03–92682(AJG). Nos. 09 civ. 9030(cm), 09 civ. 9031(cm).

United States District Court, S.D. New York.

Nov. 20, 2009.

Background: Reorganized Chapter 11 debtor brought adversary proceeding to avoid, on preference or fraudulent transfer theory, pro rated payments that it had made in connection with investors' early redemption of notes that debtor had issued prepetition. The United States Bankruptcy Court, Gonzalez, J., 407 B.R. 17, denied investors' motions for summary judgment, and investors appealed.

Holding: The District Court, McMahon, J., held that transactions in which notes were redeemed by debtor prior to maturity, using the customary mechanism of the Depository Trust Company (DTC) for trading in commercial paper, constituted "settlement payments" within meaning of Bankruptcy Code's "safe harbor" from avoidance of transactions that are in nature of settlement payments.

Reversed and remanded with instructions.

1. Bankruptcy ⚷2701

In the context of Bankruptcy Code's "safe harbor" from avoidance of transactions that are in nature of settlement payments, "settlement payments" are not limited to payments commonly used in the securities trade. 11 U.S.C.A. §§ 546(e), 741(8).

See publication Words and Phrases for other judicial constructions and definitions.

2. Statutes ⚷196

Where no contrary intention appears, "last antecedent rule" of statutory construction provides that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.

3. Bankruptcy ⚷2701

In the context of Bankruptcy Code's "safe harbor" from avoidance of transac-