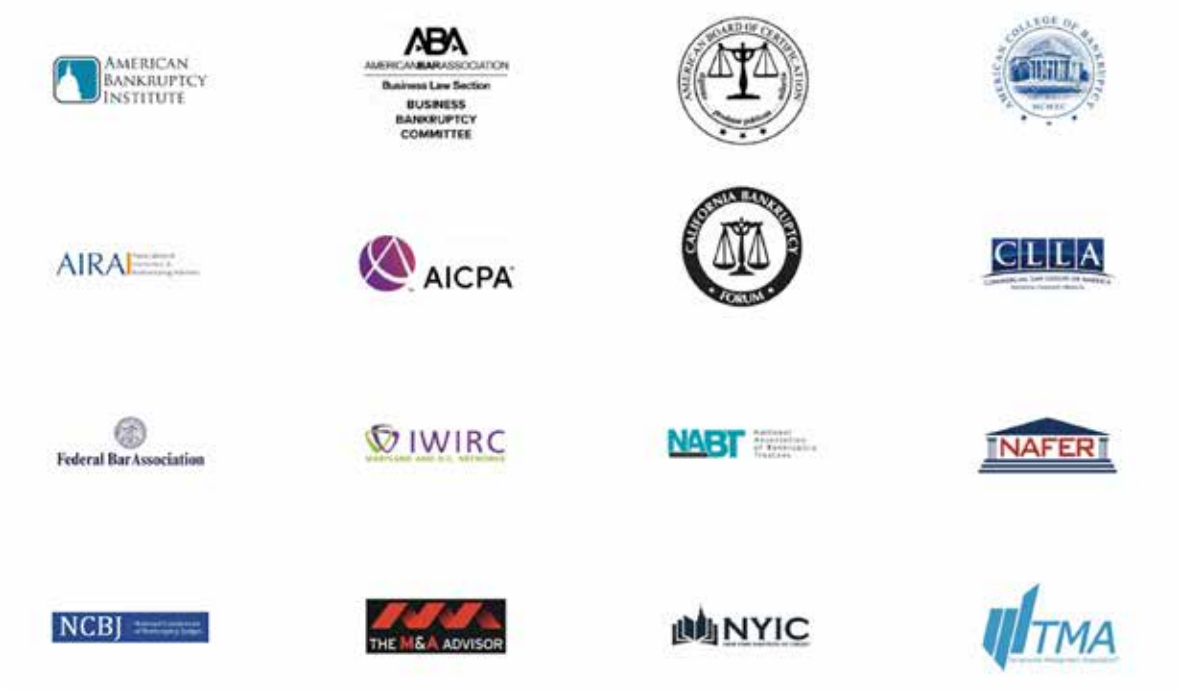
insolvency2020



Oct. 22, 2020, 3:30-4:45 p.m.

American College of Bankruptcy/National Conference of Bankruptcy Judges: Current Developments in Cross-Border Practices

Corinne Ball; Jones Day
Hon. Martin Glenn; U.S. Bankruptcy Court (S.D.N.Y.)
Hon. Christopher M. Klein; U.S. Bankruptcy Court (E.D. Cal.)
Dr. Luis Manuel C. Mejan; Instituto Tecnologico Autonomo de Mexico

Educational Materials

NCBJ 2020 San Diego

Update on Cross Border Cases

[Additional Panel Details]

NCBJ Sailing Forward

Table of Contents

RECOGNITION ISSUES

3

Serviços de Petróleo Constellation S.A.

- Chapter 15 case before Judge Martin Glenn in S.D.N.Y. (Case No. 18-13952).
- Oil-and-gas drilling company with several offices in Brazil, London, Luxembourg, Paraguay and Panama, offshore rigs in Brazil and about 93% of its employees in Brazil.
- Company had issued 2019 and 2024 Notes describing the issuer (parent) as a public liability company incorporated in Luxembourg.
- Chapter 15 proceeding was commenced seeking recognition of reorganization proceeding in Brazil as foreign main proceeding for 10 debtors: parent/Constellation, Olinda Star, Arazi, Petróleo Constellation, Constellation Overseas, Alpha Star, Gold Star, Lone Star, Star International, and Snover.
- One creditor filed a limited objection arguing that the debtors had not satisfied their burden of proving that the location of the debtors' center of main interests ("COMI") was in Brazil.

4

Serviços de Petróleo Constellation S.A.

- In its opinion, the Bankruptcy Court noted that COMI is a flexible determination and not a rigid application of factors.
- The Bankruptcy Court granted recognition as a foreign nonmain proceeding for the parent/Constellation because it found that the parent's COMI was in Luxembourg
  - where it was incorporated,
  - was a tax resident,
  - had its registered office,
  - and where its board of directors met.
- The Bankruptcy Court granted recognition as foreign main proceeding for other seven debtors it considered (determined that subsidiaries had substantial and ongoing business connections in Brazil, such that the COMI was in Brazil).
- Despite the classification, Judge Glenn stated the parent company may receive "nearly identical" relief as the subsidiaries, and the granted relief in the recognition order to put the company's U.S. assets under the bankruptcy stay.

5

CGG

- Chapter 15 cases in S.D.N.Y. before Judge Martin Glenn (Case No. 17-11636); related chapter 11 case of CGG Holding (U.S.) Inc. (Case No. 17-11637).
- CGG was founded in 1931 as Compagnie Générale de Géophysique and focused on seismic surveys and other techniques to help energy companies locate oil and natural gas reserves. Like many oil services providers, the company had been battered by low oil and natural gas prices.
- In June 2017, CGG reached an agreement on a comprehensive financial restructuring with members of its ad hoc lender group and a shareholder with significant cross-holdings in CGG's funded indebtedness.
- In order to implement the restructuring, CGG began a *Sauvegarde* (Safeguard) Proceeding in France and commenced the Chapter 15 case to obtain recognition of the Safeguard Proceeding as a foreign main proceeding. At the same time, CGG's U.S. Debtor filed its Chapter 11 case.

6

CGG

- On July 13, 2017, the Bankruptcy Court entered an order recognizing the Safeguard Proceeding as a foreign main proceeding. The Bankruptcy Court found that:
  - (1) Client Trust Accounts in New York are property of the Foreign Debtor and the Foreign Debtor was eligible to be a debtor in the Chapter 15 case; and
  - (2) the Safeguard Proceeding is a "foreign proceeding" pending in France, where the Foreign Debtor has its COMI.
- A few months later, in December 2017, the Foreign Representative sought an order recognizing and enforcing the order of the French Court sanctioning the Safeguard Plan.
- This would be the first French Safeguard Plan that was recognized and enforced by a U.S. bankruptcy court as a foreign main proceeding in a written opinion.

7

CGG

- The Bankruptcy Court reviewed the background of the French proceedings, and the creditors' overwhelming support for the Safeguard Plan (93.5%), surpassing the two-thirds in amount threshold required within each committee/meeting under French law.
- The Bankruptcy Court found that recognition and enforcement of the Sanctioning Order was necessary to ensure the Financial Restructuring could be implemented without disruption or adverse actions being taken.
  - Found that request to permanently enjoin any parties affected or bound by the Safeguard Plan from commencing or taking any actions inconsistent with the Sanctioning Order within the U.S. was warranted.
- The Bankruptcy Court also found that effectiveness of the Chapter 11 case was also conditioned on, among other things, recognition of the Sanctioning Order.
- The Bankruptcy Court further noted how the French court determined the Safeguard Plan sufficiently protected the interests of all affected creditors in accordance with French law and afforded to due process to parties in interest.

8

Odebrecht Oil & Gas

- Chapter 15 case in S.D.N.Y. before Judge James Garrity Jr. (Case No. 17-13130).
- Odebrecht Oil & Gas ("OOG"), the oil and gas arm of Odebrecht, operated various drilling and production contracts with Brazilian state-owned oil company, Petrobras.
- Issues arose when Petrobras began to terminate its contracts with OOG, triggering defaults in OOG's New York law governed notes, and with the widespread investigation into corruption and money laundering in Brazil tied to Petrobras.
- OOG filed for extrajudicial reorganization in Brazil in May 2017.
- After lengthy negotiations, OOG reached an agreement with more than 60% of its unsecured financial creditors and of the holders of each series of project bonds and entered into plans to restructure approximately $5 billion USD.
- The plans were confirmed by the Brazilian court on October 19, 2017.

9

Odebrecht Oil & Gas

- In November 2017, OOG filed its Chapter 15 case for recognition of the extrajudicial reorganization.
- There was no opposition filed to OOG's recognition petition.
- On December 23, 2017, the Bankruptcy Court entered its order:
  - (1) recognizing the Brazilian extrajudicial reorganization as a foreign main proceeding;
  - (2) recognizing, granting comity, and giving full force and effect to the Brazilian Confirmation Order and Brazilian Reorganization Plans; and
  - (3) enjoining all persons and entities from taking any action or asserting any claim within the U.S. that is inconsistent with the Brazilian Confirmation Order and Brazilian Reorganization Plans.

10

Mood Media Corporation

- Chapter 15 case before Judge Michael Wiles in S.D.N.Y. (Case No. 14-11413).
- Mood Media and certain of its affiliates (including U.S. companies) filed petitions for recognition of a foreign nonmain proceeding under Chapter 15 on May 22, 2017 as part of a debt-for-equity swap with its lenders under a plan of arrangement.
- Sought provisional relief making sections 361, 362 and 365(e) applicable in order to avoid the filing of the Canadian Proceeding being considered an event of default under Mood Media's term loans and senior unsecured notes due in 2020 and 2023.
  - The Bankruptcy Court entered an order granting provisional relief on May 24, 2017, applying section 365(e) of the Bankruptcy Code and providing a prohibition of the commencement or continuation of any action to terminate, accelerate, demand or declare in default a contract or agreement with the Debtors by reason of the commencement of the Canadian Proceeding or the Chapter 15 Cases.

11

Mood Media Corporation

- Ultimately, the Bankruptcy Court granted to recognition of the Canadian proceeding as a foreign main proceeding to Mood Media, but denied recognition as a foreign nonmain proceeding to the U.S. companies.
- The Bankruptcy Court found that the U.S. companies were not debtors in a foreign case.
  - No indication that the Canadian court purported to take jurisdiction over the business or assets of the U.S. companies, or that it even could have done so.
  - Canadian court exercised no control, gave no directions and organized no procedures by which the U.S. companies were separately directed or authorized to deal with their creditors, or to reorganize their obligations, or to do anything.
  - U.S. companies, in short, were just there as beneficiaries of orders that related to the restructuring of the parent company's obligations.

12

Mood Media Corporation

- The Bankruptcy Court also found no establishment for the U.S. companies in Canada because they only had connections to Canada and no evidence of a place of operations or employees.
- The Bankruptcy Court noted that, as a practical matter, the denial of recognition to the U.S. companies would not alter the relief available to them because:
  - (1) the orders entered in Canada free the U.S. companies from their guarantee obligations and
  - (2) the Court would include in its order a direction that counterparties to debt instruments and contracts with the U.S. companies will be barred from claiming that the U.S. companies' involvement in the Canadian proceedings amounted to their participation as "debtors," or to the commencement of insolvency proceedings as to the U.S. companies.

13

PT Bakrie Telecom Tbk

- Chapter 15 case in S.D.N.Y. before Judge Sean Lane (Case No. 18-10200).
- Indonesian Telecommunications company that guaranteed $380 million of senior unsecured notes issued by a subsidiary, which loaned the proceeds of the note offering to PT Bakrie Telecom Tbk ("BTEL"). Note indenture and guarantee were governed by New York law.
- BTEL and subsidiary defaulted on notes in 2013 and in 2014, creditors commenced proceedings in New York state court and in Indonesia's Central Jakarta Commercial Court.
- In October 2014, the Jakarta court appointed administrators in the proceeding, and the requisite majority of BTEL's creditors (a majority in number and two-thirds in value) voted in favor of BTEL's restructuring plan. The plan was approved by the Jakarta court in December 2014.
- The noteholders' claims were not recognized in the proceeding because BTEL listed the subsidiary as the creditor for the $380 million debt, rather than the noteholders or indenture trustee.
- Noteholders did not appeal or challenge confirmation of the plan.

14

PT Bakrie Telecom Tbk

- Prior to the plan process in Jakarta, the noteholders filed a second lawsuit in New York state court in September 2014 alleging fraud and other tortious conduct in connection with the notes offering. The state court ruled in favor of the noteholders on the breach of contract and fraud claims.
- In December 2017, three years after confirmation of the restructuring plan, BTEL appointed a foreign representative for purpose of seeking recognition of the Jakarta proceeding under chapter 15. The proceeding was filed in January 2018.
- Shortly after, BTEL entered into a stipulation for entry of judgment in favor of the noteholders in the amount of $160 million in the state court action.
- The noteholders moved for summary judgment denying recognition of the Jakarta proceeding under chapter 15, arguing that (1) BTEL did not satisfy the property requirement, (2) the appointment of the foreign representative was invalid and (3) the Jakarta proceeding was not collective and recognition would be manifestly contrary to U.S. policy.

15

PT Bakrie Telecom Tbk

- The Bankruptcy Court denied the motion for summary judgment.
- Found that the requirement for U.S. property under section 109(a) was satisfied by maintaining even a nominal amount of property in the U.S., finding note indenture subject to New York law and containing a New York forum selection clause constituted property in the United States sufficient to satisfy the requirement.
- With regards to appointment of the foreign representative, the court concluded that, although the delay in seeking chapter 15 relief after a foreign proceeding has been closed alone does not preclude a finding that a foreign representative was properly appointed, the significance of the delay in this case was a matter for trial.
- Evidence and questions of fact involving the administrators' consideration of the noteholders' claims, the independence of the administrators and the Jakarta court, and whether BTEL's restructuring plan would have been rejected if the indenture trustee had been permitted to vote, led the Bankruptcy Court to deny the noteholders' motion for summary judgment.

16

Oi S.A.

- Competing Chapter 15 cases in S.D.N.Y. before Judge Sean Lane (Case Nos. 16-11791, 16-11794, 17-11888).
- Oi S.A. and its affiliates form one of the largest groups of telecommunications service providers in Brazil. Certain members of the Oi Group, including Oi Brasil Holdings Coöperatief U.A. ("Dutch Oi"), a Dutch subsidiary of Oi S.A., commenced reorganization proceedings in Brazil.
- Bankruptcy Court granted recognition to the Brazilian proceedings of the Oi debtors, including Dutch Oi, as foreign main proceedings, finding that the COMI of each of the debtors was in Brazil.
- Although recognition of the Brazilian proceedings was not opposed, the court expressly found that Brazil was the COMI of Dutch Oi.
- According to the court, Dutch Oi was a special purpose vehicle created to obtain financing for the Oi Group, and the COMI of a special purpose vehicle, such as Dutch Oi, "turns at a location of the corporate nerve center and the expectation of creditors," which, in this instance, was Brazil.

17

Oi S.A.

- Prior to the recognition hearings for the Brazilian proceedings, noteholders of Dutch Oi filed involuntary bankruptcy petitions against Dutch Oi in the Netherlands. A trustee was ultimately appointed in the Netherlands.
- Dutch trustee filed a petition with the S.D.N.Y. bankruptcy court for recognition of the Dutch case as a foreign main proceeding. Because a debtor may only have one foreign main proceeding pending at a time, the Bankruptcy Court had to address its prior order in granting recognition to the Brazilian proceeding.
- The Bankruptcy Court determined that the issue was a request to terminate or modify a prior recognition that was governed by section 1517(d), making the decision discretionary and not mandatory.
- Further, the Bankruptcy Court was to analyze (1) whether the basis for recognition previously presented was flawed and (2) whether something had changed since recognition.
- The Bankruptcy Court declined to terminate recognition of the Brazil proceeding and denied the Chapter 15 recognition of the Dutch proceeding.

18

Oi S.A.

- Addressing the Dutch Trustee's arguments as to the previous basis for recognition, the Bankruptcy Court found that Oi had previously disclosed and the Bankruptcy court was aware of Dutch Oi's connections to the Netherlands when the Bankruptcy Court recognized the Brazilian proceedings.
- Further, the Bankruptcy Court found that the Dutch court's determination that Dutch Oi's COMI was Netherlands was not entitled to comity, and Oi was not estopped from challenging the assertion that the Netherlands was Dutch Oi's COMI based on statements made in the Dutch court under different applicable law.
- The Bankruptcy Court also found that the alleged fraudulent transfer of assets and plan to file a Dutch proceeding when the Brazilian proceeding was being recognized was irrelevant to the COMI analysis.
- The Bankruptcy Court concluded that the evidence demonstrated that Dutch Oi was a special purpose financing vehicle that did not engage in activities beyond serving the financing needs of the Oi Group. As a result, the COMI of Dutch Oi was Brazil, where the Oi group operated.

19

Oi S.A.

- Addressing the argument that the situation had changed, the Bankruptcy Court acknowledged that the actions of a foreign trustee prior to a Chapter 15 filing can be relevant to the COMI analysis if sufficiently significant or material.
- Bankruptcy Court found that the Dutch trustee's actions were insufficient to shift COMI because (1) his actions did little to change the economic realities of Dutch Oi as a special purpose vehicle and expectations of creditors and (2) of the significant legal and pragmatic limitations on the Dutch trustee (i.e. no ability to restructure Dutch Oi under Dutch law and unlikely Dutch Oi would restructure its debts separate from the Brazilian proceeding).
- In addition, the Bankruptcy Court found that the noteholder's strategy of remaining silent through recognition of the Brazilian proceeding while planning to eventually terminate recognition to be "troubling" and inconsistent with the aims of Chapter 15, including promoting cooperation between US and foreign courts.
- According to the court, the noteholder's conduct, including lack of candor with the court, was an independent basis for the court to refrain from terminating recognition of the Brazilian proceeding.

20

Ocean Rig UDW Inc.

- Chapter 15 case before Judge Martin Glenn in S.D.N.Y. (Case No. 17-10736).
- Ocean Rig UDW Inc. is a publicly traded parent company of three holding companies that directly or indirectly own a fleet of deepwater oil rigs leased worldwide. Until April 2016, Ocean Rig and its direct subsidiaries were registered as nonresident corporations in the Republic of the Marshall Islands.
- The Ocean Rig Group had approximately $4.5 billion in face amount of U.S. dollar-denominated notes issued under credit agreements governed by U.S. law, with U.S. financial institutions acting as indenture trustees or collateral agents.
- Faced with expected payment defaults, the Ocean Rig debtors began to explore restructuring alternatives and determined that the Republic of Marshall Islands did not have any laws or procedures permitting reorganization as distinguished from liquidation of companies.

21

Ocean Rig UDW Inc.

- As a result, debtors migrated to the Cayman Islands and registered as Cayman corporations in April and October 2016. Thereafter, the debtors:
  - (i) maintained head offices and books and records in the Cayman Islands;
  - (ii) conducted board meetings in the Cayman Islands;
  - (iii) had some, but not all, officers and directors residing in the Cayman Islands;
  - (iv) appointed registered agents for payment and notices in the Cayman Islands;
  - (v) provided notification of the change to investment service providers, the U.S. Securities and Exchange Commission, and various media outlets;
  - (vi) issued a press release noting the relocation of its principal place of business to the Cayman Islands;
  - (vii) opened a bank account in the Cayman Islands; and
  - (viii) conducted restructuring discussions and negotiations from the Cayman Islands.

22

Ocean Rig UDW Inc.

- Ocean Rig debtors commenced provisional liquidation proceedings and scheme of arrangement proceedings for the purpose of implementing a debt-for-equity swap in the Cayman Islands in March 2017. At the same time, a chapter 15 petition for recognition was filed.
- Creditors voted to support the schemes of arrangement in August 2017. In September 2017, the Cayman Islands court sanctioned the schemes.
- The Bankruptcy Court granted the petition for recognition of the Cayman Proceedings as foreign main proceedings, finding
  - that the debtors satisfied section 109(a)'s requirement of property in the U.S. by means of the legal fee retainers and the U.S. denominated debt governed by New York law;
  - that schemes of arrangement satisfy section 101(23)'s definition of foreign proceeding; and
  - that the debtors' COMI was the Cayman Islands because the shift of COMI to the Cayman Islands was "real" and "done for proper purposes to facilitate a value-maximizing restructuring of [the debtors'] financial debt."

23

Ascot Funds Ltd.

- Chapter 15 case before Judge Stuart Bernstein in S.D.N.Y. (Case No. 19-10594).
- Ascot Fund Ltd. (“Ascot Fund”), an investment fund organized under Cayman Islands law, invested substantially all of its assets in Ascot Partners L.P. (“Ascot Partners”), a Delaware limited partnership. Ascot Partners then invested all its assets in the vehicle through which Bernard Madoff ran his Ponzi scheme. When Madoff’s fraud was revealed, the Ascots investors lost all their investments.
- As a result of certain settlements, Ascot Partners held substantial assets available for distribution and some of that money would be down streamed to Ascot Fund.
- Ascot Fund filed for liquidation in the Cayman Islands (“Cayman Proceeding”) in January 2019 and one of its Joint Official Liquidators filed a petition under chapter 15 in February 2019 seeking recognition of the Cayman Proceeding as a foreign main proceeding.

24

Ascot Funds Ltd.

- An Ascot Fund shareholder opposed recognition of the petition contending that Ascot Fund's COMI was not in the Cayman Islands and the Cayman Proceeding could not be recognized as a foreign main proceeding.
- The Bankruptcy Court overruled the objection, noting that the location of the debtor's primary assets is not determinative of the COMI analysis if other factors weigh in favor of recognition elsewhere.
- The Bankruptcy Court reached this conclusion by noting that (1) the Ascot's Fund registered address had been located in the Cayman Islands since its formation in 1992, (2) the articles of association were governed by Cayman Law and creditors were aware that Ascot Funds was a Cayman company, and (3) any argument that the Cayman Proceeding lacked an "air of legitimacy" should be brought before the Cayman Islands' Court.
- Given that those factors weighed in favor of recognition, the fact that the principal asset was located elsewhere did not preclude recognition.

25

HEMA UK

- Chapter 15 case before Judge Shelley C. Chapman in S.D.N.Y. (Case No. 20-11936).
- HEMA UK was incorporated in England and Wales and is part of the HEMA group of businesses. The group's parent company is in the Netherlands. HEMA has over 775 stores, including franchises, in 12 countries.
- The HEMA group undertook a restructuring and sale process in English court to ease a debt load made unsustainable by the COVID-19 pandemic and a long-term decline in retail sales. The restructuring deal would see the HEMA group's debt decrease from from €830 million to about €427 million.
- The restructuring scheme has the support of all of HEMA's revolving credit facility providers and secured hedging providers and roughly 62% of its existing senior secured noteholders by value. More than 88% of its senior secured noteholders have agreed to a lock-up deal to temporarily waive a series of defaults that would have been triggered by some of HEMA's debt coming due.

26

HEMA UK

- On August 19, 2020, the same day its restructuring plan received support from the vast majority of its secured creditors, HEMA UK filed its Chapter 15 petition seeking recognition of the English restructuring. In addition to seeking recognition in the U.S., HEMA also sought recognition by the Dutch Court.
- On September 14, 2020, the Bankruptcy Court entered the order granting of the English proceeding as the main foreign proceeding.
- The order found that the English proceeding, which is in the country in which the debtor has its COMI, is a foreign main proceeding.
- Further, the English Proceeding, the Scheme, the Convening Order and the Sanction Order, including any and all existing and future extensions, amendments, restatements or supplements authorized by the High Court, were recognized, granted comity, and given full force and effect in the United States, on a final basis.

27

Key Points

- Recognition may be granted to various types of proceedings.
- Conclusion of foreign proceeding does not preclude later appoint of a foreign representative.
- Recognition may be denied to U.S. affiliates of foreign debtor, but, as a practical matter, some relief may be afforded.
- COMI is a flexible determination and not a rigid application of factors.
- COMI migration for a legitimate purpose, such as to restructure a company, preserve going-concern value and jobs, and maximize asset values, does not offend the purposes underlying chapter 15.

28

NON-DEBTOR THIRD PARTY ISSUES

29

Avanti Communications Group PLC

- Chapter 15 case before Judge Martin Glenn in S.D.N.Y. (Case No. 18-10458).
- Avanti issued senior secured notes maturing in 2021 and 2023 that certain of Avanti's direct and indirect subsidiaries guaranteed.
- Avanti and an ad hoc group of its noteholders entered into a restructuring support agreement, which formed the basis for a scheme of arrangement under English law.
- Pursuant to the scheme, the parties agreed to equitize the 2023 notes, which, although originally governed by New York law, were amended to be governed by English law, and to amend the terms of the 2021 notes.
- The scheme included the grant of releases to, among others, certain third-party guarantors, which prevented dissenting holders of the 2023 notes from pursuing claims against the guarantors.

30

Avanti Communications Group PLC

- In February 2018, Avanti initiated a proceeding under the U.K. Companies Act of 2006 before the High Court of Justice of England and Wales.
- Creditors holding more than 98 percent of the value of the 2023 notes voted in favor of the scheme.
- High Court approved the scheme of arrangement, finding, among other things, that the restructuring plan complied with applicable statutory requirements, fairly represented creditors and was one that "an intelligent and honest man, acting in respect of his interest as a creditor, might reasonably approve."
- Later in February 2018, Chapter 15 case was filed for recognition of the scheme.
- Judge Glenn entered recognition order enforcing the scheme of arrangement sanctioned by the High Court in England that included nonconsensual third-party releases.

31

Avanti Communications Group PLC

- Because Avanti's legal counsel held a retainer in a New York account and the indenture for the 2023 notes was originally governed by New York law, the Bankruptcy Court found that Avanti satisfied section 109(a)'s "property in the United States" requirement.
- Determined that third-party non-debtor releases should be recognized and enforced consistent with principles of "comity" and cooperation with foreign courts inherent under chapter 15.
- Further concluded that:
  - (i) affected creditors were afforded due process consistent with U.S. standards;
  - (ii) third-party non-debtor releases, particularly for affiliate guarantors of debt adjusted by a scheme of arrangement, are common under English law (and are often enforced in the Second Circuit in chapter 15 proceedings); and
  - (iii) if the scheme were not recognized and enforced in the chapter 15 case, creditors could be prejudiced and could "prevent the fair and efficient administration of the [r]estructuring."

32

Syncreon Group B.V.

- Chapter 15 case before Judge Brendan Shannon in Delaware (Case No. 19-11702).
- Syncreon and an ad hoc group agreed to a restructuring of approximately $985 million in funded debt, consisting of Secured Loans and Notes.
- Parties determined that an English Scheme was the most suitable restructuring tool because
  - (1) it had the benefit of automatic recognition across Europe (on the assumption that Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) applies to the English scheme);
  - (2) it would allow for third-party non-debtor releases for guarantors of the Secured Loans and Notes; and
  - (3) given that an English scheme is available to both solvent and insolvent companies alike, the utilization of the scheme potentially mitigated some of the negative effects of formal insolvency proceedings (*e.g.*, negative press; the possibility of attempted termination of customer and supplier contracts).

33

Syncreon Group B.V.

- Parties established jurisdiction in the UK by amending the Secured Loan and Notes documentation to change the governing law from New York law to English law.
- Ultimately, Syncreon's restructuring was supported by approximately 99% of the Secured Loan lenders and Noteholders.
- The schemes were sanctioned by the English court in early September 2019 and were recognized in the U.S. and Canada shortly thereafter.
- Judge Shannon entered the chapter 15 recognition order on September 11, 2019 and the Ontario Superior Court of Justice (Commercial List) granted CCAA recognition on September 19, 2019.

34

Agrokor d.d.

- Chapter 15 case before Judge Martin Glenn in S.D.N.Y. (Case No. 18-12104).
- The Agrokor Group ("AG") is the largest private company by revenue in the Republic of Croatia, with more than 60,000 employees.
- Seventy-seven AG companies are based in Croatia and established under Croatian law, but they operate both within and outside the country.
- These entities are part of a group of 155 AG companies, the remainder of which are not based in Croatia and operate outside the country (principally in Slovenia, Serbia, and Bosnia-Herzegovina).
- The Croatia-based AG companies commenced a proceeding under Croatia's reorganization law (the "EA Proceeding") shortly after the reorganization law was enacted in April 2017.
- At the time, these companies had approximately €625 million in New York law-governed debt and €1.6 billion in English law-governed debt.

35

Agrokor d.d.

- A settlement agreement was proposed as part of the EA Proceeding (the "Settlement Agreement"). It provided for a projected recovery of not more than 51 percent on the English and New York law-governed debt and incorporated certain third-party releases, including releases of guarantees of the English and New York law-governed debt.
- On July 4, 2018, the required majority of AG's creditors (including insider creditors) voted to accept the Settlement Agreement, which was later approved by the Commercial Court of Zagreb in Croatia. The High Commercial Court denied more than 90 appeals of the approval order on October 26, 2018, making the Settlement Agreement final.
- In 2017 and 2018, foreign representatives sought recognition of the EA proceeding in seven foreign jurisdictions. This including seeking recognition of the EA Proceeding and Settlement Agreement under Chapter 15.
- Courts in some jurisdictions refused to recognize the EA Proceeding (Slovenia, Serbia, Bosnia-Herzegovina, and Montenegro), but courts in other jurisdictions had recognized the EA Proceeding and not yet addressed the Settlement Agreement (English court).

36

Agrokor d.d.

- On September 21, 2018, the Bankruptcy Court entered an order recognizing the EA Proceeding. On December 14, 2018, the Bankruptcy Court unprovisionally recognized and enforced the Settlement Agreement.
- In determining whether to recognize and enforce the Settlement Agreement, the Bankruptcy Court considered:
  - the procedural fairness of the EA Law,
  - its previous recognition of the EA Proceeding,
  - the terms of the Settlement Agreement (including the fact that creditor distributions "closely follow the waterfall provisions of the U.S. Bankruptcy Code"), and
  - the agreement's overwhelming acceptance by creditors.
- Under the circumstances, the Bankruptcy Court emphasized that its broad discretion to grant post-recognition relief under sections 1507 and 1521 encompasses recognition and enforcement of the Settlement Agreement.

37

Agrokor d.d.

- The Bankruptcy Court also addressed the *Gibbs* Rule.
- According to the *Gibbs* Rule, contractual obligations can be changed or discharged only in accordance with the law governing those obligations. Consequently, a creditor of Agrokor with claims arising from English law-governed contracts that did not vote in favor of the Croatian plan could sue Agrokor and other released parties in England notwithstanding the terms of the plan.
- The Bankruptcy Court concluded that the *Gibbs* Rule was not an impediment to recognition and enforcement of the Settlement Agreement in the U.S.
- The Bankruptcy Court agreed with other foreign courts and commentators that the *Gibbs* Rule mischaracterizes the discharge of debt in international insolvency cases as a contractual issue rather than as a bankruptcy or insolvency-law issue.
- The Bankruptcy Court noted that "England, of course, is free to continue to adhere to the *Gibbs* rule, but that does not mean that a U.S. bankruptcy court must follow the rule in deciding whether to recognize and enforce the decision of a court of another jurisdiction."

38

Key Points

- Non-debtor third party releases in a final plan/scheme may be granted comity and enforced if
  - creditors are afforded due process consistent with U.S. standards,
  - there is widespread support for the plan/scheme by creditors, and
  - third-party non-debtor releases are commonly enforced under the foreign law.
- However, if the non-debtor relief is provisional or precautionary, the bankruptcy courts have to consider whether the interests of U.S. creditors are sufficiently protected.

39

DISCOVERY ISSUES

40

Perforadora Oro Negro

- Chapter 15 case in S.D.N.Y. before Judge Shelley Chapman (Case No. 18-11094).
- Oro Negro and its subsidiaries owned and leased oil drilling rigs. Its largest client was Mexico's state-owned oil company, Pemex.
- Oro Negro filed a voluntary *concurso mercantile* to restructure its debts in September 2017.
- After filing the *concurso*, the Mexican court entered various injunctions to protect Oro Negro. According to the Oro Negro, Pemex and Oro Negro's bondholders acted in violation of these injunctions to terminate the Pemex Contracts and attempt to seize control of the rigs.
- Oro Negro sought Chapter 15 relief on April 20, 2018 to continue its Mexican proceedings and investigate alleged tortious interference by its bondholders.
- As part of the filing, Oro Negro filed a motion for provisional relief (application of section 362) and seeking to leave to conduct rule 2004 discovery against Pemex and the ad-hoc group of bondholders prior to recognition.

41

Perforadora Oro Negro

- Pemex objected to the rule 2004 discovery on the grounds that it is an instrumentality of a foreign state and therefore immune from any civil action brought in the U.S. pursuant to the Foreign Sovereign Immunities Act.
- SeaMex (one of the bondholders) objected to the rule 2004 discovery on the basis that the Bankruptcy Court lacked personal jurisdiction over it, a foreign corporation with no operations in the United States. Further, the scope of discovery exceed the bounds of permissible discovery and was not proper because it was not urgently needed to protect the assets of the debtor and the interest of creditors prior to recognition.
- The Singapore vessel owners and some of the other bondholders objected to recognition on the basis that the Company was not in a "foreign proceeding," merely in a "*Vista,*" an examination whose purpose is to establish eligibility to commence a *concurso mercantil*.
- According to the objectors, unlike a *concurso mercantil*, a *Vista* is a judicially sealed proceeding and is not a collective proceeding that would qualify as a foreign proceeding.

42

Perforadora Oro Negro

- Prior to the hearing on recognition, the parties exchanged multiple letters on the docket regarding deposition of the foreign representative and disagreements on the issues to be covered at the recognition hearing.
- The Bankruptcy Court entered a brief order recognizing the *concurso mercantile* as a foreign main proceeding in May 2018, but provided that the Bankruptcy Court would rule on the additional discretionary relief (i.e. discovery) on notice.
- After recognition, the parties filed supplemental objections to the foreign representative's requested relief and discovery disputes continued.
- On June 1, 2018, certain of the bondholders filed a motion to impose conditions on operation of the debtors' business or for adequate protection in the alternative.

43

Perforadora Oro Negro

- On July 11, 2018, the Bankruptcy Court entered an order granting in part and denying in part the foreign representative's motion for relief and the interested parties motion for adequate protection.
  - Ordered that the orders entered by the Mexican court be granted comity and entitled to full force and effect, and allowed discovery to go forward against certain parties (denied discovery as to Pemex and SeaMex), but limited the discovery on these parties to topics relating to the Pemex Contracts, the seizure of the rigs, and other topics related to the alleged interference by the ad-hoc group of bondholders.
  - Regarding the interested parties motion, the Bankruptcy Court denied the request for an imposition of bond and discovery, but required the foreign representative to provide evidence of adequate insurance of the rigs and to continue to engage in good faith negotiations regarding access to the rigs.
- The Bankruptcy Court would eventually allow discovery as to SeaMex's joint venture partners – Seadrill Limited and Fintech Advisory Inc, who were both located in the U.S.

44

Perforadora Oro Negro

- Another issue of interest that arose in this case, although not directly related to discovery, is that certain parties attempted to dispose of assets that were part of the bankruptcy estate and requested the Bankruptcy Court grant authority for them to enter into a contract to dispose of certain assets that were placed within the United States, and therefore subject to the jurisdiction of the Bankruptcy Court.
- The Bankruptcy Court, however, decided that given the main proceeding was being carried out in Mexico, the authority of the Mexican Court over the alleged disposition of the assets should be respected.
- A factor that was taken into consideration was that there was an offer made in the Mexican proceeding to acquire the assets, and such an offer required an auction.
- A 90-day extension was requested given the situation created by COVID-19.

45

Platinum Partners Value Arbitrage Fund L.P.

- Chapter 15 case before Judge Shelley Chapman in S.D.N.Y. (Case No. 16-12925).
- Platinum Partners Value Arbitrage Fund L.P. and certain affiliates (the "Funds") were hedge funds that invested and traded in U.S. and non-U.S. financial instruments and other funds, assets and holding companies.
- The Funds were placed into liquidation by order of the Cayman Islands court in August 2016 and a petition for recognition under Chapter 15 was filed in October 2016.
- The Bankruptcy Court issued an order granting recognition to the Cayman Islands liquidation of the Funds, and authorized the liquidators to conduct discovery in the U.S.
- The liquidators then requested discovery from the debtors' former accountant, including work papers and other documents and communications concerning the services performed.
- The accountant objected, arguing that the requested discovery was not available under Cayman law. According to the accountant, Cayman law precluded the liquidators from obtaining an accountant's work papers because they are not the debtor's property.

46

Platinum Partners Value Arbitrage Fund L.P.

- The Bankruptcy Court was not convinced that discovery was not available.
- Further, even if the discovery was not available, the Bankruptcy Court noted that "the scope of discovery available in the foreign jurisdiction is not a valid basis upon which this Court, in the exercise of its discretion must limit relief available to the Liquidators."
- According to the Bankruptcy Court, comity would weigh in favor of granting the liquidator's motion unless the Cayman court would be "actively hostile" or prevent the liquidators from using the discovery obtained. In this case, the Bankruptcy Court found that Cayman courts are receptive to evidence obtained through U.S. discovery even if the evidence would not available under Cayman law.
- The Bankruptcy Court also dismissed the accountant's other arguments, including that the liquidators were required to first seek discovery in the Cayman Islands and that the discovery dispute was subject to arbitration, and issued an order compelling the accountant to produce its work papers.

47

In re Larisa Markus

- Chapter 15 case before Judge Martin Glenn in S.D.N.Y. (Case No. 19-10096).
- This chapter 15 case is related to the chapter 15 case of Foreign Economic Industrial Bank, Ltd. (Case No. 16-13534), for which the individual foreign debtor served as president.
- Foreign debtor was an individual who was serving a long jail sentence in Russia after pleading guilty to embezzling over $2 billion. Following the insolvency declaration of the Foreign Economic Industrial Bank, a creditor applied for commencement of a bankruptcy proceeding against the foreign debtor in Russia.
- The Chapter 15 case for the individual foreign debtor was filed on January 10, 2019 by a foreign representative appointed in Russia and on April 1, 2019, the Bankruptcy Court granted the foreign representative’s motion for recognition and authorized the foreign representative to examine witnesses and take evidence concerning the foreign debtor’s assets and liabilities.
- Following the recognition order, counsel for the individual foreign debtor filed motions to vacate recognition in both chapter 15 cases, with both orders being denied by the Bankruptcy Court.

48

In re Larisa Markus

- Given the individual foreign debtor's guilty plea to embezzlement, the foreign representative attempted to document and recover assets as part of the Russian bankruptcy estate, but was faced with stonewalling of discovery by the foreign debtor's counsel.
- On July 30, 2019, the Bankruptcy Court entered a discovery order providing that counsel for the foreign debtor had to produce all privileged responsive documents to the foreign representative and that counsel had to immediately communicate with the foreign debtor and her agents, including attorneys, in order to obtain and produce responsive documents.
- However, counsel for the foreign debtor failed to produce documents, asserting that the foreign debtor had no duty to produce documents located outside the US.
- On October 6, 2019, the Bankruptcy Court entered an order imposing sanctions on counsel for foreign debtor for failure to cooperate in the discovery process, given that there is no geographic limitations in a chapter 15 case. Subsequently, the Bankruptcy Court entered an order awarding fees to the foreign representative as a result of the discovery issues and sanctions motion.

49

In re Larisa Markus

- The Bankruptcy Court found that Rule 34 of the Federal Rule of Civil Procedure required a party to produce all responsive documents in the party's ''possession, custody or control,'' which included documents held by her agents and attorneys in this US or elsewhere, and that Rule 45's subpoena power was also not limited to the production of documents located within the US.
- The Bankruptcy Court reasoned that "the permitted section 1521(a)(4) 'broad discovery concern[ed] [the foreign debtor's]' worldwide financial affairs, which will aid in recovery of assets that [the foreign debtor] embezzled and is dissipating through her agents in various countries, including the U.S., U.K., France, Latvia and Russia."
- Because of counsel for the foreign debtor stonewalling discovery, the Bankruptcy Court found that civil contempt sanctions were appropriate. Sanctions were imposed and would continue to accrue until counsel complied with the subpoena.
- Counsel for the foreign debtor appealed the Bankruptcy Court's decision to the District Court, who affirmed in part, vacated and remanded in part.

50

In re Larisa Markus

- The District Court held that Rule 37 was available in contested matters arising within chapter 15 cases and that the rule could cover attorneys advising the parties.
- However, the District Court found that Rule 37 could not be used to hold counsel in contempt because the foreign representative chose to serve a Rule 45 subpoena, instead of treating the foreign debtor as a party upon whom a discovery request must be served under Rule 26.
- The District Court found that sanctions were appropriate on the record, however, given the Bankruptcy Court's inherent authority and affirmed the Bankruptcy Court's sanctions order on that ground, but remanded the sanctions order so that the sum of sanctions could be determined.
- The District Court also vacated the portion of the sanctions order imposing lump-sum retroactive sanctions as improperly criminal in nature. Finally, the District Court vacated and remanded the fee order for determination on whether it was issues pursuant to the proper authority.

51

In re Larisa Markus

- On remand, the Bankruptcy Court determined that
  - (i) the amount of sanctions to be $55,000 for 55 days of noncompliance with the discovery order,
  - (ii) the fees order was properly issued pursuant to the Bankruptcy Court's inherent authority, and
  - (iii) additional compensatory sanctions against the attorney were to be awarded to the future representative for fees that would not have been incurred but for the attorney's willful bad faith conduct.
- While the sanctions were ultimately upheld under the Bankruptcy Court's inherent authority, a future consideration is whether the result would have been different had the foreign representative sought discovery under Rule 34 (Bankruptcy Rule 7034) instead of Rule 45 (Bankruptcy Rule 9016).

52

Key Points

- Upon obtaining recognition in a Chapter 15 case, the foreign representative may seek discovery, but the discovery is not unlimited.
- Issues may arise regarding jurisdiction over foreign parties.
- Federal Rule of Civil Procedure 37 is available in contested matters arising within chapter 15 cases and that the rule could cover attorneys advising the parties.
- Foreign Representatives should give consideration to the manner in which they serve discovery requests (i.e. under Rule 34 (Bankruptcy Rule 7034) or Rule 45 (Bankruptcy Rule 9016)).

53

OTHER ISSUES

54

Concordia International Group

- Concordia International Group was a global pharmaceutical company with international reach and operations in approximately 90 countries, headquartered in Ontario, Canada.
- Prior to the commencement of the CBCA proceedings, Concordia had assets valued at approximately USD $3.7-billion and liabilities of approximately USD $4.1-billion.
- In October 2017, the company filed for a preliminary interim order under the Canada Business Corporations Act (CBCA) for a stay to effectuate a plan to realign its capital structure (the "Recapitalization Transaction").
- The stay issued under the interim order covered the entire global Concordia corporate enterprise and prevented all secured creditors, unsecured creditors and counterparties to contracts with the Concordia entities from exercising any rights or remedies as a result of the commencement of the CBCA proceedings.
- Concordia continued making interest and amortization payments on its secured debt. The stay did not extend to employee or trade obligations.

55

Concordia International Group

- In May 2018, Concordia entered into a support agreement with certain holders of secured and unsecured debt, which provided that the holders would support the Recapitalization Transaction and vote in favor of the plan of arrangement.
- The support agreement and CBCA plan of arrangement also provided for alternative implementation measures for the Recapitalization Transaction, through either the Companies' Creditors Arrangement Act (CCAA) in Canada or Chapter 11 proceedings in the U.S.
- The interim order provided that a vote cast in favor of the CBCA plan could also be counted as a vote in favor of a CCAA plan.
- Further, the CBCA plan contained a form of Chapter 11 plan and the disclosures required under Chapter 11. A contemporaneous solicitation of votes for the Chapter 11 plan was included in the disclosure materials.
- The Recapitalization Transaction was approved by 100% of voting secured creditors, 100% of voting unsecured debtholders and 87.47% of voting shareholder. In June 2018, Concordia obtained a final order from the Canadian court approving the plan of arrangement.

56

Takata

- Takata and its global affiliates entered into a global restructuring due to the financial impact of the recalls of its phase stabilized ammonium nitrate ("PSAN") airbag inflators, consisting of two parts:
  - (1) all Takata entities involved in PSAN production would be restructured into a new entity to be created as part of Takata's chapter 11 plan of reorganization in order to provide replacement parts for OEMs and
  - (2) Key Safety Systems would purchase all of Takata's non-PSAN assets.
- In the U.S., a chapter 11 case was filed for Takata's U.S. and Mexican entities on June 25, 2017 (Case No. 17-11375 before Judge Brendan Shannon in Delaware).
- On June 28, 2017, an ancillary proceeding was also commenced under the Companies' Creditors Arrangement Act ("CCAA") in Canada for Takata's Canadian entities.
- Takata's Japanese entities commenced a proceeding under Japan's Civil Rehabilitation Act on June 26, 2017.
- Apart from the in-court proceedings, the global restructuring also included out-of-court asset and stock purchases in Europe.

57

Takata

- A chapter 15 case was also filed to recognize the Japanese proceeding as a foreign main proceeding for the Japanese debtors in August 2017 (Case No. 17-11713 before Judge Brendan Shannon in Delaware).
- Prior to the hearing on recognition of the chapter 15 case, the Bankruptcy Court entered an order, after applying the preliminary injunction factors, granting provisional relief to apply the automatic stay to protect the Japanese debtors.
- In November 2017, the Bankruptcy Court granted recognition of the Japanese proceedings as the foreign main proceeding for the Japanese debtors.
- On February 21, 2018, the Bankruptcy Court entered an order confirming Takata's chapter 11 plan.
- In April 2018, the effective date of the chapter 11 plan occurred, the out-of-court asset sales in Europe closed and the Japanese court approved the Japanese debtors sale and plans in Japan, effectively finalizing the global restructuring.

58

Irish Bank Resolution Corp. Ltd.

- Chapter 15 case before Judge Christopher Sontchi in Delaware (Case No. 13-12159).
- In 2013, the Irish Minister for Finance issued an order commencing a liquidation proceeding for Dublin-based Irish Bank Resolution Corporation Limited ("IBRC") and appointing two individuals as liquidators.
  - IBRC held the remaining assets and liabilities of two distressed Irish banks nationalized by the Irish government following the global financial crisis of 2008.
- The liquidators, as IBRC's foreign representatives, filed a chapter 15 petition in the U.S. bankruptcy court seeking recognition of IBRC's Irish liquidation proceeding.
- The Bankruptcy Court issued an order recognizing the proceeding as a foreign main proceeding in December 2013.
- In 2014, the foreign representatives filed a lawsuit in the Irish High Court against a former client of the nationalized Irish banks seeking repayment of certain loans made in 2008 and 2009 to fund the purchase of the bank's stock.

59

Irish Bank Resolution Corp. Ltd.

- In 2018, the former client and two other plaintiffs filed a motion with the U.S. Bankruptcy Court seeking:
  - (i) a determination that the automatic stay did not prevent them from naming the foreign representatives (but not IBRC) as defendants in a proposed adversary proceeding alleging that the foreign representatives abused the chapter 15 process, breached their fiduciary duties, and committed fraud and other misconduct in connection with the Irish litigation, and seeking an order terminating the defendants' status as foreign representatives of IBRC; or
  - (ii) in the alternative, an order granting relief from the automatic stay in order to file the complaint.
- The Bankruptcy Court noted that, under the *Barton* Doctrine, the plaintiffs should proceed in Ireland, not the U.S., because the U.S. court only recognized the foreign representatives and did not appoint them. However, the court noted, invoking the doctrine as the sole basis for denying the stay relief motion "would be a very expansive application of *Barton*."

60

Irish Bank Resolution Corp. Ltd.

- Bankruptcy Court ultimately decided the extension of the automatic stay was warranted, finding "a significant identity of interests" between IBRC and the foreign representatives based on indemnification obligations, and the role of the foreign representatives in IBRC's liquidation. Plaintiffs appealed.
- On appeal, the Delaware District Court did not reach the issue of whether the *Barton* Doctrine applied extraterritorially because it found that the Bankruptcy Court committed no error in extending the stay to preclude litigation against the foreign representatives.
- Notable principally because the Bankruptcy Court and the District Court sanctioned expansion of the scope of the automatic stay to protect foreign representatives in a chapter 15 case.
  - As with non-debtor affiliates in some other bankruptcy cases, litigation against a foreign representative has the potential to undermine or frustrate chapter 15 as a mechanism to provide assistance to a foreign bankruptcy or insolvency proceeding.
  - It may also discourage competent individuals or entities from serving as foreign representatives in chapter 15 cases.

61

Beechwood Re

- Chapter 15 case before Judge Martin Glenn in S.D.N.Y. (Case No. 19-11560).
- Beechwood was a Cayman Islands-domiciled reinsurance company that was the subject of a winding-up proceeding in the Cayman Islands.
- The debtor was also a defendant in litigation pending before the S.D.N.Y. District Court involving allegations that Beechwood engaged in the unauthorized sale of reinsurance in the U.S.
- In this action, Plaintiffs had filed a motion to require Beechwood to post $250 million in additional security.
- Beechwood's Cayman Island liquidator filed a petition in the S.D.N.Y. Bankruptcy Court seeking Chapter 15 recognition of the Cayman Islands liquidation.
- Liquidator also sought provisional relief in the form of an order declaring that the automatic stay precluded continuation of the District Court litigation.

62

Beechwood Re

- Parties to the District Court litigation objected, arguing that the district court should be permitted to issue its ruling on the bond motion, which had already been fully briefed. Liquidator countered that the debtor did not have the ability to post the additional security and a default judgment would be entered against it
- The Bankruptcy Court issued an order denying the liquidator's motion for provisional relief.
- Applying the standard for a preliminary injunction to gap period relief, the Bankruptcy Court concluded that the Cayman Islands liquidator failed to show irreparable harm.
- According to the Bankruptcy Court, the District Court might rule in the debtor's favor on the bond issue. Even if it did not, the Bankruptcy Court wrote, the debtor "would not suffer irreparable harm unless and until the district court proceed[ed] to enter a default judgment against [the debtor]."
- However, the Bankruptcy Court held that the liquidator could renew his motion for provisional relief if the District Court issued its decision before the Bankruptcy Court ruled on the chapter 15 petition.

63

Energy Coal S.P.A.

- Chapter 15 case before Judge Laurie Silverstein in Delaware (Case No. 15-12048).
- Energy Coal S.P.A. was a debtor in a *Concordato Preventivo* under the Italian Insolvency Law pending before the Tribunale di Genova, Sezione Fallimentare (the "Genova Court").
- The debtor's foreign representative filed a petition for recognition of the Concordato Preventivo as a foreign main proceeding under Chapter 15.
- The Bankruptcy Court entered an order granting recognition in November 2015.
- Subsequent to recognition, the debtor proposed a restructuring plan to the Genova Court and the Court approved the plan following acceptance of the plan by approximately 87% of the company's creditors.
- Following approval of the plan, the foreign representative requested an order enforcing the plan and an injunction enjoining creditors from commencing lawsuits against the debtor in the U.S.

64

Energy Coal S.P.A.

- Two contract counterparties objected, arguing that they should not be enjoined from pursuing their contract claims against the debtor, which were governed by Florida law, before a court in Florida in accordance with the terms of their contracts.
- The foreign representative agreed that a Florida court could determine the amount of the claims, but not the amount to be distributed on account of them.
- The Bankruptcy Court concluded that a forum selection clause in a contract does not trump the comity afforded a foreign main proceeding.
  - Although the counterparties could litigate the amount of their claims in Florida, they could not contest the priority or the amount of their recovery in the U.S.
  - Instead, much like a foreign creditor would be required to file a claim in the U.S. to recover from a U.S. debtor's bankruptcy estate, the counterparties would be required to submit their claim to the Genova Court to receive a distribution, despite the purported cost associated with seeking a distribution in Italy.

65

M&G Mexico Holding and M&G Polimeros Mexico

- Chapter 15 cases before Judge Michael E. Wiles in SDNY (Case No. 19-11223).
- Former non-debtor subsidiaries of the M&G Chemical Group (Chapter 11 Case, No. 17-12307 before Judge Brendan Shannon in Delaware) involved in the manufacture of polymer products.
- Mexican debtors were racked by the same liquidity crunch that M&G Chemicals Group experienced during the over-budget construction of a plastic resin manufacturing complex in Corpus Christi, Texas.
- Their separation from the U.S.-based businesses pursuant to a settlement agreement in the Chapter 11 cases left $983 million worth of funded debt intact and led them to file a *concurso mercantile* in Mexico. On March 29, 2019, the *Concurso* Court entered judgment formally commencing the *concurso* proceedings.
- According to the Mexican debtors, the Chapter 15 proceedings became necessary as a result of threatened action by the Pension Benefit Guaranty Corporation (“PBGC”) stemming from the allowance of pension payment claims in the M&G Chapter 11 case.
- In addition to filing petition for recognition in April 2019, the Mexican debtors also filed a motion for provisional relief seeking to make the section 362 stay applicable in the gap period.

66

M&G Mexico Holding and M&G Polimeros Mexico

- The Bankruptcy Court entered an interim order on April 22, 2019 providing that the stay under section 362 would provisionally apply to protect against the commencement or continuation of a judicial, administrative, or other action or proceeding against M&G Mexico and their assets in the United States by the PBGC or any other creditor.
- PCBJ, in its response to the Mexican debtors' motion, noted that it was not made aware of the *concurso* proceedings until April 16, 2019, and that any emergency from the Chapter 15 case was the Mexican debtors' own doings. PBGC noted that it did not object to the relief sought by the Mexican debtors in the motion.
- On April 29, 2019, the Bankruptcy Court entered a final order providing that the stay under section 362 would continue to apply until the Bankruptcy Court ruled on recognition.
- On May 17, 2019, the Bankruptcy Court entered an order recognizing the *concurso* proceedings as a foreign main proceeding and provided that all creditors and other persons are enjoined from commencing any suit, action or proceeding in the territorial jurisdiction of the United States to resolve any dispute arising from the *concurso* or any orders issued by the *Concurso* Court.

67

Key Points

- Automatic stay may be extended to protect foreign representatives in a chapter 15 case.
- Majority view is to apply the standard for preliminary injunction in determining certain gap period relief.
- A forum selection clause in a contract does not trump the comity afforded a foreign main proceeding.

68

CASES TO WATCH

69

Cozumel El Caribe

- Chapter 15 case before Judge Martin Glenn in S.D.N.Y. (Case No. 10-13913).
- In October 2006, Cozumel Caribe and seven non-debtor affiliates executed promissory notes in the aggregate amount of USD $103 million. The loans were secured by funds required to be deposited in bank accounts in New York and are governed by New York law.
- Non-debtor affiliates also entered into a Guarantee Agreement under New York law.
- Only about USD $25 million of the USD $103 million loan was ultimately used by Cozumel Caribe; the remaining amount was allegedly used by the non-debtor affiliates. No payments of principal or interest have been made on the USD $103 million loan since 2010.
- Cozumel Caribe filed its *Concurso* Proceeding in Mexico on May 21, 2010. (File 268/2010, 3d District Court in Quintana Roo)
- On May 27, 2010, Cozumel Caribe obtained an *ex parte* order from the *Concurso* Court granting "Precautionary Measures" that barred parties from taking any action to collect any of the debt from property of Cozumel Caribe or from the non-debtor affiliates (the "May 27 Order").

70

Cozumel El Caribe

- On July 20, 2010, the Chapter 15 case was filed and the recognition order was entered on October 20, 2010.
- CT Investment Management ("CTIM"), special servicer on behalf of secured creditors of the debtor and the non-debtor affiliates, filed an action in S.D.N.Y. District Court against the non-debtor affiliates to enforce the Guarantee Agreement.
- In 2012, District Court entered opinion granting comity to the May 27 Order and enjoining CTIM from proceeding with its action.
- CTIM also filed an adversary proceeding in the Chapter 15 case.
- In 2012, the Bankruptcy Court issued an opinion that granted a stay of the adversary proceeding, but required the debtor to file an appropriate proceeding in the Mexican Court to resolve the issues identified by the Bankruptcy Court.
- In 2014, CTIM moved to terminate recognition of the *Concurso* Proceeding, and the Bankruptcy Court issued an opinion denying the motion to terminate recognition without prejudice, finding that the status quo in 2014 sufficiently protected CTIM's interests.

71

Cozumel El Caribe

- In January 2020, CTIM renewed its motion to terminate recognition arguing that serious misconduct by each the debtor and the non-debtor affiliates supported terminating recognition of the Mexican *Concurso* Proceeding of Cozumel Caribe as a foreign main proceeding.
- Since the filing of the Chapter 15 case, the debtor and non-debtors stopped paying anything on the amounts owed and the *Concurso* court has not entered a final order impairing U.S. creditor's claims.
- On March 4, 2020, Judge Glenn issued an order scheduling an evidentiary hearing to determine whether to (1) terminate the recognition order or (2) vacate or modify the comity granted to the May 27 order.
- The order notes that the these facts raise the question of "whether the interests of U.S. creditors are sufficiently protected when the non-debtors stopped paying *anything* they owe on the promissory notes for nearly 10 years."

72

Virgin Australia Holdings Ltd.

- Virgin Australia Holdings Ltd. entered bankruptcy administration on April 21, 2020 in Australia.
- On April 29, 2020, Virgin Australia filed a petition seeking recognition of its Australian proceeding as a foreign main proceeding in Chapter 15 to protect the company and its assets from creditors seeking to enforce actions.
- The case is before Judge Sean Lane (No. 20-11024) and recognition of the Australian proceeding as a foreign main proceeding was granted on May 22, 2020.

73

Faculty

Corinne Ball is a partner with Jones Day in New York and has nearly 40 years of experience in business finance and restructuring, with a focus on complex corporate reorganizations and distressed acquisitions, both court-supervised and extra judicial, including matters involving multijurisdictional and cross-border enterprises. She co-leads the New York Office's Business Restructuring & Reorganization Practice and leads the firm's European Distress Investing and Alternative Capital Initiatives. Ms. Ball worked extensively on the City of Detroit restructuring and led a team of attorneys representing Chrysler LLC in connection with its successful chapter 11 reorganization, which won the *Investment Dealers' Digest* Deal of the Year award for 2009. She also led a team of attorneys in the successful restructuring of FGIC and the sale of its portfolio to MBIA, as well as Dana Corp., which emerged from bankruptcy in 2008, and has orchestrated many other complex reorganizations involving companies such as Oncor, Oi, OSX, US Manufacturing, Metaldyne, Axcelis Technologies, Kaiser Aluminum, Tarragon and The Williams Communications Companies. In addition, she has counseled lenders and bondholders in the ABFS, Comdisco, Excite@Home, Exide SA, GST Communications, the Houston Sport's Authority and Jefferson County, European Wind Farms (Breeze) and the National Portuguese Railway, Loy Yang B, VARIG Airlines and Worldcom restructurings, among others. Ms. Ball has advised on loans, acquisitions and workouts involving professional sports franchises, including the Charlotte Bobcats, the Detroit Redwings, the Minnesota Wild, the New Jersey Devils and the Phoenix Coyotes. She also leads the firm's distressed M&A efforts and is the featured "Distress M&A" columnist for the *New York Law Journal*. Ms. Ball won the Turnaround Management Association's "International Turnaround Company of the Year" award, and was named "Dealmaker of the Year" by *The American Lawyer* and one of "Most Influential Lawyer of the Decade in Bankruptcy & Restructuring" by *The National Law Journal*. She has served as director for the American College of Bankruptcy and ABI, and she is a member of the International Institute on Insolvency. Ms. Ball received her B.A. *cum laude* and Phi Beta Kappa in 1975 from Williams College and her J.D. in 1978 with honors from George Washington University.

Hon. Martin Glenn is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Nov. 30, 2006. Previously, he was a law clerk for Hon. Henry J. Friendly, Chief Judge of the U.S. Court of Appeals for the Second Circuit, from 1971-72, and he practiced law with O'Melveny & Myers LLP in Los Angeles from 1972-85 and in New York from 1985-2006, where he focused on complex civil litigation including securities, RICO, financial and accounting fraud, and unfair competition. Judge Glenn is a is a Fellow of the American College of Bankruptcy and a member of the Committee on International Judicial Relations of the U.S. Judicial Conference, the New York Federal-State Judicial Council, the American Law Institute, the International Insolvency Institute, ABI, the New York City Bar, the National Conference of Bankruptcy Judges and the Federal Bar Council. He is also an adjunct professor of law at Columbia Law School and a contributing author to *Collier on Bankruptcy*. Judge Glenn received his B.S. from Cornell University in 1968 and his J.D. from Rutgers Law School in 1971, where he was an articles editor of the *Rutgers Law Review*.

Hon. Christopher M. Klein is a U.S. Bankruptcy Judge for the Eastern District of California in Sacramento, where he has been a judge since 1988, and he was a member of the Bankruptcy Appellate Panel of the Ninth Circuit from 1998 until August 2008, serving as Chief Judge from 2007-08. He

also is the head of the International Insolvency Institute's NGO delegation to UNCITRAL Working Group V on Cross-Border Insolvency and has been a III director. As a member of the Judicial Conference of the U.S. Advisory Committees on Bankruptcy Rules and on the Federal Rules of Evidence, Judge Klein participated in drafting rules of procedure for chapter 15 of the Bankruptcy Code. He is active in the American College of Bankruptcy's International Committee and serves on the American Law Institute's Member Consultative Groups for the Restatement (Third) of The U.S. Law of International Commercial Arbitration and Principles of Transnational Insolvency. His cross-border judicial decisions include *In re Tri-Continental Exchange, Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006), regarding determining a debtor's "center of main interests"; and the Ninth Circuit Bankruptcy Appellate Panel's decision in *Iida v. Kitahara (In re Iida)*, 377 B.R. 243 (B.A.P. 9th Cir. 2007), in which it was held that a foreign bankruptcy trustee does not need chapter 15 recognition or other permission from a U.S. court before exercising ownership and management rights over assets in the U.S., so long as judicial assistance is not needed. Judge Klein received his B.A. and M.A. from Brown and his J.D. and M.B.A. from the University of Chicago, where he was executive editor of its law review.

Dr. Luis Manuel C. Méjan is a part-time professor and researcher in the Law School of the Instituto Tecnológico Autónomo de México (ITAM) in Rio Hondo, Mexico, and has been a lawyer and professor for more than 50 years. After four years of freelance law practice, he joined Banco Nacional de México as a lawyer in its Legal Department, where he worked for 30 years in such positions as executive vice president-legal counselor to the CEO and deputy secretary of the administrative boards of Banco Nacional de México, S. A. and the Financial Group Banamex Accival, S. A. de C.V. Since May 2000 and until December 2009, Dr. Méjan was president of Mexico's Federal Institute of Commercial Insolvency Specialists (Instituto Federal de Especialistas Mercantiles, or IFECOM), the agency in charge of the administration of insolvency proceedings. In that capacity, he chaired the International Association of Insolvency Regulators. He dedicated 2010 as a sabbatical doing some research on insolvency law at the University Pompeu Fabra in Barcelona. In the academic field, Dr. Méjan has been a law professor since 1962 in different educational centers, including as a member of the faculties of the graduate programs at the Universidad Panamericana in Mexico, D. F. and Guadalajara. He is also a lecturer at several universities in the country, professional schools and associations, private groups, service clubs and notary colleges, and lecturer of many seminars and congresses both in México and abroad. Among his publications, Dr. Méjan has authored 13 books and a number of papers, chapters and articles on insolvency matters published in several publications in Mexico and abroad. He is Fellow of the American College of Bankruptcy and a member of the International Insolvency Institute, the Instituto Iberoamericano de Derecho Concursal, the Instituto Iberoamericano de Derecho y Finanzas, the International Exchange of Experience in Insolvency and the Mexican Bar Association. Among other studies, Dr. Méjan holds a law degree from the Universidad Autónoma de Guadalajara, a Ph.D. from the Universidad Nacional Autónoma de México, and a Master's degree in civic and social education.