Bankruptcy 2023:
Views from the Bench

Cross-Border Practice

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U.S. Bankruptcy Court (S.D.N.Y.) | New York

Hon. Scott M. Grossman
U.S. Bankruptcy Court (S.D. Fla.) | Fort Lauderdale

Hon. Christopher M. Klein
U.S. Bankruptcy Court (E.D. Cal.) | Sacramento

2023

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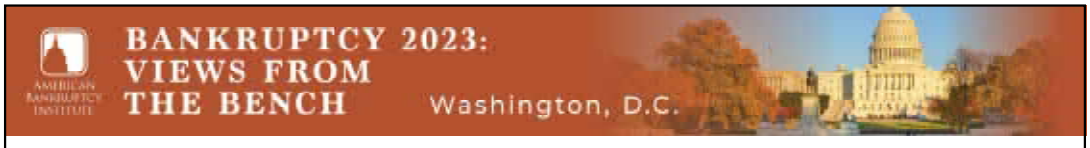

The Panel and Contributors

Panelists
- Honorable Lisa G. Beckerman (Bankr. S.D.N.Y.)
- Honorable Martin Glenn (Bankr. S.D.N.Y.)
- Honorable Scott M. Grossman (Bankr. S.D. Fla.)
- Honorable Christopher M. Klein (Bank. E.D. Cal.)

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BANKRUPTCY 2023: VIEWS FROM THE BENCH Washington, D.C.

Outline and Agenda

- Chapter 15 Eligibility Issues
- Enforcement of Foreign Schemes with Third-Party Releases
- Strategies: Chapter 11 vs. Chapter 15
- When Are Parallel Proceedings Necessary?

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Chapter 15 Eligibility Issues

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BANKRUPTCY 2023: VIEWS FROM THE BENCH Washington, D.C.

Qualification as "Foreign Proceeding"

- A foreign proceeding is:
  1. a collective judicial or administrative proceeding in a foreign country;
  2. under a law relating to insolvency or adjustment of debt;
  3. where the debtor's assets and affairs are subject to control or supervision of a foreign court;
  4. for the purpose of reorganization or liquidation.

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Impact of *Global Cord*

- U.S. courts frequently grant recognition to proceedings based in other common law jurisdictions.
- *Global Cord* took a different approach.
  - The court held that a proceeding commenced by Cayman liquidators was not a "foreign proceeding."
  - The court primarily relied on the text of the applicable Cayman statutes, but it also examined record evidence regarding the liquidators' goals and intentions.
  - The liquidators were authorized to liquidate the company at their discretion, but they believed the company was solvent and hoped to avoid a liquidation.
  - The court thus found that the Cayman proceeding was not a "foreign proceeding" because it wasn't commenced "for the purpose of reorganization or liquidation."
  - The proceeding was more akin to a fraud remediation proceeding.

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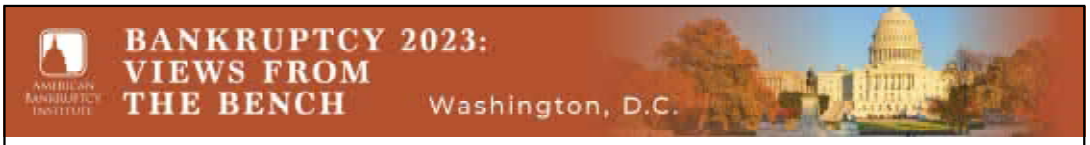

Impact of *Global Cord*

- Does *Global Cord* signal the beginning of a new regime in which a more robust evidentiary process will be a prerequisite to recognition?
- Alternatively, is it explained by the fact that the parties objecting to recognition did a good job of developing a favorable factual record?

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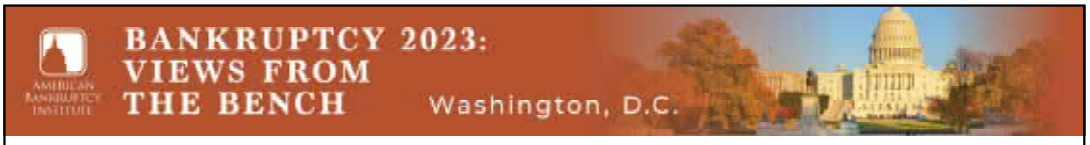

Recognition of HoldCo Offshore Proceedings

- Many Chinese enterprises have holding companies that are registered in the Cayman Islands or BVI.
- These companies often choose to restructure their debts through scheme proceedings in the jurisdiction in which they are registered.
- When they have U.S.-law governed debt, they seek recognition in the U.S.
- Two recent decisions granted recognition of such proceedings as foreign main proceedings:
  - *Modern Land;*
  - *E-House.*

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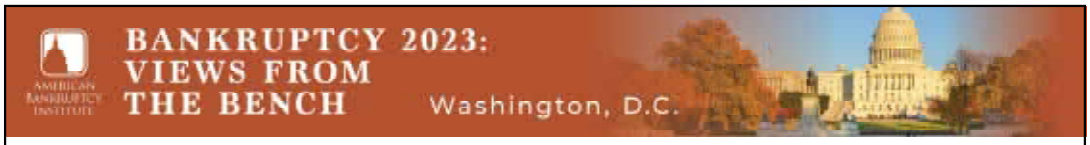

Recognition of HoldCo Offshore Proceedings

- *Modern Land* granted recognition as a foreign main proceeding.
- However, the court concluded that the proceeding did not qualify as a non-main proceeding where there were local counsel retentions, some board meetings, and other local activity in the Cayman Islands.
- What activities truly constitute "non-transitory economic activity"?
- Would the result in *Modern Land* have been different if the local activities had been more robust?
  - Monthly board meetings?
  - If Cayman counsel had been paid a significant retainer?

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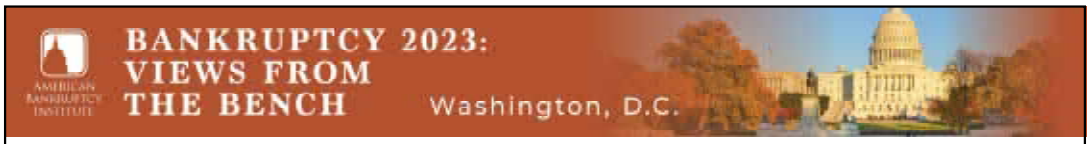

Recognition of HoldCo Offshore Proceedings

- Assumption that if a debtor is subject to a foreign court's jurisdiction that such court's adjustment of a U.S.-law governed debt instrument will be recognized in Chapter 15.
- Would it be appropriate in the Chapter 15 proceeding to allow a U.S. creditor to attack the basis for such foreign court exercising jurisdiction over the debtor?

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Recognition of HoldCo Offshore Proceedings

- What role should the law governing a company's financial indebtedness play in the recognition and enforcement analysis?
  - *Modern Land* – company was seeking to scheme U.S.-law governed debt. Recognition in Hong Kong (where its shares were listed) not necessary.
  - Would the outcome have been different had the debt been issued under a different jurisdiction?
  - Would it have been proper for the bankruptcy court to wait to see if the scheme was recognized in that other jurisdiction?
    - *Global Brands* – suggests that courts in Hong Kong may not recognize Cayman or BVI schemes in the future.
  - How would principles of comity factor into the analysis?

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Modifying a Recognition Order

- Section 1517(d) permits "modification or termination of recognition" where "the grounds for granting it were fully or partially lacking or have ceased to exist."
- Modification:
  - *Comair* – granted a motion to modify a recognition order where the South African proceeding had converted from a reorganization to a liquidation.
  - *Cozumel Caribe* – contemplated whether "suspension" of the foreign proceeding warranted modifying recognition.
  - What are some other circumstances in which it would be proper to modify a recognition order?
- Termination:
  - *Markus* – denied a motion to vacate by largely reaffirming factual findings made at recognition hearing.
  - Given the factual findings bankruptcy courts typically make prior to granting recognition, can you think of a scenario in which dismissal under 1517(d) might be predicated on a ruling that "the grounds for granting [recognition] were fully or partially lacking"?

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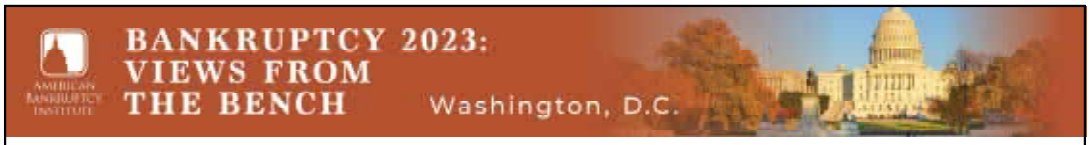

Foreign Schemes with Third-Party Releases

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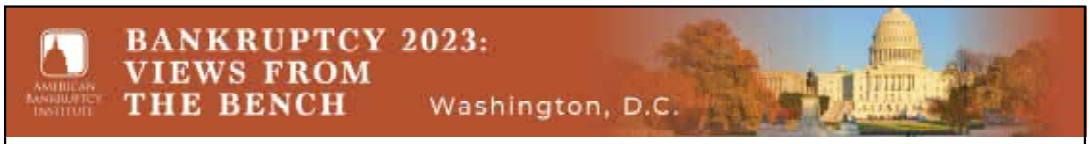

Foreign Schemes with Third-Party Releases

- *Avanti* – key question is whether foreign proceeding affords creditors notice and opportunity to be heard, not whether the relief would be available in a Chapter 11 case.
- Section 1506 – public policy exception.
  - Impact on *Avanti* of a hypothetical Supreme Court ruling that categorically prohibits third-party releases in Chapter 11 plans (*e.g.*, in a forthcoming *Purdue* decision)?
  - What if Congress passes legislation categorically prohibiting third-party releases?
- If Section 1506 would not apply even when a bankruptcy court is presented with a request to enforce a term that is categorically prohibited in a U.S. proceeding, when should it be applied?
- What is the proper role of the courts in gatekeeping after *Highland*?

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Chapter 11 vs. Chapter 15

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Reasons Non-U.S. Companies Seek Chapter 11 Reorganization

- Substantive inadequacies of restructuring regime in home jurisdiction;
- Home jurisdiction lacks mechanism for expedited proceedings;
- Additional avenues to quickly resolve insolvency;
- Creditors and personal jurisdiction;
  - *Alto Maipo* – assumption of executory contracts;
  - *Three Arrows* – contempt;
- Ability to effectuate relief and enforce orders;
- U.S. law governs debt or material contracts;
- Others?
- Impact of new restructuring laws passed in UK, Cayman Islands, and elsewhere?

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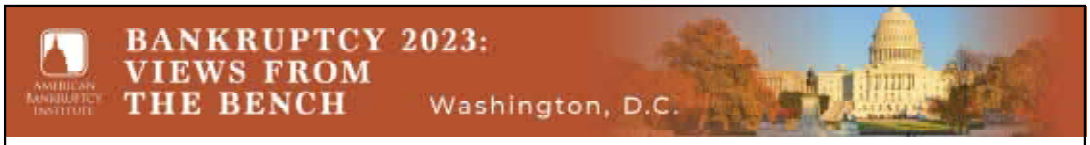

Impact of *Modern Land*

- *Modern Land* eased previous doubts about whether Chapter 15 recognition can discharge U.S.-law governed debt restructured in a foreign proceeding.
- Judge Glenn confirmed that Chapter 15 recognition of a foreign proceeding can completely and validly discharge such debt as a matter of U.S. law.
- Will *Modern Land* affect where foreign companies holding U.S.-law governed debt restructure?
- How will it interact with the U.K.'s *Gibbs* rule?

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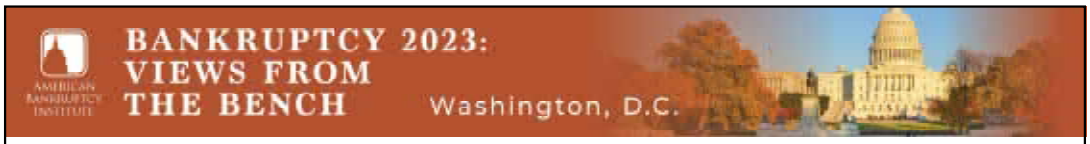

Chapter 11 vs. Chapter 15 – Administration

Chapter 11	Issue	Chapter 15
✓	Involvement of U.S. Trustee	×
✓	Involvement of Official Committees and Related Professionals	×
✓	Retention and Fee Applications for Professionals	×

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Chapter 11 vs. Chapter 15 – Available Relief

Chapter 11	Issue	Chapter 15
✓	Sales Free and Clear	✓
?	Non-Debtor Third Party Releases	✓
✓	DIP Financing	✓
✓	Avoidance Actions	?
✓	Rule 2004 Discovery	✓
✓	Valuation of Business	✓
✓	Automatic Stay	✓
✓	Ability to Address Contracts Pursuant to Section 365	✓

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Necessity of Parallel Proceedings

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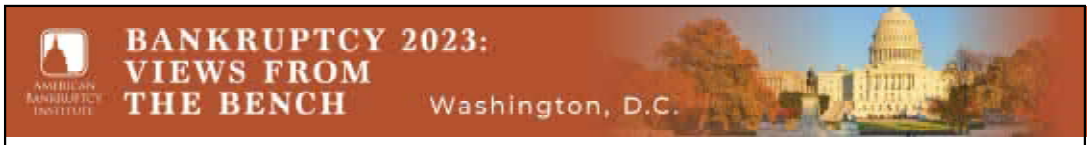

Recognition as a Means of Discharging Debt

- *Modern Land* – recognition needed only in jurisdictions governing issued debts?
- E-House plans to initiate proceedings in three locations:
  - Cayman Islands – it is registered there;
  - The U.S. – it has bonds governed by New York law;
  - Hong Kong – it has convertible notes governed by Hong Kong law.
- How does *Modern Land*'s application of *Agrokor* compare with *Rare Earth*'s?
  - The Hong Kong Judge in *Rare Earth* suggested that, for a non-U.S. scheme that purports to compromise U.S.-governed debt, Chapter 15 recognition would represent a procedural block to creditor action in the U.S. but would not be treated by HK courts as substantively altering the debt for creditors who did not submit to the jurisdiction of the non-U.S. court.
  - Judge Glenn in *Agrokor* granted a Croatian plan Chapter 15 recognition "in full within the territorial jurisdiction of the United States, including the provisions modifying the English law governed debt and the New York law governed debt."

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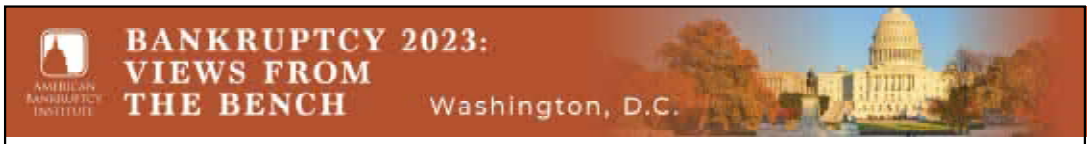

Other Considerations

- Location of creditors;
- Location of assets (including assets that creditors might look to for unsatisfied claims);
- Where the company may be subject to personal jurisdiction in creditor enforcement suits;
- Others?

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Comity Outside Chapter 15 Recognition

- Prior to enactment of Chapter 15, courts often dismissed creditor enforcement actions on comity grounds.
- Post-Chapter 15, some cases suggest that recognition is a prerequisite to granting comity.
  - *Orchard Enter. NY, Inc. v. Megabop Recs. Ltd.*, 2011 WL 832881, at *2 (S.D.N.Y. Mar. 4, 2011) ("Before English Liquidators can appear in this action [to] seek a stay or intervene . . . they must obtain recognition").
- Other cases apply the pre-Chapter 15 principles of comity where the requestor is not a foreign representative.
  - *Moyal v. Munsterland Gruppe GmbH & Co.*, 2021 WL 1963899 (S.D.N.Y. May 17, 2021) ("chapter 15 recognition is not a prerequisite to grant comity to foreign proceedings on the request of a party other than a foreign representative.").
- Can this precedent be reconciled?

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Key Takeaways

- Qualification as a foreign proceeding sometimes requires more than a rote recitation of the governing foreign statute.
- In appropriate circumstances, holding companies registered offshore can prove that their COMI is in the jurisdiction of registration even if their operating subsidiaries are concentrated elsewhere.
- Third-party releases in cases seeking Chapter 15 recognition may soon face additional scrutiny.
- Recent precedent eliminates any doubt that recognition results in discharge of U.S.-law governed debt and may make Chapter 15 a more attractive option.

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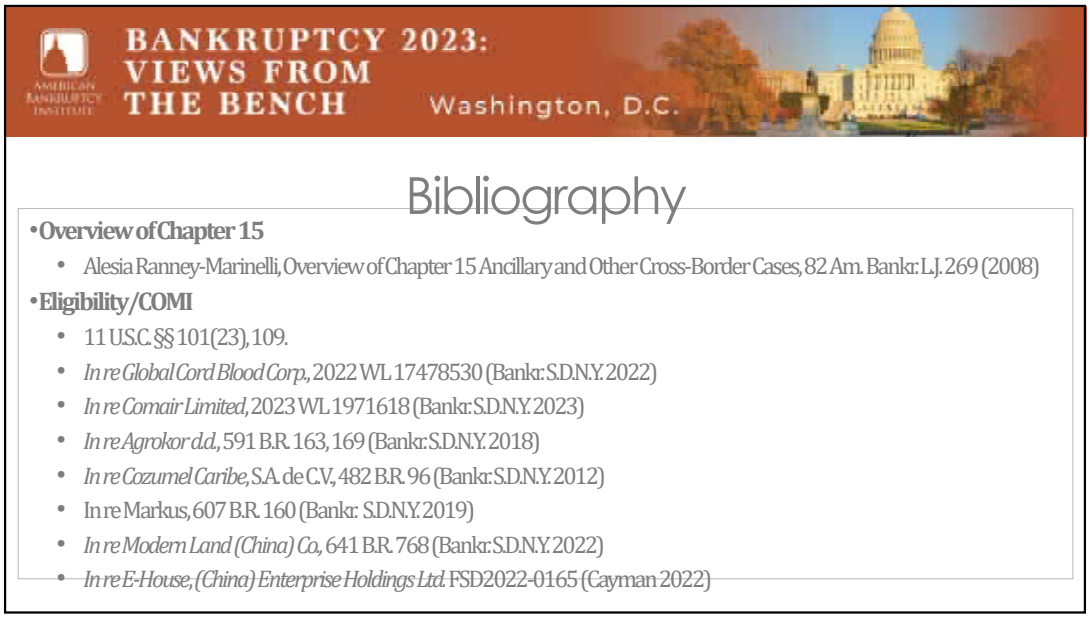
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• Alesia Ranney-Marinelli, Overview of Chapter 15 Ancillary and Other Cross-Border Cases, 82 Am. Bankr. L.J. 269 (2008)
• Eligibility/COMI
• 11 U.S.C. §§ 101(23), 109.
• In re Global Cord Blood Corp., 2022 WL 17478530 (Bankr. S.D.N.Y. 2022)
• In re Comair Limited, 2023 WL 1971618 (Bankr. S.D.N.Y. 2023)
• In re Agrokor d.d., 591 B.R. 163, 169 (Bankr. S.D.N.Y. 2018)
• In re Cozumel Caribe, S.A. de C.V., 482 B.R. 96 (Bankr. S.D.N.Y. 2012)
• In re Markus, 607 B.R. 160 (Bankr. S.D.N.Y. 2019)
• In re Modern Land (China) Co., 641 B.R. 768 (Bankr. S.D.N.Y. 2022)
• In re E-House, (China) Enterprise Holdings Ltd. FSD2022-0165 (Cayman 2022)

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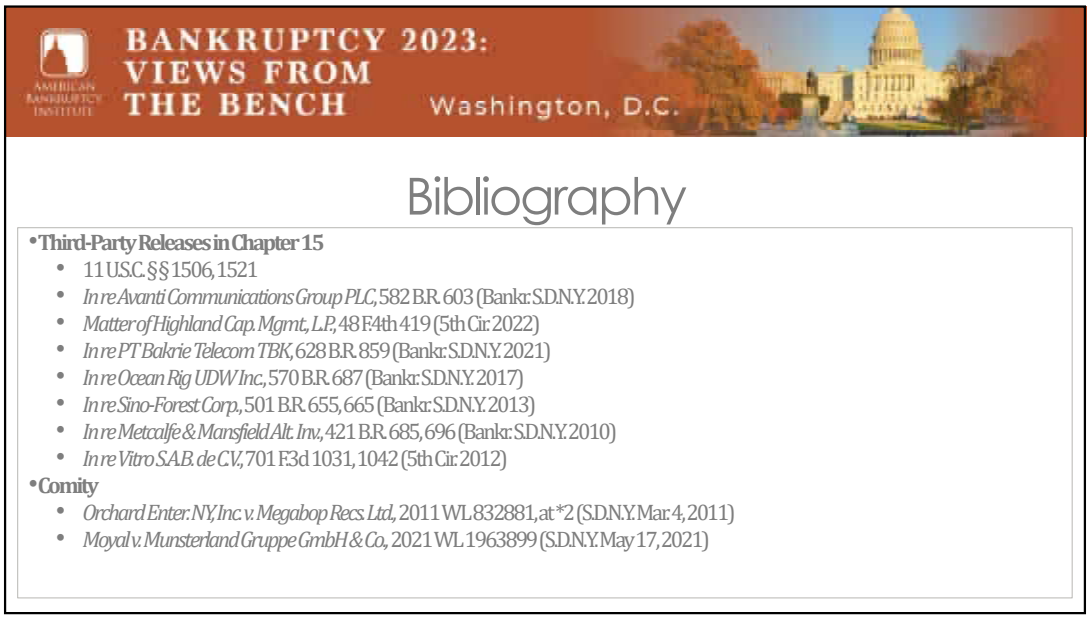
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• 11 U.S.C. §§ 1506, 1521
• In re Avanti Communications Group PLC, 582 B.R. 603 (Bankr. S.D.N.Y. 2018)
• Matter of Highland Cap. Mgmt., L.P., 48 F.4th 419 (5th Cir. 2022)
• In re PT Bakrie Telecom TBK, 628 B.R. 859 (Bankr. S.D.N.Y. 2021)
• In re Ocean Rig UDW Inc., 570 B.R. 687 (Bankr. S.D.N.Y. 2017)
• In re Sino-Forest Corp., 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013)
• In re Metcalfe & Mansfield Alt. Inv., 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010)
• In re Vitro S.A.B. de C.V., 701 F.3d 1031, 1042 (5th Cir. 2012)
• Comity
• Orchard Enter. NY, Inc. v. Megabop Recs Ltd., 2011 WL 832881, at *2 (S.D.N.Y. Mar. 4, 2011)
• Moyal v. Munsterland Gruppe GmbH & Co., 2021 WL 1963899 (S.D.N.Y. May 17, 2021)

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United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 15. Ancillary and Other Cross-Border Cases (Refs & Annos)
Subchapter I. General Provisions

11 U.S.C.A. § 1506

§ 1506. Public policy exception

Currentness

Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.

CREDIT(S)

(Added Pub.L. 109-8, Title VIII, § 801(a), Apr. 20, 2005, 119 Stat. 136.)

Notes of Decisions (17)

11 U.S.C.A. § 1506, 11 USCA § 1506
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 15. Ancillary and Other Cross-Border Cases (Refs & Annos)
Subchapter III. Recognition of a Foreign Proceeding and Relief

11 U.S.C.A. § 1517

§ 1517. Order granting recognition

Currentness

(a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if--

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

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

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

(b) Such foreign proceeding shall be recognized--

(1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or

(2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.

(c) A petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time. Entry of an order recognizing a foreign proceeding constitutes recognition under this chapter.

(d) The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under this chapter may be closed in the manner prescribed under section 350.

CREDIT(S)

(Added Pub.L. 109-8, Title VIII, § 801(a), Apr. 20, 2005, 119 Stat. 139.)

Notes of Decisions (46)

§ 1517. Order granting recognition, 11 USCA § 1517

11 U.S.C.A. § 1517, 11 USCA § 1517
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

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591 B.R. 163
United States Bankruptcy Court, S.D. New York.

IN RE: AGROKOR D.D., et. al., Foreign Debtors.

Case No. 18-12104
|
Signed October 24, 2018

Synopsis

Background: Foreign representative of debtor companies that were the subject of restructuring procedure pending in Croatia sought recognition of Croatian proceeding as foreign main proceeding, as well as related relief.

The Bankruptcy Court, Martin Glenn, J., held that bankruptcy court, in the exercise of comity, would recognize and enforce restructuring plan reached in Croatian proceeding with respect to foreign debtors within the territorial jurisdiction of the United States, if the approval of the Croatian court became final.

Ordered accordingly.

Procedural Posture(s): Motion for Recognition as Foreign Main or Nonmain Proceedings.

Attorneys and Law Firms

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KIRKLAND & ELLIS LLP, Counsel to the Foreign Representative, 300 North LaSalle, Chicago, Illinois 60654, By: Adam C. Paul, Esq., Brad Weiland, Esq., Whitney Fogelberg, Esq.

MEMORANDUM OPINION GRANTING RECOGNITION AND ENFORCEMENT OF FOREIGN DEBTORS' SETTLEMENT AGREEMENT WITHIN THE TERRITORIAL JURISDICTION OF THE UNITED STATES

MARTIN GLENN, UNITED STATES BANKRUPTCY JUDGE

Agrokor d.d. ("Agrokor") and eight debtor affiliates filed these Chapter 15 cases. [1] They are a small part of a larger group of 77 companies headquartered in the Republic of Croatia that are the subject of an extraordinary administration proceeding in a Croatian court under a new Croatian law applicable to systemically important business entities or groups. The foreign representative appointed by the Croatian court (the "Foreign Representative" or "Extraordinary Administrator") asks this Court to recognize the Croatian proceeding as a foreign main proceeding, to recognize him as the foreign representative and to recognize and enforce the restructuring plan reached in the Croatian proceeding (the "Settlement Agreement") within the territorial jurisdiction of the United States.

The proceeding in Croatia (the "Croatian Proceeding") was filed under Croatia's "Act on the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia" (the "EA Law"). The statute's purpose is the "protection of sustainability of operations of the companies of systemic importance for the Republic of Croatia which with its operations individually or together with its controlled or affiliated companies affect the entire economic, social, and financial

stability of the Republic of Croatia." The ***166** law was adopted on April 7, 2017, shortly before Agrokor and its debtor affiliates commenced the proceeding in the Croatian court. The new law will be available to all companies that are determined to be systemically important to the Republic of Croatia; it is not a specialized law only applicable to Agrokor. That said, Agrokor and its debtor affiliates' (the "Agrokor Group") financial distress and the resulting threat of systemic impact upon the Croatian economy was, no doubt, the impetus for the creation of the new law.

One of the more controversial aspects of the EA Law is that its provisions for reorganization and adjustment of debts apply to enterprise groups of companies that have a principal place of business in Croatia and exist under Croatian law, though they may operate both in and outside of Croatia. In this case, while 77 companies of the group are based in Croatia, they are part of a larger group of approximately 155 companies that operate outside of Croatia as well. How to deal with the cross-border insolvency of enterprise groups raises some of the most important issues in evolving cross-border insolvency law and practice. [2]

The Agrokor Group was, and remains, the largest private company by revenue in Croatia. It was insolvent and qualified by amount of debt and number of employees for eligibility to file under the EA Law. Once a company qualifies for an extraordinary administration proceeding, the Croatian statute includes provisions for the negotiation, acceptance by creditors and approval by the Croatian court of a settlement agreement—essentially a plan of reorganization that adjusts the debt and ownership interests of distressed companies. In accordance with the law's provisions, the Settlement Agreement was successfully negotiated, approved by the requisite vote of creditors and then approved by the Commercial Court of Zagreb in Croatia. Final approval of the Settlement Agreement is pending in the High Commercial Court, where 92 appeals were lodged against the ruling confirming the Settlement Agreement. According to counsel to the Foreign Representative's *Brief in Further Support*, the decisions of the High Commercial Court are not expected before the end of November 2018. ("Brief in Further Support," ECF Doc. # 24 ¶ 45.) The Foreign Representative asks that, in addition to recognizing him as the "foreign representative" within the meaning of the Bankruptcy Code and recognizing the Croatian Proceeding as a foreign main proceeding within the meaning of the Bankruptcy Code, this Court should also recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States.

The requests to recognize the Foreign Representative as the "foreign representative," and the Croatian Proceeding as a foreign main proceeding, present relatively straightforward questions of the application of Chapter 15; both requests were approved by this Court in an Order entered on September 21, 2018. (ECF Doc. # 30.) That Order reserved decision on the request to recognize and enforce the Settlement Agreement, as it raised more challenging issues.

Recognition and enforcement of the Settlement Agreement within the territorial jurisdiction of the United States require this Court to determine whether it may and should enforce provisions of the Settlement Agreement that modify English law governed debt. While the Croatian ***167** Proceeding of Agrokor has been recognized as a foreign main proceeding in the High Court of England and Wales, that court has not so far been asked to recognize and enforce the Settlement Agreement. English case law may not permit a court outside of England and Wales (such as the Croatian court that approved the Settlement Agreement) to approve a discharge or modification of English law governed debt so that recognition and enforcement of the Settlement Agreement by that court might not be granted. For the reasons explained below, however, the Court resolves this challenging issue, recognizing and enforcing the Settlement Agreement, including the provisions modifying the English law governed debt, within the territorial jurisdiction of the United States. [3]

This case presents challenging issues with very practical consequences. The Foreign Debtors (with their COMI in Croatia) presently have over €1,660 million of debt governed by English law (English Law Governed Loans, defined below) and over €925 million of debt governed by New York law (New York Law Governed Notes, defined below); thus, the majority (about 64%) of the debt to be restructured under the Settlement Agreement is governed by English law. Can it really be that a court in Croatia that properly has jurisdiction over the Foreign Debtors' insolvency proceeding cannot oversee and approve the Foreign Debtors' reorganization, and the resolution of all claims against the Foreign Debtors, under a national insolvency law and court procedures that satisfy widely recognized standards of fairness and due process? More directly to the point, should a U.S. Bankruptcy Court decline to extend comity to the decision of the court in Croatia to recognize and enforce within the territorial

jurisdiction of the United States the Settlement Agreement that was approved by the required vote of creditors and by the court in Croatia in a proceeding that satisfied due process standards? Of course, such a decision by this Court recognizing and enforcing the Settlement Agreement would not mean that the Settlement Agreement would be recognized and enforced in other countries. So, the Foreign Debtors might well be wise either to seek recognition and enforcement of the Settlement Agreement in the courts of England and Wales, or to commence an insolvency proceeding or scheme of arrangement in England, if either of those things can be done, even if it requires costly and duplicative proceedings in England.

The difficulties here arise because the courts in England and Wales still apply the so-called "*Gibbs* " rule, based on an 1890 decision of the Court of Appeal in *Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399 (hereinafter, "*Gibbs* "). While *Gibbs* is discussed further below, the essence of the decision is that where a debtor, in that case domiciled in France, made a contract governed by English law and to be performed in England, was declared a bankrupt and its debts discharged under foreign law in a foreign proceeding (there, French law in a French proceeding), the plaintiff was not bound by the discharge and could maintain an action on ***168** the contract and recover damages in an English court. *Id.* at 406. So, then, can Agrokor's creditors holding English law governed debt (or, at least, those creditors who did not approve of the Settlement Agreement or did not submit to the jurisdiction of the court in Croatia) bring an action in the courts of England to recover damages on the old English law governed debt? And, even if the creditors can do so in the courts in England, should that prevent this Court from recognizing and enforcing the Settlement Agreement and barring any efforts by creditors to enforce the original debt obligations within the territorial jurisdiction of the United States? While not determinative of the outcome, it should not be lost on anyone that this Court, based on comity principles, has recognized and enforced an English court decision modifying New York law debt in an English scheme of arrangement proceeding. *See In re Avanti Commc'n Grp. PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018).

Whether the *Gibbs* rule as written still applies more than 120 years after the decision was rendered remains an important issue in cross-border insolvency cases, particularly because of the substantial changes that have taken place across the globe in insolvency laws and recognition and enforcement of decisions of other courts. Courts in England and Wales, and elsewhere, still grapple with the *Gibbs* rule and the issue is currently on appeal in the Court of Appeal of England and Wales. Whatever the outcome of that decision, the matter remains to be decided by this Court whether to recognize and enforce the Settlement Agreement approved by the court in Croatia within the territorial jurisdiction of the United States. [4]

In deciding whether to recognize and enforce the Settlement Agreement, the Court will also discuss the outcomes in recognition proceedings the Foreign Debtors filed in other jurisdictions. Those proceedings resulted in a patchwork of decisions, recognizing the Croatian Proceeding in cross-border cases in England and Switzerland and denying recognition in cross-border cases in Bosnia-Herzegovina, Montenegro, Serbia and Slovenia. As already stated, this Court has already entered an order recognizing the Croatian Proceeding as a foreign main proceeding. The Court will discuss the rationale of the courts that have either recognized or refused to recognize the Croatian Proceeding. But recognition of the Croatian Proceeding as a ***169** foreign main proceeding in this Court is determined by the relevant provisions of the Bankruptcy Code and not by the decisions of the other courts.

Additionally, the Settlement Agreement releases and discharges written guarantees by non-debtor affiliates of both the English law and New York law debt. In appropriate circumstances in Chapter 15 cases, this Court has recognized and enforced such releases. The Court concludes here that those provisions in the Settlement Agreement should be recognized and enforced in these Chapter 15 cases with respect to the nine Foreign Debtors that filed these Chapter 15 cases.

Based upon the analysis that follows, the Court believes that recognition and enforcement of the Settlement Agreement within the United States with respect to the nine Foreign Debtors is an appropriate exercise of comity and application of U.S. law.

I. BACKGROUND

A. The Agrokor Group

Agrokor is the parent company of more than 155 direct and indirect subsidiaries, including not fully owned subsidiaries. ("Settlement Agreement," ECF Doc. # 4 Exhibit C § 3.1.2.) It is a joint stock company under the laws of the Republic of Croatia and has registered share capital amounting to HRK 180.1 million. (*Id.* § 3.1.1.) The shares are divided into 360,246 regular registered shares (which are designated AGKR-R-A), each of which hold a nominal value of HRK 500.00 per share. (*Id.*)

According to the *Verified Petition for (I) Recognition of Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief Under Chapter 15 of the Bankruptcy Code* ("Verified Petition," ECF Doc. # 4), Agrokor and its subsidiaries that have at least 25% of their shares held by Agrokor are subject to the Croatian Proceeding and are referred to as the EA Group, as set forth in article 5, paragraph 2 of the EA Law, described below. There are currently 77 Agrokor Group entities that are parties in the Croatian Proceeding, although as already indicated, only nine of those companies filed the Chapter 15 petitions in these cases. (Verified Petition at 1.) Approximately 80 direct and indirect affiliates of Agrokor that are part of the Agrokor Group are not based in Croatia and are not parties to the extraordinary administration proceeding in Croatia. Those companies predominately operate in Slovenia, Serbia and Bosnia-Herzegovina. [5]

B. Business of the Agrokor Group

The Agrokor Group has been in operation since 1989 and, today, is one of the largest companies in Croatia. ("Declaration of Foreign Representative," ECF Doc. # 5 ¶ 4.) The Agrokor Group's primary businesses include Croatia's largest supermarket chain (Konzum d.d.), producer of mineral and spring water (Jamnica d.d.), and producer and distributor of ice cream and frozen foods (Ledo d.d.). In addition, the Agrokor Group contains businesses related to food, agriculture and other sectors. (Declaration of Foreign Representative ¶ 4.)

***170** In April 2017, at the start of the Croatian Proceeding, Agrokor employed more than 60,000 people across Croatia, Slovenia, Serbia and Bosnia-Herzegovina. Its annual revenue was approximately €6.5 billion, which represents approximately 15 percent of the gross domestic product of Croatia. Suppliers and other businesses that are dependent on the Agrokor Group's operations represent a significant further proportion of Croatia's gross domestic product. (Declaration of Foreign Representative ¶ 5.)

Agrokor is structured as a holding company and has historically overseen M & A transactions on behalf of the Agrokor Group. It also sought to provide group-wide: (1) financial reporting, (2) management of capital markets financing and (3) facilitation of operational synergies following M & A transactions. Agrokor's main assets from a macroeconomic perspective are shareholdings in and loans to its operating subsidiaries. Additionally, these subsidiaries pay management fees to cover the costs of central management. (Settlement Agreement § 3.4.) In more concrete terms, Agrokor owns the following key assets, allowing it to perform the above operations, collectively forming the Agrokor Group: (1) shares in its subsidiaries and minority shareholdings in certain other entities; (2) loans, deposits and other receivables due to the debtor; and (3) certain directly owned real estate (including buildings, tools, plants and machinery). (*Id.*)

C. Capital Structure

In late 2016, Agrokor undertook a substantial refinancing of its existing unsecured debt. (Declaration of Foreign Representative ¶ 6.) Lenders were granted springing maturity clauses in new and amended facilities. (*Id.*) The terms of these new and amended facilities were structured such that each facility would mature early if Agrokor failed to refinance a PIK loan issued by its non-debtor parent company, Adria Group Holding BV (the "PIK Loan") by March 8, 2018. (*Id.*) The PIK Loan was, in turn, secured by a pledge granted by Adria Group Holding BV of all shares it held in Agrokor. (*Id.*) As part of this refinancing, Agrokor also sought a syndicated facility (the "F2 Club Loan") to refinance its existing bonds. (*Id.* ¶ 7.) The F2 Club Loan was entered and the syndication process began in September 2016. (*Id.*) However, the syndication process failed approximately half a year later, in January 2017. (*Id.*) Agrokor began to experience liquidity strains because of, among other things, concerns arising from the

failure of the F2 Club Loan syndication, the impact of the PIK Loan springing maturity clauses and the information provided in Agrokor's accounting records. (*Id.* ¶ 8.)

In response to these liquidity concerns, Agrokor sought new financing and ultimately entered the €100 million loan with Sberbank ("Sberbank Loan") in early 2017. (*Id.* ¶ 9.) The Sberbank Loan proved insufficient to avoid an insolvency proceeding. (*Id.*) As a result, on April 7, 2017, Agrokor filed for the commencement of the Croatian Proceeding under the EA Law. The Croatian Proceeding was commenced by order of the Commercial Court of Zagreb (the "Croatian Court") on April 10, 2017, supplemented on April 21, 2017, July 5, 2017 and July 13, 2017 (the "Commencement Order"). (*Id.*)

The valuation of the assets of the Agrokor Group took a substantial blow after the commencement of the Croatian Proceeding. Agrokor announced on April 27, 2017 that there were potential irregularities in its 2016 financial statements which would result in a delay of the publication of its financials. Following this announcement, in May of 2017, PricewaterhouseCoopers ***171** ("PWC") was appointed as auditor of the Agrokor Group's Croatia-based companies. In accordance with audit requirements, PwC undertook an audit of twenty-seven of the Agrokor Group's companies in the Republic of Croatia, three companies in Serbia and three companies in Bosnia-Herzegovina. (Settlement Agreement § 3.7.) The consolidated changes in equity in the period from December 31, 2015 to December 31, 2016 resulted in a total equity reduction of approximately €2.9 billion. Overall, this meant that liabilities exceeded total assets by HRK 14.5 billion (€1.9 billion) for that period. (*Id.*) On December 31, 2017, liabilities exceeded total assets by HRK 23.3 billion, a reduction of approximately HRK 9 billion from the preceding year.

The financial results for 2017, published by the Extraordinary Administrator on May 14, 2018, showed that liabilities exceeded assets for that period as well. This financial statement described a consolidation of 105 companies over which the Foreign Debtors exercised control, 52 of which are in the Republic of Croatia (the consolidated group as described in the 2017 Annual Report, "Consolidated Group"). (*Id.*)

1. U.S. Debt

As of the opening of the EA Proceeding, the Settlement Agreement described the total amount of third-party financial liabilities of Agrokor and some of its subsidiaries at HRK 31.5 billion. One large chunk of this debt is comprised of unsecured notes governed by New York law. According to the Settlement Agreement, the Agrokor Group issued the following unsecured notes (the "New York Law Governed Notes" or "Notes"):

(1) EUR 325 million 9.125% New York law governed senior notes due to mature in 2020 and USD 300 million 8.875% New York law governed senior notes due to mature in 2020 issued by the Debtor pursuant to an indenture dated as of 10 October 2012; and

(2) EUR 300 million 9.875% New York law governed senior notes due to mature in 2019 issued by the Debtor pursuant to an indenture dated as of 25 April 2012.

(Settlement Agreement § 3.5.1.1; *see also* Brief in Further Support, ECF Doc. # 24 ¶ 12.)

2. English Debt

The Agrokor Group has substantial additional liabilities governed by English law. The Settlement Agreement lists the following unsecured bank debt obligations (the "English Law Governed Loans"):

(1) EUR 600 million English law governed loan facility agreement dated 14th March 2014, as amended from time to time, between, among others, Agrokor and Sberbank of Russia and Sberbank Europe AG;

(2) EUR 50 million English law governed loan facility agreement dated 16th July 2015, as amended from time to time, between, among others, Agrokor and Sberbank Europe AG;

(3) EUR 350 million English law governed loan facility agreement dated 28th April 2016, as amended from time to time, between, among others, Agrokor and Sberbank of Russia;

(4) EUR 100 million English law governed term loan facility agreement dated 21st February 2017, as amended from time to time, between, among others, Agrokor and Sberbank of Russia (the "EUR 100m Sberbank Loan");

(5) EUR 100 million English law governed loan facility agreement dated 14th September 2016, as amended from time to time, between, among others, Agrokor and a group of lenders;

(6) EUR 100 million English law governed syndicated loan facility agreement ***172** dated 14th September 2016, as amended from time to time, between, among others, Agrokor and a group of lenders (the F2 Club Loan); and

(7) EUR 360 million English law governed loan facility agreement dated 21st June 2014, and as amended by way of an amendment agreement dated 28th October 2016, between, among others, Agrokor and VTB Bank (Austria) AG.

(Settlement Agreement § 3.5.1.2*; see also* Brief in Further Support ¶ 12.)

3. Third Party Releases

There are two forms of third-party releases contemplated by the Settlement Agreement. The Verified Petition of the Foreign Debtors argues that this Court should enforce the Settlement Agreement and the third-party releases contemplated therein. The Verified Petition provides, in relevant part: "The Settlement Agreement contains the Trustee Release and the Bosnian-Herzegovinian Guarantor Release. The Trustee Release Parties and the Bosnian-Herzegovinian Guarantors are not debtors in the Croatian Proceeding. As explained below, this Court may nevertheless adhere to principles of comity and enforce the Trustee Release and the Bosnian-Herzegovinian Guarantor Release." (Verified Petition ¶ 70.)

The English Law Governed Loans and New York Law Governed Notes both benefit from guarantees granted by the following entities: Agrokor Trgovina d.o.o.; Ledo d.d.; Jamnica d.d.; Konzum d.d.; PIK-Vinkovci d.d.; Zvijezda d.d.; Belje d.d.; Vupik d.d.; Ledo d.o.o. Čitluk; Sarajevski kiseljak d.d.; and Konzum d.o.o. Sarajevo. (Verified Petition ¶ 20.) Of the guarantors, the following are Foreign Debtors: Agrokor Trgovina d.o.o.; Ledo d.d.; Jamnica d.d.; Konzum d.d.; PIK- Vinkovci d.d.; Zvijezda d.d.; Belje d.d.; and Vupik d.d. The remaining entities—namely Ledo d.o.o. Čitluk; Sarajevski kiseljak d.d.; and Konzum d.o.o. Sarajevo—are the "Bosnian-Herzegovinian Guarantors," as described in the Verified Petition.[6] (Verified Petition ¶ 63.) These three entities are not Foreign Debtors in these Chapter 15 cases and nothing in this Opinion determines the rights of these entities or of their creditors. The Bosnian-Herzegovinian Guarantors are affiliates of Agrokor. (Annex 2 to the Settlement Agreement) (not available on ECF.) The Bosnian-Herzegovinian Guarantor Release is provided for in section 29.8 of the Settlement Agreement, which is titled "Releases." (Settlement Agreement § 29.8.)

The final sentence of section 29.8.1 of the Settlement Agreement, which deals ***173** with releases, contains a carve out. It clarifies that directors, officers and members of management or supervisory boards of any member of the Agrokor Group are not released from liability arising from their conduct. The section states:

> [N]othing in this Cl. 29.8.1 shall operate or be construed to release any person who was a director and/or officer (or member of the management board or supervisory board) of any member of the Agrokor Group

> prior to the commencement of the EA Proceedings from any liability arising from his or her conduct in such capacity prior to that time.

(Settlement Agreement § 29.8.1.) Two of the Bosnian-Herzegovinian Guarantors—Ledo d.o.o. Čitluk and Sarajevski kiseljak d.d.—are affiliates of the Foreign Debtors and listed as voting "FOR" the Settlement Agreement. ("Croatian Court Order Approving the Settlement Agreement," ECF Doc. # 4 Exhibit B at 302–07.) Both are listed as creditors in voting class B. (*Id.*)

The Court believes it must consider whether these "insider" votes (and any other "insider" votes) taint approval of the Settlement Agreement insofar as recognition and enforcement is concerned. As this Court explained in *In re Avanti Commc'ns. Grp. PLC*, 582 B.R. at 617–18, the Fifth Circuit in *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1043 (5th Cir. 2012), affirmed a bankruptcy court's decision in a Chapter 15 case declining to grant comity and to enforce a Mexican court order approving a Mexican reorganization plan that released guarantees of US-based non-debtor affiliates of the Mexican debtor's debt. The *Vitro* plan created only a single class of unsecured creditors and the necessary creditor votes to approve the plan were only achieved by counting the votes of insiders. *In re Vitro S.A.B. de C.V.*, 701 F.3d at 1039. Insider votes are not counted under the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(10) ("If a class is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, *determined without including any acceptance of the plan by any insider*.") (emphasis added). Absent the subsidiaries' votes of intercompany debt in favor of the plan, the *Vitro* plan could not have been approved. *Vitro*, 701 F.3d at 1039. Because the Settlement Agreement here was approved by the required majority vote of creditors, even excluding the "insider" affiliate votes, the Court concludes that *Vitro* does not stand in the way of recognition and enforcement of the Settlement Agreement. Of the total number of creditors entitled to vote, 78.52% of non-insiders by claim amount voted in favor of the plan—this is comfortably above the requisite two-thirds of all voting creditors by claim amount necessary to confirm the plan without including the votes of affiliates.

Section 18.3.2 of the Settlement Agreement discusses the trustee release of BNY Mellon. The agreement provides:

> To the maximum extent permitted under New York law, having regard for (i) the critical, ministerial services heretofore performed and to be performed by BNY Mellon in its respective capacity as trustee of the Notes under the relevant Indenture and pursuant to this Settlement Plan, (ii) the risk that BNY Mellon could incur further fees and expenses under the broad expense reimbursement and indemnification provisions of the Notes and the Indentures to the detriment of the [Agrokor], the Bond Guarantors, their Creditors and their estates, and (iii) the reasonable, commercial expectations of the Noteholders, the [Agrokor] and the Bond Guarantors that the terms of the Notes and the Indentures will be upheld and enforced as written under New York law, each of the [Agrokor], ***174** the Bond Guarantors and the Noteholders, as of the Settlement Confirmation Date, shall be deemed to have unconditionally released BNY Mellon in its respective capacity as trustee of the Notes under the relevant Indenture, and its current and former affiliates and subsidiaries, and such entities' and their current and former officers, directors, managers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, assigns, principals, members, employees, agents, attorneys, consultants, advisors, representatives and other professionals (the "Trustee Released Parties") from any and all claims, obligations, suits judgments, damages, rights, causes of action and liabilities arising from, in connection with, or relating to the Notes or the Indentures, which any such party may be entitled to assert, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise ....

(Settlement Agreement § 18.3.2.)

The section goes on to clarify that BNY Mellon will not be released from any claims for gross negligence or willful misconduct in BNY Mellon's actions as trustee of the Notes. Additionally, BNY Mellon is not deemed released from its obligations in its capacity as trustee of the Notes to take actions necessary under the Settlement Agreement. BNY Mellon and BNY Mellon Corporate Trustee Services Limited are shown as comprising their own class—class C—out of a list of 664 creditors grouped into classes A through E, as listed in the Croatian Court Order Approving the Settlement Agreement. (ECF Doc. # 4 Exhibit D at 287.)

D. Settlement Agreement

Under the Settlement Agreement, [7] the following waterfall is provided for the priority of claims:

(1) Estate Claims. Unpaid prepetition employee claims; certain court costs, fees, and expenses incurred in connection with the Croatian Proceeding; and post-petition claims have priority over all other claims of the EA Group.

(2) SPFA Claims. Amounts outstanding under the Super-Priority Term Facilities Agreement.

(3) Unsecured Claims. All unsecured claims including deficiency claims, intercompany claims and unsecured guarantees of other entities' claims.

(4) Equity Value. Equity value consists of the remaining Distributable Value after all debt claims are satisfied in full.

(Settlement Agreement § 7.5.)

Impaired claims with a Settlement Recovery amount of less than HRK 40,000 (equivalent to approximately $6,151.48 as of August 10, 2018) (the "Minor Impaired Claims") will receive a payment of a monetary amount in euros, corresponding to the Settlement Recovery of such claim (the "Cash-Out Payment"). (Settlement Agreement § 16.1.2.) The difference between the registered amount of the Minor Impaired Claim and the Settlement Recovery amount paid as a Cash-Out Payment will be discharged. (*Id.*)

Impaired Claims with a Settlement Recovery amount of HRK 40,000 and above will receive a combination of depository receipts of Aisle STAK, which holds all the shares of Aisle Dutch TopCo (the "Depository Receipts") and convertible bonds of Aisle Dutch TopCo in an aggregate nominal amount of up to €1,149 million (the ***175** "Convertible Bonds"). (Settlement Agreement § 5.4.) The percentage recovery to the holders of English Law Governed Loans and New York Law Governed Notes is projected to be 50.8 percent.

Each of the Foreign Debtors has secured debt obligations, including loans and operating leases to specific Agrokor Group entities that are secured by share pledges and fixed security over the Agrokor Group's real estate assets. Like section 506(a)(1) of the Bankruptcy Code, a portion of each secured claim against the Foreign Debtors in the Croatian Proceeding will be treated as an unsecured prepetition claim against the debtor entity (and an unsecured prepetition liability) to the extent that the amount of the secured claim exceeds the value of the related secured collateral. (*See* Settlement Agreement § 5.1.)

For secured claims with a separate satisfaction right ("SSR") against any of the Foreign Debtors where the debtor is either (a) the owner of the collateral of the relevant SSR (a "Sole Security Debtor") or (b) if more than one EA Group member granted an SSR, the owner of the collateral that comprises over 50 percent of the total value of SSR securing the relevant claim (a "Main Security Debtor") will assume the secured obligation. More specifically, the holder of such secured claim will retain its SSR and receive a monetary claim in an amount equal to the appraised value of the collateral. (*See* Settlement Agreement § 23.2.1.) This secured claim will be paid back over an eight-year term following a grace period, which is the greater of the original maturity date or two years after the Implementation Commencement Date, at an interest rate of three percent that accrues during the grace period and increases by two percent if in default. (Settlement Agreement § 23.2.1.)

For secured claims with an SSR against any of the Foreign Debtors where the debtor is not a Sole Security Debtor or the Main Security Debtor, the holder of such secured claim will retain its SSR and receive a monetary claim against Aisle HoldCo, in an amount equal to the appraised value of the collateral, and such claim will be paid back over an eight-year term following a grace period, which is the greater of the original maturity date or two years after and the Implementation Commencement Date, at an interest rate of three percent that accrues during the grace period and increases by two percent if in default. The amount of any secured claim of any of the Foreign Debtors that exceeds the appraised value of all objects of the SSR is treated as an unsecured claim. (Settlement Agreement § 23.2.2.)

E. Recognition of the Croatian Proceeding in Other Jurisdictions

Though the EA Law aims to centralize a debtor's claims in a single court, several jurisdictions have refused to recognize the Croatian Proceeding under their own laws. According to the *Memo on Foreign Recognition Hearings* ("Memo on Foreign Hearings," ECF Doc. # 21) at least some of the Agrokor Group sought recognition of the Croatian Proceeding in six jurisdictions in addition to the United States. Of these foreign recognition requests, only Switzerland has made a final decision to recognize the commencement of the Croatian Proceeding and to give effect to the Extraordinary Administrator to represent debtors and to deal with their assets in Switzerland under the Swiss International Private Law Act. (*Id.* at 4.) The High Court of England and Wales also agreed to recognize the Croatian Proceeding of Agrokor, but an appeal of that decision is pending. Appeals of decisions *rejecting* recognition of the Croatian Proceeding are pending in ***176** Slovenia, Serbia, Bosnia-Herzegovina and Montenegro. (*Id.* at 13–122.) A summary of the foreign recognition proceedings relating to the Croatian Proceeding follows. [8] These decisions have no direct impact upon the decision to recognize and enforce the Croatian Proceeding and Settlement Agreement in the U.S.

1. Slovenia

The Supreme Court of the Republic of Slovenia ("Slovenian Court") decided the issue on March 14, 2018. (ECF Doc. # 21 at 13.) The Slovenian Court explained:

> Since the recognition of a foreign court decision means recognition of its legal effects on the territory of the Republic of Slovenia, only a decision (procedure) which corresponds to the fundamental legal principles of procedures due to insolvency under ZFPPIPP may be recognized. A recognition of a foreign extraordinary administration procedure, that does not ensure an equal treatment of creditors, would adversely affect the public interest of the Republic of Slovenia, which in domestic insolvency procedures determines (and safeguards) the common (basic) principle of equal treatment of creditors, whereas in insolvency procedures with an international element (on its territory) recognizes only financial restructuring procedures or liquidation procedures of the debtor for the joint account of all creditors (which corresponds to the principle of equal treatment of creditors).

(*Id.* at 27.)

The Slovenian Court proceeded to explain that the EA Law (and therefore the Croatian Proceeding) should not be recognized, primarily because it does not comply with Slovenia's insolvency rule that creditors of equal standing should be provided equal treatment. The Slovenian Court states, "it does not even provide the basic rights the creditors would have under the Slovenian insolvency legislation." (*Id.* at 28.) Additionally, the Slovenian Court argues that the extraordinary administration procedure envisioned by the EA Law is subordinated to the interests of Croatia, since the Croatian government selects the extraordinary administrator to conduct the debtor's business. (*Id.*) While not entirely clear, it appears that the Slovenian Court was concerned

that the EA Law serves the purpose of protecting the Croatian economy by providing a new form of relief on a somewhat *ad hoc* basis as needed for Agrokor and its subsidiaries.

The Slovenian Court also notes that other countries rejected the recognition of the Croatian extraordinary administration procedure and argued that since several of these countries had laws arising out of the former Yugoslavian Compulsory Composition, Bankruptcy and Liquidation Act (SPPSL), that in a broader public policy context of the region, recognition would not be "justified and proportional." (*Id.* at 28.) Four days after the Supreme Court of the Republic of Slovenia rejected the application for recognition of the Croatian Proceeding, the Extraordinary Administrator appealed that decision to the Constitutional Court of Slovenia; that appeal remains pending.

2. Serbia

The Commercial Appellate Court for the Republic of Serbia confirmed rejection of the Croatian Proceeding on November 13, 2017. (*Id.* at 32.) The Serbian court found that under article 174, paragraph 2 of its ***177** Law on Bankruptcy, the Croatian extraordinary administration procedure could not be found to be a "foreign proceeding." (*Id.* at 45.) The court provides several grounds for this conclusion. One issue the Serbian court notes is that the EA Law is not a general law that governs all insolvency in Croatia, but rather is a *sui generis* regulation adopted to protect companies of systemic importance to the Republic of Croatia. The court found it problematic that the level of protection determined under the EA Law is determined by the interest of the Republic of Croatia as opposed to the interests of creditors. (*Id.*) The court states, "the aim of this regulation ... is not the aim of the collective settlement of creditors, but the protection of the interests of the state, the creator of such a regulation." (*Id.* at 46.) On December 20, 2017, the Croatian Extraordinary Administrator filed an appeal to the Constitutional Court of Serbia; that appeal remains pending.

3. Federation of Bosnia and Herzegovina

Article 205, Paragraph 1, item 3 of the Federation of Bosnia and Herzegovina ("FB & H") Bankruptcy Law states that to recognize a foreign decision on bankruptcy proceedings or proceedings similar to bankruptcy, such decision must not contravene the legal order of the Federation. (*Id.* at 52.) The court explains that the basic purpose of bankruptcy proceedings should be the collective settlement of creditors and that it does not believe that the EA Law was passed with creditors in mind. The court stated:

> The protection of economic, social and financial stability of the Republic of Croatia cannot jeopardize the FB & H legal order, and this opinion of the first instance court, contrary to the appeal, is not different from the international case law, according to which protection and maintenance of economic, social and financial stability of one country in the proceedings of recognition of a foreign ruling, in a situation where the compulsory regulations are opposed - which is the case here- cannot jeopardize the legal order of another country where the decision is to be recognized, as otherwise the principle of equality would be breached.

(*Id.* at 53.) The Extraordinary Administrator filed an appeal at the Constitutional Court on March 16, 2018; that appeal remains pending.

4. Montenegro

The Montenegro court held that extraordinary administration procedures under the EA Law did not meet the requirements of the Insolvency Act of Montenegro. The court explained:

> [T]he court finds that the extraordinary administration proceeding is not a foreign proceeding in terms of Article 178 paragraph 2 of the Insolvency Act, since it is not a proceeding aimed at the collective settlement of creditors, but at protecting and maintaining economic, social and financial stability of the Republic of Croatia, that is, the sustainability of business operations of certain companies that are of systemic importance for the Republic of Croatia.

(*Id.* at 109.) In other words, because the EA Law seemed primarily concerned with the protection of the interest of the Republic of Croatia rather than the creditors of a certain debtor, the proceeding did not comply with the requirements for recognition in Montenegro. An appeal filed in the Commercial Court of Montenegro is pending.

5. England and Wales

The High Court of England and Wales found that the EA Law and Croatian Proceeding ***178** sufficiently satisfied the requirements of a foreign main proceeding under the CBIR, England's adaptation of the Model Law, over the objections of respondent Sberbank. As with the above discussed foreign recognition decisions, it should be noted at the outset that the English decision was rendered before the Settlement Agreement was finalized or voted upon. The English decision was issued on September 11, 2017. Nearly a year later, creditors voted to approve the Settlement Agreement on July 4, 2018. The English decision specifically states that, "recognition of the settlement agreement is not the real question here. That is something for the future. Such recognition will depend at that stage on other considerations, for example the submission by the creditors to the jurisdiction of the foreign proceeding." (*Id.* at 97 ¶ 127.) Therefore, the decision only grants recognition of a foreign main proceeding; it does not make any decisions with respect to the later approved Settlement Agreement.

A transcript of the English hearing shows that several contentions were raised against recognition of the Croatian Proceeding under the Model Law and the CBIR. First, Sberbank's counsel argued that recognition of a "foreign proceeding" under the CBIR is limited to a single debtor and that recognition of the Croatian Proceeding would require recognizing a debtor grouped together with related, but separate entities, in one proceeding. [9] Counsel argued this was problematic because it would allow (1) all the members of the group to participate in a restructuring without requiring each individual member to prove insolvency as a gateway issue and (2) in effect, by consolidating a group of entities, the combined procedure could block a creditor from asserting a distinct claim against a particular debtor. Counsel argued that the combined proceeding effectively created a set of third-party releases for affiliated or sub-companies—counsel for Sberbank gives the example that if someone has advanced finance on terms where they also have guarantees from companies B, C, D, E and F as well as principal debt from company A, consolidation into a single pool with one claim would eradicate the value of any guarantee. ("English Recognition Hearing Transcript," ECF Doc. # 24 Exhibit B at 42.) It argued it was further problematic as applied to Agrokor, because unless Agrokor and its affiliates are grouped as one debtor, the threshold number of employees required under the EA Law is not met. (English Recognition Hearing Transcript at 40.) However, when referencing these arguments, Sberbank's attorney also goes through pains to remind the English court that U.S. courts have adopted the Model Law differently and that the English court is only bound by the CBIR and not U.S. precedent. (*Id.* at 47.) Recognition in England also apparently was sought for a single debtor, Agrokor, on behalf of the whole group. As already stated, Chapter 15 cases were filed in this Court on behalf of nine separate entities.

The High Court of England and Wales ultimately rejected Sberbank's arguments. The High Court concluded:

> The important point is simply this. There is nothing in the CBIR to prevent ***179** a foreign proceeding being recognized, which in the foreign court involves a group of companies, but the recognition is sought in this country in relation only to a particular individual debtor. In my judgment, the respondent's objection here is without foundation.

(ECF Doc. # 21 at 78 ¶ 54.)

Additionally, the English court concluded that (1) the Croatian Extraordinary Administration Law is a law relating to insolvency for the purposes of CBIR, (2) it is a proceeding under the control or supervision of a court, (3) it is a collective proceeding, (4) it is a law for the purposes of reorganization or liquidation within the meaning of the CBIR and (5) it is not manifestly contrary to English public policy. (*Id.* at 78–98.) In reaching this final public policy conclusion, the court noted that the principal of *pari passu* can be overridden in appropriate cases under English law. (*Id.* at 98 ¶ 131.) The High Court of England and Wales' decision is further discussed below in relation to the *Gibbs* rule and the possible effects of that rule on future proceedings in England. The appeal is to be heard by the Court of Appeal, and the stay will remain in effect while the English proceedings are ongoing.

6. Switzerland

The Court of the Canton of Zug in Switzerland granted recognition of the Croatian Proceeding in a decision issued on February 2, 2018. (ECF Doc. # 21 at 113.) There has been no appeal of this decision; it is final and binding.

7. European Union

On July 4, 2018, the European Parliament added the Recast Insolvency Regulation (EU) 2015/848 to the European Union's Acquis Communautaire the Law on Extraordinary Administration Proceeding for Companies of Systemic Importance for the Republic of Croatia. (Recast Insolvency Regulation, "EU Regulation," ECF Doc. # 21 Appendix D at 161–225.) The EU insolvency regulation was designed to regulate insolvencies. This adoption of the EA Law ostensibly gave the Croatian Proceeding automatic recognition as an insolvency proceeding, entitled to recognition across all European Union member states. (*Id.* at 217.)

II. DISCUSSION

A. EA Law

On April 7, 2017, Croatia published Official Gazette No. 31/17, the *Law on Extraordinary Administration Proceeding in Companies of Systemic Importance in the Republic of Croatia*. ("Certified Translation from Croatian Language of the Law on Extraordinary Administration Proceeding in Companies of Systemic Importance for the Republic of Croatia," ECF Doc. # 4 Exhibit B at 46–59.) Part 1, article 1, chapter 1 of the EA Law explains:

> This Law is passed for the purpose of protection of sustainability of operations of the companies of systemic importance for the Republic of Croatia which with its operations individually or together with

> its controlled or affiliated companies affect the entire economic, social, and financial stability of the Republic of Croatia.

(*Id.* at 46.) The Croatian law was passed to try to prevent a wider economic fallout in Croatia and surrounding global markets through restructuring companies of systemic importance to Croatia. In effect, the new law is somewhat reminiscent of the efforts globally to deal with problems of "too big to fail." The Croatian Law appears to be unique in dealing with systemically important *companies* as opposed to systemically important *financial institutions*.

Article 21 of the EA Law provides that either a debtor of systemic importance or ***180** such a debtor's creditors, with the debtor's permission, may file an extraordinary proceeding. (*Id.* at 50.) The petition to commence the proceeding is submitted to the Croatian Court, which must then inform the Croatian Government within the same day that a petition has been filed. (*Id.* at 51.) After a petition has been filed, the debtor is estopped from disposing of any assets until the petition is either approved or denied, except for those dispositions necessary for debtor to maintain its ordinary course of business operations. (*Id.*) The Croatian Court issues the final order that commences the extraordinary proceeding, and upon the court's order commencing a proceeding, notice is posted in the relevant Croatian Court districts, on the public books or records of the debtor and on the Croatian Court's web pages. (*Id.* at 52.) After the commencement of a proceeding under the EA Law, all relevant parties, further detailed below, have fifteen months (twelve months' time is allotted automatically, and the option of an additional three months' time is granted upon request approved by the Croatian Court) to craft a single settlement agreement to resolve all claims against the debtor. (*Id.* at 57.)

The EA Law lists two requirements for a debtor to be considered a company of systemic importance that may file an action under the EA Law. (*Id.* at 46.) Article 4, paragraph 2 provides that in the calendar year preceding the filing of the petition, the debtor, alone or with its controlled or affiliated companies, must (1) employ more than 5,000 employees on average for the year and (2) have balance sheet liabilities of at least the equivalent of HRK 7,500,000,000. (*Id.*) In these calculations determining whether a debtor is of systemic importance to Croatia, article 5, paragraph 2 specifies that affiliated and controlled companies are companies in which the debtor holds at least a 25% ownership interest, have a principal place of business in The Republic of Croatia and exist and operate under Croatian law. (*Id.* at 47.) The requisite amount of debt and employees along with identification of the debtor and its related entities must be proven by the party who files the petition for the extraordinary proceeding (either the debtor or a creditor of the debtor). (*Id.* at 51.)

Article 6 of the EA Law provides that the Croatian Court shall have exclusive jurisdiction in an EA proceeding. (*Id.*) Article 7 further provides that once the EA proceeding has been instituted, there will be a stay of any liquidation or bankruptcy proceedings, as defined under Croatian law, against the debtor. (*Id.*) To the extent that the EA law is silent regarding procedure, article 8 provides that procedural rules from Croatian bankruptcy proceedings will apply. (*Id.*) Article 10 authorizes the Croatian Court to take any actions or pass any decisions that are not expressly conferred on another entity as the responsibility of that other entity under Croatian Law. (*Id.*)

An extraordinary commissioner ("Extraordinary Commissioner") is appointed by the Croatian Court upon the proposal of the Government of the Republic of Croatia who will represent the debtor solely and independently. (*Id.*) The Extraordinary Commissioner is subject to the provisions of the Croatian Bankruptcy Act's rules governing a bankruptcy receiver in instances where no provision of the EA Law governs directly. (*Id.* at 48.) Together with deputies who may assist him, upon the proposal of the Croatian government and appointment by the Croatian Court, the Extraordinary Commissioner may make decisions regarding the debtor's property but may not make decisions regarding the debtor's property without prior approval of a creditors' committee if the ***181** value of the property exceeds HRK 3,500,000. (*Id.*) The commissioner may also bring legal actions on behalf of the debtor and, with approval of a creditors' committee, may assume new debt on behalf of the debtor when necessary to maintain debtor's operations. (*Id.* at 55.) Additionally, at any time, upon the proposal of the Croatian government, the Croatian Court may remove the Extraordinary Commissioner and appoint a new one. (*Id.* at 48.)

The EA Law requires the Extraordinary Commissioner to submit monthly reports regarding the debtor's financial status and the status of the EA proceedings to the central authority of the government administration responsible for economic operations in Croatia (the "Croatian Ministry") for every month between his appointment and the approval of a settlement agreement under the EA Law. (*Id.*) Additionally, the Extraordinary Commissioner is tasked with electing a restructuring advisor, auditors, legal advisors and other specialized advisors—all of whom must be given prior approval by the Croatian Ministry prior to appointment. (*Id.*)

Article 16 establishes an advisory body ("Advisory Body") that, upon request of the Croatian Ministry or the Croatian Court, will provide opinions regarding the propriety of the Extraordinary Commissioner's decisions under Croatian Law. (*Id.* at 49.) The Advisory Body has five members: one member serves as a representative of the employees of the debtor and may be an employee of the debtor; the other four members must be knowledgeable in business and law, of good reputation and not have been employed by the debtor or any of its affiliates within the ten years leading up to the filing of an EA proceeding. (*Id.*)

In addition to the Advisory Body, EA Law article 18 requires the establishment of a creditors' committee with up to nine members who will serve as representatives of the debtor's creditors. (*Id.*) The Extraordinary Commissioner recommends, and the Croatian Court approves the members of the creditors' committee, who must be categorized according to their legal position and may be subcategorized according to their economic interests in the debtor. (*Id.*) Article 30 provides that each category of creditors is then entitled to designate one member to serve as the category's representative on the creditors' committee. (*Id.* at 53.) The creditors' committee has rights to receive information regarding the debtor and to participate in the preparation and approval of the settlement agreement in conjunction with the Extraordinary Commissioner. (*Id.* at 49–50.) Additionally, article 31 explains that an interim creditors' council ("ICC") will take the role of the permanent creditors' council in the interim until the official committee is established. The ICC assumes and performs all functions of the creditors' council until the official creditors' council is established. (*Id.* at 53–4.)

Articles 32 through 36 provide a procedure for the public listing of claims against debtor and contesting claims. (*Id.* at 54.) The Extraordinary Commissioner creates a table of filed claims, a table of preferential claims and a table of rights to separate satisfaction. (*Id.*) Along with these tables, the Extraordinary Commissioner must clearly indicate whether he contests any of the claims listed in the tables. (*Id.*) The tables of claims and the commissioner's stance on each claim are published on the Croatian Court's website. (*Id.*) If a creditor does not commence a civil proceeding within eight days after publication of the table of claims, the right to contest the claim is deemed waived. (*Id.*) Once a final order is made, a claim, the claim's payment rank and the claim's category of creditors are all considered effective as to ***182** both the debtor and all the debtor's other creditors. (*Id.*)

Part VI of the EA Law includes provisions for the negotiation, acceptance by creditors and approval by the court of a settlement agreement. (*Id.* at 56–8.) The settlement agreement envisioned and negotiated under the EA Law is essentially the same as what is usually referred to as a plan of reorganization in other restructuring contexts. Within the prescribed twelve-month (and optional additional three month) period, the Extraordinary Commissioner and creditors' committee must create a single settlement agreement. (*Id.* at 57.) After a settlement agreement is created, it is published on the Croatian Court's website; three days after publication, all creditors are deemed to have notice of the agreement. (*Id.*) Within fifteen days after publication of the settlement agreement, the creditors vote upon the settlement agreement at a hearing. (*Id.*)

Article 43, paragraph 14 describes the voting outcome necessary to pass the settlement agreement. It states:

> The settlement agreement, or plan of reorganization, shall be deemed adopted if a simple majority of all creditors voted for it and if in each category of the sum of claims of creditors who voted for the settlement agreement exceeds the sum of claims of the creditors who voted against the acceptance of the settlement agreement. Exceptionally, it shall be deemed that the creditors accepted the settlement agreement if the

> total sum of claims of the creditors who voted for the settlement agreement amounts to at least two thirds of the total claims.

(*Id.*)

Thus, there are two methods of approving a settlement agreement. (*See id.*) The settlement agreement is approved either if (1) more than half of *all creditors by number* (including non-voting creditors) vote in favor of the Settlement Agreement *and* more than half of all creditors in each class [10] *by value of claims* vote in favor of the Settlement Agreement or (2) two-thirds of *all voting creditors by claim amount* vote in favor of the Settlement Agreement. (*Id.*) In other words, even if the first method of approving the Settlement Agreement cannot be achieved, the Settlement Agreement can still be approved if the sum of *all claims who vote in favor* of the agreement is at least two-thirds of the total amount of *all outstanding claims*. (*Id.*) Article 43, paragraph 18 provides that once the settlement agreement is passed in accordance with paragraph 14, all creditors, even those who do not vote, shall be bound by the agreement. (*Id.* at 58.) Therefore, it does not matter whether a creditor has appeared or voted on the settlement; if the settlement receives the requisite votes, it can be approved and has binding effect upon all creditors. (*See Id.*) These portions of the EA Law governing approval of the settlement agreement therefore create a similar effect to Bankruptcy Code § 1141(d)(1)(A) ***183** which provides, in part, that confirmation of a plan "discharges the debtor from any debt that arose before the date of such confirmation ... whether or not ... a proof of claim based on such debt is filed or deemed filed ...." *See* 11 U.S.C. § 1141(d)(1)(A).

B. Model Law

In 1997, the United Nations Commission on International Trade Law ("UNCITRAL") promulgated the Model Law on Cross-Border Insolvency (the "Model Law"). Chapter 15 of the Bankruptcy Code, which is based upon the Model Law, was adopted by Congress in 2005. Before 2005, former section 304 of the Bankruptcy Code provided the statutory framework for dealing with ancillary cases filed in the U.S. relating to foreign insolvency proceedings. Many of the principles—particularly comity—that were applied in ancillary proceedings under section 304 were carried forward and apply today in Chapter 15 cases. *See In re Atlas Shipping A/S*, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009) ("Nevertheless, many of the principles underlying § 304 remain in effect under chapter 15. Significantly, chapter 15 specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief. This is evidenced by the pervasiveness with which comity appears in chapter 15's provisions. For example, § 1509 specifically requires that if the court grants recognition under § 1517, it 'shall grant comity or cooperation to the foreign representative.' 11 U.S.C. § 1509(b)(3). In addition, § 1507 also explicitly directs the court to consider comity in granting additional assistance to the trustee.").

The Model Law is often described as an attempt to create modified universalism, which essentially entails allowing courts outside of debtors' home countries to open and maintain secondary cases supplemental to the main proceedings. *See, e.g.*, Ian G. Williams & Adrian J. Walters, *Modified Universalism in Our Time? A Look at Two Recent Cases in the U.S. and U.K.*, 37-JUL Am. Bankr. Inst. J. 24 (2018). The U.S. has a long tradition of recognizing foreign restructuring proceedings. For example, the Supreme Court's 1883 decision in *Gebhard* approved the recognition of a Canadian scheme of arrangement. *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527, 3 S.Ct. 363, 27 L.Ed. 1020 (1883). In *Gebhard*, Chief Justice Waite explained that "the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries." [11] *Id.* at 548, 3 S.Ct. 363. *See also Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713–14 (2d Cir. 1987); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 458 (2d Cir. 1985).

As the Second Circuit explained in *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*:

> We have repeatedly held that U.S. courts should ordinarily decline to adjudicate ***184** creditor claims that are the subject of a foreign bankruptcy proceeding. "Since '[t]he equitable and orderly distribution of a debtor's property requires assembling

> all claims against the limited assets in a single proceeding,' American courts regularly defer to such actions." *Finanz AG*, 192 F.3d at 246 (*quoting Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713–14 (2d Cir.1987)); *Allstate Life Ins. Co.*, 994 F.2d at 999. In such cases, deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and (consistent with the principles of Lord Mansfield's holding) do not contravene the laws or public policy of the United States.

412 F.3d 418, 424 (2d Cir. 2005).

While *Altos Hornos* was decided based on section 304, before Chapter 15 became effective in the U.S., the same principles are enshrined in Chapter 15. *See Atlas Shipping*, 404 B.R. at 738.

C. Comity in Chapter 15

Under the prior section 304 and the current Chapter 15, American courts have recognized the need to extend comity to foreign bankruptcy proceedings. The equitable and orderly distribution of a debtor's property requires assembling *all* claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganization would fail. "The Second Circuit has frequently underscored the importance of judicial deference to foreign bankruptcy proceedings." *In re Int'l Banking Corp. B.S.C.*, 439 B.R. 614, 624 (Bankr. S.D.N.Y. 2010) (citing *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999); *Maxwell*, 93 F.3d at 1048; *Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993); *Cunard*, 773 F.2d at 458).

The issue here is whether this Court, in the exercise of comity, should recognize and enforce the Settlement Agreement approved by the Croatian Court following creditor approval. There is nothing exceptional in the Croatian Court's exercise of jurisdiction over the Croatian Foreign Debtors' assets and creditors' claims in the insolvency proceeding.

In section II.A., the Court has described the provisions of the EA Law in considerable detail. In substance and effect, the EA Law tracks closely to the structure of the U.S. Bankruptcy Code and many other foreign insolvency laws. Creditors' rights to meaningful participation in insolvency proceedings is required and creditor approval of a settlement agreement is also required. As explained in section II.D., below, the record establishes that the EA Proceeding was procedurally fair.

While enterprise group aspects of the EA Law are novel, these Chapter 15 cases dealing with nine entities that have their centers of main interest ("COMI") in Croatia do not push the boundaries of cross-border insolvency law. Therefore, recognition and enforcement of the Settlement Agreement with respect to the Foreign Debtors safely fall within established principles. [12] As such, is there any basis to decline to recognize and enforce the results?

The Supreme Court concluded in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an *in rem* proceeding. A single court should resolve all claims to property of the debtor, which necessarily ***185** requires that the court resolve all creditor claims that have been, or could have been, asserted, provided that the creditors have received the notice required by due process. Thus, in an *in rem* proceeding, personal jurisdiction over all creditors is not required; the court determines the creditors' rights to receive distributions from all property of the debtor that is part of the estate. A creditor cannot ignore or avoid a Chapter 11 case and later sue to recover on its prepetition claim. Upon confirmation of a Chapter 11 plan, section 1141(d)(1)(A) discharges the debtor from any debt that arose before the date of confirmation, whether or not the creditors filed a proof of claim or accepted the plan. A successful reorganization would not be possible if creditors could simply ignore the bankruptcy proceeding and then seek to recover on their prior claims. Therefore, the *in rem* classification of a bankruptcy proceeding is key—*in rem* jurisdiction gives the court the authority to administer all the debtor's assets and resolve the rights of all creditors to all the debtor's property, and these are crucial steps in a successful restructuring. There is no reason that these same principles should not apply when considering recognition of the Croatian Proceeding, with the same consequences for a confirmed settlement agreement—namely, the discharge and modification of prepetition claims like the effect of section 1141(d)(1)(A). (*See* Settlement Agreement § 16.1.2.)

Federal courts generally extend comity when the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy. *See also Cunard S.S. Co. Ltd.*, 773 F.2d at 457. "Comity takes into account the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law." *In re Artimm, S.r.L.*, 335 B.R. 149, 161 (Bankr. C.D. Cal. 2005) (citing *Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.)*, 93 F.3d 1036, 1048 (2d Cir. 1996)).

From the record before this Court—particularly since no objections have been filed—the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement Agreement is appropriate within the territorial U.S.) arises because of the English courts' enforcement of the *Gibbs* rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fail considering the amount of prepetition debt governed by English law.[13] That would be unfortunate, indeed.

***186** While recognition of the foreign proceeding turns on the objective criteria under section 1517, "relief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity." *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008) (citing §§ 1507, 1521 and 1525). Once a case is recognized as a foreign main proceeding, as has already occurred here, Chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity. *See generally* Allan L. Gropper, *Current Devs. in Int'l Insolvency Law: A United States Perspective*, 15 J. BANKR. L. & PRAC. 2, Art. 3, at 3–5 (2006) (hereinafter "Gropper").

The court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief. *See In re Cozumel Caribe S.A. de C.V.*, 482 B.R. 96, 114–15 (Bankr. S.D.N.Y. 2012) (concluding that a central tenet of Chapter 15 is the importance of comity in cross-border insolvency proceedings); *Atlas Shipping*, 404 B.R. at 738; *see also In re Rede Energia S.A.*, 515 B.R. 69, 93 (Bankr. S.D.N.Y. 2014) (holding that a request for relief by a foreign representative (1) to enforce a foreign reorganization plan and confirmation decision even where the relief provided in the plan conflicts or is inconsistent with the relief available in a Chapter 11 plan, and (2) to enjoin acts in the U.S. in contravention of the plan and decision is relief of a type that courts have previously granted under section 304).

In addition to providing deference to foreign judgements, comity may also allow a U.S. court "to decline to exercise jurisdiction in favor of a pending foreign proceeding," where "the foreign tribunal has taken jurisdiction but not yet issued a judgement." William S. Dodge, *Int'l Comity in Am. Law*, 115 COLUM. L. REV. 2071, 2106 (2015). As between deferring to a foreign judgement or to a foreign pending proceeding, "[w]hat changes is the time at which the question [whether to defer to a foreign tribunal's resolution of a dispute] is asked." *Id.* Courts have generally recognized their ability to decline to exercise jurisdiction in deference to a case already being adjudicated abroad. *See, e.g.*, *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014) ("[A]djudicatory comity involves ... the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction." (citation and quotation marks omitted)); *In re Arcapita Bank B.S.C.(c)*, 575 B.R. 229, 238 (Bankr. S.D.N.Y. 2007) ("[C]omity among the courts or adjudicative comity may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." (citations and quotation marks omitted)); *In re Ionica PLC*, 241 B.R. 829, 841 (Bankr. S.D.N.Y. 1999) (dismissing ancillary proceeding filed under former section 304 because of pending insolvency proceeding in the U.K.).

In other words, this case presents a unique challenge in the exercise of comity under Chapter 15, because the international litigation surrounding the Croatian Proceeding and Settlement Agreement that this Court is asked to recognize and enforce

could be seen as complicating this Court's own comity analysis by requiring the Court to consider all of the other countries' decisions in addition to the analysis of whether to extend comity to the Croatian Proceeding and resulting Settlement Agreement on their own merit. However, the Court does not ultimately need to perform the broader analysis of comity with respect to every nation involved, because ***187** the Court's decision to recognize and enforce the Settlement Agreement is effective within the territorial jurisdiction of the United States. As such, if a foreign creditor has a claim governed by English law that is modified by the Settlement Agreement and wants to challenge the Croatian modification of that claim, the creditor may still challenge enforcement of the claim in the English courts.

D. Recognition of the Croatian Proceeding and Settlement Agreement in the United States

As previously stated, on September 21, 2018, the Court entered an order recognizing the Croatian Proceeding as a foreign main proceeding. (ECF Doc. # 30.) The analysis supporting that conclusion will not be repeated here. The effects of the decision to recognize the Croatian Proceeding as a foreign main proceeding merit some discussion.

1. Automatic effects of Chapter 15 Foreign Main Proceeding Recognition

Upon a court's determination that a proceeding constitutes a foreign main proceeding as described above, section 1520 of the Bankruptcy Code provides that certain relief commences immediately, while section 1521 provides additional relief that may be granted at the court's discretion. *Compare* 11 U.S.C. § 1520(a) ("Upon recognition of a foreign proceeding that is a foreign main proceeding- (1) sections 361 and 362 apply with respect to ... property of the debtor that is within the territorial jurisdiction of the United States ..."), *with* 11 U.S.C. § 1521(a) ("Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purposes of this chapter ... *the court may* ... grant *any appropriate relief* ...." (emphasis added)).

Section 1520 details the mandatory relief that is automatically granted upon recognition of a foreign main proceeding under Chapter 15. 11 U.S.C. § 1520. Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property *that is located within the territorial jurisdiction of the United States*. The statute refers specifically to the property of the debtor, as opposed to the property of the estate, since there is no estate in a Chapter 15 case. *See, e.g.*, *Atlas Shipping*, 404 B.R. at 739. Despite this difference, the automatic effect of recognition of a foreign main proceeding under section 1520(a) is an imposition of an automatic stay on any action regarding the debtor's property located in the United States. *Id.*

Additionally, once section 1520(a) applies, sections 363, 549 and 552 apply with respect to any transfers of a debtor's interest in property within the United States. 11 U.S.C. § 1520(a)(2). These provisions allow a foreign representative to operate the debtor's business in the United States by exercising the rights and powers of a trustee under sections 363 and 552.

2. Discretionary Relief including Recognition of a Plan and Third-Party Releases

The grant of additional, discretionary relief under Chapter 15 is largely dependent upon principles of comity discussed above. *See Atlas Shipping*, 404 B.R. at 738 ("While recognition of the foreign proceeding turns on the objective criteria under § 1517, 'relief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity' " (quoting *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008)). Once a case is recognized as a foreign main proceeding, Chapter 15 specifically contemplates that the court will exercise ***188** its discretion consistent with principles of comity. *See generally* Gropper, at 3–5.

Whether a foreign proceeding is held to be main or non-main, section 1521(a) outlines the discretionary relief that a court may order upon recognition of a foreign proceeding. 11 U.S.C. § 1521(a); *see Atlas Shipping*, 404 B.R. at 738 ("The discretion that is granted is 'exceedingly broad' since a court may grant 'any appropriate relief' that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors."). That said, section 1522(a) only allows courts to provide

additional discretionary relief under section 1519 or 1521 if the interests of creditors are sufficiently protected. The list of forms of discretionary relief provided under section 1521 are considered illustrative, as opposed to exclusive. 11 U.S.C. 1521 (the list of discretionary relief options begins with the word 'including,' indicating that discretionary relief includes, but is not limited to, the following listed items).

The Court's discretionary relief under section 1521 of the Code may either allow the foreign representative to merely administer the debtor's assets in the United States, but require that those assets remain here, or may allow the foreign representative to remove the debtor's assets from the United States. 11 U.S.C. §§ 1521(a)(5) and 1521(b); *see, e.g.*, *Atlas Shipping*, 404 B.R. at 740. Section 1521(a)(5) entrusts to the foreign representative the "administration or realization" of the debtor's assets within the United States. 11 U.S.C. § 1521(a)(5). This is part of the relief the Foreign Representative requested in the present case. It is not to be confused with the optional relief provided by section 1521(b), which allows the Court to "entrust the distribution" of the debtor's assets within the United States to the foreign representative. 11 U.S.C. § 1521(b). This alternative provision allows the debtor's assets to exit the United States for *distribution*. *See Atlas Shipping*, 404 B.R. at 740. The Foreign Representative here did not seek relief under section 1521(b).

Finally, section 1507 also deals with additional discretionary relief, which may include recognition and enforcement of a plan reached in a foreign proceeding. As this Court explained in *Atlas Shipping*:

> In addition to § 1521's provisions regarding 'any appropriate relief,' § 1507(b) provides that a court, [i]n determining whether to provide additional assistance ... shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—
>
> (1) just treatment of all holders of claims against or interests in the debtor's property;
>
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
>
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
>
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

404 B.R. at 740 (internal citations omitted).

"Pursuant to section 1507, the court is authorized to grant any 'additional assistance' available under the Bankruptcy Code or under 'other laws of the United States,' provided that such assistance is consistent with the principles of comity and satisfies the fairness considerations set forth in section 1507(b)." ***189** *Rede Energia*, 515 B.R. at 90. As with section 1521, relief under section 1507 may include recognition and enforcement of a plan approved by a foreign court. *Id.* at 94–5.

Thus, the principal question in determining whether to recognize and enforce the Settlement Agreement's terms under Chapter 15 ultimately boils down to a question of the appropriateness of granting comity to the foreign court approval of the Settlement Agreement. In *Metcalfe & Mansfield*, 421 B.R. 685, 688 (Bankr. S.D.N.Y. 2010), this Court considered recognition of a Canadian plan of reorganization, and specifically questioned whether it would be appropriate to extend comity to the Canadian plan if it contained provisions, such as third-party releases, that may not be allowed in plenary United States bankruptcy proceedings under Chapter 11. Even though the Court noted that it was not clear that the third-party releases contained in the Canadian plan would be permitted under U.S. law, the Court found that the proper inquiry was whether the Canadian plan's provisions should nevertheless be enforced under Chapter 15. *Id.* at 696. This Court explained, "Chapter 15 specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief." *Id.* Therefore, even though Chapter 15 contains the explicit public policy exception in section 1506, which provides, "[n]othing in this chapter prevents the court from refusing to take an

action governed by this chapter if the action would be manifestly contrary to the policy of the U.S.," the *Metcalfe* decision explained that even if the law in the U.S. may have provided differing results, this alone did not prevent a recognition of the Canadian plan under broader principals of comity. *See* 11 U.S.C. § 1506; *see also Metcalfe & Mansfield*, 421 B.R. at 697.

What factors, then, should determine whether a U.S. Court should extend comity to a foreign main proceeding's plan of reorganization? The *Metcalfe & Mansfield* decision noted several factors, including whether the foreign proceeding provided a full and fair opportunity for creditors to be heard consistent with due process, and whether the plan was approved by the debtor's creditors and the foreign court. *See Metcalfe & Mansfield*, 421 B.R. at 698–99.

Courts should also look to circumstances in which U.S. courts have refused to recognize foreign plans of reorganization to further understand when the denial of comity is appropriate. As already discussed, the Fifth Circuit affirmed the bankruptcy court's refusal to recognize a plan of reorganization approved by a Mexican court due to considerations of comity. *See Vitro*, 701 F.3d at 1039. The plan in *Vitro*, like the plan in *Metcalfe & Mansfield*, discharged obligations of creditors as well as of third-party guarantors. The Court of Appeals decision affirming the bankruptcy court focused on the fact that the plan in *Vitro* was only approved with "insider" votes. As a result, the Court of Appeals concluded that the bankruptcy court did not abuse its discretion in refusing to grant comity and enforce the Mexican plan.

This Court's recent decision in *Avanti*, 582 B.R. at 617–18, recognized and enforced a scheme of arrangement, including a release of third-party guarantees, that was approved by creditors and by the High Court of England and Wales. After reviewing *Metcalfe & Mansfield* and *Vitro*, the Court upheld the scheme of arrangement, noting that "Avanti's Scheme Creditors had a full and fair opportunity to vote on, and be heard in connection with, the Scheme." *Avanti*, 582 B.R. at 618. The ***190** *Avanti* decision also referred to seminal Supreme Court jurisprudence dealing with when a U.S. court should recognize and enforce a foreign judgment under principles of comity. *Id.* at 616. Quoting *Hilton v. Guyot*, the Court stated:

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

Id. (quoting *Hilton v. Guyot*, 159 U.S. 113, 202–03, 16 S.Ct. 139, 40 L.Ed. 95 (1895).

The *Avanti* opinion provides a helpful summary of cases in which courts have enforced third-party releases in foreign proceedings under sections 1507 and 1521. *Avanti*, 582 B.R. at 617; *see also In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (recognizing and enforcing scheme of arrangement that released affiliate guarantees); *In re Towergate Fin. plc*, Case No. 15–10509–SMB (Bankr. S.D.N.Y. Mar. 27, 2015) [ECF Doc. # 16]; *In re New World Res. N.V.*, Case No. 14–12226–SMB (Bankr. S.D.N.Y. Sept. 9, 2014) [ECF Doc. # 20]; *In re Sino–Forest Corp.*, 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (enforcing foreign order containing third-party releases); *In re Magyar Telecom B.V.*, Case No. 13-13508-SHL, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013) [ECF Doc. # 26]; *Metcalfe & Mansfield*, 421 B.R. at 696 ("[P]rinciples of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.").

Finally, the decision-making calculus for determining whether to grant comity to a foreign court's action may be honed by the list of non-exclusive factors used by the Second Circuit to analyze whether foreign proceedings are procedurally fair. In analyzing procedural fairness, the Second Circuit has looked at the following factors:

> (1) Whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have

> the rights to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to potential claimants; (5) whether there are provisions for creditors meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.

Finanz AG Zurich, 192 F.3d at 249.

With respect to the Croatian Proceeding, the record reflects that the Foreign Debtors' creditors received proper notice of the Croatian Proceeding and of these Chapter 15 cases. The record also reflects that the substance and procedures set forth in the EA Law comport with broadly recognized principles for insolvency laws. Moreover, the creditor distributions approved in the Settlement Agreement closely follow the waterfall provisions of the U.S. Bankruptcy Code. Additionally, as ***191** discussed above, over two-thirds of non-insider creditors voted to approve the Settlement Agreement, avoiding the taint of the insider votes that prevented recognition and enforcement in the *Vitro* case.

Additionally, the standards for due process set forth in the Second Circuit's nonexclusive list of factors for procedural fairness in *Finanz AG Zurich* were satisfied by the Croatian Proceeding. As outlined in the EA Law, creditors have been grouped into five classes and participated in the drafting and approval of the Settlement Agreement, which provides for payout where creditors of the same class are treated equally, satisfying the first *Finanz* factor.[14] The Foreign Representative acts as a fiduciary and is overseen by the Croatian Court throughout this process, which is consistent with the second *Finanz* factor of procedural fairness. After the Settlement Agreement was approved by a majority of creditors and approved by the Croatian court on July 6, 2018, approximately 92 complaints were filed against confirmation, showing that creditors have the right to submit denied or contested claims for further adjudication, consistent with the third *Finanz* factor for procedural fairness. According to Agrokor's official website, the company responded to all 92 complaints in one submission to the Commercial Court on September 4, 2018. The issue is still pending before the Croatian Court; enforcement of the Settlement Agreement will not commence in Croatia until the Court issues its final order. Thus, creditors who opposed the Settlement Agreement have been able to seek further adjudication in the Croatian Court system.

Satisfying the fourth *Finanz* factors, the EA Law required published notification to creditors on the Court's website. Satisfying the fifth *Finanz* factor, the EA Law provides for creditors meetings, which were held. Indeed, the Temporary Creditor's Council continues to meet and was informed of the complaints as well as Agrokor's responses to the complaints at the most recent meeting. Agrokor held its 22nd creditor meeting on September 13, 2018. Representatives of all five creditor groups attended the meeting, including Sberbank as a representative of the unsecured creditors, and Knighthead Capital Management, LLC as the representative of the bond holders' creditor group. *Finanz* factors seven and eight—regarding the creation of a centralized distribution and the creation of an automatic stay—are both provided for by the EA Law.

Finally, no objections to the recognition of the Settlement Agreement have been brought before this Court. All evidence before the Court demonstrates that creditors received due process and will be better off under the Settlement Agreement than they would be in a liquidation. The Foreign Representative affirms that the "Croatian proceedings ... will allow the [Foreign] Debtors to restructure in the most efficient manner without jeopardizing creditors' rights." (ECF Doc. # 5 ¶ 40.) The affirmation of a Croatian legal representative who practices complex commercial litigation in Croatia, provides that "[p]ursuant to the Settlement Agreement, the creditors will receive a better outcome in respect of their claims than they would in a Croatian bankruptcy or liquidation process." (ECF Doc. # 6 ¶ 9.) Thus, the essential contours of a foreign proceeding that should be granted comity in the U.S. are present. As such, the Settlement Agreement should be recognized in full within the territorial jurisdiction of the ***192** United States, including the provisions modifying the English law governed debt and the New York law governed debt. Courts in other jurisdictions will make their own, independent decisions whether to recognize and enforce the Settlement Agreement.

E. The Gibbs Rule

Because Chapter 15's principal criterion for recognizing foreign proceedings and recognizing and enforcing a reorganization plan is a comity analysis, it is appropriate for this Court to consider the effects of a decision to extend comity to one nation if doing so could be seen as a refusal to extend comity to the laws of another—particularly where a majority of the debt to be modified is governed by the law of the latter nation. In these circumstances, a complete comity analysis requires at least consideration of, even if not ultimately lending deference to, English law.

The *Gibbs* rule remains the governing law in England despite its seeming incongruence with the principle of modified universalism espoused by the Model Law and a broad consensus of international insolvency practitioners and jurists. *See, e.g.*, Kannan Ramesh, *The Gibbs Principle: A Tether on the Feet of Good Forum Shopping*, 29 Sing. Acad. L.J. 42, 43 (2017) (noting that modified universalism is the theoretical core of the Model Law and is increasingly recognized by an international consensus as the way cross-border insolvencies should be dealt with moving forward). The essence of modified universalism is that "bankruptcy proceedings ... should be unitary and universal, recognized internationally and effective in respect of all the bankrupt's assets." *Id.* The essence of the *Gibbs* rule, on the other hand, is territorialism.

In *Gibbs*, Lord Esher questions, "Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound?" [15] 25 QDB at 406. Throughout the *Gibbs* opinion, Lord Esher characterizes the recognition of a foreign insolvency proceeding as an issue of contract law between a single debtor and creditor. *Id.* If the contract was made in England and meant to be performed in England, Lord Esher reasoned that a breach of contract should be determined by the laws in England, not discharged by a French insolvency proceeding. *Id.* at 404. Thus, *Gibbs* characterizes the recognition of foreign insolvency proceedings as a contractual issue to be settled in the territory with the governing contract.

Despite the clear territorial slant of the *Gibbs* rule, it was recently followed by the English High Court. In a 2018 decision, Justice Hildyard began his opinion by noting the tension between the *Gibbs* rule and the principle of modified universalism in the CBIR. *Bakshiyeva v. Sberbank of Russia, et al.* [2018] EWHC 59 (Ch). The *Bakshiyeva* court was asked to recognize and enforce proceedings in Azerbaijan that sought to restructure Azerbaijan's largest bank. Bakshiyeva, the foreign representative for the Azerbaijan proceeding, sought a permanent stay imposed in England so that English creditors would have to participate in the centralized, Azerbaijan proceedings. ***193** Two of the bank's creditors, who held English law governed debt instruments and had not participated in any way in the foreign proceeding, invoked the *Gibbs* rule. Justice Hildyard agreed with the creditors, finding that the CBIR did not allow a foreign court to change or discharge the substantive rights of creditors conferred by English law. The decision reaffirmed the priority of the common law *Gibbs* rule over the more recently adopted CBIR. [16] In addition to governing English cross-border insolvency law for the past century, *Gibbs* has been influential and accepted in other Commonwealth countries including Canada and Australia. *See* Ian F. Fletcher, *Insolvency in Private Int'l Law*, Oxford Private International Law Series at 130 (2d ed, 2005).

Agrokor's counsel argued that although the *Gibbs* rule remains in force in England, an exception to the *Gibbs* rule applies in *Agrokor* to creditors holding English law governed debt because they voted in favor of the Settlement Agreement or otherwise submitted to the jurisdiction of the Croatian court. *Rubin v. Eurofinance SA*, a decision by the Supreme Court of England, was cited as providing the relevant exception to the *Gibbs* rule—when a creditor submits to the jurisdiction of a foreign court, either by submitting its claims in the foreign insolvency proceeding or otherwise agreeing to be bound thereby, then the creditor will be bound in that proceeding and *Gibbs* will no longer apply. *See Rubin v. Eurofinance SA* (2012) UKSC 46 at ¶ 157–67 (Eng.) (holding that creditors who filed proofs of debt and participated in a creditors' meeting, but did not file an appearance, had nonetheless submitted to the jurisdiction of an Australian court and were bound by that Australian proceeding). Agrokor's counsel asserted:

> Here, the Gibbs Rule does not govern the English Law Governed Loans compromised by the Settlement Agreement because all holders of the Agrokor Group's English Law Governed Loans submitted their

> claims in full in the Croatian Proceedings and, as such, the holders submitted to the jurisdiction of the Croatian courts.

(Brief in Further Support ¶ 48.)

While counsel argued that all holders of English Law Governed Loans submitted their claims in the EA Proceeding, no evidence was presented to support that contention, and the vote tally in the EA Proceeding shows that not all creditors voted on the Settlement Agreement. The appropriate time and place for the Foreign Debtors to raise their argument will be in any further proceedings in the English court.

While the English court has yet to decide whether to recognize and enforce the Settlement Agreement, the English court discussed *Gibbs* before holding that the Croatian Proceeding should be recognized as a foreign main proceeding in England, concluding that the proceeding did not manifestly violate English public policy. (English Decision ¶ 131.) The court did not reach the issue of whether the *Gibbs* rule applies and bars recognition and enforcement of the Settlement Agreement. The decision whether to recognize and enforce the Settlement Agreement is likely to implicate a more demanding analysis under *Gibbs*.

***194** The fact that England applies the *Gibbs* rule and refuses to recognize a discharge or modification of English law debt approved by a court outside of England is not, in this Court's view, a basis for this Court to decline to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States. On this issue, the Court agrees with Justice Kannan Ramesh of the Supreme Court of Singapore in his opinion in *Pacific Andes Resources Development Ltd*, [2016] SGHC 210. Justice Ramesh explains that, in his view, the parties to a contractual relationship governed by the law of a jurisdiction adhering to the *Gibbs* rule should be attributed with the expectation that their claims might be discharged in proceedings in a jurisdiction where the debtor has an established connection based on residence or ties of business. *Pacific Andes*, SGHC 210 at ¶ 48. This view, of course, contrasts with *Gibbs*, where the court did not think that it was fair to attribute any expectation of or consent to the jurisdiction of French bankruptcy law to the English merchant who contracted with the French company that was domiciled in Paris. Justice Ramesh's view also differs from the more recent *Rubin* decision, in which Lord Collins declares it "wholly unrealistic" that "a person who sells goods to a foreign company accepts the risk of the insolvency legislation of the place of incorporation" without providing further explanation on the point. [17] *Rubin* UKSC 46 at ¶ 116 (Eng.).

In *Pacific Andes*, Justice Ramesh discusses several academic criticisms of the *Gibbs* rule's continued application in global bankruptcy proceedings. One of the lengthier excerpts is the criticism provided by Look Chan Ho, author of *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell 2016). Look Chan Ho criticizes the notion that insolvency proceedings should be characterized as contractual issues. As mentioned above, the original *Gibbs* opinion discussed the idea that parties to a contract should be able to choose the law that would govern their interactions, even in the potentially unexpected situation of a bankruptcy proceeding. The fact that the *Gibbs* rule is premised on a predominately contractual analysis is reinforced by the *Rubin* exception to the rule, which says that if a party, who otherwise would not be bound to a foreign proceeding, nonetheless chooses to consent to the foreign forum's jurisdiction, the rule will no longer apply. Thus, the *Gibbs* rule centers around the idea of a party's contractual or consensual choice to be bound to a certain forum's rules.

A theoretical and practical issue with applying such a contractual analysis in the context of insolvency proceedings, as Look Chan Ho and others argue, is that bankruptcy discharges by their very nature imply diverging from the terms of most of the debtor's prepetition contracts. The primary disputes in a bankruptcy are ordinarily not about the rights of a single creditor against the debtor; insolvency proceedings are collective proceedings in which the rights of *all* creditors are determined for a slice of a pie that is not big enough to repay all creditors in full. A fundamental tenet of the U.S. bankruptcy system, also applied under the new Croatian law and most other modern insolvency laws, is that creditors of the same class are entitled to equality of distribution. Allowing creditors with claims governed by English law to recover a greater percentage ***195** of their claims than creditors with claims governed, for example, by New York law, would violate the fundamental principle of equality of

distribution. As already discussed, the Settlement Agreement provides for equality of distribution between the holders of the English law governed and New York law governed debt.

Additionally, as Look Chan Ho notes, framing the issue of which law should govern a creditor's rights in a bankruptcy as a solely contractual issue between two parties overlooks orthodox English classification of bankruptcy as an *in rem* proceeding. [18] The *Gibbs* rule's contractual analysis seems to be based on the contractual parties' *expectations*; but if parties' expectations created the rule, is it realistic for creditors to multinational corporations to expect that, in the context of an insolvency proceeding, their contractual bargain will ultimately prevail?

As Justice Ramesh argues, a fundamental problem with the use of the *Gibbs* rule in international insolvency cases is that it mischaracterizes the discharge of debt as a contractual issue, rather than as a bankruptcy or insolvency law issue. [19] Kannan Ramesh, *The Gibbs Principle: A Tether on the Feet of Good Forum Shopping*, 29 Sing. Acad. L.J. at 49. A discharge of debts in an insolvency proceeding almost invariably involves some form of cram-down, or modification of creditors' prepetition claims, where a majority of creditors will outweigh a minority of dissenting creditors. *Id.* As justice Ramesh explains, "bankruptcy is undergirded by the philosophy that policy is given primacy *over contractual rights*." *Id.* (emphasis added). Thus, the basic rationale espoused by Lord Esher in *Gibbs*—that parties consensual, contractual decisions should determine the choice of law of all future legal interactions—is inappropriate when applied in the context of insolvency or bankruptcy proceedings, which inherently involve a societal choice to allow collective proceedings to discharge previously existing contractual obligations. The Court agrees with Justice Ramesh that a creditor's autonomy is relevant in the context of an insolvency proceeding only to the extent that it does not impede the underlying public policy that governs a collective insolvency or bankruptcy proceeding. [20] *Id.* at 50.

Professor Ian F. Fletcher, a distinguished professor in England, argues that ***196** "[t]he Gibbs doctrine belongs to an age of Anglocentric reasoning which should be consigned to history." *Insolvency in Private International Law*, OXFORD PRIVATE INTERNATIONAL LAW SERIES 130 (Oxford University Press, 2d Ed, 2005). In addition to *Gibbs*' failure to create a system that allows for the centralized, collective restructuring of debt, Fletcher finds the rule troubling because English law only narrowly recognizes the effects of foreign discharges in England but asserts that a discharge resulting from an English proceeding has a universal effect, irrespective of the governing law. *Id.* at 129, 209–10 (describing the *Gibbs* rule's effect on English law as "a form of systemic schizophrenia when contemplating the effects of foreign insolvency proceedings on obligations to which the debtor was a party"). 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. U.S. Bankruptcy courts have long permitted foreign bankruptcy proceedings to bind U.S. creditors even where the debtor entered into a contract governed by New York law and agreed to a New York forum selection clause. For instance, in *Altos Hornos*, 412 F.3d at 429, the court considered whether contracting parties choice of New York as the forum for all contract disputes was enough to override the preference of extending comity to foreign bankruptcy proceedings. Though the New York forum clause in that case provided a broad grant of exclusive authority to New York courts, [21] the Court of Appeals nevertheless concluded that the Mexican court where the insolvency proceeding was pending should be the court to resolve the contract dispute that affected the resolution of the Mexican insolvency proceeding. *Id.* at 429. As the court explained, "*regardless of the parties' pre-litigation agreement*, once a party declares bankruptcy in a foreign state and a foreign court asserts jurisdiction over the distribution of assets, U.S. courts may defer to the foreign bankruptcy proceeding on international comity grounds." *Id.* (emphasis added); *see also Canada Southern Railway Co. v. Gebhard*, 109 U.S. at 537–38, 3 S.Ct. 363 (where Chief Justice Waite explained that "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government [and] anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere").

In sum, though the concept of comity is broad and may require overlapping considerations of the rights of several parties and nations, the Court believes it is appropriate to extend comity within the territorial jurisdiction of the United States to the Croatian Settlement Agreement if it becomes final, even with respect to the modification or discharge of English law governed debt.

III. CONCLUSION

For the reasons explained above, the Court concludes that the Settlement ***197** Agreement should be recognized and enforced with respect to the nine Foreign Debtors within the territorial jurisdiction of the United States, if the approval of the Croatian Court becomes final. When the approval of the Settlement Agreement becomes final, counsel for the Foreign Representative shall submit a proposed order consistent with this Opinion.

All Citations

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Footnotes

1 The Chapter 15 cases were filed by Agrokor d.d.; Agrokor Trgovina d.o.o.; Belje d.d.; Ledo d.d.; Jamnica d.d.; Konzum d.d.; PIK-Vinkovci d.d.; Vupik d.d.; and Zvijezda d.d. (hereinafter, the "Foreign Debtors").

2 UNCITRAL Working Group V continues its work developing principles for dealing with such issues. *See* UNCITRAL: WORKING GROUP V, http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html (last visited Oct. 22, 2018).

3 Because final approval of the Settlement Agreement awaits the outcome of the pending appeals in Croatia, this Court will not enter an order recognizing and enforcing the Settlement Agreement unless and until the Settlement Agreement becomes effective in Croatia. If material changes are made in the Settlement Agreement before it becomes effective in Croatia, the Foreign Representative will need to seek further approval from the Court before an order recognizing and enforcing the Settlement Agreement, as amended, is entered.

4 During the recognition hearing on August 27, 2018 the Court raised questions and suggested that it seemed more appropriate to defer decision whether the Croatian court could approve modification of English law debt to the court in England that has already recognized the Croatian Proceeding as a foreign main proceeding. As explained in this Opinion, the Court has concluded that it is appropriate for this Court to decide whether, in the exercise of comity, the Croatian court-approved Settlement Agreement—including provisions modifying English law debt—should be recognized and enforced *within the territorial jurisdiction of the United States*. Of course, if presented with the issue whether the Settlement Agreement should be recognized and enforced in England and Wales (and perhaps in other Commonwealth jurisdictions), the English court is obviously free to decide the issue as it believes appropriate. The Court has concluded that a U.S. court should not leave to another court (here the High Court in London) the decision whether U.S. comity principles entitle the Croatian court decision to recognition and enforcement. The Foreign Representative's counsel argued that a recognized exception to the *Gibbs* rule (*e.g.*, that creditors holding English law debt filed claims or submitted to the jurisdiction of the Croatian court and are therefore bound by the Settlement Agreement) allows this Court to decide that the *Gibbs* rule does not apply. The Court believes that is an issue for the English court to decide if the issue is raised in a proceeding in England.

5 Annex 2 to the Settlement Agreement lists the non-Croatian subsidiaries and affiliates of the Agrokor Group. 23 are located in Serbia, 18 are located in Bosnia and Herzegovina, 15 are located in Slovenia, 6 are in the U.S., 4 are in Montenegro, 3 are in Hungary, and 2 are located in both Macedonia and the Netherlands. There are approximately 11

remaining locations that each contain one or fewer Agrokor Group subsidiaries. Only Croatian subsidiaries and affiliates are subject to the Croatian Proceeding.

6 Paragraph 63 of the Verified Petition provides, "As part of this reorganization, the Settlement Agreement contemplates (i) a release of any and all claim claims, obligations, suits judgments, damages, rights, causes of action and liabilities arising from, in connection with, or relating to the Unsecured Notes or related indentures against The Bank of New York Mellon and BNY Mellon Corporate Trustee Services Limited in their respective capacities as trustee of the Unsecured Notes under the relevant indenture and its current and former affiliates and subsidiaries, and such entities' and their current and former officers, directors, managers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, assigns, principals, members, employees, agents, attorneys, consultants, advisors, representatives and other professionals (such parties, the 'Trustee Released Parties' and such release, the 'Trustee Release'), *see* Settlement Agreement, 18.3.2, and (ii) a release of certain bond guarantees governed by New York law, including guarantees by three non-debtor entities from Bosnia-Herzegovina granted by Ledo d.o.o. Čitluk, Sarajevski kiseljak d.d., and Konzum d.o.o. Sarajevo (such guarantors, the 'Bosnian-Herzegovinian Guarantors' and such release, the 'Bosnian-Herzegovinian Guarantor Release'), *see* Settlement Agreement, 29.8." (Verified Petition ¶ 63.)

7 Capitalized terms not defined within this section shall have the meaning attributed to them in the Settlement Agreement.

8 References to ECF Doc. # 21 in the following sections refer to copies or English translations of the foreign recognition opinions, which are appended to the Memo on Foreign Hearings. These opinions are cited according to page number (and paragraph where possible) for clarity.

9 Though Sberbank opposed recognition of the Croatian Proceeding before the English court, it took an active role in negotiating the Settlement Agreement as one of the members of the five-entity interim creditors council. (Settlement Agreement § 4.1.3.1) (the members of the creditors council are Sberbank of Russia, Knighthead Capital Management LLC, Zagrebacka Banka d.d., KRAS prehrambena industrija d.d., and Toni Raic). Additionally, Sberbank *voted in favor* of the Settlement Agreement. (Croatian Court Order Approving the Settlement Agreement at 301-07.)

10 Section 15 of the Settlement Agreement explains "[c]reditors have been classified into classes on the basis of claim type, meaning a single creditor with several types of claims may be represented in multiple classes. Such classification shall be used for the purposes of voting on this Settlement Plan pursuant to Art. 43 EA Act. The classification of Creditors per the above Court resolution is as follows: small suppliers, in which class Creditors whose claims do not exceed HRK 100,00 are classified; large suppliers, in which class Creditors whose claims exceed HRK 100,00 are classified; Noteholders, in which class Creditors who are holders of notes issued by the Debtor are classified; unsecured creditors, in which class Creditors whose claims are not secured by a separate satisfaction right are classified; and secured creditors, in which class Creditors whose claims are secured by a separate satisfaction right are classified." (Settlement Agreement § 15.)

11 The Court's decision in *Gebhard* was reached over a strong dissent by Justice Harlan which relied heavily on English case law and commentaries by Joseph Story, James Kent and others that, consistent with the *Gibbs* rule, would not permit a discharge of contractual obligations other than under the law of the place of contracting. *Id.* at 546–47, 3 S.Ct. 363. Justice Harlan was particularly troubled that the discharge in *Gebhard* was based on a legislative act, with no judicial hearing subject to due process requirements, *id.* at 544, 3 S.Ct. 363, which is not an issue in this case because the loan modification here was approved by a creditor vote followed by court approval following notice and a hearing.

12 It is noteworthy that no objections were filed to recognition and enforcement of the Settlement Agreement within the territorial jurisdiction of the United States.

13 As Chief Justice Waite said in *Gebhard*, 109 U.S. at 539, 3 S.Ct. 363, "[u]nless all parties in interest, wherever they reside, can be bound by the arrangement which is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."

14 The Court has already indicated that the percentage recovery to the holders of English Law Governed Loans and New York Law Governed Notes is projected to be 50.8 percent. The Loans and Notes are both unsecured.

15 Lord Esher's question may be compared with Supreme Court Justice Waite's commentary seven years earlier in the *Canada Southern Ry. v. Gebhard* case. 109 U.S. 527, 3 S.Ct. 363, 27 L.Ed. 1020 (1883). In that opinion, Justice Waite says, "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government .... It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere." *Id.* at 537-38, 3 S.Ct. 363.

16 Interestingly, one of the two creditors in the *Bakshiyeva* case, Sberbank, happens to be the largest pre-petition lender of English Law Governed Loans to Agrokor d.d. in the current Croatian Proceeding. In contrast to its position in *Bakshiyeva*, in which it did not participate in any way in the foreign proceedings, Sberbank was a member of the five member Interim Creditors Committee and voted in favor of the Croatian Settlement Agreement.

17 Lord Collins' view about what is "unrealistic" obviously differs markedly from the view of the Chief Justice Waites in *Gebhard*, decided in 1883, that everyone who deals with a foreign corporation impliedly subjects himself to foreign law, including a discharge from liability. 109 U.S. at 537–38, 3 S.Ct. 363.

18 Though Look Chan Ho refers to an orthodox classification of bankruptcy proceedings as *in rem* proceedings, the *Rubin* court definitively stated that bankruptcy proceedings were neither in rem nor in personam. *Rubin* UKSC 46 at ¶ 43 ("if the judgement had to be classified as in personam or in rem the appeal would have to be allowed, but bankruptcy proceedings did not fall into either category ...."). As discussed above, the U.S. Supreme Court in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. at 447, 124 S.Ct. 1905, concluded that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an *in rem* proceeding.

19 This criticism of the *Gibbs* rule is relevant in all cases dealing with the foreign recognition and enforcement of judgments in insolvency proceedings. The Croatian Proceeding is certainly an insolvency proceeding and Agrokor is, most certainly, insolvent. A separate question, unnecessary for the Court to reach in this case, is whether the *Gibbs* rule should be applied when considering whether to recognize and enforce a foreign scheme of arrangement that modifies English law debt. Statutory authority for schemes of arrangement typically arise from companies' laws rather than insolvency laws. *Gibbs'* reasoning that contract law should be applied in determining whether to recognize and enforce a scheme of arrangement that modifies English law debt may have more force. But this Opinion only deals with application of the *Gibbs* rule in an insolvency proceeding.

20 Where a contract selects English law, choice of law principles will most likely mean that determining the amount a breach of contract claim should be determined under English law. Choice of law principles should not dictate that English law applies in determining whether a claim can be discharged or modified in a foreign insolvency proceeding.

21 The forum selection clause stated that the foreign borrower agreed that the loan would be governed by New York law, agreed to submit any dispute to a New York court and agreed to "irrevocably waive to the fullest extent permitted by applicable law, any claim that any action or proceeding ... should be dismissed or stayed by reason ... of any action or proceeding commenced by [debtor] relating in any way to this Agreement ...." 412 F.3d at 428.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	. Chapter 11
	. Case No. 21-11507 (KBO)
ALTO MAIPO DELAWARE, LLC, *et al.*,	. (Jointly Administered)
	. Courtroom No. 3
	. 824 Market Street
Debtors.	. Wilmington, Delaware 19801
	. Tuesday, April 26, 2022
. . . . .	. 11:01 a.m.

TRANSCRIPT OF ZOOM HEARING
BEFORE THE HONORABLE KAREN B. OWENS
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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(Proceedings commenced at 11:01 a.m.)

THE COURT: Good morning, parties. This is Judge Owens. We are gathered for an omnibus hearing in Alto Maipo.

Can you all hear me?

COUNSEL: We can, Your Honor.

THE COURT: Okay. Thank you very much.

Okay. We're here for an omnibus hearing in Alto Maipo. We have a series of items scheduled to go forward. Why don't I turn the virtual podium over to the debtors and you can walk me through today's agenda.

MR. GREECHER: Yes, thanks. Good morning, Your Honor. Sean Greecher from Young Conaway, on behalf of the debtors.

We did file yesterday, an amended agenda; it's at Docket Number 537. The amended agenda reflects a few additional matters that were filed by various parties. It also reflects the adjournment of the matters relative to the Manzano community parties. Those matters, Numbers 3 and 4 on this agenda, will be heard on April 29th. And we thank Your Honor for the accommodation in that regard.

With that, Your Honor, I would propose to just jump into Matter 1, which is the debtors' motion to assume the Minera Los Pelambres agreement. And for that, I would turn things over to Mr. Barefoot.

THE COURT: Okay. Thank you, Mr. Greecher.

Mr. Barefoot, welcome.

MR. BAREFOOT: Good morning, Your Honor.

Luke Barefoot from Cleary Gottlieb Steen & Hamilton for the debtors in possession.

Your Honor, as Mr. Greecher mentioned, we have two items on the agenda this morning: the debtors' motion to assume the power purchase agreement with Minera Los Pelambres that was originally filed on March 10th at Docket Item 349 and the debtors' related motion to enforce the automatic stay, also filed on March 10th at Docket Item 352.

Your Honor, the agreement that these motions relate to, a long-term power purchase agreement with MLP, is central to the debtors' reorganization efforts and is the core of their business plan, as it secures MLP's obligations to purchase power from the debtors' hydroelectric project on favorable, predictable, and long-term terms.

In terms of how we would propose to proceed, Your Honor, subject to your views, I would propose to provide a brief introduction on the merits of the assumption motion and take care from an evidentiary perspective, admitting into evidence the testimony that the debtors would rely on in support of the motions, and then turn to the only outstanding objection, which is the personal jurisdiction objections asserted by MLP that have now been extensively briefed by the parties.

THE COURT: Okay. I actually do have a problem with that procedure. We're here on just the limited threshold question of whether I can exercise, or excuse me, whether it's appropriate to decide the motions without the presence of MLP, having been decided. So, that's the legal issue that's squarely before me and the merits are not at this point, so I will not move any evidence -- move any of the declarations into evidence at this time.

MR. BAREFOOT: Understood, Your Honor.

Then, in that light, what I would propose is that the debtors and the parties that are supporting the debtors would begin with argument on the personal jurisdiction question and then turn it over to Mr. Bromley, while reserving reply?

THE COURT: That would be perfect. Thank you.

MR. BAREFOOT: So, Your Honor, as we set it out at the beginning, the sole issue that is before the Court and the sole objection to entry of the orders is MLP's assertions on personal jurisdiction. And to set the stage there, I would like to begin with the frameworks of Section 365 and 541, which are well established. Section 365 requires that, one way or the other, the debtors assume or reject in their business judgment, all executory contracts prior to confirmation.

When the debtors exercise that business judgment

to assume a contract, the Court is required to determine under Section 365(b), whether there are any defaults under the agreement, and if there are, to provide for cure of those defaults and adequate assurance of future performance.

In turn, Section 541 provides that the debtors' estate consist of all legal and equitable interests of the debtor and property, wherever located, and pursuant to Section 1334 of Title 28, the Court is vested with jurisdiction to decide motions to assume, as matters arising under Title 11.

While MLP has framed the question before the Court in terms of due process, there can be no question that MLP has had and has what due process requires: notice and an opportunity to be heard. Presented with that opportunity, MLP made the strategic decision not to engage or object with the merits of assumption or the merits of whether a default exists.

MLP is a sophisticated party represented by capable counsel and that is their entitlement to make that decision. But what MLP asked the Court to do today is to allow their strategic choice to rely on personal jurisdiction objections to trump the debtors' entitlements under Section 365 and to make new law that the Court must engage in an individualized determination on personal jurisdiction every time the debtor exercises its business judgment to assume a

contract.

There is simply no support in the tomes of case law on Section 365 that squarely supports that assertion.

THE COURT: You would agree with me, Mr. Barefoot, that it's a basic of civil procedure that I have subject-matter jurisdiction, but as well, I need jurisdiction over the thing or I need jurisdiction over the person. You would agree with me on that?

MR. BAREFOOT: Agreed, Your Honor.

THE COURT: Okay.

MR. BAREFOOT: I agree. And that is a disjunctive choice.

THE COURT: Okay.

MR. BAREFOOT: You do not require both. If you have jurisdiction over the thing, you do not require jurisdiction over the person, as you can proceed *in rem*.

THE COURT: Okay. So the idea that only MLP is only entitled to notice and an opportunity to be heard is not exactly a correct statement of the law, is it?

MR. BAREFOOT: Well, in terms of -- Your Honor, I was framing that in terms of their framing of the issue that this is an issue of due process and that's what due process requires.

THE COURT: I think the Fifth Amendment goes to more than notice and an opportunity to be heard, doesn't it?

MR. BAREFOOT: That's fair, Your Honor.

But I think, turning squarely to Your Honor's question, the Court clearly has jurisdiction here over the thing; the thing being the debtors' rights under the power purchase agreement.

THE COURT: Okay.

MR. BAREFOOT: And, Your Honor, if I could just elaborate a bit on MLP's position and the practical import they would have, if the Court accepted MLP's assertion foreign counterparties everywhere could effectively tie the Court's hands by making a strategic choice that rather than appear and be heard on the merits, whether it be as to whether there's default, whether it be as to whether there's an integration issue, whether there is cure required, all of those matters, they could avoid a determination on and, instead, rest on personal jurisdiction assertions in an effort to block the debtors' ability to assume what would be an agreement that's beneficial to the debtors' estates.

The consequences of that kind of a ruling cannot be understating, particularly, in large cross-border cases such as these. MLP's arguments would transform what is intended to be a summary proceeding under 365, into a complex series of potentially hundreds or even thousands of minitrials, where the Court would be required to make one-by-one determinations on personal jurisdiction with each of the

debtors' counterparties. MLP's assertions, if accepted and taken to that logical conclusion, would fundamentally alter the inquiry the Court is required to make and grind the "assumption and rejection" process to a halt.

Going straight to, Your Honor, the touchstone for MLP's arguments, it's the Supreme Court's decision in Shaffer v Heitner. Courts have made clear that Shaffer only applies to *quasi in rem* proceedings, not *in rem* proceedings, such as this bankruptcy case, where the Court has core, *in rem* jurisdiction over all the legal and equitable interests of the debtor and property, wherever it's located.

As an initial matter, Your Honor, the scope of Shaffer is made clear by the fact that the Supreme Court has gone on to decide two subsequent cases: the 2006 decision in Central Virginia v Katz and the 2004 decision in Tennessee Student Assistance v Hood, where it clearly held that bankruptcy proceedings are fundamentally *in rem* actions, without so much as a citation to Shaffer.

THE COURT: You would agree we me --

MR. BAREFOOT: Indeed --

THE COURT: -- that those cases -- you would agree with me that those cases seem to imply that the *in rem* jurisdiction isn't the starting and endpoint, however. I mean, those cases --

MR. BAREFOOT: Well, Your Honor --

THE COURT: -- imply that a Bankruptcy Court could overstep *in rem* jurisdiction -- I shouldn't even say, "*in rem* jurisdiction" -- just an *in rem* action is not the start and the end; that there could be an *in rem* action coupled with an *in personam* action.

MR. BAREFOOT: There certainly could be, Your Honor, and that would be an example, such as in many of the cases that MLP has cited to where there's an adversary proceeding, there's a request for a declaratory judgment, there is a request for a monetary judgment against the counterparty.

But the debtors here are not seeking any of those; the debtors are simply seeking authority to assume the contract in the exercise of their business judgment. And as part and parcel of that, it's a required element of 365 that the Court make a determination about whether defaults exist.

THE COURT: Well, the Orion Court would seem to suggest that that's not the requirement and that's not how I should analyze a motion to assume. And other courts that have accepted Orion's position actually disagree with that approach.

MR. BAREFOOT: Your Honor, I'd only note on that point that Orion is fundamentally focused on jury trial rights. No one has asserted that jury trial rights are at issue here and, in fact, the Third Circuit in the Billing v

Ravin, Greenberg decision, which is at 22 F.3d 1242, criticized Orion and said that the Court did not engage in an in-depth Seventh Amendment analysis and that it found the observations in Orion unpersuasive.

THE COURT: Well, wouldn't it have parallels to this proceeding? Orion was concerned with constitutional rights. In that case, the issue was the jury trial, but here it's due process.

So how -- yes, while it is not on point, exactly, you can extract the fundamentals from that case and apply them to this case, couldn't you?

MR. BAREFOOT: Your Honor, I think if we look at the lower court decisions that apply to Shaffer v Heitner, it's very clear that the courts have drawn a bright-line around *quasi in rem* proceedings and distinguishes them from *in rem* proceedings.

If you look at the Ninth Circuit decision in United States v Obaid, it provides a thorough analysis of Shaffer and held and expressed terms that Shaffer is limited to *quasi in rem* proceedings and not *in rem* proceedings, and it expressly gave bankruptcy proceedings as an example of purely *in rem* proceedings.

And that's entirely consistent, Your Honor, with the District of Delaware decision in Forest Labs. Forest Labs held, and I'm quoting:

Shaffer, however, addressed the vitality of *quasi in rem* jurisdiction; it does not address the question of consent to personal jurisdiction, nor the concept of general jurisdiction.

And while MLP argues that Forest Labs from the District of Delaware is inapposite because there, the defendant consented to personal jurisdiction, that's not necessary to the Court's holding that Shaffer only applies to *quasi in rem* proceedings.

THE COURT: And how would you describe a *quasi in rem* proceeding?

MR. BAREFOOT: Your Honor, I think Shaffer is the prototypical example, right. As a matter of Delaware law, the shares in that case were located within the District of Delaware, but the parties who owned those shares were not. So, the Court was required to make findings that it could not execute because those parties were not within its jurisdiction.

THE COURT: Did the findings seek, did they seek to apply the findings to assets outside of Delaware?

MR. BAREFOOT: I don't believe so, Your Honor, because I think as a statutory matter, the shares at issue are, as a matter of Delaware law, always located in Delaware, no matter where they're certificated or who the holders of those shares are.

But here, Your Honor, it's not ambiguous and, you know, MLP has made a lot of bones about the fact that this is a contract, that it's intangible rights under a contract, rather than, you know, something like a bank account or a car that is tangible. That is really not consistent with the current concept of the scope of the debtors' property under 541. And the case law that we cited makes clear that intangible rights, such as the debtors' rights under the contract with MLP are part of the debtors' estate that is *in rem* before the Court.

Your Honor, if I could just turn to, very briefly, addressing some of the additional decisions on the Shaffer decision that MLP cited to in its surreply?

THE COURT: That would be great. Thank you.

MR. BAREFOOT: So, Your Honor, most of the other decisions that MLP cites to in its surreply brief are inapposite because they are *in personam* actions that were either adversary proceedings or district court civil actions where the relief was obviously *in personam*, because it sought a judgment against a defendant.

We're not seeking any such a judgment here. As to the Second Circuit's decision that they cite in LiButti -- that's L-i-B-u-t-t-i -- v United States. That arose in the context of an action by the IRS to quiet title over property. And the only court holding there was the unremarkable

preposition that, as Your Honor observed, the Court either neither *in rem* jurisdiction over the property or it needed *in personam* jurisdiction over the defendants. And it held that the property was not within the jurisdiction of the court and that the defendants had a lack of minimum contacts.

There's nothing in LiButti that holds or suggests that bankruptcy courts entering assumption orders must also have personal jurisdiction over contract counterparties.

Similarly, Your Honor, as to the Fourth Circuit's decision in United States v Batato, and that's B-a-t-a-t-o, the Court was clear that it was only assuming, without deciding, that estate-based, minimum contacts approach was appropriate in civil enforcement actions. Not only is that from outside of the circuit and in a different context, but it didn't actually make a decision about whether Shaffer's minimum contacts analysis applied; it only assumed that it did.

Your Honor, I'd like to turn to the two cases that I think are the closest to being on point as to the square question before the Court. On MLP's side, and that's a thin stack, because I think this is, the debtors would concede, relatively unprecedented territory MLP is asking the Court to wade into.

On MLP's side, I think the closest they get without actually hitting it on the mark, is the 1983 decision

from the Western District of Missouri in the Global International Airways case. In that case, however, Your Honor, the Court does not actually wrestle with the question of whether personal jurisdiction over the contract counterparty was required.

The procedural posture of that case was that the parties framed the question for the Court not as whether jurisdiction over the contract counterparty was required as a prerequisite to assumption; instead, the Court only answered the question that was put to it by the parties, which is whether the Court had jurisdiction over Air Canada, as an instrumentality of a foreign state.

I'd also note, Your Honor, that that case is almost 40 years old and was decided only a few years after the Bankruptcy Code was enacted and so, it lacked the benefit of the precedent that was developed over the intervening decades.

The case that we think is most squarely on point and that the debtors would urge the Court to look to is the one that's before the Court that actually decides the question of whether personal jurisdiction over a lease counterparty is required to enter an assumption order, and that's the more recent decision in Sae Young Westmont from the Northern District of Illinois in 2002. In that case, Your Honor --

THE COURT: But that case -- I've read it; I've analyzed it -- I'm not sure if that case is helpful to you because that case just simply asked the Court to decide whether it could assume and assign, whether the debtor could assume and assign a contract.

There were no findings that were made in an order about defaults. There were no findings made in an order about cure. You would agree with me that that seems to be, more squarely, the question that I have before me today?

MR. BAREFOOT: That's correct, Your Honor.

And I don't think there were -- there was a request in that case from the debtor to make those findings.

I think we have established -- and I don't think it's controversial -- that that is an element of 365(b) that's a prerequisite to the statute. And that's why the debtors have been asked -- have asked the Court to make those findings.

Obviously, if Your Honor was so persuaded, you know, there could be modifications made to the order to comport with Sae Young Westmont. But we do think that, regardless of whether Sae Young Westmont squarely addressed the question of 365(b) cure, Sae Young Westmont does clearly say that the Court does not need jurisdiction over the state counterparty and said that the nature of *in rem* jurisdiction was to determine the disposition of the property and that by

doing that and entering an order authorizing an assumption and assignment, there was no way that the Court was transforming the nature of the proceeding into an *in personam* proceeding.

THE COURT: How would you --

MR. BAREFOOT: And that's the --

THE COURT: How would you define what an *in personam* proceeding is?

MR. BAREFOOT: I would say it's a proceeding where the relief that -- where there is specific relief being sought to require a judgment or performance from the adverse party. And, Your Honor, here, we're simply seeking to, as a matter of 365, assume the agreement because I think we've made the case that it is in the debtors' business judgment to do so.

THE COURT: Okay. I understand your position but thank you for answering my -- that last question.

MR. BAREFOOT: Just going very briefly back to Sae Young Westmont, you know, I think it's important, Your Honor, that that case also expressly rejected the assertion that the assignment of the lease derived from *in personam* jurisdiction and it, instead, said that the jurisdiction to assume and assign the lease derived from the Court's jurisdiction, not over the state, which was the lease counterparty, but from jurisdiction over the debtors' estate.

Your Honor, as I said, the debtors concede that given the relatively unprecedented nature of the holding that MLP seeks, there's not a great deal of case law where courts have directly wrestled with this question. But the debtors would respectfully submit that the closest guidance that the Court has is not only in the cases that expressly distinguish Shaffer v Heitner as only applicable to *quasi in rem* proceedings, but the Sae Young Westmont case, which expressly decides that personal jurisdiction over the contract counterparty was not a prerequisite to entry of an assumption order.

THE COURT: Okay. Thank you, Mr. Barefoot, and thank you for the colloquy back-and-forth, via Zoom. It's difficult, quite frankly, to engage in any back-and-forth, but thank you for attempting that with me.

All right. I know that other parties have filed joinders in support of the debtors' position and I'm happy to hear from them at this time before I turn the podium over to Mr. Bromley on behalf of MLP.

MR. ROSENBLATT: Good morning, Your Honor.

It's Andrew Rosenblatt from Norton Rose Fulbright. I'm here on behalf of the senior secured lenders under the common terms agreement.

Your Honor, we did file joinders to the debtors' original motion to assume the PPA, the motion to enforce the

stay against MLP, and then the debtors' response to the personal jurisdiction, that is the subject of today's hearing.

Our latest joinder regarding personal jurisdiction, I believe, is at Docket 526. Your Honor, I'd note that Strabag SpA is also a party to that joinder.

I will be brief, as I agree with pretty much everything Mr. Barefoot said. I see no reason to just repeat what he said.

To me, though, Your Honor, this is not all that complicated. I think that what MLP has done, because it has to, in order to even make a colorable argument, is to try and turn Alto Maipo's assumption motion into something that it's not. Our view is that the motion is very straightforward; it's simply a motion to assume a contract that is unquestionably property of the estate and property over which the Court, unquestionably, has *in rem* jurisdiction under 28 U.S.C. 1334.

Importantly, as Mr. Barefoot, I think he alluded to, the debtors are not seeking to amend the PPA. They're not seeking to impose any obligations over MLP that do not otherwise exist under the contract. They're not seeking to modify the PPA in any way, nothing of the sort that would impact or affect MLP's, quote, particularized rights or obligations.

And I think that's the distinction; that's when you invoke *in personam* jurisdiction, when you're imposing obligations on a party and you're not just adjudicating, you know, the rights of parties in debtors' property. To me, Your Honor, their argument makes no sense because every assumption motion -- and I stress the word "every" here -- requires the same findings. And Mr. Barefoot said it's a statutory requirement under Section 365 for the Court to determine if a default exists.

So, how is this motion different than any other assumption motion? It's not and --

THE COURT: Because there's a contract counterparty that does not submit to the jurisdiction of my court and --

MR. ROSENBLATT: Yeah, but Your Honor --

THE COURT: -- and --

MR. ROSENBLATT: Yeah?

THE COURT: -- every omnibus motion to assume or reject typically does not include findings about defaults and cures -- defaults of -- over parties, when we know there's a dispute.

MR. ROSENBLATT: Well, Your Honor, they have the right to come here and contest that on the merits. They're making a decision not to come in here, okay. That is of their own volition.

But, you know, to me, the Sae Young case actually is on all fours here, Your Honor, because it clearly -- it clearly held that the Court has the authority to enter an assumption order and it's based on the Court's *in rem* jurisdiction. I think the case is right on point because there you had a nondebtor, and I believe the nondebtor did allege defaults, Your Honor, and also a lack of personal jurisdiction, and yet, the Court expressly found that it had *in rem* jurisdiction to rule on the assumption motion and that was all that was needed.

THE COURT: But the Court in Sae Young specifically said -- let me find my notes:

Number one: The debtor didn't seek to litigate any disputes it may have with the state before the Bankruptcy Court. Quote, Its rights and obligations under the lease were not adjudicated, end quote.

There was no dispute. There was no judgment on the merit of any dispute between the parties.

The findings here, were you -- are they not -- are they not an adjudication of the disputes?

MR. ROSENBLATT: Well, Your Honor, I do believe in Sae Young, though, that there -- that the nondebtor did allege defaults, yet the Court --

THE COURT: Just in passing.

MR. ROSENBLATT: -- you know, yet the Court --

THE COURT: Just in passing, in the briefs.

MR. ROSENBLATT: Right. But, Your Honor, still, the inherent nature of what the debtor, the relief they're seeking is purely *in rem* relief because they're not imposing any obligations on MLP. This is a dispute centered solely around the parties' rights with respect to the debtors' property.

If the debtors were coming in here and they were saying: Your Honor, we want to assume this contract; we want to amend it; we want to -- we're modifying this; we're imposing obligations on MLP that don't otherwise exist, Your Honor, that's when *in personam* jurisdiction is necessary. That's a dispute that imposes obligations on a nondebtor party.

This, however -- and, Your Honor, again, the findings that the debtors are asking you to make regarding default, that is a requirement under the statute, okay. That essentially -- whether or not it's contested or not, in any other 365 assumption motion, you're -- a Court is going to have to make those same findings, whether it's contested or not. A Court has to inherently find that there is no default or if there is a default, that it's cured.

So, to me, Your Honor, the larger point is that if MLP's argument has merit, then every assumption motion will require a Court to find personal jurisdiction over the

nondebtor party. And, Your Honor, I do think that this has broader implications, because I think it would create practical barriers that would prevent, particularly, foreign debtors from using Chapter 11.

And, Your Honor, I know that lawyers are quick to throw out, you know, a slippery-slope argument. They like to point out a parade of horribles that would occur from a -- not a legal position. But in this case, to me it's very clear that their argument would strip away a debtor's fundamental right under Section 365 and discourage foreign debtors from using Chapter 11 in a way that was contemplated by Congress; in fact, to me, it's inconsistent with Congress' mandate.

You know, we cited in our joinder, Section 109 of the Bankruptcy Code, which are the debtor eligibility requirements and, you know, there really are none, Your Honor. I think it's pretty clear that if Congress wanted to restrict foreign debtors who logically have foreign creditors and foreign contract counterparties, you know, from using Chapter 11, then they would have said so.

But it makes no sense to me, you know, where Congress allows foreign debtors to frequently avail themselves of Chapter 11, but then to impose jurisdictional limitations that essentially strip away their key rights and protections. So, I don't think that that lines up.

Your Honor, the final --

THE COURT: You would agree with me -- you would agree with me that I don't have the ability to affect property, okay -- or I shouldn't -- let me not use the word "affect." I need the assistance of foreign courts in order to fully realize my orders over assets or people located in foreign jurisdictions. That's why we have ancillary proceedings that get opened and foreign courts recognize my order. I just don't sit here as adjudicator of the entire world.

Now, it gets cumbersome. Like you pointed out, there's some difficulties in fully realizing the Code to its, I guess, fullest potential. And that's why we've developed cross-border procedures and laws to try to marry due process issues with the Bankruptcy Code and the fact that we're in a worldwide -- we handle worldwide cases.

MR. ROSENBLATT: Yeah, Your Honor, I think you've gotten that exactly right. But to me, enforcement is much different than the inherent power of the Court to enter the order in a Chapter 11, which is all that's before the Court today.

Enforcement is a different issue. Whether or not the -- you know, the impact or import of your order, assumption order in Chile is not before the Court. That is an enforcement issue. That is an issue that parties will

have to hash out separately. We have no -- I don't want to speculate what MLP will do, whether they will respect your -- you know, your order; obviously, thus far, they haven't respected the Court's orders. They have violated the stay.

But to me, Your Honor, those are mutually exclusive issues. The inapparent power of the Court to enter an assumption order versus, you know, enforcement of that order of ruling, and to me, that second issue, that latter issue is not before the Court today.

Your Honor, the last thing I would say is that, you know, to me, MLP's -- the rationale and the legal position that they are taking, it could have serious implications. Even just beyond contract assumption is almost every court order impacts a creditor's rights, *vis-a-vis*, the debtor and the debtors' property, including confirmation orders.

I mean, as Mr. Barefoot said, like, what is the Court to do? Do you have to go, you know, creditor by creditor to determine if you have personal jurisdiction over them to determine if you have the authority or power, inherent power to even enter, like, a confirmation order?

I mean, I just think that there's a clear distinction between purely *in rem* jurisdiction -- and to me, assumption under 365 is a purely *in rem* action. It does not rely in any way, shape, or form on *in personam* jurisdiction

or *quasi in rem* jurisdiction, which is why we didn't even address those issues, Your Honor. It's a purely *in rem* issue.

If the debtors were imposing obligations on MLP that didn't exist, if the debtors were trying to amend the contract, that would invoke or require *in personam* jurisdiction.

Your Honor, I really, truly believe that despite MLP trying to turn this into something it's not, this truly is nothing more than a run-of-the-mill assumption motion. If MLP believed that they had -- that there was a default and a basis to oppose assumption, then they should have come in here and contested assumption on the merits, Your Honor.

They chose not to do that. They're playing games and their games -- but their gamesmanship doesn't change the limited relief that the debtors are seeking or, more importantly, the power of the Court to grant relief to the debtors.

That's really all I have, Your Honor.

THE COURT: Okay. Thank you.

MR. ROSENBLATT: Thank you.

THE COURT: Okay. Anyone else?

MR. ABBOTT: Can --

THE COURT: Oh, Mr. Abbott?

MR. ABBOTT: Yes, Your Honor.

Derek Abbott, here on behalf of AES Andes and Norgener Renovables.

Your Honor, I don't wish the burden the record. I do think this matter is a little more basic than MLP would have the Court believe and, obviously, a critical issue to these debtors. But, again, I don't want to repeat what my colleagues have said, and subject to Your Honor's questions, that's all I have.

THE COURT: Okay. Thank you, Mr. Abbott. I have no questions for you.

Mr. Resnick?

MR. RESNICK: Thank you, Your Honor.

This is Brian Resnick from Davis Polk for Cerberus South American Investments, a senior lender to the debtors and a party to the RSA.

Your Honor, we also filed a joinder and I just wanted to express our support for everything that Mr. Barefoot and Mr. Rosenblatt said, and other than that, we'll (indiscernible) anything, in case there's a need for a reply.

THE COURT: Okay. Thank you.

Mr. Alberts, did you want to add to the record?

MR. ALBERTS: Your Honor, we -- Sam Alberts on behalf of the official committee of unsecured creditors -- we had filed a pleading in support of the debtors' motion

appearing at 381.

We had assessed the contract. We thought that the contract really is a valuable asset of the estate. I realize that piece of it is not before the Court, and so we will -- you know, we've rested on that pleading, itself.

THE COURT: Okay. I certainly understand the committee's position with respect to the contract.

Okay. Well, Mr. Bromley, I think we have exhausted everyone that is in support of the debtors' position, so why don't I hear from you on the matter.

MR. BROMLEY: Thank you very much, Your Honor.

James Bromley on behalf of Minera Los Pelambres, appearing in a limited fashion as set forth in our papers.

Your Honor, this is not a complicated issue. The U.S. Constitution simply does not allow Your Honor to enter the relief requested. Your subject-matter jurisdiction under 28 U.S.C. 1334 certainly extends to property of the estate, but 1334 does not exempt the bankruptcy court or the bankruptcy process from the due process clause of the Constitution or from personal jurisdictional requirements.

It does not mean that the Court can grant any relief under the Bankruptcy Code relating to property of the estate without considering the due process rights of affected parties.

I agree that there's a unique aspect to this, that

these arguments are not made frequently. And the reason they're not made frequently is that most debtors do not try to do what this debtor is trying to do.

We should start with the motion the debtors have filed to assume the power purchase agreement. Your Honor, it is almost exactly the situation that the Second Circuit addressed in Orion. Remember, in Orion, the debtors filed two motions or two things. They filed a motion to assume and an adversary proceeding looking for declaratory relief and certain findings, with respect to the contract.

The Court, in Orion, the Bankruptcy Court, Judge Lifland said, I'm going to deal with it all in connection with the motion and I'm going to say that the adversary proceeding is moot.

That is what the debtors have done here, Your Honor. They have loaded all the relief into a motion to assume. This is not a motion to assume under Section 365 that simply seeks a finding that it's in the debtors' best interests to assume the contract.

What the debtors are seeking are specific findings under Chilean law, under the contract, with respect to my client and my client's rights. That is a choice that the debtors have made.

That is not the facts that were before the Court in the Sae Young decision and, in fact, they are the facts

that were before the Court in the Orion decision. What we have here, Your Honor, is a fundamental request to effect the particularized rights of my client under a contract -- it is a contract, no question -- that the debtors are parties to.

And I'm not going to get into the questions of whether or not a foreign debtor should be filing a case in Delaware; that's not before the Court.

But what we're dealing with is the idea that this contract is a Chilean contract. It is cited in Chile. It is written in Spanish. It is governed by Chilean law. It has a Chilean arbitration provision in it that requires that Chilean arbitrators, three of them, be appointed.

Your Honor, everything about this, it is between a hydroelectric power plant located in Chile and a copper mine located in Chile, everything about this, Your Honor, is Chilean.

And the debtors consciously decided to file a motion under 365 and not an adversary proceeding. We have already talked in prior hearings about the problems that that provided, right. We did not -- this should be, in our view, and we continue to have our view and respectfully disagree with Your Honor, that this should have been brought as an adversary proceeding. If it had been brought as an adversary proceeding, we think it should have been served, pursuant to appropriate rules. And, indeed, if we had accepted service

under Federal Rules of Civil Procedure, we would have had 60 days to respond.

But, no, we are proceeding as if this is a motion. We believe, Your Honor, that what is happening and the specific relief that the debtors are seeking is relief that is beyond simply stating that the debtors' business judgment is appropriate in these circumstances.

The Court is asked to specifically find and conclude that the commencement of the Chapter 11 cases does not constitute an insolvency event under the agreement. If you read the agreement, Your Honor, "insolvency event" is a defined term.

If you read the letters that were exchanged between myself and Mr. Barefoot and between my client and his client, you will see that the question that is central to the dispute among the parties is whether the commencement of the Chapter 11 proceedings, these Chapter 11 proceedings constituted an insolvency event under the power purchase agreement.

The debtors also seek a finding from this Court that the commencement of the Chapter 11 proceedings does not constitute an act of bad faith for purposes of the agreement. Where does the bad faith come from?

Well, Your Honor, we have stated in our correspondence, whether it was between Sullivan & Cromwell

and Cleary Gottlieb or my client and Alto Maipo or the lenders, that the actions to file this Chapter 11 proceeding constituted bad faith under Chilean law. That's where the bad faith comes in.

So, what the debtors are asking Your Honor to do is to make a finding outside of the four corners of the agreement that Chilean law, generally, would not allow an action for bad faith for purposes of the agreement.

Your Honor, these are litigation issues. These are not issues relating to the determination of whether it's in the best interests of the debtors' estate to assume this agreement. So, Your Honor, the fundamental nature of the relief being sought means that this is *in personam* relief.

And this is where Shaffer v Heitner comes in. First of all, Shaffer, itself, says in Footnote 17, that it's using the term "in rem" to mean both "*quasi in rem*" and "*in rem*." So, the Ninth Circuit is just flat wrong that Shaffer v Heitner did not deal with -- that it was only related to *quasi in rem*; the Supreme Court, itself, stated that it was using the term "*in rem*" to capture both in Footnote 17.

In addition, Your Honor, there are two other Circuits, the Second and the Fourth, which both find that Shaffer v Heitner extends to both, "*in rem*" and "*quasi in rem*" as the Supreme Court said in Footnote 17 of the decision. But we don't even need to get to Shaffer v

Heitner, because the nature of the relief that's being sought is *in personam* relief. It is also *in personam* relief with respect to the motion to enforce the automatic stay.

THE COURT: So, let me ask you the question I've asked everyone: What is your definition of *in personam* relief?

Because the definitions that I've received so far is, essentially, I have to -- being put in a position to ask or, I guess, impose affirmative relief against your client and I think you disagree with that definition. And that really is the issue before me: How do you determine whether something is *in rem* -- is an *in rem* action versus an *in personam* action?

MR. BROMLEY: Well, Your Honor, let's talk about what *in rem* and *quasi in rem* means. So *in rem* means rights with respect to the property *vis-à-vis* the whole world, and *quasi in rem* means rights with respect to the property *vis-à-vis* a particular party.

Now what we are talking about here, though, is not simply *quasi in rem* or *in rem*, we are looking at litigating the particularized rights of my client. So the use of the term "affirmative" relief I'm not sure exactly what my colleagues mean by "affirmative."

They are asking the court to make a determination that their point of view, in terms of the interpretation of

contract, is correct and my client's view is incorrect. They are seeking to have you litigate this contract and whether or not there's a breach, whether or not there is a right to terminate. They want you to litigate that issue in your court, Your Honor. That, I think, is fundamentally *in personam* relief.

If I was driving a car in New York and I had an accident with a resident of California that's the classic question of whether or not it could be paled into a court in California or whether I should be subject to suit in New York.

We are talking about there is not a single instance that can be shown here that indicates that these parties had any expectation to be litigating disputes relating to this contract in any form other than the Chilean arbitration. And all the debtors have done -- and with all due respect, Your Honor, this is the truth; all they have done is put a deposit in a couple of professionals' accounts and created an LLC on the eve of filing, and they claim that they can magically transform, through 1334, every single issue that relates to my client's contract into a matter that you have the right to determine definitively as a matter of your subject matter jurisdiction under 1334.

We simply do not believe that the United States Constitution allows that to occur. We don't think that this

is outrageous. We don't think that this is outlandish. We don't think it's perfidious. We think it is a fundamental baseline rule with respect to all litigation in the United States.

To the extent that there is any risk that is presented here, for all of the non-US entities that are accessing the United States and the Chapter 11 process to reorganize their debts, it would bear everyone -- everyone should bear in mind that those cases are here in effect because the counter-parties allow them to be.

The financial services industries, the parties that are investors on a worldwide basis are more than comfortable then having US courts litigating issues. They consent to the jurisdiction of the court. And in the vast majority I would argue almost, if not all, cases up to this point have not sought to use the US courts to violate the local law of rights of individuals who are not subject to personal jurisdiction of the US courts. That is why this is a unique case. It is unique because no debtor has ever tried to cross that line before. This debtor is trying to cross that line with my client.

They knew about this issue from day one. They could have filed an adversary proceeding on day one, they did not. They have sought to shoehorn this through Section 365 and ask for affirmative relief that is only available through

an adversary proceeding. They have not tried to serve my client under Rule 4. They have not -- and now they want Your Honor to enter an order that violates my client's due process rights and, frankly, this is the sort of due process issue that will not stop here. I am not saying this from a threat perspective.

The questions is what will we do. Well we will appeal. We will appeal and we will go -- and I think this is an issue that would be very appealing, so to speak, pardon the pun, all the way up the chain. And we --

THE COURT: That certainly is an interesting issue that we have all grappled with; although, all the parties are saying it's simple, it's clear that it is not simple.

MR. BROMLEY: I very much agree, Your Honor. From a jurisdictional perspective, right, the framework that the US bankruptcy code, and the history of the bankruptcy laws of the United States, and the bankruptcy clause provide are very interesting.

All these eleventh amendment cases and, frankly, most of the framework of the conversations that we had today are premised on the idea that 99.9 percent of the day to day work that we do in US bankruptcy courts deals with individuals and corporations who are subject to or voluntarily submit themselves to the jurisdiction of the US court.

This is a situation where there is a company that has -- my client, which has no context with the United States, against whom the debtor is seeking affirmative relief, that is contrary to our point of view with respect to Chilean law generally and with respect to the language of the power purchase agreement.

THE COURT: Mr. Bromley, would you agree with me, and your briefing seems to imply, that if this was a straightforward motion to assume in which I am, essentially, substituting my -- I'm testing the sufficiency of the debtor's business judgment in assuming the contract. Would you agree with me that that is *in rem*?

MR. BROMLEY: Well, Your Honor, I would say no.

THE COURT: Okay.

MR. BROMLEY: I would also state for this particular case the train has left the station. In this case the debtor has already asked for specific relief. We can't back the car out of the car wash, so to speak. The relief is out there. If the debtor revised its relief and said I simply want you to tell me you -- simply want Your Honor to determine that there was a -- that it's an appropriate exercise of the debtor's business judgment I don't think Your Honor can do that because you already know that there are disputes.

I do think that if -- in this circumstance, Your

Honor, if the debtors had simply filed a motion and said we want to say this is an exercise of our business judgment we had already written letters to the debtors before they filed this motion to tell them that we believed that there were issues under the agreement that breaches and rights of termination existed.

If they had filed that motion, I would be speculating, but I think we would have taken up, again, with respect to a letter to say you have an obligation to inform the court that there is an active dispute with respect to the agreement and because you're asking the court to make an affirmative finding that there are no breaches and no issues.

So, Your Honor, quite honestly, you know, I don't think we have those facts. We couldn't have those facts. We had disputed the contract issues before the debtors filed the motion. That is why they incorporated it into the motion. The debtors at this point have -- the court knows there is an active dispute. I don't think that Your Honor can enter an order at this point saying that there is no breach and that it's simply an appropriate exercise of the debtor's business judgment.

THE COURT: Okay. Thank you.

I interrupted you so I will allow you to continue.

MR. BROMLEY: Well, Your Honor, to continue, and I don't want to -- I know we have covered a lot of ground here

in the colloquy. I think I have addressed the point where we believe that Orion is on all fours with this case. We don't believe that Sae Young applies for the reasons both that Your Honor said as well as, you know, another express statement in the decision where the court says, well, you know, I'm not making any decisions here and if they want to go out and try to enforce this and have to deal with a breach of contract action down the road so be it.

I think it's also important in Sae Young to recognize that it is yet another eleventh amendment decision. You read Sae Young, you read Hood, and you read Katz the one thing that is implicit in each of those cases is that there is no underlying *in personam* jurisdictional question. The question is whether the eleventh amendment's statement of sovereign immunity means that the state, itself, or the agency of the state is immune from the jurisdiction of the court.

Each one of the 50 states is resident within the 50 states. So each one of them, but for the existence of the eleventh amendment, clearly would be subject to the person jurisdiction of the bankruptcy court. So there is no discussion in any of those cases, as you wouldn't expect it to be, because it's not as if it's a foreign state; it's a domestic state.

THE COURT: I mean those cases are helpful in

determining what would be an *in rem* proceeding. The court is struggling with what the scope of an *in rem* proceeding would be in bankruptcy *vis-à-vis* the state because if it's *in rem* then you can proceed against -- the court can exercise or enter orders that would affect the state in that instance.

MR. BROMLEY: Correct, Your Honor. Look, our argument is pretty simple. It boils down to the fact that the characterization of the relief is what controls in terms of determining whether or not *in personam* jurisdiction is required. We recognize the court's subject matter jurisdiction under 1334, but the inquiry, while necessary, does not end there. There has to be a question as to what kind of relief is being sought in both with respect to the assumption motion and the enforcement of the stay the debtors are seeking particularized relief, individualized affirmative relief against my client.

THE COURT: Are we on the motion to the stay because if we are I have questions on that.

MR. BROMLEY: I am on that, Your Honor.

THE COURT: Okay. I know, Mr. Barefoot, you didn't really touch upon that so you are welcome to elaborate on the reply, but let's talk about the motion to stay because I think the relief sought with respect to the motion to say is, of course, narrowly tailored.

So focusing on that relief don't the debtors just

want me to, essentially, put the agreement back in the nature -- basically put the agreement back to where it was before you allegedly took whatever actions you purportedly took. So it's just a declaration that the actions that were taken, if true, are *void ab initio*. So how is that affirmative relief against your -- if that is, in fact, the test for *in personam* or I should say only the test for *in personam*.

I agree with you that affirmative relief would, of course, be *in personam*, but I think there's other areas where affirmative relief may not be sought that could still be *in personam*. How is that *in personam*, I guess, the relief being sought?

MR. BROMLEY: So, Your Honor, it folds back into the analysis that relates to the assumption agreement. Without arguing the merits of whether or not there was a violation of the stay. The allegations that are made focus on letters that my client sent in Chile to Chilean parties that make statements of their point of view with respect to their interpretation of the power purchase agreement full stop.

That power purchase agreement, as I said, is entirely a Chilean agreement cited in Chile among Chilean parties; all of that. Even the backup agreement with the lenders is a Chilean law governed agreement. So there is nothing that is US about that issue.

THE COURT: Well the agreement is property of the estate.

MR. BROMLEY: The agreement is property of the estate, but not the agreement with the lenders. There are two agreements, right. There is an agreement with the lenders between my client and the lenders that is not property of the estate, and there is an agreement between my client, Alto Maipo, that is property of the estate.

Without delineating and arguing the merits the debtors do not dig into that. They allege that in the statements that have been made with respect to the agreement with the banks, not property of the estate, is somehow a violation of the automatic stay. That clearly is not. It doesn't relate to property of the estate in the least.

Your Honor, what the debtors have done to try to alleviate concerns is to say that we're not seeking sanctions, we're not seeking affirmative relief in their view. Well that is the equivalent of saying that I am suing a doctor for malpractice and I would like a finding of liability, but I am going to hold off on seeking damages. You can't go part way here.

The fact -- the idea that they're not seeking the imposition of sanctions against my client, which I think undoubtedly is affirmative relief, is undercut by the idea that as soon as they get the "relief" that they're looking

for they will have in their back pocket an adjudicated decision that the automatic stay has been violated and they will come back to Your Honor looking for the imposition of actual sanctions or damages.

THE COURT: Well isn't it how it would work in practice that they would actually go to Chile and seek recognition of my order, okay, as a defensive mechanism perhaps if you were not to perform under the contract or otherwise.

MR. BROMLEY: I don't know what a finding of a statement that says that the debtors -- that MLP has violated the automatic stay would have in Chile unless attached to it with some instruction from this court that there is an impact on MLP as a result of it.

THE COURT: Well the actions -- the relief is that you violated the stay and your actions are *void ab initio*.

MR. BROMLEY: Well that is the affirmative relief. I mean the *void ab initio* is affirmative relief.

THE COURT: Hold on. Is it affirmative relief against your client?

MR. BROMLEY: It is saying that the letters that my client has sent stating out legal positions have no legal effect.

THE COURT: You would agree that the agreement is *res*, correct, of the estate?

MR. BROMLEY: Correct.

THE COURT: Okay. Why would the relief effect your client -- yes, it effects your client, of course, right, because you took certain actions and they would be declared *void ab initio* but wouldn't the -- wouldn't it really be an effort to return the *res* to what it was before you took the actions which would be *in rem* or would it be *in personam* because your rights and obligations in the agreement are somehow effected.

MR. BROMLEY: I think, Your Honor, rights with respect to the agreement are effected by that sort of a determination. And without -- I mean this is the slippery slope with respect to jurisdiction, Your Honor, right. We are not arguing the merits of whether or not there has been a stay violation. The question of whether or not there was goes to the issue that you are raising as to whether or not there is any status quo to revert to.

We don't believe that there has been any change in the status quo, but we are not going to argue that today, Your Honor, because there is no personal jurisdiction with respect to my client on that issue.

THE COURT: I understand. You can't argue it or you would be submitting to my jurisdiction.

MR. BROMLEY: Exactly, Your Honor.

THE COURT: Absolutely. If its *rem*, *in rem*, you

get the choice about whether you want to come in and argue it, but I don't need you here, correct?

MR. BROMLEY: Your Honor, I mean true. Quite honestly the point that Mr. Rosenblatt made so eloquently is that it's the choice of parties to come into court and submit to the jurisdiction. Well, you know, that is true; it is the choice. Our client -- my client has chosen not to submit to the court's jurisdiction and will stand on that right. We believe it is unconstitutional to adjudicate either of the motions as it violates the due process clause because we are not subject to the court's jurisdiction.

THE COURT: Okay. I appreciate that. Thank you.

Well, Mr. Barefoot, why don't I --

MR. BAREFOOT: Your Honor, may I be heard briefly in reply?

THE COURT: Of course. I will turn the podium -- I was just about to turn the podium back over to you. I would say to the extent others want to be heard as well I am happy to hear from them, but I want to hear from you first.

MR. BAREFOOT: Thank you, Your Honor, and I apologize for the interruption.

THE COURT: That's okay. I've been interrupting you all morning.

MR. BAREFOOT: Not at all, Your Honor. As the court stated, Your Honor, there were very clear suggestions

in the Sae Young decision that just as MLP did here the state, which asserted that it was not subject to personal jurisdiction, eluded in passing to asserted defaults under the lease, but opted not to raise that issue on the merits before the court; probably for the same reasons that MLP doesn't want to because it doesn't want to subject itself to the court's jurisdiction.

The court in Sae Young held that that was not a bar to entry of the order. And if Your Honor had any discomfort or qualms about the scope of the proposed order that we asserted we would respectfully suggest, Your Honor, that we can address that just as the Sae Young Westmont Court did by tailoring, in a more narrow fashion, the findings that we would be asking the court to make.

THE COURT: Well I thought that through too. So let's just say hypothetically you remove the finding that there is a default. So, essentially, I am in a position that has been described in a few courts that I am just looking at the debtor's business judgment in assuming the agreement, but I still have a 365(b) problem because you cannot assume an agreement unless you cure it or you provide prompt assurance of a cure.

So assuming, assuming for the sake of argument, that you're wrong and that you did, in fact, breach the agreement how do I find what the cure would be because that

means to actually be a finding, correct?

MR. BAREFOOT: I believe that is correct, Your Honor. That is why we briefed the issue because we did believe that this is a requirement under 365(b).

Let me draw Your Honor to an alternative finding that we did include in the proposed form of order which is that the insolvency clause is an unenforceable *ipso facto* clause and that as such it need not be cured. I don't think there is serious room for debate that the insolvency clause, which MLP asserts, was triggered based on the commencement and continuation of these Chapter 11 proceedings would be an *ipso facto* clause that, at least, as a matter of US bankruptcy law would not be enforceable and would not be required to be cured under 365.

THE COURT: So why does that take this matter from a potential *in personam* action if I were to agree with Mr. Bromley's client to an *in rem* action?

MR. BAREFOOT: Because, Your Honor, that is not adjudicating any rights that MLP has under Chilean law. That is adjudicating whether a cure is required as a matter of the prerequisites to assumption that are set out in the code. It's not determining whether there was a default under Chilean law, its only determining that as a matter of US bankruptcy law this is not a default that is required to be cured.

THE COURT: So in other words --

MR. BAREFOOT: And I don't think there has been --

THE COURT: -- assuming that there is a default you don't need to cure it because it cannot be enforced.

MR. BAREFOOT: That is correct, Your Honor. That just flows from the text of 365(b)(2) which provides, effectively, a carve-out from the (b)(1) cure requirement and says that Paragraph 1, which is the cure requirement, does not apply to a default that is a breach of a provision relating to the commencement of a case under this title, the insolvency or financial condition of the debtor, etc.

I think that given that MLP's allegations, you know, they haven't been briefed, but you have seen them in the latter correspondence that we have submitted to the court. They all turn on the insolvency clause being triggered by the commencement of these Chapter 11 cases.

THE COURT: Okay.

MR. BAREFOOT: I think, Your Honor, that -- I also just want to note, you know, I think there is a little bit of a disingenuous in Mr. Bromley's position that was made clear when Your Honor asked him, you know, the question about if this were just limited to a finding about the debtor's business judgment would that be an *in personam* question that directly affected MLP. He said that it still would be.

I think there is really no legitimate argument

that if all the court is doing is authorizing the assumption of the agreement based on its finding that based on the evidence that we will present at, what Your Honor deems, the appropriate time that we have satisfied the business judgment standard. I think there is really no legitimate debate about that evidence.

Your Honor, I just want to also briefly touch on the questions that have been raised as to the prospects of impact of realization or enforcement on the orders that Your Honor enters. I think as Mr. Rosenblatt alluded to that really is a question for another day and potentially for another court.

The availability of the remedies that we're asking for Your Honor should not turn on a separate showing of exactly when and how those will be enforced in the future. It would really be premature to speculate about that question.

If I could just then briefly touch on the automatic stay argument, Your Honor. I won't belabor the point, but I think there really is no legitimate argument that a notice to either terminate or unilaterally modify an executory contract is a black letter violation of the automatic stay. It is an interference with the debtors -- the property of the debtor's estates, namely the debtor's property rights under the agreement.

As Your Honor eluded to, effectively, undoing that stay violation is in no way an adjudication of specific rights or obligations as to the counterparty to that agreement. It's simply the natural consequence of the actions being taken in violation of the stay being void.

THE COURT: So it's your position that there was a notice of termination?

MR. BAREFOOT: Your Honor, the letters, I think, quite cleverly are a little ambiguous as to whether the termination was being exercised, but to the extent that that was the intent we would certainly say that that was an act in violation of the stay that was v*oid ab initio*. At minimum the letters are very clear that they are seeking to shorten the debtors and unilaterally terminate the debtors cure periods so as to commence the separate cure periods that apply to the lenders. Even though that is short of termination, a unilateral modification of an executory contract is similarly a stay violation that should be *void ab initio*.

THE COURT: Didn't I see a letter come across my desk in which MLP stated that they are performing under the contract subject to all reservations?

MR. BAREFOOT: Your Honor, that letter was attached, you're correct, as an exhibit to the Herzog declaration that we filed with our reply brief. The letter

says that -- you're correct, that they are not waiving any rights or remedies that they have, but that solely for the time being they will -- I think that the language that they used was nominate the power that they are obligated to purchase under the agreement for the time being.

I don't think in any way, though, that -- Mr. Bromley can correct me if this was his intent that that letter is intended to retract or modify the positions in the prior letters that we would assert constitutes stay violations.

THE COURT: What does it mean to nominate the power?

MR. BAREFOOT: Your Honor, this may be going into a technical realm that I am not perfectly qualified in, but there is a mechanism under the contract wherein MLP has to indicate that it, effectively, will purchase a certain quantity of power. Because the -- as you have heard in various other proceedings by way of update the project is now commercially operational which triggered a request from Alto Maipo, the debtors, to effectively have MLP agree as to the quantity of power that it's going to take from the off put of the plant.

So I think the letter is saying that they will fulfill for the time being those technical requirements and will take the power, but I don't think in any way that that

letter, given its express reservation of rights, was undoing, in particular, the unilateral shortening of the debtor's cure periods that was set forth in prior correspondence.

THE COURT: Okay. I appreciate that explanation. Thank you.

MR. BAREFOOT: So I will turn the podium to Mr. Rosenblatt, or Mr. Resnick, or Mr. Abbott if they had anything further unless Your Honor has questions.

THE COURT: I don't think I have any questions at this time. Thank you.

Mr. Rosenblatt.

MR. ROSENBLATT: Yes. Thank you, Your Honor. It's Andrew Rosenblatt, again, from Norton Rose Fulbright.

Literally just one minute, Your Honor. I just want to say that I think that, you know, mere findings that are incidental to adjudicating parties rights in the debtor's property does not transform an *in rem* action into an *in personam* action. The findings are not the relief that the debtors are seeking. The relief here that the debtors are seeking is contract assumption, Your Honor, which is a core proceeding which unquestionably this court has the authority to enter under its *in rem* jurisdiction.

Your Honor, I promise this is the last time I will refer to the Sae Young case, but I do think that there is a good quote which we had cited in our brief which addresses

this issue and, Your Honor, it's at 276 B.R. 898 where the court finds reasons as follows. It says pursuant to 28 U.S.C. 1334(e) District Courts, hence bankruptcy judges, have exclusive jurisdiction over a debtor's estate which consists of all legal or equitable interest the debtor has wherever located and by whomever held; thus, the bankruptcy judge has such authority over a debtor's property no matter where the property is located.

The jurisdiction over a debtor's estate is *in rem* jurisdiction which involves determining the status of property and, therefore, the rights of persons with respect to that property. In contrast, *in personam* jurisdiction seeks to impose an obligation on a person.

Your Honor, I agree with Mr. Bromley. The key here is really the nature of the relief that the debtors are seeking. Despite the findings that they have requested, which, again, as Mr. Barefoot eluded to can easily be scaled back the findings are not the relief that the debtor is seeking here.

They are merely seeking to have this court authorize them to assume a contract which is property of the estate which this court clearly has *in rem* jurisdiction over, Your Honor. Again, I don't think that findings that are incidental to a property dispute transforms a clear *in rem* action into an *in personam* action.

Thank you, Your Honor.

THE COURT: Thank you.

MR. BROMLEY: Your Honor, may I -- oh, I'm sorry, I don't know if Mr. Resnick has something to say.

THE COURT: Let me hear from (indiscernible) parties and then Mr. Bromley, you can get a chance to address --

MR. RESNICK: Nothing further at this time. Thank you.

THE COURT: Okay. Mr. Abbott.

MR. ABBOTT: Nor from I, Your Honor. I think you have had, as my grandfather used to say, a sufficiency here.

THE COURT: Okay. I'd like to meet your grandfather.

Mr. Bromley.

MR. BROMLEY: Your Honor, I apologize for that interruption. Very briefly.

First, to deal with Mr. Rosenblatt's comments I couldn't disagree with him more as he just read the order and the relief sought in the motion.

With respect to Mr. Barefoot's points I think the most telling comment with respect to the stay violation issue was the phrase to the extent that was the intent. There is no evidence before Your Honor right now. We are not going to submit an argument on the merits until a determination is

made as to whether or not there is personal jurisdiction. There is nothing before the court that would allow Your Honor to rule on the stay motion at the moment.

In the event that Your Honor determines that there is personal jurisdiction we reserved our rights as to whatever relief, whether modified or status quo, that the debtors decide to continue to seek.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Well this is very informative. I am going to take a break and I need to think over a few points that were raised by the parties today. Why don't we come back at four o'clock and I will let you know what my decision is on these two matters.

My understand is that --

MR. BAREFOOT: Your Honor, will we use the same zoom? Just logistically the same zoom or do we need to register for a new matter?

THE COURT: You can use the same zoom.

Are those the only two -- are these the only two matters that are going forward today?

MR. BAREFOOT: They are, Your Honor.

THE COURT: Okay. So we will adjourn and I will see you all at four o'clock. Thank you very much.

(Recess taken at 12:13 p.m.)

(Proceedings resumed at 4:01 p.m.)

THE COURT: Good afternoon, everyone. This is Judge Owens.

Thank you for giving me a couple hours to get my thoughts together following the conclusion of oral argument. We're gathered together for my oral ruling in the Alto Maipo case.

So the question before the court is whether it may, without first determining whether it has personal jurisdiction over MLP, adjudicate the debtor's motion to assume the power purchase agreement between Alto Maipo and MLP, and the debtor's motion for entry of an order enforcing the automatic stay and declaring *void ab initio* certain purported actions take to date by MLP with respect to that agreement. This is the third hearing on the matter.

At the first hearing it was made clear that the debtors did not serve the motions on MLP pursuant to Rules 9014(b) and 7004 which require them to serve the motions as they would at complaint and summons. Given MLP's status as a foreign entity service would require compliance with Rule 4(f).

While MLP argued that I could not, therefore, schedule a hearing on the motions I disagreed given MLP's actual notice of the motions and my ability to craft an appropriate schedule to give MLP the opportunity to present

the relevant jurisdictional arguments that they would raise if the motions were properly served under the applicable bankruptcy and federal rules. I ultimately scheduled the motions for a hearing today to determine, as a threshold matter, the issue currently before the court.

The debtors and their supporters do not wish to spend the time and resources in engaging in discovery and a contested hearing to establish personal jurisdiction over MLP. Rather, they assert I may enter the orders because I have *in rem* jurisdiction over both the agreement as property of the estate and because the motion to assume that agreement is an *in rem* action. MLP vigorously opposes the debtors approach directing this courts -- disputing this court's jurisdiction over it and my ability to adjudicate the motions without first establishing personal jurisdiction over it.

I agree with MLP and will not adjudicate the assumption motion without an adversary proceeding, proper service and an establishment of personal jurisdiction over MLP. In order to determine the questions before me I must take critical stock of the relief sought.

MLP is correct that the debtor's assumption motion seeks more than a determination of the debtor's business judgment in seeking to assume the agreement. It seeks findings that, among other things, there are no existing defaults and, thus, no required cure under the agreement in

order to comply with Section 365(b).

To provide an evidentiary basis for such findings the debtors attached declarations and those declarations make it clear from the outset that there was a pending dispute amongst MLP and the debtors over a potential default. The letters attached to the stay motion confirm such a dispute.

Making the requesting findings regarding default and cure requires a determination of the party's contractual rights and responsibilities in the agreement and would constitute an *in personam* action. A breach of contract action is a common example of an *in personam* action and, effectively, the findings sought here would require the same determination whether a breach of contract occurred and the appropriate remedy, if any.

The action is not one that is traditionally *in rem* requiring or involving a determination of the claims and rights of MLP and the debtors to the agreement. The debtor's suggestion that --

(Audio interruption)

THE COURT: The debtor's suggestion that they remove most of the at issue findings and leave only the question of whether a particular clause of the agreement amounts to an unenforceable *ipso facto* clause does not change the *in personam* nature of the action. The court would still be adjudicating and effecting MLP's rights in the agreement

rather than determining interest of the parties to the estates *res*.

Accordingly, the due process clause precludes me from adjudicating those issues and making the debtors requested findings in the absence of personal jurisdiction over MLP. There is no dispute that I have *in rem* jurisdiction over the agreement. Moreover, case law, including the Sae Young case relied upon the by debtors and others supportive of the debtors, suggests that a straight-forward adjudication of only a debtor's business judgment in seeking to assume the agreement would be an *in rem* proceeding, but those conclusions do not modify or transform the *in personam* nature of the related default and cure disputes into an *in rem* action or permit me to adjudicate the *in rem* action under the umbrella of an *in rem* proceeding without establishing personal jurisdiction over MLP.

While the court's jurisdiction is premised on the debtor and its estate the Supreme Court has acknowledged in Katz and Hood that the bankruptcy court's exercise of *in rem* jurisdiction can involve ancillary *in personam* actions that could exceed a court's authority. That is what we would have here if we move forward as the debtor's request.

Another hurdle presented by the inclusion of the debtor's requested findings in the proposed order is the Second Circuit's decision in Orion which is not binding on me

but is persuasive in this instance. That decision makes it clear that the types of determinations requested by the debtors in this proceeding by way of their assumption motion require an adversary proceeding.

As the court explained, at the heart a motion to assume should be considered a summary proceeding intended to efficiently review the debtors or trustee's decision to adhere to or reject a particular contract in the course of swift administration of the bankruptcy estate. It is not the time or place for prolonged discovery or lengthy trial with disputed issues. In concluding that an adversary proceeding is required for the adjudication of contract issues that arise as part of the motion to assume the court highlighted that proceeding in such a fashion eliminates the possibility that constitutional problems will arise.

While I could find no case directly on point addressing today's issues in the context of a foreign creditor there are plenty of case examples included within this jurisdiction in which bankruptcy courts have required adversary proceedings to be commenced and heard concurrently with assumption or rejection motions, or significant contract disputes exist between parties over whom the court already has personal jurisdiction.

Often parties seeking answers to contract disputes voluntarily commence an adversary alongside a 365 motion or

simply file an adversary proceeding in anticipation of such a motion. In Orion an adversary proceeding was deemed necessary to protect the counterparty's jury rights. Here, of course, the need for an adversary and attendant procedural safeguards arises from, among other things, the personal jurisdiction issues asserted by MLP.

In sum, if the debtors want the findings they must commence and adversary proceeding, properly serve the complaint and summons as well as the assumption motion to the extent proper service has not yet been effectuated so that the court's adjudicatory authority can be established and MLP's due process rights can be upheld.

The set of circumstances in which we find ourselves and which serves to support my decisions today are extraordinary. Here, there is an acknowledged contract dispute between the debtors and MLP. In the face of that dispute the debtors sought assumption of the agreement as well as adjudication of the contact disputes without an adversary proceeding or proper service on MLP.

MLP does not consent to the procedure or my exercise of personal jurisdiction and the debtors do not wish to engage in a contested hearing to establish personal jurisdiction over MLP at this time, nor have they sought recognition proceedings in Chile. While the debtors argue that my ruling today fundamentally will alter cases in this

district going forward these unique circumstances are not present in 99.999 percent of the cases before me. I do not anticipate them arising again any time in the near future; moreover, regardless of the effects I simply am not empowered to do what the debtors want me to do.

Finally, for the sake of completeness, I want to acknowledge that we have come full circle on the issues unsuccessfully presented by MLP at our first hearing. Now, however, I have the benefit of full briefing and argument, and I am in a position to hold that proceeding forward on the merits of the assumption motion cannot occur as requested by the debtors for the reasons explained. Moreover, to avoid further briefing on the issue I am also prepared to find that MLP has not submitted to the jurisdiction of the court through their briefing and arguments to date.

Turning to the stay motion the stay motion seeks a determination that MLP's actions to date and any future actions purportedly terminating or modifying contract terms violate the stay and are *void ab initio*. Given the narrow form of relief sought I do believe that the action is *in rem*. It is, essentially, a proceeding to return property of the estate, the agreement, to the form it was before MLP took the purported actions.

Affirmative relief is not sought against MLP and I am not being asked to determine whether MLP was entitled to

take the purported actions pursuant to its rights under the agreement. Rather, the question is whether its actions, *vis-à-vis* the agreement, property of the estate, the estates *res* violated the automatic stay and are thus *void ab initio*. This is an *in rem* action.

Accordingly, I will hear the merits of the motion. In fairness to MLP it should be given the opportunity to make a merits based argument, should it wish, and, therefore, I think that the motion should be scheduled for hearing on May 13th with an appropriate objection deadline for MLP of 4:00 p.m. on May 6th. I am not requiring MLP to submit to the jurisdiction of the court, I'm just giving it the opportunity and time.

So for those reasons we will not be going forward on the merits of both motions today. I will so order the record unless the parties think that my conclusions today should be submitted in an order. I am happy to direct the parties to meet and confer and submit that order under certification of counsel.

Are there any questions?

MR. BAREFOOT: No, Your Honor.

THE COURT: Okay. I'm not hearing any. To the extent that you would like an order memorializing the go-forward process, like I said, please meet and confer with Mr. Bromley. You are welcome to try to memorialize that in a

form of order submitted under certification of counsel.

I think that is all we had for today. I look forward to seeing you all on Friday. With that I will consider today's hearing adjourned. Thank you all very much for your arguments and your presentations in connection with this matter.

(Proceedings concluded at 4:12 p.m.)

CERTIFICATION

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of our knowledge and ability.

/s/ William J. Garling April 26, 2022
William J. Garling, CET-543
Certified Court Transcriptionist
For Reliable

/s/ Mary Zajaczkowski April 26, 2022
Mary Zajaczkowski, CET-531
Certified Court Transcriptionist
For Reliable

582 B.R. 603
United States Bankruptcy Court, S.D. New York.

IN RE: AVANTI COMMUNICATIONS GROUP PLC,[1] Debtor in a Foreign Proceeding.

Case No. 18–10458 (MG)
|
Signed April 9, 2018

Synopsis

Background: Foreign representative of corporate debtor that was the subject of scheme of arrangement brought under law of the United Kingdom filed petition for recognition of foreign proceeding as "foreign main proceeding" and for enforcement of scheme.

Holdings: The Bankruptcy Court, Martin Glenn, J., held that:

foreign debtor had property in the United States, as required for bankruptcy court to grant petition filed by foreign representative for recognition, as foreign main proceeding, of scheme of arrangement concerning debtor that was pending in the United Kingdom;

scheme of arrangement brought under law of the United Kingdom, as judicial proceeding convened and sanctioned by orders issued by British court in country where foreign debtor was incorporated and where its registered offices and headquarters were located, constituted a "foreign main proceeding"; and

bankruptcy court, whether as "appropriate relief" or as "additional assistance" under separate provisions of Chapter 15, would grant foreign representative's request for enforcement of third-party, non-debtor guarantor releases included in scheme of arrangement and approved by British courts.

Petition granted.

Attorneys and Law Firms

***605** MILBANK, TWEED, HADLEY AND MCCLOY LLP, Attorneys for Avanti Communications Group plc and the Foreign Representative Patrick Willcocks, 1 Chase Manhattan Plaza, New York, New York 10005, By: Peter Newman, Esq.

MEMORANDUM OPINION GRANTING RECOGNITION OF FOREIGN MAIN PROCEEDING AND ENFORCEMENT OF SCHEME OF ARRANGEMENT

MARTIN GLENN, United States Bankruptcy Judge

Recognition and enforcement of schemes of arrangement sanctioned by UK courts ***606** has become commonplace in chapter

15 cases in the United States (the "US"). Schemes of arrangement are used to restructure balance sheets of foreign companies that often include US dollar-denominated debt. The debt may be issued by one company in a large corporate group, with guarantees of the debt issued by the affiliates. When the debt is restructured, the scheme of arrangement often provides that the affiliate-guarantees are released, even though the affiliates are not parties to the scheme proceeding. Without releasing those guarantees, it would be difficult to restructure the debt because the collective assets and earnings of the group are needed to support the restructured debt without the risk of some creditors that hold the guarantees separately reaching the assets of the affiliates, endangering the ability of the group to meet its restructured debt obligations. This is exactly the situation presented in this Chapter 15 Case of Avanti Communications Group plc (the "Debtor," or "Avanti").

Third-party releases are often problematic in chapter 11 cases—seemingly prohibited entirely in some Circuits but permitted under limited circumstances in other Circuits. Courts must confront the issue whether bankruptcy courts have the power to grant such releases, and under what circumstances. Circuit courts in the Fifth, Ninth, Tenth and the District of Columbia Circuits have held that the Bankruptcy Code only permits a bankruptcy court to grant releases against a debtor, and prohibits third-party releases absent consent. *See, e.g.*, *Maxtile, Inc. v. Jiming Sun (In re Maxtile, Inc.)*, 237 Fed. Appx. 274, 276 (9th Cir. 2007); *Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 251–52 (5th Cir. 2009); *Landsing Diversified Props.–II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600–02 (10th Cir. 1990) (*per curiam*); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1152 (D.C. Cir. 1986). Circuit courts in the Second, Fourth, Sixth, Seventh and Eleventh Circuits have held that third-party releases may be given consensually and, in limited circumstances, may be approved without consent. *See, e.g.*, *SE Property Holdings, LLC v. Seaside Engineering & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070, 1077–78 (11th Cir. 2015); *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347–50 (4th Cir. 2014); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141–43 (2d Cir. 2005); *Airadigm Commc'ns., Inc. v. FCC (In re Airadigm Commc'ns., Inc.)*, 519 F.3d 640, 655–57 (7th Cir. 2008); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 657–58 (6th Cir. 2002). Issues with consent arise when less than 100% of the impaired creditors vote to confirm the plan. In the present case, the Scheme was overwhelmingly approved by 98% of the only creditor class whose rights were modified by the Scheme, including the Releases of non-debtor affiliate-guarantees. This leaves open the issue whether the Court should recognize and enforce the Scheme in this case that would bind the small number of non-voting impaired creditors to the Releases.

The issues presented by third-party releases in chapter 15 cases have received a different analysis than in chapter 11 cases, focusing primarily on the foreign court's authority to grant such relief. The issue in chapter 15 cases then is whether to recognize and enforce the foreign court order based on comity. Well-settled case law in the UK expressly authorizes third-party releases in scheme proceedings, particularly the release of affiliate-guarantees. The UK Court sanctioned the Avanti Scheme, and the Court concludes that the Avanti ***607** Scheme should be recognized and enforced in the US.

Although no objections to the motions seeking to recognize and enforce the Avanti Scheme were filed in this Court—and the Court has already entered an order enforcing the Avanti Scheme—the Court believes that an explanation of the reasons for its ruling is appropriate.

This Chapter 15 Case was filed by Patrick Willcocks, the foreign representative (the "Foreign Representative") of Avanti, a limited liability company incorporated under the laws of England and Wales, in connection with a proceeding (the "UK Proceeding") commenced under Part 26 of the Companies Act 2006 (the "Companies Act") pending before the High Court of Justice of England and Wales (the "UK Court") concerning a scheme of arrangement (the "Scheme").

The Foreign Representative filed a *Verified Petition for Recognition of Foreign Main Proceeding and Certain Related Relief* [ECF Doc. # 2] (the "Verified Petition" and, together with the Voluntary Chapter 15 Petition [ECF Doc. # 1], the "Petition"), seeking (i) recognition of the UK Proceeding as a "foreign main proceeding" under chapter 15 of the Bankruptcy Code, (ii) granting relief afforded to foreign main proceedings under section 1520 of the Bankruptcy Code, (iii) recognizing, granting comity to, and giving full force and effect in the United States, to the UK Proceeding, the Scheme, the Convening Order and the Sanction Order (as defined below), and (iv) enjoining parties from taking any action inconsistent with the Scheme in the US, including giving effect to the releases set out in the Scheme (the "Releases"), including certain releases given in favor of certain of the Debtor's direct and indirect subsidiaries (the "Subsidiary Guarantors") that guaranteed the 2023 Notes (the

"Guarantor Releases").

The Petition is supported by the: (i) *Declaration of Patrick Willcocks in Support of Verified Petition for Recognition of Foreign Main Proceeding and Certain Related Relief* (the "Willcocks Declaration," ECF Doc. # 3); and (ii) *Declaration of Nicholas Angel as English Counsel to Debtor in Support of Verified Petition for Recognition of Foreign Main Proceeding and Certain Related Relief* (ECF Doc. # 4). The Foreign Representative also filed the *Second Declaration of Patrick Willcocks in Support of the Verified Petition* (the "Second Declaration," ECF Doc. # 13), indicating that the UK Court sanctioned the Scheme on March 26, 2018. A copy of the UK Court's order sanctioning the Scheme (the "Sanction Order") was attached to the Second Declaration as Exhibit C.

The Avanti Scheme only adjusts the debt of the 2023 Noteholders (as explained below), who overwhelmingly approved the Scheme by a vote of over 98% of that class of creditors. For the reasons set forth below, the Court grants the relief sought in the Petition.

I. BACKGROUND

The following facts are taken from the Petition and the Willcocks Declaration.

A. The Debtor

The Debtor is a public limited company incorporated under the laws of England and Wales, with subsidiaries incorporated in England, Isle of Man, Germany, Sweden, Turkey, Cyprus, Kenya, Nigeria, Tanzania and South Africa. The Debtor's headquarters and primary place of business is in London, England. Avanti is a satellite operator providing fixed satellite services in Europe, the Middle East and Africa through its fleet of Ka-band satellites. The Debtor's satellites are positioned in orbital ***608** slots that are recorded in the International Telecoms Union Master International Frequency Register. Avanti sells satellite data communications services on a wholesale basis to a range of service providers who supply four key end markets: broadband, government, enterprise and backhaul.

Avanti's current fleet consists of two Ka-band satellites, HYLAS 1 and HYLAS 2, which have been commercially operational since April 2011 and November 2012. A further satellite, Artemis, a multiband satellite acquired from the European Space Agency (ESA) on December 31, 2013, was successfully re-orbited in November 2017. Avanti also has leased a steerable Ka-band beam, HYLAS 2–B, under an indefeasible right of use agreement entered into in June 2015 with another satellite operator, and also has a payload, HYLAS 3, under construction which will be deployed on the ESA's EDRS–C satellite. HYLAS 3 is currently under construction and continues to experience delays, but is expected to launch in the first three months of 2019 (although this date is subject to further change).

Avanti's HYLAS 4 satellite, which will complete its coverage of Europe, the Middle East and Africa, has now been constructed after experiencing some delays in the factory and, in February 2017, was successfully delivered to its launch site in Kourou, French Guyana. HYLAS 4 is expected to launch soon, aiming to be in orbital position ready for service in July 2018 with sufficient fuel to support the satellite for up to 19 years in orbit. HYLAS 4 is expected to generate revenue from July 2018, largely within Avanti's existing fixed cost base, and to have a strong positive effect on Avanti's business as it completes EMEA coverage and greatly increases the amount of capacity available in mature markets in Western Europe and new markets in Africa.

B. Capital Structure

As of December 31, 2017, Avanti's capital structure was composed of the following material financing agreements. As of December 31, 2017, Avanti had approximately $68.0 million of cash and cash equivalents.

1. Avanti is a borrower under a super-senior term loan facility agreement (the "Super Senior Facility Agreement"), maturing in 2020 (the "Super Senior Facility") with approximately $118 million currently outstanding.

2. Avanti issued its 10%/15% Senior Secured Notes due 2021 (the "2021 Notes") under an Indenture, dated as of January 26, 2017 (as amended, the "2021 Indenture"). Approximately $323.3 million in aggregate principal amount of the 2021 Notes are outstanding.

3. Avanti issued its 12%/17.5% Senior Secured Notes due 2023 (the "2023 Notes" and together with the 2021 Notes, the "Notes") under an Indenture, dated as of October 3, 2013 (as amended, the "2023 Indenture" and together with the 2021 Indenture, the "Indentures"). Approximately $557 million in aggregate principal amount of the 2023 Notes are outstanding.

4. The Notes and the Super Senior Facility Agreement are subject to an intercreditor agreement, dated January 26, 2017 (the "Intercreditor Agreement"). Under the Intercreditor Agreement, lenders to the Super Senior Facility Agreement rank pari passu amongst themselves and above both the holders of the 2021 Notes (the "2021 Notes Creditors") and the holders of the 2023 Notes (the "Scheme Creditors").

C. The Restructuring

Due to delays associated with the manufacture, procurement and launch of two of ***609** its satellites, Avanti experienced financial difficulties, with a materially over-leveraged capital structure. As a result, Avanti entered into preliminary discussions with Solus Alternative Asset Management LP, Tennenbaum Capital Partners, LLC and Great Elm Capital Management, Inc. (collectively, the "Ad Hoc Group," *see* Petition at 356) for a proposed comprehensive restructuring of its indebtedness that, it hoped, would create a sustainable long-term capital structure. On December 13, 2017, the Debtor and certain members of the Ad Hoc Group and other holders of the Notes (together, the "Consenting Creditors") became parties to a restructuring agreement (the "Restructuring Agreement"), primarily agreeing to equitize the 2023 Notes and to amend the 2021 Notes.

D. The Scheme

Under the terms of the Scheme, all of the Debtor's outstanding 2023 Notes will be exchanged (the "Exchange") for 92.5% of Avanti's then enlarged issued share capital (the "Exchange Shares"). The Exchange Shares will be allocated and issued to the Scheme Creditors on a *pro rata* basis, based on the principal amount of 2023 Notes held by each Scheme Creditor. The 2023 Notes debt-for-equity exchange under the Scheme will deleverage Avanti by approximately $557 million in aggregate principal amount of the 2023 Notes and save approximately $81 million in interest expense per year.

Under the Scheme, the Scheme Creditors will grant the Releases, including the Guarantor Releases. The Releases include releases of any claim or liability, whether present or future, known or unknown, prospective or contingent, against the Debtor arising directly or indirectly out of, from or in connection with, the 2023 Notes and the 2023 Indenture, including in respect of any accrued but unpaid interest, other than any claim or liability arising after the "Restructuring Effective Date" (as defined in the Scheme). The Guarantor Releases will preclude Scheme Creditors from seeking to recover under guarantees of the 2023 Notes provided by each of the Debtor's subsidiaries.

Avanti previously sought to implement certain aspects of the Restructuring under the Consent Solicitations.[2] The Consent Solicitations sought consents from the holders of the 2021 Notes and the 2023 Notes for the following amendments: (1) Amend the 2021 Indenture to: (a) extend the final maturity date of the 2021 Notes from October 1, 2021 to October 1, 2022; (b) change the interest rate payable on the 2021 Notes from 10% Cash Interest or 15% PIK interest to 9% cash interest or 9%

PIK interest for all remaining interest periods beginning October 1, 2017; (c) eliminate the Maintenance of Minimum Consolidated LTM EBITDA covenant contained in Section 4.30 of the 2021 Indenture, which would require testing on the last day of each fiscal quarter beginning March 31, 2018 and ending March 31, 2020; (d) permit the issuance of up to $30 million of additional Indebtedness which will rank junior to or *pari passu* with the 2021 Notes; (e) eliminate the Margin Increase payable on the 2021 Notes if the relevant Minimum Consolidated LTM EBITDA threshold was not met; and (f) permit interest payments on the 2021 Notes for all remaining interest periods beginning October 1, 2017 (but excluding the final interest payment) to be paid as PIK interest if the Debtor does not have sufficient cash to satisfy the applicable interest coupon (collectively (a)—(f), the "2021 Notes Restructuring Amendments"); ***610** (2) Amend the submission to jurisdiction provision of the 2023 Indenture so that each party will submit to the exclusive jurisdiction of UK Courts (the "Jurisdiction Amendment") until the Restructuring Agreement is either terminated or no longer in effect; and (3) Amend and waive certain bankruptcy-related events of default within the Indentures (the "Majority Amendments and Waiver," together with the 2021 Notes Restructuring Amendments and the Jurisdiction Amendment, the "Consent Solicitation Amendments"), to prevent the occurrence of an event of default under the Notes and related automatic acceleration of the Notes from being triggered by the filing of a petition for recognition of the Scheme pursuant to chapter 15 of the Bankruptcy Code or by any other part of the Restructuring.

The required consents for each of the Consent Solicitation amendments were received by February 7, 2018 from holders of 98.09% of the aggregate principal amount of the 2021 Notes, and Scheme Creditors holding 87.73% of the aggregate principal amount of the 2023 Notes. The 2021 Notes Restructuring Amendments will become effective conditional on the Restructuring Effective Date; the other Consent Solicitation Amendments have already become effective.

E. The UK Proceeding

To effectuate the Scheme, on February 15, 2018, the Debtor applied to the UK Court for permission to convene a meeting of its creditors for the purpose of considering and approving the Scheme. The UK Court considered that application at the convening hearing on February 19, 2018, and issued the Convening Order which, among other things: (i) ordered the convening of a meeting of the Scheme Creditors (*i.e.*, holders of the 2023 Notes) (the "Scheme Meeting") on March 20, 2018; (ii) ordered that notice of the Scheme, together with an explanatory statement and proxy forms for voting at the Scheme Meeting, be made available to the Scheme Creditors; and (iii) authorized the appointment of the Foreign Representative to act as a foreign representative in this Chapter 15 Case. *See* Willcocks Declaration ¶ 3. As only the Scheme Creditors, comprised of the holders of the 2023 Notes, are affected by the Scheme, the Scheme contains only one voting class.

The Debtor convened a meeting of the Scheme Creditors on March 20, 2018. At the Scheme Meeting, Scheme Creditors holding in aggregate $547,320,350, representing 98.3% by value of the outstanding 2023 Notes, attended the Scheme Meeting either in person or by proxy and voted in favor of the Scheme. (*See* Second Decl. ¶ 6.) No Scheme Creditors voted against the Scheme. On March 26, 2018, the Debtor asked the UK Court to sanction the Scheme. The UK Court found that all of the requirements for sanctioning the Scheme had been satisfied, including: (a) the Debtor and Scheme complied with the applicable statutory requirements; (b) the classification of Scheme Creditors fairly represented the creditors and the majority acted in a *bona fide* manner; (c) the Scheme was one that an intelligent and honest man, acting in respect of his interest as a creditor, might reasonably approve; and (d) the UK Court had jurisdiction to sanction the Scheme. Accordingly, the UK Court sanctioned the Scheme.

F. Connection to the United States

Though the Debtor has no place of business in the US, Avanti has two main connections with this country. First, Milbank, Tweed, Hadley & McCloy LLP ("Milbank"), as counsel to the Foreign Representative and the Debtor, holds a $100,000 retainer in a non-interest bearing account ***611** at JPMorgan Chase in New York (the "Retainer Account"); the funds remain in the Retainer Account and are the Debtor's property. Second, the 2023 Indenture is governed by New York law, which separately satisfies the "property in the United States" requirement for eligibility to file a chapter 15 case under section 109(a)

of the Bankruptcy Code.

II. LEGAL STANDARD

A. Requirements for Recognition of a Foreign Proceeding

Section 1517(a) of the Bankruptcy Code provides that the court shall, after notice and a hearing, enter an order recognizing a foreign main proceeding if:

> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding ... within the meaning of section 1502;
>
> (2) the foreign representative applying for recognition is a person or body; and
>
> (3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a). "While not explicit in this section, the foreign proceeding and the foreign representative must meet the definitional requirements set out in sections 101(23) and 101(24)." 8 COLLIER ON BANKRUPTCY ¶ 1517.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014). A foreign proceeding is a "collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." 11 U.S.C. § 101(23); *see also* *In re ABC Learning Ctrs. Ltd.*, 445 B.R. 318,327 (Bankr. D. Del. 2010). A foreign representative is "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." 11 U.S.C. § 101(24).

A foreign main proceeding "shall be recognized ... if it is pending in the country where the debtor has the center of its main interests." *Id.* § 1517(b)(1). The Bankruptcy Code presumes that "[i]n the absence of evidence to the contrary, the debtor's registered office ... is presumed to be the center of the debtor's main interests." *Id.* § 1516(c); *see also* *In re Bear Stearns*, 374 B.R. 122, 130 (Bankr. S.D.N.Y. 2007). Case law "establishes that the presumption in favor of place of registration can be rebutted by showing that the 'head office' functions were carried out in a jurisdiction other than where the registered office was located." 8 COLLIER ON BANKRUPTCY ¶ 1516.03; *see also* *Bear Stearns*, 374 B.R. at 130. To determine a debtor's center of main interests, courts look to a nonexclusive list of factors, including "the location of the debtor's headquarters; the location of those who actually manage the debtor ... ; the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013) (quoting *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006)).

The Bankruptcy Code further provides that a recognition order shall be entered if the foreign representative applying for recognition is a person or body, and that the petition meets the requirements of section 1515. 11 U.S.C. § 1517(a)(2)–(3). Section 1515 requires presentation of (1) a certified copy of the decision commencing ***612** the foreign proceeding and appointing the foreign representative; (2) a certificate from the foreign court affirming the existence of the proceeding and appointment of the representative; or (3) in the absence of (1) or (2), evidence which the court deems sufficient to confirm the existence of the foreign proceeding and appointment of the foreign representative. *Id.* § 1515(b). The petition must also be accompanied by a statement identifying all known foreign proceedings with respect to the debtor, 11 U.S.C. § 1515(c), and if applicable, a translation of the evidentiary materials into English. *Id.* § 1515(d).

B. Privileges Provided By Chapter 15 of the Bankruptcy Code

Upon recognition as a foreign main proceeding, section 1520(a) of the Bankruptcy Code makes (1) sections 361 and 362 (automatic stay) applicable to property of the debtor within the jurisdiction of the US; (2) applies sections 363, 549 and 552 to any transfer of a debtor's interest in property within the US; (3) allows a foreign representative to operate a debtor's business by exercising the rights and powers of a trustee under sections 363 and 552; and (4) applies section 552 to property of the debtor within the US. 11 U.S.C. § 1520(a).

Section 1521(a) outlines the discretionary relief a court may order upon recognition. *Id.* § 1521(a). The discretion that is granted is "exceedingly broad," since a court may grant "any appropriate relief" that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors. Hon. Leif M. Clark, ANCILLARY AND OTHER CROSS–BORDER INSOLVENCY CASES UNDER CHAPTER 15 OF THE BANKRUPTCY CODE, § 7[2], at 70 (2008). "Section 1521(a)(7) authorizes the court to grant to the foreign representative the sort of relief that might be available to a trustee appointed in a full bankruptcy case," including the turnover of property belonging to the debtor. *Id.* at 73. Section 1521(a)(7), however, carves out avoidance powers under sections 547 and 548, which are only available to the trustee in a full case under another chapter. 8 COLLIER ON BANKRUPTCY ¶ 1521.02.

C. The Interplay of Section 109(a) and Chapter 15 of the Bankruptcy Code

Section 109(a) provides that "[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business or property in the United States, or a municipality, may be a debtor under this title." 11 U.S.C. § 109(a). In a controversial ruling, the Second Circuit applied the requirements of section 109(a) to eligibility to file a chapter 15 case. *See* *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 247 (2d Cir. 2013). Under section 109(a), as interpreted in *Barnet*, a foreign representative must show that the debtor has either (i) a domicile, (ii) a place of business, or (iii) *property* in the United States, to be eligible to file under 11 U.S.C. § 1517 (emphasis added). *See* *Barnet,* 737 F.3d at 247; *In re Octaviar Admin. Pty. Ltd.*, 511 B.R. 361, 369 (Bankr. S.D.N.Y. 2014). Lower courts in this Circuit and elsewhere have held that a professional's retainer in a U.S. bank account satisfies the "property in the United States" requirement of section 109(a). *See, e.g.*, *Octaviar*, 511 B.R. at 372–73 ("There is a line of authority that supports the fact that prepetition deposits or retainers can supply 'property' sufficient to make a foreign debtor eligible to file in the United States.") (*citing* *In re Cenargo Int'l PLC*, 294 B.R. 571, 603 (Bankr. S.D.N.Y. 2003)); *see also In re Yukos Oil Co.*, 321 B.R. 396, 401–03 (Bankr. S.D. Tex. 2005); ***613** *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000).

D. Schemes of Arrangement Satisfy the Requirement for a Collective Judicial Proceeding in a Foreign Country Under a Law Relating to Adjustment of Debt

A chapter 15 petition may be filed by a foreign representative "for recognition of a foreign proceeding ...." 11 U.S.C. § 1515. Section 101(23) of the Bankruptcy Code defines a "foreign proceeding" to mean "a collective judicial or administrative proceeding in a foreign country ... 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." *Id.* § 101(23). Schemes of arrangement under UK law have routinely been recognized as foreign proceedings in chapter 15 cases. *See, e.g.*, *In re Metinvest B.V.*, No. 17–10130–LSS (Bankr. D. Del. Feb. 8, 2017); *In re DTK Finance (plc)*, No. 16–13521–shl (Bankr. S.D.N.Y. Jan. 18, 2017); *In re Metinvest B.V.*, No. 16–11424–LSS (Bankr. D. Del. Jun. 30, 2016); *In re Abengoa Concessions Investments Limited*, No. 16–12590–kjc (Bankr. D. Del. Dec. 6, 2016); *In re YH Limited*, No. 16–12262 (Bankr. S.D.N.Y. Sep. 8, 2016); *In re Metinvest B.V.*, No. 16–10105–LSS (Bankr. D. Del. Jan. 29, 2016); *In re OIC Run–Off Limited*, No. 15–13054–scc (Bankr. S.D.N.Y. Jan. 11, 2016); *In re Codere Finance (UK) Limited*, No. 15–13017–jig (Bankr. S.D.N.Y. Dec. 22, 2015); *In re Towergate Finance, plc*, Case No. 15–10509 (SMB) (Bankr. S.D.N.Y. Mar. 27, 2015); *In re New World Resources N.V.*, Case No. 14–12226 (SMB) (Bankr. S.D.N.Y. Sept. 9, 2014); *In re Zlomrex International Finance S.A.*, No. 13–14138 (Bankr. S.D.N.Y. Jan. 31, 2014); *In re Magyar Telecom B.V.*, No 13–13508, 2013

WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013); *In re Tokio Marine Europe Insurance Ltd.*, No. 11–13420 (MG) (Bankr. S.D.N.Y. Sept. 08, 2011); *In re Highlands Ins. Co.(U.K.)*, No. 07–13970 (MG) (Bankr. S.D.N.Y. Aug. 18, 2009); *In re Castle Holdco 4, Ltd.*, No. 09–11761 (REG) (Bankr. S.D.N.Y. May 7, 2009).

III. DISCUSSION

Section 1517(a) of the Bankruptcy Code provides that "an order recognizing a foreign proceeding shall be entered if ... (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of section 1515." 11 U.S.C. § 1517(a). Each of the foregoing requirements is satisfied in this case, and, as explained below, the recognition and enforcement of the Scheme and Sanction Order furthers the goals of chapter 15.

A. Avanti Has Property in the United States

As a preliminary matter, a foreign representative must show that the debtor has either (i) a domicile, (ii) a place of business, or (iii) *property* in the United States, as a condition to eligibility under 11 U.S.C. § 1517 (emphasis added). *See* *Barnet* 737 F.3d at 247; *Octaviar*, 511 B.R. at 369. Here, the Debtor does not have a place of business or domicile in the United States, but the Debtor's property within the territorial jurisdiction of the United States includes funds held by Milbank as a retainer, and the 2023 Indenture governed by New York law. Both of these satisfy the "property in the United States" requirement for eligibility under section 109(a). *See* *In re Berau Capital Resources Pte Ltd.*, 540 B.R. 80, 83–84 (Bankr. S.D.N.Y. 2015) (holding that foreign debtor was eligible ***614** to be a debtor under section 109(a) of the Bankruptcy Code because of (a) an interest in its US counsel's retainer account, and (b) intangible contract rights under a New York law governed the debt indenture).

B. The English Proceeding is a Foreign Main Proceeding

The UK Proceeding fits the definition of a "foreign proceeding" in section 101(23) of the Bankruptcy Code as a collective proceeding for the adjustment of debt supervised by a judicial authority. *See* 11 U.S.C. § 1502(3) (defining a "foreign court" as "a judicial or other authority competent to control or supervise a foreign proceeding"). Section 1516(a) of the Bankruptcy Code permits a court to presume that a foreign proceeding is a "foreign proceeding," if the decision commencing the foreign proceeding so indicates. *See* 11 U.S.C. §§ 1516(a), 1515(b)(1). The UK Proceeding is pending in a foreign country under a law that allows companies to effectuate binding compromises or arrangements, including the restructuring of liabilities owed to their members or creditors (or any class of them) (*i.e.*, Part 26 of the Companies Act) and is therefore an "adjustment of debt." *See* Angel Declaration ¶ 10.

The UK Proceeding is a judicial proceeding—it required the Convening Order to convene the Debtor's Scheme Meeting and required the Sanction Order for the Scheme to be sanctioned, each issued by the UK Court. *See id.* at ¶¶ 11–14. Here, the Convening Order authorized the appointment of the Foreign Representative as "foreign representative in any proceedings under chapter 15 of the United States Bankruptcy Code ...". *See* Convening Order at ¶ 21. Furthermore, the Debtor is incorporated in the UK and its registered offices and headquarters are in London. *See* Willcocks Declaration ¶ 7. The Court may therefore presume that the UK constitutes the Debtor's "center of main interests." 11 U.S.C. § 1516(c).

Moreover, a significant proportion of the Debtor's existing assets are located in the UK. *See* Willcocks Declaration at ¶ 7. Given the presumption of section 1516(c) of the Bankruptcy Code and the supporting factual information presented in the Petition, the UK constitutes the Debtor's "center of main interests" and the UK Proceeding constitutes a "foreign main proceeding" under the Bankruptcy Code.

C. The Petitioner is Qualified to be the Foreign Representative

The term "foreign representative" is defined under section 101(24) of the Bankruptcy Code as:

> 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.

11 U.S.C. § 101(24).

The Foreign Representative in this case is an individual who has been (1) duly appointed by the Debtor's board of directors as foreign representative of the UK Proceeding, and (2) authorized by the Convening Order to act as "foreign representative." *See* Willcocks Declaration ¶ 3. Accordingly, Patrick Willcocks is a "foreign representative" as defined in the Bankruptcy Code. *See* 11 U.S.C. § 1516(a) ("If the decision [commencing the foreign proceeding] ... indicates ... that the person or body is a foreign representative, the court is entitled to so presume."); *In re SphinX, Ltd.*, 351 B.R. 103, 116–17 (Bankr. S.D.N.Y. 2006), *aff'd*, ***615** *Krys v. Official Comm. of Unsecured Creditors of Refco Inc. (In re SphinX Ltd.)*, 371 B.R. 10 (S.D.N.Y. 2007) (holding that section 101(24) was satisfied where foreign representatives submitted a "copy of the Cayman Court's order appointing them to administer the [d]ebtors' winding up under [Cayman law] and authorizing their commencement of these chapter 15 cases ...").

D. Enforcing the Scheme, Including the Releases, as Discretionary Relief Under Sections 1507 and 1521 is Proper

Upon recognition of a foreign proceeding, section 1521(a) of the Bankruptcy Code authorizes the Court to grant "any appropriate relief" to a foreign representative "where necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors," provided that the interests of creditors and other interested entities are sufficiently protected. 11 U.S.C. §§ 1521(a), 1522(a). Such relief may include, but is not limited to: "(1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a); (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a); (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a); ... and (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)." *Id.* § 1521(a).

In addition to section 1521's provisions regarding "any appropriate relief," section 1507(b) provides that a court "[i]n determining whether to provide additional assistance ... shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—

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

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

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

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

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

11 U.S.C. § 1507(b) (emphasis added). These provisions embody the protections previously contained in section 304 of the Bankruptcy Court with one critical exception: the principle of comity was removed as one of the factors and elevated to the introductory paragraph. The legislative history confirms that the principle of comity was placed in the introductory language to section 1507 to emphasize its importance. *See* *United States v. J.A. Jones Constr. Group, LLC,* 333 B.R. 637, 638 (E.D.N.Y. 2005) (citing legislative history); *see also* Allan L. Gropper, *Current Devs. in Int'l Insolvency Law: A United States Perspective,* 15 J. BANKR. L. & PRAC. 2, Art. 3, at 3–4 (Apr. 2006) (hereinafter "Gropper") (noting that in light of the elevation of comity to the introductory paragraph of section 1507, and the legislative history of chapter 15, courts will likely consider precedent under section 304 in fashioning appropriate relief).

The interplay between the relief available under sections 1507 and 1521 is ***616** far from clear. *See* *In re Atlas Shipping A/*S, 404 B.R. 726, 741 (Bankr. S.D.N.Y. 2009). As the court explained in *In re Rede Energia S.A.*, 515 B.R. 69 (Bankr. S.D.N.Y. 2014):

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

Id. at 95 (internal quotation marks and citations omitted).

Cases have held that in the exercise of comity that appropriate relief under section 1521 or additional assistance under section 1507 may include recognizing and enforcing a foreign plan confirmation order. *See* *In re U.S. Steel Canada Inc.*, 571 B.R. 600, 609 (Bankr. S.D.N.Y. 2017); *In re Cell C Proprietary Ltd.*, 571 B.R. 542, 551 (Bankr. S.D.N.Y. 2017); *In re Rede Energia S.A.*, 515 B.R. at 89.

In deciding whether to grant appropriate relief or additional assistance under chapter 15, courts are guided by principles of comity and cooperation with foreign courts. *See, e.g.*, *In re Atlas Shipping*, 404 B.R. at 738; *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008). The Supreme Court has held that a foreign judgment should not be challenged in the US if the foreign forum provides: "[A] full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it [is] sitting ...." *Hilton v. Guyot*, 159 U.S. 113, 202–03, 16 S.Ct. 139, 40 L.Ed. 95 (1895); *see also* *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) ("Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy."); *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25, 60, 66–68 (Bankr. S.D.N.Y. 1999), *aff'd*, 275 B.R. 699 (S.D.N.Y. 2002) (concluding that comity should be accorded to foreign court orders as long as "it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated" (quoting *In re Gee*, 53 B.R. 891, 901 (Bankr. S.D.N.Y. 1985))).

The issue of granting third-party releases in chapter 11 cases is controversial. Third-party releases are permissible if creditors "consent," but what constitutes consent is the subject of conflicting decisions. For, example, Judge Bernstein in *In re SunEdison, Inc.* held that a warning in a disclosure statement indicating that the failure to object is "deemed consent" to third-party releases was insufficient to turn a creditor into a consenting creditor. 576 B.R. 453, 461 (Bankr. S.D.N.Y. 2017); *see also* ***617** *In re Washington Mut. Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011) (holding that "inaction" was not sufficient to manifest consent to support releases). Judge Bernstein's rationale was that there was no identifiable "duty to speak" on behalf of the creditors. *Id.* at 460. On that view, creditors who do not affirmatively vote to grant releases are not bound by the releases. Other cases have found consent when a disclosure statement or voting ballot warned that a failure to vote against the plan would be deemed consent to the releases. *See e.g.*, *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217–29 (Bankr. S.D.N.Y. 2009), *aff'd*, No. 09 CIV. 1016 (LAK), 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010); *aff'd in part, rev'd in part*, 627 F.3d 496 (2d. Cir. 2010); *In re Calpine Corp.*, 2007 WL 4565223, at *10 (Bankr. S.D.N.Y. Dec. 19, 2007). It is unnecessary for the Court to weigh-in on that issue here.

In the chapter 15 context, judges in this Court have often enforced third-party releases in foreign proceedings under section 1507 of the Bankruptcy Code. *See, e.g.*, *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (recognizing and enforcing scheme of arrangement that released affiliate guarantees); *In re Towergate Fin. plc*, Case No. 15–10509–SMB (Bankr. S.D.N.Y. Mar. 27, 2015) [ECF Doc. # 16]; *In re New World Res. N.V.*, Case No. 14–12226–SMB (Bankr. S.D.N.Y. Sept. 9, 2014) [ECF Doc. # 20]; *In re Sino–Forest Corp.*, 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (enforcing foreign order containing third-party releases); *In re Magyar Telecom B.V.*, Case No. 13–13508–SHL, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013) [ECF Doc. # 26]; *In re Metcalfe & Mansfield Alt. Inv.*, 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010) (concluding that "principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.").

However, the Fifth Circuit in *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1042 (5th Cir. 2012), affirmed a bankruptcy court's decision in a chapter 15 case declining to grant comity and to enforce a Mexican court order approving a Mexican reorganization plan that released guarantees of US-based non-debtor affiliates of the Mexican debtor's debt. *See also Sino–Forest*, 501 B.R. at 665–66. The court decided that the bankruptcy court did not abuse its discretion in refusing to enforce the order confirming the plan and releasing the guarantees. *See* *Vitro*, 701 F.3d at 1060.

Vitro had a number of very troubling facts that the Fifth Circuit concluded supported the bankruptcy court's exercise of discretion in refusing to enforce the plan approved by the Mexican court. Most significantly, the plan created only a single class of unsecured creditors and the necessary creditor votes to approve the plan were only achieved by counting the votes of insiders. *Id.* at 1039. Insider votes are not counted under the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(10) ("If a class is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, *determined without including any acceptance of the plan by any insider.*") (emphasis added); *see also CIBC Bank & Trust Co. (Cayman) Ltd.*, 866 F. Supp. 1105, 1114 (S.D.N.Y. 1995) (concluding that "the Code prevents 'insiders' from voting on whether a reorganization plan will be accepted by a class of impaired creditors").

Of the approximately 75% of principal amount of unsecured debt that voted in favor of the plan in *Vitro*, over 50% of all voting claims were held by intercompany ***618** debt holders. *Id.* Similarly, under Mexican law only 50% in amount had to vote to approve the plan. Absent the subsidiaries' votes of intercompany debt in favor of the plan, that plan could not have been approved. *Id.*

The Fifth Circuit distinguished *Vitro* from other cases allowing third-party releases, including *Metcalfe*. Many of the same distinguishing facts are present here—the Avanti Scheme has near unanimous support (all creditors that voted cast votes in favor of the Scheme), and that support does not rely on votes by insiders.

As explained in the Angel Declaration, third-party non-debtor releases are common in schemes sanctioned under UK law, particularly for releases of affiliate guarantees of the debt that is being adjusted by the scheme. *See In re T & N Ltd and*

others (No 4) [2006] EWHC 1447 (Ch) (David Richards J.) (holding that a scheme did not necessarily prohibit the alteration of third-party rights, in this case, creditors' rights to pursue asbestos claims against insurers); *Re Lehman Brothers International (Europe) (In administration) (No 2) [2009] EWCA Civ 1161* (following *T & N*, Patten LJ held (at paragraph 63) that it was "entirely logical to regard the court's jurisdiction as extending to approving a scheme which varies or releases creditors' claims against the company on terms which require them to bring into account and release rights of action against third-parties designed to recover the same loss. The release of such third-party claims is merely ancillary to the arrangement between the company and its own creditors."); *In Re La Seda de Barcelona SA [2010] EWHC 1364 (Ch)* (Proudman J applied *T & N* and *Lehman*, and concluded that a third-party subsidiary guarantor could be released pursuant to a deed of release executed on behalf of scheme creditors).

Further examples of recent schemes sanctioned by UK courts that included third-party releases include: *Re Magyar Telecom BV [2013] EWHC 3800 (Ch)* (scheme company executed a deed of covenant for each note creditor whereby scheme claims (including guarantee claims of group guarantor companies) were irrevocably released); *In the Matter of New World Resources N.V [2014] EWHC 3143 (Ch)* (scheme provided for broad release of claims arising out of finance documents, among other things, against subsidiary guarantors); *Codere Finance (UK) Limited [2015] EWHC 3778 (Ch)* (scheme creditors irrevocably waived and released scheme claims (including claims against group company guarantors) and undertook to treat the scheme claims as waived and released subject to carve-outs).

The Court concludes that schemes of arrangements sanctioned under UK law that provide third-party non-debtor guarantor releases should be recognized and enforced under chapter 15 of the Bankruptcy Code. Avanti's Scheme Creditors had a full and fair opportunity to vote on, and be heard in connection with, the Scheme. *See* Angel Declaration, ¶¶ 12, 17–18. The proceedings under UK law in the UK courts afford creditors a full and fair opportunity to be heard in a manner consistent with US due process standards. *See, e.g.*, *Society of Lloyd's v. Reinhart*, 402 F.3d 982, 987–88 (10th Cir. 2005).

Under UK law, for a scheme to become legally binding on the company and all creditors in the relevant class, a majority in number representing not less than 75% in value of each class of creditors must vote in favor of the scheme. *Id.* ¶ 14. Unlike chapter 11 of the Bankruptcy Code, UK law authorizing schemes of arrangement does not provide a mechanism for "cramming down" dissenting classes of creditors. *Id.* ¶ 17. In this case, the Scheme ***619** only adjusted the claims of a single class of creditors, namely, the holder of the 2023 Notes, and they voted overwhelmingly to approve the Scheme. Under UK law, the entire accepting class is bound by the terms of the Scheme, including the Guarantor Releases.

The failure of a US bankruptcy court to enforce the Guarantor Releases could result in prejudicial treatment of creditors to the detriment of the Debtor's reorganization efforts and prevent the fair and efficient administration of the Restructuring. Principles of comity permit a US bankruptcy court to recognize and enforce the Scheme. *See In re Sino–Forest Corp.*, 501 B.R. at 665 (enforcing foreign order containing third-party releases, noting that, in the Second Circuit, "where the third-party releases are not categorically prohibited, it cannot be argued that the issuance of such releases is manifestly contrary to public policy"); *Metcalfe*, 421 B.R. at 700 ("Principles of comity in chapter 15 cases support enforcement of the Canadian Orders in the United States whether or not the same relief could be ordered in a plenary case under chapter 11.")

IV. CONCLUSION

Recognizing the UK Proceeding (including the Scheme and Sanction Order) and enforcing the Releases of claims against the Debtor and its non-debtor subsidiaries will assist the orderly administration of the scheme of arrangement by the UK Court and help the implementation of the Scheme for the Debtor. For the reasons explained above, the Court grants the request for recognition and enforcement of the Scheme and Sanction Order.

A separate order granting the requested relief has already been entered.

All Citations

582 B.R. 603, 65 Bankr.Ct.Dec. 137

Footnotes

[1] Avanti Communications Group plc is the Debtor in this chapter 15 case (the "Chapter 15 Case"). The location of the Debtor's corporate headquarters and registered office is Cobham House, 20 Black Friars Lane, London, EC4V 6EB, United Kingdom ("UK").

[2] Capitalized terms in this paragraph not otherwise defined shall have the meaning assigned to them in the Consent Solicitations or other relevant noted document.

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United States Bankruptcy Court, S.D. New York.
IN RE: COMAIR LIMITED, Debtor in a foreign proceeding.[1]
Case No. 21-10298 (JLG)
|
Signed February 12, 2023

Attorneys and Law Firms

APPEARANCES: PILLSBURY WINTHROP SHAW PITTMAN LLP, Attorneys for the Foreign Representative of, Comair Limited, 31 West 52nd Street, New York, NY 10019-6131, By: John A. Pintarelli, Esq., Hugh M. McDonald, Esq., Rahman Connelly, Esq.

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Chapter 15

MEMORANDUM DECISION GRANTING MOTION TO (A) AMEND ORDER RECOGNIZING FOREIGN MAIN PROCEEDING PURSUANT TO 11 U.S.C. §§ 1517(D) AND 1522(C), AND (B) SUBSTITUTE THE PROVISIONAL LIQUIDATORS IN PENDING CONTESTED MATTERS PURSUANT TO BANKRUPTCY RULE 7025

James L. Garrity, Jr., United States Bankruptcy Judge

Introduction[2]

***1** Comair Limited ("Comair") is a commercial airline incorporated in the Republic of South Africa. In May 2020, it commenced a Business Rescue Proceeding, essentially to rehabilitate its business, under the South African Companies Act of 2008, in the High Court of South Africa (the "High Court"). Comair appointed Richard Ferguson and Shaun Collyer as Comair's business rescue petitioners (the "Business Rescue Practitioners" or "BRPs").[3] In September 2020, Comair's creditors approved a Rescue Plan, and in February 2021, the BRPs filed a Verified Petition[4] in this Court, commencing Comair's case under chapter 15 of title 11 of the United States Code (the "Chapter 15 Case"), and in doing so, seeking recognition of the Business Rescue Proceeding under chapter 15 of the Bankruptcy Code. In April 2021, the Court entered an order (the "Recognition Order")[5] granting recognition of the Business Rescue Proceeding as a foreign main proceeding under section 1502(4) of the Bankruptcy Code and recognizing the BRPs as foreign representatives of Comair within the meaning of section 101(24) of the Bankruptcy Code. In November 2021, the Court granted the BRPs Discovery Motion and authorized the BRPs to take discovery of the Boeing Company ("Boeing").

On June 14, 2022, the High Court entered a provisional order granting the BRPs' Winding Up Application, which effectively terminated the Business Rescue Proceeding and placed Comair into a provisional liquidation (the "Provisional Liquidation"). On June 17, 2022, the High Court appointed Cloete Murray, Kgashane Christopher Monyela, Ahmed Carim, Tracy Anne Cameron, and Buhle Jeffery Eric Buthelezi as the joint provisional liquidators (the "JPLs") of Comair in the Provisional Liquidation. On June 23, 2022, the High Court certified the appointment of the JPLs. The matter before the Court is the JPLs motion (the "Motion")[6] seeking the entry of an order:

> ***2** (a) modifying the Court's prior order recognizing Comair's Business Rescue Proceeding, ECF No. 12, in South Africa to
>
> i. recognize Comair's liquidation proceeding in South Africa as a foreign main proceeding pursuant to section 1517 of the Bankruptcy Code and
>
> ii. recognize the JPLs as foreign representatives within the meaning of section 101(24) of the Bankruptcy Code; and
>
> (b) substituting the JPLs for the Business Rescue Practitioners in all pending contested matters pursuant to Federal Rule of Civil Procedure 25(c) (made applicable to this proceeding by Federal Bankruptcy Rule 7025 and to contested matters by Rule 9014(c)).

Boeing filed an objection to the Motion (the "Objection" or "Obj.").[7] The JPLs filed a reply in support of the Motion (the "Reply").[8] The Court heard arguments on the Motion. At the hearing, this Court instructed the JPLs' counsel to supplement the Second Harduth Declaration to address certain developments in the proceeding before the High Court, after which Ms. Harduth duly filed her supplemental declaration.[9] Boeing also filed an objection to the Supplemental Harduth Declaration,[10] to which the JPLs filed a brief response.[11]

***3** For the reasons set forth herein, the Court grants the Motion.

Jurisdiction

The Court has jurisdiction over the Motion pursuant to §§ 1334(a) and 157(a) of title 28 of the United States Code, and the Amended Standing Order of Reference dated January 31, 2012 (Preska, C.J.). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

Background

On September 18, 2013, Comair and Boeing entered into an agreement (the "Purchase Agreement") for the sale, manufacture and delivery of eight 737 MAX 8 aircraft (the "Aircraft"). Only one Aircraft was delivered as scheduled under the agreement. In March 2019, following two fatal crashes involving 737 MAX 8 aircraft manufactured by Boeing, the Federal Aviation Administration grounded all 737 MAX 8 aircraft worldwide, thereby delaying two deliveries of Aircraft scheduled under the Purchase Agreement. Comair terminated the Purchase Agreement before Boeing delivered any of the remaining seven Aircraft. Comair asserts that the consequential disruption to Comair's re-fleeting plan, coupled with the worldwide COVID-19 pandemic, contributed to its financial distress.

Comair Business Rescue Proceeding

Chapter 6 of the South African Companies Act 71 of 2008 ("Companies Act") governs "Business Rescue and Compromise with Creditors."[12] The High Court of South Africa (the "High Court") has exclusive jurisdiction over business rescue proceedings. Companies Act § 128(1)(e)).The goal of a business rescue proceeding is to facilitate the rehabilitation of a financially distressed company by providing for:

> (i) the temporary supervision of the company, and the management of its affairs, business and property by a business rescue practitioner; (ii) a temporary moratorium (stay) on the rights of claimants against the company or in respect of property in its possession; and (iii) the development and implementation, if approved, of a business rescue plan to rescue the company by restructuring its business, property, debt, affairs, and equity in a manner that maximizes the likelihood of the company continuing into existence on a solvent basis or, if that is not possible, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

Harduth Decl. ¶ 8 (citing Companies Act § 128(1)(b)).[13] A company in a business rescue proceeding is placed under the supervision of a business rescue practitioner, who, "is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court," Companies Act § 140(3)(a), and who, without limitation, "has full management control of the company in substitution for its board and pre-existing management," *id.* § 140(1)(a). "[T]he board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that— *(a)* the company is financially distressed; and *(b)* there appears to be a reasonable prospect of rescuing the company," *id.* § 129(1). Without limitation, business rescue proceeding begins when the company "files a resolution to place itself under supervision in terms of section 129(3)", *id.* § 132(a)(i), and it ends when "the court ... has converted the proceedings to liquidation proceedings," *id.* § 132(2)(a)(ii).

***4** On May 4, 2020, Comair's board of directors adopted a resolution (the "Board Resolution") authorizing the commencement of business rescue proceedings under section 129(1). The Board Resolution appointed Richard Ferguson and Shaun Collyer as the Business Rescue Practitioners pursuant to section 129(3)(b) of the Companies Act. *See* First Harduth Decl. ¶ 29. On May 5, 2020, Comair commenced a business rescue proceeding (the "Business Rescue Proceeding"). First Harduth Decl. ¶¶ 11, 30. On September 18, 2020, Comair's creditors approved its business rescue plan (as amended, the "Rescue Plan"), but the proceeding remained open while the BRPs continued to assess whether Comair had a reasonable likelihood of being rehabilitated. *See* Motion ¶ 6; Second Harduth Decl. ¶ 10.

Comair Chapter 15 Case

On February 16, 2021 (the "Petition Date"), the BRPs filed the Verified Petition in this Court seeking recognition of the Business Rescue Proceeding as a foreign main proceeding and the BRPs as the foreign representatives of Comair. On April 13, 2021, the Court entered the Recognition Order and granted recognition to the Business Rescue Proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code. *See id.* ¶¶ 1–2. In doing so, the Court found that (i) the Business Rescue Proceeding was a foreign main proceeding pursuant to section 1502(4) of the Bankruptcy Code and (ii) the BRPs were "foreign representatives" of Comair within the meaning of section 101(24) of the Bankruptcy Code. *See* Recognition Order ¶¶ G, J-L.

On July 19, 2021, the BRPs filed a motion seeking entry of an order permitting them to conduct discovery of Boeing pursuant to section 1521(a)(4) of the Bankruptcy Code.[14] To obtain relief under section 1521(a), a foreign representative must demonstrate that the relief is "necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521(a). The BRPs contended that they required discovery of Boeing to assess (a) the claims and causes of action that the Debtor might have against Boeing in connection with the Purchase Agreement, (b) the Debtor's rights (if any) to be compensated for any damages from the fund created as part of Boeing's settlement with the Department of Justice relating to its manufacture of 737 MAX 8 aircraft, and (c) the extent of the Debtor's claims against

Boeing for the repayment of deposits and other amounts paid by Comair pursuant to the Purchase Agreement. *See* Discovery Motion ¶ 20. They contended that the causes of actions Comair might have against Boeing are potentially significant property interests of Comair.[15] They asserted that discovery against Boeing was necessary to assess the validity, strength, and magnitude of those potential claims, and that it would enable them to fulfill their statutory duties under South African law to determine whether Comair has a reasonable prospect of being rescued. *See* Reply ISO Discovery Motion ¶ 13.

The Court granted the Discovery Motion and entered the "Discovery Order."[16] In doing so, the Court found that the discovery sought by the BRPs was "plainly necessary to protect Comair's assets." Discovery Order at 24. The Court determined that the discovery sought "qualif[ies] as the taking of evidence concerning the debtor's assets under § 1521(a)(4)" and that "broad discovery under section 1521 would promot[e] a significant chapter 15 objective by permitting the [BRPs] to comply with [his] duties" to "investigate the company's affairs, business property, and financial situation" in accordance with the South African Companies Act § 141. *See id.* at 19–20.[17]

Comair Terminates Business Rescue Proceeding and Commences Provisional Liquidation

***5** Section 141(2) of the Companies Act requires a practitioner to "apply to the court for an order discontinuing the business rescue proceedings and placing the Respondent into liquidation" once it concludes that "there is no reasonable prospect for the Respondent to be rescued." Companies Act § 141(2). South African liquidations are conducted in the High Court and are governed by the Insolvency Act of 1936 ("Insolvency Act") and the Companies Act 61 of 1973 ("1973 Companies Act").[18]

> When an application to place a company into a wind up or liquidation is made, the applicant must serve a copy on various parties in interest, as required under section 346 of the 1973 Companies Act. The High Court may grant or dismiss any application, or adjourn the hearing thereof, conditionally or unconditionally, or make any interim order or any other order it may deem just, subject to the criteria set forth in section 347 of the 1973 Companies Act. When the High Court grants a wind up application on a conditional or interim basis, the company is placed into a provisional liquidation, and a return date is set for parties in interest to show cause as to why the company should not be placed into a final liquidation (a "Final Liquidation Order"). Notwithstanding this process, the wind-up proceeding is deemed to commence at the time of the presentation to the Court of the application for the winding-up. *See* 1973 Companies Act § 348.

Second Harduth Decl. ¶ 15. "By definition, a provisional liquidation is an interim proceeding that, upon entry of a Final Liquidation Order, becomes a final liquidation." *Id.* ¶ 16. However, the High Court can extend the return date for determining whether to place a company into final liquidation for a number of reasons. *Id.* For example, "section 155 of the Companies Act permits a provisional liquidator to propose a scheme of arrangement, which is a court-approved restructuring agreement between a company and its stakeholders," and upon the proposal of a scheme of arrangement, "the High Court will typically extend the return date for placing a company into final liquidation."[19] *Id.* ¶ 16.

***6** When a company is placed into a provisional liquidation, the Master of the High Court appoints one or more provisional liquidators in accordance with the policy for appointments set by the Minister of Justice, which appointment is subject to the High Court's oversight. Second Haruth Decl. ¶ 17 (citing 1973 Companies Act §§ 368, 373). "Upon appointment, the property of the company is deemed to be in the custody and under the control of the provisional liquidator(s)." *Id.* (citing 1973 Companies Act § 361). Once the High Court enters a Final Liquidation Order, the Master of the High Court must summon a meeting of creditors, which allows creditors to lodge their claims against the company and nominate final liquidators—ordinarily, the provisional liquidators are nominated as final liquidators. *Id.* ¶ 18. Liquidators carry the duty to recover and reduce into possession all the assets and property of the company to sell those assets, and to distribute the proceeds to creditors in accordance with their statutory order of preference. *Id.* ¶ 19 (citing 1973 Companies Act §§ 391, 409; Insolvency Act §§ 95–104). "Subject to satisfaction of certain statutory conditions, liquidators also have the power to bring and defend litigation in the name and on behalf of the company and to take such other measures for the protection and better

administration of the affairs and property of the company as the liquidators may deem necessary." *Id.* (citing 1973 Companies Act § 386).

Faced with a resurgence of COVID-19-related restrictions, rising oil prices, and a lack of financing necessary to maintain Comair as a going concern, the BRPs determined that there was no reasonable prospect for Comair to be rescued. *See* Motion ¶¶ 8–12; Second Harduth Decl. ¶¶ 10–12. On June 9, 2022, the BRPs filed an application with the High Court pursuant to section 141(2) of the Companies Act, seeking an order discontinuing the Business Rescue Proceeding and commencing a liquidation proceeding with respect to Comair (the "Winding Up Application").[20] *See* Motion ¶ 13; Second Harduth Decl. ¶ 12. On June 14, 2022, the High Court entered a provisional order (the "Provisional Liquidation Order") that granted the Winding Up Application, discontinued the Business Rescue Proceeding, and placed Comair into a provisional liquidation (the "Provisional Liquidation"). *See* Motion ¶ 15; Second Harduth Decl. ¶ 20.[21] On June 17, 2022, the Master of the High Court appointed the JPLs as the provisional liquidators of Comair. *See* Second Harduth Decl. ¶ 21.[22] On June 23, 2022, the High Court certified the appointment of the JPLs. *See id.* On June 23, 2022, the JPLs filed an application (the "JPL Powers Application")[23] with the High Court, seeking expanded powers during the Provisional Liquidation, including the powers to:

> (a) institute legal proceedings on behalf of the Comair estate;
>
> (b) move this Court to amend the Recognition Order to recognize the JPLs as the new foreign representatives;
>
> (c) notify this Court that the JPLs have ratified the BRPs' decision to obtain discovery from Boeing and to seek to be substituted for the BRPs with respect to the pending discovery dispute with Boeing; and
>
> (d) take all other and further actions as the JPLs may deem necessary in furtherance of the authority being conferred on a foreign representative under chapter 15 of the Bankruptcy Code.

See Motion ¶ 17; Second Harduth Decl. ¶ 22. On June 28, 2022, the High Court granted the JPL Powers Application.[24] In it, as relevant, the High Court granted the JPLs the authority:

> (i) To institute legal proceedings as may be necessary on behalf of the estate, particularly in regard to the following:
>
> a. declaratory relief in respect of the assets of the estate;
>
> b. interdict proceedings against companies and individuals on behalf of the estate;
>
> c. any further legal proceedings necessary in the administration of the estate;
>
> d. an amendment of this Court's order recognizing the South African Proceedings as a Foreign Main Proceeding, with the applicants as provisional liquidators being appointed as the new foreign representative;
>
> e. notifying the New York Bankruptcy Court that the applicants as the new foreign representative have ratified the joint business rescue practitioners' decision to obtain discovery from Boeing and that the applicants be substituted for the former foreign representatives in all capacities;
>
> f. authorizing the applicants, as new foreign representative, to take any actions as deemed necessary in furtherance of the authority being conferred on the foreign representative;
>
> ***7** (ii) To defend or oppose legal proceedings as may be necessary on behalf of the estate;
>
> (iii) To continue and/or settle any legal proceedings of whatever nature, whether already instituted or which may be instituted on behalf of or against the estate, on such terms as the applicant in their discretion may deem fit; and
>
> (iv) To employ any individuals or legal entity to investigate the trade, dealings and affairs of Comair and to value its assets.

See JPL Powers Order ¶¶ 3.1–3.11; *see also* Motion ¶ 18; Second Harduth Decl. ¶ 22.

The Motion

In support of the Motion, the JPLs assert that the BRPs were Comair's "foreign representatives" through June 17, 2022, and effective June 17, 2022, the JPLs are Comair's "foreign representatives". They contend that the Business Rescue Proceeding was a "foreign proceeding" within the meaning of section 101(23) of the Bankruptcy Code, that it was pending in South Africa, the country where Comair's center of main interests is located, and therefore was a foreign proceeding pursuant to section 1502(4) of the Bankruptcy Code and was entitled to recognition as a foreign main proceeding under section 1517(b)(1) of the Bankruptcy Code. Likewise, they say that the Business Rescue Proceeding was converted to the Provisional Liquidation (together with the Business Rescue Proceedings, the "South African Proceedings") as of June 14, 2022, that it is still pending in South Africa, the country where Comair's center of main interests is located, and therefore is a foreign main proceeding pursuant to section 1502(4) of the Bankruptcy Code and is entitled to recognition as a foreign main proceeding pursuant to 1517(b)(1) of the Bankruptcy Code. They assert that, pursuant to sections 1517(d) and 1522(c), the JPLs are entitled to all of the relief afforded under section 1520 of the Bankruptcy Code and the additional relief requested and provided under section 1521, subject to certain modifications. Motion ¶¶ 22–30. Pursuant to the Motion, the JPLs seek an order that, among other things, (i) recognizes the South African Proceedings as a foreign main proceeding pursuant to section 1517(a) and (b)(1) of the Bankruptcy Code; (ii) authorizes the JPLs to intervene in any proceeding in a State or Federal court in the United States in which Comair is a party; and (iii) deems the JPLs to be substituted for the BRPs pursuant to Rule 25(c) in all pending contested matters, including, without limitation, matters arising under the Discovery Order. *Id.* at 13–14.

Section 1517(d) permits the "modification ... of recognition if it is shown that the grounds for granting it ... have ceased to exist." 11 U.S.C. § 1517(d). Section 1522(c) provides that the court may "modify or terminate" relief granted by it under sections 1519 or 1521 of the Bankruptcy Code. 11 U.S.C. § 1522(c). The JPLs contend that Courts frequently grant relief under these sections to account for a change in the state of the foreign proceeding. Motion ¶ 22. They say that relief under those sections is necessary to reflect the change in the nature of Comair's South African Proceedings, i.e., that the Business Rescue Proceeding has been converted to a Provisional Liquidation and the BRPs have been replaced with the JPLs. *Id.* ¶ 23. They also assert that such relief is warranted because the Provisional Liquidation qualifies as a foreign main proceeding under the Bankruptcy Code in its own right, and the JPLs qualify as foreign representatives under the Bankruptcy Code. *Id.*

***8** Rule 25(c) provides that "[i]f an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party." Fed. R. Civ. P. 25(c). The JPLs contend that they are successors to the BRPs, who during the Business Rescue Proceeding were "charged with investigating and administering Comair's assets." They say that upon conversion of the Business Rescue Proceeding to the Provisional Liquidation, the JPLs "replaced the Business Rescue Practitioners and assumed the role of recovering and administering Comair's assets and affairs." Motion ¶ 34; *see* Second Harduth Decl. ¶ 19. Accordingly, the JPLs assert that they should be substituted for the BRPs in all respects. Motion ¶ 34.

Boeing objects to the Motion. Briefly, and in substance, it asserts that the JPLs misplace their reliance on sections 1517(d) and 1522(c) of the Bankruptcy Code. It complains that through the Motion, the JPLs seek to initiate a new chapter 15 proceeding "under the guise of a purported 'amendment' to the [Recognition Order] without even attempting to satisfy the requirements of the Bankruptcy Code or Bankruptcy Rules." Obj. ¶ 1. It says that because the Business Rescue Proceeding recognized by this Court pursuant to chapter 15 was terminated well before the JPLs filed the Motion, and the BRPs previously recognized as foreign representatives no longer have any authority to act for Comair, the relief the BRPs had pursued on behalf of reorganized Comair (including protecting Comair's business as a going concern and implementing its Plan) in this chapter 15 case is at an end.

Indeed, Boeing correctly notes that the Provisional Liquidation and Business Rescue Proceeding are distinct matters with different case numbers in the High Court, different goals and supervised by different people. Obj. ¶ 27. But it further contends that the law does not permit the JPLs simply to "swap" the new Provisional Liquidation into this Chapter 15 Case. Obj. ¶¶ 26–27. Essentially, it asserts that before the Court can recognize the Provisional Liquidation as a foreign proceeding under the Bankruptcy Code, two things must happen. First, the BRPs must file a final report with the Court pursuant to Bankruptcy Rule 5009(c). If no objection to the report has been filed 30 days after the BRPs file a certificate that notice of the report has been provided to interested parties, there shall be a presumption that the case has been fully administered and the Court would close the Chapter 15 Case. Obj. ¶ 24. Boeing maintains that the BRPs must file a final report because "their roles are indisputably complete," and they have therefore lost their authority to act for Comair. *Id.*¶¶ 16, 23, 26, 30. Second,

the JPLs must successfully petition the Court for recognition of the Provisional Liquidation under chapter 15 of the Bankruptcy Code. It contends that if the JPLs successfully do so, they can thereafter seek leave to conduct discovery of Boeing. *Id.* ¶¶ 35–38.

Boeing argues that any prior justification for relief in this Chapter 15 Case, including with respect to the Discovery Motion, no longer applies in the face of the Provisional Liquidation. *Id.* ¶ 25. It maintains that the JPLs have not demonstrated that any chapter 15 case is necessary at all, and that there is no evidence that the Debtor needs a chapter 15 case to protect its business, assets, any plan, or the now-pending liquidation. *Id.* ¶ 25. It argues that the Court should require the JPLs to commence a new chapter 15 case and make a showing that the provisional liquidation complies with the statutory and other requirements of chapter 15. *Id.* ¶ 25.

The Court considers those matters below.

Discussion

Section 1517(d) states as follows:

> ***9** The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under this chapter may be closed in the manner prescribed under section 350.

11 U.S.C. § 1517(d). Relief under section 1517(d) is discretionary. *See In re Loy*, 448 B.R. 420, 438 (Bankr. E.D. Va. 2011) ("The actual language dictates that the subchapter's provisions 'do not prevent modification or termination,' which indicates that, although revisiting a recognition determination is not mandatory, it is within the Court's discretion to do so." (quoting 11 U.S.C. § 1517(d))). However, the statute limits the Court's exercise of such discretion to cases in which: (1) the basis for recognition was flawed in some way, or (2) where the grounds for recognition have ceased to exist. *See* *In re Cozumel Caribe, S.A. de C.V.*, 482 B.R. 96, 107 (Bankr. S.D.N.Y. 2012); *see also In re Loy*, 448 B.R. at 338 ("Section 1517(d) provides a two part disjunctive test. A Court may modify or terminate recognition if (1) the grounds for granting recognition 'were fully or partially lacking' or (2) the grounds for granting recognition 'have ceased to exist.' " (quoting 11 U.S.C. § 1517(d))). In exercising that discretion, the Court must "give due weight to possible prejudice to parties that have relied on the order granting recognition." 11 U.S.C. § 1517(d).

The Business Rescue Proceeding has been terminated in favor of the Provisional Liquidation. *See* Second Harduth Decl. ¶¶ 12–13; Obj. ¶¶ 16, 23. The JPLs contend that the Comair insolvency proceeding—the South African Proceeding—is uninterrupted, and the business rescue proceeding has only been converted into an insolvency proceeding. Supp. Decl. Resp. at 4–5. Essentially, they assert that, in applying sections 1517(d) and 1522(c) of the Bankruptcy Code, there is no difference between (i) an order that terminates a reorganization and initiates a liquidation, and (ii) an order that converts a reorganization into a liquidation. *Id.* Accordingly, the JPLs assert that the South African Provisional Liquidation is the same proceeding, overseen by the same High Court, as the business rescue proceeding. *See id.* The only difference is that the conversion from a reorganization to a liquidation necessitated replacing business rescue professionals with provisional liquidators, effecting a change in the foreign representative in this chapter 15 proceeding. *See id.*

By so contending, the JPLs maintain and the Court finds that there has been no change in the identity of the foreign proceeding. Fundamentally, Comair is still in an insolvency proceeding in South Africa under the Companies Act. The High Court had jurisdiction over Comair during the Business Rescue Proceeding, and it retains jurisdiction over Comair throughout the pendency of the Provisional Liquidation. As now relevant, the only change affecting this Chapter 15 Case is

that the High Court has authorized a new party to represent Comair in the South African liquidation, thus effecting a change in the foreign representative. The Motion asks the Court to recognize that change. Comair remains under the control of court-appointed fiduciaries. The High Court simply replaced the reorganizational fiduciaries with liquidators. This is common in the United States and globally, as insolvency regimes that allow for reorganization must (as a practical matter) include a mechanism for liquidating debtor companies that unsuccessfully attempt such a reorganization.

***10** "Chapter 15 incorporates into U.S. bankruptcy law the Model Law on Cross-Border Insolvency (the "Model Law"), promulgated in 1997 by the United Nations Commission on International Trade Law." *In re Black Gold S.A.R.L.*, 635 B.R. 517, 525 (B.A.P. 9th Cir. 2022).[25] The legislative history to section 1517 confirms that the provision "closely tracks article 17 of the Model Law, with a few exceptions." *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 332 (S.D.N.Y. 2008) (quoting House Report at 113).[26] Section 1517(d) is the U.S. version of Article 17(4) of the Model Law. The latter states that:

> The provisions of articles 15, 16, 17 and 18 [governing recognition of a foreign proceeding] do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Model Law, Art. 17(4). "Congress has specifically pointed to the [UNCITRAL Guide][27] as providing historical and interpretive guidance to the meaning and purpose of the provisions in chapter 15." *In re Black Gold S.A.R.L.*, 635 B.R. at 525 (citing House Report at 106 n.101). As relevant, the UNCITRAL Guide states:

> Modification or termination of the recognition decision may be a consequence of a change of circumstances after the decision on recognition, for instance, if the recognized foreign proceeding has been terminated or its nature has changed (e.g. a reorganization proceeding might be converted into a liquidation proceeding) or if the status of the foreign representative's appointment has changed or the appointment has been terminated.

See UNCITRAL Guide § 165. "Section 1517(d) allow[s] courts to adjust their rulings based on changed circumstances, which exhibit[s] 'a policy that the recognition process remain flexible, taking into account the actual facts relevant to the court's decision rather than setting an arbitrary determination point.' " *In re Oi Brasil Holdings*, 578 B.R. at 203 (quoting *In re British Am. Ins. Co.*, 425 B.R. 884 (Bankr. D. Fla. 2010)); *see In re Loy*, 448 B.R. at 440 ("[R]ecognition determinations are malleable, and, as facts warrant in a specific case, the court may revisit recognition."); *see also* *In re Ernst & Young, Inc.*, 383 B.R. 773, 781 (Bankr. D. Colo. 2008) (concluding that a recognition determination "appears to be a summary determination" and "[s]hould it be determined in the Receivership Proceeding that KDI and KD/CO are two independent entities which should be liquidated separately, chapter 15 of the Bankruptcy Code allows the recognition determination to be modified or terminated in the future" (citing 11 U.S.C. § 1517(d))).

***11** Under the prospective prong of section 1517(d), recognition may be modified or terminated if the grounds for granting recognition "have ceased to exist." 11 U.S.C. § 1517(d). "To assess this question, the Court must examine what has changed since entry of the Prior Recognition Order." *In re Oi Brasil Holdings*, 578 B.R. at 222. "In order to modify or terminate recognition, the reviewing court that evaluates the presence or absence of either one of those prongs may consider new evidence and it is not limited to considering only the evidence that was or ought to have been available at the time the court granted recognition." *In re Loy*, 448 B.R. at 439. No party disputes that the Business Rescue Proceeding recognized by the Court in the Recognition Order has been discontinued and no longer exists. *See* Second Harduth Decl. ¶¶ 12–13; Obj. ¶¶ 16, 23.

Section 132(2)(a)(ii) of the Companies Act provides that "[b]usiness rescue proceedings end when ... the court ... has

converted the proceedings to liquidation proceedings," and section 141(2) of the Companies Act enables a business rescue practitioner to "apply to the court for an order discontinuing the business rescue proceeding and placing the company into liquidation." The Court agrees with the JPLs' contention that there is only a semantic difference between (i) the "termination" of a reorganization in favor of a liquidation, and (ii) the "conversion" of a reorganization into a liquidation. In either case, the two forms of the insolvency are coterminous—the reorganization ends where the liquidation begins. This accords with the legislative history of section 1517(d), which confirms that section 1517 closely tracks article 17 of the Model Law. *See* *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. at 332; House Report at 113. Moreover, Congress relied on the UNCITRAL Guide for interpretive guidance in reviewing the model law. *In re Black Gold S.A.R.L.*, 635 B.R. at 525 (citing House Report at 106 n.101). In turn, the UNCITRAL Guide explicitly contemplates modification or termination of a recognition order where "a reorganization proceeding might be converted into a liquidation proceeding," or where "the status of the foreign representative's appointment has changed." UNCITRAL Guide § 165.

The JPLs contend that bankruptcy courts frequently grant relief under §§ 1517(d) and 1522(c) "to account for a change in status of a foreign proceeding." Reply ¶ 22 (citing Amended Order Recognizing Foreign Main Proceeding, *In re Glitnir Banki HF.*, No. 08-14757 (Bankr. S.D.N.Y. Mar. 18, 2011), ECF No. 73; Amended Order Recognizing Foreign Main Proceeding, *In re Landsbanki Islands HF.*, No. 08-14921 (Bankr. S.D.N.Y. Jan. 14, 2011), ECF No. 41). In those cases, certain Icelandic financial institutions (the "Icelandic Banks") were being operated under the control of the Financial Supervisory Authority of Iceland (the "FME") and through separate Resolution Committees formed by the FME under Icelandic law, that replaced each bank's board of directors and was headed by an individual chairperson. The Resolution Committees commenced "Moratorium" proceedings for their respective banks, under the Icelandic Bankruptcy Act (the "Bankruptcy Act") and subject to the exclusive jurisdiction of the District Court of Reykjavík (the "Icelandic District Court"). Under Icelandic law, a "Moratorium" is a reorganization measure that is intended to preserve the financial condition of the subject entity by allowing suspension of payments, a stay of creditor enforcement actions, and the imposition of a claims process under the priority rules of the Bankruptcy Act.[28]

***12** Both Icelandic Banks filed chapter 15 petitions in this Court to give effect to the Moratorium proceedings. In both cases, this Court recognized the proceedings as foreign main proceedings and each chairperson of the Resolution Committee as the respective debtor's foreign representative.[29] After the entry of the recognition orders in both cases, the Icelandic law was amended in two ways. The 2009 Amendment granted the Icelandic District Court the power to appoint a "Winding-up Board" for a bank in a Moratorium proceeding upon the written request by the Resolution Committee of such bank. The Winding-up Board is subject to the exclusive jurisdiction of the Icelandic District Court and is entrusted to handle all aspects of the banks reorganization and winding up that are not entrusted to the Resolution Committee. *Landsbanki* Motion ¶ 9. It also provided the upon the termination of the Moratorium proceedings, the Resolution Committee was divested of any power over the banks in favor of the Winding-up Board.

Among other things, the 2010 Amendments mandate that upon the conclusion of an authorized Moratorium, the subject bank must be placed in winding-up proceedings—i.e., liquidation proceedings—subject to the control of the Winding-up Board, and pursuant to an order of the Icelandic District Court. *Id.* ¶ 17. Prior to the amendment, at the conclusion of the Moratorium, a financial institution automatically entered winding-up proceedings, without further order of the Icelandic District Court. The amendment was intended to clarify the involvement of Icelandic courts in the winding-up proceedings, thereby ensuring that the reorganization and winding-up proceedings of Icelandic financial institutions satisfy the requirements of European Directive 2001/24/EC (the "Directive"). *Id.* In both cases, the banks were placed into liquidation proceedings by order of the Icelandic District Court.

The *Glitnir* and *Landisbank* Winding-up Boards, both styling themselves as the "foreign representatives" of the respective banks, filed separate motions under section 1522(c) of the Bankruptcy Code. In so doing, they sought to amend the respective recognition orders to recognize the Winding-up Boards as the "foreign representatives" under section 101(24) of the Bankruptcy Code, and the Icelandic Proceedings as foreign main proceedings under section 1517 of the Bankruptcy Code. In each case, the Court granted the requested relief under section 1522(c). In each case, the Court referred to the respective Icelandic insolvency as one proceeding that was governed by Icelandic law, finding that each respective Winding-up Board was the duly appointed foreign representative under section 101(24).

Here, the JPLs rely on *Glitnir* and *Landsbanki* to say that bankruptcy courts "frequently grant relief" under sections 1522(c)

and 1517(d) "to account for a change in status of a foreign proceeding, such as when a new foreign representative has been appointed by the foreign court." Motion ¶ 22. However, these cases relied only on section 1522(c) for the authority to modify a recognition order to reflect the changes in those proceedings. *Landsbanki* Order ¶ M; *Glitnir* Order ¶ M. Accordingly, the court will analyze only those cases' application of section 1522(c).

The relevant issue is whether the South African reorganization proceedings and the subsequent liquidation proceedings constitute the same "foreign proceeding," as defined in section 101(23) of the Bankruptcy Code, that was recognized in this Court's Recognition Order. A foreign proceeding is "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." 11 U.S.C. § 101(23). A foreign representative is "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 a foreign proceeding." *Id.* § 101(24). Section 1522(c) permits a bankruptcy court to, "at the request of the foreign representative or an entity affected by relief granted under section 1519 or 1521, or at its own motion, modify or terminate such relief." *Id.* § 1522(c). Absent an order to the contrary, section 1519 relief "terminates when the petition for recognition is granted." *Id.* § 1519(b). Upon recognition of a foreign proceeding, a bankruptcy court has broad authority under § 1521 to grant various forms of relief relating to the prosecution of a chapter 15 case, which includes "providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities." 11 U.S.C. § 1521(a)(4). Following entry of a recognition order, section 1521 is a key provision under which a foreign representative may seek relief. The JPLs seek to avail themselves of this authority on the ground that they are the foreign representative appointed by the High Court in the foreign proceeding that this Court has already recognized. *See* Motion ¶¶ 1, 7, 22. They also say that section 1522 permits the court to modify relief already granted under section 1521, i.e., the Discovery Order, to allow them to continue discovery that the BRPs started, since the High Court has now made them the foreign representative.[30] Transcript at 10:10–11:7; *see* Second Harduth Decl. ¶ 22. Boeing says that, because the Provisional Liquidation is a new proceeding that this Court has not recognized, the JPLs should not be recognized as the foreign representative in this case, and thus they should not be extended section 1521 relief previously granted to the BRPs. Obj. ¶¶ 26–34; Supp. Obj. ¶¶ 6–10. Thus, the question of whether the JPLs may conduct discovery hinges on whether they were appointed in the same proceeding as the BRPs had been. The Court finds that the South African business rescue proceeding and the liquidation are parts of one foreign proceeding.

***13** Boeing says that the South African liquidation is distinct from the reorganization because "Comair's provisional liquidation is a new case with a different case number than its business rescue proceeding," that the JPLs are distinct from the BRPs, the liquidation is governed by the 1973 Companies Act and the business rescue was governed by the 2008 Companies Act. Supp. Obj. ¶¶ 6–8. Boeing says that these are different proceedings because the reorganization has formally ended. *Id.* ¶ 9. Moreover, Boeing says that the reorganization proceeding and the liquidation proceeding "serve fundamentally different purposes" because a business rescue proceeding aims "to *avoid* liquidation or generate returns in *excess* of liquidation." *Id.* ¶ 10.

Boeing attempts to distinguish the Icelandic cases, pointing out that the governing law had been amended, and so the orders in those chapter 15 cases "were sought out of an abundance of caution to accommodate changes in substantive Icelandic law governing an already-recognized [sic] foreign proceeding; indeed, both motions explicitly noted that the relevant legislative amendments in Iceland were automatically afforded recognition under the terms of the existing recognition order." Objection ¶ 32. In reply, the JPLs say that this is "a distinction without a difference," explaining that the Icelandic cases "stand for the proposition that the Bankruptcy Code authorizes the court to amend a recognition order when there has been a substantial change in the nature of the foreign proceeding, which is what has happened here." Reply at 5 n.5. The Court agrees.

Boeing is correct that the Icelandic cases followed a series of legislative amendments, but that is not particularly germane to the treatment of those cases by U.S. bankruptcy courts. It is the substance of those amendments that is of particular concern here. The 2009 amendment created an automatic mechanism by which the reorganizational moratoria would automatically convert to liquidation proceedings. Crucially, the Icelandic Parliament changed that procedural mechanism in 2010, instituting a process by which the reorganizational committee and the winding-up board would apply for an order to end the moratorium and begin the winding-up, upon entry of which, the moratorium will have "concluded." *Glitnir* Motion ¶ 14. That is nearly identical to the mechanism used by the High Court in South Africa, whereby the BRPs apply to the High Court for an order concluding the business rescue proceeding and beginning the liquidation, at which point the JPLs are appointed.

Ironically, Iceland enacted the 2010 amendment that required a court order to transition to liquidation specifically to ensure recognition by other countries, in accordance with Directive 2001/24/EC.[31] Certainly, it is helpful in this case to have an order from the South African High Court explaining the transition from a business rescue to a liquidation. Thus, the court rejects Boeing's argument that the formal end of the Business Rescue Proceeding distinguishes it from the liquidation for the purposes of chapter 15 recognition—the similar administrative conclusion effected by the foreign orders initiating the Icelandic liquidations did not prevent this Court from treating the already recognized moratoria and their respective liquidations as identical, and the analogous South African procedure here warrants the same treatment.

***14** The Court certainly agrees with Boeing's premise that the Icelandic cases were filed "in an abundance of caution" because the change in legal status was "automatically afforded recognition" under chapter 15. Objection ¶ 32. However, this belies Boeing's whole argument—if the analogous changes to the Icelandic cases were automatically afforded recognition, as Boeing maintains, then the motion in this case should be equally superfluous. As aforementioned, it is not important that Iceland had only recently enacted the amendments that adopted essentially the same procedural mechanism as South Africa—new or old, the important point is that this Court approved of that mechanism in *Glitnir* and *Landsbanki*.

As to Boeing's point that reorganizations and liquidations serve different ends, this is unavailing. Fundamentally, this case involves a functional transfer of controlling interest in Comair from the BRPs to the JPLs. *See* Peter N. Levenberg SC, *Directors' Liability and Shareholder Remedies in South African Companies—Evaluating Foreign Investor Risk*, 26 Tul. J. Int'l & Comp. L. 1, 55–59 (Winter 2017) (explaining the role of a liquidator in South African insolvency proceedings). While a South African business rescue proceeding is analogous to an American chapter 11 case, *id.* at 13, and a liquidation is comparable to a chapter 7 case, *id.* at 55–59, South African law administratively creates a new proceeding when it appoints a liquidator or liquidators (who fills the same role as an American chapter 7 trustee), *id.* at 41 n.260. The deliberately flexible nature of chapter 15 is designed to accommodate exactly this kind of minor administrative difference among international insolvency proceedings. *See In re Oi Brasil Holdings*, 578 B.R. at 203.

Additionally, the further interruption of the discovery process in this case would only "add duration, costs, and complexity" to this action. *Advanced Mktg. Grp.*, 269 F.R.D. at 359. The Court finds that there is no merit to Boeing's view that the Discovery Order was predicated only on the BRPs' interests in reorganization. *See* Obj. ¶¶ 2, 11, 13. Rather, the Discovery Order was intended, inter alia, to allow the parties to ascertain what claims and related assets Comair may have. Thus, as the clear successor to the BRPs, the JPLs are equally entitled to engage in discovery for the furtherance of Comair's economic interests. *See Advanced Mktg. Grp.*, 269 F.R.D. at 359.

Whether the Provisional Liquidation is Entitled to Recognition Under Section 1517(a) of the Bankruptcy Code

In granting the Motion, the Court conducts a fresh analysis of the Provisional Liquidation to ensure that it complies with chapter 15 in its current state. Section 1517 governs a request for recognition of a foreign proceeding. It provides, in relevant part:

> Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
>
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
>
> (2) the foreign representative applying for recognition is a person or body; and
>
> (3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a). Section 1506 provides an exception to recognition on the basis of U.S. public policy. It states:

> Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.

Id. § 1506. Under this framework, subject to the public policy exception under section 1506, recognition of a foreign proceeding is "mandatory" where the requirements of section 1517(a) are met. *In re Millard*, 501 B.R. 644, 653–54 (Bankr. S.D.N.Y. 2013) ("[S]ection 1517(a) imposes a mandatory requirement, in the first instance, for recognition when its requirements have been met."); *see also* *In re Bear Stearns*, 374 B.R. at 126 (noting that recognition of a foreign proceeding under chapter 15 is "a simple single step process" that involves a "formulaic" determination); *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 269 (Bankr. S.D.N.Y. 2019) ("Therefore, recognition of the foreign proceeding is statutorily mandated if the three requirements of section 1517(a) are met and no exception applies.").

The Provisional Liquidation is a Foreign Main Proceeding

***15** A foreign proceeding must be either a main or nonmain proceeding to qualify for recognition under chapter 15 of the Bankruptcy Code. *See* *In re Bear Stearns*, 374 B.R. at 126–27 ("[T]he recognition must be coded as either main or nonmain."). The JPLs seek recognition of the Provisional Liquidation as a foreign main proceeding. *See* Motion ¶ 3.

Section 1516 of the Bankruptcy Code allows the Court to presume that the Provisional Liquidation is a foreign proceeding if the decision or certificate attached to the request for recognition indicates that the foreign proceeding is a foreign proceeding. *See* 11 U.S.C. § 1516(a) ("If the decision or certificate referred to in section 1515(b) indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative, the court is entitled to so presume."); *see also In re Oi Brasil Holdings*, 578 B.R. at 194 ("The petition must be accompanied by certain evidentiary documents that are presumed authentic in the absence of contrary evidence."). The JPL Powers Order, attached as Exhibit G to the Second Harduth Declaration submitted together with the Motion, expressly grants the JPLs the authority to seek an amendment to the Recognition Order to recognize the "South African Proceedings as a Foreign Main Proceeding." JPL Powers Order ¶ 3.1.5. Therefore, the Court may presume that the Provisional Liquidation is a foreign proceeding.

Notwithstanding that, it is clear that the Provisional Liquidation is a foreign proceeding within the meaning of section 101(23). That section defines a "foreign proceeding" as:

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

11 U.S.C. § 101(23); *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. at 270 ("Section 101(23) defines a 'foreign proceeding' as (1) a collective judicial or administrative proceeding under a law relating to insolvency or adjustment of debt, (2) pending in a foreign country, (3) in which the assets and affairs of the debtor are subject to control or supervision of a foreign court, and (4) for the purpose of reorganization or liquidation."). For these purposes, the term "proceeding" refers to a "statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets and includes acts and formalities set down in law so that courts, merchants and creditors can know them in advance and apply them evenly in practice." *In re Culligan Ltd.*, No. 20-12192, 2021 WL 2787926, at *8 (Bankr. S.D.N.Y. July 2, 2021) (quoting *In re Betcorp Ltd.*, 400 B.R. 266, 277–78 (Bankr. D. Nev. 2009)). The term "foreign court" means "a judicial or other authority competent to control or supervise a foreign proceeding." 11 U.S.C. § 1502(3).

The Provisional Liquidation meets this standard. It is a collective judicial proceeding governed by the South African Insolvency Act 24 of 1936 and the Companies Act 61 of 1973, which are laws relating to the adjustment of debt. *See* Second Harduth Decl. ¶¶ 14, 23. It is a collective proceeding because all creditor claims will be adjudicated and treated in accordance with the statutory parameters set forth in the 1973 Companies Act and the Insolvency Act. *See id.* ¶ 18 ("Under South African law, after the High Court enters a Final Liquidation Order, the Master of the High Court is required to summon a

meeting of creditors in order for creditors to, *inter alia*, lodge their claims against the company and nominate final liquidators."). The Provisional Liquidation is pending in South Africa, a foreign country. *Id.* ¶ 23; *see* Provisional Liquidation Order. The proceeding is supervised by the High Court and the Master of the High Court. *See id.* ¶¶ 14, 23. Under South African law, the JPLs, who were appointed by the Master of the High Court,[32] are deemed to have custody and control over the property of Comair. *See* Second Harduth Decl. ¶ 17 (citing 1973 Companies Act § 361); *see also* 1973 Companies Act § 368 (providing for the appointment of provisional liquidators by the Master of the High Court). Finally, the Provisional Liquidation is for the purpose of reorganization or liquidation. At its current stage, it is an interim proceeding that becomes a final liquidation only upon entry of a final liquidation order. *See* Second Harduth Decl. ¶¶ 15–16. During the interim phase, a provisional liquidator may still propose a scheme of arrangement—a court-approved restructuring agreement between a company and its stakeholders. *See id.* ¶ 16. Once a final liquidation order is entered by the High Court, the Master of the High Court is required to summon a meeting of creditors at which they may lodge their claims against Comair. *See id.* ¶ 18. Thus, the Provisional Liquidation is a foreign proceeding for the purpose of reorganization or liquidation within the meaning of section 101(23) of the Bankruptcy Code.

***16** Section 1517(b)(1) requires recognition of the foreign proceeding as a "foreign main proceeding" if it is "pending in the country where the debtor has the center of its main interests" or "COMI." 11 U.S.C. § 1517(b)(1); *see* 11 U.S.C. § 1502(4) (defining "foreign main proceeding" as a "foreign proceeding pending in the country where the debtor has the center of its main interests"); *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 248 (2d Cir. 2013) (applying this definition).

On April 13, 2021, this Court found that Comair's center of main interests was located in South Africa, where the Business Rescue Proceeding was pending. Recognition Order ¶ L. The Court, therefore, recognized the Business Rescue Proceeding as a foreign main proceeding. *Id.* ¶ 2. The JPLs contend that their appointment did "nothing to alter the Debtor's center of main interests." Motion ¶ 24; *see* Second Harduth Decl. ¶ 24 ("Comair is a company registered under the laws of South Africa with its center of main interest in South Africa and with substantial connections to South Africa."). Boeing does not dispute that South Africa remains the Debtor's COMI. Section 1516(c) provides that, in the absence of evidence to the contrary, a debtor's registered office or habitual residence "is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c); *see* *In re SPhinX Ltd.*, 351 B.R. at 117. Comair's registered business address is located in the Gauteng province of South Africa. *See* Motion at 1 n.1; *see also* Harduth Decl. ¶ 24 ("Comair is a company registered under the laws of South Africa with its center of main interest in South Africa and with substantial connections to South Africa."). The Court sees no reason to disturb its prior determination that Comair's COMI is in South Africa. Accordingly, the Provisional Liquidation is a "foreign main proceeding" within the meaning of section 1502(4) of the Bankruptcy Code. *See* *In re Ocean Rig UDW Inc.*, 570 B.R. 687, 702 (Bankr. S.D.N.Y. 2017) ("A foreign proceeding shall be recognized as a foreign main proceeding if it is pending where the debtor has its COMI.").

The JPLs are the Foreign Representative of Comair

The JPLs also request modification of the Recognition Order to recognize the JPLs as the foreign representative of Comair. Motion ¶ 3. Section 101(24) defines a "foreign representative" as:

> 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.

11 U.S.C. § 101(24); *see* *In re Barnet*, 737 F.3d at 248. "The term 'person' includes individual, partnership, and corporation, but does not include governmental unit," with exceptions for certain governmental units that are not now

relevant. 11 U.S.C. 101(41). The term "body" is undefined in the Bankruptcy Code.

Section 1516 of the Bankruptcy Code allows the Court to presume that a person or body is a foreign representative if the decision or certificate filed in support of recognition indicates as much. 11 U.S.C. § 1516(a) ("If the decision or certificate referred to in section 1515(b) indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative, the court is entitled to so presume."); *see In re Oi Brasil Holdings*, 578 B.R. at 194. As discussed, the High Court expressly authorized the JPLs to move this Court to amend the Recognition Order to be "appointed as the new foreign representative." JPL Powers Order ¶ 3.1.5. Accordingly, the Court may presume that the JPLs are the foreign representative of Comair. The JPLs are individual persons who were appointed by the High Court as joint provisional liquidators of Comair. *See* Certificate of Appointment at 1. As liquidators, they are empowered with custody and control of the Debtor's property. *See* Second Harduth Decl. ¶ 17 (citing 1973 Companies Act § 361).

***17** Each of the JPLs is an individual who was appointed as a provisional liquidator in the Provisional Liquidation. Upon the appointment of the JPLs, "all the powers of the company's directors cease, except to the extent specifically authorised ... by the liquidator or the shareholders in a general meeting ... [or] the creditors." Companies Act § 80(8)(b). The JPLs have custody and control of Comair's property. *See* Second Harduth Decl. ¶ 17 (citing 1973 Companies Act § 361); *see also* 1973 Companies Act § 367 ("For the purpose of conducting the proceedings in a winding-up of a company the Master shall appoint a liquidator or liquidators as hereinafter provided."). Therefore, the JPLs satisfy the requirements that they each be a "person" pursuant to section 1517(a)(2) and are entitled to recognition as foreign representatives of Comair. *See* *In re Culligan Ltd.*, 2021 WL 2787926, at *9 (Bankr. S.D.N.Y. July 2, 2021) (holding that two individuals serving as joint liquidators in Bermuda proceeding were "foreign representatives" within the meaning of section 101(24)).

Whether the Motion Meets the Requirements of Section 1515

Section 1515(a) of the Bankruptcy Code provides that a foreign representative applies for recognition by filing a petition for recognition. 11 U.S.C. § 1515(a).[33] On February 16, 2021, the BRPs commenced this proceeding by filing an Official Form 401 Chapter 15 Petition for Recognition of a Foreign Proceeding.[34] In granting recognition to the Business Rescue Proceeding, the Court determined that the BRPs had "satisfied the requirements of 11 U.S.C. § 1515." Recognition Order ¶ I. Section 1515(b) and (c) set forth requirements for a petition for recognition. Because the Motion amounts to a request for recognition, the Court must assess whether it satisfies the substantive requirements set forth in section 1515(b) and (c).

As now relevant, section 1515(b) requires that a chapter 15 petition be accompanied by either:

> (1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;
>
> (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
>
> (3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.

11 U.S.C. § 1515(b). As set forth above, the JPLs provided the Court with a copy of the Provisional Liquidation Order granting the JPLs' Winding Up Application issued by the High Court on June 14, 2022. *See* Provisional Liquidation Order.[35] They also included a copy of the Certificate of Appointment, pursuant to which the High Court certified the appointment of the JPLs by the Master of the High Court. *See* Certificate of Appointment. The Court finds the documents acceptable to evidence the existence of the Provisional Liquidation and the appointment of the JPLs. *See* *In re Betcorp. Ltd.*, 400 B.R. at 294 ("[Section 1516] may be satisfied with 'any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.' " (quoting 11 U.S.C. 1515(b)(3))).

***18** Section 1515(c) requires that a petition for recognition be accompanied by "a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative." 11 U.S.C. § 1515(c); *In re Poymanov*,

571 B.R. 24, 38 (Bankr. S.D.N.Y. 2017). In her declaration, Ms. Harduth states, "Other than this chapter 15 case, the Provisional Liquidation is the only proceeding related to the adjustment of debts pending for Comair and, therefore, is the only 'foreign proceeding' with respect to Comair within the meaning of section 101(23) of the Bankruptcy Code." Harduth Decl. ¶ 25. The JPLs have, therefore, satisfied all the requirements set forth in section 1515 of the Bankruptcy Code.

Public Policy Considerations

Section 1506 provides an exception to recognition or any other requested relief if it is "manifestly contrary" to U.S. public policy. That exception is narrowly interpreted. *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 139 (2d Cir. 2013) ("The UNCITRAL Guide further explains that the exception should be read 'restrictively' and invoked only 'under exceptional circumstances concerning matters of fundamental importance for the enacting state.'); *see In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006) ("In adopting Chapter 15, Congress instructed the courts that the [public policy] exception ... should be narrowly interpreted ....") (quoting House Report at 109); *see also In re Toft*, 453 B.R. 186, 193 (Bankr. S.D.N.Y. 2011) ("The public policy exception is clearly drafted in narrow terms, as the action must be 'manifestly contrary' to the public policy of the United States.").

Boeing has not identified any public policy that merits a refusal to recognize to the Provisional Liquidation. On at least one other occasion, a court in this district has recognized an insolvency proceeding pending in South Africa. *See In re Cell C Proprietary Limited*, 571 B.R. 542, 544 (Bankr. S.D.N.Y. 2017) (recognizing a South African proceeding under section 155 of the Companies Act). Courts have also routinely granted recognition to foreign provisional liquidations. *See In re Culligan*, 2021 WL 2787926, at *8 (recognizing Bermudian provisional liquidation); *see also In re Ocean Rig UDW Inc.*, 570 B.R. 687, 702 (Bankr. S.D.N.Y. 2017) (recognizing Cayman provisional liquidation); *In re Suntech Power Holdings Co., Ltd.*, 520 B.R. 399, 417 (Bankr. S.D.N.Y. 2014) (same); *In re Olinda Star Ltd.*, 614 B.R. 28, 45 (Bankr. S.D.N.Y. 2020) (recognizing BVI provisional liquidation); *In re Fairfield Sentry Ltd.*, No. 10 Civ. 7311, 2011 WL 4357421, at *1 (S.D.N.Y. Sept. 16, 2011) (same).

As noted by the JPLs, Boeing does not identify a single statutory criterion that the JPLs or the Provisional Liquidation have failed to satisfy. Based on the foregoing, the Court grants the Motion to amend the Recognition Order to recognize the Provisional Liquidation as a foreign main proceeding within the meaning of section 101(23) and the JPLs as the foreign representative of Comair within the meaning of section 101(24), pursuant to section 1517(d) of the Bankruptcy Code. In doing so, the Court has considered the prejudice to the parties that have relied on the Recognition Order. *See* 11 U.S.C. § 1517(d). The prejudice to the JPLs and Comair that would result from requiring the BRPs to file a final report, closing the case and requiring the JPLs to file another petition for recognition far outweighs any prejudice to Boeing, which was afforded the opportunity to address why section 1517(d) should not apply to the JPLs' request and to scrutinize whether the Provisional Liquidation or the JPLs meet the statutory criteria for recognition, but failed to do so in its Objection. *Cf. In re Sanjel (USA) Inc.*, No. 16-50778, 2016 WL 4427075, at *4 (Bankr. W.D. Tex. July 29, 2016) (finding that the court was able to modify relief granted pursuant to § 1522(c) despite movants' failure to specify the statutory provisions relied upon where the motion provided sufficient notice of the intended result).

Whether the JPLs may be Substituted for the Business Rescue Practitioners Pursuant to Rule 25(c)

***19** As an alternative basis for granting the relief sought in this motion, the JPLs rely on Federal Rule of Civil Procedure 25(c), arguing that they may be substituted for the BRPs because there has been a transfer of interest from the BRPs to the JPLs. In relevant part, Rule 25(c) provides as follows: "If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party." Fed. R. Civ. P. 25(c). Rule 25(c) is made applicable herein pursuant to Bankruptcy Rules 7025 and 9014.

The JPLs contend that Rule 25(c) is "frequently invoked to substitute a chapter 7 trustee for a debtor-in-possession after a chapter 11 case has been converted to a liquidation under chapter 7." Motion ¶ 32. Substitution is warranted in such cases because "possession, custody, or control of the debtor's assets are transferred to the trustee." *Id.* (citing *In re ATS Prod. Corp.*, No. 01-13220F, 2003 WL 25947346, at *2 n.4 (Bankr. E.D. Pa. June 5, 2003); *In re Rose Marine, Inc.*, No. 86-40143, 1990 WL 10007382, at *1 (Bankr. S.D. Ga. Apr. 27, 1990); *Corbin v. Blankenburg*, 39 F.3d 650, 653 (6th Cir. 1994)). The JPLs also point to a case in which they say "a successor foreign representative" was substituted "for a predecessor foreign representative." *Id.* ¶ 33 (citing *In re Stanford Int'l Bank, Ltd.*, No. 09-cv-0721, 2012 WL 13093940, at *2 (N.D. Tex. July 30, 2012)). Along these lines, the JPLs contend that they are successors to the BRPs, and so they should be substituted for the BRPs under Rule 25. *See id.* ¶ 34. The JPLs contend that the BRPs' interest in investigating estate causes of action and instituting litigation was transferred to them and that they have replaced the BRPs as the fiduciaries authorized under South African law to act on Comair's behalf. Reply at 9. They note that courts have authorized substitution in the analogous circumstance where a trustee is substituted for a debtor-in-possession following a conversion to chapter 7. *Id.* They maintain that the JPL Powers Order charges the JPLs with the same duties, authorizing them to "employ individuals for the purpose of tracing assets, compiling inventories and taking possession of the assets of Comair," to "investigate the trade, dealings and affairs of Comair and to value its assets," and to "be substituted for the [BRPs] in all capacities." *Id.* at 8–9 (citing JPL Powers Order).

Boeing distinguishes *Stanford*, asserting that that case involved a replacement of joint liquidators by new joint liquidators in the same foreign proceeding, "prior to the U.S. court's consideration of the Chapter 15 petition." Objection ¶ 33. The new joint liquidators moved only "to be substituted for the prior joint liquidators as *proposed* foreign representatives." *Id.* (emphasis added). Here, Boeing argues that the JPLs "do not occupy the same office as the former BRPs." *Id.* ¶ 34. Similarly, the JPLs' duty to distribute liquidation proceeds to creditors differs from the BRPs' interests in rescuing the company, and so the two groups' interests purportedly are not the same. *Id.* ¶ 34. Boeing repeats, again, its view that the "Provisional Liquidation is not the same proceeding as the Business Rescue Proceeding previously recognized by the Court, as it arises under a completely different statutory scheme in South Africa." *Id.*

Federal Rule of Civil Procedure 25 provides for the substitution of parties in certain circumstances, including death, incompetency and when a public officer dies, resigns or otherwise ceases to hold office while an action is pending. *See* Fed. R. Civ. P. 25. Specifically, Rule 25(c) provides:

> ***20** Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

Fed. R. Civ. P. 25(c). A determination that a party is, in fact, a successor-in-interest is a prerequisite to substitution under Rule 25(c). *See Levin v. Raynor*, No. 03-cv-4697, 2010 WL 2106037, at *2 (S.D.N.Y. May 25, 2010). Substitution of a successor in interest under Rule 25(c) is within the sound discretion of the Court. *Organic Cow, LLC v. Ctr. for New Eng. Dairy Compact Rsch.*, 335 F.3d 66, 71 (2d Cir. 2003). The "primary consideration" when determining whether to substitute a party is "whether substitution will expedite and simplify the action." *Advanced Mktg. Grp., Inc. v. Bus. Payment Sys., LLC*, 269 F.R.D. 335, 359 (S.D.N.Y. 2010) (quoting *Taberna Cap. Mgmt. v. Jaggi*, 08-CV-11355, 2010 WL 1424002, at *2 (S.D.N.Y. Apr. 9, 2010)); *see also* *Banyai v. Mazur*, No. 00 Civ. 9806, 2009 WL 3754198, at *3 (S.D.N.Y. Nov. 5, 2009) (noting that "district courts within the Second Circuit have suggested that a primary consideration in deciding a motion pursuant to Rule 25(c) is whether substitution will expedite and simplify the action"). "When substitution would cause complications in discovery, this may prejudice the non-moving party such that substitution should be denied." *Bartlett v. Societe Generale de Banque au Liban SAL*, No. 19-CV-00007, 2021 WL 3706909, at *2 (E.D.N.Y. Aug. 6, 2021) (citing *Potvin v. Speedway LLC*, 891 F.3d 410, 416 (1st Cir. 2018)); *see also* *Fashion G5 LLC v. Anstalt*, No. 14-CV-5719, 2016 WL 7009043, at *3 (S.D.N.Y. Nov. 29, 2016) (denying substitution that would "impede plaintiff's ability to take discovery"). Substitution is "inappropriate where it 'would serve only to add duration, costs, and complexity to an action ... [and] would prolong rather than bring the litigation nearer to its conclusion." *Id.* (quoting *Advanced Mktg. Grp.*, 269 F.R.D. at 359).

In *Stanford*, as now relevant, an Antiguan court placed the debtor into liquidation and appointed two individuals as joint liquidators, shortly after which those initial joint liquidators filed a chapter 15 petition. *In re Stanford Int'l Bank*, 2012 WL 13093940, at *1. While that petition was pending, the Antiguan court removed both initial joint liquidators. *Id.* at *2. Two replacement liquidators were appointed by the Antiguan court, and they subsequently filed a motion that asked the court to substitute them for the former liquidators in the U.S. case. *Id.* The bankruptcy court applied Rule 25(c), substituting the replacement liquidators. *Id.* at *5 (noting "(a) that courts may continue suits by substituting a new party in interest for a party who has lost an interest in the action if authorized by substantive law, and (b) that Congress' intention in cases involving trustees is to continue the suit by substituting the new trustee for the old"). Although that case dealt with individuals appointed as replacement liquidators, and the substitution of JPLs for BRPs is a little more complex, *Stanford* makes it clear that Rule 25 relief is available to substitute foreign representatives where there is a transfer in interest. *See id.*

***21** In South Africa, the JPLs have been appointed as fiduciaries of Comair's estate. *See* Certificate of Appointment at 1; Second Harduth Decl. ¶ 17 (indicating that, under 1973 Companies Act § 361, Comair's property is deemed to be in the custody and under the control of the JPLs). South African law grants liquidators the power to bring and defend litigation on behalf of Comair. Second Harduth Decl. ¶ 19 (citing 1973 Companies Act § 386). The High Court granted the JPLs the authority to "continue and/or settle any legal proceedings of whatever nature, whether already instituted or which may be instituted on behalf of or against the estate, on such terms as the applicants in their discretion may deem fit." JPL Powers Order ¶ 3.7. The High Court also authorized the JPLs to "notify the New York Bankruptcy Court that the [JPLs] as the new foreign representative have ratified the [BRPs'] decision to obtain discovery from Boeing and that the applicants be substituted for the former foreign representative in all capacities." *Id.* ¶ 3.1.6. The discovery dispute between the BRPs and Boeing is a contested matter pending before the Court. It is clear that the purpose of this proceeding is to pursue discovery against Boeing in respect of potentially valuable causes of action Comair might have relating to their commercial transaction. Putting any doubt to rest, the High Court also expressly granted the JPLs the authority to seek to amend the Recognition Order to recognize the "South African Proceedings as a Foreign Main Proceeding, with the [JPLs] as provisional liquidators being appointed as the new foreign representative." JPL Powers Order ¶ 3.1.5.

Moreover, Boeing has not disputed that the JPLs are enabled by South African law and the High Court to institute litigation, to investigate the trade, dealings and affairs between Comair and Boeing and to value its assets, which include the causes of action it may have against Boeing. The High Court expressly granted the JPLs the authority to notify this Court that they have ratified the BRPs' decision to pursue discovery against Boeing and that they "be substituted for the former foreign representative in all capacities." JPL Powers Order ¶ 3.1.6. Neither does Boeing dispute that the JPLs are now the duly appointed fiduciary of Comair's estate with custody and control of the Debtor's property. *See* Harduth Decl. ¶ 171; *see also* 1973 Companies Act § 361). Because the BRPs no longer exist or have authority to act on behalf of Comair since the JPLs replaced them as the fiduciary of Comair's estate in the jurisdiction of its foreign main proceeding, the Court grants the JPLs' request to be substituted for the BRPs' pursuant to Rule 25(c). *See* *Fashion G5 LLC v. Anstalt*, 2016 WL 7009043, at *2 ("[S]ubstitution under Fed. R. Civ. P. 25(c) is common in cases where a party has ceased to exist ...."). Substituting the JPLs for the BRPs will "expedite and simplify the action" and would not cause complications in discovery or prejudice Boeing. *Advanced Mktg. Grp.*, 269 F.R.D. at 359; *see* *Bartlett*, 2021 WL 3706909, at *2; *Dollar Dry Dock Sav. Bank v. Hudson Street Development Associates*, No. 92 Civ. 3737, 1995 WL 412572, at *4 (S.D.N.Y. July 12, 1995) ("Brown has provided no valid reason why IOWNA should not be substituted as plaintiff in this action. Because IOWNA is the undisputed real party in interest and its substitution as plaintiff will facilitate this action, the motion for substitution under Rule 25(c) is granted."). Thus, applying law to facts, the Court determines that the JPLs are successors to the BRPs as Foreign Representative. *See Organic Cow, LLC*, 335 F.3d at 71.

Accordingly, the Court modifies the Discovery Order to authorize the JPLs to continue the BRPs' efforts to obtain discovery from Boeing in respect of the claims Comair has against it and to be substituted for the BRPs pursuant to Rule 25(c). In doing so, the Court is comforted that the interests of creditors and other interested entities, including the Debtor, are sufficiently protected because they will need to expend less time and resources on motion practice disputing the same issues were the JPLs forced to file their own motion for the same relief that has previously been granted to the BRPs by this Court. *See* *In re Cozumel Caribe, S.A. de C.V.*, 482 B.R. at 108 (modification of relief pursuant to section 1522(c) only permitted if the interests of the creditors and other interested entities are sufficiently protected); *see also In re Rede Energia S.A.*, 515 B.R. at 91 ("Chapter 15 ... provides courts with broad, flexible rules to fashion relief that is appropriate to effectuate the objectives of the chapter in accordance with comity.").

Rule 5009(c)

***22** As a final note, the Court finds no merit to Boeing's contention that the BRPs are required to file a 5009(c) report. That rule requires the foreign representative to file a final report with the Court when the "purpose of the representative's appearance in the court is completed." Fed. R. Bankr. P. 5009(c). Boeing argues that, because the purpose of the BRPs' appearance in the Court is completed, Rule 5009(c) requires them to file a final report which would result in "dismissal of this Chapter 15 case." Obj. ¶ 4. The BRPs' purpose is completed, it maintains, because "their roles are indisputably complete," and the BRPs have lost their authority to act for Comair. *Id.*¶¶ 16, 23, 26, 30. It draws attention to the fact that the Business Rescue Proceeding has been discontinued and argues that the predicate for this chapter 15 case no longer exists. *Id.* ¶¶ 16, 23, 26. Assuming the Court were able to direct the BRPs to file the final report, the Rule requires the filing of a report only when the purpose for the foreign representative's appearance before the Court is "completed." Fed. R. Bankr. P. 5009(c); *see In re Lupatech S.A.*, 611 B.R. 496, 503 (Bankr. S.D.N.Y. 2020).

Bankruptcy Rule 5009 is a ministerial rule meant to provide the Clerk of the Bankruptcy Court with notice that it may close a case as fully administered. *See Giron v. Zeytuna, Inc.*, No. 20-cv-1977, 2022 WL 856385, at *11 (D.D.C. Mar. 23, 2022) ("It has long been recognized that Rule 5009 (a) is a ministerial rule governing when the Clerk of the Bankruptcy Court may close a bankruptcy case." (citing *In re Potter*, No. 19-60216, 2020 WL 6928782, at *18 (Bankr. S.D. Ill. Oct. 30, 2020))). In the chapter 15 case of *In re Lupatech S.A.*, the court considered fully administered to mean "at a minimum, that administrative claims have been provided for, and there are no outstanding motions, contested matters or adversary proceedings." *In re Lupatech S.A.*, 611 B.R. at 503 (citing *In re Kliegl Bros. Universal Elec. Stage Lighting Co., Inc.*, 238 B.R. 531, 546 (Bankr. E.D.N.Y. 1999)). "The intended meaning of section 1517(d) of the Bankruptcy Code and Bankruptcy Rule 5009(c) is clear: once the need for a chapter 15 case no longer exists and the purpose of the representative's appearance in the U.S. court is completed, the case may be closed." *Id.* In light of the foregoing, and because the undisputed facts in the record do not support a conclusion that the Debtor's Chapter 15 Case is fully administered, the Court rejects Boeing's request to close the case by requiring the BRPs to file a final report pursuant to Bankruptcy Rule 5009.

Conclusion

Based on the foregoing, the Court grants the Motion and the JPLs' request to amend the Recognition Order to recognize the Provisional Liquidation as a foreign main proceeding and the JPLs as the foreign representative of Comair. The Court also grants the JPLs' request to be substituted for the BRPs in all contested matters, including the discovery dispute with Boeing.

Comair is directed to settle an order.

All Citations

Slip Copy, 2023 WL 1971618

Footnotes

1 The Debtor's company registration number is 1967/006783/06. The Debtor's registered business address is 1 Marignane Drive, Bonaero Park, Kempton Park, Gauteng 1619, South Africa.

2 Capitalized terms used, but not defined, in the Introduction have the meanings ascribed to them herein. References to "ECF No. —" are to filings entered on the docket in the main chapter 15 case, No. 21-10298.

[3] Mr. Collyer was later replaced by Neil Hablutzel.

[4] *Verified Petition for Recognition of Foreign Main Proceeding and for Related Relief Under Chapter 15 of the Bankruptcy Code, and Memorandum of Law In Support Thereof,* ECF No. 2 (the "Verified Petition"). Shaun Collyer, Comair's foreign representative at the time, submitted a declaration in support of the Verified Petition. *See Declaration of Shaun Collyer in Support of Chapter 15 Petition for Recognition as Foreign Main Proceeding*, ECF No. 3 (the "Collyer Decl."). Nastascha Harduth, a South African attorney and then-counsel to the BRPs, also filed a supporting declaration. *Declaration of Nastascha Harduth in Support of Chapter 15 Petition for Recognition as Foreign Main Proceeding*, ECF No. 4 (the "First Harduth Decl."). Another supporting declaration was submitted by John A. Pintarelli, then-counsel to the BRPs in the United States. *Declaration of John A. Pintarelli*, ECF No. 5.

[5] *Order Granting Recognition and Relief In Air Of A Foreign Main Proceeding Pursuant to Sections 1504, 1509, 1515, 1517, 1520, 1521, and 1524 Under Chapter 15 of the Bankruptcy Code*, ECF No. 12 (the "Recognition Order").

[6] *Motion to (A) Amend Recognition Order Recognizing Foreign Main Proceeding Pursuant to 11 U.S.C. §§ 1517(d) and 1522(c), and (B) Substitute the Provisional Liquidators in Pending Contested Matters Pursuant to Bankruptcy Rule 7025*, ECF No. 56 (the "Motion"). The Motion is supported by the declaration of Nastascha Harduth, South African legal counsel to the JPLs. *Declaration of Nastascha Harduth in Support of Motion to (A) Amend Recognition Order Recognizing Foreign Main Proceeding Pursuant to 11 U.S.C. §§ 1517(d) and 1522(c), and (B) Substitute the Provisional Liquidators in Pending Contested Matters Pursuant to Bankruptcy Rule 7025*, ECF No. 57 (the "Second Harduth Decl.").

[7] *Objection of the Boeing Company to Joint Provisional Liquidators' Motion to Amend Order Recognizing Foreign Main Proceeding and Substitute Liquidators Under Chapter 15 of the Bankruptcy Code*, ECF No. 60 (the "Objection" or "Obj.").

[8] *Reply in Support of Motion to (A) Amend Order Recognizing Foreign Main Proceeding Pursuant to 11 U.S.C. §§ 1517(d) and 1522(c) and Substitute the Provisional Liquidators in Pending Contested Matters Pursuant to Bankruptcy Rule 7025*, ECF No. 63.

[9] *Supplemental Declaration of Nastascha Harduth in Support of Motion to (A) Amend Order Recognizing Foreign Main Proceeding Pursuant to 11 U.S.C. §§ 1517(D) and 1522(C), and (B) Substitute the Joint Provisional Liquidators in Pending Contested Matters Pursuant to Bankruptcy Rule 7025*, ECF No. 66 (the "Supplemental Harduth Declaration" or "Supp. Harduth Decl.").

[10] Boeing objects to the filing of the Supplemental Harduth Declaration because it contends that the Court did not authorize the JPLs to submit a "third substantive declaration offering yet another set of new opinions—after the hearing on the JPLs' motion—without giving Boeing a chance to respond." *See Objection of the Boeing Company to the Supplemental Third Declaration of Nastascha Harduth*, ECF No. 67 (the "Supp. Obj.") ¶ 1. It contends that Ms. Harduth's new opinions are "improper, incorrect, and inconsistent", *id.* ¶ 2, but does not expound or substantiate its

contention. The Court disagrees. To the extent the Court relies on the statements made by Ms. Harduth in her Supplemental Declaration, the Court is "empowered to make determinations regarding foreign law, and granted discretion to decide on its own informed judgment what materials to consider in doing so." *In re B.C.I. Finances Pty Ltd.*, 583 B.R. 288, 299 (Bankr. S.D.N.Y. 2018); *see also In re Foreign Econ. Indus. Bank Ltd., "Vneshprombank" Ltd.*, 607 B.R. 160, 173 (Bankr. S.D.N.Y. 2019) ("Judge Vyskocil was correct to consider Declarations discussing Russian law when deciding whether to recognize the Foreign Representative."); *In re Loy*, 448 B.R. 420, 442 (Bankr. E.D. Va. 2011) ("On the specific and unique circumstances here, the Court has a duty to allow the Debtor to present all the available evidence that is crucial to his case .... [C]ourts are loath to exclude otherwise admissible evidence because of untimely production."). Boeing clearly had an opportunity to substantively dispute the conclusions of law provided by Ms. Harduth in support of the Motion. *See generally* Suppl. Obj. Because Boeing fails to put forward substantive objections to any of Ms. Harduth's statements in its Supplemental Objection, the objection is overruled.

[11] *Joint Provisional Liquidators' Response to Objection of the Boeing Company to the Supplemental Third Declaration of Nastascha Harduth*, ECF No. 68 (the "Supp. Decl. Resp.").

[12] A copy of chapter 6 of the Companies Act of 2008 is annexed as Exhibit A to the First Harduth Declaration.

[13] That section states that

> ''business rescue'' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—
>
> (i) the temporary supervision of the company, and of the management of itsaffairs, business and property;
>
> (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
>
> (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

Companies Act § 128(1)(b).

[14] *See Motion for an Order Permitting the Foreign Representatives to Conduct Discovery Pursuant to 11 U.S.C. § 1521 and Fed. R. Bankr. P. 2004*, ECF No. 13 (the "Discovery Motion").

[15] *See Reply in Further Support of Motion for an Order Permitting the Foreign Representatives to Conduct Discovery Pursuant to 11 U.S.C. § 1521 and Fed. R. Bankr. P. 2004*, ECF No. 24 (the "Reply ISO Discovery Motion") ¶ 2.

[16] *See Memorandum Decision and Order Granting the Foreign Representative's Motion for an Order Permitting the Foreign Representative to Conduct Discovery Pursuant to 11 U.S.C. § 1521 and Fed. R. Bankr. P. 2004*, ECF No. 34 (the "Discovery Order").

17 Boeing appealed this order to the United States District Court in November 2021. *Notice of Appeal,* ECF No. 35. In January 2023, the district court denied leave to appeal and dismissed the appeal for lack of jurisdiction, reasoning that the discovery order was not an appealable final order, since it did not materially advance the termination of the litigation, nor were there exceptional circumstances warranting leave to appeal. *District Court Order*, ECF No. 85.

18 The 2008 Companies Act was enacted to partially repeal and replace the 1973 Companies Act. *See* 2008 Companies Act, § 224. However, instead of re-writing the existing law on liquidating an insolvent company, the 2008 Companies Act simply incorporated and preserved the provisions in the 1973 Companies Act that govern liquidations. Harduth Supp. Decl. ¶ 4; (citing 2008 Companies Act, Schedule 5, § 9 ("Chapter 14 of [the 1973 Companies] Act continues to apply with respect to the winding-up and liquidation of companies *under this Act*, as if that Act had not been repealed.")). As counsel explained:

> Chapter 14 of the 1973 Companies Act in turn incorporates by specific reference certain provisions of the Insolvency Act 24 of 1936 and at section 339 of the 1973 Companies Act generally provides "[i]n the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this [1973 Companies] Act." In light of these provisions, business rescue proceedings and provisional liquidations are effectively governed by the same statutory scheme.

Id. (footnote omitted).

19 *See* *In re Cell C Proprietary Ltd.*, 571 B.R. 542, 546–47 (Bankr. S.D.N.Y. 2017) (discussing this provision of the Companies Act).

20 A copy of the Winding Up Application is annexed to the Second Harduth Declaration as Exhibit B.

21 A copy of the Provisional Liquidation Order is annexed to the Second Harduth Declaration as Exhibit E.

22 For clarity, none of the BRPs (i.e., neither Ferguson, Collyer, nor Hablutzel) was appointed as a JPL.

23 The JPLs did not provide a copy of the JPL Powers Application.

24 A copy of the order granting the JPL Powers Application (the "JPL Powers Order") is annexed to the Harduth Declaration as Exhibit G.

25 *See also* U.N. Comm'n on Int'l Trade. L., UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, U.N. Sales No. E.14.V.2 (2014), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enact

ment-e.pdf (the "UNCITRAL Guide").

[26] Chapter 15 of the Bankruptcy Code, which essentially incorporates into U.S. bankruptcy law the Model Law, provides a "framework for recognizing and giving effect to foreign insolvency proceedings." *In re Rede Energia S.A.*, 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014); *see also* H.R. Rep. No. 109-31(I) at 105 (2005), 2005 U.S.C.C.A.N. 88, 169 (hereinafter, the "House Report") ("Section 801 introduces chapter 15 to the Bankruptcy Code, which is the Model Law on Cross-Border Insolvency ... promulgated by the United Nations Commission on International Trade Law ... at its Thirtieth Session on May 12-30, 1997."). "The purpose of chapter 15 is to encourage cooperation between domestic and foreign courts, increase legal certainty, promote fairness and efficiency, protect and maximize value and facilitate the rescue of financially troubled businesses." *In re Oversight and Control Comm'n of Avanzit, S.A.*, 385 B.R. 525, 534 (Bankr. S.D.N.Y. 2008); *see also* 11 U.S.C. § 1501(a); House Report at 105.

[27] *Id.*

[28] Notice of Substantial Change Pursuant to 11 U.S.C. § 1518 and Motion to Amend Order Recognizing Foreign Main Proceeding Pursuant to 11 U.S.C. § 1522(c), *In re Landsbanki Islands HF.*, No. 08-14921 (Bankr. S.D.N.Y. Jan. 14, 2011), ECF No. 36 ("*Landsbanki* Motion") ¶ 18.

[29] *See* Amended Order Recognizing Foreign Main Proceeding of Landsbanki Íslands HF., and Granting Permanent Injunction, *In re Landsbanki Islands HF.*, No. 08-14921 (Bankr. S.D.N.Y. Jan. 14, 2011), ECF No. 41 ("*Landsbanki* Order"); Amended Order Recognizing Foreign Main Proceeding, *In re Glitnir Banki HF.*, No. 08-14757 (Bankr. S.D.N.Y. Mar. 18, 2011).

[30] The JPLs explained their position in detail at the hearing held on this motion. *Transcript of Hearing Held on 7/29/2022*, ECF No. 69 (the "Transcript") at 10:10–19:5.

[31] *See* Second Notice of Substantial Change and Status Report of Foreign Representative Regarding Foreign Main Proceeding Pursuant to 11 U.S.C. Section 1518, *In re Glitnir Banki HF.*, No. 08-14757 (Bankr. S.D.N.Y. Mar. 18, 2011), ECF No. 65 ¶ 11 (explaining that the Paris Court of Appeal held that the 2009 amendment's provisions "did not implement insolvency procedures that qualified for recognition in France under Directive 2001/24/EC which provides the framework for recognition of reorganization measures or winding up procedures implemented by administrative or judicial authorities with respect to a credit institution throughout the European Economic Area"). The parties have not briefed this issue, but the Court notes that penalizing a foreign jurisdiction for converting a reorganization to a liquidation by court order (as opposed to automatically) might create an unnecessary tension between chapter 15 and European law.

[32] On June 23, 2022, the High Court certified the appointment of the JPLs. *See* Second Harduth Decl. ¶ 21; *see also* Certificate of Appointment.

[33] Courts have held that section 1515 "requires a separate petition for each foreign action for which recognition is

sought." *In re Brit. Am. Ins. Co. Ltd.*, 425 B.R. at 889. In *British American*, the court construed a petition seeking recognition of a proceeding in The Bahamas and another in Saint Vincent and Grenadines as requesting recognition only of the Bahamas proceeding in light of section 1515's requirement. *See id.* Here, the two distinct proceedings are not concurrent or in different jurisdictions. To the extent section 1515 would apply to a request for modification of recognition pursuant to section 1517(d), because the Business Rescue Proceeding has been discontinued and the Provisional Liquidation qualifies as the foreign main proceeding in its stead, the Court declines to impose an additional requirement that the JPLs' request for modification of recognition be in the form of a petition in strict compliance with section 1515.

34 *Chapter 15 Petition for Recognition of Foreign Proceeding*, ECF No. 1.

35 Under South African law, a provisional liquidation is deemed to commence at the time the winding up application is presented to the High Court. *See* Second Harduth Decl. ¶ 15 (citing 1973 Companies Act § 348).

End of Document

482 B.R. 96
United States Bankruptcy Court, S.D. New York.

In re COZUMEL CARIBE, S.A. de C.V., Debtor in a Foreign Proceeding.
CT Investment Management Co., LLC., Plaintiff,
v.
Cozumel Caribe, S.A. de C.V., Defendant.

Bankruptcy No. 10–13913 (MG)
|
Adversary No. 11–02936 (MG)
|
Nov. 14, 2012.

Synopsis

Background: Foreign representatives of debtor that was the subject of insolvency proceedings in Mexico moved for post-recognition relief in nature of stay of creditor action.

Holdings: The Bankruptcy Court, Martin Glenn, J., held that:

creditor's rights in funds of non-debtor affiliates would be sufficiently protected if relief were granted;

grant of relief requested by foreign representatives was not manifestly contrary to public policy of the United States; and

bankruptcy court would conditionally grant foreign representatives' request for post-recognition relief in nature of temporary stay of cause of action brought by creditor to exercise its rights against funds of non-debtor affiliates allegedly present in same account with funds of foreign debtor.

So ordered.

Attorneys and Law Firms

***99** Sidley Austin LLP By: Lee S. Attanasio, Esq., Martin B. Jackson, Esq., Brian J. Lohan, Esq. (admitted pro hac vice), New York, NY, for Plaintiff CT Investment Management Co., LLC.

Jones Day By: Pedro A. Jimenez, Esq., Jennifer J. O'Neil, Esq., New York, NY, Todd Swatsler, Esq., Columbus, OH, for the Foreign Representative Nemias Esteban Martinez Martinez.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR ENTRY OF ORDER EXTENDING COMITY AND STAYING PROCEEDINGS

MARTIN GLENN, Bankruptcy Judge.

Plaintiff CT Investment Management Co., LLC ("CTIM") filed an adversary complaint (the "Complaint") against Cozumel Caribe, S.A. de C.V. ("Cozumel Caribe" or "Debtor"). Cozumel Caribe is the debtor in a foreign proceeding pursuant to the

provisions of the *Ley de Concursos Mercantiles* (the "Mexican Business Reorganization Act"), commenced on July 10, 2010 and currently pending before the Third District Court for the State of Quintana Roo (the "Quintana Roo District Court") Mexico (the "Concurso Proceeding"). On July 20, 2010, Nemias Esteban Martinez Martinez (the "Foreign Representative") commenced a Chapter 15 proceeding in this Court on behalf of Cozumel Caribe. On October 20, 2010, this Court entered an agreed Order Granting Recognition of Foreign Representative and Foreign Main Proceeding and for Additional Relief Under 11 U.S.C. § 1521 (the "Recognition Order") (Case No. 10–13913, ECF Doc. # 45). The Recognition Order prohibits any party from transferring outside of the U.S. the cash in the Cash Management Account held by CTIM in New York without further order from this Court. Recognition Order ¶ 3. The Complaint seeks a declaratory judgment that funds on deposit in the Cash Management Account are not property of the Debtor and therefore are not subject to the automatic stay. CTIM also seeks approval to exercise its rights to those funds pursuant to loan documents governed by New York law. The Foreign Representative responded to the Complaint by filing a motion to stay the adversary proceeding on the grounds of international comity.

For the reasons explained below, the motion for a stay is granted on specified conditions requiring the Debtor and the Foreign Representative to file an appropriate proceeding in the Quintana Roo District Court within 60 days to resolve questions identified below that are more appropriately addressed by the Quintana Roo District Court.

I. BACKGROUND

Cozumel Caribe is a Mexican company that provides hostelry and tourism services ***100** in Mexico. It owns and operates the Hotel Park Royal Cozumel in Cozumel, Mexico. Cozumel Caribe's seven non-debtor affiliates, [1] also organized under the laws of Mexico, own and operate other vacation and resort properties throughout Mexico. While the Debtor and each of the Non–Debtor Affiliates (together, the "Companies") own and operate separate resort properties, collective timeshare interests in the properties are sold to prospective timeshare owners, allegedly enhancing the value of each property, since timeshare owners may choose to vacation at any property operated by any of the Companies. According to the Debtor, "the viability and success of the timeshare arrangement in which Cozumel Caribe participates depends on the ongoing appeal of all properties operated by the Companies." *See* Declaration of Raul Garcia Herrera (the "Herrera Declaration") ¶ 4 (ECF Doc. # 4).

The current dispute centers on the effect of the Concurso Proceeding on the debt repayment obligations of the Companies in connection with a $103 million secured loan for which the Debtor and the Non–Debtor Affiliates are joint obligors. As explained further below, as part of the security for the $103 million loan, the Debtor and the Non–Debtor Affiliates were required to deposit hotel revenues in various lock box accounts. The Cash Management Account in New York is controlled by CTIM, as special servicer for the loan. The Debtor and the Non–Debtor Affiliates have defaulted on the loans. CTIM seeks to recover some or all of the funds in the Cash Management Account based on the loan defaults. No debt service payments have been made by the Debtor or by the Non–Debtor Affiliates for several years. The Non–Debtor Affiliates ceased depositing hotel revenues in the lock box accounts as they are contractually obligated to do. Only Cozumel Caribe filed a bankruptcy proceeding in Mexico, but, as explained below, on May 27, 2010, the Debtor obtained an *ex parte* order from the Quintana Roo District Court barring CTIM or any other party from taking any action to collect any of the debt from property of the Debtor or the Non–Debtor Affiliates, specifically including any funds in the Cash Management Account (the "May 27 Order," or the "Precautionary Measures"). These so-called Precautionary Measures remain in place and have so far prevented CTIM from applying any of the funds on deposit in the Cash Management Account to any of the debt. A fuller explanation of the loans, loan documentation, the accounts and the Precautionary Measures are necessary to place the current dispute in context and are discussed below.

A. The $103 Million Loan

On October 3, 2006, the Debtor and the Non–Debtor Affiliates (collectively, the "Borrowers") executed two (2) promissory notes in the aggregate amount of $103 million (the "Promissory Notes") to finance the operations of the Hotel Park Royal Cozumel and certain properties owned by the Non–Debtor Affiliates. In connection with the Promissory Notes, the Borrowers, on the one hand, and LaSalle Bank N.A. ("LaSalle" or the "Trustee"), [2] ***101** on the other, entered into a note indenture, dated

October 3, 2006 (the "Note Indenture") and a cash management agreement, dated October 3, 2006 (the "Cash Management Agreement," and together with the Promissory Notes and the Note Indenture, the "Loan Documents") governed by New York law. Pursuant to section 2.1(a) of the Cash Management Agreement and section 2.4(a) of the Notes, the Companies established (i) one account with LaSalle into which all Dollar-denominated rents from all properties were deposited on a daily basis (the "Dollars Lockbox Account") and (ii) one account with Institucion de Banca Multiple into which all Pesos-denominated rents and over-the-counter rents from all properties were deposited on a daily basis (the "Pesos Lockbox Account"). The obligations of the Borrowers under the Promissory Notes are secured by a first priority continuing security interest in and to substantially all assets in the Cash Management Account.

Funds in the Dollar Lockbox Account subsequently were swept daily into a centralized account (the "Cash Management Account"), and disbursed or applied pursuant to the terms of the Cash Management Agreement. Funds swept into the Cash Management Account were applied to one or more subaccounts, including the: (i) Tax and Insurance Escrow Subaccount; (ii) Fees Subaccount; (iii) Debt Service Subaccount; (iv) Replacement Reserve Subaccount; (v) BI Insurance Reserve Subaccount; (vi) Extraordinary Expense Subaccount; (vii) Issuers Remainder Subaccount; (viii) Excess Cash Flow Subaccount; and (ix) Alterations Subaccount. Further, Article 10 of the Note Indenture established additional reserve accounts (collectively with the subaccounts, the "Reserve Accounts"). Therefore, U.S. dollar-denominated revenues generated by each Borrowers' Property were swept to a centralized Cash Management Account, applied to various Reserve Accounts and pooled with the funds of the other Borrowers (including the Debtor), but not commingled with the funds of the Trustee or CTIM. Thus, the Cash Management Account and Reserve Accounts (other than the Performance Holdback, BI Holdback and Political Risk Holdback accounts, as discussed below) would contain funds generated by and/or belonging to both the Debtor and the Non–Debtor Affiliates.

Assuming sufficient funds were on deposit in the Cash Management Account to pay certain fees, fund certain reserve and deposit accounts and meet monthly debt service obligations, and no event of default or Trigger Event (as defined in the Cash Management Agreement) had occurred, funds on deposit in the Peso Lockbox Account were transferred daily to one or more accounts of the Borrowers for the payment of approved operating expenses. Following a Trigger Event, however, the Borrowers were only entitled to transfer an amount equal to the monthly approved operating expenses (as set forth in an approved budget) from the Peso Lockbox Account and all other amounts would be transferred from the Peso Lockbox Account to the Cash Management Account (and then ultimately to the Excess Cash Flow Account (as defined below)). Under the Cash Management Agreement, a Trigger Event occurs when, among other things, the Borrowers fail to meet certain financial tests, including a debt yield test and a debt service coverage ratio test. Upon the occurrence of a Trigger Event, all funds on deposit in the Dollar Lockbox Accounts and Peso Lockbox Accounts are swept into the Cash Management Account and then ultimately held in the "Excess Cash Flow Subaccount" (the "Excess Cash Flow Account").

***102** On or about November 1, 2006, the Loan Documents were contributed to a securitization trust, pursuant to a Pooling and Servicing Agreement (the "PSA") by and among Merrill Lynch Mortgage Investors, Inc., as depositor, KeyCorp Real Estate Capital Markets, Inc. ("KeyCorp"), as servicer and special servicer, U.S. Bank National Association, as trustee, and LaSalle, as paying agent and certificate registrar. Under this arrangement, the financing was pooled with other similar financings and the liabilities were sold to third party investors as commercial mortgage-backed securities. KeyCorp hired Wells Fargo Bank, N.A. ("Wells") to act as sub-servicer on its behalf with responsibility for the day-to-day administration of the financing, including enforcing the consent rights of the Trustee and interfacing primarily with the Borrowers.

As a result of the failure of the Borrowers to meet the required financial tests, a Trigger Event occurred in the fall of 2007. On October 12, a "cash sweep" of the funds on deposit in the Dollar Lockbox Accounts and Peso Lockbox Accounts commenced, which remained in effect as of the Petition Date. Thus, following the Trigger Event, excess funds in the Peso Lockbox Account and Dollar Lockbox Account from both the Defendant and Non–Debtor Affiliates were deposited in the Cash Management Account and ultimately swept into the Excess Cash Flow Account.

On or about July 3, 2009, CTIM assumed the responsibilities of KeyCorp, as special servicer, with responsibility to address material issues that arose with respect to the financing and to deal with any necessary enforcement actions. As special servicer,

CTIM endeavors to reach the funds remaining in the Cash Management Account, currently estimated at $8–9 million USD, which are the result of commingled deposits from the Companies' operations (*i.e.,* the Debtor *and* the Non–Debtor Affiliates).

B. The Mexican Bankruptcy Proceeding

On May 21, 2010, the Foreign Representative filed a petition to obtain a "business reorganization judgment" authorizing the commencement of a Concurso Mercantil Proceeding (the "Concurso Petition") in the Quintana Roo District Court. As part of its petition under the Mexican Business Reorganization Act, Cozumel Caribe sought certain Precautionary Measures to protect Cozumel Caribe, as well as its Non–Debtor Affiliates, as Cozumel Caribe pursued reorganization. On May 27, 2010, the Quintana Roo District Court approved Cozumel Caribe's application and entered the *ex parte* May 27 Order that, among other things, provided a stay during the pendency of the Mexican Bankruptcy Proceeding of any actions (1) seeking to transfer, or to apply against any outstanding indebtedness, funds in to the Dollars Lockbox Account or Cash Management Account, and (2) to enforce the Guarantee Agreement. [3] *See* Herrera Decl., ¶ 6–8.

The Foreign Representative argues that the relief was granted only after the Quintana Roo District Court determined that it was necessary in light of the nature of Cozumel Caribe's business, and the manner in which that business was intertwined and integrated with the businesses of the other Companies. *Id.* ¶ 7. The May 27 ***103** Order, by its terms, required that CTIM be served with a copy of the order. CTIM contends that it received no notice of the filing of the Concurso Petition or of the May 27 Order until reference to both was made in a letter received by CTIM nearly a month later. It was not until sometime in July 2010 that CTIM was served with the order. CTIM never appeared in the Quintana Roo District Court to challenge the Precautionary Measures. Instead, CTIM commenced an "*amparo* " [4] proceeding in a different Mexican court.

C. CTIM's Amparo Proceeding

On August 12, 2010, CTIM challenged the May 27 Order, insofar as its protections extended to non-Debtor affiliates, by filing a claim with the Second District Court of the City of Cancun (the "Cancun District Court") for *amparo* (the "Amparo Action"). CTIM requested a temporary and immediate suspension of the May 27 Order (the "Provisional Suspension Request"), as well as a separate request for a temporary suspension of the May 27 Order pending the outcome of the Amparo Action (the "Definitive Suspension Request"). [5]

On August 13, 2010, the Cancun District Court denied the *ex parte* Provisional Suspension Request based on CTIM's failure to demonstrate that it would suffer any harm in the absence of an immediate suspension of the May 27 Order. CTIM appealed the Cancun District Court's denial of the Provisional Suspension Request to the Second Associate Court of the Twenty–Seventh Circuit in Mexico (the "Mexican Appellate Court"). On August 23, 2010, the Mexican Appellate Court affirmed the Cancun District Court's decision and ordered that the Amparo Action be dismissed. On September 7, 2010, the Cancun District Court denied the Definitive Suspension Request, which was also appealed, but became moot upon Mexican Appellate Court's dismissal of the entire Amparo Action.

CTIM maintains that the Amparo Action was dismissed because the remedy CTIM sought was unnecessary. According to CTIM, the Protective Measures were overbroad because they impermissibly protected property that was solely owned by the non-Debtor Affiliates. According to CTIM's interpretation of the Mexican Appellate Court's decision, the Mexican Appellate Court merely clarified that the Protective Measures did not apply to property in the Cash Management Account that was not part of the common business enterprise between the Debtor and the non-Debtor Affiliates. During the September 14, 2012 hearing held by this Court, the Foreign Representative's counsel acknowledged that the Protective Measures did not protect funds solely owned by the non-Debtor Affiliates. *See* September 14, 2012 Hr'g Tr. at 18:24–20:4. The Foreign Representative argues that the dismissal of the Amparo Action leaves the May 27 Order unaltered, without any gloss or effect from any court in the Amparo Action.

D. Chapter 15 Petition and Request for Provisional Relief

On July 20, 2010, the Foreign Representative filed a *Chapter 15 Petition for Recognition of Foreign Proceeding* (Case No. 10–13913, ECF Doc. # 1) and also an *Ex Parte Application of Foreign Representative for Entry of Provisional Relief Pursuant* ***104** *to 11 U.S.C. § 1519 (id.,* ECF Doc. # 3). On July 21, 2010, the Court entered an Order to Show Cause, granting interim relief and scheduling a preliminary injunction hearing for August 3, 2010. The provisional relief included a provision that, pending the preliminary injunction hearing, provided:

> All persons and entities are enjoined from seizing, attaching, enforcing and/or executing security interests, liens or judgments against Cozumel Caribe's property in the United States, including all of the funds within the Dollars Lockbox Account and the Cash Management Account, or from transferring, encumbering or otherwise disposing of or interfering with Cozumel Caribe's assets or agreements in the United States, including all of the funds within the Dollars Lockbox Account and the Cash Management Account, absent further order of the Court ....

Order to Show Cause, dated July 21, 2010, ¶ 3.a. (*id.,* ECF Doc. # 11).

On August 4, 2010, an order was entered extending the protection of the interim relief pending further order of the Court. Order Granting Provisional Relief, dated August 4, 2010 ¶ 1.a. ("August 4 Order," Case No. 10–13913, ECF Doc. # 23). The August 4 Order provided that "CTIM expressly reserves its right (i) to dispute Cozumel Caribe's ownership interest in the assets subject to this Order, and (ii) to object to any extension or modification of this Order, or the entry of any other or further order in this proceeding..... Martinez expressly reserves the right to seek extension or modification of this Order, or the entry of other or further orders in this proceeding." *Id.* ¶ 8–9. On October 20, 2010, the Court entered an order providing that "[t]he *Concurso Mercantil* Proceeding is recognized as a foreign main proceeding pursuant to 11 U.S.C. §§ 1517(a) and 1517(b)(1), and all the effects of recognition as set forth in 11 U.S.C. § 1520 shall apply." Recognition Order ¶ 2. The Recognition Order expressly provides that:

> The relief granted herein shall not (i) impact the security interests and liens, if any, existing as of July 20, 2010 on property of Cozumel Caribe, including all of the funds in the Dollars Lockbox Account and the Cash Management Account, except as set forth herein as to enforcement; or (ii) prohibit or restrict any action to enforce rights, remedies, claims or defenses against Cozumel Caribe in Mexico..... CTIM expressly reserves its right to dispute Cozumel Caribe's ownership interest in the assets subject to this Order.

Recognition Order ¶¶ 7–8.

E. CTIM's District Court Action Against the Guarantors

On September 13, 2010, CTIM filed a complaint in the United States District Court for the Southern District of New York ("District Court") against defendants Pablo Gonzalez Carbonell and Grupo Costamex, S.A. de C.V. (the "Guarantor Defendants") alleging breach of contract under a guarantee agreement (the "Guarantee Agreement") entered into in connection with the $103 million loan for development of vacation and resort properties throughout Mexico. *CT Inv. Mgmt. Co., LLC v. Carbonell,* No. 10–Civ.–6872, 2012 WL 92359, at *1 (S.D.N.Y. Jan. 11, 2012) ("District Court Action"). The Guarantee Agreement contained a "springing" or "Bad Boy" guarantee. CTIM alleged that Cozumel Caribe's voluntary bankruptcy proceeding triggered the Guarantor Defendants' obligations under the Guarantee Agreement. The Guarantor Defendants did not

appear to defend the District Court Action; however, before a default judgment was entered, the Foreign Representative ***105** appeared in the case and requested that the District Court extend comity to subsection (e) of the May 27 Order, which prevented CTIM from exercising its rights in the Guarantee Agreement against the Guarantor Defendants.

The District Court extended comity to the May 27 Order and stayed CTIM's action against the Guarantor Defendants. The District Court reasoned that because this Court granted Cozumel Caribe's Recognition Order, section 1509 of the Bankruptcy Code required the District Court to grant comity to the May 27 Order as long as doing so was not contrary to the public policy of the United States under section 1506, which the District Court held it was not. CTIM did not appeal the stay order.

F. CTIM's Adversary Complaint and the Foreign Representative's Motion for a Stay Based on Comity

CTIM's Complaint in this case was filed on December 20, 2011. The Foreign Representative filed a motion to stay the adversary proceeding based on international comity on January 23, 2012. ("Stay Motion," ECF Doc. # 3.) The Stay Motion resulted in protracted proceedings in this Court, with an evidentiary hearing held on April 11 and 12, 2012, *see* April 11, 2012 Hr'g Tr. (ECF Doc. # 18) and April 12, 2012 Hr'g Tr. (ECF Doc. # 19), followed by several rounds of supplemental briefing.[6] The matter was taken under submission following a hearing on September 14, 2012.

II. DISCUSSION

A. This Court Is Not Required To Give Preclusive Effect To The Comity Ruling

A threshold issue is whether the Comity Ruling has preclusive effect on this Court's ability to determine whether the May 27 Order, in its entirety, should be granted comity in this adversary proceeding. The Foreign Representative argues that the Court must give the Comity Ruling preclusive effect since CTIM and the Foreign Representative fully contested the issue before the District Court, which ruled in favor of the Foreign Representative. The Court concludes that it is not bound by preclusion and must make its own determination whether to enforce the May 27 Order.

"A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ***106** ... cannot be disputed in a subsequent suit between the same parties or their privies ....' " *Montana v. United States,* 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) (quoting *S. Pac. R. Co. v. United States,* 168 U.S. 1, 48, 18 S.Ct. 18, 42 L.Ed. 355 (1897)).

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) (citing *Cromwell v. County of Sac,* 94 U.S. 351, 352, 24 L.Ed. 195 (1876); *Montana,* 440 U.S. at 153, 99 S.Ct. 970). Collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (citing *Blonder–Tongue Labs., Inc. v. Univ. of Ill. Found.,* 402 U.S. 313, 328–29, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971)).

In the Second Circuit, invocation of collateral estoppel to preclude relitigation of an issue requires that " '(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final

judgment on the merits.' " *Ball v. A.O. Smith Corp.,* 451 F.3d 66, 69 (2d Cir.2006) (quoting *Purdy v. Zeldes,* 337 F.3d 253, 258 & n. 5 (2d Cir.2003)); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

As explained below, for several reasons, the Court concludes that it is not required to give preclusive effect to the Comity Ruling.

Here, an analysis of each of the four factors stated above is unnecessary because the Comity Ruling was not a final decision on the merits. While the District Court decided to grant comity to the May 27 order to stay CTIM's action to enforce rights against the Guarantor Defendants, such a ruling falls short of a final determination on the merits because the District Court never reached the merits of CTIM's action. The District Court recognized that courts may grant a stay in favor of non-debtor affiliates. But such stays are limited in duration and are not final in that sense. *Quigley Co., Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co., Inc.),* 676 F.3d 45, 52 (2d Cir.2012) ("Enjoining litigation to protect bankruptcy estates *during the pendency of bankruptcy proceedings* ... has historically been the province of the bankruptcy courts.") (emphasis added).

Even if the Comity Ruling could be considered as a final determination on the merits, granting comity to the *entire* May 27 Order was not "necessary to support a valid and final judgment on the merits," which is the fourth factor stated above.

CTIM filed the District Court Action against the Guarantors, seeking to enforce the "springing" or "Bad Boy" guarantee contained in the Loan Documents governed by New York law.[7] The Guarantee ***107** Agreement was triggered by the Cozumel's bankruptcy filing in Mexico. Springing guarantees are generally enforceable under New York law. *See, e.g., First Nationwide Bank v. Brookhaven Realty Assocs.,* 223 A.D.2d 618, 637 N.Y.S.2d 418, 421 (1996) (holding that a bankruptcy default clause in a non-recourse mortgage agreement that, upon filing, made the partners of the general partnership personally liable for the partnership's deficiency was "neither inequitable, oppressive, or unconscionable"); *G3–Purves St., LLC v. Thomson Purves, LLC,* 101 A.D.3d 37, 953 N.Y.S.2d 109 (2012) (stating "contrary to the guarantors' contention, the carve-out language in the loan agreement was unambiguous and provided for personal liability for a violation of certain enumerated exceptions, including defined 'springing recourse events' "). The District Court analyzed whether the enforcement of the Guarantee Agreement by a U.S. court was appropriate in light of subsection (e) of the May 27 Order, which provides, "[t]he execution of additional guarantees established in the Guarantee Agreement in case of bankruptcy is suspended, whose responsibility of its credits is trying to be extended to the principal's shareholders (Pablo Ignacio Gonzalez Carbonell) by reason of the bankruptcy request." Herrera Decl., Ex A–1 at 4. Specifically, the District Court held that the May 27 Order "suspends the execution of the guarantees established in the Agreement." *Carbonell,* 2012 WL 92359, at *4. In deciding to extend comity to the May 27 Order, the District Court relied only on subsection (e) of the May 27 Order.

The issue before this Court is whether CTIM, as special servicer on behalf of secured creditors, may proceed with its adversary proceeding to recover the funds in the Cash Management Account in New York, notwithstanding subsection (a) of the May 27 Order which prohibits CTIM from recovering any funds in the Cash Management Account. The bankruptcy court has *in rem* jurisdiction over the funds on deposit in New York. The Foreign Representative asserts that the May 27 Order should be recognized and given effect; CTIM disputes this contention. The issue—whether CTIM could exercise its rights as a secured creditor to the Non–Debtor Affiliates' funds in the Cash Management Account in New York—was not presented to or decided by the District Court. Therefore, the Court concludes that preclusion does not prevent this Court from considering whether to grant comity to subsection (a) of the May 27 Order.

Moreover, the District Court's ruling was based on this Court having granted recognition to the Concurso Proceeding as a foreign main proceeding under section 1517 of the Bankruptcy Code. *Carbonell,* 2012 WL 92359, at *4–5. Section 1517(d) permits the Court to modify or terminate the Recognition Order "if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist ...." 11 U.S.C. § 1517(d). Under section 1518, the Foreign Representative "shall file with the court promptly a notice of change of status concerning (1) any substantial change in the status of such foreign proceeding ...." *Id.* § 1518(1). While the Foreign Representative has not filed a notice of change of status of the Concurso Proceeding, the Court was advised by CTIM on September 14, 2012 that the Concurso Proceeding has been "suspended."[8] September 14, 2012 Hr'g Tr. at ***108** 63:11–19. The precise effect of the suspension is unclear, as is whether a change in recognition is warranted

as a result. Since this Court is expressly provided with the authority to modify or terminate recognition, the District Court's Comity Ruling predicated on recognition should not preclude this Court's determination whether to extend comity to a different provision of the May 27 Order.

Furthermore, the District Court had no reason to consider the relevant provisions of Chapter 15 that this Court must take into account before granting the relief sought by the Foreign Representative. Section 1522(a) provides that "[t]he Court may grant relief under section 1519 or 1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." *Id.* § 1522(a). Section 1522(c) gives a court the power, "at the request of the foreign representative or an entity affected by relief granted under section 1519 or 1521, *or at its own motion,* [to] modify or terminate such relief." *Id.* § 1522(c) (emphasis added). "The purpose this section is to ensure a balance between the relief that may be granted to the foreign representative and the interests of the persons potentially affected by such relief." 8 COLLIER ON BANKRUPTCY 1522.01. As the legislative history makes clear, "[Section 1522] gives the bankruptcy court broad latitude to mold relief to meet specific circumstances, including appropriate response if it is shown that the foreign proceeding is seriously and unjustifiably injuring United States creditors." H.R.Rep. No. 109–31, pt. 1, 109th Cong., 1st Sess. 116 (2005), 2005 U.S.C.C.A.N. 88, 178.

B. Section 1509 Does Not Direct a Court to Grant Comity to a Foreign Court Order Just Because a U.S. Court Grants Recognition to a Foreign Proceeding

The District Court based its Comity Ruling on this Court's Recognition Order and on section 1509 of the Bankruptcy Code. The District Court found that section 1509 *required* that comity be granted to the May 27 Order. *Carbonell,* 2012 WL 92359, at *4 (asserting "[o]nce a foreign proceeding has been recognized by a U.S. bankruptcy court, it is mandatory that U.S. courts extend comity to a foreign representative's request for a grant of comity unless granting such request would contravene U.S. public policy").

Section 1509 is entitled "Right of Direct Access."[9] The language of the section, its legislative history and its original source in the UNCITRAL Model Law, all make clear that section 1509 reflects an "access" principle assuring that a foreign representative —"subject to any limitations that the court may impose consistent with the policy of this chapter," 11 U.S.C. § 1509(b)— may sue or be sued in a court in the United States, *id.* § 1509(b)(1), and may apply directly to a court in the United States for appropriate relief in that court, ***109** *id.* § 1509(b)(2). "[A] court in the United States shall grant comity or cooperation *to the foreign representative." Id.* § 1509(b)(3). But nothing in section 1509 commands that comity shall be given to all orders entered by a foreign court in a foreign insolvency proceeding. In short, other than providing access to courts in the United States, section 1509 is not a self-executing relief section of Chapter 15. Relief to a foreign representative must be based on sections 1507, 1519, 1520 and 1521, subject to limitations that may be imposed under section 1522.

Once recognition is granted under section 1517, "a court in the United States shall grant comity or cooperation *to the foreign representative,*" although such a grant is "subject to any limitations that the court may impose consistent with the policy of this chapter." 11 U.S.C. § 1509(b) (emphasis added). "While this provision [Section 1509(b)] mandates courtesy and respect for the foreign proceeding, consistent with the statement of purpose of chapter 15 and its international origin, it does not mandate relief. The foreign representative must still make a case that the relief it seeks is warranted." 8 COLLIER ON BANKRUPTCY ¶ 1509.02. "While recognition of the foreign proceeding turns on the objective criteria under § 1517, 'relief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity.' " *In re Metcalfe & Mansfield Alternative Investments,* 421 B.R. 685, 697 (Bankr.S.D.N.Y.2010) (quoting *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.,* 389 B.R. 325, 333 (S.D.N.Y.2008)). "Once a case is recognized as a foreign main proceeding, chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity." *Id.* (quoting *In re Atlas Shipping,* 404 B.R. 726, 738 (Bankr.S.D.N.Y.2009)).

"As each section of Chapter 15 is based on a corresponding article in the Model Law, if a textual provision of Chapter 15 is unclear or ambiguous, the Court may then consider the Model Law and Foreign interpretations of it as part of its interpretive

task." *In re Int'l Banking Corp. B.S.C.,* 439 B.R. 614, 624 (Bankr.S.D.N.Y.2010) (internal quotation marks omitted). "In addition, the Court should read Chapter 15 consistently with prior law under section 304." *Id.* (citing *Atlas Shipping,* 404 B.R. at 738–39).

Like section 1509, Article 9 of the United Nations Commission on International Trade Law on Cross Border Insolvency ("UNCITRAL" or "Model Law"), is also entitled "Right of direct access," and is located in Chapter II entitled "Access of Foreign Representatives and Creditors to Courts in this State." Article 9 of the Model Law simply states that "[a] foreign representative is entitled to apply directly to a court in this State." UNCITRAL, *Model Law on Cross–Border Insolvency,* Part one, Chpt. II, *Art. 9 (Right of direct access)* (1997) (available at http://www.uncitral. org/pdf/english/texts/insolven/insolvency-e.pdf). The Guide to Enactment of the Model Law, included with the published text of the Model Law, explains that "Article 9 is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular action." *Id.,* Part two, Guide to Enactment of the UNCITRAL Model Law on Cross–Border Insolvency ("Guide to Enactment") ¶ 93.

The principle of direct access does not dictate the relief that must be accorded to the foreign representative. Article 20 of the Model Law, implemented in section 1520 of the Bankruptcy Code, provides for certain "mandatory relief" upon recognition ***110** as a foreign main proceeding, *see infra* n. 12, but any further relief is discretionary. "In addition to the mandatory stay and suspension [provided in Article 20], the Model Law authorizes the court to grant 'discretionary' relief for the benefit of any foreign proceeding, whether it is a 'main' proceeding or not (article 21). Such discretionary relief may consist of, for example, *staying proceedings* or suspending the right to encumber assets ... and any other relief that may be available under the laws of the enacting State." *Id.,* Guide to Enactment ¶ 34 (emphasis added). [10]

The District Court stated that "[o]nce a foreign proceeding has been recognized by a U.S. bankruptcy court, it is mandatory that U.S. courts extend comity to a foreign representative's request for a grant of comity unless granting such request would contravene U.S. public policy." *Carbonell,* 2012 WL 92359, at *4. In support of this conclusion the District Court relied on *In re Qimonda AG Bankr. Lit.,* 433 B.R. 547, 565 (E.D.Va.2010). The district court in *Qimonda* focused on the words "shall grant comity or cooperation to the foreign representative" in section 1509(b)(3), and apparently concluded based on this language that a court must grant comity, not only to the foreign representative but also to either *a foreign law or a foreign court's order* upon request by the foreign representative.

Granting comity to a *foreign representative* by providing access to courts in the United States is very different from granting *the request* by the foreign representative to extend comity to a foreign law, court order or judgment. *Qimonda* did not cite any authority for the broader proposition that extending comity to foreign laws or court orders is required so long as that relief is not "manifestly contrary to the public policy of the United States," the limitation imposed by section 1506. If *Qimonda* were correct that comity is *required* to be given to any foreign law, court order or judgment that is not manifestly contrary to U.S. public policy, there would be no point in having the foreign representative "apply" to a U.S. court for discretionary relief. [11] The only ***111** issue left open would be whether the requested relief is manifestly contrary to the public policy of the United States in violation of section 1506, leaving no room for the exercise of discretion; nothing about Chapter 15 supports such an interpretation.

The relief requested by the Foreign Representative—a stay of the adversary proceeding—is available, if at all, under sections 1507 or 1521(a)(7). [12] Because section 1521 would permit the relief sought by the Foreign Representative, it is unnecessary to look to section 1507 for such authority. *See Atlas Shipping,* 404 B.R. at 741 (concluding that it was unnecessary to determine whether "additional assistance" was available under section 1507). Granting relief to the Foreign Representative under section 1521(a)(7) depends on whether "the interests of the creditors ... are sufficiently protected." [13] 11 U.S.C. § 1522(a). At least with respect to the funds belonging to the Non–Debtor Affiliates remaining in the Cash Management Account, the Court concludes that CTIM is sufficiently protected as a temporary matter as long as the funds remain in the United States. CTIM may be dissatisfied with the status, pace or a ruling in the Concurso Proceeding, but that alone does not justify permitting CTIM to proceed with its adversary proceeding in this Court.

But the *status quo* is also unsatisfactory. The Foreign Representative acknowledged that not all of the funds remaining in the Cash Management Account may be subject to the Precautionary Measures. *See* September 14 Hr'g Tr. at 14:7–20:6. CTIM is entitled to a determination of the funds that are *not* subject to the Precautionary Measures.

In *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A.,* 412 F.3d 418 (2d Cir.2005), a pre-Chapter 15 case, the Second Circuit addressed the Circuit's prior decision in *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag),* 961 F.2d 341, 349 (2d Cir.1992), and reformulated the circumstances that make ***112** it appropriate for a U.S. court to defer to a foreign insolvency court to decide issues concerning the treatment of property within the United States. The *Altos Hornos* court stated:

> On this appeal we are asked to clarify the scope of our holding in *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag),* 961 F.2d 341, 349 (2d Cir.1992), where we ruled that the ownership of property a debtor claims as part of its estate in a foreign bankruptcy proceeding is a question "antecedent to the distributive rules of bankruptcy." Local courts may resolve the question because international comity does not require deference to the parallel foreign bankruptcy proceeding in such circumstances. *Id.* at 349. The rule announced in *Koreag,* however, only applies to disputes that present a *bona fide* question of property ownership. It has no application to disputes like this one where a bankruptcy creditor claims to own assets but has a contractual obligation to use those assets to pay down the same debt that is the subject of a foreign bankruptcy proceeding. In such a case, local courts are displaced and must defer to the foreign proceeding. We therefore affirm the district court's order dismissing appellant's complaint on international comity grounds.

Id. at 420.

The decisions in *Altos Hornos* and *Koreag* allow a U.S. court to determine ownership of property in the United States that is subject to a *bona fide* question of property ownership arising under U.S. law. Here, some (undetermined) portion of the funds in the Cash Management Account is property of the Non–Debtor Affiliates, and some of those funds may not be subject to the Precautionary Measures. But unlike the situations in *Altos Hornos* or *Koreag,* the Precautionary Measures on their face extend protection to the Non–Debtor Affiliates' funds in the Cash Management Account. In such circumstances, the Court believes that the Quintana Roo District Court is the more appropriate forum to sort out these issues if it chooses to do so in a timely fashion. Additionally, changed circumstances may support modification or termination of the Precautionary Measures by the Quintana Roo District Court.[14] The Foreign Representative's counsel conceded (after conferring with the Foreign Representative's Mexican counsel who was present in court during the hearing) that the Quintana Roo District Court can modify the Precautionary Measures based on changed circumstances. September 14 Hr'g Tr. at 45:8–47:17.

CTIM argues that the stay relief sought by the Foreign Representative is manifestly contrary to public policy in violation of section 1506. The only authority CTIM cites for support is the bankruptcy court decision in *In re Vitro, S.A.B. de C.V.,* 473 B.R. 117 (Bankr.N.D.Tex.2012), which is currently pending on direct appeal to the Fifth Circuit. Whatever the outcome of that appeal, it is clear that the stay relief sought by the Foreign Representative is not manifestly contrary to public ***113** policy. The issues in this case—at least at this time—are whether this Court or the Quintana Roo District Court that issued the Precautionary Measures should determine the reach of the May 27 Order, and whether any changed circumstances support modifying or terminating the relief granted by the Quintana Roo District Court. As the District Court correctly concluded in *Carbonell,* 2012 WL 92359, at *5, the type of relief provided in the Precautionary Measures is consistent with the type of relief granted by U.S. courts under appropriate circumstances. *Id.* ("As Plaintiff [CTIM] recognizes, U.S. bankruptcy courts have, as the May 27th Order does, suspended actions against non-debtor parties in order to assist in, and maintain the integrity of, the administration of a debtor's bankruptcy case." (citations omitted)). Precautionary Measures extending protection to non-debtor affiliates may be important and appropriate in providing a debtor with a respite from creditors and a chance to reorganize. Far different issues may be presented by a foreign court's final order impairing the rights of U.S. creditors, particularly when those creditors' claims are governed by U.S. law and are against non-debtor affiliates for property in the United States.[15] The much-awaited Fifth Circuit decision in *Vitro* may shed more light on such issues, but such issues are not presented by the Precautionary Measures

because they were not a final disposition of claims against the Non–Debtor Affiliates. With that said, however, the question remains whether conditions should be imposed on any stay granted here, which will be dealt with separately below.

While it is well recognized that comity should be extended in most instances, bankruptcy courts should also have the discretion to deny granting comity to foreign laws, court orders and judgments—consistent with over a hundred years of comity precedent—when unique circumstances warrant it, so long as "the interests of the creditors ... are sufficiently protected." 11 U.S.C. § 1522(a). Furthermore, courts *must* deny granting comity in exceptional circumstances of fundamental importance, when doing otherwise would be manifestly contrary to the public policy of the United States.

C. Comity Should Be Extended to the May 27 Order

The issue here is whether a stay of the adversary proceeding should be granted pursuant to section 1521(a)(7) based on international comity. A central tenet of Chapter 15 is the importance of comity in cross-border insolvency proceedings. Comity is not defined in Chapter 15 but it pervades the statute. The Model Law upon which Chapter 15 is based emphasizes the importance of comity, but fails to define it. Section 304 of the Bankruptcy Code, the predecessor of Chapter 15, likewise called upon courts to apply international comity. The comity doctrine has been extensively analyzed in both bankruptcy and non-bankruptcy cases. [16] ***114** A review of traditional comity principles is useful.

Comity decisions arising under section 304, the predecessor to Chapter 15, provide useful precedents for the application of comity under the current Chapter 15 regime. Section 304's legislative history suggests the doctrine of comity was a late addition to section 304 to provide judges with flexibility in dealing with ancillary cases related to foreign insolvency proceedings. *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB,* 773 F.2d 452, 456 (2d Cir.1985) (explaining that section 304(c) "was subsequently amended before passage in order expressly to direct the bankruptcy court to consider comity when evaluating a petition under section 304"). Section 304's legislative history states that "[p]rinciples of international comity and respect for the judgments and laws of other nations suggest that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules." *Id.* at 455 (quoting H.R.Rep. No. 595, 95th Cong., 2d Sess. 324–25, *reprinted in* 1978 *U.S.Code Cong. Ad. News* 5963, 6281).

As stated in *Hilton v. Guyot,* 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895), comity is not an "absolute obligation." *Id.* at 164, 16 S.Ct. 139. However, the "doctrine has never been well defined." *Altos Hornos,* 412 F.3d at 423. Modern courts have suggested comity may include two distinct doctrines: "a canon of construction, it might shorten the reach of a statute," and "a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.),* 93 F.3d 1036, 1047 (2d Cir.1996).

"Comity takes into account the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law." *Atlas Shipping,* 404 B.R. at 733 (quoting *In re Artimm, S.r.L.,* 335 B.R. 149, 161 (Bankr.C.D.Cal.2005) (citing *Maxwell,* 93 F.3d at 1048)). "Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy." *Atlas Shipping,* 404 B.R. at 733 (quoting *Victrix S.S. Co., S.A v. Salen Dry Cargo A.B.,* 825 F.2d 709, 713 (2d Cir.1987)). As the court stated in *Altos Hornos,* "deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and ... do not contravene the laws or public policy of the United States." *Altos Hornos,* 412 F.3d at 424. In analyzing procedural fairness, courts have looked to the following nonexclusive factors:

> (1) Whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the rights to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4)

> whether the liquidators are required to give notice to potential claimants; (5) whether there are provisions for creditors meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized ***115** distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.

Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 249 (2d Cir.1999). [17]

"The Second Circuit has frequently underscored the importance of judicial deference to foreign bankruptcy proceedings." *In re Int'l Banking Corp. B.S.C.,* 439 B.R. 614, 624 (Bankr.S.D.N.Y.2010) (citing *Finanz AG Zurich,* 192 F.3d at 246; *Maxwell,* 93 F.3d at 1048; *Allstate Life Ins. Co. v. Linter Grp. Ltd.,* 994 F.2d 996, 999 (2d Cir.1993); *Cunard,* 773 F.2d at 458). In *Altos Hornos,* the Second Circuit extended comity and deferred to a Mexican court to decide the underlying issues, despite the secured lender's argument that so doing would be procedurally unfair because of a six-year delay in resolving Altos Hornos's debts, and despite a governing New York choice of law and choice of forum provision. 412 F.3d at 428–29.

1. A Stay Should Be Granted to Permit the Quintana Roo District Court to Decide the Pending Issues

In this case, some of the funds in the Cash Management Account are property of the Debtor; some of the funds are property of the Non–Debtor Affiliates. With respect to the funds belonging to the Non–Debtor Affiliates, the Foreign Representative acknowledged that some of those funds might be subject to the Precautionary Measures and some not. The parties have not agreed on the correct allocation of the funds. Absent an agreement between the parties, an evidentiary hearing will be required to resolve these disputes. The question now is whether the Quintana Roo District Court that entered the May 27 Order should resolve the open issues which derive from that order. *Maxwell,* 93 F.3d at 1047 (recognizing that comity involves "a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state"), and *Altos Hornos,* 412 F.3d at 424, both strongly counsel that ***116** deference should be provided to the Quintana Roo District Court to resolve these issues. [18] The Quintana Roo District Court entered the May 27 Order on an *ex parte* basis. CTIM chose to challenge the May 27 Order through the separate *amparo* proceeding, and it has never appeared in the Quintana Roo District Court seeking to vacate or modify the order. Granting comity to foreign courts does not depend on the willingness of one party to participate in a foreign proceeding, at least where the parties may be made subject to the jurisdiction of the foreign court.

2. Nothing in the Record Supports CTIM's Argument About Procedural Unfairness

One last point must be discussed. CTIM has been critical of the Quintana Roo District Court proceeding from the start. The criticism seems more appropriately leveled at Cozumel Caribe and the Foreign Representative, rather than at the Quintana Roo District Court. The Precautionary Measures were obtained *ex parte;* that is not uncommon in our courts as well. The initial order entered by the Quintana Roo District Court required that it be served on CTIM, among other parties; that too would be commonplace for *ex parte* orders issued by our courts. Due process is not violated by the entry of *ex parte* orders, provided that notice and an opportunity to appear and defend are promptly given. Cozumel Caribe did not promptly serve the order on CTIM, which learned of the May 27 Order in a letter from counsel to Cozumel Caribe. At the hearing in this case, CTIM acknowledged that the May 27 Order was finally served on it in or around July 2010. September 14, 2012 Hr'g Tr. at 7:16–8:6. CTIM chose not to challenge the order in the Quintana Roo District Court even after being served; instead, CTIM commenced a separate *amparo* proceeding in a different Mexican court, ultimately with the unsatisfying result (for CTIM) of dismissal of the proceeding. The parties dispute the effect of that final disposition, but that issue need not be resolved here.

In addition to failing to timely serve the Precautionary Measures, the Debtor or its Non–Debtor Affiliates engaged in other questionable conduct. CTIM brought its action in the District Court against the non-debtor Guarantors. *Carbonnel,* 2012 WL 92359, at *1 ("On September 13, 2010, plaintiff CT Investment Management Co., LLC, in its capacity as special servicer and

attorney-in-fact for Bank of America, National Association, as successor by merger to LaSalle Bank National Association, as trustee for the Noteholders ... commenced the instant action against defendants Pablo Gonzalez Carbonell and Grupo Costamex, S.A. de C.V. ... alleging breach of contract under a guaranty agreement (the 'Agreement') entered into in connection with the development and operation of several resort properties and hotels ***117** in Mexico.") Carbonell and Grupo Costamex did not appear and CTIM sought to have a default judgment entered. *Id.* Carbonell and Grupo Costamex had consented to New York court jurisdiction in the Guarantee Agreement.[19] (*See* ECF Doc. # 38, Ex. D at 12.) Instead of the Guarantors defending the action, the Foreign Representative appeared arguing for a stay based on the Precautionary Measures. (*See* ECF Doc. # 38 at 4.) After the District Court Action was stayed, the Guarantors commenced an action in still another Mexican court seeking to invalidate the Guarantee Agreement. They reportedly served their complaint on a teller in a Bank of America branch in Chicago, rather than serving CTIM (or Bank of America through more appropriate means), and when no one appeared in the Mexican action, the Guarantors obtained a default judgment invalidating the Guarantee Agreement. *Id.* If the default judgment withstands challenge in the Mexican courts, a court in the United States may ultimately have to decide whether the judgment can be enforced in this country should enforcement be sought.[20] While these circumstances have no direct bearing on the issues here, the Court cannot help but be influenced by this alleged conduct in deciding whether or how to exercise its discretion in granting the relief sought by the Foreign Representative.

CTIM has so far avoided appearing in the Quintana Roo District Court that entered the order that has given rise to so much controversy. But that is the court that should address the issues in the first instance. Section 1522 permits this Court to impose conditions on relief, and that is what the Court will do. Therefore, the Court will stay the adversary proceeding for a period of 180 days from the date of this order. The stay is expressly conditioned on the following:

1. Within 60 days from the date of this order, the Debtor and Foreign Representative shall commence an appropriate proceeding in the Quintana Roo District Court seeking a determination (i) whether the Precautionary Measures apply to all of the funds in the Cash Management Account, and, if not, what is the amount of funds *not* covered by the Precautionary Measures, and (ii) whether, because of changed circumstances, the Precautionary Measures should be modified or terminated;

2. In commencing that proceeding, the Debtor or Foreign Representative must *promptly* serve CTIM with ***118** such process as is necessary under Mexican law;

3. CTIM shall advise this Court within 14 days after the Mexican proceeding is commenced whether CTIM will consent to the jurisdiction of the Quintana Roo District Court to decide the issues addressed in this order; and

4. If, for any reason, the Quintana Roo District Court declines to hear and decide the issues identified in this order within 180 days, the parties shall so advise this Court. In that event, the Court will determine whether to maintain the stay of the adversary proceeding.[21]

The Precautionary Measures approved *ex parte* by the Quintana Roo District Court included a requirement that the funds in the CTIM account be returned to Mexico.[22] The Foreign Representative has never pressed this aspect of the Precautionary Measures, but to make the matter clear, the Court concludes that CTIM would not be sufficiently protected if the funds in the Cash Management Account—all of which are covered by a perfected security interest governed by New York law—were returned to Mexico absent further order of this Court.

III. CONCLUSION

For the foregoing reasons, the motion of the Foreign Representative for a stay of this adversary proceeding is **GRANTED** on the conditions set forth in this Memorandum Opinion and Order.

IT IS SO ORDERED.

All Citations

482 B.R. 96, 57 Bankr.Ct.Dec. 72

Footnotes

1 The seven non-debtor affiliates are Promotora de Inmuebles del Caribe, S.A. de C.V.; Consorcio Imnobiliario Cancun, S.A. de C.V.; Desarrollo Turistico Piramides Cancun, S.A. de C.V.; Imnobiliaria Cancun Caribe, S.A. de C.V.; Comercializadora Y Desarro Lladora Ocean, S.A. de C.V.; Desarrolladora Imnobiliariadel Sur, S.A. de C.V.; and Servicios Administrativos Etisa, S.A. de C.V. (collectively, the "Non–Debtor Affiliates").

2 Bank of America, N.A. is the successor by merger to LaSalle Bank N.A., as trustee for the Noteholders.

3 Pablo Gonzalez Carbonell and Grupo Costamex, S.A. de C.V. (together, the "Guarantors") entered into a Guarantee Agreement in connection with the development and operation of several resort properties and hotels in Mexico. CTIM alleges that the Guarantors' obligations under the Guarantee Agreement were triggered when Cozumel Caribe, a subsidiary of Grupo Costamex, commenced the Concurso Proceeding in Mexico.

4 A party brings an *amparo* action in a Mexican court to seek redress for an alleged constitutional violation.

5 It is the Court's understanding that the Provisional Suspension Request was analogous to a temporary restraining order, and the Definitive Suspension Request was similar to a preliminary and/or permanent injunction.

6 The following additional pleadings and declarations were submitted in connection with the Stay Motion: Cozumel Caribe filed the Declaration of Raul Garcia Herrera in support of the Stay Motion ("Herrera Declaration," ECF Doc. # 4); CTIM objected to the Stay Motion (the "CTIM Objection," ECF Doc. # 12) and filed the Declaration of Francisco Xavier Cortina Cortina ("Cortina's First Declaration" ECF Doc. # 13); Cozumel Caribe responded to the CTIM Objection ("Caribe Response," ECF Doc. # 15) and filed the Declaration of Alfonso Peniche (the "Peniche Declaration," ECF Doc. # 16). Upon request by the Court for further briefing, Cozumel Caribe and CTIM filed concurrent supplemental briefs (the "Caribe Supplemental Brief," ECF Doc. # 23; the "CTIM Supplemental Brief," ECF Doc. # 24); CTIM filed a second Declaration of Francisco Xavier Cortina Cortina to support the CTIM Supplemental Brief ("Cortina's Second Declaration," ECF Doc. # 25); Cozumel Caribe and CTIM also filed concurrent supplemental reply briefs (the "Caribe Supplemental Reply," ECF Doc. # 29; the "CTIM Supplemental Reply," ECF Doc. # 28). Cozumel Caribe also filed a response Declaration of Alfonso Peniche (the "Peniche's Second Declaration," ECF Doc. # 41). Several letter submissions were also filed. (*See* ECF Doc. ## 22, 38, 45, 46, 49 and 50.)

7 CTIM sought *in personam* jurisdiction over the Guarantors, all of whom are Mexican citizens residing in Mexico, based on the provisions in the Loan Documents by which the Guarantors consented to jurisdiction in New York to enforce the Guarantee Agreement.

8 The Foreign Representative is hereby directed to file in this Court within 30 days from the date of this order a notice setting forth the current status of the Concurso Proceeding pursuant to section 1518(2) of the Bankruptcy Code.

9 Section 1509 is entitled "Right of direct access." Subsection (b) states:

> (b) If the court grants recognition under section 1517, subject to any limitations that the court may impose consistent with the policy of this chapter—
>
> (1) the foreign representative has the capacity to sue and be sued in a court in the United States;
>
> (2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and
>
> (3) a court in the United States shall grant comity or cooperation *to the foreign representative.*

11 U.S.C. § 1509(b) (emphasis added).

10 The United Nations has published a Judicial Guide to application of the Model Law. With respect to the access principle, the Judicial Guide explains:

> A. the "access" principle
>
> 29. The UNCITRAL Model Law envisages a proceeding being opened by an application made to the receiving court by an insolvency representative of a debtor who has been appointed in another State—the "foreign representative". The application may seek:
>
> (a) To commence an insolvency proceeding under the laws of the enacting State;
>
> (b) Recognition of the foreign proceeding in the enacting State, so that the foreign representative may:
>
> (i) Participate in an existing insolvency proceeding in that State;
>
> (ii) Apply for relief under the Model Law; or
>
> (iii) To the extent that domestic law permits, intervene in any proceeding to which the debtor is a party.

UNCITRAL Model Law on Cross–Border Insolvency: The Judicial Perspective, III. Interpretation and application of the UNCITRAL Model Law ¶ 29 (United Nations 2012) (footnotes omitted) (available at http://www.uncitral. org/pdf/english/texts/insolven/V1188129–Judicial_Perspective_ebook-E.pdf) (last visited Nov. 12, 2012).

11 *Qimonda* is puzzling in several respects. The district court in reviewing the decision of the bankruptcy court to grant comity to German law stated that that an abuse of discretion standard applied for decisions committed to the discretion of the bankruptcy court. *Qimonda,* 433 B.R. at 555. Furthermore, according to the district court, the abuse of discretion standard applies when a lower court decides to defer to a foreign law under comity principles. *Id.* at 556. But the district court then stated that the parties unnecessarily "spill much ink" regarding whether comity should be granted when, according to the district court, the parties' "arguments are unpersuasive because they address the issue already decided by Congress in § 1509, namely whether courts must grant comity ...." *Id.* at 564–65. The "abuse of discretion" standard of review obviously cannot apply to an issue as to which the court lacks any discretion because the result is mandated by Congress. This Court does not believe that section 1509 can be read as removing the discretion that sections 1507, 1519, 1520 and 1521 expressly provide the bankruptcy court in determining whether to grant relief.

12 The effects of recognition of the Concurso Proceeding as a foreign main proceeding are set forth in section 1520. Sections 361 and 362 are made applicable to property of the debtor that is within the United States. But section 362(d)(1) is therefore applicable and permits a bankruptcy court to lift the automatic stay if a creditor is not adequately protected. This express statutory authority for a bankruptcy court to allow a creditor to obtain relief from property of the debtor within the United States (by lifting the automatic stay) appears to trump continued protection of property based on international comity. Protection of property of a non-debtor affiliate may be provided under section 1521(a)(7) only if

creditors are "sufficiently protected," as provided in section 1522(a). It would be ironic, to say the least, if property of a non-debtor affiliate received greater protection than property of the debtor.

13 Relief might also be possible under section 1521(a)(1)—"staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations ..."—to the extent the Precautionary Measures affect the Debtor's property. The dispute here appears to be limited to the Non–Debtor Affiliates' funds in the Cash Management Account, and the Precautionary Measures extend protection to property of the Non–Debtor Affiliates so section 1521(a)(7) is necessary for the Foreign Representative to obtain the requested relief.

14 The Precautionary Measures prohibit CTIM from reaching the Non–Debtor Affiliates' funds in the Cash Management Account. Nothing in the Precautionary Measures relieved the Non–Debtor Affiliates from the obligation to continue making debt service payments on the $103 million loan. Nevertheless, for more than two years, the Non–Debtor Affiliates have simply stopped paying. In a Chapter 11 case, failure to make post-petition payments on secured debt may result in lifting of the automatic stay. The Quintana Roo District Court could consider whether the Non–Debtor Affiliates' failure to make any debt service payments are changed circumstances that support modifying or terminating the Precautionary Measures.

15 The appeal in *Vitro* centers on whether the bankruptcy court was correct in refusing to grant comity to the provisions in the Mexican concurso plan approved by the Mexican insolvency court that invalidated guarantees to creditors by non-debtor affiliates. The bankruptcy court in *Vitro* did *not* analyze whether sections 1507 or 1522 provide authority to refuse to grant comity to aspects of the concurso plan even if the provisions in question are not manifestly contrary to public policy.

16 Whether Chapter 15 changes the calculus for granting, denying, limiting or conditioning the application of comity remains an open question. Sections 1507(b)(1)-(5) and 1522(a) and (c) arguably limit application of comity, allowing a court to reject application of comity in circumstances that might previously have supported its application. "Because the principle of comity does not limit the legislature's power and is, in the final analysis, simply a rule of construction, it has no application where Congress has indicated otherwise." *Maxwell,* 93 F.3d at 1047. It is unnecessary here to explore this issue further as the Court concludes that the relief ordered by the Court would be appropriate in any event.

17 Choice-of-law principles and conflicts of law are important in deciding whether to extend comity to foreign law, court orders or judgments where there is an actual conflict between substantive legal rules in jurisdictions with an interest in the pending matter. *See Maxwell,* 93 F.3d at 1046–48, and cases cited therein. Respect for generally recognized choice-of law rules may also play a role in determining whether decisions of foreign courts satisfy requirements for procedural fairness before extending comity to foreign laws, court orders or judgments. Surprisingly few court decisions have followed the clear lead in *Maxwell* and analyzed choice-of-law principles in deciding whether to extend comity, instead deciding the issues on other bases. *See Qimonda,* 433 B.R. 547 (not including any choice of law analysis in evaluating whether to apply German patent law); *but see In re Toft,* 453 B.R. 186, 196 (Bankr.S.D.N.Y.2011) (Gropper, J.) ("In many cases, these provisions would appear adequate to resolve a dispute arising from a conflict between U.S. and foreign law, and the public policy exception would not have to be invoked. It also appears patent that relief should not be granted or denied in a cross-border case where there is a conflict between U.S. and foreign law without a conflict of law analysis —*i.e.,* should U.S. or foreign law be applied to a particular issue based on familiar choice of law principles coupled with (where appropriate) due regard for the principle of comity.").

At this stage of this case, the issue is whether this Court should extend comity (deference) to permit the Quintana Roo District Court to address the issues regarding the Precautionary Measures; *Maxwell* and *Altos Hornos* strongly counsel that it should. *See infra* n. 16. The Court is *not* required to resolve whether choice-of-law principles should lead a court (here or in Mexico) to apply New York law regarding enforcement of CTIM's security interest in the Non–Debtor Affiliates' funds in the Cash Management Account in New York. Even if the security interest should be enforced, a stay of the exercise of enforcement rights is an available remedy under U.S. bankruptcy law.

18 The court in *Altos Hornos* stated:

> International comity ... involves not the choice of law but rather the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction. We have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding. Since [t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding, American courts regularly defer to such actions. In such cases, deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and (consistent with the principles of Lord Mansfield's holding) do not contravene the laws or public policy of the United States.

412 F.3d at 424 (internal quotation marks and citations omitted).

19 The existence of a choice of law and forum selection clause does not prevent staying a matter in favor of a foreign forum based on comity. *See Allstate Life Ins. Co.,* 994 F.2d at 1000 ("Appellants emphasize the presence of a forum selection and choice of law clause in the Indenture Agreement which selects New York as a forum and New York law to govern the agreement. Appellants contend that this clause indicates that the court abused its discretion in granting comity in favor of the Australian proceedings. The presence of such clauses, however, does not preclude a court from granting comity where it is otherwise warranted.").

20 In *Hilton v. Guyot,* the Supreme Court held that if the foreign forum provides "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced and not "tried afresh." *Hilton,* 159 U.S. at 202–03, 16 S.Ct. 139; *see also Metcalfe & Mansfield Alternative Investments,* 421 B.R. at 698.

21 While deference to a foreign court may be appropriate, courts in the U.S. may proceed to decide issues relevant to cases before them if the foreign court declines to decide the matter. *See International Banking Corp.,* 439 B.R. at 629 ("Accordingly, the Court directs the parties to consent to the jurisdiction of the Bahraini court to decide the voidability of the Attachment Orders, and further directs them to seek a ruling from the Bahraini court as to the voidability of the Attachment Orders under Bahraini law. In the event that the Bahraini court declines to exercise jurisdiction, this Court will decide the dispute.... Finally, the parties should schedule a conference to be held approximately 90 days after the date of this order to report on their progress.").

22 Subsection (c) of the May 27 Order directs that "the total balance of the Cash Management Account ... be placed by the current depository available for its owners (Cozumel Caribe, S.A. DE C.V. and its affiliates) for the purpose of its preservation in a sight deposit in the national territory until a conciliator ... is appointed." Herrera Decl., Ex. A–1 at 3.

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2022 WL 17478530
Only the Westlaw citation is currently available.
United States Bankruptcy Court, S.D. New York.

IN RE: GLOBAL CORD BLOOD CORPORATION, Debtor in a Foreign Proceeding.

Case No. 22-11347 (DSJ)
|
Signed December 5, 2022

Attorneys and Law Firms

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Chapter 15

MEMORANDUM OF DECISION AND ORDER DENYING CHAPTER 15 PETITION FOR RECOGNITION OF A FOREIGN PROCEEDING

DAVID S. JONES UNITED STATES BANKRUPTCY JUDGE

***1**

This Chapter 15 case arises out of proceedings pending in the Grand Court of the Cayman Islands ("**Cayman Proceeding**"). In response to evidence suggesting that a company's board and/or officers caused or allowed an improper expenditure of more than $600 million of corporate funds, the Grand Court appointed Joint Provisional Liquidators ("**JPLs**") as fiduciaries to investigate and, if appropriate, seek to recover misappropriated funds, and/or to take other actions as may be appropriate based on the findings of their investigation. The Cayman Grand Court conferred extensive corporate powers on the JPLs and divested the power of a number of the company's board members.

The JPLs have petitioned this Court for recognition of the Cayman Proceeding under Chapter 15 of the U.S. Bankruptcy Code. This application, which has drawn two objections, tests the limits of how broadly Chapter 15 can be applied to assist a foreign court in its conduct of a case that does not involve insolvency or the identification, classification, or satisfaction of debts.

For reasons detailed below, the Court concludes that, on the present record, the Cayman Proceeding does not satisfy the

Bankruptcy Code's definition of a "foreign proceeding" and, accordingly, is not eligible for recognition under Chapter 15. At bottom, the Court concludes that the Cayman Proceeding, which arises under various subsections of the Cayman Islands Companies Act ("**Companies Act**"), is most akin to a corporate governance and fraud remediation effort, and is not a collective proceeding for the purpose of dealing with insolvency, reorganization, or liquidation. As such, the Cayman Proceeding at its present stage falls outside the range of proceedings that Chapter 15 was designed to assist.

To hold otherwise would be to invite recourse to U.S. bankruptcy courts whenever any foreign corporation sustains losses as a result of officer or director fraud or defalcation, so long as that corporation first commences proceedings in its home jurisdiction seeking to install new fiduciaries and right the wrong that the corporation has suffered. Although Chapter 15 is to be applied broadly to provide assistance to a wide variety of foreign proceedings, the proceeding here—at its present stage—falls outside the range of types of proceedings that have been found eligible for assistance under Chapter 15, and outside the meaning of applicable provisions of the Bankruptcy Code.

The Petition is therefore denied, without prejudice to future applications by the JPLs or other authorized representatives if warranted by future developments in the Cayman Proceeding or elsewhere.

BACKGROUND

The Court conducted a hearing on November 10, 2022, and, by agreement of the parties, received in evidence declarations submitted by each side, along with exhibits. No party opted to question any witness despite having been afforded the opportunity to do so.

This factual background section draws on that evidentiary record, which includes substantial portions of the record of the Cayman Proceeding. Neither party questioned the factual accuracy of any of the statements and facts presented about the Cayman Proceeding, although each party contests the inferences and legal significance of those facts and parties opposing recognition dispute the JPLs' claims of malfeasance. The Court therefore credits the factual content of the parties' submissions, which form the factual basis of the Court's ruling. The salient background is as follows.

***2** Three Joint Provisional Liquidators who have been appointed by the Grand Court of the Cayman Islands in a matter relating to Global Cord Blood Corporation ("**Global Cord Blood Corp.**" or the "**Company"**) have petitioned this Court for recognition of what they assert is a foreign main proceeding pending in the Grand Court of the Cayman Islands. [ECF Nos. 1, 2]. The JPLs seek recognition of the Cayman Proceeding as a foreign main proceeding or, in the alternative, as a foreign nonmain proceeding; they also seek related relief including authorization to conduct discovery in the United States in connection with assertedly fraudulent misconduct including what the JPLs assert was a possible misappropriation of more than $600 million in corporate funds.

Two groups—a group of now-disempowered former directors of the Company, and another entity with an interest in the company (collectively the "**Objectors**")—oppose the application for recognition. [See ECF Nos. 12, 16]. An "Objection" [ECF No. 12] was filed by Golden Meditech Stem Cells (BVI) Company Limited ("**Golden Med**"), which asserts that it holds a direct or indirect ownership stake in Global Cord Blood Corp. Individuals who term themselves Independent Directors of Global Cord Blood Corporation filed a "Statement in Support" [ECF No. 16] of Golden Med's objection. The Objectors argue, in essence, that recognition is inappropriate because the Cayman proceeding is not a "foreign proceeding" as that term is defined in section 101(23) of the Bankruptcy Code, and, accordingly, the proceeding is ineligible for recognition under section 1517 of the Code.

1. Global Cord Blood Corp.

Global Cord Blood Corp. is a Cayman Islands exempted company that primarily operated in the People's Republic of China ("**PRC**") with headquarters in Hong Kong. [ECF No. 3 at ¶¶ 9, 12]. The Company's business deals with collecting and

storing umbilical cord blood for its stem cell content. [ECF No. 2 at ¶ 10]. The Company is or was a sizeable concern with shares that traded on the New York Stock Exchange. [See ECF No. 3 at ¶ 10].

Golden Med frames the Cayman Proceeding as the outgrowth of a longstanding struggle for corporate control waged by two shareholders through multiple layers of holding companies. [See ECF. No. 12 at ¶¶ 9–17]. Two entities—Golden Med and Blue Ocean Structure Investment (BVI) Company Limited ("**Blue Ocean**")—assert conflicting ownership stakes in Global Cord Blood Corp. [Id. at ¶¶ 9–19]. According to Golden Med, this dispute is the subject of ongoing litigation in the British Virgin Islands. [Id. at ¶¶ 26–28].

Blue Ocean alleges that, in April 2022, Global Cord Blood Corp. entered into a questionable transaction that transferred or purported to transfer millions of new shares of stock and over $600 million in corporate funds to two companies, including one called Cellenkos (the "**Cellenkos Transaction**"). [See ECF Nos. 3-3 at ¶¶ 17–32, 12 at ¶ 21]. This transaction is the subject of the Cayman Proceeding. [ECF No. 2 at ¶ 12].

2. The Cayman Proceeding

Blue Ocean, as a significant shareholder of Global Cord Blood Corp., sought relief from the Cellenkos Transaction in the Grand Court of the Cayman Islands by filing a "Winding Up Petition" on May 5, 2022. [ECF No. 3-2]. In its petition, Blue Ocean alleges that some combination of Global Cord Blood Corp. officers and a controlling subset of directors, with no notice or insufficient notice to shareholders, committed to the Cellenkos Transaction, which Blue Ocean contends would radically dilute the value of the shareholders' shares. [See ECF No. 3-2 at ¶ 42]. Blue Ocean sought relief from the transaction, which representatives of the company opposed. Blue Ocean alleges that the transaction in question was in furtherance of improper and self-serving transactions that violated the fiduciary duties of board members and/or officers. [ECF No. 3-3 at ¶ 32]. The Cellenkos Transaction is described in detail in Blue Ocean's petition and amended petition to the Grand Court. [ECF Nos. 3-2, 3-3].

***3** The Winding Up Petition sought relief including an order that the Company refrain from proceeding with the Cellenkos Transaction, and an order requiring revisions to its "Memorandum and Articles of Association" to limit the board's authority in various ways to unilaterally change the Memorandum and Articles of Association, to create shares of any class representing more than 20% of the issued and outstanding shares of the Company, and from engaging in actions or transactions that would result in a change in control of the Company, as well as related and similar relief. [ECF No. 3-2 at ¶¶ 44.1–44.2]. The petition also sought an order requiring an Extraordinary General Meeting of shareholders to propose removal of the Board and to consider an alternative proposed by Blue Ocean. [Id. at ¶ 44.3]. The petition sought "in the alternative" that the Company be "wound up pursuant to section 92(e) of the Companies Act." [Id. at ¶ 45.1]. The JPLs have not shown that any steps to wind-up the company have been taken, and section 92(e) does not reference or require insolvency, nor the classification, adjustment, or resolution of specific debts. Rather, section 92(e) of the Companies Act allows the Court to wind-up a company if "the [Grand] Court is of the opinion that it is just and equitable that the company should be wound up." Cayman Is. Companies Act § 92(e) (2022 Revision).

By contrast, section 92(d) of the Companies Act permits the court to wind-up a company if "the company is unable to pay its debts." But neither the petition [ECF Nos. 3-2, 3-3] nor the resulting order of the Grand Court appointing the JPLs [ECF No. 2-1] references or relies on section 92(d), nor does the Cayman Proceeding as a whole seek to ascertain the amount of the Company's debts, the identity of its creditors, or terms on which those debts are to be satisfied or adjusted.

The May 2022 petition further sought the alternative relief of appointment of joint official liquidators and asked that they be granted various powers in connection with the proposed wind-up of the company. [ECF No. 3-2 at ¶ 45]. Again, their proposed appointment referenced only section 92(e) of the Companies Act (i.e., the general equitable provision), not the debt-related section 92(d). [Id.; see also ECF No. 3-3 at ¶ 71]. The Companies Act provides for the appointment of official liquidators to carry out the winding up process. See Companies Act § 105. Cayman law also provides that "the [Grand] Court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally." Companies Act § 104(1).

On August 22, 2022, Blue Ocean filed a summons and sought appointment of joint provisional liquidators pursuant to section 104(2) of the Companies Act. [See e.g., ECF No. 3-5 at ¶ 4]. That provision authorizes applications for appointment of provisional liquidators—rather than official liquidators—on the grounds that there is a prima facie case for making a winding up order, and that appointing a provisional liquidator is necessary to prevent dissipation or misuse of corporate assets, or to prevent oppression of minority shareholders, or to prevent mismanagement on the part of the company's directors. Companies Act § 104(2).

Section 104(2) does not mention or require any showing of insolvency. By contrast, Companies Act section 104(3) does concern debt and insolvency, and authorizes appointing a provisional liquidator "ex parte on the grounds that — (a) the company is or is likely to become unable to pay its debts ... and (b) the company intends to present a compromise or arrangement to its creditors." But neither the May 2022 petition nor its subsequent amendment invoked section 104(3). [See ECF Nos. 3-2, 3-3].

In May 2022, the Grand Court granted an injunction against closing the Cellenkos Transaction. [See ECF No. 3-4 at ¶ 2]. Yet, the court lifted the injunction in July 2022 based on Global Cord Blood Corp.'s representation that the transaction had been partially performed. [Id. at ¶¶ 22, 76; see ECF No. 3-5 at ¶¶ 10, 20].

In approximately September 2022, evidence emerged that incumbent board members and/or officers seemingly forged financial records to oppose Blue Ocean's application by making it appear that the transaction was partially completed. [ECF No. 3-5 at ¶¶ 8–10]. Blue Ocean contended that it appears that substantially all of the Cellenkos Transaction was forged [ECF No. 3-3 at ¶¶ 54–56] and that that transaction was designed to conceal the disposition of roughly $500 million in corporate assets Blue Ocean asserts were unlawfully siphoned off over several years [id. at ¶¶ 57–58; see also ECF No. 3-5 at ¶ 26, 27 at ¶ 5(b) n.4].

***4** These updated allegations are set forth in an "Amended Winding Up Petition" [ECF No. 3-3] filed in the Cayman Proceeding on September 22, 2022. Among other things, the amended petition alleges that the Company proceeded with the Cellenkos acquisition without proper notice or authorizations, that the acquisition was for a vastly inflated price and was contrary to the best interests of Global Cord Blood Corp., and that the transaction was a self-interested transaction that improperly benefited a formal or informal insider of Global Cord Blood Corp. who as of April 2022 also owned more than half of the acquired entity, Cellenkos. [Id. at ¶¶ 20, 29–43].

On September 22, 2022, the Grand Court entered an order [ECF No. 2-1] ("**Appointment Order**") granting relief conditioned on an undertaking by Blue Ocean as petitioner that it will comply with any future order holding that the Appointment Order caused loss to the Company by paying up to the value of Blue Ocean's stock [id. at 2]; the order directed the appointment of the individuals as "Joint Provisional Liquidators" of the Company [id. at ¶ 1]. The Grand Court followed its order with a judgment entered on September 28, 2022. [ECF 3-5]. The Appointment Order and accompanying judgment recited that the order was issued upon application of petitioner Blue Ocean dated August 22, 2022, and that that application was made pursuant to section 104(2) of the Companies Act. [ECF Nos. 2-1 at 1, 3-5 at ¶¶ 1, 2].

Under Cayman Law, the JPLs' powers are limited by the court order appointing them. See Companies Act § 104(4). By its order, the Grand Court directed the JPLs to take such steps as they conclude in their discretion may be necessary or expedient to "protect and preserv[e] the value of the Company's assets, rights and/or property," and to "prevent[ ] the dissipation or misuse of the Company's assets." [ECF No. 2-1 at ¶ 4]. The Grand Court also directed the JPLs to investigate and report on the affairs of the Company within and without the Cayman Islands, including in PRC and Hong Kong. [Id. at ¶ 5]. More specifically, the order authorized the JPLs to "take possession of, collect and get in the property of the Company"; to act "on behalf of the Company"; to discharge "costs, expenses and debts" of the Company; and to take a variety of actions in furtherance of their responsibilities. [Id. at ¶ 6]. The Appointment Order "suspended" the powers of the Company's Board unless restored by the JPLs. [Id. at ¶ 9]. And the Grand Court ordered or gave effect to the provision of section 97 of the Companies Act, which bars the commencement of suits or other proceedings against the company except with leave of court. [Id. at ¶ 14].

The Grand Court further authorized the JPLs to "commence winding up proceedings and/or any insolvency process in the Cayman Islands or any other country." [Id. at ¶ 8(b)]. However, the record does not reflect the commencement of any winding up proceeding or insolvency process—whether in the exercise of this power, or otherwise. The record includes a sworn statement that no such winding up proceeding has begun [ECF Nos. 14 at ¶ 22, 27 at ¶ 24], and the JPLs did not

contend or present evidence to the contrary. Moreover, the JPLs state that they "believe [Global Cord Blood Corp.] is solvent." [ECF No. 26 at ¶ 1].

Finally, the Appointment Order authorizes the JPLs "to take any such action as may be necessary or desirable to obtain recognition of the JPLs and/or their appointment in the PRC, Hong Kong and in any other relevant jurisdiction and to make applications to the courts of such jurisdictions for that purpose or for the purpose of obtaining information to assist them in their investigations ...." [ECF No. 21 at ¶ 10].

3. The Texas 1782 Proceeding

***5** In July 2022, Blue Ocean filed an application with the United States District Court for the Southern District of Texas seeking judicial assistance pursuant to 28 U.S.C. § 1782. [ECF No. 13-4; see ECF No. 12 at ¶¶ 29–32]. See generally In re Application of Blue Ocean Structure Inv. Co. Ltd. for Discovery in Aid of Foreign Proc. Pursuant to 28 U.S.C. § 1782, Case No. 4:22-mc-01161 (S.D. Tex.). Blue Ocean sought the appointment of a commissioner to issue subpoenas to Cellenkos and certain other related parties to produce documents related to the Cellenkos Transaction for use in the Cayman Proceeding and the BVI Proceeding. [ECF No. 13-4]. The District Court granted the application in an order entered on July 20, 2022. [ECF No. 13-5]. On September 8, 2022, Cellenkos and the other respondents filed a motion to vacate the order. [ECF No. 13-6]. On October 28, 2022, Blue Ocean filed a Sur-Reply to the motion to vacate. [ECF No. 13-7].

4. Chapter 15 Petition for Recognition

Against this backdrop, the JPLs, acting as foreign representatives, filed a standard form Chapter 15 Petition for Recognition of a Foreign Proceeding in this Court [ECF No. 1], accompanied by a more detailed "Verified Chapter 15 Petition for Recognition of Foreign Proceeding and Related Relief" [ECF No. 2]. The Verified Petition attaches the Cayman Court's Appointment Order. [ECF No. 2-1]. The petition seeks as relief entry of a proposed order attached to the application, and paragraph 21 of the Verified Petition summarizes that requested relief as (a) recognition of the Cayman Proceeding pursuant to Bankruptcy Code section 1517 as a "foreign main proceeding," (b) relief available under sections 1520(a) and 1520(b) including the ability to examine witnesses and take evidence, and (c) "such other and further relief as is appropriate." [ECF No. 2].

Golden Med opposes recognition, essentially on the basis that the Cayman Proceeding is brought under the Cayman Companies Act's "just and equitable" powers, not its powers relating to the adjustment or satisfaction of debtors or the liquidation or "winding up" of companies or the adoption of a scheme of arrangement to resolve the company's debts. [ECF No. 12 at ¶¶ 44–45]. Thus, Golden Med objects, the Cayman Proceeding does not involve insolvency, does not address the debts and/or creditors of Global Cord Blood Corp., and, rather, is an effort under the Cayman Companies Act to appoint JPLs as fiduciaries to take over substantial organizational responsibility for Global Cord Blood Corp. and to investigate and potentially recover allegedly misappropriated corporate funds. [Id. at ¶ 22]. Golden Med asserts that the Cayman Proceeding therefore does not constitute a "foreign proceeding" as defined by Bankruptcy Code section 101(23), and that, in the absence of such a proceeding, this Court must decline to enter an order granting "recognition" under Bankruptcy Code section 1517. [Id. at ¶ 39].

At the conclusion of the hearing on November 10, 2022, the Court reserved decision.

ANALYSIS

Chapter 15 of the Bankruptcy Code is titled "Ancillary and Other Cross-Border Cases," and Code section 1501 explains that

"[t]he purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with ... objectives" including "(1) cooperation between—(A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases." 11 U.S.C. § 1501(a). The chapter "applies where," in relevant part, "assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding." 11 U.S.C. § 1501(b)(1). The Bankruptcy Code defines "foreign proceeding," 11 U.S.C. § 101(23), and this opinion turns on whether petitioners satisfy that definition here.

***6** By way of further legal background, a Chapter 15 case is commenced by the foreign representative of a debtor filing a petition for recognition of a foreign proceeding. See 11 U.S.C. §§ 1504, 1515(a). The petition must be accompanied by certain documents that are presumed authentic in the absence of contrary evidence. See 11 U.S.C. §§ 1515(b), 1516(b); In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 127 (Bankr. S.D.N.Y. 2007), aff'd, 389 B.R. 325 (S.D.N.Y. 2008). Section 1517 of the Bankruptcy Code identifies the requirements for recognition of a foreign proceeding. It provides that an order recognizing a foreign proceeding shall be entered if "(1) such foreign proceeding ... is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of section 1515." 11 U.S.C. § 1517(a). Recognition is mandatory if all three requirements of Section 1517(a) are met. See 11 U.S.C. § 1517(a). "But recognition is not a rubber stamp exercise," and the burden rests on the foreign representative to prove each of the requirements of Section 1517. In re Creative Fin. Ltd., 543 B.R. 498, 514 (Bankr. S.D.N.Y. 2016) (citations omitted).

Although it does not come into play here, section 1506 of the Bankruptcy Code includes an overriding public policy exception, providing that a court may refuse to take an action under Chapter 15 if such action "would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. The exception is read narrowly, with legislative history stating that "the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), 714 F.3d 127, 139 (2d Cir. 2013) (quoting H.R.Rep. No. 109-31, at 109 (2005)). Thus, "even the absence of certain procedural or constitutional rights will not itself be a bar under [section] 1506." In re OAS S.A., 533 B.R. 83, 104 (Bankr. S.D.N.Y. 2015) (quoting Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro), 701 F.3d 1031, 1069 (5th Cir. 2012)).

Here there is no serious dispute that the JPLs are a "person or body" and that their petition for the most part meets the formal requirements of section 1515 of the Bankruptcy Code. However, there is a serious question whether the Cayman Proceeding constitutes a "foreign proceeding" as is defined by section 101(23) of the Code, and as is required for recognition under section 1517. See, e.g., In re Millard, 501 B.R. 644, 649 (Bankr. S.D.N.Y. 2013) ("presence, or not, of a 'foreign proceeding' as used in section 1517(a)(1), as ultimately defined in section 101(23), determines whether [a court] should grant recognition") (internal citations omitted); In re Vitro, 701 F.3d at 1044 ("Only after a United States court recognizes a proceeding can 'the foreign representative ... apply directly to a court in the United States for appropriate relief in that court.' ") (quoting 11 U.S.C. § 1509(b)(2)).

The Bankruptcy Code defines "foreign proceeding" as:

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

11 U.S.C. § 101(23). As a general matter, this definition "is to be broadly construed." E.g., In re Bd. of Dirs. of Telecom Argentina S.A., 2006 WL 686867, at *21, 22 (Bankr. S.D.N.Y. Feb. 24, 2006); In re MMG LLC, 256 B.R. 544, 550 (Bankr. S.D.N.Y. 2000) (same); see 2 Collier on Bankruptcy ¶ 101.23 (16th ed. 2022) ("Courts have construed the definition of

'foreign proceeding' broadly."); In re Netia Holdings S.A., 277 B.R. 571, 580–81 (Bankr. S.D.N.Y. 2002) (the definition "by its terms encompasses a broad array of types of proceedings"). Broad construction of proceedings eligible for Chapter 15 recognition helps ensure that other nations using varied approaches in addressing insolvencies will receive the assistance of the U.S. courts. See, e.g., In re Oi S.A., 587 B.R. 253, 264 (Bankr. S.D.N.Y. 2018) ("Chapter 15 ... provides courts with broad, flexible rules to fashion relief that is appropriate to effectuate the objectives of the chapter in accordance with comity.") (quoting In re Rede Energia S.A., 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014)); In re B.C.I. Fins. Pty Ltd., 583 B.R. 288, 292 (Bankr. S.D.N.Y. 2018) ("Chapter 15 and the Model Law are designed to optimize disposition of international insolvencies by facilitating appropriate access to the court system of a host country (the United States, in the case of Chapter 15) by a representative of an insolvency proceeding pending in a foreign country.") (quoting In re Bear Stearns, 389 B.R. at 333). At the same time, however, the resulting flexibility is not limitless, and, as in all questions of statutory construction, the statutory "words to be interpreted are not considered in isolation; rather, [courts] 'look[ ] to the statutory scheme as a whole and plac[e] the particular provision within the context of that statute.' " King v. Time Warner Cable Inc., 894 F.3d 473, 477 (2d Cir. 2018) (quoting Saks v. Franklin Covey Co., 316 F.3d 337, 345 (2d Cir. 2003)).

***7** Courts construing section 101(23) have required the petitioner to establish each of seven criteria: "(i) [the existence of] a proceeding; (ii) that is either judicial or administrative; (iii) that is collective in nature; (iv) that is in a foreign country; (v) that is authorized or conducted under a law related to insolvency or the adjustment of debts; (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and (vii) which proceeding is for the purpose of reorganization or liquidation." In re Ashapura Minechem Ltd., 480 B.R. 129, 136 (S.D.N.Y. 2012) (quoting In re Betcorp Ltd., 400 B.R. 266, 277 (Bankr. D. Nev. 2009)); In re ENNIA Caribe Holding N.V., 594 B.R. 631, 638 (Bankr. S.D.N.Y. 2018). If the JPLs fail to meet their burden of proof on any one of these seven "definitional elements," then the Cayman Proceeding is not a "foreign proceeding" within the meaning of Chapter 15. In re Ashapura, 480 B.R. at 136.

Here, there is no dispute that four of these elements are satisfied, and the Court concludes that they are. But the Objectors contend that the JPLs have failed to establish three required elements of this definition, namely, (1) the existence of a "collective proceeding"; (2) that is "under a law relating to insolvency or adjustment of debt" with foreign court control of the debtor's assets; and (3) that is "for the purpose of reorganization or liquidation." The JPLs contend that they have established all required elements, including these.

1. "Collective" Proceeding

First, as to whether the proceeding is "collective," relevant case law typically speaks in terms of the proceeding's treatment of and potential benefit to creditors, as well as emphasizing that the proceeding must concern all interests or the interests of a creditor body as a whole, not just individuals. There is no dispute that Global Cord Blood Corp.'s creditors have not received formal notice of the Cayman proceeding, nor been granted standing to participate in the Cayman Proceeding; nor has the Cayman Proceeding involved any effort to identify or classify creditors or determine how and whether to satisfy their claims. [Hr'g Tr., ECF No. 30 at 22:14–22 (The Court: "I just want to make sure I'm understanding correctly that as of now, there's no process in place or underway by which creditors are identifying themselves, claims are being stated, creditors are being grouped into categories of similar claims, distribution plans are being made, any of that, right? There's none of that happening?" Counsel for JPLs: "That is not happening today. And we're glad it's not, if you see what I mean, Your Honor.").

This reality distinguishes every prior case that the Court or the parties have identified that courts concluded involved "collective" action. One leading case, for example, instructs that a "collective proceeding is one that considers the rights and objectives of all creditors," and that is for the "general benefit of creditors." In re Ashapura, 480 B.R. at 136 (citations omitted; emphasis in original). This concept "contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action." Id. (citations omitted). And "[o]ther characteristics of a collective proceeding include: ... provisions for the distribution of assets according to statutory priorities, and a statutory mechanism for creditors to seek court review of the proceeding." Id. at 137 (internal citations omitted). Other cases agree. See, e.g., In re British Am. Ins. Co. Ltd., 425 B.R. 884, 902 (Bankr. S.D. Fla. 2010) ("For a proceeding to be collective within the meaning of section 101(23), it must be instituted for the benefit of creditors

generally rather than for a single creditor or class of creditors."); In re Betcorp, 400 B.R. at 281 (noting that a "collective proceeding is one that considers the rights and obligations of all creditors" and holding that a voluntary liquidation abroad qualifies, where the "procedure is compulsory" and "any attempt by a creditor to undermine the collective nature of liquidation is outlawed").

***8** This interpretation is informed by the "objectives" of Chapter 15 to, among other things, ensure the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors," In re Ashapura, 480 B.R. at 137 (citing 11 U.S.C. § 1501), and the "suggest[ion]" in the UNCITRAL Guide to Enactment that "a foreign proceeding must contemplate the involvement of creditors collectively," id. (quoting In re British Am. Ins., 425 B.R. at 902) (internal quotation marks omitted). Courts often contrast this required characteristic to efforts by individual creditors to advance their own interests (which is not an issue here), "for example, to a receivership remedy instigated at the request, and for the benefit, of a single secured creditor." In re Irish Bank Resolution Corp. Ltd., 2014 WL 9953792, at *14 (Bankr. D. Del. Apr. 30, 2014) (citations omitted); In re Gold & Honey, Ltd., 410 B.R. 357, 369–70 (Bankr. E.D.N.Y. 2009) (finding Israeli receivership proceeding was not collective in nature because it was primarily designed to benefit a single secured creditor). "A proceeding is collective if it considers the rights and obligations of all of a debtor's creditors, rather than a single creditor." In re Poymanov, 571 B.R. 24, 33 (Bankr. S.D.N.Y. 2017); see In re Betcorp, 400 B.R. at 281 (same). This Court has taken a broad view of what it means to "consider" the rights of creditors, holding that a foreign proceeding can be "collective" even if some creditors are not able to participate directly. See In re ENNIA Caribe, 594 B.R. at 638–39 (finding proceeding collective despite possibility creditors were not allowed to participate; reasoning that relevant foreign insolvency statute ensured proceedings were in creditors' interest); In re Ashapura, 480 B.R. at 141 ("even if there were no opportunity ... for unsecured creditors to participate, ... this may still be a collective proceeding, because it involves parties other than just one class of creditor or just one party-in-interest"). Whether or not all creditors are able to participate, for a foreign proceeding to be collective, "[a]ll creditors ... must receive notice and be able to protect their rights." In re PT Bakrie Telecom Tbk, 628 B.R. 859, 873 (Bankr. S.D.N.Y. 2021).

As noted, the JPLs acknowledge that the Cayman Proceeding at issue here does not, at least presently, seek to identify creditors, quantify and classify Global Cord Blood Corp.'s debts, or determine a scheme of distribution to creditors on account of those debts. Indeed, the creditor body has not even received formal notice of the Cayman Proceeding, and no claim submission or review process is in place. [See Hr'g Tr. at 62:13–16 ("there's been no notice to creditors .... [and] no bar date in the Cayman proceedings ... because the creditors aren't yet found to be at risk of not getting repaid")]. Nor has any "winding up" process begun, although the JPLs have been authorized to seek to wind-up the company's affairs if they deem it appropriate to do so. [ECF No. 2-1 at ¶ 8(b); Hr'g Tr. at 27:12–17 (The Court: "JPLs have the authority to seek to commence a winding down process ... [b]ut they haven't done so at this time?" Counsel for JPLs: "That's right. Winding down would result in the JPL's becoming joint official liquidators.")]. So it is clear that the Cayman Proceeding does not involve all the hallmarks of "collective" proceedings envisioned by leading cases such as Ashapura.

The JPLs nevertheless maintain that the Cayman Proceeding is "collective," because it seeks to benefit the corporation as a whole and all of its constituencies, rather than constituting a receivership or other collection activity taken on behalf of Blue Ocean or some discrete subset of claimants to satisfy just their individual interests. They further contend that there has been no need to facilitate the submission of claims or a claim review process, because they hope that Global Cord Blood Corp. remains solvent and will be able to pay all its creditors and other stakeholders, such as holders of equity. They point to no cases holding that "collective" action is present in cases involving action taken for the intended benefit of a corporation as a whole without specific reference to the existence or rights of "creditors," but they argue that that characteristic was merely a factual indicator of "collective" action in other cases, and does not preclude finding an action to be "collective" so long as it seeks to benefit a company as a whole. [Hr'g Tr. at 22:23–23:4].

The JPLs' position has some logical appeal, but the Court declines to adopt it. All relevant case law, including Ashapura, unequivocally and at length invokes a focus on and involvement of "creditors" as the main definitional hallmark of "collective" action within the meaning of section 101(23). See, e.g., In re Ashapura, 480 B.R. at 136 ("First and foremost, '[a] collective proceeding is one that considers the rights and obligations of all creditors'—that is for the general benefit of creditors.") (quoting In re Betcorp, 480 B.R. at 281); In re British Am. Ins., 425 B.R. at 902 ("the word 'collective' ... contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility

that creditors may take part in the foreign action"). As of now there is nothing about the Cayman Proceeding that is specifically oriented toward creditors. Rather, the Cayman Proceeding was commenced by concerned shareholders that say they seek to benefit the company by seeking relief and a recovery of funds that allegedly have been dissipated or improperly transferred due to an alleged fraud and other fiduciary breaches by management and/or board members.

***9** Courts' consistent focus on the existence of creditor-related proceedings abroad reflects the overall purpose and focus of Chapter 15, and avoids expanding Chapter 15 to provide Bankruptcy Court assistance for any foreign proceeding aimed at counteracting corporate fraud and making victimized corporations or shareholders whole. The Bankruptcy Code unmistakably expresses the "purpose" of Chapter 15 as being to assist foreign courts dealing with "insolvency": "The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency ...." 11 U.S.C. § 1501(a). The Code further identifies as Chapter 15's first stated "objective[ ]" to be "cooperation between" U.S. courts and "the courts and other competent authorities of foreign countries involved in cross-border insolvency cases." 11 U.S.C. § 1501(a)(1). This overarching statutory emphasis on "insolvency" explains and confirms the case law's focus on the role of and impact on creditors in determining whether a proceeding is "collective" and thus a "foreign proceeding" that is eligible to trigger Chapter 15 processes. See generally King v. Time Warner, 894 F.3d at 477 ("we look to the statutory scheme as a whole and place the particular provision within the context of that statute") (internal punctuation and citation omitted).

In reaching this conclusion, the Court considered and was given pause by the JPLs' correct observation that, as a general matter, eligibility for Chapter 15 relief is to be "broadly construed." See, e.g., In re Telecom Argentina, 2006 WL 686867, at *21. But "broad" construction cannot be limitless, and here the proposition advanced by the JPLs exceeds the bounds of any prior on-point case law, and the text of Code section 101(23) when construed in keeping with the structure and intent of the statute of which it forms an important part.

Accordingly, the JPLs here are not engaged in a "collective" action as contemplated by the Bankruptcy Code. As a result, this case is not a "foreign proceeding" as defined by section 101(23), and recognition is denied.

2. "Under a Law Relating to Insolvency or Adjustment of Debt"

Second, section 101(23) requires that the proceeding abroad arises "under a law relating to insolvency or adjustment of debt." Although this element is not beyond reasonable dispute here, the Court concludes that the Cayman Proceeding satisfies this required attribute of "foreign proceedings" within the meaning of section 101(23).

The Objectors argue that the Cayman Proceeding is founded on portions of the Companies Act that do not address insolvency or a winding up, and no winding up process has been initiated. [ECF No. 12 at ¶ 44]. Rather, they argue, relief has been granted under Companies Act sections 92(e) and 104(2), which provide remedies including replacement of incumbent management where "just and equitable," with no showing of insolvency required and no requirement that the proceeding be aimed at identifying or defining the rights of creditors. [Id. at ¶ 53].

The Cayman Companies Act, however, is a comprehensive statute dealing with multiple questions relating to corporations, including both general corporate governance and remedies for varied types of corporate malfeasance, and insolvencies and the winding up of insolvent entities. [See generally ECF No. 14-1 (complete text of Companies Act)]. The question thus becomes how granularly to define the "law" under which the foreign proceeding arises, and how loosely to construe the statute's requirement that the foreign proceeding simply be under a law that "relat[es] to" insolvency or adjustment of debt. The Cayman Companies Act as a whole unquestionably includes provisions that satisfy this element of the definition of "foreign proceeding," but the subsections that have been invoked in the Cayman Proceeding at issue here do not invoke any of the Companies Act provisions that most clearly meet this requirement. The JPLs, however, have been authorized to commence a winding up process if they decide that would be appropriate, and that process, if commenced, appears more likely to constitute or resemble a liquidation.

The relevant test is not whether the currently pending proceeding concerns insolvency or adjustment of debtors, or even whether the current proceeding in some sense relates to those objectives, but rather whether the proceeding is being brought under a "law" that "relat[es] to" insolvency or adjustment of debt. Further, section 101(23) is to be "broadly construed." E.g., In re MMG LLC, 256 B.R. at 550. This guidance counsels against an unduly grudging application of this flexibly worded test by narrowly examining whether the specific subsections of the governing Cayman statutory scheme that are presently being applied redress insolvency or creditor rights. See In re Betcorp, 400 B.R. at 282 (for law to be "related to" insolvency, company need not be insolvent or contemplating debt adjustment; unified Australian Corporations Act that governs both insolvencies and other corporate matters suffices); In re Ashapura, 480 B.R. at 138 ("The fact that a proceeding has a 'unified structure of the external administration provisions' favors a finding that the statute meets this criterion.") (citing In re Betcorp, 400 B.R. at 282). Rather, given the flexibility encouraged by merely requiring that the governing law "relat[e] to" insolvency or the adjustment of debt, the Court concludes that the Cayman Proceeding meets this aspect of the section 101(23) test for foreign proceedings.

3. "For the Purpose of Reorganization or Liquidation"

***10** The final required element of section 101(23)'s definition of "foreign proceeding" is whether the proceeding abroad is "for the purpose of reorganization or liquidation." In re Ashapura, 480 B.R. at 136; In re ENNIA Caribe, 594 B.R. at 638. The Cayman Proceeding is not. The JPL Appointment Order does not confer powers of reorganization. Rather, the JPLs have been granted powers for the purpose of preserving Global Cord Blood Corp.'s assets and investigating and reporting on the company's affairs.

As discussed above, no "winding up" process has been commenced in the Cayman Proceeding, nor is any effort underway to "liquidate" corporate assets or the corporation itself. The JPLs do not even contend that, at this time, a "liquidation" is being pursued, or is the current purpose of the proceeding. Indeed, the JPLs say they seek to avoid the need for such measures. [Hr'g Tr. at 22:14–22]. The Court views this reality as fatal to the JPLs' effort to satisfy this element based on the possibility that a liquidation or reorganization may be necessary in the future if the JPLs' current asset recovery and corporate governance efforts fail. Cf. In re British Am. Ins., 425 B.R. at 906 (because the foreign court "had ordered neither a winding up nor a reorganization ... [the proceeding] was not 'for the purpose of reorganization or liquidation' and therefore was not a 'foreign proceeding' ").

The JPLs argue that courts routinely grant Chapter 15 recognition to Cayman proceedings brought under the Companies Act. [ECF No. 2 (citing In re Ocean Rig UDW Inc., 570 B.R. 687, 701–02 (Bankr. S.D.N.Y. 2017); In re Suntech Power Holdings Co., Ltd., 520 B.R. 399 (Bankr. S.D.N.Y. 2014))]. Yet, while recognition is routine in appropriate circumstances, it is not indiscriminate. On this point, the Objectors appear correct that all instances of recognition of Cayman Companies Act proceedings have involved Cayman proceedings that, in one way or another, directly concerned creditor issues, entity debts, or a winding up or liquidation of the company in question. See In re Ocean Rig, 570 B.R. at 701–02 ("This Court and others have previously held that insolvency or debt adjustment proceedings (including provisional liquidations) and schemes of arrangement under Cayman Islands law qualify as foreign proceedings under chapter 15 of the Bankruptcy Code."); In re Millard, 501 B.R. at 647 (recognizing Cayman bankruptcy proceeding involving insolvent individuals).

Frequently when Cayman proceedings are recognized, the Grand Court has entered a winding up order and/or appointed an official liquidator or joint official liquidators. See In re Platinum Partners Value Arbitrage Intermediate Fund Ltd., Case No. 17-12269, Dkt. Nos. 3-2, 12 (Bankr. S.D.N.Y. 2017) (recognizing Cayman proceeding where Grand Court entered winding up order and appointed official liquidators in liquidation proceeding started by a creditor); In re AJW Offshore Ltd., Case No. 13-70078, Dkt. Nos. 3-1, 31 (Bankr. E.D.N.Y. 2013) (recognizing Cayman proceeding where Grand Court entered winding up order and appointed official liquidators in Companies Act § 124 voluntary liquidation); In re Saad Invs. Fin. Co. (No. 5) Ltd., Case No. 09-13985 Dkt. Nos. 2-3, 47 (Bankr. D. Del. 2009) (recognizing Cayman proceeding where Grand Court entered winding up order and appointed official liquidators).

U.S. courts also frequently grant the recognition petitions of provisional liquidators when the underlying proceeding concerns insolvency, including where JPLs are appointed under Companies Act section 104(3) (on the grounds that "the company is or is likely to become unable to pay its debts," and "the company intends to present a compromise or arrangement to its creditors") or where the Grand Court grants the JPLs authority under Companies Act section 86 (the power to enter into a "compromise or arrangement" between a company and its creditors). See In re Luckin Coffee Inc., Case No. 21-10228, Dkt. No. 48 (Bankr. S.D.N.Y. Feb. 5, 2021) (recognizing Cayman proceeding where Grand Court appointed JPLs under § 104(3) and conferred authority under § 86); In re Suntech, 520 B.R. at 406 (recognizing Cayman proceeding where Grand Court appointed JPLs with powers pursuant to § 86); In re Ocean Rig, 570 B.R. 687, 690–91, Case No. 17-10736 Dkt. 1 at 5–6 (Bankr. S.D.N.Y. 2017) (recognizing Cayman proceeding where Grand Court appointed JPLs with power to "consider," "promote," and "enter into" restructuring agreement between company and its creditors); In re LDK Solar Co., Ltd., Case No. 14-12387, Dkt. Nos. 3, 43 (Bankr. D. Del. 2014) (recognizing Cayman proceeding where Grand Court granted petition brought under Companies Act § 92(d) and appointed JPLs under § 104(1) with authority to promote a scheme of arrangement under § 86).

***11** Here, the JPLs note that, on Blue Ocean's request for alternative relief, the Grand Court has authorized the JPLs "to commence winding up proceedings," [ECF No. 2-1 at ¶ 8(b)], if in their discretion they determine it appropriate to do so, and without the need for "further sanction or order of the [Grand] Court," [id. at ¶ 8]. The JPLs acknowledge they have not done so and hope that they never will. [Hr'g Tr. at 22:14–22]. The JPLs cite no case finding such an alternative and not yet in-progress possibility satisfies the requirement of section 101(23) that a proceeding be for purposes of liquidation. The Court concludes that where, as here, the JPLs aver that they hope never to need to liquidate the company or even its assets, the mere possibility that a liquidation could occur down the road is not sufficient to make the "purpose" of the Cayman Proceeding the "liquidation" of the corporation or its affairs.

If and when the Cayman Proceeding shifts to an active liquidation process, this element may well be satisfied. Cf. In re Betcorp, 400 B.R. at 285 (element satisfied where declarant stated "that the purpose of the winding up is to liquidate" the company). But at present, the focus of the JPLs' efforts and of the Cayman Proceeding is to investigate possible wrongful dissipation of corporate assets, and to take appropriate remedial steps that the JPLs hope will succeed without any liquidation being required. That simply does not constitute "liquidation" according to any definition known to the Court or identified by the JPLs.

The JPLs also argue, without authority, that they are engaged in a corporate "reorganization" because the Cayman Proceeding has removed prior controlling board members from authority and conferred broad powers on the JPLs. [ECF No. 26 at ¶ 17 (citing ECF No. 27 at ¶¶ 39–43); Hr'g Tr. at 33:10–12]. Be that as it may, the JPLs cite no authority deeming the relief now being sought by the JPLs and the measures they are taking to constitute a "reorganization" of the corporation itself. Nothing in the portions of the Cayman Companies Act under which the JPLs have been appointed or vested with authority characterizes them as being engaged in a corporate "reorganization." [See ECF Nos. 3-3 at ¶¶ 70, 71.1 (petitioning the Grand Court for relief "pursuant to section 95(3)" and, alternatively, "92(e)"), 2-1 at 1 (appointing JPLs "pursuant to section 104(2)")]. Compare Companies Act § 95(3) (just and equitable winding up), id. at § 92(e) ("company may be wound up by the Court if ... just and equitable"), and id. at § 104(2) (providing for appointment of JPLs where "necessary" to "prevent dissipation or misuse of the company's assets" or "prevent mismanagement or misconduct" by company directors); with id. at § 92(d) ("company may be wound up by the Court if ... unable to pay its debts"), id. at § 104(3) (providing for appointment of JPLs where "company is or is likely to become unable to pay its debts"), and id. at § 86 (court may sanction a "compromise or arrangement" between a company and its creditors; defining "arrangement" to include "a reorgani[z]ation of the share capital of the company"). The JPLs have not identified any contemplated liquidation or identification and compensation of creditors, as noted above; nor have they pointed to any modified capitalization or change in stock ownership or shareholder entitlements. Rather, what the JPLs point to—the Grand Court's conferring of various investigatory and other corporate powers on the JPLs, and the JPLs' investigation and anticipated pursuit of allegedly misdirected corporate funds and remedies for alleged self-interested transactions by corporate insiders—does not constitute a "reorganization" under any authority identified by the JPLs or known to the Court. Nor do these measures resemble the common legal or layperson understandings of the word "reorganization." See Reorganization, Black's Law Dictionary (11th ed. 2019) (defining "reorganization" as "[a] financial restructuring of a corporation, esp. in the repayment of debts, under a plan created by a trustee and approved by a court"); see also Merriam-Webster's Collegiate Dictionary 991 (10th ed. 1997) (defining "reorganization" as "the act or process of reorganizing" and defining the verb "reorganize" as "to organize again or anew").

***12** The conclusion that the Cayman Proceeding is not for the "purpose of reorganization or liquidation" is reinforced by reference to the UNCITRAL Enactment Guide, which is an appropriate source for construing the meaning of Chapter 15's provisions because Chapter 15 is designed to implement UNCITRAL consistent with its usage internationally. See 11 U.S.C. §§ 1501 ("The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency," adopted by the United Nations Commission on International Trade Law ("UNCITRAL") in 1997), 1508 ("In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."); In re Ashapura, 480 B.R. at 135, 137 (relying on UNCITRAL and Enactment Guide). In relevant part, the Enactment Guide states: "Some types of proceeding that may satisfy certain elements of the definition of foreign proceeding ... may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganization or liquidation." U.N. Comm'n on Int'l Law, UNCITRAL Model Law on Cross–Border Insolvency with Guide to Enactment, ¶ 77 (2014). Further, among the proceedings contemplated to be ineligible are those, like the Cayman Proceeding, "designed to prevent dissipation and waste, rather than to liquidate or reorganize [an] insolvency estate," as well as "proceedings designed to prevent detriment to investors rather than to all creditors (in which case the proceeding is also likely not to be a collective proceeding)." Id. Furthermore, proceedings may be ineligible where "powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization, for example, the power to do no more than preserve assets." Id.

This conclusion is further reinforced by the actions of the Cayman Grand Court itself in the Cayman Proceeding, which do not communicate a belief that that proceeding relates to insolvency or is in need of this Court's aid under Chapter 15. As noted above, the JPLs were not appointed under Cayman Companies Act sections 104(3), 92(d) or 86, which concern the creation of an arrangement or compromise with creditors—the Companies Act provisions most akin to U.S. reorganization proceedings. Rather, the Grand Court appointed the JPLs under sections 92(e), which implicate the Grand Court's "just and equitable" powers, and 104(2), with its threefold purpose (i) to prevent the dissipation or misuse of the company's assets; (ii) to prevent the oppression of minority shareholders; or (iii) to prevent mismanagement or misconduct on the part of the company's directors. [ECF Nos. 3-5 at ¶¶ 2, 13, 14 ("In this case, reliance is placed on subsection[s] ... [104](2)(i) and (iii)"), 2-1 at 2]; accord Companies Act §§ 92(e), 104(2)(b). And while the Appointment Order authorized the JPLs to seek the assistance of courts in other nations without limitation, that order mentioned only the PRC and Hong Kong as specifically contemplated jurisdictions whose assistance might be sought, and referenced as a contemplated objective "obtaining information to assist [the JPLs] in their investigations" [ECF No. 2-1 at ¶ 10]—exactly what the JPLs seek to do through the Texas 1782 Proceeding. Thus, nothing in the Appointment Order signals that the Cayman Grand Court understands itself to be presiding over an insolvency proceeding or contemplating U.S.-based assistance under Chapter 15.

Finally, the JPLs' position is not saved by their citation of Millard and that case's citation of the Collier treatise's observation that insolvency need not be proved to proceed under Chapter 15, or that solvent petitioners in financial distress can be eligible for Chapter 15 relief. [Hr'g Tr. 19:1–24]. Millard is materially distinguishable on its facts, and does not support the conclusion the JPLs propose here. In Millard, the party opposing recognition argued that, even though the proceedings in the Cayman Islands were styled and pursued as insolvency proceedings, the foreign representatives in that case had not in fact established "insolvency" because many debts at issue were tax obligations that "are not provable as debts in the Caymans." In re Millard, 501 B.R. at 648. Judge Gerber, then of this Court, held that he "can't agree" that a U.S. court should engage in its own solvency inquiry and grant recognition only if the U.S. court concludes insolvency is present. Id. Further, the passage from Millard emphasized by the JPLs here (which drew on Collier) was not a blanket pass to Chapter 15 recognition of all Cayman proceedings, but rather observed that the "words 'under a law relating to insolvency or adjustment of debt' in section 101(23) emphasize that Chapter 15 is available not only to debtors that are technically insolvent or facing liquidation, but also to debtors who are in distress and may need to reorganize." Id. at 649–50 (quoting 8 Collier ¶ 1501.03[1] (16th ed. 2013)). This Court agrees, but reorganization and/or debt adjustment was clearly contemplated on the facts of Millard, where the Cayman proceeding was explicitly styled as an insolvency or debt-adjustment proceeding. Millard accordingly does not require recognition here, where no such effort is underway and the JPLs characterize the Company as solvent and seeking to avoid liquidation or reorganization, notwithstanding that the JPLs believe the Company has incurred a major misappropriation that the JPLs seek to remedy. This conclusion is consistent with the very next sentence of Millard, which emphasizes it is the "nature of the proceeding that is the subject of the request for assistance ... that governs the inquiry." Id. at 650 (emphasis in original). Here, careful review of the record shows that the Cayman Proceeding does not satisfy the definitional requirements of section 101(23) for the reasons described at length above, in essence, because the Cayman Proceeding does not involve fixing or adjusting debts or creditors' rights, and instead serves the current purpose of

investigating suspected misconduct, and locating and recovering corporate assets.

***13** Accordingly, recognition is denied for the further and independent reason that the Cayman Proceeding is not for the purpose of reorganization or liquidation.

CONCLUSION

For the reasons stated above, the Court denies the JPLs' Chapter 15 Petition for Recognition and Related Relief without prejudice to future applications by the JPLs or other authorized representatives, if warranted by future developments in the Cayman Proceeding or elsewhere. Counsel for Golden Med is to settle a proposed order to that effect.

It is so ORDERED.

All Citations

Slip Copy, 2022 WL 17478530

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607 B.R. 160
United States Bankruptcy Court, S.D. New York.

IN RE: FOREIGN ECONOMIC INDUSTRIAL BANK LIMITED, "VNESHPROMBANK" LTD. Debtor in a Foreign Proceeding.
In re: Larisa Markus, Debtor in a Foreign Proceeding.

Case No. 16-13534 (MG), Case No. 19-10096 (MG)
|
Signed October 8, 2019

Synopsis

Background: In two Chapter 15 cases, attorney representing foreign debtors in underlying Russian foreign proceedings filed motions to vacate orders recognizing each of the underlying proceedings as a foreign main proceeding.

The Bankruptcy Court, Martin Glenn, J., held that post-recognition relief was not appropriate.

Motions denied.

Procedural Posture(s): Motion to Set Aside or Vacate.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER DENYING MOTIONS TO VACATE RECOGNITION AS FOREIGN MAIN PROCEEDINGS

MARTIN GLENN, UNITED STATES BANKRUPTCY JUDGE

Pending before the Court in each of these two chapter 15 cases are motions to ***163** vacate prior orders entered by Judge Vyskocil recognizing each of the underlying Russian foreign proceedings as a foreign main proceeding. For ease of reference, the Court will refer to these two cases as the "Markus Case" and the "Bank Case." (*See* "Markus Motion to Vacate," *Markus Case*, ECF Doc. # 70; "Bank Motion to Vacate," *Bank Case*, ECF Doc. # 106). On June 24, 2019, both cases were transferred to me. Both motions were filed by attorney Victor Worms ("Worms"). Worms represents Larisa Markus, the foreign debtor in the Markus Case. Worms claims that he represents the Bank in the Bank Case, but the Foreign Representative in the Bank Case disputes that Worms was ever authorized to represent Foreign Economic Industrial Bank, Ltd. ("Bank") in the Bank Case. [1]

The Court will assume without deciding for purposes of this decision only that Worms represents the Bank in connection with the Bank Motion to Vacate. Both motions raise substantially similar arguments and both motions are resolved in this Opinion.

For the reasons explained below, the Markus Motion to Vacate and the Bank Motion to Vacate are **DENIED.**

I. BACKGROUND

On March 11, 2016, on application of the Central Bank of Russia, the Moscow Arbitration Court declared the Bank insolvent and commenced a bankruptcy proceeding under the Russian Federation Federal Law No 127-FZ "On Insolvency (Bankruptcy)" (the "Russian Bankruptcy Law"). ("Bank Russian Insolvency Proceeding".) The Arbitration Court appointed the State Corporation "Deposit Insurance Agency" ("DIA" or "Bank Foreign Representative") as the trustee for the Bank. Thereafter, in accordance with Russian Bankruptcy Law, the DIA on March 16, 2016 sent a report to the Moscow Arbitration Court designating Korzhenkova Natalia Igorevna as the authorized representative, with power of attorney, to act on behalf of the DIA in respect of the Russian Insolvency Proceeding. (Russian Counsel Declaration at Ex. C, ECF Doc. # 5-3.) On November 10, 2016, the DIA sent a report to the Moscow Arbitration Court indicating that as of November 7, 2016 Khalizev Aleksandr Victorovich succeeded Korzhenkova as the authorized representative to act on behalf of the DIA in respect of the Russian Insolvency Proceeding.

On December 19, 2016, the DIA filed a *Verified Petition Under Chapter 15 for Recognition of Foreign Main Proceeding.* ("Bank Petition," *Bank Case*, ECF Doc. #1.)

On April 19, 2016, Bank VTB 24, a creditor of Markus, filed an application for the commencement of a personal bankruptcy proceeding against Markus under the Russian Bankruptcy Law. The application for commencement was granted on April 22, 2016, by the Moscow Arbitrazh Court. On October 18, 2016, the Moscow Arbitrazh Court entered an order granting the application of Bank VTB 24, initiating a debt restructuring procedure in respect of Markus and appointing the Markus Foreign Representative as Markus' financial administrator (the "Commencement Order"). On May 25, 2017, the Moscow Arbitrazh Court determined that there was no evidence that Markus was eligible for a restructuring of debts and that there was evidence that Markus is bankrupt and initiated a procedure to liquidate her assets. By the same judgment, the Moscow Arbitrazh Court appointed the Markus Foreign ***164** Representative as Markus' financial administrator to preside over the liquidation.

On January 10, 2019, Yuri Vladimirovich Rozhkov ("Markus Foreign Representative"), the financial administrator and foreign representative of Larisa Markus (the "Debtor" or "Markus") in Markus' pending insolvency proceeding (the "Markus Russian Insolvency Proceeding") under the Russian Federation Federal Law No 127-FZ "On Insolvency (Bankruptcy)" (the "Russian Bankruptcy Law"), filed a *Verified Petition Under Chapter 15 for Recognition of Foreign Main Proceeding.* ("Markus Petition," *Markus Case*, ECF Doc. # 2.) Markus is a Russian citizen incarcerated in Moscow. (*Id.* ¶ 6.) The Markus Petition stated that venue was proper in the Southern District Bankruptcy Court because of two actions pending against Markus in this district: *HSBC Bank USA, N.A. v. LM Realty 31B, LLC et al.*, Case No. 850323/2018 (New York Sup. Ct. 2018) and *BG Atlantic, Inc. v. Larisa Markus*, Case No. 655892/2016 (New York Sup. Ct. 2017). (Markus Petition at 2.) Markus also owns assets in New York, including shares of a corporation registered in New York. The Markus Foreign Representative also has an unapplied attorney retainer that was held for the benefit of Markus' estate. (*Id.*) The Markus Petition states that Markus does not have a place of business or assets in the United States. (*Id.*) As will be discussed in resolving a separate pending motion, Markus in fact has substantial assets in New York as a result of a transfer of funds by Markus resulting from the sale of Markus' London apartment; the assets were transferred to and held in a New York bank account of a revocable trust for which Markus was the settlor.

On May 27, 2019, the Markus Foreign Representative took steps to terminate the revocable trust; Worms disputes that the termination was effective, an issue that will be dealt with in a separate opinion. If the termination was effective, the trust assets reverted to Markus' bankruptcy estate, which the Foreign Representative seeks to recover in a pending turnover motion.

On May 28, 2019, Worms appeared as counsel for Markus in the Markus Case. (ECF Doc. # 55.) As a result of that notice of appearance, Markus, through Worms, has appeared generally in the Markus chapter 15 Case. As a result of Worms' appearance, Markus became a party to the Markus Case; Worms thereby became obligated to fulfill all responsibilities of counsel appearing in an any case in this Court. Worms' disregard of his professional responsibilities in respect of discovery undertaken on behalf of the Markus Foreign Representative has resulted in a substantial sanctions award against Worms. Markus and Worms have repeatedly violated orders entered in this case.

A. Recognition Was Granted in the Bank Case and the Markus Case

On February 10, 2017, Judge Vyskocil, before whom both the *Markus Case* and the *Bank Case* were pending before being transferred to me on June 24, 2019, held a hearing on the Verified Petition in the *Bank Case*. ("Recognition Hearing," *Bank Case*, ECF Doc. # 27.) The Court ruled that the Foreign Representative met the requirements for recognition pursuant to section 1517(a). (*Id.* at 19:1-11.) The Court noted that it received all required documentation, including the Sokolov Declaration. (*Id.* at 19:10-11.) On February 15, 2017, the Court entered an order granting recognition of the foreign main proceeding. ("Bank Foreign Main Proceeding Order," *Bank Case*, ECF Doc. # 24.)

On February 27, 2019, Judge Vyskocil held a hearing on the Verified Petition in the *Markus Case*. ("Recognition Hearing," ***165** *Markus Case*, ECF Doc. # 24.) At the hearing, the Foreign Representative's counsel stated that the Verified Petition was unopposed. (*Id.* at 14: 9-15.) The Sokolov and Rozhkov Declarations in support of the Verified Petition were offered and admitted into evidence and no one requested to cross-examine the declarants. (*Id.* at 18-25.) Sokolov was present at the hearing to be cross-examined, if there was an objection. (*Id.* at 15: 9-10.)

On April 1, 2019, Judge Vyskocil entered an order granting recognition and relief in aid of a foreign main proceeding pursuant to sections 105(a), 1517, 1520, and 1521. ("Recognition Order," *Markus Case*, ECF Doc. # 29.) The Court found that, pursuant to section 1514, appropriate and timely notice of the filing of the Petition and Hearing was given by the Foreign Representative, and that such notice was sufficient for all purposes, and no further notice was necessary or required. (*Id.* ¶ A.) The Court also found that all interested parties had an opportunity to be heard at the hearing. (*Id.* ¶ B.) Moreover, the Foreign Representative satisfied the requirements of section 1515 and Fed. R. Bankr. P. 1007(a)(4) because the Debtor is subject to a pending foreign proceeding under section 101(23), and the Russian Insolvency Proceeding is pending in Moscow, Russia where the Debtor's center of main interests is located. (*Id.* ¶ G(i)-(ii).) Accordingly, the Court found that the Russian Insolvency Proceeding is a "foreign main proceeding" under section 1502(4), and entitled to recognition as a foreign main proceeding pursuant to section 1517(b)(1). (*Id.* ¶ G(ii).) Lastly, the Court found that the chapter 15 case was properly commenced under sections 1504 and 1515, the Petition satisfies the requirements of section 1515, and recognition is not manifestly contrary to U.S. public policy. (*Id.* at (iv)-(vii).)

B. Worms Moved to Vacate Recognition

On June 18, 2019, Worms filed a Motion to Vacate the Recognition Order, supported by a Memorandum of Law and Declaration. ("Markus Motion to Vacate," "Worms Declaration," and "Markus Motion to Vacate MOL," *Markus Case*, ECF Doc. # 70.) On July 3, 2019, Worms filed a similar Motion to Vacate the Recognition Order on behalf of the Bank, supported by a Memorandum of Law and Declaration. ("Bank Motion to Vacate," "Worms Declaration," and "Bank Motion to Vacate MOL," *Bank Case*, ECF Doc. ## 106-107.) Worms argues that the Order should be vacated under Federal Rule of Civil Procedure 60(b) because the Bankruptcy Court did not have personal jurisdiction over Markus. (Markus Motion to Vacate MOL at 5.) Worms argues that service of the chapter 15 petition did not comply with Federal Rule of Civil Procedure 4(f) and the Hague Convention. (*Id.*) Moreover, Worms argues that the Order should be vacated because the Bankruptcy Court did not conduct an evidentiary hearing before the Order was granted. (*Id.* at 15.) Lastly, Worms argues that the Order should be vacated under the public policy exception in section 1506 because the Russians are using chapter 15 proceedings to undermine the United States judicial system. (*Id.* at 19-21.)

The Bank moved on similar grounds to Markus but included one additional argument, namely that the Order should be vacated because it was not eligible to be a debtor under section 109(a) since it had no property in the United States on the date the Petition was filed. (Bank Motion to Vacate MOL at 22.)

On July 10, 2019, the Foreign Representative in the *Markus Case* filed an Opposition to Markus's Motion to Vacate the Recognition Order, supported by a Declaration ***166** from Sergey S. Sokolov. ("Markus Opposition," *Markus Case*, ECF Doc. #80; "Sokolov Declaration," *Markus Case*, ECF Doc. #81.) On August 16, 2019, the Foreign Representative in the *Bank Case* filed a Memorandum of Law in Opposition to the Motion to Vacate the Bank's Order. ("Bank Opposition," *Bank Case*, ECF Doc. # 133.) The oppositions argue that Markus and the Bank are not entitled to relief under Federal Rule 60(b)(4) because the Court is not exercising personal jurisdiction over them. (Markus Opposition at 7; Bank Opposition at 15-23.) Instead, they argue this is not an extraordinary case meriting Rule 60(b)(6) relief because a Russian court has already established jurisdiction over her, and this Court is recognizing that foreign proceeding. (Markus Opposition at 7-8, 17-18; Bank Opposition at 15-23.) The Foreign Representative also properly notified Markus of the Petition and hearing pursuant to Bankruptcy Rule 2002(q)(1). (Markus Motion to Vacate MOL at 16-17.) Moreover, no evidentiary hearing was required to determine that Russia is Markus' COMI and Worms has failed to put forward any arguments establishing why the public policy exception applies. (*Id.* at 23-25.)

On July 15, 2019, Worms filed a Reply Motion in further support of Markus' Motion to Vacate the Order. ("Markus Reply," *Markus Case*, ECF Doc. # 85.) On September 3, 2019 Worms filed a Reply Memorandum of Law in further support of the Bank Motion to Vacate the Order. ("Worm's Reply," *Bank Case*, ECF Doc. # 139.)

II. LEGAL STANDARD

A. 11 U.S.C. § 109(a)

Section 109(a) sets forth the requirements to be eligible to be a debtor under the Bankruptcy Code. *See* 2 COLLIER ON BANKRUPTCY ¶ 109.01 (16th ed. 2019). Section 109(a) provides that "[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." 11 U.S.C. § 109(a). The Second Circuit has held that section 109(a) applies to chapter 15 proceedings. *See Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 247 (2d Cir. 2013). An entity or individual must be eligible to be a debtor under section 109(a) before the court can grant recognition of its foreign proceeding. *See id.*

Bankruptcy courts within the Second Circuit have found that section 109(a) sets a low bar to satisfy the eligibility requirements. *See* 8 COLLIER ON BANKRUPTCY ¶ 1517.01 (16th ed. 2019). Section 109(a) does not specify how much property must be present or when or for how long property has had a situs in New York. *See In re Berau Capital Res. Pte Ltd*, 540 B.R. 80, 82 (Bankr. S.D.N.Y. 2015). Bank accounts, attorney retainers deposited in New York, or causes of action owned by the foreign debtor with a situs in New York have all satisfied the "property in the United States" eligibility requirement. *See id.*; *In re Octaviar Admin. Pty Ltd*, 511 B.R. 361, 372 (Bankr. S.D.N.Y. 2014) ("Octaviar also has property in the United States in the form of an undrawn retainer in the possession of the Foreign Representatives' counsel."); *see also In re Yukos Oil*, 321 B.R. 396, 407 (Bankr. S.D. Tex. 2005) (holding that funds deposited by debtor in a Texas account were sufficient to confer eligibility under section 109(a)); *In re Glob. Ocean Carriers*, 251 B.R. 31, 39 (Bankr. D. Del. 2000) (holding that any debtor who has paid a retainer that is not fully earned can be eligible for debtor status under section 109(a)); 2 COLLIER ON BANKRUPTCY ¶ 109.02 (16th ed. 2019) ***167** ("[C]ourts have been willing to entertain title 11 cases brought by or against foreign persons in the United States where the debtor's nexus to the United States was as tenuous as ownership of stock, a clearing account, or bank account.").

B. 11 U.S.C. § 541

Upon the filing of a bankruptcy petition under chapters 7, 11, 12 and 13 of the Bankruptcy Code, a bankruptcy estate consisting of all property interests of the debtor is created. *See* 11 U.S.C. § 541. However, section 541 does not apply to chapter 15 cases.

See In re Berau Capital Res. Pte Ltd, 540 B.R. at 83 n.4 ("In a chapter 15 case, there is no 'estate'; nevertheless, section 1520(a) imposes an automatic stay on any action with respect to the debtor's property located in the United States."); *In re British Am. Ins. Co. Ltd.*, 488 B.R. 205, 222-23 (Bankr. S.D. Fla. 2013) ("In light of the United States court's ancillary role under chapter 15, there is no estate created here in a chapter 15 case. Section 541(a), establishing the estate under all chapters other than chapter 9, does not apply."). While no estate is created in a chapter 15 case, that chapter provides broad relief to a foreign representative with respect to property of the debtor in the United States. The record shows that Larissa Markus, directly or indirectly, owns and controls many millions of dollars of property in the U.S. and specifically in New York. The full extent of her holdings in New York has been largely concealed through stonewalling of legitimate discovery undertaken by the Foreign Representative and his counsel. Issues concerning that discovery abuse by Markus' attorneys, agents and representatives will be dealt with in separate orders.

C. Rule 60(b)

Civil Rule 60(b), made applicable to bankruptcy proceedings by Rule 9024 of the Federal Rules of Bankruptcy Procedure, governs a request for relief from a final judgment, order, or proceeding. *See In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 203 n.15 (Bankr. S.D.N.Y. 2017). Circumstances warranting relief from an order under Rule 60(b) include: mistake, inadvertence, surprise, excusable neglect, newly discovered evidence and fraud. FED. R. CIV. P. 60(b)(1)-(6). However, the Second Circuit has repeatedly found that "[a] motion for relief from judgment is generally not favored and is properly granted only upon a showing of exceptional circumstances." *United States v. Int'l Bd. of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001); *United States v. Cirami*, 535 F.2d 736, 738 (2d Cir. 1976).

Bankruptcy courts have found that Rule 60(b) does not apply to vacating orders granting recognition of a foreign proceeding because section 1517(d) of the Bankruptcy Code already provides the standard for a request to terminate or modify recognition. *See In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. at 203. Section 1517(d) provides that "[t]he provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist ...." 11 U.S.C. § 1517(d). Moreover, courts have been reluctant to apply Rule 60(b) to a chapter 15 case because it does not provide sufficient "flexib[ility] to achieve the goals of chapter 15." *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. at 203; *see also In re Rede Energia S.A.*, 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014) ("Chapter 15 thus provides courts with broad, flexible rules to fashion relief that is appropriate to effectuate the objectives of the chapter in accordance with comity."); ***168** *In re Cozumel Caribe, S.A. de C.V.*, 508 B.R. 330, 334–35 (Bankr. S.D.N.Y. 2014) ("Under Bankruptcy Code section 1517(d), recognition of a foreign proceeding can be modified or terminated 'if it is shown that the grounds for granting it were fully or partially lacking and or have ceased to exist,' after consideration of prejudice to parties that have relied on the recognition order.... The same factors relevant in determining whether to grant recognition are therefore relevant in determining whether to terminate a recognition order."); *In re Ashapura Minechem Ltd.*, No. 11-14668(JMP), 2011 WL 5855475, at *5 (Bankr. S.D.N.Y. Nov. 22, 2011) (stating that a recognition order could be terminated "in the interests of justice").

D. Chapter 15's Framework for Recognition of Foreign Proceedings

Under chapter 15, a case ancillary to a foreign proceeding is commenced by filing a petition for recognition of a foreign proceeding. *See* 11 U.S.C. § 1504. Under section 101(23), a foreign proceeding is defined as: "(i) a proceeding; (ii) that is either judicial or administrative; (iii) that is collective in nature; (iv) that is in a foreign country; (v) that is authorized or conducted under a law related to insolvency or the adjustment of debts; (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and (vii) which proceeding is for the purpose of reorganization or liquidation." 8 COLLIER ON BANKRUPTCY ¶ 1517.01 (16th ed. 2019). For a foreign proceeding to gain recognition under chapter 15, the individual or entity seeking recognition must be a "foreign representative," defined by the Code as "a person ... authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24).

Section 1517 of the Bankruptcy Code provides the following regarding recognition of foreign proceedings:

(a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—

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

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

(3) the petition meets the requirements of section 1515

(b) Such foreign proceeding shall be recognized—

(1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or

(2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.

11 U.S.C. § 1517(a) & (b).

The language of this section makes clear that the decision whether to grant recognition is not dependent upon any findings about the nature of the foreign proceeding as previously mandated by section 304(c)(2). *See* 8 COLLIER ON BANKRUPTCY ¶ 1517.01 (16th ed. 2019). Instead, if the three requirements of this section are met, the court is obligated to grant recognition. *See id.* Moreover, case law reveals that there is no requirement that the hearing be an evidentiary hearing.

" '[F]oreign main proceeding' means a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4). The Bankruptcy Code does not define ***169** "center of its main interests"; however, the Code does provide that "[i]n the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c); *see also In re Ran*, 607 F.3d 1017, 1022 (5th Cir. 2010). With presentation of evidence, however—especially evidence indicating that the recognition proceedings were commenced for an improper purpose—the statutory presumption of section 1516(c) may be overcome. *In re SPhinX, Ltd.*, 371 B.R. 10, 19 (S.D.N.Y. 2007). While the Code does not define "habitual residence," domestic and foreign courts interpret it similarly to the United States concept of "domicile" (*i.e.*, "physical presence in a location coupled with intent to remain there indefinitely." *In re Ran*, 607 F.3d at 1022. "One acquires a 'domicile of origin' at birth, and that domicile continues until a new one (a 'domicile of choice') is acquired ... To defeat the presumption of continuing domicile and establish a new domicile, an individual must demonstrate residence in a new state and an intention to remain in that state indefinitely." *Id.* at 1022.

With respect to individual debtors' COMI, courts have considered: "(1) the location of a debtor's primary assets; (2) the location of the majority of the debtor's creditors; and (3) the jurisdiction whose law would apply to most disputes." *In re Ran*, 607 F.3d at 1024; *In re Loy*, 380 B.R. 154, 161 (Bankr. E.D. Va. 2007).

Section 1516 also establishes a presumption of the authenticity of documents submitted with the recognition petition, which the court may decline to give great weight if other evidence points to their lack of authenticity. 11 U.S.C. § 1516(b); 8 COLLIER ON BANKRUPTCY ¶ 1516.02 (16th ed. 2019).

Recognition of a foreign main proceeding may only occur upon a showing that: (1) there is a foreign proceeding pending in the country where the debtor has the center of its main interests and (2) the further requirements of section 1515 are met. 8 COLLIER ON BANKRUPTCY ¶ 1515.02 (16th ed. 2019). These requirements include presentation of (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 proceeding and appointment of the representative; or (3) in the absence of (1) or (2), evidence which the court deems sufficient to confirm the existence of the foreign proceeding and appointment of the foreign representative. 11

U.S.C. § 1515(b). The petition must also be accompanied by a statement identifying all known foreign proceedings with respect to the debtor, 11 U.S.C. § 1515(c), and if applicable, a translation of the evidentiary materials into English. 11 U.S.C. § 1515(d).

Recognition of a foreign main proceeding is limited by section 1506. Section 1506 provides that the court may "refus[e] to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. Courts have held that Congress's use of the word "manifestly" requires the statute to be interpreted restrictively. *See Micron Tech. v. Qimonda AG*, 433 B.R. 547, 567–70 (E.D.Va.2010) (reviewing decisions to date); *see also In re British Am. Isle of Venice (BVI), Ltd.*, 441 B.R. 713, 717 (Bankr. S.D. Fla. 2010). Accordingly, "[S]ection 1506 should be invoked only under exceptional circumstances concerning matters of fundamental importance to the United States." *Id.* In determining whether to apply section 1506, courts have focused on two factors: "(1) whether the foreign proceeding was procedurally ***170** unfair; and (2) whether the application of foreign law or the recognition of a foreign main proceeding under Chapter 15 would severely impinge the value and import of a United States statutory or constitutional right, such that granting comity would severely hinder United States bankruptcy courts' abilities to carry out ... the most fundamental policies and purposes of these rights." *In re Fairfield Sentry Ltd.*, No. 10 CIV. 7311 GBD, 2011 WL 4357421, at * 8 (S.D.N.Y. Sept. 16, 2011), *aff'd*, 714 F.3d 127 (2d Cir. 2013) (citations omitted).

Upon an order recognizing a proceeding as a foreign main proceeding, section 1520 of the Bankruptcy Code makes the automatic stay under sections 361 and 362 applicable with regard to a stay of actions against property of the debtor within the jurisdiction of the United States. The statute refers to "property of the debtor" to distinguish it from the "property of the estate" that is created under section 541(a). In a chapter 15 case, there is no "estate"; nevertheless, section 1520(a) imposes an automatic stay on the debtor's property located in the United States. *In re Pro-Fit Holdings Ltd.*, 391 B.R. 850, 864 n.48 (Bankr. C.D. Cal. 2008).

Section 1520(a) also applies sections 363, 549 and 552 of the Code to any transfer of a debtor's interest in property within this same jurisdiction; it allows a foreign representative to operate a debtor's business by exercising the rights and powers of a trustee under sections 363 and 552; and it applies section 552 to property of the debtor that is within the territorial jurisdiction of the United States. 11 U.S.C. § 1520(a).

Section 1521(a) outlines the discretionary relief a court may order upon recognition. 11 U.S.C. § 1521(a). The discretion that is granted is "exceedingly broad," since a court may grant "any appropriate relief" that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors. 8 COLLIER ON BANKRUPTCY ¶ 1521.01 (16th ed. 2019).

"Section 1521(a)(4) enables discovery" and "[s]ubsection 1521(a)(5) permits the delivery of assets located in the United States to a foreign representative or another person for administration or realization but stops short of allowing repatriation or distribution." 8 COLLIER ON BANKRUPTCY ¶ 1521.02 (16th ed. 2019). Discovery under section 1521(a)(4) "enables a Foreign Representative to take broad discovery concerning the property and affairs of a [foreign] debtor." *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 471 B.R. 342, 346 (Bankr. S.D.N.Y. 2012). Where discovery is sought, the protective conditions of section 1522 apply.

"Section 1521(a)(7) authorizes the court to grant to the foreign representative the sort of relief that might be available to a trustee appointed in a full bankruptcy case," including the turnover of property belonging to the debtor. *In re Inversora Eléctrica de Buenos Aires S.A.*, 560 B.R. 650, 655 (Bankr. S.D.N.Y. 2016) (internal citation omitted). Section 1521(a)(7) carves out, however, avoidance powers under sections 544, 547 and 548, which are only available to the trustee in a full case under another chapter. 8 COLLIER ON BANKRUPTCY ¶ 1521.02 (16th ed. 2019).

Section 1521(b) permits the court, at the request of the foreign representative, to "entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative ... provided that the court is satisfied that the interests of the creditors in the United States will be sufficiently protected." 11 U.S.C. § 1521(b). For example, in *In re Tri-Continental Exch. Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006), the court permitted the turnover of funds to foreign representatives ***171**

for administration where the funds would be maintained in a deposit account within the jurisdiction of the court but could be used to fund efforts to realize additional assets.

E. Rule 7004(f), The Hague Convention, and Rule 2002(q)(1)

Bankruptcy Rule 7004(f) provides that serving a summons or filing a waiver of service of an adversary proceeding in accordance with Rule 7004 or Fed. R. Civ. P. 4 is required to establish personal jurisdiction over the defendant. FED. R. BANKR. P. 7004(f). But service of a petition and seeking recognition of the foreign main or nonmain proceeding in a chapter 15 case does not require service under Rule 7004 or Civil Rule 4.

Service of a chapter 15 petition and notice of the recognition hearing requires compliance with Bankruptcy Rule 2002(q),[2] *not* with Bankruptcy Rule 7004 or Civil Rule 4. *See also* 9 COLLIER ON BANKRUPTCY ¶ 2002.18 (16th ed. 2019).

In *In re Japan Airlines Corp.*, 425 B.R. 732, 733 (Bankr. S.D.N.Y. 2010), the bankruptcy court granted recognition of the chapter 15 petition where: "[g]ood, sufficient, appropriate and timely notice of the filing of the Petition and the hearing on the Petition has been given by the Foreign Representative, pursuant to Bankruptcy Rules 1011(b) and 2002(q)." Similarly, in *In re Gandi Innovations Holdings, LLC*, No. 09-51782-C, 2009 WL 2916908, at *2 (Bankr. W.D. Tex. June 5, 2009), the court found that "[n]otice of [the chapter 15] proceedings has been sufficient and proper under the circumstances and satisfies the requirements of Fed. R. Bankr. P.2002(q). No further notice [to the debtor] is required or necessary."

III. DISCUSSION

A. Judge Vyskocil's Recognition Orders Should Not be Vacated

1 The Bank is a Debtor Under 11 U.S.C. § 109(a)

The Bank is eligible to be a debtor pursuant to section 109(a) because the retainer ***172** agreement was sufficient to constitute property. Blank Rome, as counsel for the DIA, received $65,000 as a security retainer, which it held on behalf of the Bank. The retainer funds were transferred to Blank Rome by Marks & Sokolov, as counsel and agent for the DIA. (Bank Opposition, *Bank Case*, ECF Doc. # 133 at 25-27; Antonoff Declaration, *Bank Case*, ECF Doc. # 21; Sokolov Declaration, *Bank Case*, ECF Doc. # 133-4 ¶ 12.) A foreign debtor may satisfy the section 109(a) property requirement by having a retainer. *See In re Berau Capital Res. Pte Ltd*, 540 B.R. at 82. Bank accounts, attorney retainers deposited in New York, or causes of action owned by the foreign debtor with a situs in New York have satisfied the "property in the United States" eligibility requirement. *See id.*; *In re Octaviar Admin. Pty Ltd*, 511 B.R. at 372 ("Octaviar also has property in the United States in the form of an undrawn retainer in the possession of the Foreign Representatives' counsel.").

This Court credits the Foreign Representative's Opposition and finds unpersuasive Worm's argument that the retainer deposited in a New York bank should not be deemed property. (Worm's Reply, *Bank Case*, at 12-13.) Worm's Reply alleges that that the transfer of funds into retainer accounts was to fraudulently manufacture a debtor status. (*Id.*) However, this argument fails to provide evidence to oppose the Declarations submitted by Antonoff and Sokolov.

2 Rule 60(b) Does Not Apply

Worms made his Motions to vacate Judge Vyskocil's recognition orders in the *Bank Case* and *Markus Case* pursuant to FED. R. CIV. P.60(b). (Bank Motion to Vacate MOL, *Bank Case*, ECF Doc. # 107 at 4; Markus Motion to Vacate MOL, *Markus Case*, ECF Doc. # 70 at 7.) However, Rule 60(b) does not apply because section 1517(d) already specifies when the court may

modify or terminate recognition. *See* 11 U.S.C. § 1517. Even if Rule 60(b) did apply, courts only grant relief under Rule 60(b) in exceptional circumstances, and none have been demonstrated here. *See* FED. F. CIV. P. 60(b)(1)-(6).

3 Chapter 15's Framework for Recognition

Section 1517(d) provides for terminating or modifying a recognition order. Relief under section 1517(d) is discretionary. *See* 8 COLLIER ON BANKRUPTCY ¶ 1517.04 (16th ed. 2019). The Court may grant relief where: (1) the basis for recognition was flawed in some way or (2) where the grounds for recognition have ceased to exist. *See id.* Because neither of those circumstances are present here, the motions to vacate recognition must be denied under section 1517(d).

The Court finds that Worms' Motions to Vacate the Recognition Orders in the *Markus Case* and the *Bank Case* fail. As a threshold matter, hearings were held on the motions for recognition in compliance with section 1517(a). Notice was provided to both debtors pursuant to Bankruptcy Rule 2002(q) and section 1517(a). On February 10, 2017, Judge Vyskocil held a hearing on the Bank's Verified Petition. (Bank Recognition Hearing, *Bank Case*, 19:10-11); on February 27, 2019, Judge Vyskocil held a hearing on the Verified Petition in Markus, during which both the Sokolov and Rozhkov Declarations were admitted into evidence. (Recognition Hearing, *Markus Case*, 14:9-25.) Under section 1517(a), the requirement of a hearing was satisfied. *See In re Japan Airlines Corp.*, 425 B.R. at 733 (granting recognition of the chapter 15 petition where "[g]ood, sufficient, appropriate and timely notice of the filing of the Petition and the hearing on the Petition has been given by the ***173** Foreign Representative, pursuant to Bankruptcy Rules 1011(b) and 2002(q)").

Worms' argument that there was no evidentiary hearing is meritless. Worms cites no caselaw requiring that an "evidentiary hearing" be held. Notice of the recognition hearings was properly given. During the recognition hearings, evidence was offered and admitted in evidence. Nothing more was required.

Civil Rule 44.1 provides that determinations regarding foreign law are "questions of law," not fact. *See* FED. R. CIV. P. 44.1. In *In re B.C.I. Finances Pty Ltd.*, 583 B.R. 288 (Bankr. S.D.N.Y. 2018), the court held that determinations about foreign law are questions of law, not fact, and the "Court is empowered to make determinations regarding foreign law, and granted discretion to decide on its own informed judgment what materials to consider in doing so." *Id.* at 299. Thus, Judge Vyskocil was correct to consider Declarations discussing Russian law when deciding whether to recognize the Foreign Representative. No further evidence was required.

Further, the three prongs of section 1517(a) were satisfied here. First, both matters are foreign proceedings pending in Russia. No challenge to the Russian COMI of either Markus or the Bank was raised at the recognition hearings. Worms' belated challenge now to the COMI determinations is without merit. Worms acknowledged during the hearing on the motions to vacate recognition that Markus resided in Russia before being jailed and certainly since being jailed on her guilty plea. Worms also acknowledged that the registered office of the Bank is in Russia. More than this is not required. *See In re Ran*, 607 F.3d at 1024 (concluding that with respect to an individual debtor's COMI, courts have considered: "(1) the location of a debtor's primary assets; (2) the location of the majority of the debtor's creditors; and (3) the jurisdiction whose law would apply to most disputes"). Based on these factors, Markus' COMI is Russia. Second, the Foreign Representative is identified as a "person" in the *Markus Case*—Yuri Vladimirovich Rozhkov—and a "body" in the *Bank Case*—the DIA. Third, the petition meets the requirements of section 1515, since (1) a certified copy of the decision commencing the foreign proceeding and appointing the Foreign Representative was attached, and (2) a certificate from the foreign court affirming the existence of the proceeding and appointment of the representative are not contested. 11 U.S.C. § 1515(b). (Sokolov Declaration, *Bank Case*, ECF Doc. # 5-2 at 2; Sokolov Declaration, *Markus Case*, ECF Doc. # 5-6.)

In addition, notice of the recognition hearing complied with Bankruptcy Rule 2002(q). *See In re Japan Airlines Corp.*, 425 B.R. at 733, (granting recognition where "[g]ood, sufficient, appropriate and timely notice of the filing of the Petition and the

hearing on the Petition has been given by the Foreign Representative, pursuant to Bankruptcy Rules 1011(b) and 2002(q)"). Notice was properly given in accordance with Rule 2002(q) in both cases, which Worms does not contest.

The Court rejects Worms' argument that service of the chapter 15 petition was insufficient because it did not comply with FED. R. CIV. P. 4(f). Very simply, notice under Civil Rule 4(f) is *not* required. (Markus Motion to Vacate MOL, *Markus Case*, ECF Doc. # 70 at 5; Bank Motion to Vacate MOL, *Bank Case*, ECF Doc. 107 at 9.) Bankruptcy Rule 7004(f) provides that *in adversary proceedings.* service of a summons or filing a waiver of service in accordance with Rule 7004 or Federal Rule of Civil Procedure 4 is required to establish personal jurisdiction over the defendant. FED. R. BANKR. P. 7004(a)(1). But ***174** Rule 7004 does not apply to commencement and recognition of a foreign proceeding under chapter 15. Rather, Bankruptcy Rule 2002(q) applies to the notice required for a petition for recognition in a chapter 15 case.

Recognition of the foreign representative and the foreign proceeding as a foreign main proceeding provides the foreign representative with the right of direct access to courts in the United States, 11 U.S.C. § 1509, and, additionally, among other things, permits the court to entrust the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative, 11 U.S.C. § 1521(a)(5). Furthermore, "[n]othing in the statute requires prior judicial permission for acts that do not implicate matters of comity or cooperation by courts.... The Foreign Representative need not obtain any order from the bankruptcy court recognizing his authority as trustee to act on any rights, interests and titles of the [Russian] bankruptcy estate." *In re Iida*, 377 B.R. 243, 258–59 (9th Cir. BAP 2007). This last point is most relevant in connection with a separate motion by Markus' Foreign Representative with respect to his action in terminating a revocable trust established by Markus, expressly governed by New York law, holding proceeds in accounts in New York from the sale of Markus' London property. The Foreign Representative has filed a turnover motion, that will be addressed in a separate opinion, seeking more than $5 million on deposit in New York that was being held by the LM Trust.

Upon recognition, a foreign representative has *in rem* jurisdiction over property of the foreign debtor in the United States. It is unnecessary for a foreign representative to obtain personal jurisdiction over the foreign debtor to exercise authority over the debtor's property in the United States if that authority was granted to the foreign representative in the foreign proceeding. If a foreign representative commences an adversary proceeding against a foreign debtor seeking a money judgment, the foreign representative will have to serve the summons and complaint in the manner required by Bankruptcy Rule 7004.

With respect to the discovery addressed to Markus and Worms by the Foreign Representative, Markus has appeared in this chapter 15 case through her lawyer, Worms. Having appeared, Markus and Worms are subject to discovery under the bankruptcy and civil rules. Markus and her counsel do not get a "free ride," arguing, as Worms has, that personal jurisdiction over Markus through service of process under Bankruptcy Rule 7004 and Civil Rule 4 *must* occur before she and Worms are required to respond to discovery as any other party that has appeared in a case in this Court. [3]

Worms cites no cases in support of his argument that Bankruptcy Rule 7004 applies to service of a petition seeking recognition of a chapter 15 petition, and the Court is not aware of any. Bankruptcy Rule 7004 and Civil Rule 4 [4] require compliance ***175** with the Hague Convention where an *adversary proceeding* seeking *in personam* jurisdiction over the defendant is commenced against a defendant who resides in a foreign country; such service is not required for notice of a hearing for recognition of a chapter 15 petition.

On behalf of the Bank and Markus, Worms also argues that a basis to vacate the recognition orders is section 1506's public policy exception. Relief under section 1506 should be "applied sparingly." *In re ENNIA Caribe Holding N.V.*, 594 B.R. 631, 640 (Bankr. S.D.N.Y. 2018). "The key determination is whether the procedures used in the foreign court meet our fundamental standards of fairness." *Id.* (citations omitted). Worms fails to show that the procedures in the Russian bankruptcy court with respect to Markus and the Bank do not meet the United States' standards of fairness. Instead, based wholly on conclusory assertions, Worms alleges that "[t]here has been an increase in the number of chapter 15 proceedings emanating from Russia because they have discovered that they can use chapter 15 to legal steal the assets of individuals who have ... fraudulently" come to the United States to obtain recognition. (Markus Motion to Vacate MOL, *Markus Case*, ECF Doc. # 70 at 20-21.) This

"virus of corruption ... poses a clear danger to the integrity of the American judicial process." (Bank Motion to Vacate MOL, *Bank Case*, ECF Doc. # 107 at 27.) Worms offers no competent factual support for his assertions. Because Worms offers no factual or legal support to show that the procedures that were used in Russia in the two foreign proceedings do not meet our standards of fairness, section 1506's public policy exception does not apply.

IV. CONCLUSION

For the foregoing reasons, the Markus Motion to Vacate, *Markus Case*, ECF Doc. # 70, and the Bank Motion to Vacate, *Bank Case*, ECF Doc. # 106, are **DENIED.**

IT IS SO ORDERED.

All Citations

607 B.R. 160, 67 Bankr.Ct.Dec. 219

Footnotes

1 On July 3, 2019, Worms filed a notice of appearance on behalf of Foreign Economic Industrial Bank Limited, "Vneshprombank" Ltd., more than 2 ½ years after the case was filed by the Foreign Representative. (*Bank Case*, ECF Doc. # 105.)

2 Rule 2002(q) specifically applies to the required notice for recognition of a foreign proceeding. The Rule provides as follows:

> (q) *Notice of Petition for Recognition of Foreign Proceeding and of Court's Intention to Communicate With Foreign Courts and Foreign Representatives.*
>
> (1) *Notice of Petition for Recognition*. After the filing of a petition for recognition of a foreign proceeding, the court shall promptly schedule and hold a hearing on the petition. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days' notice by mail of the hearing. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding and shall include the petition and any other document the court may require. If the court consolidates the hearing on the petition with the hearing on a request for provisional relief, the court may set a shorter notice period, with notice to the entities listed in this subdivision.
>
> (2) *Notice of Court's Intention to Communicate with Foreign Courts and Foreign Representatives*. The clerk, or some other person as the court may direct, shall give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, notice by mail of the court's intention to communicate with a foreign court or foreign representative.
>
> FED. R. BANKR. P. 2002(q).

3 The Foreign Representative's motion for sanctions against Markus and Worms for violating discovery orders entered by this Court, and for stonewalling in discovery, will dealt with in separate order that will be entered by the Court.

4 Civil Rule 4(f), made applicable in bankruptcy adversary proceedings by Fed. R. Bankr. P. 7004(a)(1), provides as follows:

> (f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:
>
> (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
>
> (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
>
> (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
>
> (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
>
> (C) unless prohibited by the foreign country's law, by:
>
> (i) delivering a copy of the summons and of the complaint to the individual personally; or
>
> (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
>
> (3) by other means not prohibited by international agreement, as the court orders.
>
> FED. R. CIV. P. 4(f).

End of Document

641 B.R. 768
United States Bankruptcy Court, S.D. New York.

IN RE: MODERN LAND (CHINA) CO., LTD., Debtor in a Foreign Proceeding.

Case No. 22-10707 (MG)
|
Signed July 22, 2022

Synopsis

Background: Authorized foreign representative of debtor, a Cayman-incorporated holding company for a large group of businesses involved in real estate investment and development that largely were incorporated in the Cayman Islands or the British Virgin Islands (BVI) but conducted most or all of their business in the People's Republic of China (PRC), filed motion for recognition, as a foreign main proceeding, of Cayman Islands proceeding involving consensual scheme of arrangement between debtor and certain holders of notes that were issued by debtor and governed by New York law. No objections were filed.

Holdings: The Bankruptcy Court, Martin Glenn, Chief Judge, held that:

the fact that debtor's Cayman Islands proceeding did not involve court-appointed joint provisional liquidators did not preclude a determination that debtor's center of main interests (COMI) was in the Cayman Islands;

recognition of the Cayman Islands proceeding as a foreign nonmain proceeding was not warranted; but

recognition as a foreign main proceeding was warranted.

Motion granted.

Procedural Posture(s): Motion for Recognition as Foreign Main or Nonmain Proceedings.

Attorneys and Law Firms

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MEMORANDUM OPINION GRANTING MOTION FOR RECOGNITION AND RELATED RELIEF

MARTIN GLENN, CHIEF UNITED STATES BANKRUPTCY JUDGE

This case raises the important questions of whether and when, under Chapter 15 of the Bankruptcy Code, a bankruptcy court may recognize and enforce a scheme of arrangement sanctioned by a court in the Cayman Islands, the debtor's place of incorporation, that modifies or discharges New York law governed debt. The Debtor here is a holding company for a large group of businesses, most of which are incorporated in the Cayman Islands or the British Virgin Islands ("BVI"), but that conduct most or all of their business in the People's Republic of China ("PRC"). Based on the UNCITRAL Model Law on Cross-Border Insolvency, Chapter 15 adopts the center of main interest ("COMI") concept, permitting recognition of a foreign proceeding in a debtor's center of main interest (a "foreign main proceeding") or, alternatively, recognition of a "foreign nonmain proceeding" in a place where the debtor maintains an "establishment." While the statute establishes a presumption that a debtor's COMI is its place of incorporation, the presumption can be overcome where other factors support finding the COMI to be elsewhere. Should this Debtor's Cayman sanctioned Scheme be recognized and enforced by this Court? On the facts of this case, the Court concludes the answer is yes. For the reasons explained below, this Court **GRANTS** the Motion recognizing the Cayman Proceeding as a foreign main proceeding and recognizing and enforcing the Scheme.

*773 I. BACKGROUND

A. The Motion for Recognition and Enforcement

Pending before the Court is the *Motion for (I) Recognition of a Foreign Main Proceeding, (II) Recognition of a Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* (the "Motion," ECF Doc. # 4), filed by Mr. Zhang Peng, in his capacity as the authorized foreign representative (the "Foreign Representative") of Modern Land (China) Co., Limited (the "Debtor"). A proposed recognition order is attached to the Motion as Exhibit A. ("Proposed Recognition Order," ECF Doc. # 4-1.) The Debtor is the subject of a foreign proceeding (the "Cayman Proceeding") concerning a scheme of arrangement (the "Scheme" or "Cayman Scheme") between the Debtor and certain holders of the existing notes (the "Scheme Creditors"), under section 86 of the Cayman Islands Companies Act 2022 (the "Companies Act") and currently pending before the Grand Court of the Cayman Islands (the "Cayman Court").

The following declarations were filed in support of the Motion: (i) a declaration of the Foreign Representative ("Peng Declaration," ECF Doc. # 5); (ii) a declaration of the Debtor's Cayman Islands counsel, Caroline Moran ("Ms. Moran") (ECF Doc. # 6); and (iii) the Foreign Representative's statements required by section 1515(c) of the Bankruptcy Code and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure (ECF Doc. # 3). The Foreign Representative also filed supplemental briefing addressing the *In the Matter of Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686 ("Rare Earth Briefing," ECF Doc. # 12) and *In the Matter of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)*, HCMP 644/2022, [2022] HKCFI 1789 ("Global Brands Briefing," ECF Doc. # 19.)

The objection deadline was set for June 29, 2022, at 4:00 p.m. (*See* ECF Doc. # 9). There were no objections filed in response to the Motion. The hearing to sanction the Scheme by the Cayman Court was scheduled for July 5, 2022, at 11:00 a.m. (Motion ¶ 34.)

On July 5, 2022, the Debtor filed a supplemental declaration of Ms. Moran addressing the hearing to sanction the Scheme. ("Supplemental Moran Declaration," ECF Doc. # 20.) Annexed to the Supplemental Moran Declaration as Exhibit A is a report of the scheme meeting held on June 30, 2022 (ECF Doc. # 20-1) and as Exhibit B a copy of the order sanctioning the Scheme issued by the Cayman Court ("Sanction Order," ECF Doc. # 20-2).

A hearing on the Motion was held on July 7, 2022. At the hearing, the Court directed the Foreign Representative's counsel to

file further supplemental briefing by July 12, 2022. On July 12, 2022, the Foreign Representative filed (i) a supplemental brief ("Supplemental Brief," ECF Doc. # 23), (ii) a second declaration by the Foreign Representative ("Supplemental Peng Declaration," ECF Doc. # 24), and (iii) a third declaration by Ms. Moran ("Third Moran Declaration," ECF Doc. # 25).

B. The Debtor's Business Operations and Preexisting Capital Structure

On June 28, 2006, the Debtor was incorporated in the Cayman Islands under the Companies Act as an exempted company with limited liability. (Motion ¶ 6.) The Debtor is the ultimate holding company of a group of companies comprising the Debtor and its subsidiaries, including the following: Great Trade Technology Ltd., a holding company incorporated with limited ***774** liability in the BVI; the Modern Land HK Companies; and Jiu Yun Development Co., Ltd., a holding company incorporated with limited liability in Hong Kong (collectively with Great Trade Technology Ltd., the Modern Land HK Companies, and together with the Debtor, the "Company"), that carries out real estate investment and development in the PRC and the United States. (*Id.* ¶ 7.) The Company is a property developer focused on eco-friendly residences in the PRC with four product lines: MOMA; Modern Eminence MOMA; Modern Horizon MOMA; and Modern City MOMA. (*Id.* ¶¶ 8, 10.)

As of June 30, 2021, the Company had a contracted sales gross floor area of 2.08 million square meters and aggregate unsold gross floor area of 16.77 million square meters in the PRC. (*Id.* ¶ 11.) During the first half of 2021, the Company purchased a total of 20 new projects with an aggregate gross floor area of 3.56 million square feet. (*Id.*)

The Debtor's shares have been listed on the Stock Exchange of Hong Kong Limited since July 12, 2013. (*Id.* ¶ 9.) As of December 31, 2021, the authorized share capital of the Debtor was $80 million divided into eight billion ordinary shares of a par value of $0.01 each, of which 2.79 billion of the ordinary shares were issued and fully paid.[1] (*Id.*) As of June 30, 2021, the Company's total indebtedness was $4.32 billion, including: (i) short-term borrowings of $972.33 million; (ii) long-term borrowings of $1.92 billion; and (iii) bonds payable of $1.42 billion. (*Id.* ¶ 12.) Additionally, as of June 30, 2021, the Company's contingent liabilities amounted to $2.57 billion. (*Id.*)

As part of the Company's $1.42 billion of bonds payable, the total principal amount outstanding under the existing notes ("Existing Notes") is $1.34 billion. (*Id.* ¶ 13.) The Existing Notes are the subject of the Scheme with each series of notes issued by the Debtor having different maturity dates and different interest rates. (*Id.* ¶¶ 13–14.) The remaining indebtedness is not being restructured and will be unaffected by the Scheme and this Chapter 15 case. (*Id.* ¶ 14.) As of June 30, 2021, the Debtor's current assets amounted to $12.49 billion on a consolidated basis[2] and these assets were located in the PRC and the United States. (*Id.* ¶ 15.) Some of the assets were pledged to secure certain banking and other facilities granted to the Company and mortgage loans granted to buyers of sold properties. (*Id.*)

C. The Cayman Proceeding

Market concerns over the operations of Chinese property developers were intensified due to reduced lending for real estate development, the impact of COVID-19 on macroeconomic conditions, and certain negative credit events. (*Id.* ¶ 18.) These conditions led the Company to experience liquidity pressures due to limited access to external capital to refinance debt and reduced cash generated from sales. (*Id.*) The Company failed to meet two repayments arranged for October 2021 and February 2021 which constituted events of default. (*Id.*) These amounts remain unpaid. (*Id.*)

On October 26, 2021, the Debtor appointed Sidley Austin LLP as its legal advisor. (*Id.* ¶ 20.) On November 5, 2021, the Debtor appointed Houlihan Lokey ***775** (China) Limited as its financial advisor. (*Id.*) The Company commenced discussions with the ad hoc group of holders of the Existing Notes, who are advised by Kirkland & Ellis LLP. (*Id.* ¶ 19.)

On February 25, 2022, after negotiations with the ad hoc group, the Debtor entered into a restructuring support agreement (the "RSA") with the Scheme Creditors. (*Id.* ¶ 21; *see also* Peng Decl., Ex. A.) As of May 31, 2022, certain Scheme Creditors

holding $1,083,272,000 of the Existing Notes—representing 80.75% of the aggregate outstanding principal amount of all Existing Notes—had agreed to the RSA. (Motion ¶ 24.)

On April 14, 2022, the Debtor filed a petition (the "Scheme Petition," ECF Doc. # 6-1) with the Cayman Court commencing the Cayman Proceeding, seeking an order that (i) directed the Company to convene a meeting on the Scheme for a single class of creditors only (the "Scheme Meeting"), (ii) requested a convening hearing (the "Convening Hearing"), and (iii) sought the appointment of the Foreign Representative. (*Id.* ¶ 32.) Following the Convening Hearing on May 31, 2022, the Cayman Court entered the order (the "Convening Order") scheduling the Scheme Meeting for June 29, 2022, scheduling the Sanction Hearing for July 5, 2022, and appointing the Foreign Representative. (*Id.* ¶ 34; Peng Decl., Ex. B.)

The Convening Order states that Scheme Creditors will be notified properly of the Scheme Meeting and will have the opportunity to raise questions and objections to the Scheme at the Scheme Meeting and/or at the Sanction Hearing. (Motion ¶ 37; Peng Decl., Ex. B.) At the Scheme Meeting, a vote will be held to determine whether the Scheme Creditors that are present and voting in person or by proxy will approve the Scheme. (Motion ¶ 38.) If a majority of creditors representing at least seventy-five percent in value of the Scheme Creditors present and voting at the Scheme Meeting votes in favor of the scheme, the Scheme is approved.[3] (*Id.*)

D. Description of the Scheme and Issuance of New Notes

The Scheme's effect will be to release the Scheme Creditors' claims related to the Existing Notes documents. (*Id.* ¶ 26.) In return, each Scheme Creditor will receive a pro rata share of the following consideration (the "Scheme Consideration"): cash consideration of $22.916 million; and the new notes ("New Notes"), in an aggregate principal amount equal to the sum of (i) 98.3% of the outstanding principal amount of the Existing Notes held by the Scheme Creditors; and (ii) accrued and unpaid interest up to but excluding the day the restructuring becomes effective (the "Restructuring Effective Date"). (*Id.*) This will enable the Company to restructure its existing indebtedness under the Existing Notes. (*Id.* ¶ 28.) The Debtor will also be issuing the New Notes on the Restructuring Effective Date. (*Id.*)

On the Restructuring Effective Date, following the distribution of the Scheme Consideration and the issuance of the New Notes, all outstanding Existing Notes will be canceled and all guarantees in connection with the Existing Notes will be released. (*Id.* ¶ 29.) Additionally, the Scheme provides for releases by Scheme Creditors of any claim related to the restructuring against the Debtor and its affiliates. (*Id.* ¶ 30.) If the Scheme is approved by the requisite majorities of creditors and sanctioned ***776** by the Cayman Court with a sealed copy of the Sanction Order filed with the Cayman Islands Registrar of Companies, the Scheme will then bind all Scheme Creditors regardless of how, or if, they voted. (*Id.* ¶ 31.)

E. Rare Earth Briefing

On June 6, 2022, the High Court of the Hong Kong Special Administrative Region Court of First Instance (the "Hong Kong Court") ruled in *In the Matter of Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686 (the "*Rare Earth* Opinion"). In dicta, the *Rare Earth* Opinion speculated that "recognition under *Chapter 15* is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt." *Rare Earth* Opinion ¶ 36. The *Rare Earth* Opinion relies heavily upon this Court's decision in *In re Agrokor d.d.*, 591 B.R. 163, 169 (Bankr. S.D.N.Y. 2018). Specifically, the Hong Kong Court points to this Court's explanation that "Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property *that is located within the territorial jurisdiction of the United States*." *Rare Earth* Opinion ¶ 35 (citing *In re Agrokor*, 591 B.R. at 187). From this statement, the Hong Kong Court concludes that "[r]ecognition does not appear as a matter of United States' law to discharge the debt." *Id.* ¶ 36.

On June 17, 2022, the Debtor filed the Rare Earth Briefing noting that the Hong Kong Court's statements principally rely on

the application of United States law. (Rare Earth Briefing ¶ 8.) The Debtor notes that a federal court's Chapter 15 order that recognizes a discharge of New York law governed debt granted in a foreign proceeding is a complete and valid discharge of that debt as a matter of United States law. (*Id.* ¶ 9.) The Debtor asserts that because the Proposed Recognition Order recognizes a discharge to the extent granted in the foreign Cayman Proceeding, it serves as a complete and valid discharge of the Existing Notes, which are governed by New York law, as a matter of New York state law. (*Id.*)

This is a critically important issue. The Scheme in this case, and in many other scheme or restructuring plan cases, modifies or discharges existing debt and related guarantees governed by New York law, and provides for the issuance of new debt and guarantees governed by New York law. An indenture trustee will only take the actions authorized by the scheme or plan if enforceable orders have been entered by the foreign court and a Chapter 15 court.

With great respect for the Hong Kong court in *Rare Earth*, that court misinterprets this Court's earlier decision in *Agrokor*, as well as many other decisions in the United States which have recognized and enforced foreign court sanctioned schemes or restructuring plans that have modified or discharged New York law governed debt. Provided that the foreign court properly exercises jurisdiction over the foreign debtor in an insolvency proceeding, and the foreign court's procedures comport with broadly accepted due process principles, a decision of the foreign court approving a scheme or plan that modifies or discharges New York law governed debt is enforceable. Under U.S. law, that is an unremarkable proposition that has been firmly established in the U.S. at least since the Supreme Court decision in *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 3 S.Ct. 363, 27 L.Ed. 1020 (1883), which granted international comity and enforced a Canadian scheme that discharged New York law governed debt and provided for the issuance of new debt governed by New York law. As Chief Justice Waite said in *Gebhard*, "the true spirit of international ***777** comity requires that schemes of this character, legalized at home, should be recognized in other countries." *Id.* at 548, 3 S.Ct. 363. Chapter 15 limits a U.S. bankruptcy court's authority to enjoin conduct outside the territorial jurisdiction of the United States, but it does not make a discharge of New York law governed debt any less controlling.

To be clear, in recognizing and enforcing the Scheme in this case, the Court concludes that the discharge of the Existing Notes and issuance of the replacement notes is binding and effective.[4]

F. The Global Brands Briefing

1. The Debtor Does Not Intend or Expect to Seek Recognition of the Scheme or any Chapter 15 Order of this Court in Hong Kong

The Court entered an order on June 27, 2022 (ECF Doc. # 18) requiring the Foreign Representative to file a supplemental brief addressing another recent Hong Kong court judgment, *In the Matter of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)*, HCMP 644/2022, [2022] HKCFI 1789 ("*Global Brands*"). The court in *Global Brands* stated that, in the future, recognition and enforcement by the Hong Kong court of schemes sanctioned in the Cayman Islands and BVI depended upon common law principles developed by Hong Kong courts that would ordinarily apply a center of main interests test rather than the place of incorporation as had been done in the past. Because the Debtor and its affiliates conduct their business in the PRC, and the Debtor's common stock trades on the Stock Exchange of Hong Kong Limited, this Court wanted to know whether the Debtor intends to seek recognition and enforcement in Hong Kong of the Cayman Scheme and of any order of this Court recognizing and enforcing the Cayman Scheme. In short, the Foreign Representative's answer is that the Debtor does not intend or expect to seek recognition and enforcement of the Scheme or this Court's order recognizing and enforcing the Scheme in Hong Kong.

Given that the Existing Notes are issued by a Cayman Islands entity and are governed by New York law, the Foreign Representative submits that the implementation and effectuation of a Cayman Islands scheme of arrangement and recognition and enforcement of the scheme under Chapter 15 of the Bankruptcy Code are all that is required to effectuate the Restructuring. (Global Brands Briefing ¶ 5.) Further, the Foreign Representative notes that the solely affected creditors, the holders of the Existing Notes, also agree with this position. (*Id.* ¶ 6.) The RSA and the Scheme documents, which were

negotiated at arm's-length with sophisticated creditors represented by able counsel, do not require recognition of the Scheme in Hong Kong. (*Id*.)

2. The Scheme Can Become Effective Without Recognition in Hong Kong

According to the Foreign Representative, nothing in the RSA or in any of the Scheme documents necessitates or requires recognition and/or enforcement of the Scheme by the Hong Kong Court for the Scheme to be effective. (*Id.* ¶ 8.) Under ***778** the terms of the Scheme, once the Cayman Court sanctions the Scheme and the Sanction Order has been delivered to the Cayman Companies Registrar, the Scheme will become effective. (*Id.*) The Foreign Representative notes that the restructuring will ultimately become effective upon entry of the Sanction Order by the Cayman Court and the Proposed Recognition Order by this Court. (*Id*.) Further, the Foreign Representative argues that this Court does not need to consider whether the Scheme would be recognized and enforced in Hong Kong in making its determination whether to recognize and enforce the Scheme pursuant to section 1521 of the Bankruptcy Code. (*Id.* ¶ 9.) This argument relies on the *Agrokor* case, where this Court enforced the modification of both English law and New York law-governed debts pursuant to a Croatian insolvency proceeding, even though jurisdictions following the *Gibbs* Rule may not have treated the modification of English law-governed debts as effective. (*Id*. ¶ 10.)

3. Global Brands is Distinguishable

The Foreign Representative believes it is unlikely that a court in Hong Kong will be asked to consider whether the Scheme is effective in Hong Kong. (*Id.* ¶ 15.) The Foreign Representative does not intend to seek relief in Hong Kong or to obtain any assets located in Hong Kong, and they argue the risk of a dissenting Scheme Creditor seeking enforcement of the Existing Notes in Hong Kong is de minimis. (*Id*.) It is, of course, for the Debtor to decide whether to seek recognition and enforcement in Hong Kong, and for Hong Kong Court to decide whether to recognize and enforce the Scheme if the issue is presented by the Debtor or any other party that has standing to raise the issue in Hong Kong.

G. The Outcome of the Cayman Proceeding

Ms. Moran notes that the Scheme Creditors overwhelmingly approved the Scheme in the required majorities. (Supp. Moran Decl. ¶ 4.) Ms. Moran states that there were 372 creditors who voted (and one creditor that abstained), with over 99% (370) of those voting to support the Scheme. (*Id.*) Further, the supporting creditors represented 94.78% ($1,271,425,000) of the total principal amount outstanding under the Existing Notes. (*Id.*) Only two creditors voted against the Scheme representing less than 1.23% ($16,319,000) of the total principal amount outstanding under the Existing Notes. (*Id.*)

On July 5, 2022, the Cayman Court presided over the Sanction Hearing and found that the Scheme satisfied the requisite elements to be sanctioned. (*Id.* ¶ 7.) Ms. Moran notes that no creditor raised any objection during the Sanction Hearing. (*Id.*) The Cayman Court entered the Sanction Order which sanctions and approves consummation of the Scheme and authorizes and effectuates the Scheme Restructuring. (*Id.* ¶ 8.)

H. Supplemental Briefs

A hearing on the Motion was held on July 6, 2022. ("Transcript," ECF Doc. # 21.) The Court expressed its concerns regarding the Debtor's COMI and, with respect to possible recognition as a foreign nonmain proceeding, whether the Debtor established that it was engaged in "non-transitory activity." (Transcript at 45:6–24.) Counsel to the Foreign Representative

filed the Supplemental Brief on July 12, 2022.

The Debtor asserts that it's COMI is in the Cayman Islands because it is, and publicly identifies as, a Cayman-incorporated company. (Supp. Brief ¶ 1.) The ***779** Foreign Representative states that the Debtor's historical corporate counsel is a Cayman Islands law firm, Conyers Dill & Pearman, which provided general corporate advice on the issuance of the Existing Notes. (*Id.* ¶ 2.) The offering memoranda for the Existing Notes make clear that the Debtor is a Cayman entity. (*Id.* ¶ 3.) The Debtor notes that when it first defaulted under the Existing Notes, BFAM Asian Opportunities Master Fund, LP ("BFAM,") issued a "statutory demand" (the "Statutory Demand") against the Debtor, threatening a winding up petition that would be filed under the laws of the Cayman Islands. (*Id.* ¶ 4.) The Statutory Demand prompted the restructuring negotiations and the RSA. (*Id.* ¶ 5.)

1. Insolvency Procedures in the Cayman Islands

The Debtor notes that liquidation of a Cayman Islands incorporated company is required to be implemented pursuant to Cayman law through insolvency practitioners appointed by the Cayman Court. (*Id.* ¶ 5 (citing Third Moran Decl. ¶¶ 16–18).) The Cayman courts generally do not recognize a non-Cayman Islands liquidation as being capable of liquidating and dissolving a Cayman Islands company. (*Id.* (citing Third Moran Decl. ¶¶ 18–23).)

The Foreign Representative notes that most of the Restructuring-related activities took place in the Cayman Islands. (Supp. Peng Decl ¶ 6.) Maples and Calder (Cayman) LLP ("Maples"), the Debtor's Cayman counsel since November 2021, advised the Debtor with respect to practical elements of the Restructuring during negotiations of the RSA. (Third Moran Decl. ¶ 25.) The RSA put Scheme Creditors on notice that the proceeding to sanction the Scheme would occur in the Cayman Islands. (Supp. Brief ¶ 8.) The Debtor completed each of the steps needed to sanction the Scheme by the Cayman Court. (Supp. Peng Decl. ¶ 10.) These steps included holding the Scheme Meeting in the Cayman Islands that was chaired by an individual who resides in the Cayman Islands and was engaged directly by the Debtor for the purposes of the Scheme Meeting. (Third Moran Decl. ¶ 25.) The chairman of the Scheme Meeting held proxies for the majority of the Scheme Creditors and attended and voted at the meeting in the Cayman Islands on their behalf. (*Id.*)

2. Debtor's Arguments in Favor of Foreign Main

The Debtor relies on the Scheme Creditor's expectations that the Debtor's COMI is the Cayman Islands. (Supp. Brief ¶ 11.) The Debtor notes that creditor expectations were formed via the publicly available descriptions of the Debtor in (i) the offering memoranda of the Existing Notes that stated that "an insolvency proceeding relating to us, even if brought in the United States, would likely involve Cayman Islands insolvency law" and (ii) the Debtor's press releases, pointing to the Debtor as a company "incorporated in the Cayman Islands." (*Id.*) The Debtor notes that creditor expectations were reinforced by certain actions including: (i) BFAM's negotiations related to the Restructuring by issuing the Statutory Demand and threatening a Cayman Islands winding up petition and (ii) the RSA contemplating an insolvency proceeding in the Cayman Islands. (*Id.*)

The Debtor notes that no Scheme Creditor—including the two Scheme Creditors that voted against the Scheme—objected to the Debtor's COMI being in the Cayman Islands. (*Id.* ¶ 12.) The Debtor argues that the consensus of those affected by the Scheme points in favor of a Cayman COMI. (*Id.*)

The Debtor notes that Cayman Islands law requires that liquidation proceedings of Cayman Islands-incorporated companies take place in the Cayman Islands under the supervision of a Cayman Islands-appointed ***780** liquidator. (*Id.* ¶ 13.) This requirement was made clear in the documents related to the issuance of the Existing Notes.[5] (*Id.*)

The Debtor maintains its registered office in the Cayman Islands to which all communications may be addressed, and where matters such as the administration of annual filings and the payment of annual fees with the Cayman Registrar are dealt with.

(*Id.* ¶ 14.) The Debtor is also required to maintain statutory registers of members (*i.e.*, shareholders), mortgages and charges, and directors in the Cayman Islands. (*Id.*)

The Debtor is also tied to the Cayman Islands by way of its asset holdings and the location of certain creditors. (*Id.* ¶ 15.) Nearly half of the Debtor's wholly owned direct subsidiaries are Cayman entities. (*Id.*) Additionally, the Debtor identified at least 35 entities—representing a minimum of over half a billion dollars of the outstanding principal of the Existing Notes—that are domiciled in the Cayman Islands. (*Id.*) But it is undisputed that despite its domicile in the Cayman Islands, the Debtor and its affiliates are managed and conduct their business in the PRC.

Finally, the Debtor's restructuring activities have been centralized in the Cayman Islands and undertaken by Cayman Islands actors. (*Id.* ¶ 16.) These activities include: (i) Maples advising the Debtor on all aspects of the Restructuring, including the terms of the RSA, the Practice Statement Letter, the Explanatory Statement, and all Cayman Court documents; (ii) preparing for and appearing at hearings in front of the Cayman Court in the Cayman Islands; (iii) the convening of the Scheme Meeting by the Cayman Court; and (iv) the Scheme Meeting, which was chaired by an individual who resides in the Cayman Islands, was engaged directly by the Debtor for the purposes of the Scheme Meeting, and who held proxies for the majority of the Scheme Creditors and attended and voted at the Scheme Meeting in the Cayman Islands on their behalf. (*Id.*) The Debtor notes that its board of directors did not host meetings that were physically located in the Cayman Islands during the restructuring due to international travel restrictions and changes in business practices ***781** resulting from the COVID-19 pandemic. (*Id.*)

The Debtor also argues that it was not necessary for its Cayman counsel or its Scheme Chairperson to wrest control of the Debtor from its previously existing management or take possession of its property like a joint provisional liquidator ("JPL"). (*Id.*) The Debtor asserts that such activities are not required or appropriate in a consensual scheme of arrangement. (*Id.*) A scheme of arrangement, by its nature, is driven by negotiation and compromises between a company and its creditors. (*Id.*) The Debtor argues that holding scheme chairpersons to the same standard as a JPL would create a perverse incentive for companies to enter into liquidations rather than a value maximizing, consensual resolution with their creditors via a scheme of arrangement.[6] (*Id.*) The Debtor argues that this would dictate that the restructuring activities in liquidations, but not schemes, would merit recognition under Chapter 15. (*Id.*)

3. Foreign Nonmain Arguments

The Debtor asserts that it has substantial connections to the Caymans including issuing debt and holding assets in the Caymans, retaining counsel and employing professionals in the Caymans, and holding itself as an entity that could only be liquidated effectively in the Caymans. (*Id.* ¶ 19.) The Debtor argues that this is sufficient to find that the Debtor has non-transitory business connections with the Caymans. (*Id.*) The Debtor notes that its maintenance of a registered office in the Cayman Islands, compliance with the corporate formalities required to maintain its status as a Cayman entity, and representations to creditors that it is a Cayman-incorporated entity also support finding non-transitory connections with the Caymans. (*Id.*)

The Debtor also argues that the alternative to recognition of the Cayman Proceeding is to potentially deny the Debtor the ability to implement a consensual restructuring and force the Debtor into a Cayman liquidation. (*Id.* ¶ 20.) The Debtor argues that it would leave all parties in a worse position. (*Id.*)

II. LEGAL STANDARD

A. Foreign Main Proceeding

To obtain recognition, the foreign proceeding must be either a foreign main or foreign nonmain proceeding. 11 U.S.C. §

1517(a)(1). Under section 1502(4) of the Bankruptcy Code, the term "foreign main proceeding" means "a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4); *see, e.g.,* *In re Ocean Rig UDW Inc.*, 570 B.R. 687, 702 (Bankr. S.DN.Y. 2017) (recognizing foreign main proceeding); *In re Suntech Power Holdings Co.*, 520 B.R. 399, 416–17 (Bankr. S.D.N.Y. 2014) (recognizing foreign main proceeding); *see also* *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 138 (2d Cir. 2013) (hereinafter "*Fairfield Sentry*") (affirming recognition of foreign main proceeding). A Chapter 15 debtor's COMI is determined as of the filing date of the Chapter 15 petition, without regard to the debtor's historic operational activity. *See* *Fairfield Sentry*, 714 F.3d at 137 ("[A] debtor's COMI should be determined based on its activities at or around the time the chapter ***782** 15 petition is filed, as the statutory text suggests.").

The Bankruptcy Code establishes that "[i]n the absence of evidence to the contrary, the debtor's registered office ... is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c). However, this presumption can be overcome. *See, e.g.* *ABC Learning*, 445 B.R. 318, 328 (Bankr. D. Del. 2010); *aff'd*, 728 F.3d 301 (3d Cir. 2013) (stating that "the COMI presumption may be overcome particularly in the case of a 'letterbox' company not carrying out any business" in the country where its registered office is located); *In re Basis-Yield Alpha Fund (Master)*, 381 B.R. 37, 51–54 (Bankr. S.D.N.Y. 2008) (concluding that the absence of objections to COMI were not binding; the court must make an independent determination of COMI).

Courts consider several additional factors to determine whether the COMI presumption has been overcome, including: "the location of the debtor's headquarters; the location of those who actually manage the debtor ... the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *In re SphinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006). In *SphinX*, this court explained that these factors should not be applied "mechanically"; rather, "they should be viewed in light of Chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value." *Id.*; *see also* *Fairfield Sentry*, 714 F.3d at 137 (explaining that "consideration of these specific factors is neither required nor dispositive" and warning against mechanical application). The *SphinX* court also noted that "because their money is ultimately at stake, one generally should defer ... to the creditors' acquiescence in or support of a proposed COMI." 351 B.R. at 117.

The Second Circuit and other courts often examine whether a Chapter 15 debtor's COMI would have been ascertainable to interested third parties, finding "the relevant principle is that the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties. Among other factors that may be considered are the location of headquarters, decision-makers, assets, creditors, and the law applicable to most disputes." *Fairfield Sentry*, 714 F.3d at 130. As the Second Circuit explained, by examining factors "in the public domain," courts are readily able to determine whether a debtor's COMI is in fact "regular and ascertainable [and] not easily subject to tactical removal." *Id.* at 136–37; *see also* *In re British Am. Ins. Co.*, 425 B.R. 884, 912 (Bankr. S.D. Fla. 2010) ("The location of a debtor's COMI should be readily ascertainable by third parties."); *In re Betcorp Ltd.*, 400 B.R. 266, 289 (Bankr. D. Nev. 2009) (looking to ascertainability of COMI by creditors).

If a debtor's COMI has "shifted" prior to filing its Chapter 15 petition, courts may engage in a more holistic analysis to ensure that the debtor has not manipulated COMI in bad faith. *See* *Fairfield Sentry*, 714 F.3d at 138 (concluding that "a court may look at the period between the commencement of the foreign proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith .... The factors that a court may consider in the analysis are not limited and may include the debtor's liquidation activities"). Courts ask whether there is evidence pointing to any "insider exploitation, untoward manipulation, [and] overt thwarting of third-party expectations" that would support denying recognition. *Id.*; *see also* ***783** *Ocean Rig*, 570 B.R. at 687 (granting recognition of foreign main proceeding where debtors shifted COMI from jurisdiction that only provided a liquidation option to jurisdiction that permitted reorganization, taking steps to shift COMI beginning one year before the foreign filing and where notice was given to creditors throughout the process of shifting COMI). The court in *Suntech* noted how "[A] debtor's COMI is determined as of the time of the filing of the Chapter 15 petition," but, "[t]o offset a debtor's ability to manipulate its COMI, a court may also look at the time

period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition." 520 B.R. at 416. Various factors could be relevant, such as "the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *Id*.

In *Suntech,* the debtor's presumptive COMI was the Cayman Islands, where it was incorporated, however, the Cayman Islands was not its actual COMI when the Foreign Proceeding was commenced. *Id.* Notably, the *Suntech* debtor did not conduct any activities in the Cayman Islands, and maintained its principal executive offices in Wuxi, China from where it managed the Suntech Group. *Id.* So, the issue was whether the debtor's COMI should be measured at the time of the commencement of the Chapter 15 case or when the Foreign Proceeding was commenced. *Id.* But in *Suntech*, the Cayman Court appointed JPLs and authorized them to exercise a host of additional powers (including acts on behalf of the debtor, possession of its property and collect all debts, dealing with all questions relating to or affecting the assets or the restructuring etc.) *Id.* at 417–18. The JPLs assumed control of the debtor's affairs, met with employees and creditors, opened a bank account in the Cayman Islands funded with transfers from one of the debtor's other accounts, and filed claims. *Id.* The *Suntech* court found the debtor's COMI on the date of the commencement of the chapter 15 case was the Cayman Islands and the JPLs did not manipulate the debtor's COMI in bad faith. *Id*. Therefore, the court overruled a creditor's objection to finding the debtor's COMI to be in the Cayman Islands.

The *Suntech* court's analysis and conclusion that COMI was in the Cayman Islands was consistent with the Second Circuit's analysis in *Fairfield Sentry*. In both cases, court-appointed fiduciaries assumed substantial control over the debtors' liquidation (in the case of *Fairfield Sentry*) and scheme proceeding (in the case of *Suntech*). So, the question is whether the absence of court-supervised fiduciaries, such as JPLs, requires a different result in finding COMI in the Cayman Islands in this case given that no JPLs were appointed. While this would be an easier case if JPLs had been appointed, the Court concludes that the Cayman court's supervision of the Debtor's Scheme Proceeding, in light of the other factors present here, is enough for the Court to conclude that the Debtor's COMI for the proceeding involving the single class of Existing Note holders was in the Cayman Islands.[7]

***784 B. Foreign Nonmain Proceeding**

The Foreign Representative's counsel argues, in the alternative, that the Scheme Proceeding satisfies the requirements to be a foreign nonmain proceeding. Recognition and enforcement can be granted as discretionary relief under sections 1507 and 1521 of the Bankruptcy Code even in a nonmain proceeding. The Court concludes that the Scheme Proceeding was not a foreign nonmain proceeding.

Courts recognize a foreign proceeding as a "foreign nonmain proceeding" if "the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending." 11 U.S.C. § 1517(b)(2). Section 1502(2) defines "[e]stablishment" as "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2); *see also In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 70 (Bankr. S.D.N.Y. 2011), *aff'd* 474 B.R. 88 (S.D.N.Y. 2012) ("*Millennium Glob. I*"). Additionally, courts have required proof of more than a "mail-drop presence" to satisfy the establishment requirement. *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 277 (Bankr. S.D.N.Y. 2019) ("*Constellation I*") (citation omitted). Due to the "paucity of U.S. authority" on this question, the court in *Millennium Glob. I* cited a "persuasive" English law holding that the presence of an asset and minimal management or organization can create a debtor establishment. 458 B.R. at 84–85 (citing *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005)).

Whether the debtor has an "establishment" in a country is determined at the time of filing the Chapter 15 petition. *See Beveridge v. Vidunas (In re O'Reilly)*, 598 B.R. 784, 803 (Bankr. W.D. Pa. 2019). Several factors "contribute to identifying an establishment: the economic impact of the debtor's operations on the market, the maintenance of a 'minimum level of organization' for a period of time, and the objective appearance to creditors whether the debtor has a local presence." *Millennium Glob. I*, 458 B.R. at 85. *See In re Creative Fin., Ltd.*, 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016) (citing *In*

re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007)) (finding that an "establishment" requires a "showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property.") This is evidenced by engagement of "local counsel and commitment of capital to local banks." *Millennium Glob. I*, 458 B.R. at 86–67. *See also* *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1028 (5th Cir. 2010) (If a foreign "bankruptcy proceeding and associated debts [themselves] ... demonstrate an establishment ... [t]here would be no reason to define establishment as engaging in a nontransitory economic activity. The petition for recognition would simply require evidence of the existence of the foreign proceeding."); *Rozhkov v. Pirogova (In re Pirogova)*, 612 B.R. 475, 484 (S.D.N.Y. 2020) (finding that a foreign insolvency proceeding on its own cannot suffice to count as nontransitory economic activity in support of recognition as a foreign nonmain proceeding.)

III. DISCUSSION

For the reasons outlined below, the Court **GRANTS** the Motion for recognition of the Cayman Proceeding as a foreign main proceeding. The Court does not explicitly address the following aspects of the ***785** Motion because they are uncontroversial and satisfied by the uncontested facts: (i) whether the Debtor meets the eligibility requirements under section 109(a) of the Bankruptcy Code; (ii) whether the Cayman Proceeding is a foreign proceeding as defined in section 101(23) of the Bankruptcy Code; (iii) whether the Cayman Proceeding has been commenced by a duly authorized foreign representative; (iv) whether the Scheme Petition meets the requirements of section 1515 of the Bankruptcy Code; (v) whether the Debtor is entitled to additional relief under section 1521 of the Bankruptcy Code; (vi) whether the Scheme is procedurally fair; (vii) whether the interests of creditors and other interested parties are sufficiently protected; (viii) whether the Foreign Representative is entitled to additional relief under section 1507 of the Bankruptcy Code; and (ix) whether recognition of the foreign proceeding is contrary to the public policy of the United States.

A. Recognition is Not Warranted as a Foreign Nonmain Proceeding.

The Court finds that recognition of the Cayman Proceeding as a foreign nonmain proceeding is not warranted because recognition would be inconsistent with the goals of foreign nonmain proceedings. Further, neither the bankruptcy proceeding itself nor the Debtor's bookkeeping activities constitute nontransitory economic activity, and the Debtor does not otherwise affect the local marketplace in the Cayman Islands.

1. Recognition as a Nonmain Proceeding Would Be Inconsistent with the Goals of UNCITRAL Model Law

The Court declines to recognize the Cayman Proceeding as a foreign nonmain proceeding because such a recognition would not comport with the stated goals of foreign nonmain proceedings. The UNCITRAL Model Law on Cross-Border Insolvency explains that in a foreign nonmain proceeding, "the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding." UNITED NATIONS, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, 12 (2014) (the "GUIDE"). The GUIDE further explains that "[u]nlike 'foreign main proceeding,' there is no presumption with respect to the determination of establishment ... [t]he commencement of insolvency proceedings, the existence of debts, and the presence alone of goods in isolation, of bank accounts, or of property would not in principle satisfy the definition of establishment." *Id.* at 47. These provisions support the administration of a restructuring proceeding by a single foreign court.

In the present case, the Cayman Scheme pertains to the Existing Notes held by the Scheme Creditors. (Motion ¶ 13.) The language of the UNCITRAL Model Law on Cross-Border Insolvency therefore requires, for the purposes of recognition of the Cayman Proceeding as a foreign nonmain proceeding, that the Existing Notes be assets in the Cayman Islands. However, this Court is not persuaded that the Existing Notes are assets within the meaning of Article 23, subsection 2 of the Model

Law. As the GUIDE explains, "the existence of debts ... would not in principle satisfy the definition of establishment." GUIDE at 47.

2. There is Insufficient Evidence to Support a Finding of Nontransitory Economic Activity in the Caymans

The Cayman restructuring cannot itself constitute nontransitory economic activity to support recognition as a foreign nonmain proceeding. In *Lavie v. Ran*, 406 B.R. 277, 286–87 (S.D. Tex. 2009), the bankruptcy court explained that if "the ***786** proceeding and associated debts alone could suffice to demonstrate an establishment, it would essentially rule out the possibility that any proceeding would fall into the ... category of proceedings that are neither foreign main nor foreign nonmain. But, this third category was clearly envisioned by the drafters." Further, in *In re Pirogova*, 612 B.R. at 484, the court cited *Ran* and agreed that if "a foreign trustee could merely point to a foreign bankruptcy itself, which is subject to a recognition petition, as evidence of an establishment, the statutory requirements for recognition would be pointless." The court in *Pirogova* denied recognition of a foreign nonmain proceeding despite the Debtor's ownership of an apartment in Russia, her Russian utility bills, her vehicles in Russia, and her Russian yacht club membership, as well as the debtor's ongoing bankruptcy proceeding in Russia. *Id.* at 480.

In the present case, the Debtor's connections to the Cayman economy are far more tenuous than those discussed in *Pirogova*. The Debtor maintains a registered office in the Cayman Islands to which all communications may be addressed or served, and where the administration of annual filings and the payment of annual fees are registered. (Supp. Brief ¶ 1.) The Debtor also initiated the restructuring proceeding in its country of incorporation, the Cayman Islands. (*Id.*) However, the Debtor has been unable to point to any additional connections to the Cayman Islands that might constitute nontransitory economic activity, and therefore falls well short of the standards set in *Ran* and *Pirogova*.

3. The Debtor's Business Activities Have No Local Effect on the Marketplace

The court explained the standard for nontransitory economic activity in *In re Creative Fin., Ltd.*, 543 B.R. at 520–21. There, the court explained that recognition required "a showing of a *local effect on the marketplace*, more than mere incorporation and record-keeping and more than just the maintenance of property." *Id.* at 520 (emphasis added). In that case, the debtor, a foreign exchange trading business, was organized under the laws of the BVI, and admittedly engaged in bad-faith actions to pursue a restructuring proceeding there. *Id.* at 513. Nevertheless, the tenuous nature of the connection between the debtor's business activities and the BVI marketplace supported the court's denial of recognition as a foreign nonmain proceeding. *Id.* at 521.

In the present case, despite the absence of apparent bad faith, the Debtor similarly has a negligible effect on the local marketplace. The Debtor is a Cayman-incorporated investor and developer in real-estate that carries out its business in the PRC and maintains its books and records in the Cayman Islands. (*Id.* ¶¶ 6–7, 64.) However, the Debtor has not provided the Court evidence of "more than mere incorporation and record-keeping and more than just the maintenance of property." *In re Creative Fin., Ltd.*, 543 B.R. at 520. The failure to engage the local economy excludes the Debtor from a foreign nonmain classification.

B. Recognition Is Warranted as a Foreign Main Proceeding

The Court recognizes the Debtor's COMI in the Cayman Islands. Section 1516(c) provides that "[i]n the absence of evidence to the contrary, the debtor's registered office ... is presumed to be the center of the debtor's main interest." 11 U.S.C. § 1516(c). Given the evidence in this case, the Court considers the totality of the circumstances before it, including the goals of

Chapter 15, the Scheme Creditors' expectations and intentions, the judicial role in the Cayman Scheme, the function ***787** of the Cayman Scheme Chairperson, the insolvency activities in the Caymans, Cayman choice of law principles and the Debtor's good-faith petition for recognition of the Cayman Proceeding. Each of these factors function together to support a finding of COMI in the Cayman Islands.

1. Recognition as a Foreign Main Proceeding is Consistent with the Goals of Chapter 15

Recognition of the Cayman proceeding as a foreign main proceeding would comport with the goals of Chapter 15. In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 126, *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008), the court explained that:

> Unique to the Bankruptcy Code, Chapter 15 contains a statement of purpose: "[t]he purpose of this chapter is to incorporate the Model Law on Cross–Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency," with the express objectives of cooperation between United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses. 11 U.S.C. § 1501(a)(1)–(5); *In re SPhinX, Ltd.*, 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007).

Chapter 15 contemplates cooperation between American and foreign bankruptcy courts, as well as facilitating protection for the Debtor in this case before the Court.

The Second Circuit has recognized that "[t]he absence of a statutory definition for a term that is not self-defining signifies that the text is open-ended, and invites development by courts, depending on facts presented, without prescription or limitation." *Fairfield Sentry*, 714 F.3d at 138.

Here, the Debtor argues that denial of recognition of the Debtor's COMI in the Cayman Islands may leave the Debtor "with the alternative of converting a highly consensual Scheme into a Cayman liquidation in an effort to obtain such chapter 15 recognition at a later date." (Supp. Brief ¶ 23.) The Debtor also contends that this "would not maximize the value of the Debtor's assets, as it would divert additional funds towards an entirely new insolvency process in an effort to potentially achieve the relief requested" in the Motion. (*Id.*) Such an outcome would clearly diverge from Chapter 15's stated goal of maximizing the value of the debtor's assets, as well as facilitating the rescue of a financially troubled business. Further, recognition of the Cayman Proceeding would promote cooperation between the American and Cayman courts, by helping facilitate the Cayman Proceeding and maximizing the chances of a successful reorganization.

2. Recognition of this Proceeding is Consistent with Creditors' Expectations

The Scheme Creditors' expectations that their loan agreements would be governed by Cayman law supports recognition of COMI in the Cayman Islands. (Supp. Brief ¶ 11.) When determining a Debtor's COMI, "creditor expectations can be evaluated through examination of the public documents and information available to guide creditor understanding of the nature and risks of their investments." ***788** *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 228 (Bankr. S.D.N.Y. 2017); *see also Constellation I*, 600 B.R. at 274 (listing cases in which offering memoranda and indentures were evaluated for purposes of determining creditors' expectations). Here, this expectation was reasonable considering the publicly available descriptions of the Debtor as a Cayman company in (i) the offering memoranda of the Existing Notes that stated that "an insolvency proceeding relating to us, even if brought in the United States, would likely involve Cayman Islands insolvency law" and (ii) the Debtor's press releases, pointing to the Debtor as a company "incorporated in the Cayman Islands." (Supp. Brief ¶ 11.)

The Debtor's actions reinforced these expectations, particularly the fact that (i) BFAM initiated negotiations related to the Restructuring by issuing the Statutory Demand and threatening a Cayman Islands winding up petition and (ii) the RSA contemplated an insolvency proceeding in the Cayman Islands. (*Id.*) It is incontrovertible that the Scheme Creditors understood that the Debtor is a Cayman Islands company and expected that its debts would be restructured pursuant to the law of the Cayman Islands if a restructuring became necessary. (*Id.*) *See* *In re Ascot Fund Ltd.*, 603 B.R. 271, 283 (Bankr. S.D.N.Y. 2019) (finding COMI in the Caymans, in part, because "[f]rom the Ascot Fund investors' point of view, and as a matter of fact and law, they invested in a Cayman fund and their rights were to be determined under Cayman law.")

In *In re SPhinX, Ltd.*, 351 B.R. at 117, the Court explained that "[v]arious factors, singly or combined, could be relevant" to a COMI determination. The factors are not meant to be applied "mechanically," but rather, "viewed in light of chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value." *Id*. The *SPhinX* court reasoned that "because their money is ultimately at stake, one generally should defer, therefore, to the creditors' acquiescence in or support of a proposed COMI." *Id*. In *SPhinx*, ultimately, the Court found that COMI was outside of the Caymans, but the concept remains, when a Court considers COMI factors, the protection of the creditors' interests is paramount. *Id*.

The decision in *In re Serviços de Petróleo Constellation S.A.* ("*Constellation II"*) also underscores how "Courts in the Second Circuit also look to the expectations of creditors with regard to the location of a debtor's COMI." 613 B.R. 497 (Bankr. S.D.N.Y. 2019) (finding COMI in Luxembourg, in part, because the creditors' expectations of the location of the insolvency proceeding); *see* *In re Chiang*, 437 B.R. 397 (Bankr. C.D. Cal. 2010) (noting how "the location of the COMI is an objective determination based on the viewpoint of third parties (usually creditors)"); *see also In re Codere Finance 2(UK) Ltd.*, Case No. 20-12151 (MG), (Bankr. S.D.N.Y. Oct. 9, 2020) ("*Codere* Transcript," ECF Doc. # 13 at 21:17–23:6) (concluding that COMI in the UK was supported by lack of objections, overwhelming support of the scheme, no evidence of exploitation or untoward manipulation or thwarting of third-party expectations, and interests of creditors and other interested parties sufficiently protected).

In *In re Oi Brasil Holdings*, 578 B.R. at 226–229, the court considered whether, having initially recognized Brazil as the Debtor's COMI, subsequent events caused the COMI to shift to the Netherlands. To evaluate whether the COMI had shifted, the court considered creditor expectations, concluding "that purchasers of the notes understood that they were investing in Brazilian-based businesses, and [the debtor's] place of incorporation, or for that ***789** matter its very existence, was immaterial to their decision to purchase their notes." *Id.* at 229. It was notable in this case that "the [noteholders] had no legitimate expectation that the Austrian courts would play any role in the determination or payment." *Id*. at 226; *see also In re Olinda Star Ltd.*, 614 B.R. 28, 44 (Bankr. S.D.N.Y. 2020) (holding third party and creditors' expectations weigh in favor of finding COMI); *Constellation II*, 613 B.R. at 508 (noting "[c]ourts in the Second Circuit also look to the expectations of creditors with regard to the location of a Debtor's COMI.")

In the present case, the Scheme Creditors made loans to Modern Land, a Cayman-incorporated holding company that carries out the business of real estate development in the PRC. (Motion ¶¶ 6–7.) Given the statutory presumption included in section 1516(c) of the Bankruptcy Code, the creditors could reasonably have concluded that the Debtor's registered office in the Cayman Islands was its COMI, subjecting it to the Cayman Companies Act, and in turn subjecting the creditors' agreements with the Debtor to Cayman law. Further, "nearly half of the Debtor's wholly owned subsidiaries are Cayman entities." (Supp. Brief ¶ 7.) Given the proclivity of Courts in the Second Circuit to consider creditor expectations when making a COMI determination, therefore, this factor supports a finding of the Cayman Islands being the Debtor's COMI.

The creditor expectations in this case are further evidenced by the overwhelming creditor support. Not one Scheme Creditor objected to the Debtor's COMI being located in the Cayman Islands, including the two dissenting Scheme Creditors that voted against the Scheme. (Supp. Brief ¶ 12.) Over 99% in number of the Scheme Creditors present and voting at the Scheme Meeting, representing approximately 95% in value of the outstanding principal of the Existing Notes, voted in favor of the Scheme. (*Id*., Supp. Moran Decl. ¶ 4.) In this case, definitive creditor expectations and overwhelming creditor support solidify a finding of COMI in the Cayman Islands.

3. The Judicial Role in the Cayman Scheme is Prevalent in this Case

Another factor supporting COMI being in the Cayman Islands is the ongoing restructuring proceeding itself. In *In re Suntech Power Holdings Co.*, 520 B.R. at 418, a Cayman-incorporated holding company primarily conducting business in China filed for Chapter 15, seeking recognition. Over creditors' objections, this Court found COMI in the Cayman at the time of the filing, while acknowledging that COMI had been in China prior to the filing. *Id.* The *Suntech* court discussed at length the role of the JPLs, who conducted much of the Debtor's business from the Cayman Islands following the petition. *Id.*

In the present case, unlike in *Suntech*, there are no objections to recognition as a foreign main proceeding. The Scheme Creditors in this case overwhelmingly approved the Scheme. (Motion ¶ 65.) Modern Land is not subject to the control of JPLs, but there were no issues about the propriety if any actions by management, and the Debtor and its professionals successfully negotiated an RSA with very broad creditor support. (Third Moran Decl. ¶ 7.) There was no need for the appointment of JPLs. (Supp. Brief ¶ 16.)

Furthermore, the Debtor in this case identifies itself as a Cayman-incorporated company in press releases and in official memoranda. (*Id.* ¶ 1.) The Debtor maintains its registered office in the Cayman Islands, and maintains a statutory register of members (i.e. shareholders), mortgages, charges, and directors in the Cayman Islands. (*Id.*) The Debtor's historical corporate counsel, who additionally advised the Debtor on the issuance of the Existing ***790** Notes, is a law firm located in the Cayman Islands. (*Id.* ¶ 2.) The offering memoranda for the Existing Notes indicated in several places that, if needed, the Debtor would initiate an insolvency proceeding in the Cayman Islands. (*Id.* ¶ 3.) Lastly, the first demand upon the Debtor following its initial default under the Existing Notes threatened a winding up petition pursuant to the laws of the Cayman Islands. (*Id.* ¶ 4.)

The RSA expressly requires a Cayman Islands scheme of arrangement, and approximately 80.75% of the aggregate principal outstanding amount of all Existing Notes acceded to the RSA. (*Id.* ¶ 5.) No Scheme Creditors objected to the Debtor's COMI being located in the Cayman Islands, and 99% in number of the Scheme Creditors present and voting at the Scheme Meeting representing approximately 95% in value of the outstanding principal of the Existing Notes, voted in favor of the Scheme. (*Id.* ¶ 12.)

Cayman law further provides that only the Cayman Court can conduct an effective liquidation of a Cayman Islands-incorporated company. (Third Moran Decl. ¶ 16.) The Debtors assert that, pursuant to Cayman law, a suit against a member of the Debtor's board of directors would require the application of Cayman law, even if such director did not live in the Cayman Islands. (*Id.* ¶ 24.) Next, nearly half of the Debtor's direct wholly owned subsidiaries are Cayman entities. (Supp. Brief ¶ 7.) The Debtor further identified at least 35 entities—representing a minimum of over half a billion dollars of the outstanding principal of the Existing Notes—that are domiciled in the Cayman Islands. (*Id.*)

The Debtor asserts, importantly, that as of the time of the filing of the Chapter 15 petition, the restructuring efforts were the Debtor's "primary business activity ... to ensure the Debtor's survival." (*Id.* ¶ 8.) The "vast majority of Restructuring-related activities took place in the Caymans," and the Debtor's Cayman counsel advised the Debtor as a matter of Cayman Islands law. (*Id.*) For example, the Scheme Meeting took place in the Cayman Islands, the Scheme Meeting was presided over by a Cayman Islands resident, and the chairman of the meeting held proxies for the majority of the Scheme Creditors and attended and voted at the meeting in the Cayman Islands on their behalf. (*Id.*) The Debtor's Cayman counsel also appeared at both hearings before the Cayman Court to obtain permission to convene the Scheme Meeting and to sanction the Scheme. (Third Moran Decl. ¶ 25.) The Scheme received the support of Scheme Creditors representing approximately 95% of the value of the Existing Notes. (Supp. Brief ¶ 9.) Given the strong support for the Scheme, the fact that the restructuring was the primary business activity of the Debtor at the time of the filing of the Chapter 15, the ongoing activities pertaining to the restructuring itself support recognition of the Cayman Islands as the Debtor's COMI in the present case.

Further, the fact that the Debtor is an exempted company does not jeopardize its ability to have a COMI in the Cayman Islands. The Debtor was incorporated in the Cayman Islands under the Companies Act as an exempted company with limited liability. (Motion ¶ 6.) While the Debtor's exempted company status places certain limitations upon its operations in the Cayman Islands, this Court has held that exempted companies can have a Cayman COMI. In *Ocean Rig.*, 570 B.R. at 705, this Court held that "[i]t also does not matter that [the debtor] is classified as 'exempted' under the Cayman Companies Law, even though 'exempted' company status appears to limit that company's activities in the Cayman Islands ... [w]hile exempted companies are prohibited from ***791** *trading* in the Cayman Islands, except in furtherance of their business outside the

Cayman Islands, they may still be *managed* from there." The *Ocean Rig* Court subsequently concluded that the Cayman Islands was indeed the debtor's COMI, and recognized the foreign main proceeding. *Id.* at 707. Therefore, in the present case, the Debtor's status as an exempted company does not jeopardize its COMI in the Cayman Islands.

4. Choice of Law Principles Support a Finding of COMI in the Cayman Islands

When conducting a COMI analysis, Courts in this Circuit additionally consider the jurisdiction whose law would apply to most disputes. *Olinda Star*, 614 B.R. at 43. "[T]his factor weighs in favor of a COMI in" the jurisdiction whose law applies. *Id.* at 44; *see also Constellation I*, 600 B.R. at 280 (stating that "because Parent/Constellation is a Luxembourg incorporated entity, that depends upon Luxembourg law for its existence and its corporate operations, the Court found that Luxembourg law should be considered the law that applies to *most* of Parent/Constellation's disputes"). In the present case, the Foreign Representative explained that the Debtor, as a Cayman-incorporated company, "depends on Cayman Islands law for its existence and is subject to Cayman Islands laws and regulations." (Supp. Brief ¶ 13.) The Foreign Representative further explained that the requirements of Cayman law were "made clear in the documents related to the issuance of the Existing Notes." (*Id.*) While the Existing Notes as governed by New York law, the Cayman Islands is the jurisdiction whose law would apply to most disputes over corporate actions that may arise in the Cayman Proceeding, this factor supports finding a COMI in the Cayman Islands. And, to the extent that any New York law issues arose concerning the Existing Notes, the Second Circuit explained in *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005), that "[w]e have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding."

The Scheme Creditors here include only holders of Existing Notes. The Debtor's capital structure includes substantial debt governed by Hon Kong law. The Court has no reason to address the COMI of any insolvency or scheme proceeding involving creditors with claims other than holders of the Existing Notes. Creditor expectations in such a case could point to COMI somewhere other than the Cayman Islands.

5. The Debtors Seek Recognition in Good Faith

Many of the cases in which courts have denied recognition of a foreign main proceeding in a debtor's country of incorporation involved instances of bad faith, which are not present in the Debtor's petition for recognition. For example, in *Creative Finance*, the court found that the debtor's principal "and his associates—and hence the Debtors—were guilty of bad faith in numerous respects." 543 B.R. at 513. Among other transgressions, the debtors in *Creative Finance* sought to manipulate a liquidator, ignored important inquiries, and sought to deny a disfavored creditor the opportunity to benefit from the proceeding. *Id.* In contrast, in *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 64-65 (Bankr. S.D.N.Y. 2010), the Court held that "[t]here being no showing of bad faith on the part of the BVI Liquidators, and given that the [d]ebtors are incorporated in and maintain their registered offices in the BVI, the Court finds it more compelling that the [d]ebtor's COMI lies in the BVI." *See also Codere* Transcript at 20:1–21:25 (reasoning that "the lack of objections ***792** and the overwhelming support for the scheme of arrangement in this case suggests that there has not been insider exploitation, untoward manipulation, overt thwarting of third-party expectations.... Those sorts of things could evidence bad faith COMI manipulation.").

SPhinX was even more explicit in its consideration of the Debtor's bad faith as the basis for rejecting recognition. There, the Bankruptcy Court explained that "a primary basis for the Petition, and the investors' tacit consent to the Cayman Islands proceedings as foreign main proceedings, is improper ... this litigation strategy [seeking to frustrate a settlement agreement by exploiting the automatic stay] appears to be the only reason for their request for recognition." *In re SPhinX*, 351 B.R. at 121. The *SPhinX* Court therefore rejected a finding of COMI supporting recognition of a foreign main proceeding, and

instead proceeded to consider the existence of a foreign nonmain proceeding not subject to the debtor's bad faith. *Id.*

In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, the court denied recognition of a Cayman scheme proceeding seeking to restructure an open-end investment firm as either a foreign main or nonmain proceeding. 374 B.R. at 126. The *Bear Stearns* court emphasized the Debtor's operational history, considering the location of its employees, managers, books and records, and liquid assets. *Id.* at 130. The court therefore denied recognition of COMI in the Cayman Islands because the United States, not the Cayman Islands, was "the place where the Funds conduct the administration of their interests on a regular basis." *Id.* However, *Fairfield Sentry* subsequently clarified that:

> A court may look at the period between the commencement of the foreign proceeding and the filing of the chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith, but there is no support for [the] contention that a debtor's entire operational history should be considered. The factors that a court may consider in this analysis are not limited and may include the debtor's liquidation activities.

714 F.3d at 138.

The *Fairfield Sentry* court also emphasized that "[t]here was no finding of bad-faith COMI manipulation." *Id.* at 139. In the present case, like in *Fairfield Sentry*, the Debtor is a holding company with subsidiaries that conduct business around the world. (Motion ¶ 7.) The Debtor is similarly engaged in a restructuring proceeding pursuant to the laws of its country of incorporation. (*Id.* ¶ 21.) The *Fairfield Sentry* court explained that "[it] matters that the inquiry under Section 1517 is whether a foreign proceeding '*is pending* in the country where the debtor *has* the center of its main interests.' 11 U.S.C. § 1517(b)(1) (emphasis added)." 714 F.3d at 134. The same is true in this case too.

In *In re Ran*, 390 B.R. 257 (Bankr. S.D. Tex. 2008), the bankruptcy court denied recognition of an Israeli bankruptcy proceeding as either a foreign main or nonmain proceeding. On remand from the district court, the bankruptcy court "decline[d] to make findings on whether or not Lavie [a trustee overseeing the bankruptcy] acted in bad faith." *Id.* at 298. However, the court explained that "[b]y citing favorably to *In re SPhinX*, ... in its order of remand, the district court suggests that a foreign representative's bad faith motive in seeking recognition of a foreign proceeding may appropriately be considered in determining the location of a debtor's center of main interests." *Id.* at 297. Indeed, despite the court's distaste for making findings based upon the debtor's apparent bad faith, the court nevertheless devoted an entire section of its ***793** analysis to the foreign representative's motive. *Id.* at 295. So, while the presence of bad faith did not play an explicit role in the court's decision in *Ran*, the questionable motivations of the foreign representative clearly informed the court's analysis.

In the present case, the Debtor has not engaged in COMI-shifting behavior, nor has it sought to deceive the Court or the Scheme Creditors in its pursuit of a Cayman restructuring. Instead, as discussed above, the Debtor seeks recognition of a proceeding under Cayman law, a fact which the Scheme Creditors likely factored into their decision to conduct business with the Debtor in the first place.[8] Given the absence of COMI-shifting and the Debtor's good-faith petition for recognition under chapter 15, this factor supports recognition of COMI in the Cayman Islands.

IV. CONCLUSION

For the reasons explained above, the Court **FINDS** that the Cayman Islands is the Debtor's COMI. All other requirements for recognition have been satisfied.

Therefore, the Court recognizes the Cayman Proceeding as a foreign main proceeding. Additionally, the Court, in the exercise of discretion, recognizes and enforces the Cayman Scheme.

A separate order will be entered granting the requested relief.

All Citations

641 B.R. 768

Footnotes

1 All dollar amounts are calculated in USD.

2 As of June 30, 2021, the Company's current assets consist of the following: a) inventory of $145.79 million; b) properties under development for sale of $6.92 billion; c) properties held for sale of $895 million; d) trade and other receivables of $1.78 billion; e) amount due from related parties of $129.27 million; f) restricted cash of $570.69 million; and g) bank balances and cash of $2.06 billion. (Motion ¶ 15.)

3 As detailed in Section I.G., below, the Scheme Creditors voted overwhelmingly to approve the Scheme—99% in number and 94.8% in amount. No objections to the Scheme were raised either in connection with the Cayman sanction hearing or this Court's recognition hearing.

4 What *Agrokor* discussed at length (and will not be repeated here) is that English and some commonwealth courts continue to apply the *Gibbs* Rule, based on an 1890 decision of the Court of Appeal in *Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399, which refuses to recognize a discharge or modification of English law governed debt approved by a court outside of England. *See* *Agrokor*, 591 B.R. at 192-96.

5 The Debtor's argument is misleading. Neither the Debtor nor any of its creditors filed a winding up petition that would have resulted in the appointment by the Cayman court of one or more provisional liquidators, who are independent fiduciaries. *See* Cayman Companies Act §§ 94, 104. Rather, here, the Debtor filed the Scheme Petition under section 86 of the Cayman Companies Act, which does not by itself result in the appointment of JPLs. The benefit of a winding up order is that it enables the court in appropriate cases to issue a moratorium similar to our automatic stay preventing creditors from taking action to recover on their claims while the parties try to reach agreement on a scheme.

The Cayman court in this case issued the Convening Order appointing the Debtor's president as the Foreign Representative and scheduling the Scheme Meeting. No JPLs were appointed, meaning that there was no independent fiduciary overseeing the process. The Debtor and its professionals had already negotiated the RSA and were proceeding rapidly to a consensual scheme of arrangement without the necessity of a winding up petition, JPLs and a moratorium.

In many Cayman cases where the debtor hopes to negotiate a scheme of arrangement, a winding up order and appointment of JPLs precedes the negotiation of the scheme. Such matters are often referred to as a "light touch" restructuring. *See In the Matter of Midway Resources Int'l*, Grand Court of the Cayman Islands, Cause Number: FSD

51 of 2021 (NSD) (Nicholas Segal J.) (30 March 2021), at [68] ("I am satisfied that this is an appropriate case in which the PLs should be appointed on a soft touch basis (although I would reiterate my plea to substitute 'light-touch' for 'soft touch', since the latter expression has always seemed to me to bring with it associations of someone being duped and defrauded!").

6 Ms. Moran notes that a company would seek the appointment of JPLs and avail of the stay afforded by section 97(1) of the Companies Act to facilitate a restructuring if: (a) there were issues with the propriety of actions taken by management, with a view to suspending the powers of the directors and/or (b) the scheme of arrangement was contentious including where there is a risk that minority creditor(s) might seek to frustrate the restructuring through the presentation of a winding up petition. (Third Moran Decl. ¶ 7.)

7 It would be ironic if a scheme proceeding, following the appointment of JPLs in a contentious case where JPLs were needed to facilitate agreement between the debtor and its creditors, was recognized as a foreign main proceeding, but in a case such as this one where the Debtor and its professionals successfully negotiated the RSA with overwhelming creditor support without the need to file a winding up petition and the appointment of JPLs before obtaining sanction of the Scheme could not be recognized as a foreign main proceeding.

8 *See Suntech*, 520 B.R. at 418:

> Nor does the evidence support a finding that the Debtor's creditors would have expected it to restructure its businesses in China. The Debtor's largest creditor group was the Noteholders. The Indenture was governed by New York law and the parties to the Indenture submitted to the non-exclusive jurisdiction of the New York state and federal courts. In addition, when the representatives ... who held approximately 50% of the debt, met with the Debtor's representatives, they urged the Cayman Islands as the most logical restructuring venue. The Debtor was incorporated in the Cayman Islands and the Cayman Islands employed a predictable, flexible and cost effective method for dealing with restructuring.

End of Document

HCMP 2227/2021 & HCCW 81/2021
(HEARD TOGETHER)
[2022] HKCFI 1686

HCMP 2227/2021

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 2227 OF 2021

IN THE MATTER of Rare Earth Magnesium Technology Group Holdings Limited 稀鎂科技集團控有限公司 (Provisional Liquidators Appointed) (For Restructuring Purposes Only)

and

IN THE MATTER of Sections 670, 671, 673, and 674 of the Companies Ordinance (Cap 622)

AND

HCCW 81/2021

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES WINDING-UP PROCEEDINGS NO 81 OF 2021

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32)

and

IN THE MATTER of Rare Earth Magnesium Technology Group Holdings Limited 稀鎂科技集團控有限公司 (Provisional Liquidators Appointed) (For Restructuring Purposes Only)

(HEARD TOGETHER)

Before: Hon Harris J in Court

Date of Hearing: 27 May 2022

Date of Decision: 27 May 2022

Date of Reasons for Decision: 6 June 2022

REASONS FOR DECISION

Introduction

1. I have before me:

(1) the Company's Petition seeking the Court's:

(a) sanction under *section 673* of the *Companies Ordinance* (Cap. 622) ("**Ordinance**") of a scheme of arrangement between the Company and its Scheme Creditors; and

(b) approval of certain amendments to the Scheme providing for improved recovery for the Scheme Creditors.

(2) The Petition issued by AI Global Investment SPC on 22 February 2021 to wind up the Company ("**Winding-Up Petition**"), which the Company asks me to dismiss and order that the costs are paid by the Petitioner. I deal with this in [44].

2. On 12 January 2022 I made an order for the Company to convene a meeting of its creditors to consider a proposed scheme of arrangement restructuring its debt ("**Convening Order**"). After an adjournment, the Scheme Meeting was duly convened on 1 March 2022. At the Scheme Meeting the resolution was carried by a majority in number of the Scheme Creditors present and voting, in person or by proxy, holding 79.06% of the Claims voted. Specifically, 9 out of the 10 Scheme Creditors voted for the Scheme.

3. The Scheme seeks to restructure the Company's indebtedness in order to return the Company to a solvent going concern. A successful restructuring would give the Scheme Creditors a much higher recovery (estimated to be 100% of the principal under the Scheme's Term Extension Option). Absent restructuring, the Company would be liquidated and the Scheme Creditors' estimated recovery would be approximately 8.5% to 23.1%.

4. The background to the Company and the need for the Scheme are in brief as follows. The Company is a Bermuda-incorporated entity and its shares have been listed on the Main Board of The Stock Exchange of Hong Kong Limited ("**SEHK**") since 28 January 1993. The Company is an investment holding company. The Company's subsidiaries are principally located in Hong Kong, Mainland China, and the British Virgin Islands. The Company is also part of a wider group ("**Group**") ultimately held by Century Sunshine Group Holdings Limited ("**Century Sunshine**") which is an exempted company incorporated in the Cayman Islands and listed in Hong Kong (Stock Code: 509).

5. The Group's key businesses consist of the development and production of green fertilisers, including ecological fertilisers, functional

fertilisers and general fertilisers; a with the primary production bases in the Jiangsu Province and Jiangxi Province; and the production of magnesium in the Jilin Province and Xinjiang Uyghur Autonomous Region.

6. The Company is the key operator of the magnesium alloy production business segment of the Group and indirectly owns the relevant production bases in the Mainland. Despite enjoying strong growth and profitability in the past, the Group's financial position deteriorated in 2020 due to COVID-19. The Company is at least cashflow insolvent. The Company's management accounts as of 31 December 2021 stated that the Company had net assets of HK$1,138,523,000 and net current liabilities of HK$613,477,000.

7. The Company's principal indebtedness arises from unsecured interest-bearing bonds issued by the Company, which are governed by Hong Kong law. As of 31 December 2021, the Company's total indebtedness was approximately HK$852,533,000 owed to 10 Scheme Creditors. The Company is likely to go into liquidation unless its current indebtedness can be restructured. On 22 February 2021, a creditor (AI Global Investment SPC) presented a winding-up petition against the Company in Hong Kong ("**Petition**"). The Petition hearing has been adjourned to 27 May 2022 so that the Court may consider both the Scheme's progress and the Petition together.

8. Before the Petition was issued, the Company sought the appointment of soft-touch provisional liquidators ("**PLs**") in Bermuda:

(1) On 3 July 2020, the Company filed a winding-up petition in Bermuda against itself.

(2) On 16 July 2020, the Bermuda court appointed the PLs to assist in and facilitate the Company's debt restructuring.

9. On 25 August 2020, I recognised the PLs in Hong Kong: *Re Rare Earth Magnesium Technology Group Holdings Ltd*[1].

10. To avoid liquidation and to return the Company to a solvent going concern, the Company (with the PLs' assistance) has been pursuing a debt restructuring leading to the Scheme. The Scheme seeks to discharge the Company's unsecured indebtedness, which would also entail releasing the Scheme Creditors' right to enforce guarantees granted by Century Sunshine (Clauses 1 and 2 of the Scheme). In return, the Scheme Creditors will be given a choice to choose either the Term Extension Option, the Convertible Bonds Swap Option, or a combination of both (Clause 7 of the Scheme).

11. Under the Term Extension Option, the Scheme Creditors' Claim repayment deadline will be extended for five years, during which the Scheme Creditors will be entitled to receive the Term Extension Interest, Interim Payments, and the Final Payment; and where applicable the Early Repayment and Term Extension Potential Extra Payment (Clauses 7.2 to 7.10 of the Scheme).

12. Under the Convertible Bonds Swap Option, the Scheme Creditors' Claim will be converted into Convertible Bonds which will mature in five years. The Convertible Bonds do not carry any interest and may be converted into the Conversion Shares during the conversion period. Unless previously redeemed or converted, the Company shall redeem the

[1] [2020] HKCFI 2260; [2020] HKCLC 1295.

Convertible Bonds on the maturity date at the redemption amount which shall be equal to 100% of the outstanding principal amount (Clause 7.14 of the Scheme).

13. To give additional comfort to the Scheme Creditors who choose the Term Extension Option, the following are offered to those Scheme Creditors:

(1) Century Sunshine is pursuing its own debt restructuring via the Century Sunshine Proposed Scheme. If there are surplus assets resulting from the Century Sunshine Proposed Scheme, the surplus assets are intended to be transferred to the Scheme Company for distribution to the Option A Creditors (Clause 7.11 of the Scheme).

(2) Century Sunshine will provide a corporate guarantee to the Scheme Company to guarantee the punctual payment of the Interim Payment(s) (if payable) and the Final Payment (Clause 7.12 of the Scheme).

(3) The Company's various subsidiaries will provide security interests and corporate guarantees to the Scheme Company to secure the Final Payment (Clause 7.13 of the Scheme).

14. In addition, the Scheme Creditors who have executed the Consenting Agreement will be given a consent fee in cash amounting to 3% of the principal amount of the debt owed by the Company to the Scheme Creditors (Clause 9 of the Scheme).

15. The Scheme Creditors' recovery under the Term Extension Option is estimated to be 100% of the principal, whereas in a liquidation the Scheme Creditors' recovery is estimated to be approximately 8.5% to 23.1%.

16. The Company does not need any parallel scheme of arrangement in any jurisdiction.

Relevant Principles

17. In considering whether to sanction a scheme, the Court applies some well-established principles which I recently restated in *Re China Singyes Solar Technologies Holdings Ltd*[2]. The Court considers in particular the following:

(1) whether the scheme is for a permissible purpose;

(2) whether creditors who were called on to vote as a single class had sufficiently similar legal rights such that they could consult together with a view to their common interest at a single meeting;

(3) whether the meeting was duly convened in accordance with the Court's directions;

(4) whether creditors have been given sufficient information about the scheme to enable them to make an informed decision on whether or not to support it;

(5) whether the necessary statutory majorities have been obtained;

(6) whether the Court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme; and

(7) in an international case, whether there is sufficient connection between the scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions.

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[2] [2020] HKCFI 467; [2020] HKCLC 379 at [7].

18. As in *Singyes*, the Scheme is a genuine debt restructuring of a distressed company. It is also a permissible purpose to compromise via the Scheme guarantees granted by Century Sunshine (see *Re Century Sun International Ltd*[3]).

19. In considering whether creditors are properly classified, the test is whether creditors who are called on to vote as a single class have sufficiently similar legal rights that they could consult together with a view to their common interest at a single meeting. The relevant principles may be summarised as follows:

(1) The overarching question is whether the pre and post-scheme rights of those proposed to be included in a single class are so dissimilar as to make it impossible for them to consult with a view to their common interest. If that is the case, separate meetings must be summoned.

(2) The second principle is that it is the rights of creditors, not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests will normally only ever arise at the sanction stage as a question for consideration.

(3) The third principle is that the court should take a broad approach to the composition of classes, so as to avoid giving unjustified veto rights to a minority group of creditors, with the result that the test for classes becomes an instrument of oppression by a minority.

(4) The fourth principle is that the court has to consider, on the one hand, the rights of the creditors in the absence of the scheme and, on the other hand, any new rights to which the creditors become entitled under the scheme. If, having carried

[3] [2021] HKCFI 2928; [2021] HKCLC 1477 at [15]–[17].

out that exercise, there is a material difference between the rights of the different groups of creditors, they may, but not necessarily will, constitute different classes. Whether they do so depends on a judgment as to whether such a difference makes it impossible for the different groups to consult together with a view to their common interest.

(5) In applying the above test, the starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed.

See *Re China Oil Gangran Energy Group Holdings Ltd*[4].

20. The Scheme Creditors correctly voted as a single class for these reasons:

(1) The appropriate comparator here is an insolvent liquidation because, absent the Scheme, an insolvent liquidation of the Company would be an unavoidable outcome.

(2) The Scheme Claims are the Company's general unsecured debts.

(3) All Scheme Creditors are given the same options for distribution under the Scheme.

21. The Convening Order has been complied with. This is explained by Mr Chi in his 2nd affirmation which confirms the circulation of the notice of the Scheme Meeting, Explanatory Statement and Scheme. The advertisement of the Scheme Meeting was duly placed in The Standard and Sing Tao Daily on 18 January 2022.

[4] [2021] HKCFI 1592; [2021] HKCLC 911 at [15]–[16].

22. During the Scheme Meeting held on 15 February 2022, the Chairman adjourned the Scheme Meeting to 1 March 2022 in view of the impending amendments to the Scheme resulting from negotiations with a major Scheme Creditor. This was permissible. The Chairperson could validly adjourn the Scheme Meeting to allow the Scheme Creditors sufficient opportunity to consider proposed amendments to the Scheme (see *Re Peninsula and Oriental Steam Navigation Company*[5]; *aff'd The Peninsular and Oriental Steam Navigation Company v Eller and Co*[6]; *Re CIL Holdings Ltd*[7]).

23. On 23 February 2022, the Company circulated the revised Scheme to all Scheme Creditors. The adjourned Scheme Meeting on 1 March 2022 duly voted in favour of the Scheme. The requirements under *section 674(1)(b)* of the *Ordinance* that the Scheme be approved by a majority in number representing at least 75% in value of the Scheme Creditors present and voting in person or by proxy have been satisfied.

24. To satisfy the requirements of *section 671(3)* of the *Ordinance*, an explanatory statement must be sufficiently informative:

> "A company is under a duty to include in the explanatory statement all the information necessary to enable the creditors to form a reasonable judgement on whether the scheme is in their best interests or not, and hence how to vote. The extent of the information required to be provided will, of course, depend on the facts of the particular case. Necessarily, the duty extends to the company providing up to date information, or an adequate explanation of why it has not done so, that will allow a creditor to contrast what is to be anticipated if the scheme is approved, and the outcome if it is not. A company is required to provide specific financial information to support its predicted outcomes, and I would normally expect it to have its views independently

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5 [2006] EWHC 389 (Ch) at [34], [49], [54]–[55] (Warren J).
6 [2006] EWCA Civ 432.
7 (Unrep., HCMP 2799/2002, 2 April 2003) at [8]–[12] and [18] (Kwan J).

> verified by an insolvency practitioner or other suitable professionals."[8]

The Explanatory Statement satisfies these requirements.

25. The Court is slow to differ from the majority views, as it normally acts on the principle that businessmen are much better judges of what is to their commercial advantage than the court could be: *Re Allied Properties (HK) Ltd*[9]. The primary object of the Scheme is that, upon the Scheme becoming effective, the Scheme Creditors' Claims will be discharged and in return they will be entitled to be given a cash distribution, convertible bonds or a combination of both under the terms of the Scheme. The Scheme consideration provides the Scheme Creditors with a much better return than in an insolvent liquidation of the Company. Therefore, in respect of the Scheme Creditors, the Scheme is one that an intelligent and honest person acting in accordance with his interests as a member of the class within which he voted might reasonably approve.

Transnational Cases

26. The business group of which the Company is an intermediate subsidiary carries on business in Jiangsu, Jiangxi and Jilin Provinces and the Xinjiang Uyghur Autonomous Region. The ultimate holding company is incorporated in the Cayman Islands and listed on the SEHK. The Company is incorporated in Bermuda. The debt to be compromised by the Scheme is very largely governed by Hong Kong law.

27. In transnational cases, the Court considers whether a scheme is effective in other foreign jurisdictions of practical importance because it

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[8] *Re Century Sun International Ltd, supra*, footnote 3 at [23].
[9] [2020] HKCA 973; [2020] HKCLC 1549 at [37].

would not be a proper exercise of the discretion to sanction a scheme if it serves no purpose. In practice whether or not a jurisdiction is of practical importance to the efficacy of a scheme sanctioned in Hong Kong will commonly be determined by the following considerations:

(1) Is a material amount of debt to be compromised by a scheme governed by the law of a jurisdiction other than Hong Kong?

(2) Even if there is some doubt as to whether or not a scheme will compromise a proportion of the debt, is there any reason to think that the creditors will take action in a jurisdiction which will not recognise a scheme as compromising the debt?

(3) The amount of the debt involved. If, for example, the amount of debt that is not governed by Hong Kong law is less than the cost of introducing a parallel scheme it makes more sense to exclude that debt from the scheme and settle it separately if it is ever pursued: *China Oil*[10].

28. Although there is no parallel scheme or recognition application in any jurisdiction, the Scheme is expected to be internationally effective, in particular in Bermuda and Cayman Islands, because all the Claims are governed by Hong Kong law. As Miles J recently observed in, *Re PGS ASA*[11], in an English law context:

> "There is no requirement for a scheme to be effective in every jurisdiction worldwide, provided that it is likely to be effective in the key jurisdictions in which the company operates or has assets. Where the governing law of the debt affected by the scheme is English law, it is inherently likely that the scheme will be recognised abroad."

[10] *Supra*, footnote 4 at [21]–[23].
[11] [2021] EWHC 222 (Ch) at [29] (Miles J).

29. The expectation that the discharge of Hong Kong law-governed debt effected by a Hong Kong scheme of arrangement will be recognised abroad is justified because the discharge occurs as a matter of substantive Hong Kong law. This is certainly to be expected of a jurisdiction, which applies, what is commonly known as, the Rule in *Gibbs*. The Rule in *Gibbs*[12] provides that a debt is treated as discharged if compromised in accordance with the law of the jurisdiction, which governed the instrument giving rise to the debt. As far as I am aware, at the time of this decision *Gibbs* is followed in Bermuda, Cayman Islands and the other offshore jurisdictions. If a creditor submits to the jurisdiction of a foreign insolvency process he is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency process[13]. Consequently, a scheme sanctioned by the court of an offshore jurisdiction compromising debt governed by Hong Kong law will be treated in Hong Kong as binding on a creditor, who submitted to the foreign jurisdiction. It will not bind a creditor, who did not participate in the scheme proceedings or any associated insolvency process in the foreign jurisdiction.

30. Although not material in the present case, it is common for Mainland business groups listed in Hong Kong to raise US$ denominated debt and for the relevant agreements to be governed by United States law. A technique was established in about 2016 to compromise such debt by introducing a scheme in Hong Kong that would be recognised in the United States[14]. This would not be inconsistent with the Rule in *Gibbs*. As I explain in *Winsway*[15]:

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12 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399.
13 *China Oil supra* [24] referring to *China Singyes supra* [18(2)].
14 See in particular *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1; [2016] HKEC 2495.
15 *Ibid* [36].

> "The second issue is answered by the Privy Council's decision in *New Zealand Loan and Mercantile Agency Co v Morrison*[16]. The Privy Council held, applying *Gibbs*, that a scheme of arrangement sanctioned in England under the *Joint Stock Companies Arrangement Act 1870* did not prevent a claim being brought in Victoria in respect of a debt governed by the law of Victoria. It did, however, bind all creditors '*wherever the creditors may be found, whether in the United Kingdom or in the Colonies or in foreign countries; and within the jurisdiction of the English Courts, all, wherever domicile, will be bound by the result.*'[17] The Scheme will, therefore, prevent action being taken within the jurisdiction of the Hong Kong courts regardless of the governing law of the debt. This is one of the principal reasons for introducing a scheme such as the present one. It will prevent action being taken in Hong Kong by a dissident creditor, which interferes with the Company's listed status."

31. A creditor could not take enforcement action within the United States as a consequence of recognition of the scheme under *Chapter 15* and granting by the relevant Bankruptcy Court of ancillary relief which prohibited enforcement in the United States. As the offshore jurisdictions apply the Rule in *Gibbs*, such a scheme might not be effective to compromise the debt of a creditor, who has not submitted to the jurisdiction of the Hong Kong court. Whether or not it is necessary to introduce a parallel scheme in the offshore jurisdiction will depend on the factors that I consider in [23]–[29] of *China Oil*[18].

32. A scheme sanctioned in an offshore jurisdiction and recognised under *Chapter 15* in the United States will not be treated by a Hong Kong court as compromising US$ debt. The Rule in *Gibbs* requires the substantive alteration of contractual rights to be sanctioned by some substantive provision of the relevant law[19]. In the insolvency context in the United States this is I understand is achieved under *Chapter 11* of

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16 [1898] AC 349.
17 Lord Davey pp357–8.
18 *Supra.*
19 *In re OJSC International Bank of Azerbaijan Bakhshiyeva v Sberbank of Russia* [2018] Bus LR 1270, 1308, [158(2)] (Hildyard J).

United States Bankruptcy Code. This is explained by Glenn J (who dealt with the *Chapter 15* application in *Winsway*[20]) in his judgment in *In re Agrokor d.d*[21]. In pages 184 to 185 Glenn J explains the position as follows:

> "The Supreme Court concluded in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an *in rem* proceeding. A single court should resolve all claims to property of the debtor, which necessarily requires that the court resolve all creditor claims that have been, or could have been, asserted, provided that the creditors have received the notice required by due process. Thus, in an *in rem* proceeding, personal jurisdiction over all creditors is not required; the court determines the creditors' rights to receive distributions from all property of the debtor that is part of the estate. A creditor cannot ignore or avoid a Chapter 11 case and later sue to recover on its prepetition claim. Upon confirmation of a Chapter 11 plan, section 1141 (d)(1)(A) discharges the debtor from any debt that arose before the date of confirmation, whether or not the creditors filed a proof of claim or accepted the plan…"

33. As a matter of United States law a confirmed *Chapter 11* plan operates to discharge the existing debt of a debtor and replace it with a right to receive a distribution in accordance with the confirmed plan. This is also the effect of a sanctioned scheme. Glenn J goes on at the end of the paragraph I have quoted to refer to the same principles applying to recognition of a foreign insolvency process with the same consequences, however, it is clear from reading the judgment as a whole that recognition under *Chapter 15* does not operate as a discharge and that Glenn J acknowledges this.

34. On page 185 Glenn J introduces an objection to recognition based on the fact that some of the debt compromised by the arrangement

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[20] *Supra*.
[21] 591 B.R. 163 (Bankr. S.D.N.Y. 2018).

Glenn J was asked to recognise was governed by English law and the arrangement arose under Croatia's *Act of the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia*.

> "From the record before this Court—particularly since no objections have been filed—the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement: Agreement is appropriate within the territorial U.S.) arises because of the English courts' enforcement of the *Gibbs* rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fall considering the amount of prepetition debt governed by English law.[22] That would be unfortunate, indeed."

35. The material distinction between *Chapter 11* and *Chapter 15* proceedings is explained on page 187:

> "Section 1520 details the mandatory relief that is automatically granted upon recognition of a foreign main proceeding under Chapter 15. 11 U.S.C. § 1520. Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property *that is located within the territorial jurisdiction of the United States*. The statute refers specifically to the property of the debtor, as opposed to the property of the estate, since there is no estate in a Chapter 15 case. *See, e.g., Atlas Shipping*, 404 B.R. at 739. Despite this difference, the automatic effect of recognition of a foreign main proceeding under section 1520(a) is an imposition of an automatic stay on any action regarding the debtor's property located **in the United States. *Id.***" (emphasis added)

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[22] As Chief Justice Waite said in *Gebhard*, 109 U.S. at 539, 3 S.Ct. 363, "[u]nless all parties in interest, wherever they reside, can be bound" by the arrangement which is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."

36. It is clear from this passage that recognition under *Chapter 15* operates procedurally to prevent action by a creditor against a debtor's property in the United States. Recognition does not appear as a matter of United States' law to discharge the debt. Consistent with this at page 196 Glenn J states that it is appropriate to extend comity within the territorial jurisdiction of the United States. Unlike a discharge under *Chapter 11* which purports to have worldwide effect, recognition under *Chapter 15* is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt.

37. There is a distinction between a court treating a compromise as having the substantive legal effect of altering the legal rights of the parties to an agreement (the issue with which *Gibbs* is concerned) and a court within its jurisdiction recognising, pursuant to a process such as *Chapter 15*, the purported legal consequence of a foreign insolvency procedure. This is a distinction to which advisers need to be alert when dealing with transnational restructuring. A scheme in an offshore jurisdiction purporting to compromise debt governed by United States law will not be effective in Hong Kong. Recognition of the scheme under *Chapter 15* does not constitute a compromise of debt governed by United States law, which satisfies the Rule in *Gibbs*. The result is that if a company has a creditor, which did not submit to the jurisdiction of the offshore court the creditor will be able to present a petition in Hong Kong to wind up the Company and if, for example, the creditor is a bond holder whose debt is not disputed, obtain a winding up order unless the debt is settled. I note that there appears to be a surprisingly large number of Mainland business groups listed in Hong Kong, whose US$ denominated debt has recently been subject to schemes only in offshore jurisdictions and

recognition under *Chapter 15*[23]. It may be that all the creditors of these companies, which hold debt of any material value have agreed to the terms of the compromise, but if that is not the case such companies, and any that might adopt a similar model in future, will be at risk of a petition being presented against them in Hong Kong and being wound up here. An offshore scheme and *Chapter 15* recognition will not protect them.

Modification of the Scheme

38. The Company seeks to modify the Scheme terms slightly in order to accommodate SEHK's comments on the structure of the Term Extension Share Placement. The amendments are in summary as follows:

(1) Subject to complying with the public float requirement, the Company will issue in one lot all shares under the Term Extension Share Placement, instead of five instalments as originally proposed.

(2) The Term Extension Interest payable to the Scheme Creditors will no longer be subject to any cap; the original proposal was a 5% cap.

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[23] By way of example: Hilong Holding Limited (Stock Code 1623), GCL New Energy Holdings (Stock Code: 451), MIE Holdings Corporation (Stock Code: 1555), Golden Wheel Tiandi Holdings Company Limited (Stock Code: 1232), Modern Land (China) Co., Limited (Stock Code: 1107) and E-House (China) Enterprise Holdings Limited (Stock Code: 2048). In *Winsway* the scheme was recognised because the Hong Kong proceedings to introduce a scheme were found by Glenn J to constitute "*foreign non-main proceedings*" as defined in the **UNCITRAL Model Law** as incorporated in *Chapter 15*, on the basis that the Company was listed on the SEHK: *supra* [37]. My understanding is that it was thought by *Winsway's* legal advisers that the Company's COMI might be in the Mainland and, therefore, the proceedings in Hong Kong would not constitute "*foreign main proceedings*" and the *Chapter 15* application was framed accordingly. For obvious reasons it is unlikely that any of the Mainland companies to which I have referred have their COMI in an offshore jurisdiction or an establishment as defined in paragraph (f) of Article 2. Article 16 paragraph 3 provides that "*In the absence of proof to the contrary, the debtor's registered office ..... is presumed to be the centre of the debtor's main interests*". I would have thought that it would be apparent from evidence filed in support of an application for recognition under *Chapter 15* explaining a scheme and its background that most, if not all, of these companies do not have their COMI in the place of incorporation. As I explain in [20] of my decision in *Li Yiqing v Lamtex Holdings Limited* [2021] HKCFI 622; [2021] HKCLC 329, referring to *Creative Finance Ltd* Case No. 14–10358 (REG) 13 January 2016, my understanding is that offshore jurisdictions are not normally eligible for recognition under *Chapter 11*.

(3) The Company will have no liability for the Scheme Costs. All Scheme Costs will be settled solely from the Term Extension Share Placement Proceeds.

39. The Company seeks the Court's permission to modify the Scheme terms to meet SEHK's requirements. In this connection, the Company relies on Clause 119 of the Scheme:

> "The Scheme Administrators may jointly consent for and on behalf of all concerned to any modification of or addition to the Scheme or to any condition the Court may see fit to approve or impose at any hearing of the Court to sanction or give directions in respect of the Scheme, whether in accordance with Section 670 of the Companies Ordinance or otherwise… If the Court approves a modification or addition to the Scheme without the need to convene a meeting of the Scheme Creditors to vote on the modification, such modification or addition shall be binding on the Company and the Scheme Creditors provided that no further obligations or liabilities should be imposed on the Company and that the Company should not be adversely affected by reason of such modification or addition."

40. I permit the post-Scheme Meeting modifications. The proposed modifications seek only to improve the Scheme Creditors' recovery and thus by definition would not prejudice any Scheme Creditors. Had the proposed modifications been before the Scheme Meeting, they would not have made any difference to the outcome of the Scheme Meeting. There is no question of the Court, by approving these modifications, "foisting" on the Scheme Creditors anything other than what they voted on at the Scheme Meeting. In these circumstance, allowing the proposed modifications would be entirely consistent with authority: *Re China Saite Group Co Ltd*[24].

[24] [2022] HKCFI 1128 at [8].

Determination

41. The Scheme is a legitimate debt restructuring scheme which has complied with all the statutory requirements and has received the requisite Scheme Creditors' support after exercising their independent business judgment and will achieve its intended purpose. I will, therefore, make an order sanctioning the Scheme in the form of the draft order submitted to Court, which is in conventional terms.

Listing of Schemes, recognition applications and applications to appoint Provisional Liquidators

42. Mr Look Chan Ho for the Company told me at the hearing that there appears some confusion among practitioners about the procedural and jurisdiction aspects of the current scheme practice. It will be helpful if I clarify this. As I thought had been brought to practitioners' attention, although Linda Chan J has taken over the role of Companies Judge, because of the amount of cases in the Companies List I will continue to deal with particular types of applications if my diary permits and in the first instance solicitors should approach my clerk for dates. If I am not able to deal with them I will liaise with Linda Chan J. The following matters should be referred to my Clerk in the first instance for dates and listing:

(1) Schemes of arrangement and capital reductions;

(2) applications to appoint provisional liquidators; and

(3) applications for recognition and assistance of foreign provisional liquidators and liquidators.

43. I would also remind practitioners of my guidance in *Re Enice Holding Co Ltd*[25]:

[25] [2018] HKCFI 1736; [2018] HKCLC 305 at [49].

> "I would emphasise that the Companies Court expects solicitors to proceed as follows when acting for parties introducing schemes or capital reductions. As soon as they are instructed to proceed with a scheme or capital reduction they should approach the Companies Judge's clerk to obtain dates, which it is reasonable to expect the company to meet. Counsel should be instructed who are available on the allocated dates and the Company should work towards those dates. The Companies Court should not be expected to fit in with the convenience of companies and solicitors should make this clear to those instructing them."

The Winding Up Petition

44. The Company seeks an order dismissing the Winding-Up Petition. The Petitioner, who appeared today through Justin Ho did not object, but the Petitioner seeks its costs. Costs are controversial. As Recorder William Wong SC heard that substantive hearing of the Winding-Up Petition and will determine the costs of that hearing it seems to me that he should also deal with the other costs of the Petition, which I anticipate are small.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Look Chan Ho, instructed by Gall, for the company (in both actions)

Mr Justin Ho, instructed by DLA Piper Hong Kong, for AI Global Investment SPS (the creditor in HCMP 2227/2021 & the petitioner in HCCW 81/2021)

Attendance of the Official Receiver was excused (in HCCW 81/2021)

649 B.R. 143
United States Bankruptcy Court, S.D. New York.

IN RE: THREE ARROWS CAPITAL, LTD., Debtor in a Foreign Proceeding.

Case No. 22-10920 (MG)
|
March 22, 2023

Synopsis

Background: Duly authorized foreign representatives of Chapter 15 debtor investment firm with focus on trading cryptocurrency and other digital assets moved for entry of order authorizing issuance of subpoenas and granting related relief and for entry of order authorizing alternative service of process. United States Bankruptcy Court for the Southern District of New York, Martin Glenn, Chief Judge, 647 B.R. 440, granted motions in part and denied in part, and ruled that alternative service of subpoena on debtor's founder was warranted. Later, foreign representatives filed motion seeking entry of order directing debtor's founder to comply in full with subpoena issued by foreign representatives.

Holdings: The Bankruptcy Court, Martin Glenn, Chief Judge, held that:

service of subpoena on debtor's founder was in fact adequate under the Federal Rules and comported with due process, and

District Court was not required to make an affirmative finding that personal jurisdiction existed before compelling compliance with subpoena.

Motion granted.

Procedural Posture(s): Motion to Compel.

Attorneys and Law Firms

***145** LATHAM & WATKINS LLP, Counsel to the Foreign Representatives of Three Arrows Capital, Ltd., 1271 Avenue of the Americas, New York, NY 10020, By: Adam J. Goldberg, Esq., Brett M. Neve, Esq., Nacif Taousse, Esq., Brian S. Rosen, Esq.

LATHAM & WATKINS LLP, Counsel to the Foreign Representatives of Three Arrows Capital, Ltd., 355 South Grand Avenue, Suite 100, Los Angeles, CA 90071, By: Daniel Scott Schecter, Esq. (admitted pro hac vice), Nima H. Mohebbi, Esq. (admitted pro hac vice), Caitlin Campbell, Esq. (admitted pro hac vice).

HOLLAND & KNIGHT LLP, Counsel to the Foreign Representatives of Three Arrows Capital, Ltd., 31 West 52nd Street, 12th Floor, New York, NY 10019, By: Warren E. Gluck, Esq., Shardul S. Desai, Esq. (pro hac vice pending).

MEMORANDUM OPINION GRANTING THE FOREIGN REPRESENTATIVES' MOTION TO COMPEL

MARTIN GLENN, CHIEF UNITED STATES BANKRUPTCY JUDGE

This Opinion addresses the motion ("Motion," ECF Doc. # 81) filed by Russell Crumpler and Christopher Farmer, in their joint capacities as the duly authorized foreign representatives (the "Foreign Representatives") of Three Arrows Capital, Ltd. (the "Debtor"), for entry of an order directing one of the Debtor's founders, Kyle Livingstone Davies ("Davies"), to comply in full

with the subpoena issued by the Foreign Representatives ("Subpoena"). Annexed to the Motion is the declaration of Nima H. Mohebbi in support ("Mohebbi Decl.," ECF Doc. # 84), the declaration of Alex M. Englander in support ("Englander Decl.," ECF Doc. # 83), and the declaration of Russell Crumpler in support ("Crumpler Decl.," ECF Doc. #82).

For the reasons set forth below, the Motion is **GRANTED**.

I. BACKGROUND

The Motion seeks an order compelling Davies to comply with the Subpoena served on him pursuant to this Court's *Memorandum Opinion and Order Granting in Part and Denying in Part the Foreign Representatives' Service Motion* ("Service Opinion"). *See In re Three Arrows Capital, Ltd.*, 647 B.R. 440 (Bankr. S.D.N.Y. 2022). General familiarity with the chapter 15 case, the conduct of the Debtor's founders, Davies and Su Zhu ("Founders"), and the Foreign Representatives' efforts to obtain discovery in this ***146** case are presumed from the Service Opinion.

The Service Opinion addressed two motions made by the Foreign Representatives: (1) the *Motion for Entry of an Order Authorizing Issuance of Subpoenas and Granting Related Relief* ("Subpoena Motion," ECF Doc. # 54); and (2) the *Motion for Entry of an Order Authorizing Alternative Service of Process* ("Service Motion," ECF Doc. # 55). Through the Subpoena Motion and Service Motion, the Foreign Representatives sought relief related to discovery from Debtor's Founders and related entities.

At the initial hearing on the Subpoena and Service Motions, the Court informed the Foreign Representatives that outstanding legal and factual issues prevented the Court from granting the Service Motion. Specifically, the Foreign Representatives' Service Motion raised concerns regarding the scope of Federal Rule of Civil Procedure 45 ("Rule 45") and alternative service of process under Rule 45. The Court directed the Foreign Representatives to submit additional evidence and a legal brief on those issues before reaching a decision on the Service Motion. In the interim, the Court issued an order granting the Subpoena Motion ("Subpoena Order," ECF Doc. # 71), in the event it became possible to serve the subpoena without the relief sought in the Service Motion. Paragraph 5 of the Subpoena Order provides that "each subpoena recipient shall comply with the subpoenas not later than fourteen (14) days after the service of subpoena." (Motion ¶ 18 (quoting Subpoena Order ¶ 5).)

After receiving the Foreign Representatives' supplemental legal brief and evidentiary submission, the Court issued the Service Opinion on December 29, 2022. The Court concluded that the Foreign Representatives failed to show that Rule 45 supported the issuance of a subpoena against Zhu, Three Arrows Capital Pte. Ltd. and Three AC Ltd. (the "Investment Managers"), and Troy Trade, the Debtor's prime broker. *See Three Arrows Cap.*, 647 B.R. at 448–50. With respect to Mr. Davies, however, the Court held that the Foreign Representatives had shown that Rule 45 and 28 U.S.C. § 1783 allowed for service of a subpoena on Davies outside the United States. *Id.* at 453. Accordingly, the Court granted the Service Motion with respect to Mr. Davies and denied it with respect to Mr. Zhu, the Investment Managers, and Troy Trade. *Id.* at 457.

Having established that Rule 45 supported the service of a subpoena on Davies, the Court considered whether the Foreign Representatives were entitled to serve Davies via their proposed "alternative" means—email and social media. The Court concluded that "alternative service via email and Twitter would be warranted and reasonably calculated to provide notice," consistent with due process. *Id.* at 455.

Following the Court's decision in the Service Opinion, the Foreign Representatives, through their counsel, served the Subpoena on Mr. Davies by Twitter and by email on January 5, 2023. (Motion ¶ 20.) Mr. Davies was required to respond by electronic production to counsel for the Foreign Representatives by January 26, 2023. (*Id.* ¶ 23.) The Foreign Representatives report that Mr. Davies failed to produce documents or respond to the Subpoena. (*Id.* ¶ 25.) Counsel for the Foreign Representatives attempted to meet and confer with Mr. Davies before filing this Motion, but Mr. Davies did not respond. (*Id.* ¶ 24.)

Since January 5, 2023, Mr. Davies has been active on social media, having "tweeted" or "retweeted" dozens of times on Twitter. (*Id.* ¶ 21.) The Foreign Representatives ***147** claim that Mr. Davies is educated, represented by counsel, and undoubtedly aware of the Subpoena given that there were a large number of replies (41) and retweets (64) regarding the Subpoena following service. (*Id.* ¶ 22.)

II. ANALYSIS

This opinion considers two issues. The first is whether the record establishes that service of the Subpoena was, in fact, reasonably calculated to provide notice to Davies. The second is whether the Court must address personal jurisdiction over Davies before compelling compliance with the Subpoena. On those issues, the Court concludes that: (A) service of the Subpoena was in fact reasonably calculated to provide notice to Davies as served; and (B) it is not necessary to reach the issue of personal jurisdiction before compelling compliance with the Subpoena.

A. Service of the Subpoena

In the Service Opinion, the Court concluded *ex ante* that service of the Subpoena could comport with the requirements of Rule 45 and due process. *See Three Arrows Cap.*, 647 B.R. at 453–57. Now that the Foreign Representatives move to compel compliance with the Subpoena, the Court must consider whether service of the Subpoena in fact comported with those authorities. Due process requires that service of a subpoena must be "reasonably measured to insure the actual receipt of the subpoena." *Ultradent Prods., Inc. v. Hayman*, No. M8-85 (RPP), 2002 WL 31119425, at *3 (S.D.N.Y. Sept. 24, 2002). The Court concludes that standard is satisfied here.

Other courts in this district have considered the adequacy of service effected electronically, and the Court finds such cases instructive. For instance, in *Morse v. Levine*, the court assessed whether service to an email address listed on a business's website provided adequate notice, and in doing so, considered relevant whether the "party to be served maintains the website, monitors the email, or would be likely to receive information transmitted to that address." *See* 2019 WL 7494619, at *5 (S.D.N.Y. Dec. 19, 2019), *report and recommendation adopted*, 2020 WL 85410 (S.D.N.Y. Jan. 3, 2020). [1]

Here, the Subpoena was served both via email and to Davies' Twitter account. Even before the Subpoena was served, the Court noted in the Service Opinion that it considered relevant the fact that the email address in question was the same one that had been provided to the Foreign Representatives by the Founders for the purpose of fielding informal discovery questions, and that Davies' use of his Twitter account was frequent and recent. *See Three Arrows Cap.*, 647 B.R. at 455–56. These facts support finding that service was adequate.

With respect to service via Twitter, the Foreign Representatives have shown that Davies' use of his Twitter account since the Subpoena was served make it highly likely that he has notice of the Subpoena for three reasons: (1) the Twitter account has posted frequently since service; (2) the posts appear to be from Davies himself based on their content; and (3) there has been additional activity that would have drawn additional attention to the Subpoena for a frequent Twitter user like Davies. While Twitter is a relatively new platform ***148** for service of process, these facts bearing on control, frequency of use, and likelihood of receipt that were considered in the email context by the court in *Morse* are similarly relevant here.

In sum, the Court finds that service of the Subpoena was adequate under the Federal Rules and comported with due process.

B. Personal Jurisdiction

The Service Opinion concluded that service via certain alternative electronic means was sufficient under Rule 45, Rule 4, and 28 U.S.C. § 1783, and would comport with due process. The analysis above confirms that service was in fact effected consistent

with those same authorities. Davies has neither complied with nor appeared to challenge the Subpoena, and now the Foreign Representatives seek an order compelling him to comply.

In seeking an order compelling compliance, the Foreign Representatives inch closer to issues relating to personal jurisdiction. The issue of personal jurisdiction was not ripe at the time of the Service Motion, and the Court concludes for the reasons explained below that it is still unnecessary to address the issue at this juncture.

The Motion to compel compliance with the Subpoena raises an issue regarding the application of the Second Circuit's decision in *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014). There, the Second Circuit held that courts "must have personal jurisdiction over a nonparty in order to compel it to comply with a valid discovery request under Federal Rule of Civil Procedure 45." *Id.* at 141. The Foreign Representatives have not briefed the issue of personal jurisdiction. They suggest that the Service Opinion already determined that this Court has jurisdiction over Davies. The Court disagrees. The issue of personal jurisdiction was not decided in the Service Opinion. As explained below, the Court concludes that it is not necessary to reach the issue of personal jurisdiction now.

1. The Court Did Not Reach the Issue of Personal Jurisdiction in the Service Opinion

The Foreign Representatives claim that the Court's Service Opinion included a "finding that [Davies] is subject to the Court's jurisdiction." (Motion ¶ 31.) The Service Opinion only held that service on Davies would be proper under the Federal Rules of Civil Procedure 45 and 4, as well as 28 U.S.C. § 1783. The Service Opinion also held on the facts of this case that certain means of alternative service would comport with due process. But the adequacy of service and the existence of personal jurisdiction are separate issues. The Service Opinion only dealt with the adequacy of service.

a. The Service Opinion Regarding Rules 4 and 45 Did Not Reach Issue of Personal Jurisdiction

The Service Opinion found that service of a subpoena on Davies was proper under Federal Rules 4 and 45. But a finding that a party was properly served under the Federal Rules does not necessarily confer personal jurisdiction.

The point is clearly illustrated in the context of Rule 4, the rule by which a summons and complaint is served on defendants to initiate an action. A defendant may be properly served with process under Rule 4, but that does not necessarily mean that the defendant will be subject to personal jurisdiction in the court where the suit is pending:

> "Although the questions of personal jurisdiction and service of process are closely interrelated, service of process is merely the means by which a federal ***149** court gives notice to the defendant and asserts jurisdiction over him; the actual existence of personal jurisdiction should be challenged by a Rule 12(b)(2) motion."

Vega v. Hastens Beds, Inc., 339 F.R.D. 210, 217–18 (S.D.N.Y. 2021) (quoting 5B Wright & Miller, FED. PRAC. & PROC. CIV. § 1353).

In other words, a party—like a foreign defendant—might properly be served under Rule 4 (and Rule 4(f) in particular), but the defendant may then make a successful motion to dismiss under Rule 12(b)(2) for lack of personal jurisdiction based on their lack of connection to the forum.

The same is true under Rule 45. Indeed, the analysis surrounding whether personal jurisdiction existed over the subpoenaed foreign party in *Gucci America, Inc. v. Weixing Li* was premised on a finding that the foreign party had been properly served under Rule 45. 768 F.3d at 141 ("A district court, however, must have personal jurisdiction over a nonparty in order to compel

it to comply with *a valid discovery request* under Federal Rule of Civil Procedure 45." (emphasis added)). The Second Circuit identified that the issue of personal jurisdiction was an independent issue that required a separate analysis on remand.

The Court's ruling in the Service Opinion that alternative service would comply with Rules 4 and 45 did not necessarily establish that there was personal jurisdiction over Davies.

b. The Service Opinion Regarding Section 1783 Did Not Reach Issues of Personal Jurisdiction

In the Service Opinion, the Court also found that service was warranted under 28 U.S.C. § 1783. But that did not establish personal jurisdiction either. While satisfying the requirements of section 1783 may be necessary to confer personal jurisdiction over a subpoena recipient in a foreign country, it is not sufficient to establish personal jurisdiction. Personal jurisdiction is ultimately guided by constitutional considerations regarding due process. *See Matter of Marc Rich & Co., A.G.*, 707 F.2d 663, 669 (2d Cir. 1983) ("A federal court's jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction.").

This principle was illustrated in *In re del Valle Ruiz*, 939 F.3d 520, 528 (2d Cir. 2019), where the Second Circuit undertook an independent constitutional analysis of personal jurisdiction, in addition to analyzing whether the subpoenas were permissible under the relevant statutory authorities. *See id.* at 531 (determining that district court lacked personal jurisdiction to enforce subpoenas against parties subpoenaed pursuant to 28 U.S.C. § 1782). [2]

***150** 2. The Court Need Not Reach the Issue of Personal Jurisdiction Here

For the reasons explained below, the Court concludes it is not required to decide the issue whether the Court has personal jurisdiction over Davies at this juncture. In *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122, 141 (2d Cir. 2014), the Second Circuit held that a court must have personal jurisdiction over a nonparty to compel compliance with a discovery request. The *Gucci* court only reached that conclusion, however, after the nonparty served with the subpoena appeared to contest personal jurisdiction. *See id.* at 127. In this case, the subpoenaed nonparty, Davies, has failed to appear. The narrower issue here is whether, applying *Gucci*, the Court must make an affirmative finding that personal jurisdiction exists before compelling compliance with the subpoena, where personal jurisdiction has not actually been challenged by the subpoenaed party.

The Court is not aware of any cases in the Second Circuit or elsewhere that address whether a court must undertake a *sua sponte* analysis of personal jurisdiction over a non-appearing subpoena recipient. But courts have addressed whether a trial court must undertake a *sua sponte* analysis of personal jurisdiction before entering a default judgment when a defendant has failed to appear and raise the defense. The Second Circuit has instructed:

> [B]efore a court grants a motion for default judgment, it may first assure itself that it has personal jurisdiction over the defendant. We have, however, left open the question whether a district court must investigate its personal jurisdiction over [a] defendant before entering a default judgment ... Several of our sister circuits appear to impose such a requirement.

City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 133 (2d Cir. 2011) (internal quotes and citations omitted); *see also Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading Corp.*, 619 F.3d 207, 213 (2d Cir. 2010).

Caselaw addressing *sua sponte* consideration of personal jurisdiction allows, ***151** but does not require, courts to consider the issue at the default judgment stage. The default judgment cases discussed below identify factors a court should consider in deciding whether to address personal jurisdiction before entering a default judgment. Since *Gucci* makes clear that personal jurisdiction is also required to compel discovery, the Court will apply these same factors in deciding whether to resolve the issue of personal jurisdiction over Davies now, before entering an order to compel discovery. The Court concludes that consideration of these factors does not require *sua sponte* analysis of personal jurisdiction to decide the instant Motion. If Davies fails to comply with an order compelling compliance with the Subpoena, and the Foreign Representatives seek to hold Davies in contempt, the Foreign Representatives can introduce evidence and arguments supporting: (1) service of the order compelling compliance; (2) personal jurisdiction over Davies; and (3) the appropriate coercive contempt sanction that the Court should impose. Davies, of course, can appear and contest the Foreign Representatives' showing, or he can fail to appear as he has done so far, and, frankly, take his chances.

In the default judgment cases where courts examine personal jurisdiction *sua sponte*, judicial economy is consistently cited as the reason for doing so. Courts in this Circuit have observed that:

> Since a judgment rendered against a defendant over whom the Court does not have personal jurisdiction can be vacated pursuant to Rule 60(b)(4), it "preserves judicial economy for the court to assess personal jurisdiction from the outset and thereby avoid rendering a void judgment."

No Limit Auto Enterprises, Inc. v. No Limit Auto Body, Inc., No. 21-cv-04755 (AMD) (JMW), 2022 WL 18399477, at *3 (E.D.N.Y. Dec. 12, 2022) (quoting *Foshan Shunde Xinrunlian Textile Co. v. Asia 153 Ltd.*, No. 14-cv-4697 (DLI) (SMG), 2017 WL 696025, at *2 (E.D.N.Y. Jan. 30, 2017)).

But cases have also found that judicial economy does not always favor resolving personal jurisdiction before entering a default judgment. Applying the flexibility permitted by *Mickalis*, 645 F.3d at 133, which declined to impose an affirmative requirement to address the issue in every case when the defendant has failed to appear and contest personal jurisdiction, courts have entered default judgments without fully resolving personal jurisdiction.

Some courts have examined whether a plaintiff's filings " 'raise questions' as to whether the court may permissibly exercise personal jurisdiction over a defendant who has never appeared." *Chen v. Best Miyako Sushi Corp.*, No. 16 Civ. 2012 (JGK) (BCM), 2021 WL 707273, at *6 (S.D.N.Y. Feb. 1, 2021), *report and recommendation adopted by* 2021 WL 706412 (S.D.N.Y. Feb. 19, 2021) (citations omitted). *Best Miyako* concluded that "questions" about personal jurisdiction not only create an opportunity, but an obligation, to address the issue. *See* 2021 WL 707273, at *6. (concluding that courts *must* address personal jurisdiction where a plaintiff's filings have "raise[d] questions" about whether the exercise of personal jurisdiction is appropriate).

Other cases require more than just "questions" about personal jurisdiction before analyzing the issue *sua sponte*. For example, in *Kaplan v. Hezbollah*, No. 19-cv-3187, 2022 WL 2207263 (E.D.N.Y. June 21, 2022), the court distinguished between cases where "a plaintiff's submissions clearly show an absence of personal jurisdiction or ... show that sustaining personal ***152** jurisdiction is highly unlikely," and cases where "the question of personal jurisdiction is close or unsettled." *Id.* at *2. The court in *Kaplan* held that while judicial efficiency was served in the former case, the same is not always true in the latter case. The court explained:

> When the question of personal jurisdiction is close or unsettled, however, as it is here, my view is that courts should hesitate before undertaking an examination of their personal jurisdiction over a defaulting defendant. It is not just that personal jurisdiction is a waivable defense as to which the court, by examining it *sua sponte*, is in some sense acting on behalf of the defaulting defendant. It is that in a case where a defendant appears and challenges personal jurisdiction, the court is positioned to make a much better-informed decision. When a defendant that has appeared seeks to challenge personal jurisdiction (even when it has appeared only for that purpose), the court has a panoply of options with which to refine its decision. It can order the defendant to produce discovery on the issue of personal jurisdiction. It can hold an evidentiary hearing to determine

> contested facts relating to personal jurisdiction. Or it can consolidate discovery on personal jurisdiction issues with discovery on the merits and defer ruling on the personal jurisdiction issue until trial.
>
> However, when a defendant fails to appear, it deprives the court, and, more importantly, the plaintiff, of any of these options. It handicaps the plaintiff by depriving her of discovery that she would have had if the defendant had not defaulted. It requires the plaintiff to make her case for personal jurisdiction blindfolded. In other words, the defendant's non-appearance results in determination of the personal jurisdiction issue on less – and often far less – than a full record.

See id. at *3 (citations omitted).

Other courts have simply considered whether judicial economy would be served by a preemptive personal jurisdiction analysis based on the posture of the case at hand. For instance, in *CKR Law LLP v. Anderson Invs. Int'l, LLC*, 544 F. Supp. 3d 474, 480 (S.D.N.Y. 2021), Judge Rakoff assessed the possibilities for future litigation over jurisdiction in the case and concluded that reaching the issue of jurisdiction *sua sponte* would have likely been an inefficient use of judicial resources. *Id.* at 480. The court explained:

> For one thing, the Court is skeptical that addressing personal jurisdiction, in this posture and without the benefit of adversarial briefing, actually preserves judicial resources. Even if the Court were to determine that it possessed jurisdiction over the respondents, the respondents could later attack the default judgment as void either under Rule 60(b)(4) or on direct appeal. A court would then have to re-analyze the personal jurisdiction issue, thereby duplicating work. And if the respondents have no intention of attacking the default judgment — that is, if they effectively waive their personal jurisdiction arguments — then the initial analysis will have been unnecessary. By waiting until a party actually contests personal jurisdiction, a court ensures that it will resolve only those issues that are properly presented.

Id.

In sum, the default judgment cases show that while judicial economy can be a valid reason to evaluate personal jurisdiction *sua sponte*, whether judicial economy will actually be served by doing so is dependent on the circumstances. The Court considers here that judicial economy would ***153** not be served by a *sua sponte* personal jurisdiction analysis on the facts here.

Initially, the Court finds that the submissions here do not even rise to the level of the "rais[ing] questions" standard applied in *Best Miyako*. *See* 2021 WL 707273, at *6. Any analysis of personal jurisdiction over Davies must be framed around his minimum contacts with the United States as a whole. In bankruptcy cases, assuming valid service of process, "the only remaining inquiry for a bankruptcy court is whether exercising personal jurisdiction over the defendant would be consistent with the Due Process Clause of the Fifth Amendment." *Bickerton v. Bozel S.A. (In re Bozel S.A.)*, 434 B.R. 86, 97 (Bankr. S.D.N.Y. 2010) (citing *In re Enron Corp.*, 316 B.R. 434, 440, 444–45 (Bankr. S.D.N.Y. 2004)). Under that analysis, the "forum state" is the United States as a whole, and "a court should consider the defendant's contacts throughout the United States ...." *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 527 (S.D.N.Y. 2008); *see also Lehman Bros. Special Fin., Inc. v. Bank of Am. (In re Lehman Bros. Holdings Inc.)*, 535 B.R. 608, 619 (Bankr. S.D.N.Y. 2015). "The rationale for this holding is that the sovereign exercising jurisdiction under 28 U.S.C. § 1334 is the U.S., not the particular state in which the federal court is situated." *In re Hellas Telecomm. (Luxembourg) II SCA*, 524 B.R. 488, 506 (Bankr. S.D.N.Y. 2015). [3]

As discussed in the Service Opinion, the Foreign Representatives have made a strong initial showing that despite no longer residing in the United States, Davies had substantial contacts with the United States forum in operating the Debtor's business. Davies and Zhu first formed Three Arrows Capital, LLC in Delaware, and registered it to operate in the State of California

as Three Arrows Capital Management, LLC, before incorporating the Debtor entity in the British Virgin Islands. *See Three Arrows Cap.*, 647 B.R. at 442.

In a December 3, 2022 interview, Davies stated that he and Zhu ran the firm together and built everything in-house themselves, and personally performed every role at the firm. *Id.* Those activities included executing hundreds of millions of dollars ***154** in funding deals in and/or with numerous American cryptocurrency, blockchain, and fintech companies, including Aptos Labs, dYdx, and BlockFi. *Id.* at 443. These deals included a syndicate of investors, many of which were based in New York and California, and many of the loan contracts are governed by New York venue and choice of law provisions. *Id.* The Founders obtained credit from U.S. financial institutions including JPMorgan Chase, Citibank, and Bank of America. *Id.* at 442. Davies and Zhu, on behalf of the Debtors, also contracted with U.S. service providers such as BitGo, an auditing service provider located in California. *Id.* at 443.

Since the beginning of this case, the Court has been cognizant of the fact that Davies and Zhu are located outside the United States. Indeed, that is what prompted the Court to require the Foreign Representatives to make additional factual and legal submissions before finding in the Service Opinion that subpoena service on Davies was proper. It is entirely uncontroversial, however, that courts can establish personal jurisdiction over foreign individuals based on their contacts with the United States, and the record in this case does not "raise questions" as to personal jurisdiction simply because Davies may have been located outside the United States for some period of time while operating the Debtor's business.

The Foreign Representatives have made a substantial showing regarding Davies' contacts with the United States; by never appearing, Davies has obviously failed to articulate why these contacts do not render him amenable to discovery orders in the United States. To the extent that the Court does not have a full record on which to decide the jurisdiction issue, that problem is solely a product of Davies' failure to appear. And while the Second Circuit stated that a court "may first assure itself that it has personal jurisdiction" in the default judgment context, *see Mickalis*, 645 F.3d at 133, here that exercise could run the risk of the Court impermissibly asserting hypothetical arguments on Davies' behalf, considering the strength of the current submissions from the Foreign Representatives. *See Greathouse v. JHS Security, Inc.*, 784 F.3d 105, 119 (2d Cir. 2015) ("There is something wrong when a case or controversy, to the extent that it exists, is principally between a plaintiff and the judges deciding the case." (Korman, D. J., concurring in part and dissenting in part)). As noted in *Kaplan*, parties like Davies can appear for the limited purposes of contesting jurisdiction. *See Kaplan*, 2022 WL 2207263, at *3. Davies chose not to do so, and "[t]here is no reason [he] should be better off for not appearing at all." *See id.*

Furthermore, just as Judge Rakoff concluded in *CKR Law*, judicial economy would not be served here by addressing personal jurisdiction now, considering the possibility of a future challenge to the order compelling compliance on jurisdictional grounds. Davies can appear and contest personal jurisdiction if he fails to comply with an order compelling compliance and the Foreign Representatives seeks to hold Davies in contempt. In that scenario, the Court will need to evaluate both parties' evidence and arguments. On the other hand, if Davies continues to ignore the Court's order, the Court will base its ruling on the showing made by the Foreign Representatives.

Finally, concerns regarding judicial economy are further ameliorated in this case because the Foreign Representatives have also represented that they will withdraw the motion if compliance is achieved in other jurisdictions. (*See* Motion ¶ 27.) In other words, the Court might not be required to take further action, providing yet ***155** another reason to refrain from addressing the personal jurisdiction issue now. In sum, the factors identified in the default judgment cases do not counsel a *sua sponte* personal jurisdiction analysis here.

III. CONCLUSION

This Motion and an Order granting the Motion is not the final stop on enforcement of the subpoena. A motion seeking to compel compliance with a subpoena without seeking sanctions, as is true here, effectively provides Davies with an additional

opportunity to appear, contest jurisdiction, and assert any other available defenses to enforcement of the subpoena. An Order compelling compliance does not impose liability as would a default judgment. Any sanctions later imposed for continued failure to comply would be coercive, and thus, within Davies' power to purge. *See Markus v. Rozhkov*, 615 B.R. 679, 713 (S.D.N.Y. 2020) ("[A] sanction 'is considered civil and remedial if it either coerces the defendant into compliance with the court's order, or ... compensates the complainant for losses sustained. Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge.' ") (quoting *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994)).

For the reasons discussed above, the Motion is **GRANTED**. Within seven (7) days from the date of this Opinion, counsel for the Foreign Representatives shall submit a proposed order granting relief consistent with this Opinion.

All Citations

649 B.R. 143

Footnotes

1 The service in question in *Morse* was pursuant to Rule 4. While the Subpoena here was served pursuant to Rule 45, the Court's analysis in the Service Opinion makes clear that Rule 4 precedent regarding adequacy of service is instructive, if not controlling. *See Three Arrows Cap.*, 647 B.R. at 456.

2 At least one decision in this district concluded that a subpoena served pursuant to section 1783 on a U.S. citizen abroad creates personal jurisdiction over the citizen. *See Estate of Ungar v. Palestinian Auth.*, 412 F. Supp. 2d 328, 332 (S.D.N.Y. 2006) ("Pursuant to the Supreme Court's holding in *Blackmer v. United States*, § 1783(a) establishes the requisite personal jurisdiction over a United States citizen living outside of the jurisdiction of the United States to substantiate a valid subpoena for his or her testimony." (citation omitted)). *Ungar* rested its conclusion on *Blackmer v. United States*, 284 U.S. 421, 438, 52 S.Ct. 252, 76 L.Ed. 375 (1932). In *Blackmer*, the Supreme Court concluded that *in personam* jurisdiction was established based on a subpoena issued pursuant to the Walsh Act that was personally served on Blackmer, a U.S. citizen who resided in France, that required him to testify in a criminal trial relating to the infamous Teapot Dome scandal. Blackmer failed to comply and was held in contempt, with sanctions imposed on him under the Walsh Act. The Court explained that the extraterritorial application of U.S. law to its citizens abroad did not violate the Fifth Amendment. Despite moving his residence to France, Blackmer "continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country." *Id.* at 436, 52 S.Ct. 252. The Walsh Act, then codified at 28 U.S.C. §§ 711–718, satisfied the due process requirements of notice and opportunity to be heard. *See* 284 U.S. at 438, 52 S.Ct. 252. No issue was presented whether Blackmer had sufficient minimum contacts with the United States to compel his testimony at a criminal trial; it is clear that he did.

The Walsh Act was amended multiple times in the following decades and now exists in modern form as section 1783. *See* 9A Wright & Miller, FED. PRAC. & PROC. CIV. § 2462. More recent caselaw recognizes that "[t]his longstanding principle that citizenship alone is sufficient to satisfy Due Process concerns still has force." *United States v. Clark*, 435 F.3d 1100, 1108 (9th Cir. 2006).

But *Blackmer* predated *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), by thirteen years, and it said nothing about the minimum contacts analysis that *International Shoe* and its progeny require. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) ("Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident ... that has certain

minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.") (quoting *International Shoe*, 326 U.S. at 316, 66 S.Ct. 154 (internal quotes omitted)). The Court has not found any other cases that conclude that compliance with section 1783 automatically confers personal jurisdiction over the subpoena recipient and it declines to follow *Ungar*.

3 In *Owens-Illinois v. Rapid American Corp. (In re Celotex Corp)*, 124 F.3d 619, 630 (4th Cir. 1997), the court explained that in bankruptcy proceedings where jurisdiction is based on section 1334(b), because the sovereign exercising jurisdiction is the United States, not a particular state, minimum contacts with the United States is sufficient to satisfy the Fifth Amendment due process requirement, whether the claims asserted arise under federal, state or foreign law. Similarly, in *Diamond Mortgage Corp. v. Sugar*, 913 F.2d 1233, 1244 (7th Cir. 1990), the court in considering state law claims stated that "[s]ince section 1334 provides federal question jurisdiction, the sovereign exercising its authority over the [defendant] is the United States, not the state of Illinois. Hence, whether there exist sufficient minimum contacts between the [defendants] and the state of Illinois has no bearing upon whether the United States may exercise its power over the [defendants] pursuant to its federal question jurisdiction." *See id.*

While cases like *Owens-Illinois, Diamond*, and *Hellas* addressed service of process of a complaint under Bankruptcy Rule 7004, the analysis here does not differ because service of the subpoena was made pursuant to Rule 45. The Court is ultimately exercising jurisdiction under the same authorities. Additionally, while the Second Circuit has not explicitly ruled on the issue, it has acknowledged that the nationwide approach has been adopted by other circuits in the Rule 45 context. *See Gucci America, Inc. v. Weixing Li*, 768 F.3d 122, 142 n.21 (2d Cir. 2014) ("Several of our sister circuits have endorsed the position that, when a civil case arises under federal law and a federal statute authorizes nationwide service of process, the relevant contacts for determining personal jurisdiction are contacts with the United States as a whole .... This court has not yet decided the issue.").

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IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 165 OF 2022 (NSJ)

IN THE MATTER OF SECTION 86 OF THE COMPANIES ACT (2022 REVISION)

AND

IN THE MATTER OF E-HOUSE (CHINA) ENTERPRISE HOLDINGS LIMITED

Before:	**The Hon. Mr Justice Segal**
Appearances:	**Mr Nick Herrod, Mr Ryan Hallett and Ms Allegra Crawford of Maples and Calder (Cayman) LLP for the Company**
Convening hearing:	**15 September 2022**
Sanction hearing:	**9 November 2022**
Draft judgment distributed:	**10 November 2022**
Judgment Delivered:	**17 November 2022**

HEADNOTE

Creditors' scheme of arrangement pursuant to section 86 of the Companies Act (2022 Revision) – decision at convening hearing and sanction hearing – voting by creditors who are affected by sanctions on Russia – scheme discharging New York law governed debt – availability and effect of relief under chapter 15 of the US Bankruptcy Code and under New York private international law – effect of the scheme under Hong Kong and BVI law

JUDGMENT

Introduction

1. In July 2022 E-House (China) Enterprise Holdings Limited (the ***Company***) applied for an order (the ***Convening Order***) giving it permission to convene a single meeting (the ***Scheme Meeting)*** of certain of its creditors (all of whom are holders of notes issued by the Company) who were to be parties to a scheme of arrangement under section 86 of the Companies Act (2022 Revision) (the ***Companies Act***) for the purpose of considering and if thought fit approving the scheme.

2. On 28 July 2022, the Company filed a petition seeking the sanction of the proposed scheme and a summons (the ***Convening Order Summons***) pursuant to which it applied for the Convening Order. On 7 September 2022 the Company filed a further summons seeking permission to amend the petition in the manner set out in the amended petition attached to the further summons (the ***Amended Petition***).

3. The Convening Order Summons was heard on 15 September 2022. I was satisfied that it was appropriate to permit the Company to convene a meeting of the creditors to be parties to the scheme, although, as I explain below, I declined to permit the Company to exclude from voting certain creditors affected by sanctions against The Russian Federation (***Russia***). The Convening Order was made on 20 September 2022. The meeting was to be held on 12 October 2022. I explain below the issues that arose at the convening hearing and my reasons for making the Convening Order.

4. On 4 October 2022 the Company filed a summons (the ***Scheme Meeting Summons***) seeking an urgent order that the date of the meeting be changed to 2 November 2022. The Company, in its evidence in support of the Scheme Meeting Summons, explained that scheme documents had been sent to creditors but the Company had recently found that creditors were taking longer than expected to submit their voting instructions. As a result, the Company considered that creditors should be given more time to submit voting instructions so that as many creditors as

possible had the opportunity to vote and participate in the meeting. The Company also sought an order that the record date for the meeting be amended and that certain other consequential orders be made (including a direction that it give notice to creditors of the change to the date of the meeting and the other orders made). The Company also filed a Re-Amended Petition (the ***Re-Amended Petition***) which included various minor updating amendments to the Amended Petition. The Company requested that I deal with the Scheme Meeting Summons on the papers without the need for a further hearing. In view of the urgency and subject matter of the Scheme Meeting Summons, I was prepared to do so. On 5 October 2022, I ordered (the ***Further Convening Order***) that the Company had permission to amend and reschedule the date of the meeting to 2 November 2022 and made the necessary consequential orders. I also gave the Company permission to amend the scheme document in the form appended to the Fourth Affirmation of Zhou Liang (***Mr Zhou***).

5. On 6 October 2022 the Company sent to scheme creditors and published the notice of the date of the reschedule meeting and an update letter explaining the reasons for the change to the date of the meeting, explaining the further proposed amendments to the scheme and providing an update on progress in the restructuring and certain further information which I directed be provided to scheme creditors.

6. The meeting of scheme creditors was held in the Cayman Islands on 2 November 2022 at the offices of the Company's Cayman Islands attorneys (Maples and Calder). Creditors were able to attend in person or via a Zoom link. Over 93% in value of the notes subject to the scheme attended in person or by proxy and creditors representing 99.96% by value and 99.87% by number voted in favour of the scheme. The scheme therefore achieved the support of a very substantial proportion of affected scheme creditors.

7. On 9 November 2022, the Company's application for an order sanctioning the scheme was heard. At the end of the hearing I confirmed that I would grant the order sought and that I would subsequently set out in writing, in addition to my reasons for making the Convening Order, my reasons for making the order sanctioning the scheme. This judgment now sets out those reasons.

The evidence

8. The main evidence filed in support of the Convening Order Summons was as follows. The First Affirmation (***Zhou 1***) of Mr Zhou (who is the Company's CFO), the Second Affirmation of Mr Zhou (***Zhou 2***), the Third Affirmation of Mr Zhou (***Zhou 3***), the First Affidavit of Yeung King Shan Fanny (***Ms Yeung***) (who is an associate director of D.F. King Limited, the Company's information agent (the ***Information Agent***)), the Second Affidavit of Ms Yeung, the Affidavit of Edward Lam (***Mr Lam***) (who is a partner in Skadden, Arps, Slate, Meagher & Flom, the Company's onshore legal advisers) and the Affidavit of Allan Gropper (***Judge Gropper***) (who is a well-known and highly respected retired Bankruptcy Judge for the Southern District of New York). Zhou 1 exhibited a copy of the form of explanatory statement (the ***Explanatory Statement***) that the Company proposed to send to the creditors who were to be parties to the proposed scheme. The formal terms of the proposed scheme were set out at Appendix 4 of the Explanatory Statement (the ***Scheme***).

9. The following further evidence was filed in support of the Company's application for an order sanctioning the scheme. The Fifth Affirmation of Mr Zhou (***Zhou 5***); the Third Affidavit if Ms Yeung; the First Affidavit of Mr Alexander Lawson (the chairperson at the meeting of scheme creditors); the First Affirmation of Zhang Xing (***Zhang 1***) (Mr Zhang is an officer of China International Capital Corporation Hong Kong Securities Limited (***CICC***), the Company's financial adviser) and the Third Affidavit of Ms Rachel Catherine Baxendale of Maples and Calder. Shortly before the sanction hearing, the Company also filed the Sixth Affirmation of Mr Zhou (***Zhou 6***).

The Company, its financial position, and the notes which are to be subject to the scheme

10. The Company is a holding company. Its shares and notes have been listed on the Hong Kong Stock Exchange (***HKSE***). Its principal assets are the shares that it holds in its subsidiaries, in

particular Fangyou Information Technology Holdings Limited (***Fangyou***), a company incorporated in the BVI (through which it indirectly owns a number of operating entities including Hong Kong Fangyou Software Technology Company Limited (***Hong Kong Fangyou***) a company incorporated in Hong Kong), and TM Home Limited (of which the Company owns 70.23%, and which is incorporated in the Cayman Islands and ultimately controls a number of other operating entities). The Company is in the business of real estate agency services, real estate data and consulting services and real estate brokerage network services in the People's Republic of China (***PRC***), through its indirect operating subsidiaries there (I refer to the Company, its subsidiaries and its indirect subsidiaries as the ***Group***).

11. There are two note issues which are to be subject to the scheme (together the ***Old Notes***). The notes are all governed by New York law:

(a). senior notes with an aggregate principal amount of US$298,200,000, a coupon of 7.625% per annum and a maturity date of 18 April 2022 (the ***2022 Notes***).

(b). senior notes with an aggregate principal amount of US$300,000,000, a coupon of 7.60% per annum and a maturity date of 10 December 2023 (the ***2023 Notes***).

12. The 2022 Notes were listed on the HKSE but were delisted following maturity. The 2023 Notes remain listed on the HKSE but trading was suspended on 19 April 2022. I refer to the holders of the 2022 Notes and the 2023 Notes together as the ***Noteholders***.

13. The Old Notes are held in global form through the Hongkong and Shanghai Banking Corporation Limited (***HSBC***) acting through its nominee HSBC Nominees (Hong Kong) Limited as common depositary (the ***Depositary***) for the clearing systems (who are identified below). HSBC is the trustee of the Old Notes (the ***Old Notes Trustee***).

14. The Old Notes are guaranteed by certain direct and indirect subsidiaries of the Company (the ***Subsidiary Guarantors***), namely Fangyou , CRIC Holdings Limited (***CRIC***) (incorporated in the British Virgin Islands), Hong Kong Fangyou and CRIC Holdings (HK) Limited (***CRIC Hong Kong***) (incorporated in Hong Kong).

15. The Company has liabilities in addition to those arising under the Old Notes. These include sums owing under a convertible note (the ***Convertible Note***) issued on 4 November 2020 to Alibaba.com Hong Kong Limited (***Alibaba***) in the principal amount of HK$1,031,900,000 (US$135,000,000). In addition, there are liabilities owed to other members of the Group of RMB 1,423,300,000 (US$223,347,000) and other payables of RMB 12,200,000 (US$1,914,000).

16. The Company's financial position deteriorated in the second half of 2021 and the first half of 2022 as a result of various factors described in Zhou 1, including the downturn in the PRC property market. The Company was unable to repay the principal due on 18 April 2022 in respect of certain of the Old Notes. This default caused a cross-default under the Convertible Note but Alibaba agreed to waive this default subject to certain conditions which included a term that if the Company's proposed restructuring had not become effective by 31 October 2022 (which was later extended to 15 December 2022), then the waiver would be automatically and immediately revoked and Alibaba would become entitled to enforce the Convertible Note. Despite this waiver, sums remain due and owing under both the 2022 Notes and the 2023 Notes which the Company cannot pay. The Company's position is that it was therefore cashflow insolvent at the time of the filing of the petition and remains so and that absent the approval of the scheme by Noteholders and the sanction of the scheme by the Court, it was likely to go into insolvent liquidation.

17. According to Mr Zhou, the Company's financial position as at 31 March 2022 can be summarised as follows:

(a). it had assets with a net book value of approximately RMB 8,967,000,000 (approximately US$1,407,118,000). It had total liabilities of approximately RMB 5,981,189,000 (approximately US$938,579,000).

(b). the value of its assets (valued at book value) exceeded its liabilities. However, a majority of the Company's assets were not readily realisable and were unlikely to be recoverable in full or, in some instances, at all.

(c). the Company held cash and cash equivalents of approximately RMB13,380,000 (approximately US$2,100,000).

(d). the Company was, as noted above, unable to repay the principal sum of US$298,200,000 due on the maturity of the 2022 Notes on 18 April 2022. The failure to pay the amounts due under the 2022 Notes constituted an event of default under the relevant indenture, and as already noted, a cross-default (but without giving rise to an automatic acceleration) under the terms of the Convertible Note, which in turn constituted a cross-default under the 2023 Notes. The default under the Convertible Note has been, as I have also already noted, waived by Alibaba in exchange for the Company entering into various undertakings and agreements. However, the amounts due under the 2022 Notes and the 2023 Notes remain payable and outstanding.

18. As at the date of the Explanatory Statement, the Company's most recent audited accounts were those for the period ending 31 December 2020, as the audited accounts for 31 December 2021 were still in preparation (see the Explanatory Statement at [2.14(b)]). A copy of the unaudited consolidated financial statements of the Group for the year ended 31 December 2021 and the interim unaudited consolidated financial statements of the Group as at 30 June 2021 were attached in Appendix 8 to the Explanatory Statement and Mr Zhou provided further financial information in Zhou 1 based on and extracted from the Group's unaudited management accounts as at 31 December 2021. Mr Zhou stated that there had been some significant movements in relation to certain assets and liabilities during the period from 1 January 2022 to 31 March 2022 and confirmed that these had been taken into account in the information provided and statements made regarding the Company's financial position in Zhou 1 and that the updated information had been provided to Kroll (HK) Limited (***Kroll***) for the purpose of its liquidation analysis (which was attached as appendix 3 to the Explanatory Statement).

19. The Explanatory Statement (at [2.14(a)]) also noted that the figures for 31 March 2022 provided in it were based on the Group's unaudited management accounts as at 31 December 2021 with the necessary amendments to reflect the updated information provided to Kroll. Mr

Zhou further confirmed in Zhou 1 that there had been no significant changes to the Company's financial position since these updated figures. He also explained why the Company had been unable to finalise its 2021 and interim 2022 financial statements in time for inclusion in the Explanatory Statement. This, he said, had been primarily due to the fact that the progress in preparing the financial statements of the Group had been negatively affected by the strict COVID-19 prevention and control measures in the PRC, as well as staff turnover within the Group and a change in the Company's auditor. The Company had made announcements in July 2022 and August 2022 on the HKSE regarding the delays in finalising its financial statements and the reasons for the delays.

The restructuring negotiations and communications with Noteholders regarding the scheme process in advance of the hearing of the Convening Order Summons

20. The Company has been in discussions for some time regarding how to deal with its financial problems and the terms of a restructuring of the Old Notes.

21. In March 2022, the Company appointed a financial adviser (CICC) to evaluate the capital structure and liquidity position of the Company and its subsidiaries, and to explore options for the restructuring of the Old Notes.

22. On 31 March 2022, the Company announced on the HKSE website the commencement of an offer to exchange the outstanding principal amount of the Old Notes and a solicitation of consents from the Noteholders (the ***Exchange Offer***) which exchange was subject to certain conditions being met, including acceptance of the Exchange Offer by holders of at least 90 per cent of the outstanding principal amount of the Old Notes (the ***Minimum Acceptance Amount***).

23. Given the conditions attached to the Exchange Offer, concurrent with announcement of the Exchange Offer, the Company also invited the Noteholders (through an announcement on the HKSE website) to accede to a restructuring support agreement (the ***RSA***) by 4.00 p.m. London time on 11 April 2022 (the ***Exchange Expiration Deadline***). The Company's announcement also stated that the restructuring may be implemented through a scheme of arrangement if the Exchange Offer was not successfully completed, and provided a copy of the RSA, which

appended a term sheet setting out the terms of the proposed restructuring (the ***RSA Term Sheet***).

24. On 11 April 2022, the Exchange Expiration Deadline was extended to 4.00pm London time on 13 April 2022 and the Company announced this on the HKSE's website.

25. On 14 April 2022, the Company announced on that website that it had terminated the Exchange Offer due to the Minimum Acceptance Amount condition not having been satisfied and that it was preparing to implement the restructuring by way of a scheme of arrangement and that therefore it was extending the deadline for accession to the RSA, in accordance with the terms of the RSA, to 4.00 pm London time on 22 April 2022 (the ***Instruction Fee Deadline***).

26. On 5 August 2022, the Company sent a letter to Noteholders (as creditors who would be subject to the scheme). This letter is referred to as the ***PSL*** (an abbreviation of practice statement letter). The purpose of the PSL was (as contemplated by [3.1] of the Practice Direction No 2 of 2010 (the ***Practice Direction***)) to give notice to Noteholders of the terms of the proposed Scheme and of the restructuring, of the relevant background, that the Company intended to apply to the Court for an order permitting it to convene a meeting of Noteholders and to give notice of the issues that the Court would need to consider at the hearing of the Convening Order Summons. The PSL stated that the hearing of the Convening Order Summons had been listed for 5 September. It also explained that the commencement of the Scheme proceedings had been delayed for various reasons including (as discussed in more detail below) difficulties resulting from the effect of sanctions on Russia and the need for negotiations with Alibaba. The PSL noted that the terms of the scheme provided that the date on which the scheme became effective (the ***Restructuring Effective Date***) must occur by a certain date (the ***Longstop Date***) which had initially been 13 October 2022 but which the Company wished to amend to 31 October 2022. The PSL was notified to Noteholders via various different methods. These were posting the PSL on the website established by the Company to upload relevant information and documents relating to the scheme; circulating the PSL electronically through the clearing systems (Euroclear Bank S.A./N.V. and Clearstream Banking, S.A.) and sending the PSL via email

directly to each Noteholder who had registered with the Information Agent or had otherwise notified the Company or the Information Agent of its email address.

27. As noted above, the petition and the Convening Order Summons were then filed on 28 July 2022. The hearing of that summons was originally listed for 5 September 2022. However it subsequently became necessary to delay the hearing until 15 September 2022. Noteholders were notified of this change by letter dated 2 September 2022 (the ***2 September 2022 Letter***) which was distributed using the same methods of communication that had been used for giving notice of and circulating the PSL.

28. The Company had planned to circulate on 2 September 2022 or shortly thereafter an update to Noteholders to inform them of the changes that had been made since the PSL to the terms and structure of, and the process for voting on, the scheme. The 2 September 2022 Letter stated that "*Further details on the Scheme will follow early next week*." But unfortunately, because of further delays in finalising aspects of the restructuring, in particular delays in obtaining confirmation from the Old Notes Trustee that it would be prepared to act as a trustee of the new notes to be issued under the scheme (the ***New Notes***) and that it would assume other roles in connection with the New Notes, the update was further delayed. On 12 September 2022, three days before the hearing of the Convening Order Summons, the Company eventually sent out the update (the ***Additional PSL***) once again using the same methods of communication as had been used for the PSL. The Additional PSL explained the revisions to the scheme and the restructuring that had been made since the PSL and attached copies of the amendments to the scheme documents required to give effect to those changes.

The terms of the RSA and the high level of Noteholder support for the Scheme

29. A detailed overview of the RSA is set out at [5.10] of the Explanatory Statement. Its terms can be summarised as follows. Under the RSA, any Noteholder who accedes to the RSA by the Instruction Fee Deadline, votes in favour of the Scheme at the Scheme meeting and does not exercise its rights to terminate the RSA or breach any provision of it in any material respect, will be a ***Consenting Creditor***, and will receive a cash fee on the Restructuring Effective Date

in an amount equal to 1% of the aggregate principal amount of that Consenting Creditor's Old Notes as at the Instruction Fee Deadline (the ***Instruction Fee***). Mr Zhou confirmed in Zhou 1 (at [49]) that as at the date of his affirmation (9 September 2022) approximately 89.07% by value of Noteholders had signed or acceded to the RSA and therefore had undertaken to vote in favour of the Scheme at the Scheme meeting.

The terms of the Scheme

30. The terms of the Scheme were summarised in Zhou 1 at [61] to [87] and in further detail in section 7 of the Explanatory Statement and, as I have noted, set out in Appendix 4 to the Explanatory Statement. The Scheme will only affect the rights of the Company, the Subsidiary Guarantors and the "*Scheme Creditors*."

31. Scheme Creditors are defined as "*without double counting, the Noteholders, the Old Notes Trustee and the Depositary*." As regards voting, however, the Old Notes Trustee and the Depositary have agreed not to vote at the scheme meeting. The Noteholders are defined as "*those Persons with an economic or beneficial interest as principal in the Old Notes held in global form or global restricted form through the Clearing Systems at the Record Date, each of whom has a right upon the satisfaction of certain conditions, to be issued with definitive registered notes in accordance with the terms of the Old Notes*." A Released Claim is defined as "*any Scheme Claim, Ancillary Claim, or any past, present and/or future Claim arising out of, relating to or in respect of: (a) the Old Notes Documents; (b) the preparation, negotiation, sanction and implementation of [the] Scheme and/or the RSA; and/or (c) the execution of the Restructuring Documents and the carrying out of the steps and transactions contemplated in [the] Scheme …"* An Ancillary Claim is a claim against a Released Person. The following are defined as a Released person: the Company; the Subsidiary Guarantors, the Group, their Affiliates, Personnel and Advisers; the Old Notes Trustee and its connected parties and advisers; the New Notes Trustee and its connected parties and advisers; the Holding Period Trustee (whose role I discuss below); the Scheme Supervisor (who is Mr Lawson, who is appointed by the Board to act in such capacity); the Information Agent and the Cayman Islands Information Agent (which is Alvarez & Marsal Cayman Islands Limited).

32. Under the Scheme, on the Restructuring Effective Date:

(a). Scheme Creditors will release in full the Released Claims, in exchange for the New Notes and the Cash Consideration (which means 6% of the outstanding principal amount of the Old Notes held by the relevant Noteholder together with interest on the Old Notes accrued up to but excluding 18 April 2022).

(b). the Old Notes will be released, cancelled, fully compromised and forever discharged, and the respective rights and obligations of the Scheme Creditors, the Company, the Subsidiary Guarantors and the Old Notes Trustee towards one another under the Old Notes Documents will terminate and be of no further effect.

(c). Noteholders who are Consenting Creditors will be paid the Instruction Fee.

(d). the New Notes will be issued to Scheme Creditors in tranches which mature on the first anniversary and then in six-month increments from the date of the issue of the New Notes. The interest rate on the New Notes will be 8% per annum. The first principal payment of 10% of the aggregate principal amount of the New Notes will be due one year after the Restructuring Effective Date. The New Notes will mature on the third anniversary of the date that they are issued.

(e). the liability of the Subsidiary Guarantors will be released.

The Kroll liquidation analysis

33. An estimated outcome for Scheme Creditors of a liquidation of the Company was prepared by Kroll. They prepared a written liquidation analysis (dated 29 July 2022) which was discussed in Zhou 1 at [93] to [97] and set out, as I have said, at appendix 3 to the Explanatory Statement. In summary, the return to Scheme Creditors in an insolvent liquidation was estimated by Kroll to be in a range from 25.8% (low case) to 36.1% (high case). The liquidation analysis assumed

that all entities in the Group are put into liquidation. It assessed the likely realisable value of each of the companies in the Group on what is described as a segmented based approach. Kroll explained what this means in [3.2] of their analysis:

> *"E-House has over 300 major subsidiary entities within the Group. Given the significant number of subsidiaries and the complexity of the Group's corporate structure, we have sought to conduct our analysis on a consolidated basis for each Segment level. Based on the information provided by Management, we have aggregated the assets and liabilities of each Segment. For this Liquidation Analysis, we have assumed that upon the liquidation of each Segment, the proceeds from the aggregated realisation of assets for any specific Segment will be used to repay the aggregated debts recognised in the same Segment."*

34. The six segments identified by Kroll were as follows: the Company; 125 subsidiary entities that are principally engaged in real estate agency and consultancy; 17 subsidiary entities that are principally engaged in the provision of real estate related education services; 7 subsidiary entities that are engaged in offshore financing and marketing activities; 54 subsidiary entities that are principally engaged in digital marketing and brokerage; and 104 entities controlled by Leju Holdings Limited, a NYSE-listed entity that is principally engaged in the provision of online-to-offline real estate services. The liquidation analysis assumed that each company in the Group will cease operations upon liquidation and as a result that its assets will be sold at discounted prices rather than at prices that might be achieved if they were sold on a going concern basis.

The impact of Russian sanctions

35. The UK Government, the US Government and the European Union have imposed sanctions on Russia including sanctions in response to Russia's invasion of Ukraine. The UK's sanctions have been extended to and apply in the Cayman Islands. The Company was required to consider the effects, and to modify the terms of the scheme to deal with issues arising because, of these sanctions. The Company had to consider whether any Noteholders were subject to these sanctions regimes (in particular the asset freezes imposed thereby) in order to decide whether sanctions prohibited the discharge of the Old Notes, the issue of the New Notes and the payment of fees to Noteholders. Furthermore, as the Company discovered, it was also necessary

to consider whether any Russian banks or custodians through whom Noteholders hold their Old Notes (which banks and custodians are participants in and hold accounts with the clearing systems) were subject to sanctions and the impact of sanctions on the operation of the clearing systems. Sanctions may have an impact on the means by which the clearing systems communicate with and distribute documents to their participants and account holders. This could extend to the process by which the Explanatory Statement and related documents are to be distributed to Noteholders, the blocking by the clearing systems of transfers of and dealings in the Old Notes and the process for obtaining voting instructions from Noteholders.

36. Where notes are held through a clearing system the identity of the beneficial holders of the notes will generally not be known to the issuer of the notes and may be impossible to ascertain otherwise than with the assistance of the clearing system. The issuer relies on the clearing systems to facilitate communications with (both to and from) noteholders. The issuer sends a notice or other communication to the clearing system who transmits it to its account holders, who in turn submit it to those who hold accounts with them. The clearing system will also transmit voting instructions back from the ultimate beneficial owner to the issuer. The issuer also depends on the clearing system to ensure the integrity of the voting process by blocking trading in and transfers of the notes during the period in which noteholders are voting. The issuer also depends on account holders in the clearing system to provide confirmation and verification that a person claiming to be a scheme creditor is a holder of notes and the amount of notes they hold. The position role of the clearing systems and their involvement in communications with Noteholders and the voting process is explained in Ms Yeung's First Affidavit.

37. The sanctions regimes I have identified are relevant to the Company's scheme for the following reasons:

(a). the Cayman Islands sanctions regime is engaged because the Company is a Cayman Islands exempted company. As a British Overseas Territory the UK's sanction regulations (The Russia (Sanctions) (EU Exit) Regulations 2019) are applied to and

in the Cayman Islands by The Russia (Sanctions) (Overseas Territories) Order 2020 (as amended).

(b). the United States sanctions regime is potentially engaged because the Old Notes are governed by New York law and denominated in US$.

(c). the European Union sanctions regime is engaged because the clearing systems through which the Old Notes are held are subject to certain sanctions imposed by the European Union. This includes, since March 2022, the blocking and suspension of settlement services provided by the clearing systems in respect of accounts held by certain Russian banks and financial intermediaries, including the National Settlement Depository (***NSD***) which is the central securities depository for the Russian Federation.

38. Consequently, the Company considered and took advice on the impact on the scheme process and the nature and scope of these sanction regimes. Mr Zhou dealt with this in his evidence. He summarised the position in Zhou 2 as follows (see also Zhou 1 at [86]):

> *"6. Various financial sanctions have been imposed in response to Russia's invasion of Ukraine. As a result of such sanctions, the Clearing Systems (through which the Old Notes are settled) have blocked all transfers with accounts held by certain Russian banks and financial intermediaries. These restrictions have affected approximately 6.65% of the Noteholders (by value) who acceded to the RSA.*
>
> *7. The Company has been advised that the Scheme does not constitute a breach of the applicable financial sanctions regimes of the United States, the United Kingdom, the Cayman Islands and the European Union.*
>
> *8. Nevertheless, it is a matter for all stakeholders in the Scheme …to take their own commercial position on sanctions."*

39. A summary of the steps taken and advice received by the Company was set out by Mr Lam in his Affidavit. He noted that the Company had made various inquiries, with the assistance of the Information Agent, to ascertain whether any Noteholders were subject to or affected by the sanctions regimes. The Company deduced, based on information provided by the clearing

systems and obtained from the process for obtaining Noteholders' agreement to accede to the RSA, that approximately 6.65% of those Noteholders who acceded to the RSA hold their Old Notes through the NSD. The clearing systems have blocked transfers from the accounts of NSD's held by them. Mr Lam explained (at [22]) that:

> *"I have been informed by D.F. King, the information agent engaged by the Company, that Euroclear and Clearstream, through which the 2022 Notes and the 2023 Notes are settled, have blocked all transfers with accounts held by certain Russian banks and financial intermediaries, including Russia's National Settlement Depositary (the **"NSD")** from March 2022 (prior to the time the RSA was entered into in April 2022). I have also been informed by D. F. King that approximately 6.65 per cent of the holders of the 2022 Notes and the 2023 Notes who acceded to the RSA did not submit instructions through Euroclear or Clearstream. The Company was provided with a lock-up report containing the identity those holders that had acceded to the RSA, including those who did not submit instructions through Euroclear or Clearstream (the **"Lock-up Report").** So far as the Company can determine, the Lock-up Report contains the identity of all the holders of the 2022 Notes and 2023 Notes that did not submit instructions through Euroclear or Clearstream (the **"Blocked Noteholders")**. The Company has informed us that it believes, after due inquiry with D.F. King, that all of its Blocked Noteholders hold their 2022 Notes and/or 2023 Notes through the account of the NSD. As a result of the transfer block imposed by Euroclear and Clearstream, the Company believes there has been no change to the list of Blocked Noteholders since the time the RSA was entered into."*

40. Accordingly, some Noteholders are unable to receive documents or give instructions via the clearing systems (I refer to all such Noteholders as the ***Blocked Noteholders***). It appears that the Blocked Noteholders are Noteholders who hold their Old Notes through accounts with NSD or with other custodians who themselves have accounts with NSD. Some of the Blocked Noteholders have, despite these difficulties, been contacted by the Company and acceded to and agreed to be by bound the RSA. I refer to these Noteholders as the ***RSA Blocked Noteholders***. There may be other Blocked Noteholders but the Company currently does not know whether any exist or if they do exist who they are.

41. 89.07% by value of all Noteholders have acceded to the RSA and, as I have said, the RSA Blocked Noteholders constitute approximately 6.65% of all such acceding Noteholders. The alternative method for contacting the RSA Blocked Noteholders was discussed in Zhou 1 at [53]. The PSL and other documents and notices were posted on the scheme website so that any

Blocked Noteholder could access them and were sent by email to each Blocked Noteholder whose email address was known to the Company or the Information Agent (see Zhou 1 at [102]).

42. Therefore, so far as the Company was able to ascertain, all the RSA Blocked Noteholders held their Old Notes through NSD and none of the Noteholders were themselves subject to the asset freezes or other provisions of the sanctions regimes. The Company had also, as Mr Lam confirmed, verified that none of the RSA Blocked Noteholders were listed or treated as designated or blocked persons under the regulations governing the relevant sanctions.

43. As a further precaution to ensure that no Noteholder who is prevented by sanctions from voting on, from having the Old Notes discharged by or from receiving the scheme consideration under the scheme, from doing so, the Company will require Scheme Creditors to execute a distribution confirmation deed. This contains various sanctions related confirmations to be made by and on behalf of each Scheme Creditor to confirm that they are not subject to sanctions. If any Scheme Creditor fails to give the required affirmative confirmations then Company will check that Scheme Creditor's details against the lists of designated sanctioned persons in the Cayman Islands, the United Kingdom, the European Union and the United States to ensure that the Scheme Creditor is not on a sanctioned person.

44. In these circumstances, the Company is satisfied that, based on and following what it considers to be reasonable inquiries, the promotion and implementation of the scheme will not give rise to a breach of any applicable sanctions regime.

The Company's approach before the hearing of the Convening Order Summons to voting by Blocked Noteholders

45. Thus the clearing systems' decision to suspend settlement services and communications through accounts held by NSD has had an impact on the process for obtaining the approval of and implementing the scheme. As a result, the Company has been unable to give notices to or obtain voting instructions from the Blocked Noteholders via the clearing systems in the usual way (or make payments or transfer the scheme consideration to Blocked Noteholders). In

addition, the Company's bank has advised that it cannot make direct payments to the Blocked Noteholders (see Zhou 1 at [58]) and the Information Agent has indicated (in light of comments made by the clearing systems) that it is unable to collect information and voting instructions from the Blocked Noteholders outside the clearing systems.

46. The difficulties associated with sanctions were not addressed prior to the RSA being signed because the Company was not aware of them at the time. The need to investigate and resolve these difficulties and to prepare amendments to the scheme documents caused delays in finalising the terms and structure of the scheme and were mainly responsible for the need to delay the hearing of the Convening Order Summons. The amendments that the Company decided were needed to address the problems caused by sanctions were summarised in the Additional PSL as follows (underlining added):

> *"5. Since the [PSL], the Scheme Company has been working through the mechanics of the Restructuring and, following discussions with Euroclear and Clearstream, it has been agreed that the new notes to be issued pursuant to the Restructuring (the **"New Notes")** can take a global form and will be on the same terms as the Term Sheet to the RSA, subject to the amendments shown in Appendix B to this PSL. The trustee of the New Notes will be an independent and professional provider of note trustee services that will be confirmed by the Scheme Company as soon as possible. The Scheme and Restructuring are also subject to the amendments set out below.*
>
> *6. First, the Scheme Consideration due to those persons or entities who hold the Old Notes through accounts held by certain Russian banks and financial intermediaries, including the [NSD], whose settlement services have been suspended and blocked by Euroclear and Clearstream, (the **"Blocked Scheme Creditors")** will need to be first held by a trustee in accordance with the terms of the Holding Period Trust Deed (the **"Holding Period Trustee")** on trust for the Blocked Scheme Creditors until the maturity date of the New Notes or the lifting of the applicable sanctions, whichever is earlier. If applicable sanctions are still in place upon the expiry of the Holding Period Trust, the Scheme Company will undertake in the Scheme to create a successor trust (the **"Successor Trust")** for Blocked Scheme Creditors' Scheme Consideration to be held until the earlier of (i) the expiry of the perpetuity period of the Successor Trust or (ii) the lifting of applicable sanctions, with the Blocked Scheme Creditors being given a reasonable period thereafter to recover their entitlement to the Scheme Consideration in accordance with the terms of the Successor Trust. The same will apply to the Instruction Fee, which is to be paid to those Blocked Scheme Creditors who*

> *are also Consenting Creditors. The Holding Period Trustee will be Ultrex Holdings (HK) Limited, a Hong Kong incorporated subsidiary of the Scheme Company.*
>
> *7. Further and on account of the same sanctions regulations of the European Union, the Information Agent is not able to collect information, including voting instructions, from the Blocked Scheme Creditors. As a result, the Blocked Scheme Creditors will not be permitted to attend or vote at the Scheme Meeting. However, Blocked Scheme Creditors who are also Consenting Creditors will still be eligible to receive the Instruction Fee, on the terms set out in paragraph 6 above.*
>
> *8. Finally, as anticipated in the [PSL], the Scheme Company proposes an amendment to the RSA to extend the Longstop Date until 31 October 2022. The Scheme Company now also proposes a further amendment to the RSA to provide the Scheme Company with the right (at its sole discretion) to extend the Longstop Date to 30 November 2022 (together with the initial extension until 31 October 2022, the **"Longstop Date Extension")** should additional time be required to complete the Restructuring. Consenting Creditors who vote in favour of the Scheme will be treated as having voted in favour of the Longstop Date Extension."*

47. As this extract makes clear, the Company decided, in order to deal with the impact of sanctions, that the New Notes could be issued in global form; that the New Notes could not be issued to Blocked Noteholders but would need to be held on their behalf by a trustee and Blocked Noteholders could not and would not be allowed to vote at the scheme meeting.

48. The arrangements for voting at the scheme meeting were set out in the Explanatory Statement and the documents attached to it, including the solicitation package. These explained what steps needed to be taken by a Scheme Creditor in order to be entitled to attend and vote at the scheme meeting. In the case of intermediated securities such as the Old Notes held through clearing systems, as I have noted, the clearing systems play a critical role since they pass on documents to their account holders (who then forward the documents to sub-custodians and thereby to Noteholders), block dealings in the Old Notes while voting is taking place and transmit back voting instructions executed by such account holders on behalf of Noteholders.

49. The Company prepared a form of document to be used by account holders for the purpose of recording and evidencing the Old Notes held and the voting instructions given by Noteholders.

This is the Account Holder Letter which must be signed by an Account Holder, who is defined in the Scheme as a person who has an account with the clearing systems and is recorded in the books of the clearing systems as holding in that account a book-entry interest in the Old Notes. The Account Holder in the Account Holder Letter identifies and provides the name of the person who is the to be treated as the Scheme Creditor in respect of a specified amount of the Old Notes and on whose behalf the Account Holder is acting. This ensures that the ultimate beneficial owner of the relevant Old Notes can attend and vote at the Scheme Meeting in accordance with the "Looking through the Register" approach set out in the Practice Direction (see [4]). The Account Holder in the Account Holder Letter gives various confirmations (representations) and voting instructions on behalf of the Scheme Creditor and provision is made in the Account Holder Letter for the appointment of a proxy by the Scheme Creditor. Appendix 2 to the Account Holder Letter attaches a distribution confirmation deed (to which I made reference above) which all Scheme Creditors must execute in order to be entitled to receive and before receiving their share of the New Notes. Annex B to the distribution confirmation deed sets out various securities law and sanctions confirmations and undertakings to be given by the relevant Scheme Creditor. The sanctions confirmations, in summary, confirm that the Scheme Creditor and its affiliates and associates are not subject to sanctions or acting for Russia and will not use the proceeds of the New Notes to fund or facilitate the business of any sanctioned person or of Russia.

50. The Explanatory Statement and the solicitation package confirmed and expanded on what was said in the Additional PSL regarding the position of the Blocked Noteholders. Blocked Noteholders (including the RSA Blocked Noteholders) would be excluded from voting. The Company considered that this was necessary because the Blocked Noteholders could not receive documents or give voting instructions via the clearing systems and because the Information Agent was also unable to send documents to or receive voting instructions from them. However, to ensure that the RSA Blocked Noteholders (who had acceded to the RSA and thereby agreed to submit an Account Holder Letter and vote in favour of the Scheme at the scheme meeting, and who were only entitled to the Instruction Fee if they did so) would be financially no worse off by being unable to vote, the Company agreed to waive the RSA Blocked Noteholders' obligation to submit an Account Holder Letter and agreed that the RSA

Blocked Noteholders should nonetheless still be paid their Instruction Fee if the Scheme was approved and sanctioned. This would be paid to the Holding Period Trustee.

Third Parties

51. The Scheme also provides that by no later than the date of the sanction hearing, various non-parties to the Scheme will give undertakings to the Company and the Court to be bound by the terms of the Scheme. These include the Subsidiary Guarantors, the subsidiaries who will guarantee the New Notes, the Old Notes Trustee, the Depositary, the Old Notes Paying and Transfer Agent, the New Notes Trustee,, the New Notes Paying and Transfer Agent, the Holding Period Trustee, the person appointed to act as the supervisor of the Scheme and the Information Agent.

The issues arising on the convening hearing

52. It is now well settled that the function of the Court at a scheme convening hearing is not to consider the merits or fairness of the proposed scheme. These issues arise for consideration at the sanction hearing if the scheme is approved by the requisite majority of creditors. At the convening hearing the Court is concerned with a narrower range of issues when determining whether to give directions for the convening of the scheme meeting and if so what those directions should be. The issues for consideration are referred to in the Practice Direction (at [3]). They are now frequently summarised as covering three main areas, namely first, any issues which may arise as to the constitution of the meeting or meetings of creditors; secondly, any issues as to the existence of the Court's jurisdiction to sanction the scheme and thirdly, any other issue (not going to the merits or fairness of the scheme) which might lead the Court to refuse to sanction it (which will usually include a review of the extent to which the scheme will be effective abroad in other relevant jurisdictions).

53. In addition, the Court will consider whether adequate notice has been given to creditors of the purpose and effect of the proposed scheme and of the convening hearing. The Practice Direction (at [3.1]), as noted above, states that:

> *"....practitioners should consider giving notice to persons affected by the scheme in cases where class or other issues referred to in paragraph 3.3 below arise and where it is practical to do so. Such notice should include a statement of the intention to promote the scheme and of its purpose, and also of the proposed composition of classes and of the intention to raise any issue as referred to in paragraph 3.3 below."*

54. Paragraph 3.3 of the Practice Direction states that:

> *"At the first hearing, the Court will also consider any other issue which is relevant to the jurisdiction of the Court to sanction the scheme, and any other issue which, although not strictly going to jurisdiction, is such that it would unquestionably lead the Court to refuse to sanction the scheme."*

55. In this case, there is no issue as to jurisdiction. The Company is a Cayman Islands incorporated company and is therefore liable to be wound up under the Companies Act. Accordingly, pursuant to section 86(5) of the Companies Act the Court clearly has jurisdiction to convene a scheme meeting (and sanction a scheme) in respect of the Company (I discuss below the relevance of the connections to the jurisdiction for the purpose of the Court's exercise of its discretion to sanction the Scheme). The Scheme is also clearly an arrangement within the meaning of section 86 of the Companies Act.

56. Issues do however arise in relation to the following matters: the notice of the convening hearing; class composition; the extent to which there are doubts as to the international effectiveness of the Scheme; the adequacy of the disclosure in the Explanatory Statement and the directions to be given for the convening and conduct of the Scheme meeting. I deal with each of these issues in turn.

Notice of the convening hearing and amendments to the Scheme

57. As I have noted above, Scheme Creditors were first given notice of the proposed scheme on 5 August 2022 in the PSL. The PSL said that the convening hearing was listed on 5 September 2022. They were notified on 2 September 2022 that the date of the convening hearing had been put back to 15 September 2022. They were then notified shortly before the convening hearing,

on 12 September 2022, that certain amendments to the Scheme were to be made with respect to the treatment of the Blocked Noteholders and that the Company would seek to be granted the power to extend the Longstop Date to 30 November 2022.

58. The question of the timing and adequacy of notice to Scheme Creditors has been considered by a number of authorities. As Mr Justice Zacaroli noted in *Re Lecta Paper UK Limited* [2019] EWHC 3615 (Ch) (***Lecta***) at [10] "*The essential question, as posed by Norris J in Re NN2 Newco Ltd [2019] EWHC 1917 (Ch), at [22]-[23] is whether in all the circumstances of the case (including the complexity of the scheme, the degree of prior consultation with creditors and the urgency of the scheme) creditors have been given sufficient notice of the basic terms of the scheme and an effective opportunity to raise any concerns*." As Mr Justice Meade said in *Re Nostrum Oil & Gas Plc* [2022] EWHC 1646 (Ch) (***Nostrum***) at [25] "*the appropriate period of notice is a fact-sensitive matter*."

59. In this case, leaving to one side the position of the Blocked Noteholders, I am satisfied that adequate notice has been given. The basic terms of the Scheme were notified on and have not materially changed since 5 August 2022. The PSL in early August gave notice that the convening hearing would be in early September and the subsequent notice dated 2 September gave just under two weeks' notice of the revised hearing date (of 15 September). Furthermore, a substantial proportion of the Noteholders have been involved in the restructuring negotiations and have become parties to the RSA. The precise dates on which Noteholders acceded to the RSA have not been disclosed but it is clear that they did so some time in advance of the PSL. In the PSL the Company confirmed (at [39]) that Noteholders holding approximately 90% of the Old Notes had already by 5 August 2022 entered into or acceded to the RSA.

60. But what about the position of the Blocked Noteholders? Some of the Blocked Noteholders acceded to the RSA. They will have been fully informed of the terms of the Scheme. But there may be others who have not come forward. They cannot receive notices through the clearing systems and so must rely on making their own searches of the Company's website and the HKSE website. This may result in some delays in their picking up and finding out about developments. However, the PSL was uploaded to the Company's and the HKSE's website in

early August 2022 and therefore it is reasonable to expect that even these other Blocked Noteholders will have been aware of the restructuring proposals, the terms of the Scheme and the timetable for implementing it, including there being a convening hearing in early September. I had a concern that they will only have found out that the Company was proposing that they would not have the right to vote at the Scheme meeting a matter of days before the convening hearing. It is possible that some of the Blocked Noteholders may have wished to object to the Company's proposal and to have made representations at the convening hearing but were unable to do so in view of the very short notice given of the amendments. However, in this case I do not consider that there is a need to find or justification finding that the Company failed to give adequate notice to the Blocked Noteholders of important amendments to the Scheme so that the convening hearing should be adjourned. First, as I shall explain shortly, I directed at, and the Company has agreed following the convening hearing that Blocked Noteholders be permitted to vote at the Scheme meeting and that arrangements be made that will give them an opportunity to do so outside the clearing systems. Therefore, the main cause of concern that the Blocked Noteholders would have had has been dealt with. Secondly, and most importantly, the Blocked Noteholders will have an opportunity to raise any concerns and objections to sanction of the Scheme at the sanction hearing. In view of the very short notice they were given of the amendments to the Scheme affecting them, they will be given greater leeway than creditors would usually have to raise at the sanction hearing issues that could and should have been brought forward at the convening hearing. Thirdly, the Company is clearly under serious time pressure in view of the Alibaba deadline and an adjournment of the convening hearing would potentially have serious and damaging consequences for the restructuring and the interests of Noteholders.

Class composition

61. The Court's approach to considering the question of class composition was neatly summed up recently by Meade J in *Nostrum* as follows:

> *"The basic principle is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (see Sovereign Life Assurance v Dodd [1892] 2 QB at [573] and many cases since, including e.g. Re Telewest Communications Plc [2004] BCC*

> *342). In answering the question of whether a separate class is required, the Court must consider the rights that creditors would have if the proposed scheme were not implemented. In carrying out that exercise, the Court is concerned with rights, not interests. Even where there are differences in rights, the differences must be sufficient to make consultation impossible. It is important that the Court should not be too picky, to guard against the risk that that will enable a small group to hold out unfairly against a majority."*

62. In this jurisdiction the test to be applied is also summarised in the Practice Direction (at [3.2]).

63. When dividing creditors or members into classes, two considerations are relevant: the rights that the creditors or members would have if the scheme were not implemented, and the rights that the creditors or members have if the scheme is implemented. As Chadwick LJ said in *Re Hawk Insurance Co Ltd* [2002] BCC 300 at [30]:

> *"In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied."*

64. The Company submitted that in the present case, the Scheme Creditors should vote in a single class:

(a). the Court needed to consider the rights of Scheme Creditors under the Scheme and under the alternative to the Scheme. The Company submitted that the Scheme Creditors have the same rights and are treated equally under the Scheme and would have the same rights under the alternative to the Scheme.

(b). the Scheme Creditors will, subject to the two differences discussed below, be given identical legal rights under the Scheme. Once the restructuring is implemented, each Scheme Creditor will be entitled to receive the same package of Scheme consideration pro rata to their existing claims. There is no relevant difference of treatment and therefore no difference in the rights acquired by Scheme Creditors under the Scheme.

(c). the Company also submitted that the evidence indicated that the alternative to the Scheme (the comparator) was an insolvent liquidation. If the Scheme is not approved the Company is very likely to enter into insolvent liquidation. In that situation, all Scheme Creditors would have the same legal rights against the Company. They would have unsecured claims ranking *pari passu*, and would receive (based on the Kroll liquidation analysis) the same estimated pro rata return of approximately 25.8% to 36.1%. The Company submitted that the Kroll liquidation analysis had been properly prepared and set out a realistic and reasonable estimate of the recoveries that Scheme Creditors would make if the Company and other members of the Group were forced in liquidation upon the failure of the Scheme.

65. The Company accepted that there were some differences of treatment between Scheme Creditors but that these differences were said to be immaterial and did not fracture the class:

(a). some, but not all, Scheme Creditors have signed the RSA and will receive the Instruction Fee although all Noteholders were offered the opportunity to accede to the RSA and receive the Instruction Fee.

(b). the Blocked Noteholders will not be able to receive the Scheme consideration on the Restructuring Effective Date, but instead the Scheme consideration to which the Blocked Noteholders would otherwise be entitled will be held on trust by the Holding Period Trustee, and subsequently the trustee of the Successor Trust until the applicable sanctions are lifted or for the duration of the two trusts. Furthermore, the Company's position at the convening hearing was that the Blocked Noteholders would not be entitled to attend or vote at the Scheme meeting.

66. As regards the fees, the Company argued that the fact that creditors had entered into a lock-up agreement did not give rise to a class issue. Rather, it was relevant to the exercise of the discretion of the Court when deciding whether to sanction a scheme (citing *Telewest Communications* [2004] BCC 342 at [53]). The Company argued that it was well-established that fees paid in connection with lock-up agreements of a type similar to the RSA (commonly

referred to as consent fees) did not fracture a class merely because some members of the class will not receive the fee (*In Re DX Holdings Ltd and other Companies* [2010] EWHC 1513 (Ch) at [7]). Two factors were important: first, whether or not the consent fee was offered to all scheme creditors and secondly, whether the consent fee was likely to exert any material influence on creditors' voting decisions (*Re Magyar Telecom* [2014] BCC 448 at [12]; *Re PrimaCom Holdings GmbH (No.1)* [2013] BCC 201 at [55]-[57] and *Re Privatbank* [2015] EWHC 3186 (Ch) at [30]). In this case, as already noted, the Instruction Fee had been offered to all Noteholders who acceded to the RSA by the Instruction Fee Deadline and all Noteholders were given the opportunity and sufficient time to accede to the RSA after the announcement of the RSA on 31 March 2022; the Instruction Fee was small, being only 1% of the outstanding principal amount of the Old Notes held by Noteholders who are Consenting Creditors; under the Scheme, the Noteholders were expected to receive 100% of the sums due under the Old Notes (albeit at a later date) but in a liquidation, the return was expected to be between 25.8% (low) and 36.1% (high) so that in these circumstances it was highly unlikely that a Noteholder who would otherwise have intended or planned to vote against the Scheme would have been persuaded and incentivised to vote in favour in order to obtain the Instruction Fee and a small additional 1% return.

67. As regards the treatment of the Blocked Noteholders:

(a). the Company noted that the Blocked Noteholders were receiving the same benefits under the Scheme as other Scheme Creditors (including, where they had acceded to the RSA, the Instruction Fee) but at a later date. The Company submitted that the delay in the Blocked Noteholders having access to their Scheme consideration was not unusual where parties to a scheme were subject to regulatory or other requirements that made it unlawful for them to receive the scheme consideration immediately. The Company relied on the following recent statement of the applicable principle by Mr Justice Marcus Smith in *Re Haya Holco 2 plc* [2022] EWHC 1079 (Ch) (***Haya***) at [72(3)]:

> "*Scheme Creditors will be required to make certain customary confirmations with respect to US securities legislation in order to certify their ability to*

> *receive their allocation of New SSNs and New Shares. If a Scheme Creditor is unable to make such customary confirmations, it may nominate a person to receive its allocation of New SSNs and New Shares on its behalf. If a Scheme Creditor fails to nominate such a person, then the New SSNs and New Shares for that Scheme Creditor will be transferred into a "holding trust" for up to 12 months. If the New SSNs and New Shares still have not been claimed at the end of that period, then they will be sold and the net proceeds will be distributed to the relevant creditor. This structure does not, in my judgment, fracture the class. It is a customary feature of schemes that involve the issuance of new debt or equity securities. The Scheme Creditors have the same rights in relation to the New SSNs and New Shares under the Scheme. An inability to give the customary confirmations required to be given to receive an allocation of New SSNs and New Shares goes merely to the enjoyment of those rights, creating a potential fairness, not class, issue: see Re Lecta Paper UK Ltd [2019] EWHC 3615 (Ch) at [19] per Zacaroli J; Re Obrascon Huarte Lain SA [2021] EWHC 859 (Ch) at [28] per Adam Johnson J; Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [82]-[83] per Trower J.*"

(b). as regards the prohibition on the Blocked Noteholders from attending or voting at the Scheme Meeting, the Company noted that the issue had arisen in *Nostrum*, another sanctions case, but had not affected Meade J's decision that it was appropriate to convene a scheme meeting of a single class of scheme creditors. Meade J had noted at [42] of his judgment, the Company said, that the scheme creditors affected by sanctions had signed a lock-up agreement prior to their being sanctioned, and this strongly indicated that they did not object to the scheme. The Company submitted that the restrictions on the Blocked Noteholders' right to attend and vote at the Scheme meeting, if relevant at all, related only to the fairness of the Scheme, which was not a question to be decided at the convening hearing. If the Blocked Noteholders had any objections to the Scheme, related to the effect of sanctions or the mechanisms put in place to deal with them, then they would be able to raise these objections at the sanction hearing.

68. I accept that the entitlement of Consenting Creditors to be paid the Instruction Fee does not require that they be put in a separate class. But in my view the proper approach to be followed by the Court was that set out by Marcus Smith J in *Haya*. He said this (at [72(4)] (underlining added):

*"Consent payment. A consent fee is payable to Scheme Creditors who acceded to the Lock-Up Agreement by 5pm on 31 March 2022 (the **Consent Payment**). The Consent Payment is a sum equal to 0.5% of the principal amount of the New SSNs to be received by the relevant Scheme Creditor under the Scheme. The Consent Payment will be payable in cash upon the implementation of the Scheme. Consent fees of this type are common, and at this level do not – given the value at risk - fracture the proposed class. Of course, this is a matter that is fact dependent, and the fees incurred in bringing forward a scheme, and the basis on which they are to be paid, are always going to be matters the court ought to bear in mind. More specifically:*

(a) Some of the authorities suggest that, where a consent fee is made available to all creditors in advance of the scheme meeting, it cannot fracture the class. If each creditor had a right to obtain the fee, then there is no difference in rights that is capable of fracturing the class: see Re HEMA UK I Ltd [2020] EWHC 2219 (Ch) and Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [72] per Trower J, among many other cases. I am a little doubtful as to the weight of this point, since the critical question is how the class will vote at the meeting, and the factors that might impair that vote.

(b) Some of the authorities suggest that even if a consent fee was made available to all, it is necessary to consider whether the quantum of the consent fee is material. On this view, if a consent fee would be unlikely to exert a material influence on the relevant creditors' voting decisions (having regard to the amount that creditors would receive in the comparator to the scheme and the value of the rights conferred by the scheme), then the fee does not fracture the class: see Re Primacom Holding GmbH [2013] BCC 201 at [57] per Hildyard J, among other cases.

It is this, second, factor that is persuasive – at least in the present case, although I would be troubled if the potential for a consent fee were not available to all members of the class. To that extent, selectivity may be a negative factor, requiring of explanation. In the present case, all of the financial creditors were given an opportunity to sign the Lock-Up Agreement and receive the Consent Payment (if they acceded by 5pm on 31 March 2022). More importantly, the Consent Payment (which represents only 0.5% of the New SSNs to be received by the relevant Scheme Creditor) would not, in my judgment, exert a material influence on the Scheme Creditors' voting decisions. The difference between the "Scheme outcome" and the "comparator outcome" is far greater than 0.5% and it would be fanciful to suppose that anyone would vote for the Scheme in order to receive the Consent Payment."

69. The Court is required, when addressing the question of whether the class of Scheme Creditors has been fractured, to have regard to the rights given to Scheme Creditors pursuant to or in connection with the Scheme and consider whether there are material differences in those rights that prevent the Scheme Creditors from being able to consult together with a view to their common interest. It seems to me that rights have to be assessed at the date of the Scheme Meeting and include rights granted under documents that are entered into in connection with and for the purpose of obtaining creditor support for the Scheme. Accordingly, Consenting Creditors are to be treated as having different rights from other Scheme Creditors. But where all Scheme Creditors have been given an equal opportunity to obtain the consent fee (by acceding to a lockup agreement such as the RSA) and all Scheme Creditors are otherwise treated equally, the difference in rights is self-induced, in the sense that it arises from a choice made by those Scheme Creditors who have decided not to accede to the lockup agreement. Furthermore, the difference in rights is not of a kind that can reasonably be expected materially to affect Scheme Creditors' decision making at the Scheme Meeting, if the amount of the consent fee is so small that no reasonable and properly informed Scheme Creditor would be likely to change his/her vote (to vote in favour of the scheme) because of the entitlement to be paid the consent fee or be likely to regard that entitlement as having a substantial effect on his voting decision.

70. In the present case, all Scheme Creditors were invited to become parties to the RSA. This included the Blocked Noteholders, a significant number of whom acceded to the RSA. The Instruction Fee is an amount equal to 1% of the aggregate principal amount of that Consenting Creditor's Old Notes as at the Instruction Fee Deadline. The fee is not calculated by reference to the scheme consideration, as was the case in *Haya*, but that is not unusual or determinative. The amount of the Instruction Fee is not *de minimis* or trivial but it is not of such an amount that Scheme Creditors who are entitled to it can reasonably be expected to have a materially different view of the benefits of the Scheme over the alternative (an insolvent liquidation). There is no evidence to indicate, nor is the amount of the Instruction Fee inherently and of itself so large as to indicate, that a reasonable and properly informed Scheme Creditor would be likely to change his/her vote because of the entitlement to be paid the Instruction Fee or be likely to regard that entitlement as having a substantial effect on his voting decision. The Instruction Fee is being paid as an incentive for an early commitment to support the Scheme,

and represents reasonable compensation for a commitment to support the Scheme in advance of the Scheme meeting.

71. It is also worth noting that the payment of a consent fee may also be relevant to a different issue at the sanction stage. If fees are paid to secure the support of Scheme Creditors and have the effect of manipulating the vote at the Scheme Meeting, such fees can affect and undermine the integrity of the vote and be a ground for refusing to sanction the scheme. But no issue on this ground arises in this case.

72. I accept the Company's submissions with respect to the effect of the arrangements made in relation to the Blocked Noteholders' Scheme consideration. As pointed out by Marcus Smith J in *Haya* there is a fundamental distinction between a scheme conferring different rights on different groups of creditors and a scheme conferring the same rights on all creditors but with some creditors being unable to enjoy those rights (immediately) by virtue of some personal characteristic that they possess. The latter situation should not fracture the class, as it involves a difference in interests rather than rights.

Preventing Blocked Noteholders from attending or voting at the Scheme meeting

73. However, I do not accept that it would be permissible to deprive the Blocked Noteholders of the right to attend and vote at the Scheme meeting. While it might be said that by establishing arrangements and obtaining directions for the conduct of the Scheme meeting that prevented Blocked Noteholders (who were nonetheless Scheme Creditors whose rights were discharged and varied by the Scheme) from attending and voting, the Blocked Noteholders were being granted different rights from other Scheme Creditors under or in connection with the Scheme (so that they should be in a different class), it seems to me that this issue does not go to class composition. It goes to an even more fundamental point, namely the rights given by the Companies Act to parties to a scheme and to the fairness of the Scheme (leaving aside the

impact of the Bill of Rights). It therefore raises an issue which might lead the Court to refuse to sanction the Scheme at the sanction stage.

74. Blocked Noteholders are unable to receive documents and give voting instructions via the clearing systems. There is no evidence that attendance of any Blocked Noteholder or voting by a Blocked Noteholder at the Scheme meeting would be unlawful and a breach of relevant sanctions. If that were the case, the position would be different. It is just that the usual method of communicating with and obtaining instructions from the ultimate and unidentified holders of the Old Notes is not available because of the effect of sanctions and the action taken by the clearing systems in response to such sanctions.

75. Parties to a scheme of arrangement whose rights are to be varied or discharged thereby are entitled to attend and vote at the Scheme meeting. In my view, that is what is envisaged and required by the relevant provisions of the Companies Act.

76. Section 86 of the Companies Act states that:

> *"(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them … the Court may … order a meeting of the creditors or class of creditors …. to be summoned in such manner as the Court directs.*
>
> *(2) If a majority in number representing seventy-five per cent in value of the creditors or class of creditors as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors as the case may be, and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company.*

77. The Court is to summon a meeting of all those creditors who are made parties to the scheme and such creditors are entitled to vote. The Blocked Noteholders are to be made parties to the Scheme. They must be summoned to the Scheme meeting and allowed to vote.

78. As I pointed out to the Company at the convening hearing, parties to a scheme must be given the right to vote on it and if there are practical problems which make it difficult for them or limit their ability to exercise that right and vote then the company must do (and must show that it has done) everything which it can reasonably be expected to do to give the scheme creditors concerned the opportunity to exercise the right to vote. In this case, it seemed to me that Blocked Noteholders could be given the opportunity to vote. They had already been notified of the Scheme and arrangements for the Scheme Meeting and could access the Scheme documents via the Company's scheme website and it seemed to me that it must also be possible for the Company to make arrangements, as had been done with the RSA, for Blocked Noteholders to submit voting instructions and evidence of their status as Noteholders outside the clearing systems to suitable persons identified and appointed by the Company for the purpose. After the convening hearing, and following consultations with its advisers and the clearing systems, the Company confirmed that indeed this was possible and the Scheme documents and the arrangements for attendance and voting at the Scheme meeting were amended to allow Blocked Noteholders to attend and vote at the meeting.

79. The Company relied on the judgment of Meade J in *Nostrum* and it is worth noting precisely what the learned judge had said on this topic in his judgment (underlining added):

> *"13. There are certain regulatory approvals that the Company must obtain in order to implement the Restructuring, which arise due to certain of the Scheme Creditors being direct or indirect targets of sanctions in the UK, EU or US. Such Scheme Creditors ("the Sanctions Disqualified Persons") are currently prohibited from dealing with the Existing Notes. Approximately 7.1% by value of the Notes are held by Sanctions Disqualified Persons.*
>
> *14. The Restructuring may require licences to be granted by the sanctions authorities in the UK, the Netherlands and the US. I understand from Mr Allison QC, who appeared for the Company, that there is a possibility that the relevant authorities will indicate that no such licence is required (although this is less likely with the US). There is uncertainty as to when such licences (or confirmation that licences are not required) will be provided, which is why the moratorium is necessary to provide the Company with breathing room to implement the Restructuring.*
>
> ....

> 42. *Sanctions Disqualified Persons will not, because of their status as such, be able to vote on the Scheme. I note however that the (current) Sanctions Disqualified Persons signed up to the Lock-Up Agreement prior to their being sanctioned and this strongly indicates that they did not object to the Scheme and would be unlikely to do so now.*
>
> 43. *In any event, in my opinion the issue of sanctions relates, if anything, to the fairness of the Scheme, which is not a question I need to decide at this stage. I therefore agree with Mr Allison that the fact that there are Sanctions Disqualified Persons, and the mechanisms put in place to deal with sanctions, do not fracture the class. For completeness, I record that I slightly misunderstood the voting position in relation to Sanctions Disqualified Persons at the hearing because I was at cross-purposes with Mr Allison. The paragraphs above have been corrected following a helpful communication from the Company's Counsel after seeing my judgment. I am confident that my misunderstanding did not affect the result and I would have announced the same decision at the hearing anyway."*

80. It therefore appears that in *Nostrum* the Sanctions Disqualified Persons were prohibited by sanctions from dealing with their notes. That appears to have meant that it would have been unlawful for them to vote at the scheme meeting. That is not the position in this case. In addition, it appears that all the Sanctions Disqualified Persons had agreed to support and be bound by the scheme, so that their assent did not need to be established or confirmed by a vote at the scheme meeting. I do not need in this case to decide whether the Court would be willing to sanction a scheme where creditors who are made parties to the scheme cannot vote. I would say however that I am not currently satisfied that this is an issue which only goes to fairness.

International effectiveness of the Scheme

81. At the convening hearing, the Court also needs to consider, at that stage on a preliminary basis, whether there is no point in convening a meeting of creditors because even if scheme creditors were to vote in favour and the Court were to sanction the scheme it would ultimately be ineffective since the scheme would not bind creditors and would be of no effect in other jurisdictions in which the company concerned had valuable assets or could be subject to insolvency proceedings (and there was a real risk that dissenting creditors might take action there). The Court will not act in vain and will not sanction a scheme which will not be substantially effective and achieve its core purpose.

82. In this case the Old Notes are governed by New York law. While as a matter of Cayman law, the Scheme will be effective to discharge the Old Notes and Noteholders will be bound by the Scheme if sanctioned, the question arises as to whether the Scheme will be effective as a matter of New York law and whether Noteholders will be bound so that they cannot bring proceedings to enforce the Old Notes or to wind up the Company in another jurisdiction in which the Company has valuable assets or could be wound up (and whether there is a real risk that dissenting creditors would take such action). As I have noted, the Company is a holding company and its principal assets are the shares it holds in its subsidiaries, in particular Fangyou (a BVI incorporated company) and TM Home Limited (a Cayman incorporated company).

83. In order to ensure that the Scheme is binding and given effect as a matter of New York law, the Company intends to apply, if the Scheme is sanctioned, for relief under chapter 15 of the US Bankruptcy Code. As regards the prospects of obtaining and the effect of chapter 15 relief the Company relied on Judge Gropper's evidence. Judge Gropper, as I have noted, is a hugely experienced and highly respected former US Bankruptcy Judge for the Southern District of New York. He summarised his evidence at [9] and [10] of his Affidavit as follows:

> *"9. I have been asked to state whether in my opinion (i) a United States Bankruptcy Court with appropriate jurisdiction, including the United States Bankruptcy Court for the Southern District of New York, would recognize the Cayman Islands' judicial process of obtaining approval of the Scheme (the "**Proceeding**") as a foreign main proceeding under chapter 15; (ii) relief could be obtained to ensure that the Scheme would be enforced in the United States, given the Indentures are governed by New York law, and in accordance with such principles, a creditor would or could be prevented from bringing legal proceedings in the United States against the Company in contravention of the terms of the Scheme; (iii) the grant of appropriate relief in the chapter 15 proceeding would have the effect of substantively discharging the Notes affected by the Scheme for the purposes of U.S federal and state law; and (iv) the third-party waivers and releases and exculpation provisions set out in substantially the same form as the draft Scheme would be enforceable in the United States. I have also been asked to address whether the Cayman Islands would be recognized as the center of main interests ("**COMI**") of the Company such that the Proceeding would be*

recognized as a "foreign main" proceeding under chapter 15 of the Bankruptcy Code.

10. Based on the facts provided in the documents identified below and the analysis set forth herein, and subject to the qualifications stated, it is my opinion that (i) the Cayman Proceeding would be recognized as a "foreign main proceeding" under chapter 15 of the Bankruptcy Code; (ii) the Scheme will be effective in the United States in practice to bind Scheme Creditors in relation to the variation of their rights; (iii) relief in the chapter 15 proceeding would have the effect of substantively discharging the Notes and related guarantees for the purposes of U.S. Federal and State law; and (iv) the third-party waivers, releases and exculpation provisions set out in substantially the same form as the draft Scheme will be enforceable in the United States. I can also confirm that principles of international comity remain important considerations for courts in the United States when considering applications to give effect in the United States to foreign proceedings."

84. Judge Gropper's Affidavit sets out a fully reasoned analysis with reference to relevant authorities to support his conclusions. He dealt in depth with the test under the chapter 15 jurisprudence for determining COMI and said this at [24]:

"Based on the statute as construed by the cases discussed above, it is my opinion that the Proceeding in the Cayman Islands would be recognized by a U.S. bankruptcy court as a foreign main proceeding. As stated above, section 1516(c) of chapter 15 provides that the place of registration is presumed to be the debtor's COMI, and in the instant case we must start with the presumption that the Cayman Islands is the COMI. This presumption may be rebutted, but here there would be insufficient grounds to do so. The Cayman Islands is undoubtedly the "center of the Company's interests", taking into account the words of the statute as written. Indeed, the Company's future as an entity depends on its efforts to restructure debt that is in default. These efforts are all centered in the Cayman Islands - in the petition to this Court to convene a Scheme Meeting, in that the Scheme Meeting will take place in the Cayman Islands, and in this Court sanctioning the Scheme. I am informed that noteholders who wish to contact the Company in relation to the restructuring and/or the Scheme will be informed through a practice statement letter that they may do so by contacting A&M, a service provider located in the Cayman Islands by: (i) writing to a Cayman Islands address; (ii) sending an email to a Cayman Islands email address; or (iii) by telephoning A&M on a Cayman Islands telephone number. In any event, by the date of the filing of the chapter 15 petition, which is the critical date for chapter 15 purposes, the Company's very existence will depend on activities centered in the Cayman Islands."

85. Judge Gropper relied in particular on the decision of the Second Circuit Court of Appeals in *Morning Mist Holdings Ltd v Kris* 714 F.3d 127 (2d Cir. 2013) (***Morning Mist***) and noted that his conclusions were strongly supported by the recent decision of Judge Glenn, the Chief Judge of the Bankruptcy Court for the Southern District of New York, in *In re Modern Land (China) Co., Ltd* 2022 WL 2794014 (Bankr. S.D.N.Y, July 22, 2022) ("***Modern Land***"). He said this about that decision:

> *"My conclusions as set forth above are strongly supported by the Modern Land decision of Judge Glenn discussed above. In a case involving a company with many relevant similarities to the Company here, the Court held that recognition as a foreign main proceeding would be consistent with the goals of chapter 15, with creditors' expectations and with choice of law principles, among other things. The Court also stressed that the judicial role in that proceeding, like the instant proceeding, was prevalent and that it would not imply the requirement that provisional liquidators or their equivalent would be required in order to meet the standards for recognition. 2022 WL 27940 at *13-14.*

86. In Judge Gropper's opinion, the third party releases in the Scheme would not preclude the US Bankruptcy Court from granting relief under chapter 15 and that the relief which would be granted would include both recognition and enforcement of the discharge effected by the Scheme. The US Bankruptcy Court would "*give full force and effect*" to the provisions of the Scheme.

87. Judge Gropper also referred to the judgment of Mr Justice Harris in Hong Kong in *In re Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 16896 (***Rare Earth***). *Rare Earth* was a case involving a Hong Kong scheme in respect of a company incorporated in Bermuda which sought to discharge debt governed by Hong Kong law. But the learned judge made some comments regarding the approach of the Hong Kong courts to the effect and recognition in Hong Kong of chapter 15 relief granted by US Bankruptcy Courts in respect of schemes sanctioned in "*offshore jurisdictions*" which discharged New York law debt. Mr Justice Harris said as follows:

> *"31. A creditor could not take enforcement action within the United States as a consequence of recognition of the scheme under Chapter 15 and granting by the relevant Bankruptcy Court of ancillary relief which prohibited*

enforcement in the United States. As the offshore jurisdictions apply the Rule in Gibbs, such a scheme might not be effective to compromise the debt of a creditor, who has not submitted to the jurisdiction of the Hong Kong court. Whether or not it is necessary to introduce a parallel scheme in the offshore jurisdiction will depend on the factors that I consider in [23]–[29] of China Oil.

32. *A scheme sanctioned in an offshore jurisdiction and recognised under Chapter 15 in the United States will not be treated by a Hong Kong court as compromising US$ debt. The Rule in Gibbs requires the substantive alteration of contractual rights to be sanctioned by some substantive provision of the relevant law. In the insolvency context in the United States this is I understand is achieved under Chapter 11 of United States Bankruptcy Code. This is explained by Glenn J (who dealt with the Chapter 15 application in Winsway) in his judgment in In re Agrokor d.d. In pages 184 to 185 Glenn J explains the position as follows:*

> *"The Supreme Court concluded in Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an in rem proceeding. A single court should resolve all claims to property of the debtor, which necessarily requires that the court resolve all creditor claims that have been, or could have been, asserted, provided that the creditors have received the notice required by due process. Thus, in an in rem proceeding, personal jurisdiction over all creditors is not required; the court determines the creditors' rights to receive distributions from all property of the debtor that is part of the estate. A creditor cannot ignore or avoid a Chapter 11 case and later sue to recover on its prepetition claim. Upon confirmation of a Chapter 11 plan, section 1141 (d)(1)(A) discharges the debtor from any debt that arose before the date of confirmation, whether or not the creditors filed a proof of claim or accepted the plan…"*

33. *As a matter of United States law a confirmed Chapter 11 plan operates to discharge the existing debt of a debtor and replace it with a right to receive a distribution in accordance with the confirmed plan. This is also the effect of a sanctioned scheme. Glenn J goes on at the end of the paragraph I have quoted to refer to the same principles applying to recognition of a foreign insolvency process with the same consequences, however, it is clear from reading the judgment as a whole that recognition under Chapter 15 does not operate as a discharge and that Glenn J acknowledges this.*

34. *On page 185 Glenn J introduces an objection to recognition based on the fact that some of the debt compromised by the arrangement Glenn J was asked to*

recognise was governed by English law and the arrangement arose under Croatia's Act of the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia.

"From the record before this Court—particularly since no objections have been filed—the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement: Agreement is appropriate within the territorial U.S.) arises because of the English courts' enforcement of the Gibbs rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fall considering the amount of prepetition debt governed by English law. That would be unfortunate, indeed."

35. *The material distinction between Chapter 11 and Chapter 15 proceedings is explained on page 187:*

"Section 1520 details the mandatory relief that is automatically granted upon recognition of a foreign main proceeding under Chapter 15. 11 U.S.C. § 1520. Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property that is located within the territorial jurisdiction of the United States. The statute refers specifically to the property of the debtor, as opposed to the property of the estate, since there is no estate in a Chapter 15 case. See, e.g., Atlas Shipping, 404 B.R. at 739. Despite this difference, the automatic effect of recognition of a foreign main proceeding under section 1520(a) is an imposition of an automatic stay on any action regarding the debtor's property located in the United States. Id." (emphasis added)

36. *It is clear from this passage that recognition under Chapter 15 operates procedurally to prevent action by a creditor against a debtor's property in the United States. Recognition does not appear as a matter of United States' law to discharge the debt. Consistent with this at page 196 Glenn J states that it is appropriate to extend comity within the territorial jurisdiction of the United States. Unlike a discharge under Chapter 11 which purports to have*

worldwide effect, recognition under Chapter 15 is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt.

37. There is a distinction between a court treating a compromise as having the substantive legal effect of altering the legal rights of the parties to an agreement (the issue with which Gibbs is concerned) and a court within its jurisdiction recognising, pursuant to a process such as Chapter 15, the purported legal consequence of a foreign insolvency procedure. This is a distinction to which advisers need to be alert when dealing with transnational restructuring. A scheme in an offshore jurisdiction purporting to compromise debt governed by United States law will not be effective in Hong Kong. Recognition of the scheme under Chapter 15 does not constitute a compromise of debt governed by United States law, which satisfies the Rule in Gibbs. The result is that if a company has a creditor, which did not submit to the jurisdiction of the offshore court the creditor will be able to present a petition in Hong Kong to wind up the Company and if, for example, the creditor is a bond holder whose debt is not disputed, obtain a winding up order unless the debt is settled. I note that there appears to be a surprisingly large number of Mainland business groups listed in Hong Kong, whose US$ denominated debt has recently been subject to schemes only in offshore jurisdictions and recognition under Chapter 15. It may be that all the creditors of these companies, which hold debt of any material value have agreed to the terms of the compromise, but if that is not the case such companies, and any that might adopt a similar model in future, will be at risk of a petition being presented against them in Hong Kong and being wound up here. An offshore scheme and Chapter 15 recognition will not protect them.

88. Judge Gropper noted that Judge Glenn in *Modern Land* had considered that Mr Justice Harris' summary of applicable US law had not been correct. Judge Gropper made the following comments in his Affidavit (at [19]) (underlining added):

"In regard to these issues, mention should be made of the recent decision of a Hong Kong Court in a case captioned In the Matter of Rare Earth Magnesium Technology Group Holdings Limited, [2022] HKCFI 1686. There, the Court, taking it upon itself to construe United States law and quoting from the decision in the Agrokor case cited above, stated in dictum that it did not believe that an order under chapter 15 recognizing and enforcing a foreign proceeding discharges the underlying debt. With respect, I believe the Court's discussion of chapter 15 and its effect erred, and Judge Glenn, the author of the decision in Agrokor, stated his disagreement with the Hong Kong decision in his recent decision in Modern Land. Judge Glenn said that the Hong Kong Court had misinterpreted his Agrokor decision and, in the plainest terms, said:

> *"To be clear in recognizing and enforcing the Scheme in this case, the Court concludes that the discharge of the Existing Notes and issuance of the replacement notes [in Modern land's Cayman scheme] is "binding and effective." 2022 WL 2794014 at *5 (footnote omitted)."*
>
> *Therefore, as stated above, it is my opinion that an order of a court in a foreign insolvency proceeding under chapter 15 that meets the requirements of chapter 15 will be enforced in the United States and the relief granted will have the effect of discharging the debt and releasing guarantee claims against the Old Notes Subsidiary Guarantors for U.S. purposes, regardless of whether the debt is governed by U.S. law. If a court in Hong Kong or elsewhere refuses, for whatever reason, to give similar effect to a foreign scheme or liquidation, it will do so for its own reasons, not because of any issue arising under chapter 15 or other provision of U.S. law."*

89. The Company also relied on an opinion on Hong Kong law provided by Mr Ian De Witt, a partner in Tanner De Witt and a solicitor qualified in Hong Kong. His opinion dated 19 August 2022 was exhibited to Zhou 1. Mr De Witt opined (as I understood it) that if the Old Notes were treated as discharged in accordance with New York law, they would be treated as discharged as a matter of Hong Kong law. He relied on Judge Gropper's evidence for the proposition that the relief to be granted on the Company's application under chapter 15 would discharge the debts under the Old Notes and the obligations of the Subsidiary Guarantors and that therefore that such discharge would also be given effect under the law of Hong Kong as a result of the well-known rule in *Anthony Gibbs and Sons v La Societe Industrielle et Commercial des Metaux* (1890) 25 QBD 399 (***Gibbs***). As regards *Rare Earth*, Mr De Witt noted that Mr Justice Harris' "*analysis [did] not accord with the opinion given by [Judge] Gropper*" and that:

> *"In any event, the potential impact of Harris J's decision in respect of the effect of a Chapter 15 recognition is minimal as his statements are obiter and non-binding. This is because:*
>
> *(a). The debts compromised by the scheme of arrangement in [Rare Earth] did not concern any United States governed law debts….. It is unclear [how the effect of chapter 15 relief in a case involving the discharge of New York law debts by a foreign scheme] arose in the written decision.*
>
> *(b). It is not apparent from the written decision that his Lordship considered any expert opinion on New York law.*

> *(c). The sanction of the scheme of arrangement in [Rare Earth] was unopposed, thus any expert opinion adduced by the scheme company would not have been challenged."*

90. At the convening hearing I asked where the restructuring negotiations had taken place and Mr Herrod confirmed that they had largely taken place in the PRC including Hong Kong. I then asked whether this was a fact that Judge Gropper had considered and whether this might be relevant to his assessment of the location of the Company's COMI. Mr Herrod said that this was a matter that the Company would raise with Judge Gropper in advance of the sanction hearing.

91. Further, the Company also relied on the advice it had received from Maples' BVI attorneys as to applicable BVI law. In an email dated 5 August 2022, Mr Matthew Freeman, a partner of Maples in the BVI, noted that two of the Subsidiary Guarantors were incorporated in the BVI and that their guarantees were governed by New York law. He confirmed that in his opinion if sums due under the Old Notes and liability under the guarantees were discharged in accordance with New York law, then such discharge would be given effect in the BVI.

92. In view of these opinions and advice, I was satisfied that there were good grounds for concluding (and that it was reasonably likely) that the discharge effected by the Scheme would be given effect and be binding on Scheme Creditors under and as matter of New York law. It appeared that the Company would be seeking, following and in the event of the sanction of the Scheme, an order from the Bankruptcy Court for the Southern District of New York under chapter 15 (or pursuant to New York private international law applying comity) to the effect that the Released Claims would be treated as discharged under and as a matter of New York law and that there were good grounds for concluding (and that it was reasonably likely), based on Judge Gropper's evidence and recent authority (*Modern Land*), that the New York court would grant such relief.

93. It also appeared that there were good grounds for concluding (and that it was reasonably likely) that, applying the chapter 15 jurisprudence to the facts of the present case, the Company's COMI is to be treated in the Cayman Islands at the date of the filing of its chapter 15 petition.

94. I was also satisfied that in these circumstances, and applying *Gibbs*, the discharge under and resulting from the Scheme should be given effect and recognised as a matter of Hong Kong and BVI law. However, I recognise and respect the fact that Mr Justice Harris has taken a different view of the effect of relief under chapter 15 and do not disregard the importance of the *dicta* in his judgment in *Rare Earth*. It seemed to me that Mr De Witt had rather too heavily discounted the significance of those *dicta*. Nonetheless, in view of the clear decision of Judge Glenn in *Modern Land* and the strong opinion of Judge Gropper in his evidence in this case, I concluded that there were good grounds for concluding that a properly drafted order (which confirmed that the relevant debt was treated as discharged by the Scheme) did mean that under and as a matter of the law of New York the Released Claims would for all purposes be regarded as discharged and extinguished by the Scheme so that for the purpose of the rule in *Gibbs* the Released Claims would treated as having been discharged and extinguished in accordance with, as a matter of and under their proper law. I also concluded that Mr Justice Harris may wish (of course recognising that this is a matter entirely for him and the Hong Kong court) at least to review and revisit his analysis of the effect of relief under chapter 15 (with the benefit of Judge Glenn's opinion and in light of the terms of the orders made by the US court) and that, while the issue was likely to come before and require further consideration by the Hong Kong courts, the evidence before me was that the discharge of the Old Notes and the liabilities of the Subsidiary Guarantors under the Scheme would be effective in and under New York law and therefore should be given effect in Hong Kong law (once again recognising that it is for the Hong Kong court to determine questions of Hong Kong law and not for this court to do so). I can see that it might be the case that the Hong Kong court would wish to form its own view and be entitled to make its own decision as to the location of the Company's COMI when deciding whether itself to give common law assistance to Cayman appointed provisional liquidators or liquidators but it was not argued nor does it seem to me to be right to say that when the *Gibbs* rule is being applied the Hong Kong court can or should go behind and mount a collateral attack on the New York court's finding with respect to COMI and its order granting chapter 15 relief.

95. The position is the same as a matter of BVI law, which is clearly of considerable practical significance in this case since the Company has assets (shares in a major subsidiary) and two of the Subsidiary Guarantors are incorporated there.

Adequacy of the Explanatory Statement

96. I was generally satisfied that the Explanatory Statement provided adequate disclosure to Scheme Creditors. However, there were three issues which arose.

97. First, I noted that the Explanatory Statement did not provide Scheme Creditors with any details of the costs of the restructuring and Scheme process. It seemed to me that Scheme Creditors should have this information and I directed that it be provided.

98. Second, there was an issue whether the financial information contained or referred to in the Explanatory Statement was sufficiently up to date or could be considered to be stale, and whether audited financial statements should have been included. I have explained above the financial information which the Company included and referred to and the Company's explanation as to why it had not been possible or practicable to include audited financial statements or more recent financial information. I was satisfied that in the circumstances the financial information was sufficiently up to date to allow Scheme Creditors to make a properly informed decision as to how to vote on the Scheme and that the Company's explanations as to why audited financial statements were not available was reasonable.

99. Thirdly, there was an issue as to whether Kroll's liquidation analysis had been properly prepared and was sufficiently reliable. As I have noted, Kroll's liquidation analysis was not based on a company by company analysis of the likely outcome of a liquidation of each company. Instead Kroll adopted what they described as a segmented based approach under which Kroll put the Group's over three hundred companies into six sub-groups (segments) and aggregated the assets and liabilities of each sub-group (segment) for the purpose of estimating their estimate of the return to creditors of each company in the sub-group in the event of a liquidation of all the companies concerned. Kroll assumed that it was sufficient to give Scheme Creditors an analysis that based estimated returns for creditors of each company in a sub-group

on the *pro rata* amount that all creditors of all companies in the sub-group would receive if the proceeds from realisation of all assets of all such companies were aggregated and distributed among all such creditors to discharge the aggregate of all liabilities of all such companies. It appears that membership of the sub-groups was based on the companies concerned being part of the same business sector. I did have some concerns about this methodology which did not appear to be based on the impact of intercompany indebtedness between particular companies (a company in one segment might owe or be owed large sums by a company in another segment so that value would flow from or to such companies otherwise than through the segment) but concluded that it was not wholly unreasonable to assess the impact of the liquidation of a company by reference to and with the effect of a liquidation of other companies operating in the same business sector and that Kroll's approach was reasonable having regard to the number of companies concerned and the need to establish a workable and cost-effective methodology for the liquidation analysis.

Directions for the convening and conduct of the Scheme meeting

100. I was satisfied that the arrangements for convening and conducting the Scheme meeting were satisfactory. The Scheme meeting was to take place in the Cayman Islands at a time and in a manner that would allow Scheme Creditors from across the world, in particular from Asia, the UK and the US east coast to participate. Scheme Creditors were able to attend and vote at the Scheme Meeting by video conference using dial-in details which could be obtained on request from the Information Agent. Scheme Creditors who attended via video conference would be able to see and hear and be seen and heard by other Scheme Creditors attending the Scheme meeting so as so ensure that there would be an adequate "*coming together*" of Scheme Creditors and an ability for them to consult among themselves (see Trower J's judgment in *Re Castle Trust Direct PLC* [2021] BCC 1 at [42]). At the convening hearing I indicated that it would be necessary for the chairperson at the Scheme meeting to confirm in his report to the Court on the outcome of the Scheme meeting for the purpose of the sanction hearing that the technology had worked properly and that Scheme Creditors were in fact able to see and hear each other and consult in this way.

101. As I have noted, following the convening hearing the Convening Order was amended to allow the Blocked Noteholders to attend and vote at the Scheme meeting. A form of voting form (the ***Blocked Scheme Creditor Voting Form***) was prepared for use by the Blocked Noteholders and the Convening Order provided that votes cast by Blocked Noteholders using the Blocked Scheme Creditor Voting Form were to be counted by the chairperson at the Scheme meeting.

The outcome of the Scheme meeting

102. The Scheme meeting was duly held on 2 November 2022 in accordance with the terms of the Convening Order and the Scheme Creditors in attendance at the Scheme Meeting overwhelmingly approved the Scheme. Of those Scheme Creditors present and voting at the Scheme Meeting, 99.96% by value and 99.87% by number voted in favour of the Scheme. In particular, of those Blocked Noteholders present and voting at the Scheme meeting, all Blocked Noteholders voted in favour of the Scheme and none voted against. All of the Blocked Noteholders who voted in favour of the Scheme were Consenting Creditors.

Further amendment to the Scheme

103. Shortly before the sanction hearing, the Company filed Zhou 6. In that affirmation, Mr Zhou explained that Deutsche Bank AG, Hong Kong, who has been engaged to act as the New Depository, had recently informed the Company that it would not sign the deed of undertaking on the basis that it had no direct contact with the Company. Its role and relationship was only with the clearing systems. Mr Zhou said that Deutsche Bank AG had no obligations under the Scheme and so did not need to be party to the deed of undertaking. Nonetheless, it had been necessary to amend the form of deed of undertaking to remove Deutsche Bank AG as a party and to make minor amendments to the Scheme to reflect the fact that Deutsche Bank AG would not be a party. The Company indicated that it would be seeking the sanction of the Scheme with this amendment and submitted, and I accept, that it had the power to make this minor change pursuant to clause 17 of the Scheme.

Longstop Date

104. At the sanction hearing, the Company confirmed that it would be exercising the power under clause 10.1(a) of the Scheme of extending the Longstop Date to 14 December 2022 and would, if the Scheme was sanctioned, give notice to this effect to Scheme Creditors in the Scheme Effective Notice.

The issues arising at the sanction hearing

105. In my judgment in *Re Freeman FinTech Corporation Ltd* (unreported, 4 February 2021) (***Freeman FinTech***) I set out and summarised the law regarding the function of, and the approach to be adopted by, the Court at the sanction hearing (see [16] – [17]). I also set out the approach to be taken where there were issues as to the international effectiveness of the scheme (see [31]). I also note that the approach to be adopted and issues to be considered by the Court at the sanction hearing were well summarised even more recently by Mellor J when sanctioning the scheme in *Re Nostrum* [2022] EWHC 2249 (Ch) at [15] – [18].

106. The issues to be considered can be summarised as follows:

(a). first, that the Company has complied with the terms of the Convening Order and the Further Convening Order in convening the Scheme meeting and that the requisite statutory majorities under section 86(2) of the Companies Act were achieved at the Scheme meeting (***Issue One***).

(b). secondly, that the class of Scheme Creditors was fairly and adequately represented by those who attended the Scheme meeting and that the statutory majorities were acting bona fide and not coercing the minority in order to promote interests adverse to those of the class whom they purported to represent (***Issue Two***).

(c). thirdly, that the Scheme is a scheme of arrangement that is fair, in the sense that an intelligent and honest person, being a member of the class concerned and acting in

respect of his/her interest, might reasonably approve of it and that, as a matter of its residual discretion, the Court should sanction the Scheme (***Issue Three***).

(d). fourthly, that there is no other blot or defect in the Scheme which would warrant the Court refusing to sanction the Scheme (***Issue Four***).

(e). fifthly, in the case of a scheme with an international element, that the Court will not be acting in vain if it sanctions the Scheme. This requires consideration of whether the scheme will be recognised and given effect in other relevant jurisdictions. This was, as I have noted above, addressed in a preliminary way without the benefit of the results of the Scheme Meeting, at the convening hearing but needs to be reviewed again at the sanction stage (***Issue Five***).

Issue One

107. As regards Issue 1, I am satisfied that the additional evidence filed by the Company in advance of the sanction hearing demonstrates that the Scheme meeting was convened and conducted in accordance with the Convening Order and the Further Convening Order (and was quorate). I note in particular the evidence in Zhang 1 regarding the effectiveness of the video conference facilities. All Scheme Creditors who could not, or did not, wish to attend at the Scheme meeting venue including the Blocked Noteholders who were invited to vote by lodging duly completed Blocked Scheme Creditor Voting Forms and to attend the Scheme meeting, provided that they were able to have their identity/authority, status as Noteholder, and the size of their note holding verified by the Company prior to the Scheme Meeting. CICC provided and hosted the video conference facilities for the Scheme meeting using Zoom. One Scheme Creditor attended the Scheme meeting by video conference and no Blocked Noteholders indicated they would like to attend or attended the Scheme meeting. The person who joined via video conference could see and hear the proceedings at the Scheme Meeting venue, they could see each other and be seen by those at the Scheme Meeting venue and had the opportunity to ask questions or express opinions by using the chat function.

Issue Two

108. The Court is bound to assess whether the vote at the Scheme meeting was representative of the class of Scheme Creditors. In *Re BTR plc* [2000] 1 BCLC 740 at 747 Chadwick LJ stated that:

> *"The way in which Parliament's intention is to be given effect – as it seems to me and as it has seemed to judges over the century or so since Bowen LJ considered the matter in 1892 – is that the court is not bound by the decision of the meeting. A favourable resolution at the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting is unrepresentative, or that those voting in favour at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court. That, as it seems to me, is the check or balance which Parliament has envisaged."*

109. Similarly, in *Re The Scottish Lion Insurance Co Ltd* [2010] SCLR 107 at [37] Lord Glennie stated that:

> *"[T]he grounds upon which an opposing creditor may seek to oppose the scheme are clearly wider than perversity, dishonesty and irrationality. The opposing creditor is entitled to seek to prove that the voting was unfair, unrepresentative or affected by special interests."*

110. I accept the Company's submission that in this case there is no reason to believe, and no evidence, that the views of those Scheme Creditors who voted at the Scheme meeting do not fairly represent the views of the Scheme Creditors as a whole. Neither is there any reason to believe or evidence that they were not acting *bona fide* or that they were being coerced.

Issue Three

111. The Court must also be satisfied that the proposed Scheme is fair such that as a matter of discretion it is appropriate to sanction the Scheme. Putting the same point another way, the

Court must be satisfied that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme.

112. In *Re SPhinX Group of Companies*, [2014] (2) CILR 152 at [3] Chief Justice Smellie summarised the role of the Court at the sanction hearing as follows:

> *"At the third stage of the process, it is apparent that the role of the court is a limited one. Although it is often referred to as the stage at which the court will consider issues relating to the "fairness" of the proposed scheme, the task of the court at the sanction stage is not to pass its own subjective judgment on the merits of a scheme. The court takes the view that in commercial matters, members or creditors are much better judges of their own interests than the court."*

113. In applying this test, the Court is required to consider the relevant comparator to the Scheme. In the present case, the evidence shows that the Scheme is likely to produce or at least facilitate a considerably better recovery for Scheme Creditors than a liquidation.

114. It seems to me that the Scheme is obviously one that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve. The commercial purpose of the Scheme was clearly explained in the Explanatory Statement and it appears that the Scheme offers material benefits to Scheme Creditors. Furthermore, Scheme Creditors have, both as regards the terms of and the procedure of voting on the Scheme, as a result of the directions given to permit Blocked Noteholders to attend and vote at the Scheme meeting, been treated fairly and I see nothing unfair in the Company agreeing to pay the Instruction Fee only to Consenting Creditors.

115. I also accept the Company's submission that the arrangements relating to the Holding Period Trust and, potentially, the Successor Trust for Blocked Noteholders are necessary, reasonable and fair in the circumstances. As the Company pointed out, the structure it adopted mirrors and responds to the block currently imposed by the clearing systems. The position of the Blocked Noteholders under the Scheme is no different from their position as holders of the Old Notes in that they are unable to receive consideration until that block is lifted. Furthermore, the Company has not arbitrarily imposed this structure on the Blocked Noteholders but explored,

under considerable time pressure, a number of alternatives. The Company will be able to review the status of sanctions and the position of Blocked Noteholders after three years at the end of the Holding Period Trust and before setting up and if required transferring the Blocked Noteholders' Scheme consideration to the Successor Trust. I also note that none of the Blocked Noteholders have objected to these arrangements.

Issue Four

116. The Court must also be satisfied that there is no blot on or defect in the Scheme that would warrant refusal to sanction the Scheme. I accept the Company's submission that no question of a blot or other defect arises in this case.

Issue Five

117. In *Freeman FinTech* I explained at [31] the Court's approach when considering the international effectiveness issue:

> "31. *In my view, the following points summarise the approach which the Court should adopt in the present and similar cases:*
>
> *(a). the Court needs to take into account all relevant circumstances when deciding whether to exercise its discretion to sanction the scheme.*
>
> *(b). the Court needs to be provided with evidence as to the circumstances and in particular the realistic risks arising from and associated with the creditor not being bound by the scheme or the sanction order. This was why in this case I required further evidence to be provided as to whether the Company had considered whether the Macau Creditor could obtain a judgment in a jurisdiction in which the Cayman Scheme was not recognised and enforce that judgment or otherwise obtain execution in a jurisdiction in which the Company had assets and which would also not recognise the Cayman Scheme. I indicated that there should be evidence as to the nature and extent*

of the risks associated with having a creditor, who is owed a not insubstantial sum, left outside and not bound by the Cayman Scheme. In this connection, I note the following comments of Snowden J in Van Gansewinkel Groep BV [2015] EWHC 2151 (Ch) at [71], after referring to Sompo Japan (underlining added):

"In cases such as the present, the issue is normally whether the scheme will be recognised as having compromised creditor rights so as to prevent dissenting creditors from seeking to attach assets of the scheme companies in other countries on the basis of an assertion of their old rights. The English court does not need certainty as to the position under foreign law—but it ought to have some credible evidence to the effect that it will not be acting in vain."

(c). *the Court needs to consider whether on the evidence it is appropriate to sanction the scheme despite and having regard to the risks of enforcement action by creditors who are not bound and are likely to be able to take action in other jurisdictions. This assessment will be made in light of the location of the company's assets and the impact of any enforcement action (including any winding up proceedings in other jurisdictions) on the implementation of the scheme and company in the future (in so far as that may impact the recovery and rights of creditors and others under the scheme). The Court will consider, as Lloyd J put it in his judgment at first instance in Garuda (2001 and WL 1171948, which was upheld by the Court of Appeal) the "risk of disturbance." In appropriate cases, the fact that significant claims may not be bound by the scheme may not prevent the Court sanctioning the scheme where there are clear and real benefits that will be derived from the scheme and which are unlikely to be disturbed by hostile action following sanction. In Sompo Japan, a case involving an insurance business transfer scheme where what mattered most was the effectiveness of the transfer, the evidence established that only something over 27% of the policies in number and by reference to reserves were governed by English law. Nonetheless, since it was reasonable to suppose that the transfer would be effective in any relevant jurisdictions as regards those policies, the scheme would achieve a substantial purpose, irrespective of the fact that it also extended to a larger class of business not governed by English law. If the scheme is likely to be effective to a substantial extent and provide parties with the benefits they anticipated to a substantial or material extent, the Court will be likely to sanction the scheme despite some creditors not being bound and the risk of enforcement action by them. But the Court will wish carefully to consider the risks in each case. It will be relevant that the creditor or creditors in question had indicated support for the scheme and an intention not to take action, as was the case in China*

Lumena, or that there was evidence of foreign law that the courts in other relevant jurisdictions were unlikely to act inconsistently with the scheme, as in Garuda.

(d). it also seems to me that the Court needs to consider the issue of fairness in this context. If those who are bound by the scheme have accepted a haircut or other variation or discharge of their rights and claims, it may be unfair to sanction the scheme and hold them to the terms of the scheme if there is a serious risk that other creditors will be able to enforce their pre-scheme claims in full or to a substantial extent (or subsequently negotiate a payment or recovery above that received by Scheme Creditors under the scheme). It may be relevant in this context to have regard to the extent to which creditors were made aware of the risks in the explanatory statement before voting, as in Garuda."

118. I have already discussed at some length the approach I took to this issue at the convening hearing. But something further briefly needs to be said on the point since the Company filed further evidence from Judge Gropper after the convening hearing, the outcome of the Scheme meeting is now known and the issue falls to be reconsidered and assessed in the context of the exercise of the Court's discretion to sanction the Scheme.

119. On 28 September 2022 Judge Gropper wrote a letter to the Company, which was adduced into evidence by being exhibited to Zhou 5. In that letter Judge Gropper confirmed that he had been told that the restructuring negotiations leading to the proposed Scheme had taken place in the PRC including Hong Kong and that his opinions and conclusions set out in his Affidavit were unaffected. He noted, *inter alia*, that in *Morning Mist* the critical factor confirming that BVI was the COMI of the company was the fact that the scheme was considered and sanctioned there. Judge Gropper also noted the criticisms of the decision by Professor Jay Westbrook, a well–respected academic and bankruptcy law specialist from the University of Texas, but confirmed his view that *Modern Land* was correctly decided and that in his view Professor Westbrook's views were unpersuasive.

120. Accordingly, Judge Gropper has strongly reiterated his opinion and the analysis of the applicable law that I applied for the purpose of the convening hearing remains unaffected. Furthermore, the very substantial vote in favour of the Scheme by Noteholders and the

complete absence of any opposition to the Scheme means that, applying the test I set out in *Freeman FinTech*, it must be right to conclude that the risk of a successful challenge to the effectiveness is very low. There is a risk that the very small percentage of Noteholders who did not vote in favour of the Scheme could, even assuming that the New York Bankruptcy Judge grants the relief sought under chapter 15, seek to take action in Hong Kong but it is far from clear that they would be entitled to do so as a matter of law or that any action would prevent the Scheme being implemented. In any event, there is no evidence that any such Noteholders are considering or would wish to do so.

121. There is of course the risk that New York Bankruptcy Judge will decline to grant the relief sought by the Company. It is a condition to the effectiveness of the Scheme that such relief is granted. I was told at the sanction hearing that the Company's chapter 15 petition is due to be heard by The Honorable John P. Mastando III on Monday (14 November). It will, obviously, be a matter for Judge Mastando. The Company pointed out at the sanction hearing that this condition is one that it is permitted to waive and that should the relief it seeks not be granted it will need to consider its position and whether to waive the condition. This would be a possibility in this case in view of the very high level of support that the Scheme has obtained. Of course, in this event, the Company has the ability under the Scheme to apply for directions from this Court (see clause 19 of the Scheme). As I noted in *Re China Agrotech* [2019 2 CILR 356] at [35] the Court has the power to sanction a scheme subject to the satisfaction of conditions to implementation which are unsatisfied at the hearing date (following the reasoning of Henderson, J. in *Lombard Medical* [2014] EWHC 2457 (Ch)) and will do so where those conditions can reasonably be expected to be satisfied within a reasonably short time. I was satisfied in the present case that it was reasonably likely that the chapter 15 petition would be granted and in any event that since it was due to be heard very shortly after the sanction hearing any difficulties would emerge and could be dealt with promptly; that the conditions that needed to be satisfied in order to allow the Restructuring Effective Date to occur were administrative or otherwise likely to occur and that the amended Longstop Date was in the near future and reasonable in the circumstances.

122. I have also considered, in the context of the exercise of my discretion to sanction the Scheme, whether there are any grounds for concluding that the use of a Cayman scheme in the present case represents an abuse of process or improper forum shopping, having regard in particular to the fact that the debt subject to the Scheme is governed by New York law and the Company's strong connections with Hong Kong and the PRC. I note that no Scheme Creditor has raised any objection to a Scheme being promoted in this jurisdiction; in fact the position is the reverse. Virtually all the Noteholders have supported and voted in favour of the Scheme. In those circumstances, and generally in the circumstances of this case, it seems to me that the application for a scheme in this jurisdiction was proper and justifiable. I must say that I sometimes have a concern that when courts seek to be overly prescriptive as to when and whether it is legitimate for foreign courts to exercise jurisdiction in respect of cross-border restructuring or insolvency proceedings they do so without regard to whether creditors have objections. It seems to me that we need to adopt a flexible approach that gives companies the opportunity properly to make use of procedures in jurisdictions with which they have a sufficient and appropriate connection, where that is done in the interests of and with the support of creditors and adopt a case by case and fact sensitive basis that involves the rejection of attempts by companies to use foreign proceedings which harm or are objected to by creditors but not to intervene where they do not.

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
17 November 2022

HCMP 644/2022
[2022] HKCFI 1789

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 644 OF 2022

IN THE MATTER of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)

and

IN THE MATTER of the inherent jurisdiction of the Court

BETWEEN

PROVISIONAL LIQUIDATOR OF GLOBAL BRANDS GROUP HOLDING LIMITED (IN LIQUIDATION)	Applicant
and	
COMPUTERSHARE HONG KONG TRUSTEES LIMITED	1st Respondent
THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED	2nd Respondent

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Before: Hon Harris J in Chambers

Date of Hearing: 1 June 2022

Date of Decision: 23 June 2022

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DECISION

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The Application

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1. On 25 May 2022 the Provisional Liquidator of Global Brands Group Holdings Limited ("**Provisional Liquidator**" and the "**Company**" respectively) issued an originating summons to which Computershare Hong Kong Trustee Limited ("**Computershare**") and The Hong Kong and Shanghai Banking Corporation Limited ("**HSBC**") are Respondents seeking an order for recognition and assistance. The Company is incorporated in Bermuda and was wound up in Bermuda on 5 November 2021. The circumstances of the application provide an opportunity to consider in more detail an issue I discuss in *Re Li Yiqing v Lamtex Holdings Limited*[1], namely, whether in future the Hong Kong court will recognise and assist a foreign insolvency process conducted in the place of company's centre of main interests ("**COMI**") and it is not sufficient, nor necessary, that the foreign insolvency process is conducted in a company's place of incorporation.

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Background

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2. The Provisional Liquidator, John McKenna, had been appointed on 16 September 2021 and continued in office on the making of the winding-up order. The principle reason for seeking recognition and assistance from the Hong Kong court is to obtain the proceeds of the sale of shares held by Computershare in Hong Kong on behalf of the Company, totalling approximately HK$9 million, and the rather more modest balance

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[1] [2021] HKCFI 622; [2021] HKCLC 329.

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held by HSBC in the Company's bank account in Hong Kong, which totals approximately US$5,000. The originating summons also seeks certain other general powers. I will explain them later in this judgment.

3. In his affidavit in support of the application the Provisional Liquidator explains the background to the Company and the circumstances leading up to its liquidation in Bermuda. The Company is an investment holding company. The Company, along with its subsidiaries ("**Group**"), were engaged in the business design, development, marketing and sale of branded children's, men's and women's apparel, footwear, fashion accessories and related lifestyle products in North America and Europe. The Company and its subsidiaries were also engaged in brand management and offered expertise in expanding its clients' branded assets new product categories, new regions and retail collaborations, as well as assisting in distribution of licensed products on a global basis.

4. The Company was listed on the Main Board of The Stock Exchange of Hong Kong ("**HKEX**") Limited in 2014 as a result of a spin-off from Li & Fung of which it had formed part. Due to the ongoing COVID-19 pandemic and geopolitical uncertainties, as well as structural shifts in the retail industry, the business of the Company and its subsidiaries was seriously challenged. As a result, the Company had been facing immense financial difficulties since 2020. For the year ended 31 March 2020, the Group reported: **(a)** a net loss after tax of US$586,590,000; **(b)** current liabilities exceeding current assets by US$772,125,000; and **(c)** cash and cash equivalents amounting to US$83,880,000. For the six months ended 30 September 2020, the Group reported: **(a)** a net loss after tax of US$119,838,000; **(b)** that current

liabilities exceed current assets by US$899,391,000; and **(c)** that the Group's cash and cash equivalents were US$55,805,000.

5. From around January 2021, the Company actively engaged in discussions with the lenders of a syndicated loan to the Group ("**Lenders**") of which the Company was a guarantor, other creditors, and potential investors in relation to revising repayment obligations of loans and injecting new equity from prospective investors. The Company also explored different debt restructuring options including potential transactions or corporate actions involving the sale, disposal and/or restructuring of various assets or businesses of the Group (collectively, "**Restructuring**").

6. While the Company explored various restructuring options to improve its financial position, the board of the Company resolved that it was in the interests of the Company and its creditors to commence its own winding-up proceedings and apply to the Bermuda Court to appoint a provisional liquidator with limited powers, which could maximise the chance of success of the restructuring and provide a moratorium on claims against the Company to avoid a potential disorderly liquidation by the Company's creditors. The appointment was apparently intended to create an environment for a successful restructuring. The board could continue to manage the Group's business operations, a provisional liquidator would monitor and consult with the board on implementing a group-wide and coordinated debt restructuring plan, and the business of the Group could continue to operate to generate revenue as a whole instead of assets being subject to fire sale at a significant discount.

7. On 10 September 2021, the Company presented a petition to the Bermuda Court for the winding-up of the Company ("**Petition**") and made an application for appointment of Mr McKenna as provisional liquidator of the Company on a "limited powers" basis for restructuring purposes only. Suffice to say the attempts to restructure proved unsuccessful, the board recognised that a winding-up would be in creditors' best interests and the Company applied successfully for a winding-up order on 5 November 2021.

8. Since his appointment, the Provisional Liquidator has been trying to take possession of the Company's assets in Hong Kong. The Company's assets in Hong Kong are:

(1) cash balances in the sum of about HK$8 million held by Computershare, which represents a surplus arising from the Group's employee share schemes; and

(2) cash balances in the sum of about US$4,800 held in the Company's bank accounts with HSBC.

Both Computershare and HSBC require the Provisional Liquidator to obtain a recognition order before they will release the cash balances. Nearly all the Company's creditors are in Hong Kong. As is to be expected as it is a holding company, the creditors are largely financial or professional companies and are all unsecured. The remainder of the liquidation will be straightforward. The Provisional Liquidator will adjudicate proofs, which seems likely to be uncontroversial, and declare a dividend to be paid out of the assets, which he will receive if a recognition and assistance is granted, which consists of the monies I have referred to in the previous paragraph.

9. The Provisional Liquidator accepts that before the Bermuda liquidation the Company's COMI was probably in Hong Kong. In the light of the Provisional Liquidator's activities after the Bermuda liquidation commenced the COMI may have become either Hong Kong or Bermuda. For the purposes of this decision the Provisional Liquidator accepts that the core requirements that need to be satisfied before the Hong Kong court will exercise its winding-up jurisdiction over a foreign company are satisfied[2].

Recognition and Assistance in Hong Kong—Background

10. Commencing in 2014 recognition and assistance has increasingly been used to address issues arising in transnational restructuring and insolvency in Hong Kong that largely arise as a consequence of the extensive use of holding companies incorporated in offshore jurisdictions rather than Hong Kong or the Mainland, although the business groups affected commonly consist of operating and asset owning companies in Hong Kong and the Mainland. This practice has become the norm in the case of companies listed on the HKEX. The operating and asset owning subsidiaries are commonly separated from the holding company by a layer of intermediate subsidiaries incorporated in an offshore jurisdiction different from the holding company. The most common structure recently adopted would appear to involve a Cayman holding company and intermediate subsidiaries incorporated in the British Virgin Islands. The business groups have no assets, creditors or debtors in the offshore jurisdictions. When such business groups encounter financial difficulties and creditors and the companies themselves are considering what steps to take to protect their interests they encounter problems arising

[2] *Silver Starlight Ltd v China CITIC Bank Corporation Ltd, Tianjin Branch* [2021] HKCA 1248; [2021] HKCLC 1347 at [15] (G Lam JA).

from the artificial structure of the group, which it is difficult to address because unlike comparable jurisdictions Hong Kong has neither legislation dealing with rehabilitation of distressed businesses nor legislation dealing with transnational insolvency other than the discretionary power given to the court by *section 327* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap. 32 ("**Ordinance**"), to wind up a foreign company. The absence of the tools available in other jurisdictions, including the Mainland, to address these issues has been a well-publicised source of concern to those involved in restructuring and insolvency for over two decades. In the absence of any legislation to address these issues the Court has worked with practitioners to use common law techniques to address them so far as the common law permits. There have been two major problem areas.

11. The first concerns the restrictions that exist on winding up a foreign incorporated company. It is not necessary to explore this issue in depth as it is comprehensively dealt with in a number of authorities well known to practitioners. In summary the court has adopted what Ma CJ and Lord Millett NPJ refer to in the Court of Final Appeal's judgment in *Kam Leung Sui Kwan v Kam Kwan Lai*[3] as "*necessary self-imposed constraints on the making of a winding-up order against a foreign company*". In some cases, these are easy to satisfy. Others less so resulting in delay in creditors or shareholders being able to take action in Hong Kong to protect their economic interests while complicated questions concerning jurisdiction are resolved. It was this problem that led to the application and decision in *Joint Official Liquidators of A Co v B*[4]. The liquidators

[3] (2015) 18 HKCFAR 501. See [18]–[24] in which Ma CJ and Lord Millett NPJ explain the constraints, commonly referred to as "the 3 core requirements" and their application.

[4] [2014] 4 HKLRD 374; [2014] HKEC 1244.

appointed in the Cayman Islands, where the Company was incorporated, initially sought (ultimately successfully) to wind up the Company in Hong Kong, but pending the determination of the petition wished to be able to obtain documents from the Company's bankers in Hong Kong concerning a substantial fraud. The bankers refused to provide them without an order of the Hong Kong court confirming the liquidators' authority to represent the company in Hong Kong.

12. The second issue concerns the problems caused by Hong Kong's lack of any legislation facilitating debt restructuring and rehabilitation of financially distressed companies. In the period following the Asian Financial Crisis of 1997 and 1998 the practice was developed of companies, mainly listed companies, being put into a form of soft-touch provisional liquidation in Hong Kong to facilitate a debt restructuring. This practice was brought to a halt by the Court of Appeal's decision in *Re Legend International Resorts Ltd*[5], which determined that the power to appoint provisional liquidators conferred by *section 193* of the *Ordinance* could not be used to appoint provisional liquidators for the principle purpose of restructuring a company. Many of these companies were incorporated in offshore jurisdictions. To circumvent the practical problem to which the Court of Appeal's decision gave rise a technique was developed[6], which involved a company incorporated in an offshore jurisdiction being put into soft-touch provisional liquidation in its domestic jurisdiction, the courts of those jurisdictions treating this as a proper use of the power to appoint provisional liquidators, and the provisional liquidators being recognised in Hong Kong and assistance being provided in the form

[5] [2006] 2 HKLRD 192; [2006] 3 HKC 565.
[6] *Z-Obee Holdings Ltd* [2018] 1 HKLRD 165; *Re Joint and Provisional Liquidators of Hsin Chong Group Holdings* [2019] HKCFI 805; *Re Moody Technology Holdings Limited* [2020] 2 HKLRD 187.

of the limited powers necessary for provisional liquidators to participate in the restructuring process in Hong Kong. Unfortunately, it has become increasingly apparent that what is commonly referred to as the *Z-Obee* technique has been abused by certain insolvency practitioners and offshore law firms[7]. It seems to me tolerably clear that many of the offshore soft-touch provisional liquidations adopt a debtor in possession model, which has been rejected in Hong Kong, the principal purpose of which, viewed from the Company's point of view, is to obtain so far as possible a moratorium on action being taken to recover unpaid debts. The application to appoint provision liquidators in the present case would appear to be an example. Hong Kong has consciously decided not to enact legislation that provides for this kind of debt moratorium. Although it is not an issue that I need to decide in the present case and is one which requires detailed consideration, my preliminary view is that in future the Hong Kong court should generally decline to recognise soft-touch provisional liquidators appointed by offshore jurisdictions on the kind of terms I have summarised.

13. There is another consideration. As I have already explained the businesses of companies of the sort with which I am concerned are carried on in China; primarily the Mainland. The Mainland has a different economic system to Hong Kong. Reconciling the differences between the Hong Kong and the Mainland systems can be challenging. It requires an understanding of the different insolvency systems and the different social and economic considerations, which are reflected in the differing statute law and the decisions that judges and others involved in the insolvency and restructuring process are required to make. To take one example, the

[7] See for example *Re China Bozza Development Holdings Ltd* [2021] 2 HKLRD 977; [2021] HKEC 1993; [2021] HKCFI 1235.

Enterprise Bankruptcy Law gives primacy to rehabilitation of businesses reflecting the importance placed in the Mainland on maintaining economic and social stability. Consistent with this the Mainland favours debtor in possession solutions. As I have explained Hong Kong does not. Hong Kong and Mainland judges are familiar with these issues and are well placed to deal with them; courts outside China considerably less so. Relevant to this are the concerns that have recently been expressed by two leading academics in the field of international insolvency, Professor Jay Westbrook of the University of Texas at Austin and Professor Christoph Paulus of Humboldt-Universität zu Berlin [8], about judicial decision making and bankruptcy law becoming increasingly remote from territorial or political control. The suggestion that a Chinese business can avoid the supervision of its affairs by Chinese courts[9] when bankrupt by using a company incorporated in, what has been called by the European Court of Justice, amongst others, a "*letter box jurisdiction*"[10] invites the question that Professor Westbrook and Professor Paulus pose as to the extent to which it is congruent with the purpose of insolvency law and the expectations of creditors to allow a commercial enterprise to use a bankruptcy process in a jurisdiction with which it or its debt[11] has no economic or social connection rather than one in which it carries on business. The question is relevant to the issue, which I am considering, which in practice amounts to this: should a jurisdiction in which a company's business is conducted recognise an insolvency process

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8 International Insolvency Institute's podcast 23 April 2022.

9 Whether the courts of the Hong Kong SAR or the Mainland.

10 *In re Eurofood IFSC Ltd* [2006] Ch 508; *Creative Finance Ltd* Case No. 14-10358 (REG) 13 January 2016; *Re Bear Stearns High-Grade Strategies Master Fund, Ltd* 381 B.R. 37 (Bankr. S.D.N.Y. 2007), aff'd 389 B.R. 325 (S.D.N.Y.) (Sweet J).

11 As opposed, for example, to US$ debt governed by United States Law, which would have an economic connection with the United States and might be compromised under *Chapter 11* of the *United States Bankruptcy Code* and normally recognised in Hong Kong in accordance with the *Rule in Gibbs, Antony Gibbs Sons v. La Société Industrielle Et Commerciale Des Métaux* [1890] LR 25 QBD 399.

conducted in a place with which the company has no material economic connection.

The Order

14. I will grant an order for recognition of the Provisional Liquidator with assistance limited to the power to receive and transfer out of Hong Kong the balances in the account to which I have referred in [8]. My reasons for so ordering are explained in [48]–[50]. The majority of the remainder of this decision concerns the basis on which in future Hong Kong should grant recognition and assistance to foreign insolvency practitioners. The decision is divided into sections addressing the following:

(1) The established principles for common law recognition and assistance relevant to this application.

(2) COMI as the criteria for recognition and assistance.

(3) Principles of recognition—modified universalism.

(4) Modified universalism—criteria for determining home or principal jurisdiction in comparative authorities.

(5) Adopting the COMI criteria in Hong Kong.

(6) Authorities in Hong Kong.

(7) The recent case of Up-Energy.

(8) Conclusion.

Principles of Common Law Recognition and Assistance

15. There is a distinction between recognition and assistance. Recognition concerns acknowledging and confirming the status of a

foreign insolvency process and officer. Assistance involves granting expressly to the foreign insolvency officer powers to act in the local jurisdiction. The distinction is well understood. In *Kireeva v Bedzhamov*[12], Snowden J held:

> "[T]here is a conceptual distinction between the principles that apply to the decision whether to recognise a foreign bankruptcy, and the principles that apply to the question of what, if any, further assistance ought to be given by the English court to a foreign trustee in bankruptcy following recognition."

In *Net International Property Limited v ADV Eitan Erez*[13], Webster JA explains the distinction in more detail:

> "The starting point on the issues of recognition and assistance is to determine what, if any, is the difference between recognition and assistance. There is, at least in theory, a difference between the two principles. Recognition is the formal act of the local court recognising or treating the foreign office holder as having status in the BVI in accordance with his or her appointment by the foreign court. In this case, this means recognising the Trustee's position granted by the courts of Israel as being the trustee in bankruptcy of the assets of Mrs. Sofer and treating him as the trustee of those assets in the BVI.
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> Assistance goes further. If granted by the BVI court, it allows the Trustee to deal with the BVI assets of Mrs. Sofer, namely, her legal and beneficial interest in the shares of Net International. Put another way, recognition gives the foreign office holder status in the BVI and assistance gives him or her power to deal with the BVI assets. However, the dividing line between the two principles is blurred in practice because recognition by itself is generally of little assistance to the foreign office holder unless it is accompanied by the grant of assistance to deal with the local assets. Viewed in this way, recognition is generally treated as recognition and assistance. The blurring of the lines between the two concepts is illustrated by the judgment of the Supreme Court of Transvaal, South Africa, in *Re African Farms Ltd*…
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> Notwithstanding the blurring of the lines between recognition and assistance, it is important to bear in mind that recognition

[12] [2021] EWHC 2281 (Ch); [2021] BPIR 1465 at [107].
[13] (Eastern Caribbean Court of Appeal, 22 February 2021) at [19]–[21].

> does not necessarily include assistance. In this case, the trial judge's order recognising the Trustee included assistance."

A simple practical example of the distinction is to be found in my decision in *Re China Bozza Development Holdings Ltd*[14]. I held:

> "[N]otwithstanding my misgivings about how this matter has developed the JPLs should be recognised and I will so order. However, granting an order providing active assistance is a different matter. I am not currently satisfied that I should make an order granting the type of general assistance which I have on previous occasions ..."

16. The authorities establish that the orthodox common law position is that the court may recognise foreign insolvency proceedings that comply with two criteria[15]. First, that the foreign insolvency proceedings are collective insolvency proceedings; and secondly, that the foreign insolvency proceedings are opened in the company's country of incorporation. Part of the rationale for recognising and assisting foreign officeholders appointed in the country of incorporation is to be found in ordinary conflict of laws principles for corporations as opposed to pure insolvency law. As Lord Sumption explains in *Singularis Holdings Ltd v PricewaterhouseCoopers*[16]:

> "12. [E]ven without a winding up, the court could, on ordinary principles of private international law, have recognised as a matter of comity the vesting of the company's assets in an agent or office-holder appointed or recognised under the law of its incorporation. For many years before a corresponding rule was recognised for the winding up of foreign companies, the principle had been applied in the absence of any statutory powers to the English moveable assets of a foreign bankrupt which had been transferred to an office-holder in an insolvency proceeding under the law of his domicile."

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14 [2021] HKCFI 1235; [2021] HKCLC 831 at [23].
15 See *Re CEFC Shanghai International Group Ltd* [2020] HKCFI 167; [2020] HKCLC 1 at [8].
16 [2014] UKPC 36; [2015] AC 1675.

COMI as the criteria for recognition and assistance

17. To date the court in Hong Kong has not used COMI as the yardstick for granting common law recognition or assistance. The criteria applied are those explained in the previous paragraph. It is, however, open to the court as a matter of principle and authority to develop these common law principles. As the then Chief Justice Li observed in *Solicitor (24/07) v Law Society of Hong Kong*[17]: "*[t]he great strength of the common law lies in its capacity to develop to meet the changing needs and circumstances of the society in which it functions*". For the reasons discussed in the remainder of this judgment in my view the criteria to be adopted in future in determining whether or not foreign insolvency proceedings should be recognised and assisted are, in short, that the foreign proceedings constitute a collective insolvency process and that the proceedings (subject to limited exceptions) are conducted in the jurisdiction in which the Company's COMI is located.

18. As I have already explained Hong Kong is unusual in not having any legislation dealing with cross-border insolvency and restructuring. The Government has largely left it to the Judiciary to use common law tools to address the challenges that have arisen in this area as Hong Kong's economy has developed in line with the Mainland's rapid economic expansion. This is not an oversight. On 14 May 2021 the Secretary for Justice and the Supreme Court signed a "*Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland*

[17] (2008) 11 HKCFAR 117 at [19].

and of the Hong Kong Special Administrative Region". This Cooperation Mechanism consists of two parts. The first is the Record of meeting. The second is "*The Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region.*"[18] As is explained in both documents the purpose of the Mechanism is to facilitate economic integration and development in Hong Kong and the Mainland. Paragraphs 3 and 5 of the Record of Meeting make it clear that the parties expect the High Court to grant assistance to Mainland Administrators and cooperate on the implementation and improvement of the Mechanism. The absence of relevant legislation and the purpose of the Cooperation Mechanism are relevant to a consideration of the development of common law assistance in Hong Kong, its necessity and what form it might take. Hong Kong is not in the same position as jurisdictions, which have enacted comprehensive statutory codes to regulate recognition and assistance of foreign insolvencies. As the Cooperation Mechanism to which I have referred demonstrates, the absence of a statutory code to regulate recognition and assistance does not imply that the court is to take a restrictive view of its ability to develop the common law principles to address the issues that come before it. It is clear that the opposite is the case.

19. In *Rubin v Eurofinance SA*[19] Lord Collins at [129] describes the limits of a court's ability to develop the law in this field. Lord Collins says this:

> "A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the

[18] 最高人民法院關於開展認可和協助香港特別行政區破產程序試點工作的意見
[19] [2012] UKSC 46; [2013] 1 AC 236.

> identification of those courts which are to be regarded as courts of competent jurisdiction (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, 'if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it': *Owens Bank Ltd v Bracco [1992] 2 AC 443*, 489."

20. It can readily be understood why the courts in England would approach the development of the common law relating to international insolvency as Lord Collins describes. Judge initiated developments in the law, which in the context of a system, which has introduced deliberate and comprehensive legislation to regulate cross-border insolvency, may be viewed as judicial overreach, are not necessarily to be viewed similarly in a jurisdiction, which lacks comparable legislation and whose current circumstances justify modifying the common law to implement more effectively an established legal principle. The development of the basis upon which foreign liquidations are recognised which I am considering does not involve the creation of a new legal principle. It involves a modification of an existing one, namely, recognition and assistance of a foreign insolvency process. The purpose of the modification is to implement the principle in a manner better suited to the circumstances in which transnational insolvencies currently arise in Hong Kong and the development of the principle in comparable jurisdictions.

21. It is apparent from its terms that the Cooperation Mechanism is premised on the assumption that the common law as practiced in

Hong Kong has developed to provide for judicial assistance to insolvencies conducted in different jurisdictions; albeit in the China context different legal jurisdictions within one unitary State. There are many examples of common law assistance being granted by the Hong Kong court to foreign insolvency office holders. In [43]–[44] I give a number of examples of the Court of Final Appeal and the Court of Appeal recognising the court's power to do so. In the case of administrators from the Mainland the Court of First Instance has made a number of orders for recognition and assistance in recent years: *Re Liquidator of CEFC Shanghai International Group Ltd*[20]; *Re Shenzhen Everich Supply Chain Co, Ltd*[21]; *Re HNA Group Co., Limited*[22]*; Nuoxi Capital Limited v Peking University Founder Group Company Limited*[23].

Principles of recognition—modified universalism

22. Underpinning the principle of recognition is the principle that the insolvency law of a company's home insolvency jurisdiction is applicable across the world. This is illustrated by the English Court of Appeal's decision in *Tchenguiz v Grant Thornton UK LLP*[24], which concerned whether Icelandic Insolvency Law applied throughout the European Economic Area, including England, by virtue of *Article 10* of the *Parliament and Council Directive 2001/24/EC*, given effect in *England by the Credit Institutions (Reorganisation and Winding Up) Regulations 2004*. Briggs LJ explains the character of the extraterritorial effect of Icelandic bankruptcy law in the following paragraphs[25]:

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[20] *Supra* footnote 14.
[21] [2020] HKCFI 965, [2020] HKEC 1188.
[22] [2021] HKCFI 2897.
[23] [2021] HKCFI 3817; [2021] HKEC 5793.
[24] [2017] EWCA Civ 83; [2018] QB 695.
[25] *Ibid* [68].

> "66. This much more confined part of the appeal also breaks down into two sections. The first raises the question whether Icelandic insolvency law (and its equivalents in all other home member states) is 'internationalised' by virtue of the Winding up Directive (and the Insolvency Regulation) regardless whether, viewed separately, it has purely domestic or both domestic and extraterritorial effect. The judge concluded that it was internationalised in that sense, and the claimants' third ground of appeal challenges that conclusion.
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> …
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> 68. The answer to the first of those questions flows in my view inexorably from the analysis of the purposes and terms of the Insolvency Instruments, as described above. The very essence of the universalism sought to be achieved by making the insolvency law of the home member state applicable across the territory of all member states depends upon that being achieved in relation to every potential home member state in which a credit institution is regulated and has its head office regardless whether, apart from those instruments, that state's insolvency law would be anything more than domestic in its application. If that were not so, then the creation of a universally applicable law (subject to strict exceptions) for the insolvency of credit institutions, and other entities, would fall at the first hurdle, in relation to any home member state the insolvency law of which did not already have cross-border effect."

23. Consistent with this principle the aim of modified universalism is that there should be a unitary bankruptcy proceeding in the court of the home insolvency jurisdiction which receives world-wide recognition and it should apply universally to all the bankrupt's assets. This is explained by Lord Hoffmann in *Re HIH Casualty and General Insurance Ltd*[26]:

> "6. Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the

[26] [2008] UKHL 21; [2008] 1 WLR 852 at [6].

> bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets."

24. Universalism is to be contrasted with territorialism where each country is regarded as determining according to its own law the distribution of the assets of an insolvent company located within its territorial jurisdiction[27]. Modified universalism is a compromise between these two opposites, recognising that the theoretical ideal of universality must in some circumstances give way to the practical reality of territorial or local interests. Lord Hoffmann describes the principle in *HIH* in the paragraph immediately following the one I have just quoted[28]:

> "7. This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see *Cambridge Gas Transportation Corp u Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, 517, para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of 'modified universalism': see also *Fletcher, Insolvency in Private International Law*, 2nd ed (2005), pp 15-17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one."

This principle has been part of the English common law since the 18th century[29].

25. In *Singularis* the Privy Council considered three propositions derived from the decision of the Privy Council in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of*

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[27] *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41; [2015] AC 616 at [15] (Lord Sumption and Lord Toulson).

[28] *Supra* at [7].

[29] *Re HIH Casualty and General Insurance Ltd supra* at [30]; *Singularis Holdings Ltd v PricewaterhouseCoopers supra* at [19] and [23]; *Riverrock Securities Ltd v International Bank of St Petersburg (Joint Stock Co)* [2020] EWHC 2483 (Comm); [2021] 2 All ER (Comm) 1121 at [80] (Foxton J); *Kireeva v Bedzhamov* [2022] EWCA Civ 35 at [81]–[88] (Newey LJ).

Navigator Holdings plc[30]. "*First the principle of modified universalism, namely, that the court has a common law power to assist foreign winding up proceedings so far as it properly can. The second is that this includes doing whatever it [the court] could properly have done in a domestic insolvency, subject to its own law and public policy. The third (which is implicit) is that this power is itself the source of its jurisdiction over those affected, and that the absence of jurisdiction in rem or in personam according to ordinary common law principles is irrelevant*."[31] The Privy Council concluded that the 2nd and 3rd principles had been wrongly decided, but not the first, which Lord Sumption explains in [19]:

> "19. However, the first proposition, the principle of modified universalism itself, has not been discredited. On the contrary, it was accepted in principle by Lord Phillips, Lord Hoffman and Lord Walker in *HIH* [2008] 1 WLR 852, and by Lord Collins of Mapesbury (with whom Lord Walker and Lord Sumption JJSC agreed) in *Rubin v Eurofinance SA* [2013] 1 AC 236. Nothing in the concurring judgment of Lord Mance JSC in that case casts doubt on it. At paras 29–33, Lord Collins summarised the position in this way:
>
> > '29. Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign office-holders in insolvencies with an international element. The underlying principle has been stated in different ways: "recognition … carries with it the active assistance of the court": *In re African Farms Ltd* [1906] TS 373, 377; "This court … will do its utmost to co-operate with the US Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under Chapter 11": *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117.
> >
> > 30. In *Crédit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, Millett LJ said: "In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each

[30] [2006] UKPC 26; [2007] 1 AC 508; [2006] 3 WLR 689; [2006] 3 AER 829.
[31] *Supra* Lord Sumption [15].

> other without waiting for such co-operation to be sanctioned by international convention … It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."
>
> 31. The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there ….
>
> 33. One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf *In re African Farms Ltd* [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in *Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme"* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). Cases of judicial assistance in the traditional sense include *In re Impex Services Worldwide Ltd* [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company.

In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and,

> secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise. On this appeal, the Board proposes to confine itself to the particular form of assistance which is sought in this case, namely an order for the production of information by an entity within the personal jurisdiction of the Bermuda court. The fate of that application depends on whether, there being no statutory power to order production, there is an inherent power at common law do so."

26. It is clear from this passage that modified universalism is the foundation of the common law power to recognise and assist a foreign insolvency process and that the power may be developed if the development is consistent with modified universalism and is consistent with the applicable domestic legal framework. Although the formulation of the principle in *Singularis* is considerably more restrictive than that to be found in *Cambridge Gas*, as is apparent from the final paragraph of the extract of Lord Collin's judgment that I have quoted, it envisages further development of the common law power of assistance.

Modified universalism—criteria for determining home or principle jurisdiction in comparative authorities

27. Universalism and modified universalism are premised on there being a home or principal insolvency jurisdiction. The criteria for determining the home or principal insolvency jurisdiction have evolved over time. First, there is the concept of the debtor's domicile[32]. Secondly, there is the concept of the debtor's country of incorporation: In *Singularis*,

[32] *Re HIH Casualty and General Insurance Ltd supra* at [6] and [8]; see also *Stichting Shell Pensioenfonds v Krys supra* at [14].

Lord Sumption talks of the common law principle of modified universalism treating the place of incorporation as being the principal insolvency jurisdiction:

> "The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction."[33]

Thirdly, there is the concept of COMI. Lord Hoffmann explains in *HIH*[34]. the emergence of the criteria for assessing the most appropriate country to be treated as the principal jurisdiction in which a transnational insolvency is to be conducted:

> "In some cases there may be some doubt about how to determine the appropriate jurisdiction which should be regarded as the seat of the principal liquidation. I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings ((EC) No 1346/2000 of 29 May 2000) uses the concept of the '*centre of a debtor's main interests*' as a test, with a presumption that it is the place where the registered office is situated: see article 3.1. That may be more appropriate."

28. Assuming one uses the old concept of domicile, there appear to be two schools of thought on the meaning of "domicile" of a company. One view is that the domicile of a company is in its place of incorporation. Lord Collins explains this in *Rubin v Eurofinance SA*[35]:

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[33] *Singularis Holdings Ltd v PricewaterhouseCoopers supra* at [23].
[34] *Supra* at [31].
[35] *Supra* at [31].

> "31. The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign officeholder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there."

The alternative view is that the domicile of a company is in its principal place of business, which may or may not be the country of incorporation. This is explained by Murison CJ in *Re Lee Wah Bank*[36]:

> "The general principle in cases of this kind is clear enough. It is laid down by Vaugham Williams J in *In re English Scottish and Australian Chartered Bank* [[1893] 3 Ch 385] thus:—'Where there is a liquidation of the concern the general principle is—ascertain what is the domicile of the company in liquidation; let the Court of the country of domicile act as the principal Court to govern the liquidation; and let the other Courts act as ancillary, as far as they can, to the principal liquidation.' The domicile of a trading company is fixed by the situation of its principal place of business (*Jones v Scottish Accident Insurance Company Limited* [(1886) 17 QBD 421]) and there is no doubt at all that in this case the domicile of the liquidating Company is Hong Kong."

29. In Singapore, the common law recognition regime has developed to embrace the COMI concept for reasons explained by Abdullah JC in *Re Opti-Medix Ltd*[37]:

> "Under a universalist approach, one court takes the lead while other courts assist in administering the liquidation…
>
> A consequence of a greater sensitivity to universalist notions in insolvency is a greater readiness to go beyond traditional bases for recognising foreign insolvency proceedings. As the winding up of a company by the court of the place of incorporation accords with legal logic, there may be a natural tendency to regard a liquidator appointed by that court as having primacy or legitimacy. However, the place of incorporation may be an

[36] (1926) 2 Malayan Cases 81, 84.
[37] *Re Opti-Medix Ltd* [2016] SGHC 108; [2016] 4 SLR 312 at [17]–[18] (Aedit Abdullah JC).

> accident of many factors, and may be far removed from the actual place of business. The approach of identifying the COMI has much to commend it as a matter of practicality"

30. The position adopted in Hong Kong has historically been that a liquidator appointed in the place of incorporation is recognised[38]. However, it would be incorrect to say that the Hong Kong recognition criteria has exclusively been tied to the debtor's country of incorporation. There are instances of the Hong Kong court granting, or being willing to grant, recognition to insolvency office-holders appointed in a foreign jurisdiction which was not the jurisdiction of incorporation. In *Re The Russo-Asiatic Bank*[39], the Court recognised liquidators appointed by the English court over a Russian bank. In *Bank of Credit and Commerce International (Overseas) Ltd v Bank of Credit & Commerce International (Overseas) Ltd—Macau Branch*[40], the Court of Appeal recognised liquidators appointed in Macau over a Cayman-incorporated bank. In *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd*[41], I took the view that there was no objection in principle to granting recognition to an English administrator over a Bermuda-incorporated company with its COMI in England.

Adopting the COMI criteria in Hong Kong

31. In *Re Li Yiqing v Lamtex Holdings Limited*[42] at [22] and [26] I suggested that the Hong Kong court should, as Singapore has done, consider whether common law recognition based on place of incorporation

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38 *Re China Fishery Group Ltd* [2019] HKCFI 174; [2019] HKCLC 45 at [24]–[25].
39 (1929-30) 24 HKLR 16.
40 [1997] HKLRD 304.
41 [2015] HKCFI 645; [2015] HKCLC 323.
42 *Supra* footnote 1.

is consistent with contemporary commercial practice in the SAR and the Mainland:

> "22. It is becoming increasingly apparent that it is desirable, and it might reasonably be suggested essential, that the Hong Kong courts are able to deal with recognition and assistance using methods that are consistent with commercial practice in the SAR and the Mainland. In response to suggestions for legislation to address this subject, it has been the Government's position that for the time being it is a matter for the courts of Hong Kong to address using the techniques available at common law. The current position in Hong Kong is that the court recognises only insolvency practitioners appointed in the place of incorporation. In my view we have reached the stage at which this question needs to be reconsidered at there is much in my view to be said in support of Abdullah J's conclusion that the common law in this area contains sufficient flexibility to develop so as to be consistent with commercial practice and there is nothing in principle preventing recognition of liquidators appointed in a company's COMI or a jurisdiction with which it has a sufficiently strong connection to justify recognition, just as the Hong Kong court will exercise its discretion to wind up a foreign incorporated company if the connection between it and Hong Kong is substantial and the other core requirements are satisfied [43]. It might, I appreciate, be objected that there is a material difference in the case of the jurisdiction to wind up a foreign incorporated company, namely, the power is expressly conferred by statute. This takes me back to *Singularis* [44].
>
> …
>
> 26. As I have already observed Hong Kong has no legislation dealing with recognition of foreign insolvencies. Issues such as recognition of foreign soft-touch provisional liquidation do not involve using the common law to extend legislation. In Hong Kong it is purely a matter of common law. *Singularis* is authority that the common law generally permits recognition and assistance of foreign liquidations. The issue I am currently considering is whether the common law of Hong Kong should be extended to permit recognition of insolvencies in places other than a company's place of incorporation and in particular in which its COMI or something similar is to be found. I can see no doctrinal reason why it should not be."

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[43] See the authorities discussed in *Re China Huiyuan Juice Group Limited* [2020] HKCFI 2940, [18]–[29].

[44] *Supra* at [11].

32. In my view the criteria for recognition should in future primarily be determined by the location of a company's COMI. As I suggest in *Lamtex*[45], this better reflects the current commercial practice in Hong Kong. The use of companies incorporated in offshore jurisdictions as holding companies and intermediate subsidiaries for business groups conducting their activities in Hong Kong and the Mainland is widespread. The connection between such companies and the place of their incorporation is entirely formal. It is rare for such companies to conduct any business in the jurisdiction and I imagine commonly no director or employee ever visits them. Normally in my experience when such companies are put into provisional or final liquidation two or three liquidators are appointed by the offshore court at least one of whom, commonly two, are based in Hong Kong from where they conduct the liquidation. Treating the place of incorporation in such circumstances as being the natural home or commercially most relevant jurisdiction of the company for the purpose of determining, which jurisdiction is the appropriate place for the seat of a principal liquidation is highly artificial. It also encounters problems of the type discussed recently by Linda Chan J in *Re Up Energy Development Group Limited*[46], namely, the need in the case of a genuine liquidation (as opposed to the type of soft-touch provisional liquidation that I have referred to in [12]) for the liquidator to be able to access the wide, express powers provided for in the *Ordinance*, which cannot be granted by way of recognition at common law. I discuss *Up Energy* in more detail later in [46]. If a company's COMI is in Hong Kong I would not normally expect there to be any difficulty in a petitioner demonstrating that the court can properly exercise its discretion

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45 *Supra*.
46 [2022] HKCFI 1329.

to wind up a foreign incorporated company[47]. A winding up order made in Hong Kong will allow the liquidator to use the powers available under the *Ordinance* and, importantly, seek recognition and assistance in the Mainland, which is normally where a company's business is primarily conducted and its assets located. The Cooperation Mechanism I have referred to in [18] permits the relevant Mainland courts to recognise liquidators appointed in Hong Kong over companies whose COMI is located in Hong Kong at the time the application for recognition and assistance is commenced. Adopting the COMI criteria would bring Hong Kong in line with the approach in the Mainland, which is of itself desirable.

33. Adopting and framing the COMI criteria requires consideration of five subsidiary questions. **First**, it is necessary to decide the relevant date for determining COMI. There are three alternatives:

(1) the COMI location as at the date of commencement of the foreign insolvency proceedings;

(2) the COMI location as at the date of the hearing of the foreign officeholder's recognition application in Hong Kong; and

(3) the COMI location as at the date the foreign office-holder's Hong Kong recognition application is made. This approach would be consistent with the position under *Article 6* of *The Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region*, which forms part of the Cooperation Mechanism. See also *Re Zetta Jet*[48].

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47 See [11].

48 [2019] SGHC 53; [2019] 4 SLR 1343 at [52]–[61] (Aedit Abdullah J).

34. **Secondly**, it is necessary to decide the elements of COMI. There are four established approaches. All are similar. Under the Cooperation Mechanism, COMI generally means the place of incorporation, although other factors are also relevant, including the place of the debtor's principal office, the debtor's principal place of business, and the place of the debtor's principal assets (*Article 4* of the Cooperation Mechanism). In the context of the common law Lord Hoffmann in *HIH*[49] regarded the following as the key COMI elements—the place of incorporation, the place of central management, and the location of assets and liabilities. In *Re Opti-Medix Ltd*[50], the Singapore court suggested the following common-law COMI test:

> "The COMI will likely be the place where most dealings occur, most money is paid in and out, and most decisions are made. It is thus the place where the bulk of the business is carried out, and for that reason, provides a strong connecting factor to the courts there…
>
> I would note that on a common law adoption of the COMI test, there need not necessarily be a presumption in favour of the registered office, as there is under the Model Law or the EU Insolvency Regulation. However, such a presumption provides a sound default rule in the absence of evidence to the contrary, and provides certainty and regularity. The adoption of such a presumption would also harmonise the results on common law and statutory applications of the COMI test."

35. ICC Judge Mullen explains the key COMI considerations under the EU Insolvency Regulation, in *Re Investin Quay House Ltd*[51]:

> "[T]here is a presumption that the COMI of a company corresponds to the place in which it is registered. Ms Staynings took me to factors that have been held to be relevant in rebutting the presumption, which include—

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49 *Supra* at [31].
50 *Supra* at [18] and [25].
51 *Re Investin Quay House Ltd* [2021] EWHC 2371 (Ch) at [35].

> i) Where the majority of the company's administration is undertaken in the UK, particularly if the company's creditors would consider the UK to be the place where the important functions are carried out …;
>
> ii) Where day to day conduct of the business and activities of the company was handled by an agent appointed in England and dealings with third parties were arranged from offices in London, particularly since a third party would not have known that board meetings took place in Jersey …;
>
> iii) Where a company is a 'letterbox' company that does not carry out any business in the country where its office is situated …; and
>
> iv) Generally, factors going to the 'head office functions test', including the law governing the main contracts, the location of business relations with clients, the location of creditors, and the management of the company …
>
> I bear in mind of course that the question is fact specific and the cases cited are simply examples of factors that the court has considered relevant in the particular circumstances of those cases."

36. The term COMI is not defined in the UNCITRAL Model Law on Cross-Border Insolvency. The key COMI considerations are summarised by Abdullah JC in *Re Zetta Jet*[52] at [29] and [85]:

> "The term 'COMI' is not … defined in the Model Law or the Singapore Model Law. There is only a presumption under Art 16(3) of the Singapore Model Law that the place of the debtor's registered office is its COMI …
>
> I will assess the various factors raised by the parties in the following categories:
>
> (a) the location from which control and direction was administered;
>
> (b) the location of clients;
>
> (c) the location of creditors;
>
> (d) the location of employees;

[52] *Supra*.

(e) the location of operations;

(f) dealings with third parties; and

(g) the governing law."

37. A more comprehensive discussion of the criteria for determining COMI under the Model Law is to be found in the judgment of Glenn J in *In re Ocean Rig UDW Inc*[53], which concerned an application for recognition under *Chapter 15* of the *United States Bankruptcy Code*. The case concerns the restructuring of the debt of four companies through a scheme of arrangement sanctioned in the Cayman Islands. One which was incorporated in the Cayman Islands was the holding company of the other three, which were incorporated in the Republic of the Marshall Islands. Until sometime in 2016 each of the companies had its COMI in the Marshall Islands. It was the companies' case that subsequently the COMI was moved to the Cayman Islands. Whether or not this was correct was relevant because recognition under *Chapter 15* requires that a company is in an insolvency process in the location of its "centre of main interests", in which case it is a "foreign main proceeding", or in a place in which it has an "establishment", in which case it is a "foreign non-main proceeding": the terms in quotes being defined in *Chapter 15*, which adopts the *UNCITRAL Model Code* on cross-border insolvency. The legal framework and the issue is summarised by Glenn J at page 695:

> "[O]f course, more than good intentions are required before a U.S. bankruptcy court can recognize a foreign proceeding as either a foreign main or foreign nonmain proceeding. For example, a so-called 'letter box company,' with no real establishment or other required indicia for its proposed COMI, cannot support recognition. See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129-31 & n.8 (Bankr. S.D.N.Y.), *aff'd*, 389 B.R. 325 (S.D.N.Y.

[53] 570 B.R. 687 (Bank. S.D.N.Y. Aug. 24, 2017); the decision was upheld on appeal 585 B.R. 31 (S.D.N.Y. April 5, 2018).

> 2007) (stating that 'the COMI presumption may be overcome particularly in the case of a "letterbox" company not carrying out any business' in the country where its registered office is located) (citation omitted). The question that must be addressed here is whether the Foreign Debtors' change of COMI from the RMI to the Cayman Islands satisfies the requirements of the Bankruptcy Code, permitting this Court to recognize the Cayman Proceedings as a foreign main proceeding. A U.S, bankruptcy court that is asked to recognize a foreign proceeding as a foreign main proceeding must decide where a foreign debtor has its center of main interest."

38. It is not necessary for me to consider the detailed analysis by Glenn J of the evidence relied on as demonstrating that the COMI for each company had moved from the Marshall Islands to the Cayman Islands. It is sufficient to note that Glenn J considered evidence of the following matters as being relevant: the location of directors and board meetings, the location of the companies' principal officers, notices of relocation to the Cayman Islands, location of operations, location of assets, location of bank accounts, location of books and records and the location in which the restructuring activities took place. Glenn J concluded that the COMI of each of the companies was in the Cayman Islands and the proceedings in the Cayman Islands to restructure the debt were "foreign main proceedings". His conclusion is contained in the following passages on page 704.

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

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

In my view similar matters are relevant to the Hong Kong court's determination of whether or not the COMI of a company is in the jurisdiction of the foreign insolvency proceedings.

39. **Thirdly**, how the relationship between the COMI criteria and the Hong Kong court's winding-up jurisdiction may be relevant; a subject I touched on in [32]. The position in my view is as follows. The recognition regime is distinct from the winding-up jurisdiction. The Court may recognise foreign insolvency proceedings whether or not the debtor may be wound up in Hong Kong: *Singularis Holdings Ltd*[54]. The fact that the debtor could be, or has been, wound up in Hong Kong is not of itself a bar to the Court granting assistance to the foreign insolvency office-holders. Recognition as an ancillary liquidation is one form of assistance that may be granted to foreign insolvency office-holders.

40. **Fourthly**, whether an inconsistency between the principles of private international law and the principles of recognition and assistance,

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[54] *Supra* at [5] and [13].

the former supporting recognition of foreign office-holders appointed in the country of incorporation as the company's lawful agents in accordance with agency theory and ordinary conflict of laws principles for corporations and the latter supporting recognition largely determined by COMI, will cause practical problems. In my view not. The COMI test is relevant in cases in which a foreign liquidator requires more than an order that confirms the liquidator's status and rights arising from his appointment in the place of incorporation (which is justified by orthodox principles of private international law) and seeks a power necessary to exercise a right in furtherance of a liquidation (which engages the principle of modified universalism); the sort of order referred to by Lord Sumption in [23] of *Singularis* [55], albeit on the assumption that the Liquidator had been appointed in the place of incorporation and this justifies recognition:

> "[T]he right and duty to assist foreign office-holders which the courts have acknowledged on a number of occasions would be an empty formula if it were confined to recognising the companies title to its assets in the same way as any other legal person who has acquired title under a foreign law, or to recognising the office-holders right to act on the company's behalf in the same way as any other agent or company appointed in accordance with the law of its incorporation. The recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them."

41. **Fifthly**, cases where the location of the COMI is unclear. In my view where the location of COMI is unclear, the Court may nevertheless grant recognition and assistance if for practical reasons it is necessary and the foreign insolvency process is in the place of

[55] *Supra*.

incorporation. This type of pragmatic approach was supported by Abdullah JC in *Re Opti-Medix Ltd*[56]:

> "Aside from a common law COMI test, the recognition of the Tokyo order could also be justified on practical grounds. Where the interests of the forum are not adversely affected by a foreign order, the courts should lean towards recognition. This approach could be justified on the bases of not only comity but also of business practicality. In the present case, the interests of Singapore creditors were protected by the undertaking …, and there was no competing jurisdiction interested in the winding up of the Companies. On the other hand, the jurisdiction which had the greatest interest, Japan, had moved in favour of liquidation. To hinder the orderly dissolution of the Companies in this situation would serve no purpose. The decisions in both *Re Lee Wah Bank* … and *Re RussoAsiatic Bank* … could perhaps be explained on this practical basis."

42. In my view none of the subsidiary matters I have considered suggest that adopting the COMI criteria conflicts in a material and problematic way with other principles and practical considerations, which are potentially engaged.

Authorities in Hong Kong

43. The authorities show the following types of specific assistance having been granted. In *Re Irish Shipping Ltd*[57] concerned a petition to winding up an unregistered company pursuant to *section 327* of the *Companies Ordinance*, Cap. 32. The company was incorporated and in liquidation in Ireland. The petition was presented by the company's liquidator. Jones J in accepting that assistance in the form of an ancillary liquidation should be granted says this:

> "Another factor that I have taken into account in exercising my discretion is the comity of nations whereby it is desirable that

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[56] *Supra* at [26].
[57] [1985] HKLR 437, 439, 445 (Jones J).

> the court should assist the liquidator in another jurisdiction to carry out his duties unless good reasons to the contrary have been put forward and I find none in this case. The jurisdiction of this court in the liquidation would be ancillary as far as possible to the winding up in Ireland and would provide assistance to the official liquidator in the collection and preservation of the assets within Hong Kong."

In *Re Information Security One Ltd*[58] the winding-up petition was brought by the company in compulsory liquidation in the Cayman Islands in which it was incorporated acting by its joint and several liquidators. Kwan J as she then was held that:

> "8. Authorities for the proposition that an ancillary liquidation may be brought in Hong Kong in respect of a foreign company where there is principal liquidation in its place of incorporation are found in *Re Irish Shipping Ltd* [1985] HKLR 437 and *Re Zhu Kuan Group Co Ltd* (unrep., HCCW No 874 of 2003) …"

Similarly, in *Re China Medical Technologies Inc (No 1)*[59] where the Court of Appeal permitted Cayman Liquidators to act on behalf of the debtor in Hong Kong. Barma JA explains the situation in [5]–[6] and [24]:

> "The Company, incorporated in the Cayman Islands, was not registered in Hong Kong. It was the holding company of a group of companies which developed, manufactured and marketed surgical and medical equipment in China. It was wound up in the Cayman Islands in July 2012 and placed into bankruptcy in New York in August 2012…
>
> The petition to wind up the Company in Hong Kong was, as noted above, brought by the Company itself, acting through its Cayman Islands Joint Official Liquidators…
>
> In the present case, it is pertinent to note that while the winding up order sought is in respect of an insolvent company, the petition is not in fact brought by a creditor, but by the Company itself, acting through its liquidators appointed in its home jurisdiction, by the courts of its place of incorporation."

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[58] [2007] 3 HKLRD 780 at [1]–[2] and [8] (Kwan J).
[59] [2018] HKCA 111; [2018] HKCLC 65.

44. The following cases demonstrate that it is permissible for foreign insolvency office-holders to take possession of the debtor's assets: In *Singularis Holdings Ltd*[60] Lord Sumption explains that:

> "The English courts have for at least a century and a half exercised a power to assist a foreign liquidation by taking control of the English assets of the insolvent company."

The Court of Final Appeal in *Chen Li Hung v Ting Lei Miao*[61] recognised and assisted Taiwanese bankruptcy trustees. Bokhary PJJ held:

> "By suing to establish that shares registered in other persons' names are beneficially owned by a bankrupt, his trustees in bankruptcy would be doing nothing materially different from suing to recover debts due to him. And I am satisfied that we should proceed on the footing that under the law in operation where they were appointed, the Trustees have the right to sue in their own names here with a view to getting the disputed 1.25 million Nikko shares into Mr Ting's estate. This is because it is not in dispute that every step taken by the Trustees, including every step which they have taken in Hong Kong, is in conformity with directions obtained by them from the bankruptcy court in Taiwan…
>
> I hold that the Taiwanese bankruptcy order extends to Mr Ting's assets situated in Hong Kong…
>
> In my judgment, the Taiwanese bankruptcy order is to be given effect by the Hong Kong courts…
>
> That the Trustees act in accordance with the directions of the Taiwanese bankruptcy court is an unremarkable matter consistent with routine insolvency practice the world over."

45. It is permissible to grant foreign insolvency office-holders the power to gather information from third parties. Continuing from his explanation quoted in [25] above Lord Sumption explains in *Singularis*[62]:

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60 *Supra* at [10].
61 (2000) 3 HKCFAR 9 at 16-17, 21.
62 *Supra*.

> "[T]here is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is subject to the limitation in *In re African Farms Ltd* and in *HIH* and *Rubin*, that such an order must be consistent with the substantive law and public policy of the assisting court ... It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information."

Also in *Singularis* a stay was imposed on creditors trying to levy execution against local assets[63].

Up Energy

46. Mr Ho drew my attention to a very recent decision of Linda Chan J in *Re Up Energy Development Group Limited*[64]. As Chan J notes in the first paragraph of her judgment *Up Energy* is an unusual case. *Up Energy* is incorporated in Bermuda, listed in Hong Kong and its business was conducted in the Mainland. The winding-up petition in Hong Kong came on for substantive hearing before Chan J on

[63] *Supra* at [12]–[14] and [19] (Lord Sumption), and [54] (Lord Collins).
[64] *Supra*.

10 January 2022. As I understand the position the company sought initially to have the petition adjourned until after a hearing to convene a meeting of creditors, which it intended would be made before me a few months later. Chan J was not satisfied that all the relevant issues had been properly addressed before her and adjourned the petition for further argument on 14 February 2022. Chan J ordered further submissions to be made. The company was wound up in Bermuda on 11 March 2022. The company had been put into soft-touch provisional liquidation in 2017, which was recognised by an order made by me in August 2017. Obviously this proved unsuccessful. The Company argued that it should not be wound up in Hong Kong and instead the liquidation in Bermuda should be recognised and the powers necessary to conduct the liquidation in Hong Kong extended to the liquidators by way of common law recognition. Chan J rejected this argument. Chan J held, and I simplify, that it was not possible for a foreign liquidator to conduct a winding up in Hong Kong, which required the liquidators to exercise the powers available to a Hong Kong liquidator under the *Ordinance*. The common law power of assistance did not permit the court "*to make the provisions under the CWUO available to the Bermuda liquidators or the Company in the absence of a winding up order made by the Hong Kong court.*"[65] Mr Ho in the present case agreed that Chan J's conclusion represented the current orthodox view for the reasons explained in *Rubin v Eurofinance*[66] and *Singularis*[67]. I agree. So far as the present case is concerned what requires consideration is sub-paragraph (3) of [81], which contains Chan J's determinations. Chan J says this: "*In the absence of a winding up order [in Hong Kong] made against the [c]ompany, the court does not have*

[65] [59].
[66] *Supra*.
[67] *Supra*.

power under the common law to confer any powers on the Bermuda Liquidators or make any provisions under the [Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)] available to the [c]ompany." Mr Ho quite properly brought it to my attention, because although the second part of the sentence, which concerns the issue that I understand was central in the case is not relevant to the present matter as the order sought does not require a power under the *Ordinance* to be extended to the Liquidator, the first part of the sentence suggests that no powers at all can be conferred at common law.

47. As I have explained, in the present case the order that I have made is justified by established principles of private international law. As Lord Sumption demonstrates in the parts of *Singularis* referred to in [16] above the court is not constrained from granting any assistance at all to a foreign liquidator. The court can grant assistance to facilitate a foreign liquidator whose appointment has been recognised on orthodox principles of private international and which engages the principles of modified universalism. As Chan J refers at length to *Singularis* in her judgment I think a fair reading of [81(3)] is that her Ladyship had in mind (A) an argument that the common law allowed powers analogous to those provided in the Ordinance to be granted to foreign liquidators rather than (B) powers intended to assist a foreign liquidator effectively to exercise rights that a domestic court recognises because the liquidator had been appointed in the place of incorporation; in other words the situation discussed by Lord Sumption in [23] of *Singularis*. I am concerned with the latter type of case. For the reasons I have explained in earlier paragraphs, in my view it is entirely consistent with modified universalism and the established common law principles of recognition and assistance

for the Hong Kong court to grant powers intended to assist a foreign liquidator appointed in the jurisdiction of a company's COMI effectively to exercise rights, which arise from the liquidator's status in the COMI jurisdiction.

Form of Order

48. I will grant an order in the form annexed to this judgment. In [1] I will order that the liquidation is recognised. This I do on the basis discussed in [39]–[40] alternatively on practical grounds. The Liquidator is the lawful agent of the Company as a matter of the law of its place of incorporation and entitled to direct that its assets are transferred from accounts in Hong Kong to accounts in Bermuda. Paragraph 2 confirms that the Provisional Liquidator has the power to secure and obtain the Company's assets and documents in Hong Kong. This is simply confirming the position under orthodox principles of private international law and gives the Provisional Liquidator assistance, which might fairly be described as more managerial in nature than of a type associated specifically with insolvency.

49. Paragraph 3 permits the transfers of the relevant sums of money as directed by the Provisional Liquidator. Paragraphs 4 and 5 are self-explanatory.

Conclusion

50. In my view the correct approach to assessing whether or not a foreign liquidation should be recognised is first to determine if at the time the application for recognition is made the foreign liquidation is taking place in the jurisdiction of the Company's COMI. If it is not recognition

and assistance should be declined unless the application falls within one of the following two categories. **First**, it is limited to recognition of a liquidator's authority, if appointed in the place of incorporation, to represent a company and orders that are an incident of that authority; which might be described as managerial assistance. As the Provisional Liquidator in the present case only requires an order that demonstrates to Computershare and HSBC that as the lawful agent of the Company he is entitled to direct the monies to be transferred to another bank account in my view the application, when the superfluous paragraphs dealing with more general assistance in the originating summons are deleted, is justified by established principles of private international law. **Secondly**, recognition and limited and carefully prescribed assistance which does not fall within the first category required by a liquidator appointed in the place of incorporation as a matter of practicality; the type of situation in other words, which Abdullah JC describes as justifying assistance on practical grounds in *Opti-Medix*.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Look Chan Ho, instructed by Stephenson Harwood, for the applicant

The 1st respondent was not represented and did not appear

The 2nd respondent was not represented and did not appear

Appendix

Order

UPON the application of Mr. John Christopher McKenna of Finance & Risk Services Limited in his capacity as the sole provisional liquidator of Global Brands Group Holding Limited (In Liquidation in Bermuda) ("**Company**") by way of ex-parte originating summons filed on 25 May 2022

AND UPON reading the Letter of Request issued by the Supreme Court of Bermuda dated 28 March 2022, the Affidavit of John Christopher McKenna filed on 26 May 2022 and the exhibit referred to therein, and the 2nd Affidavit of Lau Po Wa Vivian filed on 27 May 2022 and the exhibit referred to therein

AND UPON hearing counsel for the Applicant, the 1st and 2nd Respondents being absent

IT IS ORDERED THAT:-

(1) The liquidation of the Company pursuant to the order of the Supreme Court of Bermuda ("**Bermuda Court**") dated 5 November 2021 and the appointment of John Christopher McKenna of Finance & Risk Services Limited, Suite 502, 26 Bermudiana Road, Hamilton, Bermuda, as provisional liquidator ("**Provisional Liquidator**") pursuant to the order of the Bermuda Court dated 16 September 2021, and his continuation in office pursuant to the order of the Bermuda Court dated 5 November 2021, be recognised by this Court.

(2) The Provisional Liquidator has and may exercise in the Hong Kong Special Administrative Region the following powers:

a) to locate, protect, secure and take into their possession and control the books, papers, and records of the Company including the accountancy and statutory records within the jurisdiction of this Court. The books, records and documents of the Company include:

i. Emails exchanged and other correspondences between the Company and its auditors, and the Company and other third parties; and

ii. Documents and information provided by the Company to its auditors and provided by the auditors to the Company in relation to the audit work;

b) to take all necessary steps to prevent any disposal of the Company's assets and, in particular, to secure any credit balances in any bank accounts in the name or under the control of the Company within this jurisdiction;

c) to operate and open or close any bank accounts in the name and on behalf of the Company for the purpose of collecting the assets and paying the costs and expenses of the Provisional Liquidator;

d) to retain and employ barristers, solicitors or attorneys, accountants and/or such other agents or professional persons as the Provisional Liquidator considers appropriate for the purpose of advising or assisting in the execution of their powers and duties under this Order; and

e) to bring legal proceedings and make applications to this Court, whether in his own name or in the name of the Company.

(3) Subject to any adjustments for additional interest accrued and for bank charges or fees incurred, the following balances comprising receivables due in respect of dividends and interest income derived from shares that are not vested under the Company's 2014 and 2016 share award schemes ("**GBG Share Award Schemes**") because of staff termination standing to the credit of the 1st Respondent, the trustee for the GBG Share Award Schemes, and maintained with the 2nd Respondent, be delivered up to the Company in accordance with the instructions issued by the Provisional Liquidator:

Type of account	**Name of Account**	**Account number**	**Balances (HKD)**
Cash Custodian Account	Computershare Hong Kong Trustees Limited Account No. 0018	848-674503-001	64,860.54 or any balances remaining therein
Cash Custodian Account	Computershare Hong Kong Trustees Limited Account No. 0047	741-018584-001	8,399,057.66

	Computershare Hong Kong Trustees Limited Account No. 0047 - No.2 Account		or any balances remaining therein

(4) The sum of HK$135,250 be returned by the 1st Respondent to the Company in accordance with the instructions issued by the Provisional Liquidator. Such sum is the total amount deducted by the 1st Respondent from the cash balance held by them as trustee under the GBG Share Award Schemes to set off their outstanding fees for the months of April to August 2021.

(5) The following balances standing to the credit of the Company maintained with the 2nd Respondent, subject to any adjustments for additional interest accrued and for bank charges or fees incurred be delivered up to the Company in accordance with the instructions issued by the Provisional Liquidator:

Type of account	**Account number**	**Balances**
EUR Current Account	848-580056-220	EUR 9.85
HKD Current Account	848-580056-001	HKD 730.01
USD Current Account	848-580056-201	USD 4,748.79

(6) The Provisional Liquidator does have liberty to apply; and

(7) The costs of this application be paid out of the assets of the Company as an expense of the liquidation.

48 F.4th 419
United States Court of Appeals, Fifth Circuit.

In the MATTER OF: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor,
NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P.; Highland Income Fund; NexPoint Strategic Opportunities Fund; Highland Global Allocation Fund; NexPoint Capital, Incorporated; James Dondero; The Dugaboy Investment Trust; Get Good Trust, Appellants,
v.
Highland Capital Management, L.P., Appellee.

No. 21-10449
|
FILED September 7, 2022

Synopsis

Background: Co-founder of Chapter 11 debtor, an investment firm that had managed billion-dollar, publicly-traded investment portfolios for nearly three decades, together with several other creditors and the United States Trustee (UST), objected to confirmation of debtor's proposed reorganization plan. The United States Bankruptcy Court for the Northern District of Texas, Stacey G. C. Jernigan, Chief Judge, overruled the objections and subsequently granted motion of co-founder and creditors to directly appeal confirmation order to Court of Appeals. Following consolidation of direct appeals, debtor moved to dismiss appeal as equitably moot.

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

equitable mootness did not bar review of creditors' claims, even though, because no stay of the plan pending appeal was granted, the plan had been substantially consummated;

the plan was properly classified as a reorganization plan, allowing for automatic discharge of its debts, notwithstanding debtor's "wind down" of its portfolio management;

the plan satisfied the absolute-priority rule;

failure of "Independent Directors" to file periodic financial reports as required by bankruptcy rule did not bar the plan's confirmation;

the Bankruptcy Court did not clearly err in finding that, despite their purported independence, debtor's publicly traded investment funds were entities "owned and/or controlled by" debtor's co-founder;

the plan's non-debtor exculpation provision violated the Bankruptcy Code to the extent it extended beyond debtor, unsecured creditors committee, and "Independent Directors" selected by committee to act as "quasitrustee" for debtor; and

the plan's injunction provision was not unlawfully overbroad or vague.

Motion to dismiss appeal denied; judgment affirmed in part, reversed in part, and remanded.

Previous opinion, 2022 WL 3571094, withdrawn.

Procedural Posture(s): On Appeal; Objection to Confirmation of Plan; Motion to Dismiss.

***424** Appeal from the United States Bankruptcy Court for the Northern District of Texas, USDC No. 19-34054, USDC No. 3:21-CV-538, Stacey G. C. Jernigan, Chief Judge

Attorneys and Law Firms

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George W. Hicks, Jr., Kirkland & Ellis, L.L.P., Washington, DC, for Amicus Curiae.

Before Wiener, Graves, and Duncan, Circuit Judges.

ON PETITION FOR REHEARING

Stuart Kyle Duncan, Circuit Judge:

The petition for panel rehearing is GRANTED. We withdraw our previous opinion, reported at 2022 WL 3571094, and substitute the following:

Highland Capital Management, L.P., a Dallas-based investment firm, managed billion-dollar, publicly traded investment portfolios for nearly three decades. By 2019, however, myriad unpaid judgments and liabilities forced Highland Capital to file for Chapter 11 bankruptcy. This provoked a nasty breakup between Highland Capital and its co-founder James Dondero. Under those trying circumstances, the bankruptcy court successfully mediated with the largest creditors and ultimately confirmed a reorganization plan amenable to most of the remaining creditors.

Dondero and other creditors unsuccessfully objected to the confirmation order and then sought review in this court. In turn, Highland Capital moved to dismiss their appeal as equitably moot. First, we hold that equitable mootness does not bar our review of any claim. Second, we affirm the confirmation order in large part. We reverse only insofar as the plan exculpates certain non-debtors in violation of 11 U.S.C. § 524(e), strike those few parties from the plan's exculpation, and affirm on all remaining grounds.

I. BACKGROUND

A. Parties

In 1993, Mark Okada and appellant James Dondero co-founded Highland Capital Management, L.P. ("Highland Capital") in Dallas. Highland Capital managed portfolios and assets for other investment advisers and funds through a complex of entities under the Highland umbrella. Highland Capital's ownership-interest holders included Hunter Mountain Investment ***425** Trust (99.5%); appellant The Dugaboy Investment Trust, Dondero's family trust (0.1866%); [1] Okada, personally and through trusts (0.0627%); and Strand Advisors, Inc. (0.25%), the only general partner, which Dondero wholly owned.

Dondero also manages two of Highland Capital's clients—appellants Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (the "Advisors"). Both the Advisors and Highland Capital serviced and advised billion-dollar, publicly traded investment funds for appellants Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and NexPoint Capital, Inc. (collectively, the "Funds"), among others. For example, on behalf of the Funds, Highland Capital managed certain investment vehicles known as collateral loan obligations ("CLOs") under individualized servicing agreements.

B. Bankruptcy Proceedings

Strapped with a series of unpaid judgments, Highland Capital filed for Chapter 11 bankruptcy in the District of Delaware in October 2019. The creditors included Highland Capital's interest holders, business affiliates, contractors, former partners, employees, defrauded investors, and unpaid law firms. Among those creditors, the Office of the United States Trustee appointed a four-member Unsecured Creditors' Committee (the "Committee"). [2] *See* 11 U.S.C. § 1102(a)(1), (b)(1). Throughout the bankruptcy proceedings, the Committee investigated Highland Capital's past and current operations, oversaw its continuing operations, and negotiated the reorganization plan. *See id.* § 1103(c). Upon the Committee's request, the court transferred the case to the Northern District of Texas in December 2019.

Highland Capital's reorganization did not proceed under the governance of a traditional Chapter 11 trustee. Instead, the Committee reached a corporate governance settlement agreement to displace Dondero, which the bankruptcy court approved in January 2020. Under the agreed order, Dondero stepped down as director and officer of Highland Capital and Strand to be an unpaid portfolio manager and "agreed not to cause any Related Entity ... to terminate any agreements" with Highland Capital. The Committee selected a board of three independent directors to act as a quasitrustee and to govern Strand and Highland Capital: James Seery Jr., John Dubel, and retired Bankruptcy Judge Russell Nelms (collectively, the "Independent Directors"). The order also barred any claim against the Independent Directors in their official roles without the bankruptcy court's authorizing the claim as a "colorable claim[ ] of willful misconduct or gross negligence." Six months later, at the behest of the creditors, the bankruptcy court appointed Seery as Highland Capital's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative. The order contained an identical bar on claims against Seery ***426** acting in these roles. Neither order was appealed.

Throughout summer 2020, Dondero proposed several reorganization plans, each opposed by the Committee and the Independent Directors. Unpersuaded by Dondero, the Committee and Independent Directors negotiated their own plan. When Dondero's plans failed, he and other creditors began to frustrate the proceedings by objecting to settlements, appealing orders, seeking writs of mandamus, interfering with Highland Capital's management, threatening employees, and canceling trades between Highland Capital and its clients. *See Highland Cap. Mgmt., L.P. v. Dondero (In re Highland Cap. Mgmt., L.P.)*, Ch. 11 Case No. 19-34054-SGJ11, Adv. No. 20-03190-SGJ11, 2021 WL 2326350, at *1, *26 (Bankr. N.D. Tex. June 7, 2021) (holding Dondero in civil contempt, sanctioning him $100,000, and comparing this case to a "nasty divorce"). In Seery's words, Dondero wanted to "burn the place down" because he did not get his way. The Independent Directors insisted Dondero resign from Highland Capital, which he did in October 2020.

Highland Capital, meanwhile, proceeded toward confirmation of its reorganization plan—the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan"). In August 2020, the Independent Directors filed the Plan and an accompanying disclosure statement with the support of the Committee. *See* 11 U.S.C. §§ 1121, 1125. The bankruptcy court approved the statement as well as proposed notice and voting procedures for creditors, teeing up confirmation. Leading up to the confirmation hearing, the Advisors and the Funds asked the court to bar Highland Capital from trading or disposing of CLO assets pending confirmation. The bankruptcy court denied the request, and Highland Capital declined to voluntarily abstain and continued to manage the CLO assets.

Before confirmation, Dondero and other creditors (including several non-appellants) filed over a dozen objections to the Plan. Like Dondero, the United States Trustee primarily objected to the Plan's exculpation of certain non-debtors as unlawful. Highland Capital voluntarily modified the Plan to resolve six such objections. The Plan proposed to create eleven classes of creditors and equity holders and three classes of administrative claimants. *See* 11 U.S.C. § 1122. Of the voting-eligible classes, classes 2, 7, and 9 voted to accept the Plan while classes 8, 10, and 11 voted to reject it.

C. Reorganization Plan

The Plan works like this: It dissolves the Committee, and creates four entities—the Claimant Trust, the Reorganized Debtor, HCMLP GP LLC,[3] and the Litigation Sub-Trust. Administered by its trustee Seery, the Claimant Trust "wind[s]-down" Highland Capital's estate over approximately three years by liquidating its assets and issuing distributions to class-8 and -9 claimants as trust beneficiaries. Highland Capital vests its ongoing servicing agreements with the Reorganized Debtor, which "among other things" continues to manage the CLOs and other investment portfolios. The Reorganized Debtor's only general partner is HCMLP GP LLC. And the Litigation Sub-Trust resolves pending claims against Highland Capital under the direction of its trustee Marc Kirschner.

***427** The whole operation is overseen by a Claimant Trust Oversight Board (the "Oversight Board") comprised of four creditor representatives and one restructuring advisor. The Claimant Trust wholly owns the limited partnership interests in the Reorganized Debtor, HCMLP GP LLC, and the Litigation Sub-Trust. The Claimant Trust (and its interests) will dissolve either at the soonest of three years after the effective date (August 2024) or (1) when it is unlikely to obtain additional proceeds to justify further action, (2) all claims and objections are resolved, (3) all distributions are made, and (4) the Reorganized Debtor is dissolved.

Anticipating Dondero's continued litigiousness, the Plan shields Highland Capital and bankruptcy participants from lawsuits through an exculpation provision, which is enforced by an injunction and a gatekeeper provision (collectively, "protection provisions"). The protection provisions extend to nearly all bankruptcy participants: Highland Capital and its employees and CEO; Strand; the Independent Directors; the Committee; the successor entities and Oversight Board; professionals retained in this case; and all "Related Persons"[4] (collectively, "protected parties").[5]

The Plan exculpates the protected parties from claims based on any conduct "in connection with or arising out of" (1) the filing and administration of the case, (2) the negotiation and solicitation of votes preceding the Plan, (3) the consummation, implementation, and funding of the Plan, (4) the offer, issuance, and distribution of securities under the Plan before or after the filing of the bankruptcy, and (5) any related negotiations, transactions, and documentation. But it excludes "acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct" *and* actions by Strand and its employees predating the appointment of the Independent Directors.

Under the Plan, bankruptcy participants are enjoined "from taking any actions to interfere with the implementation or consummation of the Plan" or filing any claim related to the Plan or proceeding. Should a party seek to bring a claim against any of the protected parties, it must go to the bankruptcy court to "first determin[e], after notice and a hearing, that such claim

or cause of action represents a colorable claim of any kind." Only then may the bankruptcy court "specifically authoriz[e]" the party to bring the claim. The Plan reserves for the bankruptcy court the "sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable" and then to adjudicate the claim if the court has jurisdiction over the merits.

D. Confirmation Order

At a February 2021 hearing, the bankruptcy court confirmed the Plan from the bench over several remaining objections. *See* FED R. BANKR. P. 3017–18; 11 U.S.C. §§ 1126, 1128, 1129. In its later-written decision, the bankruptcy court observed that Highland Capital's bankruptcy was "not a garden variety chapter 11 case." The type of debtor, the reason for the ***428** bankruptcy filing, the kinds of creditor claims, the corporate governance structure, the unusual success of the mediation efforts, and the small economic interests of the current objectors all make this case unique.

The confirmation order criticized Dondero's behavior before and during the bankruptcy proceedings. The court could not "help but wonder" if Highland Capital's deficit "was necessitated because of enormous litigation fees and expenses incurred" due to Highland Capital's "culture of litigation." Recounting Highland Capital's litigation history, it deduced that Dondero is a "serial litigator." It reasoned that, while "Dondero wants his company back," this "is not a good faith basis to lob objections to the Plan." It attributed Dondero's bad faith to the Advisors, the Trusts, and the Funds, given the "remoteness of their economic interests." For example, the bankruptcy court "was not convinced of the[ ] [Funds'] independence" from Dondero because the Funds' board members did not testify and had "engaged with the Highland complex for many years." And so the bankruptcy court "consider[ed] them all to be marching pursuant to the orders of Mr. Dondero." The court, meanwhile, applauded the members of the Committee for their "wills of steel" for fighting "hard before and during this Chapter 11 Case" and "represent[ing] their constituency ... extremely well."

On the merits of the Plan, the bankruptcy court again approved the Plan's voting and confirmation procedures as well as the fairness of the Plan's classes. *See* 11 U.S.C. §§ 1122, 1125(a)–(c). The court held the Plan complied with the statutory requirements for confirmation. *See id.* §§ 1123(a)(1)–(7), 1129(a)(1)–(7), (9)–(13). Because classes 8, 10, and 11 had voted to reject the Plan, it was confirmable only by cramdown. [6] *See id.* § 1129(b). The bankruptcy court found that the Plan treated the dissenting classes fairly and equitably and satisfied the absolute-priority rule, so the Plan was confirmable. *See id.* § 1129(b)(2)(B)–(C). The court also concluded that the protection provisions were fair, equitable, and reasonable, as well as "integral elements" of the Plan under the circumstances, and were within both the court's jurisdiction and authority. The court confirmed the Plan as proposed and discharged Highland Capital's debts. *Id.* § 1141(d)(1). After confirmation and satisfaction of several conditions precedent, the Plan took effect August 11, 2021.

E. The Appeal

Dondero, the Advisors, the Funds, and the Trusts (collectively, "Appellants") timely appealed, objecting to the Plan's legality and some of the bankruptcy court's factual findings. [7] Together with Highland Capital, Appellants moved to directly appeal the confirmation order to this court, which the bankruptcy court granted. *See* 28 U.S.C. § 158(d). A motions panel certified and consolidated the direct appeals. *See ibid.* Both the bankruptcy court ***429** and the motions panel declined to stay the Plan's confirmation pending appeal. Given the Plan's substantial consummation since its confirmation, Highland Capital moved to dismiss the appeal as equitably moot, a motion the panel ordered carried with the case.

* * *

We first consider equitable mootness and decline to invoke it here. We then turn to the merits, conclude the Plan exculpates certain non-debtors beyond the bankruptcy court's authority, and affirm in all other respects.

II. STANDARD OF REVIEW

A confirmation order is an appealable final order, over which we have jurisdiction. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 502, 135 S.Ct. 1686, 191 L.Ed.2d 621 (2015); *see* 28 U.S.C. §§ 158(d), 1291. This court reviews a bankruptcy court's factual findings for clear error and legal conclusions *de novo*. *Evolve Fed. Credit Union v. Barragan-Flores (In re Barragan-Flores)*, 984 F.3d 471, 473 (5th Cir. 2021) (citation omitted).

III. EQUITABLE MOOTNESS

Highland Capital moved to dismiss this appeal as equitably moot. It argues we should abstain from appellate review because clawing back the implemented Plan "would generate untold chaos." We disagree and deny the motion.

The judge-made doctrine of equitable mootness allows appellate courts to abstain from reviewing bankruptcy orders confirming "complex plans whose implementation has substantial secondary effects." *New Indus., Inc. v. Byman (In re Sneed Shipbuilding, Inc.)*, 916 F.3d 405, 409 (5th Cir. 2019) (citing *In re Trib. Media Co.*, 799 F.3d 272, 274, 281 (3d Cir. 2015)). It seeks to balance "the equitable considerations of finality and good faith reliance on a judgment" and "the right of a party to seek review of a bankruptcy order adversely affecting him." *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994) (quoting *First Union Real Estate Equity & Mortg. Inv. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992)); *see In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008); *see also* 7 Collier on Bankruptcy ¶ 1129.09 (16th ed.), LexisNexis (database updated June 2022) (observing "the equitable mootness doctrine is embraced in every circuit"). [8]

This court uses equitable mootness as a "scalpel rather than an axe," applying it claim-by-claim, instead of appeal-by-appeal. *In re Pac. Lumber Co. (Pacific Lumber)*, 584 F.3d 229, 240–41 (5th Cir. 2009). For each claim, we analyze three factors: "(i) whether a stay has been obtained, (ii) whether the plan has been 'substantially consummated,' and (iii) whether the relief requested would affect either the rights of parties not before the court or the success of the plan." *In re Manges*, 29 F.3d at 1039 (citing ***430** *In re Block Shim Dev. Co.*, 939 F.2d 289, 291 (5th Cir. 1991); and *Cleveland, Barrios, Kingsdorf & Casteix v. Thibaut*, 166 B.R. 281, 286 (E.D. La. 1994)); *see also, e.g., In re Blast Energy Servs.*, 593 F.3d 418, 424–25 (5th Cir. 2010); *In re Ultra Petroleum Corp.*, No. 21-20049, 2022 WL 989389, at *5 (5th Cir. Apr. 1, 2022). No one factor is dispositive. *See In re Manges*, 29 F.3d at 1039.

Here, the bankruptcy court and this court declined to stay the Plan pending appeal, and it took effect August 11, 2021. Given the months of progress, no party meaningfully argues the Plan has not been substantially consummated. [9] *See Pacific Lumber*, 584 F.3d at 242 (observing "consummation includes transferring all or substantially all of the property covered by the plan, the assumption of business by the debtors' successors, and the commencement of plan distributions" (citing 11 U.S.C. § 1141; and *In re Manges*, 29 F.3d at 1041 n.10)). But that alone does not trigger equitable mootness. *See In re SCOPAC*, 624 F.3d 274, 281–82 (5th Cir. 2010). Instead, for each claim, the inquiry turns on whether the court can craft relief for that claim that would not have significant adverse consequences to the reorganization. Highland Capital highlights four possible disruptions: (1) the unraveling of the Claimant Trust and its entities, (2) the expense of disgorging disbursements, (3) the threat of defaulting on exit-financing loans, and (4) the exposure to vexatious litigation.

Each party first suggests its own all-or-nothing equitable mootness applications. To Highland Capital, Appellants' broad requested remedy with only a minor economic stake demands mooting the entire appeal. To Appellants, the type of reorganization plan categorially bars equitable mootness, or, alternatively, Highland Capital's joining the motion to certify the appeal estops it from asserting equitable mootness. These arguments are unpersuasive and foreclosed by *Pacific Lumber*.

First, Highland Capital contends the entire appeal is equitably moot because Appellants, with only a minor economic stake and questionable good faith, "seek[ ] nothing less than a complete unravelling of the confirmed Plan." It claims the court cannot "surgically excise[ ]" certain provisions, as the Funds request, because the Bankruptcy Code prohibits "modifications to confirmed plans after substantial consummation." *See* 11 U.S.C. § 1127(b). Not so.

***431** "Although the Bankruptcy Code ... restricts post-confirmation plan modifications, it does not expressly limit appellate review of plan confirmation orders." *Pacific Lumber*, 584 F.3d at 240 (footnote omitted) (citing 11 U.S.C. § 1127). This court may fashion "fractional relief" to minimize an appellate disturbance's effect on the rights of third parties. *In re Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 328 (5th Cir. 2013) (denying dismissal on equitable mootness grounds because the court "could grant partial relief ... without disturbing the reorganization"); *cf. In re Cont'l Airlines*, 91 F.3d 553, 571–72 (3d Cir. 1996) (en banc) (Alito, J., dissenting) (observing "a remedy could be fashioned in the present case to ensure that the [debtor's] reorganization is not undermined"). In short, Highland Capital's speculations are farfetched, as the court may fashion the remedy it sees fit without upsetting the reorganization.

Second, Appellants contend that equitable mootness cannot apply—full-stop—because this appeal concerns a liquidation plan, not a reorganization plan. We reject that premise. *See infra* Part IV.A. Even if it were correct, however, this court has conducted the equitable-mootness inquiry for a Chapter 11 liquidation plan in the past. *See In re Superior Offshore Int'l, Inc.*, 591 F.3d 350, 353–54 (5th Cir. 2009). And other circuits have squarely rejected the categorical bar proposed by Appellants. *See In re Abengoa Bioenergy Biomass of Kan., LLC*, 958 F.3d 949, 956–57 (10th Cir. 2020); *In re BGI, Inc.*, 772 F.3d 102, 107–09 (2d Cir. 2014). We do the same.

Finally, Appellants assert that because Highland Capital and NexPoint Advisors, L.P. jointly moved to certify the appeal, it should be estopped from arguing the appeal is equitably moot. They cite no legal support for that approach. We decline to adopt it.

Instead, we proceed with a claim-by-claim analysis, as our precedent requires. Highland Capital suggests only two claims are equitably moot: (1) the protection-provisions challenge and (2) the absolute-priority-rule challenge. Neither provides a basis for equitable mootness.

For the protection provisions, Highland Capital anticipates that, without the provisions, its officers, employees, trustees, and Oversight Board members would all resign rather than be exposed to Dondero-initiated litigation. Those resignations would disrupt the Reorganized Debtor's operation, "significant[ly] deteriorat[ing] asset values due to uncertainty." Appellants disagree, offering several instances when this court has reviewed release, exculpation, and injunction provisions over calls for equitable mootness. *See, e.g., In re Hilal*, 534 F.3d at 501; *Pacific Lumber*, 584 F.3d at 252; *In re Thru Inc.*, 782 F. App'x 339, 341 (5th Cir. 2019) (per curiam). In response, Highland Capital distinguishes this case because the provisions are "integral to the consummated plans." *See In re Charter Commc'ns, Inc.*, 691 F.3d 476, 486 (2d Cir. 2012). We again reject that premise. *See infra* Part IV.E.1. In any event, Appellants have the better argument.

We have before explained that "equity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process." *In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008). That is so because "the goal of finality sought in equitable mootness analysis does not outweigh a court's duty to protect the integrity of the process." *Pacific Lumber*, 584 F.3d at 252. As in *Pacific Lumber*, the legality of a reorganization plan's non-consensual non-debtor release is consequential to the Chapter 11 process and so should not escape appellate review ***432** in the name of equity. *Ibid.* The same is true here. Equitable mootness does not bar our review of the protection provisions.

For the absolute-priority-rule challenge,[10] Highland Capital contends our review requires us to "rejigger class recoveries." *Pacific Lumber* is again instructive. There, the court declined to apply equitable mootness to a secured creditor's absolute-priority-rule challenge, as no other panel had extended the doctrine so far. *Id.* at 243. Similarly, Highland Capital fails to identify a single case in which this court has declined review of the treatment of a class of creditor's claims resulting from a cramdown. *See id.* at 252. Regardless, Appellants challenge the distributions to classes 8, 10, and 11. According to Highland Capital's own

declaration, "Class 8 General Unsecured Claims have received their Claimant Trust Interests." But there is no evidence that classes 10 or 11 have received any distributions. *Contra Pacific Lumber*, 584 F.3d at 251 (holding certain claims equitably moot where "the smaller unsecured creditors" had already "received payment for their claims"). As a result, the relief requested would not affect third parties or the success of the Plan. *See In re Manges*, 29 F.3d at 1039. The doctrine of equitable mootness does not bar our review of the cramdown and treatment of class-8 creditors.

We DENY Highland Capital's motion to dismiss the appeal as equitably moot.

IV. DISCUSSION

As to the merits, Appellants fire a bankruptcy-law blunderbuss. They contest the Plan's classification as a reorganization plan, the Plan's satisfaction of the absolute priority rule, the Plan's confirmation despite Highland Capital's noncompliance with Bankruptcy Rule 2015.3, and the sufficiency of the evidence supporting the court's factual finding that the Funds are "owned/controlled" by Dondero. For each, we disagree and affirm. We do, however, agree with Appellants that the bankruptcy court exceeded its statutory authority under § 524(e) by exculpating certain non-debtors, and so we reverse and vacate the Plan only to that extent.

A. Discharge of Debt

We begin with the Plan's classification as a reorganization plan, allowing for automatic discharge of the debts. The confirmation of a Chapter 11 restructuring plan "discharges the debtor from any [pre-confirmation] debt" unless, under the plan, the debtor liquidates its assets, stops "engag[ing] in [its] business after consummation of the plan," and would be denied discharge in a Chapter 7 case. 11 U.S.C. § 1141(d)(1), (3); *see In re Sullivan*, No. 99-11107, 234 F.3d 705, 2000 WL 1597984, at *2 (5th Cir. Sept. 26, 2000) (per curiam). The bankruptcy court concluded Highland Capital continued to engage in business after plan consummation, so its debts are automatically discharged. The Trusts call foul because, in their view, Highland Capital's "wind down" of its portfolio management is not a continuation of its business. We disagree.

Whether a corporate debtor "engages in business" is "relatively straightforward." *Um v. Spokane Rock I, LLC*, 904 F.3d 815, 819 (9th Cir. 2018) (contrasting the more complex question for individual debtors); *see Grausz v. Sampson (In re Grausz)*, 63 F. App'x 647, 650 (4th Cir. 2003) (per curiam) (same). That is, "a business entity will not engage in business post-bankruptcy when its assets are liquidated and the entity is dissolved." ***433** *Um*, 904 F.3d at 819 (collecting cases). [11] But even a temporary continuation of business after a plan's confirmation is sufficient to discharge a Chapter 11 debtor's debt. *See In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 804 n.15 (5th Cir. 1997) (recognizing a debtor's "conducting business for two years following Plan confirmation satisfies § 1141(d)(3)(B)" (citation omitted)). That is the case here.

By the plain terms of the Plan, Highland Capital has and will continue its business as the Reorganized Debtor for several years. Indeed, much of this appeal concerns objections to Highland Capital's "continu[ing] to manage the assets of others." Because the Plan contemplates Highland Capital "engag[ing] in business after consummation," 11 U.S.C. § 1141(d)(1), the bankruptcy court correctly held Highland Capital was eligible for automatic discharge of its debts. [12]

B. Absolute Priority Rule

Next, we consider the Plan's compliance with the absolute-priority rule. When assessing whether a plan is " 'fair and equitable" in a cramdown scenario, courts must invoke the absolute-priority rule. 11 U.S.C. § 1129(b)(1); *see* 7 COLLIER ON BANKRUPTCY ¶ 1129.04. Under that rule, if a class of unsecured claimants rejects a plan, the plan must provide that those

claimants be paid in full on the effective date *or* any junior interest "will not receive or retain under the plan ... any property." 11 U.S.C. § 1129(b)(2)(B). [13]

Because class-8 claimants voted against the Plan, the bankruptcy court proceeded by nonconsensual confirmation. The court concluded the Plan was fair and equitable to class 8 and its distributions were in line with the absolute-priority rule. 11 U.S.C. § 1129(b)(2)(B). The Advisors claim the Plan violates the absolute priority rule by giving class-10 and -11 claimants a "Contingent Claimant Trust Interest" without fully satisfying class-8 claimants. We agree the absolute-priority rule applies, and the Plan plainly satisfies it.

The Plan proposed to pay 71% of class-8 creditors' claims with *pro rata* distributions of interest generated by the Claimant Trust and then *pro rata* distributions from liquidated Claimant Trust assets. Classes 10 and 11 received a *pro rata* share of "Contingent Claimant Trust Interests," defined as a Claimant Trust Interest vesting only when the Claimant Trustee certifies that all class-8 claimants have been paid indefeasibly in full and all disputed claims in class 8 have been resolved. Voilà: no interest junior to class 8 will receive any property until class-8 claimants are paid.

But the Advisors point to Highland Capital's testimony and briefs to suggest the ***434** Contingent Claimant Trust Interests (received by classes 10 and 11) are property in some sense because they have value. That argument is specious. Of course, the Contingent Claimant Trust Interests have some small probability of vesting in the future and, thus, has some *de minimis* present value. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207-08, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988) (holding a junior creditor's receipt of a presently valueless equity interest is receipt of property). But the absolute-priority rule has never required us to bar junior creditors from ever receiving property. By the Plan's terms, no trust property vests with class-10 or -11 claimants "unless and until" class-8 claims "have been paid indefeasibly in full." *See* 11 U.S.C. § 1129(b)(2)(B)(ii). That plainly comports with the absolute-priority rule.

C. Bankruptcy Rule 2015.3

We turn to whether the failure to comply with Bankruptcy Rule of Procedure 2015.3 bars the Plan's confirmation. The Independent Directors failed to file periodic financial reports per Federal Rule of Bankruptcy Procedure 2015.3(a) about entities "in which the [Highland Capital] estate holds a substantial or controlling interest." The Advisors claim the failure dooms the Plan's confirmation because the Plan proponent failed to comply "with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). We disagree.

Rule 2015.3 cannot be an applicable provision of Title 11 because the Federal Rules of Bankruptcy Procedure are not provisions of the Bankruptcy Code. *See Bonner v. Adams (In re Adams)*, 734 F.2d 1094, 1101 (5th Cir. 1984) ("The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, provides that the Supreme Court may prescribe 'by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure' in bankruptcy courts."); *cf. In re Mandel*, No. 20-40026, 2021 WL 3642331, at *6 n.7 (5th Cir. Aug. 17, 2021) (per curiam) (noting "Rule 2015.3 implements section 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," which amended 28 U.S.C. § 2073). The Advisors' attempt to tether the rule to the bankruptcy trustee's general duties lacks any legal basis. *See* 11 U.S.C. §§ 704(a)(8), 1106(a)(1), 1107(a). The bankruptcy court, therefore, correctly overruled the Advisors' objection.

D. Factual Findings

One factual finding is in dispute, but we see no clear error. The bankruptcy court found that, despite their purported independence, the Funds are entities "owned and/or controlled by [Dondero]." The Funds ask the court to vacate the factual finding because it threatens the Funds' compliance with federal law and damages their reputations and values. According to the Funds, the characterization is unfair, as *they* are not litigious like Dondero and are completely independent from him. Highland

Capital maintains Dondero has sole discretion over the Funds as their portfolio manager and through his control of the Advisors, so the finding is supported by the record.

"Clear error is a formidable standard: this court disturbs factual findings only if left with a firm and definite conviction that the bankruptcy court made a mistake." *In re Krueger*, 812 F.3d 365, 374 (5th Cir. 2016) (cleaned up). We defer to the bankruptcy court's credibility determinations. *See Randall & Blake, Inc. v. Evans (In re Canion)*, 196 F.3d 579, 587–88 (5th Cir. 1999).

Here, the bankruptcy court drew its factual finding from the testimony of Jason Post, the Advisors' chief compliance officer, and Dustin Norris, an executive vice ***435** president for the Funds and the Advisors. Post testified that the Funds have independent board members that run them. But the bankruptcy court found Post not credible because "he abruptly resigned" from Highland Capital at the same time as Dondero and is currently employed by Dondero. Norris testified that Dondero "owned and/or controlled" the Funds and Advisors. The bankruptcy court found Norris credible and relied on his testimony. The bankruptcy court also observed that none of the Funds' board members testified in the bankruptcy case and all "engaged with the Highland complex for many years." Because nothing in this record leaves us with a firm and definite conviction that the bankruptcy court made a mistake in finding that the Funds are "owned and/or controlled by [Dondero]," we leave the bankruptcy court's factual finding undisturbed.

E. The Protection Provisions

Finally, we address the legality of the Plan's protection provisions. As discussed, the Plan exculpates certain non-debtor third parties supporting the Plan from post-petition lawsuits not arising from gross negligence, bad faith, or willful or criminal misconduct. It also enjoins certain parties "from taking any actions to interfere with the implementation or consummation of the Plan." The injunction requires that, before any lawsuit is filed, the plaintiff must seek the bankruptcy court's approval of the claim as "colorable"—*i.e.*, the bankruptcy court acts as a gatekeeper. Together, the provisions screen and prevent bad-faith litigation against Highland Capital, its successors, and other bankruptcy participants that could disrupt the Plan's effectiveness.

The bankruptcy court deemed the provisions legal, necessary under the circumstances, and in the best interest of all parties. We agree, but only in part. Though the injunction and gatekeeping provisions are sound, the exculpation of certain non-debtors exceeds the bankruptcy court's authority. We reverse and vacate that limited portion of the Plan.

1. *Non-Debtor Exculpation*

We start with the scope of the non-debtor exculpation. In a Chapter 11 bankruptcy proceeding, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Contrary to the bankruptcy court's holding, the exculpation here partly runs afoul of that statutory bar on non-debtor discharge by reaching beyond Highland Capital, the Committee, and the Independent Directors. *See Pacific Lumber*, 584 F.3d at 251–53. We must reverse and strike the few unlawful parts of the Plan's exculpation provision.

The parties agree that *Pacific Lumber* controls and also that the bankruptcy court had the power to exculpate both Highland Capital and the Committee members. Appellants, however, submit the bankruptcy court improperly stretched *Pacific Lumber* to shield other non-debtors from breach-of-contract and negligence claims, in violation of § 524(e). Highland Capital counters that the exculpation provision is a commonplace Chapter 11 term, is appropriate given Dondero's litigious nature, does not implicate § 524(e), and merely provides a heightened standard of care.

To support that argument, Highland Capital highlights the distinction between a concededly unlawful release of all non-debtor liability and the Plain's limited exculpation of non-debtor post-petition liability. *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 246–47 (3d Cir. 2000) (describing releases as "eliminating" a covered ***436** party's liability "altogether" while exculpation

provisions "set[ ] forth the applicable standard of liability" in future litigation). According to Highland Capital, the Third and Ninth Circuits have adopted that distinction when applying § 524(e). *See Blixseth v. Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020), *cert. denied*, —— U.S. ——, 141 S. Ct. 1394, 209 L.Ed.2d 132 (2021); *In re PWS Holding*, 228 F.3d at 246–47. Under those cases, narrow exculpations of post-petition liability for certain critical third-party non-debtors are lawful "appropriate" or "necessary" actions for the bankruptcy court to carry out the proceeding through its statutory authority under § 1123(b)(6) and § 105(a). *See* 11 U.S.C. § 1123(b)(6) ("[A] plan may ... include any other appropriate provision not inconsistent with the applicable provisions of this title."); *id* § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

Highland Capital reads *Pacific Lumber* as "in step with the law in [those] other circuits" by allowing a limited exculpation of post-petition liability. *Cf. Blixseth*, 961 F.3d at 1084. We disagree. As the Ninth Circuit acknowledged, our court in *Pacific Lumber* arrived at "a conclusion opposite [the Ninth Circuit's]." 961 F.3d at 1085 n.7. Moreover, the Ninth Circuit expressly disavowed *Pacific Lumber*'s rationale—that an exculpation provision provides a "fresh start" to a non-debtor in violation of § 524(e)—because, in the Ninth Circuit's view, the post-petition exculpation "affects only claims arising from the bankruptcy proceedings themselves." *Ibid.* We are not persuaded, as Highland Capital contends, that the Ninth Circuit was "sloppy" and simply "misread *Pacific Lumber.*" *See* O.A. Rec. 19:45–21:38.

The simple fact of the matter is that there is a circuit split concerning the effect and reach of § 524(e).[14] Our court along with the Tenth Circuit hold § 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code. *Pacific Lumber*, 584 F.3d at 252–53; *Landsing Diversified Props. v. First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990) (per curiam). By contrast, the Ninth Circuit joins the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits in reading § 524(e) to allow varying degrees of limited third-party exculpations. *Blixseth*, 961 F.3d at 1084; *accord In re PWS Holding*, 228 F.3d at 246–47 (allowing third-party releases for "fairness, necessity to the reorganization, and specific factual findings to support these conclusions"); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *In re Airadigm Commc'ns., Inc.*, 519 F.3d 640, 657 (7th Cir. 2008); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015).

Our *Pacific Lumber* decision was not blind to the countervailing view, as it twice cites the Third Circuit's contrary holding in other contexts. *See* 584 F.3d at 241, 253 (citing *In re PWS Holding*, 228 F.3d at 236–37, 246). But we rejected the parsing between limited exculpations and full releases that Highland Capital now requests. We are obviously bound to apply our own precedent. *See* ***437** *Hidalgo Cnty. Emergency Serv. Found. v. Carranza (In re Hidalgo Cnty. Emergency Serv. Found.)*, 962 F.3d 838, 841 (5th Cir. 2020) ("Under our well-recognized rule of orderliness, ... a panel of this court is bound by circuit precedent." (citation omitted)).

Under *Pacific Lumber*, § 524(e) does not permit "absolv[ing] the [non-debtor] from any negligent conduct that occurred during the course of the bankruptcy" absent another source of authority. 584 F.3d at 252–53; *see also In re Zale Corp.*, 62 F.3d 746, 760 (5th Cir. 1995). At oral argument, Highland Capital pointed only to § 1123(b)(6) and § 105(a) as footholds. *See* O.A. Rec. 16:45–17:28. But in this circuit, § 105(a) provides no statutory basis for a non-debtor exculpation. *In re Zale*, 62 F.3d at 760 (noting "[a] § 105 injunction cannot alter another provision of the code" (citing *In re Oxford Mgmt., Inc.*, 4 F.3d 1329, 1334 (5th Cir. 1993))). And the same logic extends to § 1123(b)(6), which allows a plan to "include any other appropriate provision *not inconsistent with the applicable provisions of this title.*" 11 U.S.C. § 1123(b)(6) (emphasis added).

Pacific Lumber identified two sources of authority to exculpate non-debtors. *See* 584 F.3d at 252–53. The first is to channel asbestos claims (not present here). *Id.* at 252 (citing 11 U.S.C. § 524(g)). The second is to provide a limited qualified immunity to creditors' committee members for actions within the scope of their statutory duties. *Pacific Lumber*, 584 F.3d at 253 (citing 11 U.S.C. § 1103(c)); *see In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1069 (5th Cir. 2012). And, though not before the court in *Pacific Lumber*, we have also recognized a limited qualified immunity to bankruptcy trustees unless they act with gross negligence. *In re Hilal*, 534 F.3d at 501 (citing *In re Smyth*, 207 F.3d 758, 762 (5th Cir. 2000)); *accord Baron v. Sherman (In re Ondova Ltd.)*,

914 F.3d 990, 993 (5th Cir. 2019) (per curiam). If other sources exist, Highland Capital failed to identify them. So we see no statutory authority for the full extent of the exculpation here.

The bankruptcy court read *Pacific Lumber* differently. In its view, *Pacific Lumber* created an additional ground to exculpate non-debtors: when the record demonstrates that "costs [a party] might incur defending against suits alleging such negligence are likely to swamp either [it] or the consummated reorganization." 584 F.3d at 252. We do not read the decision that way. The bankruptcy court's underlying factual findings do not alter whether it has statutory authority to exculpate a non-debtor. That is the holding of *Pacific Lumber*.

That leaves one remaining question: whether the bankruptcy court can exculpate the Independent Directors under *Pacific Lumber*. We answer in the affirmative. As the bankruptcy court's governance order clarified, nontraditional as it may be, the Independent Directors were appointed to act together as the bankruptcy trustee for Highland Capital. Like a debtor-in-possession, the Independent Directors are entitled to all the rights and powers of a trustee. *See* 11 U.S.C. § 1107(a); 7 COLLIER ON BANKRUPTCY ¶ 1101.01. It follows that the Independent Directors are entitled to the limited qualified immunity for any actions short of gross negligence. *See In re Hilal*, 534 F.3d at 501. Under this unique governance structure, the bankruptcy court legally exculpated the Independent Directors.

In sum, our precedent and § 524(e) require any exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors' committee and its members for conduct within the scope of their duties, 11 U.S.C. § 1103(c), and the trustees within the scope of their duties, ***438** *see Baron*, 914 F.3d at 993. And so, excepting the Independent Directors and the Committee members, the exculpation of non-debtors here was unlawful. Accordingly, the other non-debtor exculpations must be struck from the Plan. *See Pacific Lumber*, 584 F.3d at 253. [15]

As it stands, the Plan's exculpation provision extends to Highland Capital and its employees and CEO; Strand; the Reorganized Debtor and HCMLP GP LLC; the Independent Directors; the Committee and its members; the Claimant Trust, its trustee, and the members of its Oversight Board; the Litigation Sub-Trust and its trustee; professionals retained by the Highland Capital and the Committee in this case; and all "Related Persons." Consistent with § 524(e), we strike all exculpated parties from the Plan except Highland Capital, the Committee and its members, and the Independent Directors.

2. *Injunction & Gatekeeper Provisions*

We now turn to the Plan's injunction and gatekeeper provisions. Appellants object to the bankruptcy court's injunction as vague and the gatekeeper provision as overbroad. We are unpersuaded.

First, Appellants' primary contention—that the Plan's injunction "is broad" by releasing non-debtors in violation of § 524(e)—is resolved by our striking the impermissibly exculpated parties. *See supra* Part IV.E.1.

Second, Appellants dispute the permanency of the injunction for the legally exculpated parties by enjoining conduct "on and after the Effective Date." Even assuming the issue was preserved, [16] permanency alone is no reason to alter a bankruptcy court's otherwise-lawful injunction on appeal. *See In re Zale*, 62 F.3d at 759–60 (recognizing the bankruptcy court's jurisdiction to issue an injunction in the first place allowed it to issue a permanent injunction).

Third, the Advisors argue that the injunction is "overbroad and vague" because it does not define what it means to "interfere" with the "implementation or consummation of the Plan." That is unsupported by the record. As the bankruptcy court recognized, the Plan defined what constitutes interference: (i) filing a lawsuit, (ii) enforcing judgments, (iii) enforcing security ***439** interests, (iv) asserting setoff rights, or (v) acting "in any manner" not conforming with the Plan. The injunction is not unlawfully overbroad or vague.

Finally, Appellants maintain that the gatekeeper provision impermissibly extends to unrelated claims over which the bankruptcy court lacks subject-matter jurisdiction. *See In re Craig's Stores of Tex., Inc.*, 266 F.3d 388, 390 (5th Cir. 2001) (noting a bankruptcy court retains jurisdiction post-confirmation only over "matters pertaining to the implementation or execution of the plan" (citations omitted)). While that may be the case, our precedent requires we leave that determination to the bankruptcy court in the first instance.

Courts have long recognized bankruptcy courts can perform a gatekeeping function. Under the "*Barton* doctrine," the bankruptcy court may require a party to "obtain leave of the bankruptcy court before initiating an action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity." *Villegas v. Schmidt*, 788 F.3d 156, 159 (5th Cir. 2015) (emphasis added) (quoting *Carter v. Rodgers*, 220 F.3d 1249, 1252 (11th Cir. 2000)); *accord Barton v. Barbour*, 104 U.S. 126, 26 L.Ed. 672 (1881). [17] In *Villegas*, we held "that a party must continue to file with the relevant bankruptcy court for permission to proceed with a claim against the trustee." 788 F.3d at 158. Relevant here, we left to the bankruptcy court, faced with pre-approval of a claim, to determine whether it had subject matter jurisdiction over that claim in the first instance. *Id.* at 158–59; *see, e.g., Carroll v. Abide*, 788 F.3d 502, 506–07 (5th Cir. 2015) (noting *Villegas* "rejected an argument that the *Barton* doctrine does not apply when the bankruptcy court lacked jurisdiction"). In other words, we need not evaluate whether the bankruptcy court would have jurisdiction under every conceivable claim falling under the widest interpretation of the gatekeeper provision. We leave that to the bankruptcy court in the first instance. [18]

* * *

In sum, the Plan violates § 524(e) but only insofar as it exculpates and enjoins certain non-debtors. The exculpatory order is therefore vacated as to all parties *except* Highland Capital, the Committee and its members, and the Independent Directors for conduct within the scope of their duties. We otherwise affirm the inclusion of the injunction and the gatekeeper provisions in the Plan. [19]

***440** V. CONCLUSION

Highland Capital's motion to dismiss the appeal as equitably moot is DENIED. The bankruptcy court's judgment is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

All Citations

48 F.4th 419, Bankr. L. Rep. P 83,811

Footnotes

1 The Dugaboy Investment Trust appeals alongside Dondero's other family trust Get Good Trust (collectively, the "Trusts").

2 First, Redeemer Committee of the Highland Crusader Fund had obtained a $191 million arbitration award after a decade of litigation against Highland Capital. Second, Acis Capital Management, L.P. and Acis Capital Management GP, LLC had sued Highland Capital after facing an adverse $8 million arbitration award, arising in part from its now-extinguished affiliation. Third, UBS Securities LLC and UBS AG London Branch had received a $1 billion judgment against Highland

Capital following a 2019 bench trial in New York. Fourth, discovery vendor Meta-E Discovery had $779,000 in unpaid invoices. The Committee members are not parties on appeal.

3 The Plan calls this entity "New GP LLC," but according to the motion to dismiss as equitably moot, the new general partner was later named HCMLP GP LLC. For the sake of clarity, we use HCMLP GP LLC.

4 The Plan generously defines "Related Persons" to include all former, present, and future officers, directors, employees, managers, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, heirs, agents, other representatives, subsidiaries, divisions, and managing companies.

5 The Plan expressly excludes from the protections Dondero and Okada; NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P.; their subsidiaries, managed entities, managed entities, and members; and the Dugaboy Investment Trust and its trustees, among others.

6 The bankruptcy court must proceed by nonconsensual confirmation, or "cramdown," 11 U.S.C. § 1129(b), when a class of unsecured creditors rejects a Chapter 11 reorganization plan, *id.* § 1129(a)(8), but at least one impaired class accepts it, *id.* § 1129(a)(10). A cramdown requires that the plan be "fair and equitable" to dissenting classes and satisfy the absolute priority rule—that is, dissenting classes are paid in full before any junior class can retain any property. *Id.* § 1129(b)(2)(B); *see Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441–42, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999).

7 The Trusts adopt the Funds' and the Advisors' briefs in full, and Dondero adopts the Funds' brief in full and the Advisors' brief in part. FED. R. APP. P. 28(i).

8 The doctrine's atextual balancing act has been criticized. *See In re Pac. Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009) ("Despite its apparent virtues, equitable mootness is a judicial anomaly."); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 438–54 (3rd Cir. 2015) (Krause, J., concurring); *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (banishing the term "equitable mootness" as a misnomer); *In re Cont'l Airlines*, 91 F.3d 553, 569 (3d Cir. 1996) (en banc) (Alito, J., dissenting); *see also* Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 Am. Bankr. L.J. 377, 393–96 (2019) (addressing the varying applications between circuits). *But see In re Trib. Media*, 799 F.3d at 287–88 (Ambro, J., concurring) (highlighting some benefits of the equitable mootness doctrine).

9 Since the Plan's effectuation, Highland Capital paid $2.2 million in claims to a committee member and $525,000 in "cure payments" to other counterparties. The independent directors resigned. The Reorganized Debtor, the Claimant Trust, HCMLP GP LLC, and the Litigation Sub-Trust were created and organized in accordance with the Plan. The bankruptcy court appointed the Oversight Board members, the Litigation Sub-Trust trustee, and the Claimant Trust trustee. Highland Capital assumed certain service contracts, including management of twenty CLOs with approximately $700 million in assets, and transferred its assets and estate claims to the successor entities. Highland Capital's pre-petition partnership interests were cancelled and cease to exist. A third party, Blue Torch Capital, infused $45 million in exit financing, fully guaranteed by the Reorganized Debtor, its operating subsidiaries, the Claimant Trust, and most of their assets. From the exit financing, an Indemnity Trust was created to indemnify claims that arise against the Reorganized Debtor, Claimant Trust, Ligation Sub-Trust, Claimant Trustee, Litigation Trustee, or Oversight Board members. The lone class-1 creditor withdrew its claim against Highland Capital. The lone class-2 creditor has been fully paid approximately $500,000 and issued a note of $5.2 million secured by $23 million of the Reorganized Debtor's assets. Classes 3 and 4 have been paid $165,412. Class 7 has received $5.1 million in distributions from the Claimant Trust, totaling 77% of class-7 claims filed.

10 While the issue is nearly forfeited for inadequate briefing, it fails on the merits regardless. *See Roy v. City of Monroe*, 950 F.3d 245, 251 (5th Cir. 2020).

11 *See, e.g., In re W. Asbestos Co.*, 313 B.R. 832, 853 (Bankr. N.D. Cal. 2003) (holding corporate debtor was not engaging in business by merely having directors and officers, rights under an insurance policy, and claims against it); *In re Wood*

Fam. Ints., Ltd., 135 B.R. 407, 410 (Bankr. D. Colo. 1989) (holding corporate debtor was not engaging in business when the plan called for liquidation and discontinuation of its business upon confirmation).

12 For the same reasons, we reject the Trusts' follow-on argument extending the same logic to the protection provisions.

13 *See Pacific Lumber*, 584 F.3d at 244 (noting the rule "enforces a strict hierarchy of [creditor classes'] rights defined by state and federal law" to protect dissenting creditor classes); *see also In re Geneva Steel Co.*, 281 F.3d 1173, 1180 n.4 (10th Cir. 2002) ("[U]nsecured creditors stand ahead of investors in the receiving line and their claims must be satisfied before any investment loss is compensated." (citations omitted)).

14 Amicus's contention that failing to adopt the Ninth Circuit's holding "would generate a clear circuit split" is wrong. There already is one. *See* Petition for Writ of Certiorari, *Blixseth v. Credit Suisse*, 141 S. Ct. 1394 (highlighting the circuits' divergent approaches to the non-debtor discharge bar under § 524(e)).

15 Highland Capital, like the bankruptcy court, claims the *res judicata* effect of the January and July 2020 orders appointing the independent directors and appointing Seery as CEO binds the court to include the protection provisions here. We lack jurisdiction to consider collateral attacks on final bankruptcy orders even when it concerns whether the court properly exercised jurisdiction or authority at the time. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009); *In re Linn Energy, L.L.C.*, 927 F.3d 862, 866–67 (5th Cir. 2019) (quoting *Bailey*, 557 U.S. at 152, 129 S.Ct. 2195). To the extent Appellants seek to roll back the protections in the bankruptcy court's January 2020 and July 2020 orders (which is not clear from their briefing), such a collateral attack is precluded.

As a result, the bankruptcy court was correct insofar as *those* orders have the effect of exculpating the Independent Directors and Seery in his executive capacities, but it was incorrect that *res judicata* mandates their inclusion in the Plan's new exculpation provision. Despite removal from the exculpation provision in the confirmation order, the Independent Directors' agents, advisors, and employees, as well as Seery in his official capacities are all exculpated to the extent provided in the January and July 2020 orders, given the orders' ongoing *res judicata* effects and our lack of jurisdiction to review those orders. But that says nothing of the effect of the Plan's exculpation provision.

16 *See Roy*, 950 F.3d at 251 ("Failure adequately to brief an issue on appeal constitutes waiver of that argument." (citation omitted)).

17 The Advisors also maintain that Highland Capital is neither a receiver nor a trustee, so *Barton* has no application here. We disagree. Highland Capital, for all practical purposes, was a debtor in possession entitled to the rights of a trustee. *See* 7 Collier on Bankruptcy ¶ 1101.01 ("The debtor in possession is generally vested with all of the rights and powers of a trustee as set forth in section 1106 ...."); *see also Carter*, 220 F.3d at 1252 n.4. (finding no distinction between bankruptcy court "approved" and bankruptcy court "appointed" officers).

18 For the same reasons, we also leave the applicability of *Barton*'s limited statutory exception to the bankruptcy and district courts in the first instance. *See* 28 U.S.C. § 959(a) (allowing suit, without leave of the appointing court, if the challenged acts relate to the trustee or debtor in possession "carrying on business connected with [their] property").

19 Nothing in this opinion should be construed to hinder the bankruptcy court's power to enjoin and impose sanctions on Dondero and other entities by following the procedures to designate them vexatious litigants. *See In re Carroll*, 850 F.3d 811, 815 (5th Cir. 2017) (per curiam). But non-debtor exculpation within a reorganization plan is not a lawful means to impose vexatious litigant injunctions and sanctions.

End of Document

539 F.Supp.3d 305
United States District Court, S.D. New York.

David MOYAL, Plaintiff,
v.
MÜNSTERLAND GRUPPE GMBH & CO. KG d/b/a Original Antique Furniture, Defendant.

1:19-cv-04946 (SDA)
|
Signed 05/17/2021

Synopsis

Background: Distributor brought action in state court against German company for breach of contract, seeking damages for company's alleged breach of a distribution agreement. Action was removed to federal court. Company filed motion to dismiss or stay due to insolvency proceeding which it initiated in Germany, and company's counsel filed motion to withdraw.

Holdings: The District Court, Stewart D. Aaron, United States Magistrate Judge, held that:

company established that its insolvency proceeding was procedurally fair and did not contravene the laws or public policy of the United States;

company's counsel had authority to file motion to dismiss or stay;

distributor had notice of insolvency proceeding; and

company's counsel showed satisfactory reasons for withdrawal.

Motion to dismiss granted.

Motion to withdraw granted.

Procedural Posture(s): Motion to Dismiss; Motion to Withdraw as Counsel.

Attorneys and Law Firms

***306** Michael J. Kapin, Michael J. Kapin, P.C., New York, NY, for Plaintiff.

Gregory Lamar Smith, Law Office of Gregory L. Smith, Brooklyn, NY, for Defendant.

Munsterland Gruppe GmbH & Co. KG, Pro Se.

OPINION AND ORDER

STEWART D. AARON, UNITED STATES MAGISTRATE JUDGE.

**1 *307 Pending before the Court are a motion by Defendant Münsterland Gruppe GmbH & Co. KG ("Defendant" or "MGKG") to dismiss or stay due to the pendency of insolvency proceedings in Germany. (Def.'s Mot., ECF No. 99), and a motion by Defendant's counsel to withdraw due to the insolvency proceedings. (Mot. to Withdraw, ECF No. 109.) For the reasons set forth below, Defendant's motion to dismiss and Defendant's counsel's motion to withdraw are GRANTED.

BACKGROUND

On February 1, 2019, this action was commenced by Plaintiff David Moyal ("Plaintiff") in the New York County Supreme Court seeking damages from MGKG for breach of a distribution agreement. (*See* Summons & Compl., ECF No. 1-1.) On May 28, 2019, the action was removed to this Court. (*See* Notice of Removal, ECF No. 1.) On July 5, 2019, a First Amended Complaint ("FAC") was filed. (*See* FAC, ECF No. 13.)

On March 12, 2020, the parties filed a joint motion for a default to be entered as to the FAC, whereby MGKG "concede[d] [Plaintiff's] allegations relating to liability set forth in his [FAC], and assert[ed] its right to contest [Plaintiff's] evidence of damages, if any, upon his application for a default judgment." (Joint Mot. at 1-2.) MGKG stated that it was conceding liability because it "does not have the financial resources to defend this action and also defend against a judgment enforcement action that [Defendant] anticipates [Plaintiff] would commence in Germany if he were to obtain a judgment herein." (Kobelboom Decl., ECF No. 55-1, ¶ 2.) On March 16, 2020, District Judge Schofield referred this action to me for a contested damages inquest. (3/16/20 Order, ECF No. 56; Order of Ref., ECF No. 57.) The parties thereafter filed numerous submissions in connection with the inquest. (*See* ECF Nos. 66-71, 78.)

On November 13, 2020, Judge Schofield approved the parties' consent for me to conduct all proceedings in this case, including the entry of final judgment. (Consent, ECF No. 79.) Following oral argument on December 2, 2020, the parties filed various additional submissions required by the Court in the ensuing months, after procuring extensions of time to do so. (*See* ECF Nos. 87-88, 91, 94, 96-98, 102-03.)

On March 11, 2021, MGKG and its general partner, Münsterland Gruppe Verwaltungs GmbH ("MGVG"), commenced a proceeding in the District Court of Münster, Germany (the "German Court") seeking bankruptcy protection under the German Insolvency Act. (Galik Decl., ECF No. 99-1, ¶ 3.) Under Section 240 of the German Code of Civil Procedure, the commencement of the bankruptcy proceeding automatically stayed all previously filed actions against MGKG. (*Id.* ¶ 4; *see also* Reiter Decl., ECF No. 114-1, ¶ 5.) Pursuant to an Order issued by the German Court on March 11, 2021, Andreas Sontopski ("Sontopski") was appointed by the German Court as insolvency administrator. (*See* Galik Decl. Ex. A (German Court Preliminary Order), ECF No. 99-2, at 2, 3; Reiter Decl. ¶ 6.)

On March 26, 2021, MGKG filed its motion to dismiss or stay due to the insolvency proceedings in Germany. (*See* Def.'s Mot.) On April 8, 2021, Gregory Smith ("Smith"), MGKG's counsel of record in this action, was advised by Sontopski's attorney that, by operation of German law, ***308** Smith's mandate to act for MGKG was terminated upon the filing of MGKG's insolvency proceeding and that Smith no longer was authorized to represent MGKG in this action. (*See* Smith 4/8/21 Decl., ECF No. 109-1, ¶ 3.) On April 8, 2021, Defendant's counsel filed his motion to withdraw, pursuant to Local Civil Rule 1.4. (*See* Mot. to Withdraw.)

**2 On April 21, 2021, Plaintiff filed his opposition to Defendant's motion to dismiss or stay. (Pl.'s Opp. Mem., ECF No. 112.) On April 27, 2021, Defendant filed its reply. (Def.'s Reply, ECF No. 114.)

LEGAL STANDARDS

I. Comity And Foreign Bankruptcy Proceedings

Comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 40 L.Ed. 95 (1895). "[I]nternational comity" encompasses "two distinct doctrines": (1) a "canon of construction [that] might shorten the reach of a statute"; and (2) "comity among courts," which is "a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *In re Maxwell Commc'n Corp. plc*, 93 F.3d 1036, 1047 (2d Cir. 1996).

"Abstention comity, or 'comity among courts,' is concerned with which court should decide the parties' rights, and relatedly, whether a U.S. court should enforce a foreign bankruptcy court's order relating to the debtor's assets or the adjudication of a creditor's claims." *In re SunEdison, Inc.*, 577 B.R. 120, 131 (Bankr. S.D.N.Y. 2017). "Abstention comity aims to prevent an 'end-run' around the foreign bankruptcy proceeding by a creditor seeking to collect a claim against a foreign debtor through a U.S. court proceeding instead of through the foreign bankruptcy case." *Id.* (citations omitted).

"The mere existence of parallel foreign proceedings does not negate the district courts' 'virtually unflagging obligation ... to exercise the jurisdiction given them.' " *Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms. Inc.*, 466 F.3d 88, 92 (2d Cir. 2006) (alteration in original) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)). Foreign bankruptcy proceedings, however, generally are an exception to this rule. "[O]ne discrete category of foreign litigation ... generally requires the dismissal of parallel district court actions—foreign bankruptcy proceedings. A foreign nation's interest in the 'equitable and orderly distribution of a debtor's property' is an interest deserving of particular respect and deference, and accordingly we have followed the general practice of American courts and regularly deferred to such actions." *Royal & Sun Alliance Ins. Co. of Canada.*, 466 F.3d at 92-93.

Deference to foreign bankruptcy proceedings is appropriate where "the foreign proceedings are procedurally fair and ... do not contravene the laws or public policy of the United States." *JP Morgan Chase Bank v. Altos Hornos de Mexico. S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005); *see also* *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999) ("We have repeatedly noted the importance of extending comity to foreign bankruptcy proceedings."). The burden is ***309** on the party urging the district court to defer to a foreign proceeding as a matter of comity to prove that comity is appropriate. *See* *Allstate Life Ins. Co. v. Linter Group. Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993).

II. Withdrawal Of Counsel

****3** Local Civil Rule 1.4 sets forth the requirements for an attorney to withdraw as counsel of record in an action pending in this Court. Local Civil Rule 1.4 provides in relevant part:

> An attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the Court and may not withdraw from a case without leave of the Court granted by order. Such an order may be granted only upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar, and whether or not the attorney is asserting a retaining or charging lien. All applications to withdraw must be served upon the client and (unless excused by the Court) upon all other parties.

S. & E.D.N.Y. Local Civ. R. 1.4.

APPLICATION

I. This Action Is Dismissed Based Upon Principles Of Comity

The Court carefully has reviewed the declarations filed by MGKG in connection with its motion and finds that MGKG has met its burden to prove that comity is appropriate in this case, since it has shown that the German insolvency proceedings are procedurally fair and do not contravene the laws or public policy of the United States. Here, the German insolvency laws "comport with due process and fairly treat claims of [U.S.] creditors." *See* *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 714 (2d Cir. 1987). As set forth in the declaration submitted by MGKG from German-qualified counsel, Peter Galik (*see* Galik Decl. ¶¶ 4-6), "(1) the [German Court] shares our policy of equal distribution of assets; and (2) [German] law mandates the issuance [of a] stay." *Philadelphia Gear Corp. v. Phila. Gear, S.A.*, 44 F.3d 187, 193 (3d Cir. 1994). German law makes no distinction between, and gives no preference to, claims by foreign or German creditors based on their nationality. (*See* Galik Decl. ¶ 6.) In addition, the MGKG bankruptcy proceeding automatically stayed all previously filed actions against MGKG. (*See id.* ¶ 4.)

Plaintiff himself acknowledges that "the matter of comity is a generally accepted principle." (*See* Pl.'s Opp. Mem. at 5.) Moreover, the objections raised by Plaintiff to the relief sought by Defendant are meritless. First, Plaintiff contends that Smith did not have authority to file Defendant's motion to dismiss or stay. (*See id.* at 3.) This contention is baseless, as Smith still was counsel of record for Defendant at the time he filed such motion.[1]

Second, Plaintiff contends that Defendant's motion is "suspect" because MGVG is the "parent company" of MGKG, and Defendant failed to disclose the identity of MGVG in its Rule 7.1 Statement filed in this Court. (*See* Pl.'s Opp. Mem. at 3-4.) This contention also is baseless. ***310** Rule 7.1 of the Federal Rules of Civil Procedure requires disclosure of a corporate party's "parent corporation" and any publicly traded corporation owning 10% or more of the party's stock. Fed. R. Civ. P. 7.1.[2] As Defendant disclosed when it removed this action to this Court, "Münsterland Verwaltungs [Gruppe] GmbH" is MGKG's general partner. (*See* Notice of Removal ¶ 2.) Thus, MGVG is not MGKG's parent company, and there is nothing "suspect" about MGKG's ownership structure or the disclosure it made about such structure.

****4** Third, Plaintiff contends that it did not receive "formal notice" of the German insolvency proceedings. (*See* Pl.'s Opp. Mem. at 4-5.) Plaintiff was made aware of the insolvency proceedings no later than March 26, 2021. In a letter Plaintiff's counsel filed with the Court on that date, Plaintiff's counsel acknowledged having been advised by Defendant's counsel about the insolvency proceeding. (*See* Pl.'s 3/26/21 Ltr., ECF No. 98, at 1 n.1.) In any event, on April 26, 2021, Defendant sent formal notice to Plaintiff. (*See* Reiter Decl. ¶ 9 & Ex. A.)

Accordingly, the Court finds that comity is appropriate and therefore dismisses this action.[3]

II. Smith Is Relieved As Counsel For MGKG

Smith has complied with the requirements of Local Civil Rule 1.4 and shown satisfactory reasons for withdrawal in this action, since he no longer has authority to act on behalf of MGKG. As required under Local Civil Rule 1.4, he has stated that he is not seeking a retaining or charging lien and has served Plaintiff and MGKG with copies of his motion. (*See* Smith 4/8/21 Decl. ¶¶ 5, 7.) Thus, his motion to withdraw is granted.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is GRANTED and Defendant's counsel's motion to withdraw as counsel is GRANTED.

SO ORDERED.

All Citations

539 F.Supp.3d 305, 2021 WL 1963899

Footnotes

[1] Plaintiff's suggestion that the insolvency trustee appointed under German law should have commenced a proceeding in U.S. bankruptcy court under Chapter 15 of the Bankruptcy Code to seek a stay of this action in the District Court is absurd and would fly in the face of comity principles. *See* 8 Collier on Bankruptcy ¶ 1509.02 (16th ed. 2021) ("[C]ourts regularly rule that chapter 15 recognition is not a prerequisite to grant comity to foreign proceedings on the request of a party other than a foreign representative.").

[2] The purpose of Rule 7.1 is to provide judges with information to determine whether they possess financial interests in the litigants before them. *See* Fed. R. Civ. P. 7.1, Notes of Advisory Committee on 2002 Amendments ("The information required by Rule 7.1(a) reflects the 'financial interest' standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This information will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c)."). The disclosures required by Rule 7.1 "may seem limited," yet they "are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect." *Id.*

[3] The Court notes that Plaintiff is not prejudiced by this outcome. Even if the Court had entered a default judgment in a sum certain, MGKG would be entitled to the protections of German bankruptcy law.

End of Document

2011 WL 832881
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

ORCHARD ENTERPRISE NY, INC., Plaintiff,
v.
MEGABOP RECORDS LTD. T/a Mbop Digital, Defendants.

No. 09 CIV 9607(GBD).
|
March 4, 2011.

MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, District Judge.

***1** Plaintiff Orchard Enterprise brings this action for breach of contract against Defendant Megabop Records. Defendant removed this case from New York State Supreme Court on November 18, 2009. After requesting and receiving an extension of time, Defendant answered on December 19, 2009. After Defendant's counsel withdrew, this Court issued an order to show cause requiring Defendant to appoint new counsel or to show cause why default judgment should not be entered against them. After Defendant informed this Court that it would not defend this action, Plaintiff moved for a default judgment pursuant to Fed.R.Civ.P. 55(a).

I. FACTS

In 2007, Plaintiff and Defendant entered into a Digital Content License Agreement ("License Agreement") where Plaintiff agreed to provide Defendant with music recordings. Under the contract, Defendant would reproduce and distribute recordings via the internet to its authorized customers. The contract contained a forum selection clause that granted this Court or the Supreme Court of New York exclusive jurisdiction.

Pursuant to the License Agreement, Plaintiff delivered various recordings and Defendant allegedly failed to pay in full. Plaintiff alleges that Defendant paid $20,000 to Plaintiff and there is an unpaid balance of $175,039.69.

II. PROCEDURAL HISTORY

This case was initially assigned to Judge Chin. Upon reassignment, this Court scheduled an initial pretrial conference for August 11, 2010. Before that date, Defendant's counsel withdrew. In granting Defense counsel's request, this Court ordered the Defendant to obtain new counsel by August 2, 2010. The Defendant failed to comply and subsequently failed to appear for the Court's next ordered pretrial conference on December 13, 2010.

On October 14, 2010, this Court denied Plaintiff's motion to strike Defendant's answer and motion for judgment pursuant to Fed.R.Civ.P. 16(f) and 37(b)(2)(a) but issued an order to show cause ordering that Defendant obtain counsel and provide good cause, in writing, why default judgment should not be entered against it by November 30, 2010.

On November 8, 2010, this Court received a letter from Taylor Hampton, an English solicitor ("November 8 Letter"), stating that Defendant was insolvent and applied for an administrator in England. Mr. Hampton described this process in England as comparable to a Chapter 11 bankruptcy proceeding in the U.S. This letter stated that Defendant would request a stay of this proceeding while an administrator was appointed in England. Included with this correspondence was a document from the English High Court of Justice, which stated an intention to appoint an administrator. Defendant never petitioned for a stay.

On November 30, 2010, this Court received another letter ("November 30 th Letter') from I.D. Yeruill ("Joint Liquidator") who was appointed as Joint Liquidator for the Defendant on November 18, 2010 in England. This letter classified Defendant's pending English proceedings as "Formally in Administration—High Court of Justice" and "now in creditor's voluntary liquidation." The Joint Liquidator informed this Court that the Defendant was insolvent, undergoing liquidation, and would not defend against this pending action.

III. DEFAULT JUDGMENT

***2** A party may move for default judgment against an adversary who has failed to answer, appear or otherwise defend. Fed.R.Civ.P. 55(a). When determining whether to grant or deny a motion for default judgment "the court may consider numerous factors, including whether plaintiff has been substantially prejudiced by the delay and whether the grounds for default are clearly established or in doubt." *O'Callaghan v. Sifre,* 242 F.R.D. 69, 2007 U.S. Dist. LEXIS 25244 at *73, 2007 WL 962872 (S.D.N.Y. Mar.14, 2007). The Court also considers the factors for vacating a default judgment. *Id.* In this analysis, the Court examines: (1) whether the failure to respond was willful; (2) whether defendants have a meritorious defense, and (3) whether plaintiff was prejudiced by the delay. *Olvera v. New Ko–Sushi,* No. 10 Civ 4643(PKC), 2011 U.S. Dist. LEXIS 17650 at *4, 2011 WL 724699 (S.D.N.Y Feb. 16, 2011); *Pecarsky v. Glaxiwood.com Ltd.,* 249 F.3d 167, 171 (2d Cir.2001).

The Second Circuit has held that a default judgment is appropriate "when [Defendant] willfully disregard[s][a] district court's order." *Eagle Assocs. V. Bank Montreal,* 926 F.2d 1305, 1310 (2d Cir.1991) (finding default judgment properly entered when defendant ignored court order to obtain new counsel within a month). "Such cavalier disregard for a court order is a failure, under Rule 55(a), to otherwise defend as provided by these rules.' " *Eagle Assocs.,* 926 F.2d at 1310; (citing *Shapiro, Bernstein & Co. v. Continental Record Co.,* 386 F.2d 426, 427 (2d Cir.1967)).

Here, the Defendant, like in *Eagle Assocs.,* has failed to comply with the Court's orders. Thus, Defendants have demonstrated a willful failure to respond to the pending action. *See id.* Since August 2010, the Defendant has repeatedly failed to obtain U.S. counsel and appear or defend this action. Further, Defendant explicitly informed the Court that it would not defend this action.

IV. DEFENDANT'S VOLUNTARY ENGLISH BANKRUPTCY

In the letter submitted by the English Liquidators, Defendant contends that this matter should be stayed pending Defendants voluntary, informal English dissolution. Before English Liquidators "can appear in this action, seek a stay or intervene ... they must obtain recognition under Chapter 15." *Reserve Intern. Liquidity Fund, Ltd. v. Caxton,* No. 09 Civ. 9021(PGG), 2010 WL 1779282, at * 7, (S.D.N.Y. Apr.29, 2010). "Chapter 15 of the Bankruptcy Code was enacted in 2005 to 'to provide effective mechanisms for dealing with cases of cross-border insolvency.' " *Id.* (citing 11 U.S.C. § 1501(a)(1)-(5)). Before a foreign bankruptcy proceeding can be recognized in a United States court, its foreign representative must petition the court and apply for recognition of the foreign proceeding. 11 U.S.C.A. § 1517. Only after recognition is granted, then "the foreign representative may apply directly to the court of the United States for appropriate relief in that court," such as a stay. 11 U.S.C.A. § 1509(b)(2) (b)(3); *see also* *United States v. J.A. Jones Constr. Group, LLC, 333 B.R. 637, 639 (E.D.N.Y.2005)*. (holding under Chapter 15, foreign representatives must be recognized in order to seek a stay from a federal court). "A federal court's recognition of representatives appointed in the course of a federal bankruptcy or liquidation proceeding is a matter of comity-it is an acknowledgement of the validity of the foreign proceeding. *Reserve Intern. Liquidity Fund, Ltd. v. Caxton,* No. 09 Civ. 9021(PGG), 2010 WL 1779282, at *5 (S.D.N.Y. Apr.29, 2010); (citing *see* *Finanz AG Zurich v. Banco Economico S.A.,* 192 F.3d 240, 246 (2d Cir.1999)).

1. Applying for Recognition

***3** A foreign proceeding can only be recognized when the debtor's foreign representative petitions a U.S. court. 11 U.S.C. § 17. A "foreign representative means a person or body ... authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24).

A petition must include: (1) "a certified copy of decision commencing such foreign proceeding and appointing the foreign representative;" (2) "a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representation;" or (3) "in the absence of evidence referred to in paragraph (1) and (2), any evidence acceptable to the court of the existence of such foreign proceedings and of the appointment of the foreign representative." 11 U.S.C. § 1515(b)(1)-(b)(3). Additionally, a petition for recognition must include a statement "identifying all foreign proceedings with respect to the debtor that are known to the foreign representative." 11 U.S.C. § 1515(c). Congress intended for these requirements to be strictly construed. The House of Representatives Report noted that prior courts had:

> granted comity suspensions or dismissal of cases involving foreign proceedings without requiring [a] petition or even referring to the requirements of that section. Even if the result is correct in a particular case, the procedure is to avoid the requirements of this chapter and the expert scrutiny of the bankruptcy court by applying directly to a state or Federal court unfamiliar with the statutory requirements.

Reserve Intern. Liquidity Fund, Ltd. v. Caxton, No. 09 Civ. 9021(PGG), 2010 WL 1779282, at *5(S.D.N.Y. Apr.29, 2010), (quoting H .R. Rep. No. 109–31 at 110–11 (2005)).

Here, the Defendant failed to satisfy the strict statutory requirements for recognition under Chapter 15. The Defendant has not attempted to obtain Chapter 15 recognition of any pending English proceedings. The Defendant did not formally petition any court for recognition with either a certified copy of a decision in foreign proceeding or a certificate from the foreign court declaring a bankruptcy proceeding and appointment of foreign representative.

Even if the November 8 th letter submitted to the Court by the "Joint Liquidator" is a petition to the court for recognition, it falls far below the statutory requirements and the legislative intent of Chapter 15. The November 8th letter makes no

reference to Chapter 15 statutory requirements. It does not request that the Joint Liquidators be recognized as foreign representatives. It does not provide a summary of the Defendant's foreign proceedings. It is also filed in this Court and not before the Bankruptcy Court. *See* *J.A. Jones Const. Group,* 333 B.R. 637, 638 ("relief under Chapter 15 is available only after a foreign representative commences an ancillary proceeding for recognition of a foreign proceeding *before the bankruptcy court."*) Because it does not comport with the strict statutory requirements of Chapter 15, no stay was issued pursuant to the November 8 letter. Therefore, the voluntary, informal bankruptcy proceeding in England has no impact on this case. Default judgment is therefore granted.

V. DAMAGES

***4** "While a party's default is deemed to constitute a concession of all well pleaded allegations of liability, it is not considered an admission of damages." *Greyhound Exhibit group. Inc. v. E.L.U.L. Realty Corp.,* 973 F.2d 155, 158 (2d Cir.1992); *Flaks v. Koegel,* 504 F.2d 702, 707 (2d Cir.1974). "Allegations in the complaint with respect to the amount of damages are not deemed true." *Credit Lyonnais Securities (USA), Inc. v. Alcantara,* 183 F.3d 151, 155 (2d Cir.1999). Rule 55(b)(2) of the Federal Rules of Civil Procedure states that to determine damages when entering a default judgment "the court may conduct ... a hearing." *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., Div. Of Ace Young Inc.,* 109 F.3d 105, 111 (2d Cir.1997). "Damages, which are neither susceptible of mathematical computation nor liquidated as of the default, usually must be established by the plaintiff in an evidentiary proceeding in which the defendant has the opportunity to contest the amount." *Greyhound Exhitbitgroup,* 973 F.2d at 158. The Court must determine the proper method for calculating damages. *Credit Lyonnais Securities,* 183 F.3d at 155. Pursuant to Fed.R.Civ.P. 55(b)(2), this Court refers the matter to Magistrate Judge Gorenstein for an inquest on damages.

VI. CONCLUSION

Plaintiff's motion for a default judgment is granted. The matter is referred to the Magistrate Judge for an inquest on damages.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 832881

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Hon. Lisa G. Beckerman is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Feb. 26, 2021. From May 1999 until she was appointed to the bench, she was a partner in the financial restructuring group at Akin Gump Strauss Hauer & Feld LLP. From September 1989 until May 1999, she was an associate and then a partner in the bankruptcy group at Stroock & Stroock & Lavan LLP. Prior to her appointment, Judge Beckerman served as a co-chair of the Executive Committee of UJA-Federation of New York's Bankruptcy and Reorganization Group, as co-chair and as a member of the Advisory Board of ABI's New York City Bankruptcy Conference, and as a member of ABI's Board of Directors of from 2013-19. She is a Fellow and a member of the board of directors of the American College of Bankruptcy and a member of the National Conference of Bankruptcy Judges (NCBJ) and the 2021 NCBJ Education Committee. She also is a member of the Dean's Advisory Board for Boston University School of Law. Judge Beckerman received her A.B. from University of Chicago in 1984, her M.B.A. from the University of Texas in 1986 and her J.D. from Boston University in 1989.

Hon. Martin Glenn is Chief U.S. Bankruptcy Judge for the Southern District of New York in New York, initially sworn in on Nov. 30, 2006, and appointed Chief Judge on March 1, 2022. 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 Fellow in the American College of Bankruptcy and a member of the American Law Institute, International Insolvency Institute, New York Federal-State Judicial Council, New York City Bar, National Conference of Bankruptcy Judges, Federal Bar Council and ABI. He is a past member of the Committee on International Judicial Relations of the U.S. Judicial Conference and the Bankruptcy Judge Advisory Group of the Administrative Office of the U.S. Courts. In addition, he is an adjunct professor at Columbia Law School, a contributing author to *Collier on Bankruptcy* and a frequent lecturer on bankruptcy-related issues. 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. Scott M. Grossman is a U.S. Bankruptcy Judge for the Southern District of Florida in Fort Lauderdale, sworn in on Oct. 2, 2019. He previously was a shareholder with a large international law firm in its global restructuring and bankruptcy practice, and he represented distressed companies, debtors, secured and unsecured creditors, official committees, trustees, landlords and purchasers of distressed assets, and worked on bankruptcy cases across various industries, including real estate, hospitality, health care, entertainment, banking, technology, energy and financial fraud. While primarily involved in chapter 11 reorganizations, he also represented clients in out-of-court workouts and restructurings, chapter 7 liquidations, receiverships, assignments for the benefit of creditors and insolvency-related litigation. Judge Grossman was active in local bar activities, including having served as president of the Bankruptcy Bar Association of the Southern District of Florida. When in private practice, he was listed in *Chambers USA*, *The Best Lawyers in America* and *Super Lawyers* magazine, and was a member of the winning teams for the Global M&A Network's Turnaround Atlas Awards for both "Cross Border Special Situation M&A Deal (Small-Mid Markets)" in 2019, as well

as "Turnaround of the Year — Small Markets" in 2015. Judge Grossman began his legal career in the Attorney General's Honors Program at the U.S. Department of Justice, where he was a trial attorney in the Tax Division, Civil Trial Southern Section, from 1999-2004. He received his B.S. in 1996 from the University of Florida and his J.D. in 1999 from George Washington University Law School.

Hon. Christopher M. Klein is a U.S. Bankruptcy Judge for the Eastern District of California in Sacramento, appointed in 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 is admitted to the California, District of Columbia, Illinois and Massachusetts Bar Associations. After completing service in the U.S. Marine Corps as an artillery officer in Vietnam and judge advocate, Judge Klein was a trial attorney in the U.S. Department of Justice, in private practice with Cleary, Gottlieb, Steen & Hamilton, and deputy general counsel-litigation of the National Railroad Passenger Corporation. In 1988, he was appointed a U.S. Bankruptcy Judge for the Eastern District of California. He was appointed to the Bankruptcy Appellate Panel in 1998 and served for 10 years. From 2000-07, Judge Klein was a member of Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States and the Advisory Committee on the Federal Rules of Evidence. He is a Fellow of the American College of Bankruptcy and a member of the American Law Institute, International Insolvency Institute, ABI and the American Bar Association's Business Bankruptcy Committee. In addition, he serves as NGO delegate to the Cross-Border Insolvency Working Group of UNCITRAL. Judge Klein received his B.A. and M.A. from Brown and his M.B.A. and J.D. from the University of Chicago, where he was executive editor of its law review.

Daniel T. Moss is a partner with Jones Day in Washington, D.C., and has experience in business finance and restructuring, with a particular focus on complex corporate reorganizations, distressed acquisitions, chapter 15 restructurings and crypto-related matters. He has represented debtors, creditors and creditor committees in significant corporate and government reorganizations. He also has counseled clients on avoidance litigation, fiduciary duty and corporate governance issues. Mr. Moss served as co-lead counsel for the Official Committee of Unsecured Creditors in the Toys "R" Us Property Company I chapter 11 cases and the Peabody Energy chapter 11 cases. He also played a significant role in the City of Detroit's historic chapter 9 case — from litigating the city's eligibility for chapter 9 to confirmation of its plan for the adjustment of debts. He also represented the Washington Metropolitan Area Transit Authority in connection with its revitalization efforts. In connection with Jones Day's representation of the chapter 7 trustee of Anthracite Capital, one of the largest chapter 7 cases ever filed, Mr. Moss oversaw all aspects of this engagement, which resulted in a recovery of approximately $47 million for the estate and a release of more than $33 million in secured affiliate claims. He also was a member of the team that represented Chrysler in the sale of its assets to Fiat. Mr. Moss devotes time to monitoring various legislative proposals pending in Congress that would amend the Bankruptcy Code, as well as to such *pro bono* activities as the representation of disabled veterans. He is an active leader of INSOL International and writes frequently about cross-border restructuring matters. Mr. Moss is a member of ABI's 2018 Class of "40 Under 40" honorees, and he is listed in *Chambers USA* for Bankruptcy/Restructuring - District of Columbia for 2021. He also was named a 2017 *National Law Journal* "D.C. Rising Star," which identifies top legal talent under the age of 40, and was selected by *Washingtonian* magazine as one of Washington, DC's Best Lawyers for Bankruptcy in 2018. Mr. Moss received his B.B.A. in 2004 from The George Washington University and his J.D. *cum laude* in 2007 from Cornell University, where he concentrated in business law and regulation.

Andrew M. Troop is a partner in Pillsbury Winthrop Shaw & Pittman LLP's Insolvency & Restructuring practice in New York, where he focuses his practice on advising global clientele on business reorganizations, debtors' and creditors' rights, mass tort restructurings and crisis response, representing them in high-profile cases and related litigation. He represents debtors, creditors, acquirers, landlords, and creditors' and equity committees from diverse industries both in and out of court. Mr. Troop has helped private-equity clients acquire, sell and reorganize U.S. and international portfolio companies and defend fraudulent-transfer and breach-of-fiduciary-duty claims. He also represents nonprofits in debtors' and creditors' rights matters, and has distinguished himself representing states in complex restructurings where state priorities and the U.S. Bankruptcy Code intersect. Mr. Troop has an active *pro bono* practice. He has served on the board of directors for Greater Boston Legal Services for over a decade, was honored by the Massachusetts Bar Association with its 2017 Pro Bono Publico award, which is presented to individuals who have been instrumental in developing, implementing and supporting *pro bono* programs, and was honored by the David A. Grossman Fund for Social Justice at Harvard Law School for successfully preventing the eviction of numerous families and ensuring them affordable housing though 2067. Mr. Troop is admitted to practice in New York and Massachusetts and is recognized by *Chambers USA* in Bankruptcy/Restructuring, is listed in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, Litigation – Bankruptcy from 2001-23), and is listed among *Nightingale Health Care News*'s "Top 10 Health Care Transaction Lawyers of the Year." He also co-chairs the American Bar Association's Business Bankruptcy Committee's Government Powers Subcommittee and is a coordinating editor for the *ABI Journal*'s Toxins-Are-Us column. Mr. Troop received his B.A. *cum laude* from Amherst College and his J.D. *cum laude* from Northwestern School of Law.