"Can't We All Just Get Along? Adventures in Cross-Border Insolvency Proceedings"

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"CAN'T WE ALL JUST GET ALONG? ADVENTURES IN CROSS-BORDER INSOLVENCY PROCEEDINGS"

I. Introduction – Joseph J. Wielebinski

- Topics covered today will include:
    - Some of the foundational elements of Chapter 15, including Center of Main Interest determinations.
    - What kind of challenges can be made to a Chapter 15 filing.
    - How you can utilize Chapter 15 for your clients.
    - The role of comity in a Chapter 15 proceeding.

a. *Panelists*

- **Christopher A. Jarvinen**
    - Partner on the Business Reorganization Team at the Miami, Florida, law firm of Berger Singerman, LLP, a Florida based business law firm that practices across the United States and internationally.
    - 2013 M&A Advisor Turnaround Award recipient for his role in the restructuring of Maguire Group Holdings, Inc.
- **Laura Hatfield**
    - Head of the Dispute Resolution and Corporate Restructuring practice at Solomon Harris, a full service law firm with offices in the Cayman Islands and Switzerland, recognized for expertise in international offshore work.
    - Ranked in the Legal 500 and featured in the International Who's Who of Asset Recovery and Insolvency and Restructuring.
- **Andy Turner**
    - Partner at the Oklahoma law firm of Conner & Winters with over 30 years of experience in commercial bankruptcy cases in multiple industries.
    - Andy has been certified in Business Bankruptcy Law for 20 years.
- **Joseph J. Wielebinski**
    - Shareholder in the Insolvency, Restructuring, and Creditors' Rights section of Munsch Hardt Kopf & Harr, P.C. and an AV® Preeminent™ Peer Review Rated lawyer in Bankruptcy Law.

- Joe is the Executive Director Emeritus of ICC-FraudNet, a London based invitation-only organization, consisting of lawyers throughout the world who have significant experience in complex commercial fraud and offshore asset identification and recovery.

II. Setting the Stage – Christopher A. Jarvinen

a. Legislative Blueprint: Model Law, adopted in 1997 by the United Nations Commission on International Trade Law ("UNCITRAL")

   i. Goal: Assist countries to manage transnational insolvency cases

   ii. Legislation based on the Model Law has been adopted by 20 countries and one overseas territory (and year of adoption):

   Australia (2008), British Virgin Islands British Virgin Islands (overseas territory of the United Kingdom of Great Britain and Northern Ireland; 2003), Canada (2009), Chile (2014), Colombia (2006), Eritrea (1998), Great Britain (2006), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), Uganda (2010), and United States of America (2005)

   iii. Trend (2014): Not much movement on adoption of the Model Law for three years. The last country to do so was Uganda in 2011, and Chile recently adopted it

b. Authority: European Union Council Regulation on Insolvency Proceedings ("EC Regulation")

   i. Model Law uses concepts taken from EC Regulation (e.g., COMI)

   ii. EC Regulation came into force on May 31, 2002 *(Council Regulation 1346/2000, 2000 O.J. (L160) 1–18 (as amended))*

   iii. Jurisdiction of EU Member States

   - "Main proceeding" can be opened only in the EU Member State where the debtor's "center of main interests" ("COMI") exists

   - Creates carve-out for secondary proceeding where the debtor has an "establishment"

   iv. Trend (2014): As of today, references to the EC Regulation have appeared in ***only*** a few chapter 15 published decisions, none of which have given the EC Regulation more than a passing mention

c. Adoption of Chapter 15: Chapter 15 added to Bankruptcy Code as part of the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" ("BAPCPA")

   i. Implements Model Law

   ii. Language of chapter 15 tracks the Model Law

iii. Model Law modified to conform with US law

iv. Intended to provide effective mechanisms for dealing with cases of cross-border insolvency

d. Objections of Chapter 15**:**

i. Cooperation between the US courts and US debtors, on the one hand, and the courts and other competent authorities of foreign countries involved in cross-border insolvencies, on the other hand

ii. Greater legal certainty for trade and investment

iii. Fair and efficient administration of cross-border insolvencies protecting the interests of all creditors, interested parties and the foreign debtor

iv. Protecting and maximizing the value of the foreign debtor's assets

v. Facilitating the rescue of a financially-troubled business, thereby protecting investment and preserving employment

e. Chapter 15 Applies Where …

i. US assistance sought by a foreign court or a foreign representative in connection with a foreign proceeding

ii. Assistance sought in a foreign country in connection with a case under the Bankruptcy Code

iii. A foreign proceeding and a plenary case under the Bankruptcy Code are pending with respect to the same debtor

iv. Creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under the Bankruptcy Code

f. How is a Chapter 15 Case Commenced?

i. A chapter 15 case begins with the filing by a foreign representative of a petition for recognition of a foreign proceeding (§§ 1504, 1515)

1. *Foreign Representative: 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*

2. *Foreign Proceeding*: *[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*

ii. A petition for recognition must be accompanied by a statement identifying all foreign proceedings involving the debtor that are known to the foreign representative, as well as one of the following three items:

1. a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative

2. a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative

3. in the absence of the evidence referred to above, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative

iii. Typical Pleadings

1. Verified chapter 15 petition

2. Rule 1007(a)(4) list

3. Statement of foreign representative under 1515(c)

4. Motion for joint administration

5. Motion for order specifying form and manner of service

6. *Ex parte* application for order to show cause with TRO and, after notice and a hearing, a preliminary injunction

7. Declaration by foreign representative in support of (a) recognition and (b) preliminary relief (if any)

8. Foreign court order

iv. There is a statutory presumption that a proceeding is a "foreign proceeding" and the representative is a "foreign representative" so long as the foreign decision or certificate, and the documents submitted in support of the petition, indicate as much (§ 1516)

v. *Practice Pointer:* Unlike filing a chapter 11 petition, filing a chapter 15 petition does not itself trigger automatic relief and does not create an estate under § 541 of the Bankruptcy Code

g. A Few Factoids

i. Hundreds of chapter 15 petitions have been filed since the statute came into force in October, 2005

ii. Chapter 15 cases have been filed by debtors located in more than 30 countries

iii. The largest number of chapter 15 filings have come from debtors located in Canada and the United Kingdom (which, together, account for approximately *two-thirds* of all chapter 15 cases)

iv. However, over 200 petitions have been filed by debtors hailing from more than 28 other countries, including Bermuda, Brazil, the Cayman Islands, Germany, Japan, Khazakstan, Korea…*and so on*…

v. No single industry dominates chapter 15 filings. Country Trends…

1. Brazil → manufacturers (exports) … subject to currency fluctuations!!!

2. Mexico → producer of corrugated containers, containerboard and industrial paper

3. Canada → paper/pulp/lumber; forestry equipment products; print media; products used in home construction (bathrooms, floor coverings); furniture; automobile parts manufacturers

4. Cayman Islands and BVI → hedge funds

5. South Korea and Japan → computer parts manufacturers….and more recently…..currency!!

6. UK → insurers; offshore oil & gas exploration

vi. Main vs. Nonmain: Recognition "almost always" involves classifying a foreign proceeding as either "main" or "nonmain" -

1. Foreign main proceeding: "a foreign proceeding pending in the country where the debtor has 'the center of its main interests'"

a. "Center of main interests" (COMI) concept derived from EC Regulation

2. Foreign nonmain proceeding: "a proceeding, other than a foreign main proceeding, pending in a country where the debtor has an 'establishment'"

a. "Establishment": "any place of operation where the debtor carries out a nontransitory economic activity"

vii. Types of Relief

1. Interim/Provisional : Covers time between filing of the chapter 15 petition and the Court's hearing to consider whether to grant the petition

a. The provisional relief must be "urgently needed" to protect the debtor's assets or the interests of creditors

b. A request for provisional relief is subject to the standards, procedures and limitations applicable to an injunction

2. Relief Upon Recognition: Depends upon whether Court recognizes foreign proceeding as main (automatic and discretionary) or nonmain (only discretionary)

    a. Automatic relief (e.g., automatic stay, foreign representative may operate the debtor's business in the US)

    b. Types of Discretionary Relief

        i. Staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities

        ii. Staying execution against the debtor's assets

        iii. Suspending the right to transfer, encumber or otherwise dispose of any of the debtor's assets

        iv. Providing for the examination of witnesses, the taking of evidence or delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities

        v. Entrusting the administration, realization and/or distribution of all or part of the debtor's assets within the US to the foreign representative or another person authorized by the court

        vi. Extending any provisional relief that was granted

        vii. Granting any "additional relief" available to a trustee under the Bankruptcy Code *(but not authority to bring avoidance actions under chapter 15)*

        viii. Turnover of assets to the foreign proceeding when *"the court is satisfied that the interests of creditors in the United States are sufficiently protected"*

    c. Additional Assistance (§ 1507)

        i. § 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

        ii. The grant of "additional assistance" depends on evaluation of former § 304 factors:

            1. Just treatment of all holders of claims against or interests in the debtor's property

2. Protecting US claim holders against prejudice and inconvenience in processing claims in the foreign proceeding

3. Prevention of preferential or fraudulent dispositions of the debtor's property

4. Distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by the Bankruptcy Code

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

iii. Practice Pointer: The relationship between §§ 1507 and 1521 is not entirely clear – movants generally rely upon both sections when seeking relief

III. Center of Main Interests (COMI) – Laura Hatfield

a. What is Center of Main Interest? ("COMI")

i. Definition – there is none

ii. Absent evidence to contrary, a corporate debtor's registered office is presumed to be COMI and a habitual residence (i.e., "place where reside with intention of remaining for indefinite period") is the COMI in the case of an individual (11 U.S.C. §1516(c).) Burden of proof is on the foreign representative seeking recognition.

iii. This presumption may be rebutted. (*In re Bear Stearns High Grade Structured Credit Strategies Master Fund Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008) (Bear Stearns II). at 335-336).

iv. The Bankruptcy Code, however, does not provide any guidance as to what evidence would be sufficient to rebut the presumption. *See In re Basis Yield Alpha Fund (Master),* 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008).

b. U.S. Case History

i. U.S. Courts are required to consider chapter 15's international origins when called upon to interpret its provisions. See 11 U.S.C. §1508. U.S. courts have looked to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency. Courts have noted that the regulation that adopted the EU Convention defines COMI as "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." *See, e.g., In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006). This concept has been equated with "principal place of business" in the U.S. *See In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006).

ii. In determining a corporate debtor's COMI, U.S. courts may consider a long list of factors, including:

1. the location of the debtor's headquarters;
2. the location of those who actually manage the debtor (which conceivably could be the headquarters of a holding company);
3. the location of the debtor's primary assets;
4. the location of the majority of the debtor's creditors or of the majority of the creditors who would be affected by the case;
5. the jurisdiction whose law would apply in most disputes; and
6. the jurisdiction in which the debtor is organized and/or registered, and what kind of business entity (*e.g.,* corporation, limited liability company, general or limited partnership, business trust, etc.).

See, e.g., Bear Stearns II, 389 B.R. at 336; *In re Basis Yield,* 381 B.R. at 56-57; *In re SPhinX Ltd.,* 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), *aff'd.,* 371 B.R. 10 (S.D.N.Y. 2007).

iii. In *Morning Mist Holdings Ltd. v Krys (In Re Fairfield Sentry Ltd.)* (No. 11-4376) 2013 BL 102426 (2nd Circuit, 16 April 2013) US Court of Appeals, Second Circuit:

1. BVI registered company entered BVI liquidation in 2009. Applied for recognition in 2010. Liquidators acting from BVI. Assets and creditors in BVI, UK and Ireland.
2. Court decided that it must look at factors and activities at or around the time the Chapter 15 petition is filed (consistent with the interpretation of the Fifth Circuit in In *re Ran*, 607 F.3d 1017 (5th Cir. 2010)).
3. Court may look at the period between the commencement of the foreign proceeding and the filing of the Chapter 15 petition to ensure that the debtor has not manipulated its COMI in bad faith.
4. The US "Principal Place of Business" concept helpful but not determinative.
5. European authority useful for emphasis on importance of factors that indicate regularity and ascertainability of a debtor's COMI to third parties.
6. No limit to factors that can be considered.

iv. *In re Kemsley*, No. 12-13570, 2013 WL 1164930, at *1 (Bankr. S.D.N.Y. 22 March 2013))

1. UK Trustee in bankruptcy of individual who is a UK National sought recognition in August 2012 to get stay after creditors sued for £5 million in USA.
2. Kemsley lived USA with family from 2009 based in Florida then California then New York but throughout retained ties with London.
3. He filed for bankruptcy in January 2012 and was declared bankrupt in UK in March 2012 and would be discharged free of debt in March 2013.

4. The UK Order was made on basis of actual physical presence and residence within 3 years of petition. In June 2012 his marriage failed and family moved back to UK but he stayed in New York.

5. The Court considered it could look at COMI by reference to 2 possible dates –

    1) Filing initial bankruptcy

    2) Filing recognition application

    And used the filing initial bankruptcy date because it was fixed and ascertainable and it could look at statements made by Kemsley on filing for bankruptcy in the UK related to his COMI as he saw it.

6. The Court then looked at evidence as to whether Kemsley had an intention to live in US indefinitely when he filed for bankruptcy and found:

    1) His intentions as to residence were principally linked to his family and in particular his children's residence.

    2) In January 2012, the time of filing the initial bankruptcy petition, the family was in California and so at that time it was Kemsley's intention to reside there indefinitely.

    3) By the time of application for recognition Kemsley's wife and children had moved back to the UK so it was likely he no longer intended to reside indefinitely in the USA.

7. As a result Kemsley did not have his COMI in the UK when he filed the bankruptcy petition there and foreign main recognition could not be given to the Trustee in bankruptcy.

8. The Court then considered if Kemlsey had an " establishment" in the UK in order to give foreign non-main recognition but found there was no residence or employment as Kemsley's ad hoc arrangement with his employer based in London was not enough to get over the high bar established in *Re Ran* 607 F.3d 1017 (5th Cir. 2010).

9. The Court also thought it relevant to examine evidence of Kemsley's activities etc between Initial Petition and the application for recognition and was concerned that Kemsley appeared to still have a high standard of living and there might be a "coordinated trans-Atlantic litigation strategy" seeking to avoid liability to his major creditor.

c. <u>European COMI</u>

i. UK Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings (2007) OJ L 160/1

ii. Article 3(1) – COMI determines jurisdiction where insolvency/bankruptcy proceeding can take place.

iii. Article 3(2) – if debtor has an "establishment" a court can have jurisdiction even if COMI elsewhere for assets in the state where the "establishment" is located

iv. Paragraph 13 of preamble states that COMI is where debtor conducts administration of interests on regular basis and is therefore ascertainable by third party.

v. For a corporate debtor, rebuttable presumption that, in relation to companies COMI is presumed to be at its registered office; unless this presumption can be rebutted by factual circumstances which are both (a) objective and (b) ascertainable by third-parties, which show the company's actual centre of management and supervision of its interests (i.e., its "centre of its main interests") is located elsewhere than its registered office.

vi. The Courts' current approach to identifying COMI emphasises the importance of circumstances ascertainable to third parties, particularly creditors, dealing with the company and from information publically available. Internal factors relating to central management and control are relevant but not decisive.

The following non-exhaustive, combined factors have therefore been used to assess the actual location of COMI:

1. the location of the debtor's headquarters;
2. the residence of those who actually manage the debtor and the place where that management is conducted;
3. the location of the debtor's primary assets;
4. the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected in the particular case;
5. the jurisdiction whose law would apply to most contracts or disputes;
6. the place where any negotiations with creditors are conducted;
7. whether the debtor has notified creditors and / or publicised that its place of conduct of business has moved and / or is elsewhere than its registered office;
8. where the debtor holds its principal bank accounts / manages its principal financing; and
9. whether it has registered as a foreign company under the law of a domicile other than that of its registered office.

vii. For an individual debtor, COMI will be the country where the debtor mainly carries out their trade, profession or self-employment. Where the debtor does not trade or carry on a profession, the COMI is usually considered to be the country where he or she resides (i.e., have a property in which they live, pay bills, operate a bank account, purchase goods and so on). If the debtor resides in one country and trades in another, the COMI is the country where the debtor trades. In the event of bankruptcy proceedings, the COMI is determined at the date the petition is presented and not where, historically, the relevant activity was carried out. Therefore the location of creditors and the country in which debts were incurred are not material issues in determining a COMI for an individual.

d. European Bankruptcy Tourism

i. Individual Bankruptcy discharge times vary greatly. In UK it is 1 year, in Germany 6 years and in Ireland up to 12 Years.

ii. Corporate restructuring regimes and protections from creditors vary greatly e.g. Scheme of Arrangement imposing restructuring of debt with 75% majority, French *procédure de sauvegarde where* without the consent of its creditors the opening of such proceedings, initiated by the debtor, immediately triggers a mandatory stay of proceedings including on the enforcement of security until the completion of the safeguard process

iii. *Sparkasse Hilden Ratingen Verbert v Benk* [2012] EWHC 2432 (Ch)

1. COMI established by usually showing 6 months in UK by reference to property, employment, bank account and spending at time petition BUT if debtor changed COMI in face of insolvency the court to check change COMI not illusory and look beyond date of petition.

2. Mr Benk had been a Notary in Germany but moved to England and had a residence in Birmingham with his German girlfriend who had substantial activities in Germany. He had appealed his striking off as a Notary. He had entered into a Tenancy agreement from December 2008 and had previously rented a furnished flat in Birmingham from September 2008. He had paid utility bills and Council tax. He was able to produce bank statements showing that he had made purchases in England from February 2009. He was unable to show substantial evidence of his stated profession of sports photographer and he did not own a camera. He had not told his creditors he had moved to England.

3. A Bankruptcy Order was made but an application to annul it was made. On that application the Court stated that the motive behind a debtor choosing a new COMI was not relevant but the potential for abuse means that the Court would need to scrutinise the evidence in support of the petition with care. Having done so it concluded Mr Benk had come to England prompted by his looming insolvency and his intention was to achieve discharge from bankruptcy in England and then resume his activities as a Notary in Germany. The Court considered that there was a sufficiently close dependence, emotional and financial, with his girlfriend that it was appropriate to consider her circumstances when considering Mr Benk's COMI. All of the evidence pointed to her COMI being in Germany. The Court concluded that Mr Benk resided only temporarily in England and not habitually, also that he had no professional domicile in England. His presence in England was to facilitate his return to Germany.

iv. *Wind Hellas (Hellas Telecommunications Luxembourg)* 11 SCA 2009

1. Wind Hellas is one of Greece's largest telecom groups, with more than 5 million customers, 400 stores in Greece, and revenue exceeding €1 billion a year. In the summer of 2009, a Luxembourg-registered entity, Hellas Telecommunications (Luxembourg) II S.C.A ("HTL"), which held the group assets (comprising shares in operating companies), migrated its COMI (but not its registered office) from Luxembourg to London.

2. In addition to and concurrent with moving its head office, the company also:

    1) Informed creditors of the change of address to London;

    2) Made a press announcement that its activities were moving to London;

    3) Opened a London bank account;

    4) Registered under the Companies Act as a foreign company;

    5) Appointed U.K. resident individuals directors of the English company that had become HTL's general partner; and

    6) All negotiations between company and creditors were in London

3. However, HTL retained its registered office in Luxembourg, occupied no more than relatively modest premises in London (certainly not befitting the parent company of a group with €1 billion in revenue), retained a bank account in Luxembourg, and may have remained liable to pay tax in Luxembourg.

4. The migration took place in August and Wind Hellas files in November for pre-pack Administration (a sale by an administrator on terms which have been agreed before the administration and which is carried out shortly after the administrator is appointed) on the basis that its COMI was in UK. The Order was granted.

5. Taking advantage of a more favourable insolvency regime is a permissible reason to move COMI. A company's COMI was never intended to be static. As the Judge in the case pointed out, "*as one might expect in a system of law which encourages a single market across the whole of the European Union*", a company is able to move its COMI. The courts have been willing to allow such COMI shifting in appropriate circumstances, accepting that taking advantage of another country's insolvency system may be commercially sensible and represent "*merely the optimisation of procedural possibilities*"

IV. Challenging and Utilizing Chapter 15 –Joe Wielebinski and Andy Turner

a. Strategic CHALLENGES to Chapter 15 Recognition.

    i. Just because a Chapter 15 can be easily filed and pleadings appear technically correct does not mean recognition is appropriate.

    ii. Make sure everything is valid and compliant

        1. Pay attention to the key requirements.

b. Not a Foreign Proceeding.

    i. A foreign proceeding must be "a **collective** judicial or administrative proceeding."

1. Not Collective – *In re Gold & Honey, Ltd.*

a. Key: relevant facts must show that it is a "collective proceeding" in the home country.

b. Facts

i. Revolving line of credit financier was trying to establish a receivership in Israel.

ii. Two entities – one New York based, one Israeli. Both file for Chapter 11 protection in the United States.

1. There was an existing receivership proceeding in Israel.

2. After the Chapter 11 cases were filed – the Israeli creditor pursued the existing receivership proceeding in violation of the automatic stay.

c. Held

i. Not a "foreign proceeding" because it was not a "collective" proceeding.

ii. Receivership did not "consider[] the rights and obligations of all creditors."

iii. Receivership was just one creditor's "enforcement" scheme, not an insolvency proceeding).

d. Additional Reason for Non-Recognition in *Gold and Honey* – Public Policy

ii. Collective – *In re Betcorp Limited.*

1. Australian voluntary wind-up.

2. Held – Legal system took into account all creditors' rights and was collective in nature.

c. Standing – No residence or property in the U.S. (§ 109(a))

i. 11 U.S.C. § 109(a) – "Only a person that resides or has a domicile, a place of business, or property in the United States . . . may be a debtor under this title."

ii. Possible that a foreign debtor will not have a domicile, residence, place of business, or property in the United States.

iii. Second Circuit – currently the only jurisdiction holding that § 109(a) prevents a foreign representative from being a debtor without a residence or property in the United States.

1. *In re Barnet*

    a. Facts: Foreign representatives were liquidating an investment company and filed suit in Australia against certain affiliates.

        i. Filed for recognition as a Foreign Main Proceeding in the Southern District of New York, which was granted.

        ii. Filed a petition seeking discovery from several companies, one of which appealed the Foreign Main Proceeding determination.

    b. Second Circuit held that § 109(a)'s requirement applies to Chapter 15

2. Implications

d. Public Policy – laws and rules of the foreign proceeding are "manifestly contrary" to U.S. public policy and granting Chapter 15 relief is inappropriate.

    i. Key Cases: *Qimonda* (4th Circuit) and *In re Vitro* (5th Circuit)

    ii. From *Qimonda* (also used in *Vitro*), two parts:

        1. Was the foreign proceeding procedurally unfair; and

        2. Would recognition severely impinge on 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 these policies.

            a. Clear as mud, right?

    iii. *Qimonda*

        1. First round: Bankruptcy Court – a German Insolvency Administrator could extinguish licensee's rights under IP licenses under German law despite § 365(n) of the Bankruptcy Code, which allows IP licensees to retain their rights.

        2. Remanded from the District Court, new decision:

            a. Court had to consider protecting creditors under § 1522 when applying § 365(n) as discretionary relief under § 1521 and, therefore, § 365(n) did not apply.

        3. The Fourth Circuit affirmed certain aspects of that decision.

    iv. *Vitro*

        1. Background and Facts

a. Mexican insolvency proceeding (*concurso*) involving one of the largest glass manufacturers in the world.

b. Proceeding was problematic from a due process standpoint.

    i. Example: Subsidiaries that held large inter-company debts were allowed to vote on the plan with all of the other creditors.

c. Bankruptcy Court held that the Mexican *concurso* plan provisions that discharged U.S. subsidiaries' guarantees of the Debtor's debt could not be enforced under Chapter 15 for several reasons.

d. To do so would be against public policy because the protection of third party claims is a fundamental policy of the United States. The *concurso* plan extinguished those claim rights.

e. Note: Bankruptcy Court cites *Gold and Honey* as a more appropriate situation for a "manifestly contrary" to public policy argument (the use of a receivership proceeding as a method to limit the automatic stay).

2. Fifth Circuit

a. Agreed that plan provisions could not be enforced, but not because of public policy.

b. Circuit indicates that because this type of relief is available under some factual circumstances in some U.S. circuits (not the Fifth), it cannot be "manifestly contrary" to U.S. policy, even if the right facts are not present.

3. *Other Cases*

a. *In re Toft* – German court order allowing foreign representative to intercept personal mail and e-mail was contrary to public policy b/c it exceeded the powers of a trustee in bankruptcy.

b. *In re Fairfield Sentry Ltd.* – BVI liquidation proceeding that kept judicial records confidential was not contrary to public policy.

c. *In re ABC Learning Centres Ltd.* – Australian law that allowed secured creditors to realize the full value of their debts and then give the debtor the excess was not contrary to public policy.

d. *In re Ashapura Minechem Ltd.* – public policy exception did not bar Indian proceeding that lacked a jury trial right.

e. *In re Millenium Global Emerging Credit Master Fund Ltd.* – Party argued that the U.S.'s general public policy for 'openness' in court

proceedings should allow irrelevant testimony to be admitted in a Chapter 15 context.

f. *In re Grant Forest Products* – Allowing a Canadian court monitor to sign tax returns for U.S. subsidiaries without being liable to the IRS did not violate public policy.

g. *In re Millard* – Cayman Islands debtor sought recognition to get a review of a Northern Mariana Islands default judgment without having to post a bond.

e. Strategic USES of Chapter 15.

1. Chapter 15 can be used against you (and your client), but it can also be a powerful weapon or useful tool, especially because it is relatively easy to qualify.

ii. Stay of Litigation

1. Bankruptcy Code's automatic stay applies upon recognition and all litigation is stayed.

a. Includes efforts to commence an action, enforce judgments, and exercise control.

2. *Mt. Gox* – Japanese bitcoin company. In an insolvency proceeding in Japan.

a. Filed for Chapter 15 recognition in the Fifth Circuit (Dallas).

b. Stated purpose of filing was to stay a proposed class action in Chicago federal court and a breach of contract case in Seattle federal court.

i. Argument: The cases were "jeopard[izing] the Debtor's reorganization efforts abroad."

ii. They argue that diverting the Mt. Gox personnel away from dealing with the bankruptcy and into dealing with the litigation would cause irreparable harm.

c. As of now – recognition temporarily granted. Automatic stay is in place pending full recognition.

3. But, what if you are on the other side and the foreign debtor has been granted automatic stay relief, but you need to continue your litigation?

a. *Mt. Gox* – Creditors requested lifting of the automatic stay that was granted as relief to the debtor *prior to* recognition (TRO standards apply).

i. Creditors are able to attack the stay based on the different standard for relief granted prior to recognition.

iii. Discovery

1. Relief is available.

a. *Barnet* – remember the Second Circuit § 109(a) standard, if you're in those courts, make sure you have some kind of property or other connection (it can be a pretty small amount).

b. *In re Condor* – the debtor's liquidators got discovery from the debtor's asset manager and primary secured lender in the U.S.

iv. Selling Property

1. *In re Maax Corp.* – Canadian insolvency

2. *In re Madill Equipment Canada*

v. Apply Foreign Law in the U.S.

1. Distribution waterfalls under foreign law can be applied in a Chapter 15 proceeding.

a. Must be "substantially in accordance" with United State law and not manifestly contrary to U.S. public policy.

2. Case Examples

a. *In re ABC Learning Centres Ltd.* – Under Australian law, the distribution protocol allows secured creditors to pursue the creditor's collateral and only turn over any excess to the court for distribution.

b. *In re Treco* – Bahamian case prioritizing administrative expenses over secured claims where liquidator had spent almost the entire estate.

c. *In re Sivec SRL* – Bankruptcy Court did not turn over funds to an Italian debtor that were subject to a right to setoff in the U.S.

d. *In re Lee* – Bankruptcy Court allowed Hong Kong foreign representative to take possession of the foreign company's equity interests in a U.S. corporation, even though doing so triggered default provisions in the foreign debtor's loan documents.

e. *Mt. Gox* - Japan

i. Facts:

1. Large bitcoin (online currency of sorts) exchange based in Japan.

2. Filed an insolvency proceeding after an alleged massive theft of bitcoins.

3. Filed a Chapter 15 petition in Dallas in March of 2014.

ii. Question: If you represented a Mt. Gox creditor, what distribution priority would you receive under Japanese law?

f. Tangling with Chapter 15 in Ordinary Litigation, Litigators Beware – Andy Turner

V. The Special Case of Comity

a. Introduction – Laura

> "*Comity is the recognition which one nation allows within its territory to the legislative, executive and/or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or of other persons under the protection of its laws*".

b. CICA in *HSH Cayman II GP Ltd –v- ABN Amro Bank NV* 2010 (1) CILR 375, adopting terms used by the US Supreme Court in *Hilton –v- Guyot* (1895) 159 US 113:

c. Adherence to the concept of comity does not necessarily mean that the New York court should be expected to apply Cayman Islands law or that the Cayman Islands court should be expected to apply United States law in any given set of circumstances. ..... The application of Cayman Islands law is entirely consistent with an adherence to comity."

v. Limits in Cayman Islands

1. Picard v Primeo

2. Cayman Companies Law 241 (1) Upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of-

1) (e) ordering a turnover to a foreign representative of any property belonging to a debtor.

2) 242....the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with-

3) (c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

4) The Cayman Islands Court of Appeal had to consider whether Mr Picard could invoke section 241(e) to pursue clawback claims against the Defendant which was a Cayman company. The Court decided

> *"The avoidance of "preferential or fraudulent dispositions of property comprised in the debtor's estate" has the effect of restoring the property to the debtor; so enabling an order to*

be made for the turnover to the foreign representative of "property belonging to a debtor" in the strict sense".

5) The Cayman Islands Court of Appeal then had to consider whether US Law avoidance rules or Cayman Islands Law avoidance rules would determine what could be claimed and concluded:

"I acknowledge, as did the judge, the apparent illogicality of applying domestic law to transaction avoidance issues when the distribution regime is governed by a foreign law. But, like the judge, I take the view that that would represent so radical a departure from the common law, that, had the legislature intended that result, it could have been expected to say so in clear terms. It did not do so, either in clear terms, or at all".

vi. Limits in UK

1. *Rubin v Eurofinance SA* Supreme Court 24 October 2012 Reported [2012] UKSC 46

2. The main issue that the court was required to determine was whether and in what circumstances an order of a foreign court in avoidance proceedings in insolvency would be recognized and enforced in England. At common law (and under English Legislation) a foreign court had jurisdiction to give a judgment in personam capable of enforcement in England if the person against whom it was given was present in the country of the foreign court when the proceedings were instituted; claimed or counterclaimed in the foreign proceedings; submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings; or had agreed to submit to the jurisdiction of the foreign court. Those principles were known as the "Dicey rule".

3. In this case a defendant had not been present or resident in the place where judgment was given (U.S. Bankruptcy Court), did not claim or counter claim and did not appear in the proceeding which gave rise to the default judgment against them on the basis of anti avoidance claims under US Law and there was no submission to the jurisdiction of the foreign court.

4. The Supreme Court decided that the default judgment could not be enforced unless it was both were in personam and the Dicey rule applied. There was no reason why, as a matter of policy, there should be a more liberal rule for enforcement of avoidance judgments in insolvency proceedings. Such a rule would represent a radical departure from substantially settled law, and a change of that nature was a matter for the legislature. The limited scope of the Dicey Rule was because there was no expectation of reciprocity on the part of foreign countries**.**

d. Fraudulent Transfers – Christopher A. Jarvinen – The Case of Condor Insurance (*Fogerty* v. *Petroquest Resources Inc. (In re Condor Insurance Ltd.)*, 601 F.3d 319, 2010 WL 961613 (5th Cir. Mar. 17, 2010).

i. Chapter 15 explicitly denies a foreign representative the ability to use *US law* -- the Bankruptcy Code's avoidance powers in a chapter 15 case -- absent the foreign representative commencing a plenary case under chapter 7 or 11 involving the same debtor.

ii. Question: Did Congress exclude avoidance actions under *foreign law* from the scope of available chapter 15 relief?

iii. The Fifth Circuit answered the question in the negative. It held that chapter 15 does not bar a foreign representative's resort to avoidance powers supplied by applicable *foreign law* and that a foreign representative has standing under chapter 15 to initiate such a suit in the United States.

iv. The Bankruptcy Code

1. Section 1521(a)(7) : Upon recognition of a foreign proceeding, the discretion to grant a broad range of relief to a foreign representative in a Chapter 15 case, "except for relief available under sections 522, 544, 545, 547, 548, 550 and 724(a). *Those sections of the Bankruptcy Code incorporate avoidance actions under U.S. law*.

2. Section 1523(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, 545, 547, 548, 550, 553 and 724(a)."

v. Bankruptcy Court: When read together, section 1521(a)(7) and 1523(a) prohibit a foreign representative from pursuing any avoidance action under chapter 15 (but instead require that the foreign representative must assert such actions in a chapter 7 or chapter 11 case).

vi. The District Court affirmed.

vii. The Fifth Circuit reversed (*comity*.....*comity*.....*comity*)

1. Court focused extensively on the legislative history and international origins of chapter 15.

2. Rules of statutory construction, the Fifth Circuit concluded that the Bankruptcy Code was silent regarding a foreign representative's ability to initiate adversary proceedings in chapter 15 that apply foreign – versus United States – law.

a. Judge Patrick E. Higginbotham, writing for an unanimous court, noted that while section 1521(a)(7) expressly carves out avoidance actions under United States law as a form of relief that a bankruptcy court can grant to a foreign representative, the exception does not

mandate the conclusion that Congress also intended to deny the foreign representative avoidance powers supplied by applicable *foreign law*. "If Congress wished to bar all avoidance actions whatever their source, it could have stated so; it did not," explained the Court.

viii. Practice Pointer: What chapter 15 taketh away, comity may giveth

e. Settlements and Third-Party Releases – One for and One Against - Joe Wielebinski

i. *Vitro (Fifth Circuit)*

1. **Reminder:** Vitro's Mexican plan extinguished guarantees by the Debtor's U.S. based non-debtor subsidiaries.

2. This type of relief was not available in the Fifth Circuit.

3. Circuit holds that you have to look at all of United States' law when deciding whether the assistance is available as "additional assistance under . . . laws of the United States" per § 1507(b)(4).

4. Factual circumstances of the Mexican proceeding did not meet the test outlined by the other Circuits.

5. § 1507(b)(4) was the key to the analysis:

6. Interesting Factual Points from the Case:

a. The guarantees provided that the choice of law for disputes was New York and that they would not be affected by insolvency proceedings.

ii. *In re Sino Forest Corporation*

1. 2013 decision by the Bankruptcy Court for SDNY.

2. The Court granted enforcement of a claims settlement from a reorganization under Canada's Companies Creditors Arrangement Act that gave a discharge to a non-debtor third party.

3. Facts and Background

a. Ernst & Young was the external auditor for a company going through a Canadian reorganization proceeding.

b. Sued over financial statements prepared for that company.

c. E&Y settled all claims against it for some cash consideration, a release of E&Y's claims in the bankruptcy case, and E&Y's support for the plan of reorganization.

4. Difference from *Vitro*:

a. Vastly different factual circumstances.

b. *Vitro* and *Sino Forest* decided the same issue:

c. *Metcalfe* decision held the same way in the Second Circuit (granted recognition) – but the Court re-examined the issue in light of the *Vitro* decision.

i. Distinguishing *Sino Forest* from *Vitro*:

5. *Sino Forest* and *Vitro* really are not different holdings.

VI. Wrap-up

VII. Questions