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The Madoff Fraud: A Ground-Breaking Case in Cross-Border International Litigation

[**Editor's Note**: The following is an edited transcript of a program held on 25 January 2012 at the Hilton Hotel in New York City as part of the Annual Meeting activities of the International Section of the New York State Bar Association.]

I. Welcome

ANDRE JAGLOM: Good morning. My name is Drew Jaglom. I'm a partner at Tannenbaum Helpern Syracuse & Hirschtritt, and I'm the Chair of the International Section this year. We've got a terrific program this morning. I'm going to turn it over to one of our program chairs, Megan Davis of Flemming Zulack, in just a moment.

I do want to thank Megan and Jerry Ferguson for all their work in putting it together. And I also want to particularly thank Jack Zulack, who suggested this program many months ago when we first started talking about what would make an interesting Annual Meeting program.

Without further ado, let me turn it over to one of our program chairs, Megan Davis, to kick us off. Thanks very much.

MEGAN DAVIS: Thank you, Drew, and welcome everyone. Drew also mentioned Jerry Ferguson, my co-chair for today's program. Unfortunately Jerry couldn't be here at the last minute, so I wanted to introduce Gonzolo Zeballos, who has graciously stepped in at the last minute. We have a full program for you today, and Gonzolo and I don't want to take time away from our three panels of distinguished speakers. As a result, we'll give you a brief overview of the topics that will be covered today, and then we'll turn things over promptly to our first panel.

Today's speakers will address some of the many thorny legal and procedural issues that arise in most cross-border international litigations. But instead of discussing these issues only in the abstract, our panelists will explain how they have been playing out in one of the largest and most complex cross-border litigations to be filed to date: The liquidation of Bernard L. Madoff Investment Securities.

Since the discovery of Bernard Madoff's fraud in December 2008, the Trustee for BLMIS, Irving Picard, has filed more than one thousand avoidance actions in the United States Bankruptcy Court for the Southern District of New York. He seeks in these cases to recover more than ninety billion dollars, and many of these actions name as defendants individuals and entities located abroad.

The largest of the Madoff feeder funds, Fairfield Sentry, has separately filed more than two hundred lawsuits, both in New York and in the British Virgin Islands, alleging common-law claims and claims under the BVI insolvency law against mostly foreign defendants. Fairfield, a BVI fund, is also currently the subject of liquidation proceedings in the British Virgin Islands.

Using these Madoff cases to provide context, our speakers, who include lawyers from both sides of the Madoff litigation as well as a judge from the U.S. Bankruptcy Court, will discuss some of the complicated jurisdictional, discovery, enforcement and comity issues that all practitioners are likely to face when litigating a complex cross-border international case.

With that brief overview, I'll turn it over to Gonzolo to introduce our first panel.

II. The Madoff Fraud: A Ground-Breaking Case in Cross-Border International Litigation

GONZOLO ZEBALLOS: Thank you, Megan.

Our first panel this morning will address the issue of coordinating a complex international bankruptcy proceeding in the context of how counsel and the trustee have reacted tactically to the complexities of such a proceeding. As the last few years have shown us, international frauds and their eventual and inevitable insolvencies are being uncovered and litigated on an unprecedented scale.

Chapter 15 of the U.S. Bankruptcy Code, which is our implementation of the UNCITRAL Model Law on Cross-Border Insolvency, represents our jurisdiction's statutory solution to the challenge of managing and litigating a multinational insolvency. Frauds like Madoff's scheme test to the absolute limit statutes like Chapter 15 and their foreign counterparts around the world.

Given the globalization of modern economies and the speed and ease by which funds can be transmitted back and forth across international borders, the question of which law applies where has never been more complex, difficult or important to resolve. Panel one will discuss the Madoff fraud and our real-life experiences working with Chapter 15 and its international equivalent in connection with asset recovery and investigation efforts.

Our moderator for the panel is David Sheehan. He is chief counsel of the team at Baker Hostetler for the court-appointed counsel for the Trustee, Mr. Irving Picard. He leads more than three hundred attorneys and numerous foreign counsel engaged in the multinational investigation and litigation connected with the largest Ponzi scheme in history. I am pleased and honored to introduce Mr. David Sheehan.

DAVID SHEEHAN: Thanks, Gonzolo.

Let me start by telling you that my role here today is simply to put the work of all these fine lawyers into context. That is, to give you some background with regard to the Madoff liquidation that I'm not so sure is readily known by a lot of people. That is so because we get covered by the newspapers in a certain way, and they always have a certain focus on it. The broader context sometimes gets lost in that as we drill down on individual issues.

So let me start with a different point of view that I don't think necessarily is seen outside the case itself. The case is viewed, I think, and correctly so, as an affinity fraud. In other words, Mr. Madoff preyed upon Jewish relatives, friends and organizations throughout the course of his career, and he continued to do so right up until the very end. That never really changed. But what changed over time and what changed the Ponzi scheme was his ingenuity and that of his close colleagues to reach out to other organizations and to continue to feed the Ponzi scheme itself. That is, over time he passed from individuals and wealthy families onto organizations that had long-term investments, pension plans and those types of organization, et cetera.

He was doing fine with that until about 1992, and this is probably well-known. There were two accountants who became feeders down in Florida, and that was Avellino and Bienes. In '92 the SEC went after them as not being registered investment advisers. They weren't. They capitulated and they lost.

At that point Madoff was seen as somewhat of an angel, coming in and with $400 million basically bailing them and the investors out at the same time. The SEC wiped its hands and said, "Well, we took care of that problem," and moved on. But the reality of what was behind Avellino and Bienes was Bernie all along, and basically he just took over for them.

Now he had a much broader organization to deal with, and he needed a much larger context in which to feed the scheme. So he started developing relationships with feeder funds, the funds that you hear about most often in the case, such as the Fairfield one that was mentioned earlier. There are well over fifty of those funds. Interestingly enough, most of them are located outside the United States. Only a handful are located within the United States. What I mean by that is it's not just that they are organized under the laws of BVI, the Caymans, Bermuda or other foreign countries, but in fact most of the investors are outside the United States as well—although there are obviously thousands of investors here in the United States.

What makes it very significant and I think different is how he was able to do that; how he was able to sustain this. What becomes apparent as you study each of these cases and as you weave them together is that what Bernard Madoff became was part of the financial fabric of the international financial community. He was no different than any other instrumentality that was out there and that rose up during the time of securitization and the kind of things that were out there for all of the investment banking community to get involved in.

The lack of transparency that took place within the banking community through the derivatives process fit right into his wheelhouse. So that when AIG at the end of the day had $73 billion worth of CDOs and could not tell you who the counterparts were, that was no different than for years and years people saying to Bernie Madoff, "Who are your counterparties on all those options you're taking out?" Bernie told them that it was part of the secret sauce; he couldn't give that out. It was part of that European dark pool liquidity, and everybody bought into this. Not because they had done real due diligence or that they really looked into it, any more than they had in any of the credit default swaps or any other instrumentality that they were buying at the time from other legitimate organizations, such as banks that are still in existence today, still operating today. Bernie is out of business because he actually did it as a Ponzi scheme.

Essentially what happened is that Bernie got securitized. All of the instrumentalities that we talk about here today originate out of the feeder funds becoming what? Such a steady revenue source. Bernie at one point was called the Jewish T-Bill. He was better than the T-Bill. He gave you better returns than the T-Bill. They were guaranteed. He literally would talk to customers and say what are you looking for, and they would say, "eighteen percent"—and he would say, "you got it." Excuse me, you wouldn't stop and say, "How can you guarantee that?" But he did, because he didn't have any investments to worry about. You don't worry about it if you don't have to.

It is like the old saw, "If I can predict the market three days from now I'd be a wealthy man." Bernie did the market three days from now; he created it. So the bottom line is, if you really wanted to take a hard look at this over the years, people could have found it. Which is obviously the core of our litigation, and the fact that all of these red flags, as we call them, were readily apparent. This isn't hindsight. This is something that was occurring at the time.

There were many legitimate organizations who took a hard look at Bernie and walked away. The absolute lack of transparency, the unbelievably consistent high returns, all of these hallmarks of a fraud were apparent years ago. But he had become, as I said, part of a financial fabric. Those feeder funds were generating so many dollars that what happened? Financial institutions started to create instrumentalities that were based upon Bernie. They started leveraging the Bernie product. They started selling it to high net worth individuals. So Bernie just wasn't operat-

ing directly with customers or indirectly through feeder funds. He was actually being leveraged through major financial institutions like JP Morgan Chase and other banks here in the United States.

So there it was; it was part of that. That is what we deal with every day, it's that large matrix. The litigation that we're involved in is involved in thirty countries; thirty countries around the world, predominantly in the Caribbean, such as the Caymans, Bermuda and BVI. We are also in London; we are also in Austria, in France, in Switzerland—all across Europe. Not because we went there on our own, but because we followed the money. The old Watergate line still works. You follow the money, and where does it take you? It takes you to all of those jurisdictions. What these panelists are going to talk about is the difficulties associated with finding that money, recovering it and bringing it back here to the United States for the victims of the fraud.

What we have found over the last several years is that in some ways—and we have a great panel that's going to talk about this—things have worked very well for us. Because of the advent of cross-border insolvency being well recognized and the need for having it in cases like *Rubin* that Nick Moser is going to talk about and others, there's a great deal of awareness of the fact that there has to be a consistency intentionally in the law of bankruptcy and the enforcement of it on an international basis. There is no question that that's happening. But at the same time we're still hampered by, as others will talk about, restrictions, blocking statutes, jurisdictional and extra-territoriality issues—all those things you hear about every day, we live with every day. Those are the kinds of things that these fine attorneys deal with.

So what we have is litigation that's ongoing in each of those venues. We appear almost weekly in Cayman, BVI, Bermuda, London, et cetera. We fight jurisdictional battles and discovery battles there on a weekly basis. And the reason, at the end of the day, is that, while all of those entities were of foreign registry, ultimately all of that money came out of what? The money of the Ponzi scheme always starts with the people at the beginning getting their money out, and people at the end actually paying the price. Those people at the end who did not get their money back.

The vast majority of the money that we are trying to retrieve here is going back to the feeder funds. That is, those indirect investors who are not feeder funds, but rather the ultimate beneficiary of all this activity will be the people who invested in those funds. Our goal here is to return money to the funds, if not directly to the funds themselves, than their liquidators or receivers. As I'm sure you're aware, in many instances, such as in Fairfield, there is a liquidator appointed by the BVI court: you will be finding we'll be returning funds to the liquidators. Because ultimately, that amount ought to be $18 billion or $19 billion. (And the reason that sort of moves around—and those familiar with bankruptcy know this—is that, as we allow claims, claims get bigger, so sometimes the fund gets bigger: We did that recently in the Tremont settlement that we had.) But in any event, at the end of the day the vast majority of those funds are going to go back to whom? To the international investors who are participating through those feeder funds.

So just in that context let me turn it over now to the other folks here today, and let me do a very brief introduction for you.

The first person who is going to speak is my partner, Mark Kornfeld, whose practice focuses on securities litigation. He's a member of our Task Force on Complex Financial Fraud that we have at Baker Hostetler. He's been working on a lot of the leverage litigation that I've spoken about earlier, and he's been working with us for the last several years.

The next panelist will be Nick Moser. Nick is the head of the bankruptcy department at Taylor Wessing in London. Taylor Wessing has been an incredible ally of the Trustee, a great colleague working with us in all the litigation that transpires in the U.K. and has been of great assistance to us throughout the Commonwealth—it still exists interestingly enough—in BVI, Bermuda and London. (Although quite frankly, I don't think they get along that well, but I'll let Nick comment on that.)

Last, but not least, Dr. Nikolaus Pitkowitz. What we have here is the head of dispute resolution at Graf & Pitkowitz. Nikolaus has been one of the preeminent Austrian dispute resolution and arbitration practitioners. Let me stop reading and tell you what I really think: Nick is great, all right? What we have in Austria is an extremely complex set of laws. I don't know how to put it as a practitioner who for years quite frankly did not practice in the international arena—and the last few years have been a great education for me—but I almost have an intuitive reaction whenever I talk to Nikolaus about it, because what goes on in Austria doesn't exactly match up to how we operate over here. If we didn't have his great expertise and guidance, we wouldn't have been able to achieve half of what we have been able to achieve in our cases here.

We are very proud to have Nick Moser and Nikolaus Pitkowitz on our team today.

Let me turn it over to Mark and have him take it from there.

MARK KORNFELD: Thanks, Dave.

It is a pleasure to be here this morning to talk to you all. Getting a chance to hang out with lawyers to start the day as opposed to working on Madoff is kind of a pleasant diversion.

Following Dave is also a privilege. The service that we are doing here and the undertaking is truly historic. It is complicated beyond words. The magnitude of it can't really fully be captured by anything anyone is going to say. We live and breathe and take it home with us every minute of every day because of its size and its magnitude and its reach around the world.

To suggest that the panel is aptly titled would be correct. This is the most complex proceeding globally that I've ever been a part of and I dare say most of the lawyers have been a part of. The challenges here are myriad. They are of kind of a garden variety first-year law school nature. We often talk about the fact that the cases here are like a first-year law school exam every minute of every day. Issues that you learned back in law school are front and center every minute of every day: personal jurisdiction; forum non conveniens; standing; bailment. Who thought that at this stage they'd be talking about bailments in their legal career?

We are dealing with these issues both in the courts here, in the Bankruptcy Court, in the District Court and in the courts around the world with all of our learned and esteemed international counsel. The legal landscape here is changing in real time, and that's probably the most challenging part about what's going on. Often when the law is changing, there is more lead time.

Here in real time you're dealing with issues on the fly arising out of issues like *Stern v. Marshall*; dealing with challenges now in courts; under what we call the *Morrison* issue. Dealing with issues abroad that Nick will talk about in the *Rubin* case. Dealing with safe harbor defenses under the Bankruptcy Code and how they intersect with securities litigation. All of these issues are happening in real time, and they are a huge challenge for the Trustee and his counsel in prosecuting and trying to recover monies, both domestically and around the world.

As Dave said, one of my focuses, in addition to assisting Dave in managing what we call the Board, is the Fairfield case. The Fairfield case is a good case study of the cross-border nature and complexities of managing a global bankruptcy.

Fairfield Sentry was Bernie Madoff's largest feeder fund. At its zenith it was about forty percent of the money that Madoff had under management, about $7 billion. The Fairfield Sentry fund is a BVI fund, and it is currently in liquidation, as Dave mentioned. It's got Joint Liquidators, who were appointed by a BVI court. It was a fund listed on the Irish exchange, so there are issues involving Irish law, and courts in Ireland are looking at matters relating to Fairfield.

The shareholders in the Fairfield Sentry fund were all over the world. They were in Europe, they were in Asia, they were in the Mideast, and they are part of this recovery initiative both by the Trustee, in our subsequent transferee cases that we filed against folks who received the money from the fund, and by the Joint Liquidators.

So what you have here is a trustee in bankruptcy in America working hand in hand, shoulder to shoulder, with the Joint Liquidators of a court-appointed fiduciary in the BVI. The Joint Liquidators have litigated and been recognized under Chapter 15 here in America. The Fairfield Liquidators and the Trustee have entered into an historic settlement group where the parties are working together to pursue recoveries on a shared basis for both the assets of the customers of Bernie Madoff as well as the shareholders of Fairfield Sentry.

That negotiation took two years to get done due to the layers of complexity of both the U.S. and the BVI law. We have to deal with the challenges not only of the law here but of the law in the BVI, where the court has its own ideas in the BVI about what the Joint Liquidators there can and cannot do, and what that means to our settlement agreement and what it means ultimately to the potential recovery of customers here and abroad.

The Fairfield litigation has over four dozen defendants. There are probably two dozen different funds and management companies that were in play, and there was about $3 billion in recoveries that we see for withdrawals that were taken out of Fairfield Sentry within the last six years up to the fraud. The case involves millions and millions of dollars from investors here and shareholders abroad.

Some of the challenges we face are not surprising, as David alluded to. Discovery in the U.S. is not the same as discovery around the world, and in fact they are often quite in conflict. So trying to navigate things like blocking statutes and data privacy and customer privacy when dealing with subpoenas issued in America to entities abroad is a challenge. This is a challenge that we face and have to navigate on a day-to-day basis.

In the normal world, service of process of a litigation may or may not be complex. There may be the random international defendant that you have to serve. Here service of process takes on a whole new meaning. Hundreds of potential witnesses live abroad, thousands in fact. Hundreds of defendants live abroad, and just getting them served to get the chance to have discovery is a task that we have to navigate. Again, back to first-year law school.

The litigation has some kind of standard fare. You have normal questions that you'd ask in any litigation, regardless of its story: Where to sue, whom to sue, how to sue, what are the causes of action? That kind of checklist exists here too, but the difference is that it is exponentially longer because of the broad magnitude of the fraud and the location of the money. So the issues that we confront in navigating the litigations day to day go well beyond simply who might be liable. Obviously who might be liable is a threshold question, but you can't just ask the

who-might-be-liable question. You then have to ask, can I enforce a judgment? If I get one here, where do I enforce it? Will it be recognized? How will the court abroad look at what I've done? If someone chooses to default in a case in America, can that someone then attack the default judgment in a foreign jurisdiction?

In addition to enforceability and liability, there's the ultimate question of collectability, which goes very much into the strategy that we have to contemplate. Even if we're right on who owes money, and even if we could theoretically enforce a judgment, is there something to collect at the end of the day? Because we're not in the business of pure victories: The objective here is to secure money, to distribute equity to the customers with valid claims in the Madoff estate.

So we deal with the questions of identifying assets—and some of the folks here to my right and left, as well as our second panel, will talk about that—and how we trace the money.

In addition to Fairfield, we have had litigation with feeder funds in the BVI involving Kingate and involving a feeder fund known as Mount Capital. Mount Capital is a fund with which we reached a settlement in the BVI. Kingate is now in litigation with Deutsche Bank over a settlement agreement we thought we had here in America.

An interesting angle here to all that we are doing is that a secondary market now exists for claims—not uncommon in bankruptcy but a little different here, because there's a group of folks who do claims trading as part of their business. But the folks doing claims trading in the Madoff claims are of a different caliber. These are highly global banks who are now betting and investing as to how well we're going to do in recovering money both here in America and abroad. One of the things that doesn't get picked up much is the claims market and how much that's moving. Normally that might not be such a big deal, but here it is huge. The reason is because the main sources of money, the direct customer feeder funds, are all broke; they are all in liquidation. So getting a settlement or a recovery from those funds doesn't advance the distribution to customers. You have to go beyond, to the subsequent transferees, to the folks who have money, who received the money from the feeder funds. And that is a challenge that we have to deal with. The difference is between the claims against the direct customers and the indirect customers, subsequent transferees.

In addition, right now there is a huge series of litigation related to marshaling. The extraterritoriality of the Bankruptcy Code and SIPA is under attack. Many of the adversaries that we are dealing with on a day-to-day basis are advocating that our reach stops at the American border; that the bankruptcy laws and SIPA don't extend beyond America. So that issue is being litigated in real time.

Ultimately, looking at this from a broader view, if you had to draw a picture of what's going on here—and the next panel will give you a really cool chart, but I'll just give you a visual—to us this is the world's largest onion. There is no way to ever peel it back all the way. Every day we peel a layer and it creates five hundred new avenues for us to go down, all with the same singular objective: bringing money back into this estate so that we can distribute it fairly and equitably to customers with valid claims.

I've given a really quick speed version of Madoff. It is like the three fastest minutes in football, and this is like the eight fastest minutes in Madoff. What I would suggest is that we are still very much at its early stages. These issues are going to play out in courts, domestically and internationally, for years.

With that, let me turn over the panel to my learned friend here, Mr. Moser, to talk about *Rubin*.

NICK MOSER: Thanks, Mark.

And thank you very much for having me. It is an honor to be speaking at the New York State Bar Association. I should say that, as an Englishman, it is not just an honor but also something of a relief, because when you say to an Englishman, "Turn up to a bar association," you focus on "bar." And at 8:45 I was expecting beer and gin and tonic. I would have been up for it, but to just have water is something of a relief.

But the *Rubin* case, which is what I've been asked to talk about and one in which I am involved, is potentially a seminal case not just for English lawyers but for an enormous number of jurisdictions around the world. That is why it's so relevant to the Madoff fraud. As Dave said, a number of the relevant jurisdictions are these offshore Caribbean countries, and they are effectively subject to or bound by the judgments of the English courts.

English law is leading the way now, maybe alongside the American courts and lawmakers, in developing a unified bankruptcy regime around the world. In England we pretty much signed up to everything that we could have signed up to in order to help effect that. There is something called the EC Regulations on Insolvency, and those harmonize to a large degree insolvency laws and processes across the states in the EU that have signed up to it, which is pretty much all, apart from Denmark. Denmark hasn't signed up, but everybody else has. England is also a signatory to and has implemented the UNCITRAL Model Law on Cross-Border Insolvency, and something we call the Cross-Border Insolvency Regulations.

All that was missing—and is now probably not missing because of the *Rubin* case (which I'll elaborate on)—is how the common law deals with cross-border insolvency situations. Because we have signed up to every treaty we could sign up to, in a contractual way we have dealt with

other countries. But where other countries are not signatories to those treaties, the common law in England and U.K. does fill in the gaps.

So *Rubin v. Euro Finance* is the latest and possibly the final stop in the English courts' journey toward a universal bankruptcy regime. By which I mean a regime which recognizes bankruptcy processes in other countries and seeks to unify them so that all assets are dealt well centrally, as opposed to separate regimes which operate on what we call the "grab rule," where the local court will grab the assets for the local creditors to be distributed amongst them only, as opposed to being pooled and brought back into the central bankruptcy pool and then distributed globally.

I say universal bankruptcy regime, but the reality is that you can't achieve universality without harmonizing to the nth degree all the bankruptcy processes. So in fact what is being achieved here, or what we're trying to achieve here through this case with *Rubin* and the other treaties we signed up to, is something we called "modified universal bankruptcy."

Modified universal bankruptcy, which is a phrase coined by Professor Jay Westbrook and often quoted by English courts, is where you recognize that there are going to be local variations, and so the universal bankruptcy process is varied according to local tastes. But broadly speaking, it achieves the aim of avoiding the "grab" approach to bankruptcy and instead pooling assets centrally.

Now, if the *Rubin* case is upheld in the Supreme Court—and it is coming to the Supreme Court, which is our highest court, in May—then over a hundred years of protection for British citizens and companies will be effectively stripped away from them. What *Rubin* says—and I say if it is upheld by the courts in May it will become unappealable—is that a foreign bankruptcy trustee can enforce a properly obtained default judgment in the defendant's home country without having to commence substantive proceedings there. And the foreign bankruptcy law will be enforceable in that defendant's home country, so there's no hiding. So you can no longer, as an English person who is facing a claim in a bankruptcy in the U.S., sit at home and ignore the proceedings taking place in the U.S., do nothing to submit to the jurisdiction of the U.S. courts, and think that by doing so you are protected, since that U.S. judgment would be worthless because it won't be recognized by the English courts. That is the position pre-*Rubin*. But if *Rubin* is upheld, the English courts will be obliged to respond to a request from the New York court to enforce that judgment, regardless of the attitude of the English defendant. So as I said, it strips away over a hundred years of protection for English companies and English citizens.

The *Rubin* case, as I say, is coming to the Supreme Court in May and we, on behalf of the Trustee, are intervening to give our views on how that case should be resolved. Essentially what we consider to be the correct position here is that *Rubin* is the correct outcome, because bankruptcies should be treated differently from other kinds of judgments in the enforcement of those kinds of judgments. So the traditional provisions which apply to judgments in rem and judgments in personam don't apply when it comes to bankruptcy. It is a special case.

English law is moving very much in that direction. It's something which is recognized in other jurisdictions as well, but the reason why it's a special case is because you have to have a system which creates fairness between creditors of a company or of an individual who has gone bankrupt to ensure that you don't have, as I said, this "grab" approach to assets, where you will get some creditors in some countries doing far better than others. Bankruptcy is a special case, a singularly defined category, and should be permitted to be enforced in that way.

If *Rubin* is upheld, then essentially this is the position: An order of a foreign court that is integral to the bankruptcy will be enforceable. When I say integral to the bankruptcy, it is not just any order obtained by a trustee in bankruptcy; it has to be one which relates purely to the bankruptcy, so a preference action or fraudulent transfer claim. Not just the reclaiming of a debt or breach of contract claim, but it must be something which is specific to the bankruptcy. And if that order is then obtained from a court which is properly seated for the administration of the worldwide assets of the estate and has been properly obtained, *i.e.*, there is no irregularity in the way that the order has been obtained, and if that order is of a nature which is not dissimilar to the kind of bankruptcy order which could be made by the English courts, then the English courts will have to enforce it. And as I said, this reasoning of the English courts applies across all the Commonwealth countries—we tend to call it the Empire still. And the only thing that will stop that happening is if there is some public policy reason which you would assess on a case-by-case basis. The aim is not to open up the floodgates to all sorts of spurious bankruptcy claims from jurisdictions where you may have concerns about the propriety of the process behind which that judgment was obtained. But essentially it opens up the doors and it's up to the local court in England or BVI, Cayman, Gibraltar to say, "No, actually we don't like the look of that."

I mentioned that we've signed up to pretty much everything, and one way just to emphasize this is that the UNCITRAL Model Law on Cross-Border Insolvency is implemented in slightly different ways by different countries. One point of distinction between the way England has implemented it and U.S., through Chapter 15, is that the Cross-Border Insolvency Regulations in the U.K. require the foreign trustee to frame the trustee's case as an English law bankruptcy claim, so that you are bringing

under the statute a local claim. Under Chapter 15, it is going to be the other way around, where it allows foreign law to be implemented or to be enforced. So that's one difference to be aware of.

In summary, if *Rubin* is upheld, then enforcement of foreign bankruptcy judgments will be far, far simpler and more straightforward across all of those offshore jurisdictions. And if you are owed money by an Englishman, you don't need to worry anymore: go down to the local court and let things take their course.

MR. SHEEHAN: As these two speakers were speaking I thought of a couple of things, just from a practical standpoint, that come out of this.

So we are in the United Kingdom, and we are there under Chapter 15 and we are recognized, the Trustee was recognized in that proceeding very early on. We participated, as you probably know, in the appointment of Joint Liquidators for MSIL, which is Bernie's London operation, and we participate in that proceeding all the time, and we are indeed by far the major creditor in that proceeding. Notwithstanding that, Taylor Wessing has represented us in connection with two matters in which we are working in cooperation with the Joint Liquidators. We have created a cooperation agreement, which I think is somewhat unique. What we are trying to do with this is we are trying to harness the strength and value of the jurisdiction that we happen to be in, in this case the U.K., but at the same time utilize, as Nick is pointing out, the strength of what we're doing here in the United States.

Almost every one of the foreign actions has a parallel proceeding here in the U.S. Bankruptcy Court. The reason for that is fairly obvious: That is, what if we were just to rest on our laurels in the Bankruptcy Court, and it turns out we lose the extraterritoriality issue, the personal jurisdiction issue or whatever that issue may be? Are we therefore, what? Out of luck? We can't go anywhere? So what we are doing is parallel proceedings and we participated, as I said earlier, throughout the Caribbean islands and in the U.K. And that's why I think *Rubin* is so important to us, because it will affect not just the U.K., but it will affect other Commonwealth countries, or the Empire as it were.

So it's not that we are just operating in one sphere each day; we are operating in several. The Kingate case that Mark spoke of, we are in four jurisdictions there: we are in the U.K., where we have a proceeding we filed; we are here in the United States; we are in Bermuda, where Kingate Management, which is the management arm created by the principals behind Kingate operated; and we are in BVI, where Kingate was incorporated. Each one of those jurisdictions is very jealous of how each of those aspects of the case is administered. If we don't participate there, we can get blocked ultimately. What is the impact ultimately? Is anyone in the room willing to forecast what the outcome will be if in we don't participate in the Kingate Management Company case in Bermuda and the management company gets liquidated there and someone takes it over? In this case it would be Ernst & Young, who were actually the accountants for Kingate. Seemingly that doesn't seem to bar them from getting appointed, much to our chagrin.

But nonetheless, these are the tactical things that we deal with every day. So that when we are operating here, to a certain extent we obviously rely upon the law as we know it, but also the law as perhaps we can change it. We are participating, as Nick said, as amici in the *Rubin* case. But in the long run, all of those practical matters must be dealt with on a daily basis, so on each of those issues that come up we are being creative as each arises. And we represent obviously in each of those proceedings always the largest creditor.

So those have the overtones of a bankruptcy proceeding, even though we are in liquidation proceedings in other countries. We are also in active litigation.

Nick is heading up the litigation against the MISL shareholders and Sonja Kohn in London. I tried to get writ of attachment prior to judgment in the United States: very, very difficult thing to do. We had a hearing there that Nick and his team and others worked on, and as a result we got a freezing order entered against all of Sonja Kohn's assets around the world. I didn't know you could do that: it is that Empire again, it just keeps running out there and coming after you.

But that's what I'm talking about. If we tried to get such a freezing order entered here in the United States, we would have no success in doing that. But by utilizing Nick's good offices and his colleagues—and we have of course other lawyers that work with us as well—but at the end of the day we achieved a result that we couldn't have otherwise achieved here.

Obviously it is long before liability. We ultimately have to prove our case both there and here, but in the long run that's the kind of thing which is the hallmark of what we have been able to achieve by working with colleagues like Nick.

And now we'll turn it over to Nikolaus, who will talk about the byzantine—or should I say Austrian—criminal justice system.

NIKOLAUS PITKOWITZ: Thank you for the nice introduction. And I am very honored that I have the opportunity to address you today and speak on this very distinguished panel.

Now, I am the last speaker in this general discussion analyzing some very critical and strategic issues, and one of these is the issue which was addressed before by Nick Moser. That is, the tension between universalism and ter-

ritoriality: One law, one court versus each country exclusively governing its own territory.

Europe, as you heard from Nick, has implemented, similar to the United States, a modified universalism. Indeed, it's said that universalism is more predictable, maximizes the proceeds, minimizes costs and delays and leads to a fairer distribution to creditors. On the other hand, it has been criticized because it permits foreign law to intrude into the domestic relationships and can thereby create uncertainty and domination.

So what you have heard before were speakers from the United States and the United Kingdom promoting universalism. My home country, Austria, used to be a truly universal country. Indeed, when our general civil code was enacted, a little bit more than two hundred years ago, it was translated into all twelve languages of the Austrian Empire and universally applied there.

Today, however, we are a small country in the center of Europe. Our economy, by the way, is still one of the strongest and healthiest in Europe. And even though a U.S. rating agency has just last week removed our AAA status, downgraded us to AA, Vienna is constantly ranked as one of the most livable cities in the world.

Given the role Austria plays in the world—and you can also see that from my role here as the last speaker on this panel—it's indeed surprising that one of the biggest agents and abettors of the Ponzi scheme comes from Austria. The Trustee has filed a multibillion RICO claim against Austrians.

What I intend to shortly outline in the ten minutes that I have been allocated is what I would call the other side of universalism: The role of the countries which need to submit to universalism—and many implement the rules and decisions of that other country. Thus I am speaking of a perspective from the other direction, so to say. I would refer to this as judicial aid or legal assistance. I will try to give you a broad picture of legal assistance and judicial aid, and my partner, Ferdinand Graf, will be speaking in the next panel on two very distinct issues: enforcement of insolvency-related issues and interim issues.

The first issue I need to address is what I will call a translation issue. When a universal measure needs to be implemented in Austria, more generally the question arises how to qualify it. In other words, will a decision from a New York insolvency court be treated in Austria as insolvency-related and will legal assistance thus be rendered in Austria by an insolvency court? In fact, that is not automatically the case.

Austria, and more generally Europe, take a factional approach and thus attempt to determine which of their home concepts corresponds to the content of the judicial assistance which is being sought. Consequently, if a U.S. trustee acts abroad, his acts will need to be "translated" into the corresponding legal concept in the foreign country, and thus the trustee may not always trigger the foreign insolvency rules, but, depending on the nature of the assistance sought, it may also fall under other legal concepts.

For example, a claim for payment filed with a New York insolvency court may not automatically be insolvency-related in Austria. An avoidance claim filed with the New York general court could fall under Austrian rules for legal aid in insolvency matters. In particular, there are three distinct fields under which cross-border legal assistance may fall: insolvency law; civil law; and criminal law. Each of these fields may have other rules and particularly other treaties which could apply.

Before I address that, I just want to refer to two general aspects. One is comity and the other is reciprocity. Comity is a doctrine which is generally established in Austria and under which, even without an explicit treaty, customs of international law are followed. So Austrian authorities, for example, abide by the Hague Service Convention, even though Austria is not a party to it. Reciprocity is often a prerequisite for a state to provide legal assistance to another state. In fact, reciprocity was required by law in Austria until 1983 for civil legal aid.

Now coming to insolvency. The first issue that arises is to translate insolvency into the Austrian understanding, and here in fact what you will hear now is that Austria has fully implemented the concepts of *Rubin* and even gone a step further than that. Section 240 of the Austrian Insolvency Law provides for *Rubin* recognition of foreign insolvency proceedings in Austria on the basis of national insolvency law. Under this provision, two prerequisites must be met, and if they are met, then the foreign proceedings will be fully recognized.

First, the center of the main interest of the debtor—and that's actually the same term that Chapter 15 uses, COMI—must be situated abroad. And, second, the foreign proceedings must be similar to proceedings in Austria. And that similarity test is generally met for U.S. insolvency. So Section 240 is a very broad provision, and it is also a very important exception from the otherwise required reciprocity requirement for acknowledgment of foreign decisions in Austria.

The next aspect I want to address is civil law. Legal assistance in civil law in Austria rests on three pillars: international treaties, European Union law; and Austrian civil law.

Even beyond numerous conventions and EU regulations, Austrian courts have, and that is irrespective of reciprocity, a general duty to provide legal assistance to any foreign court. This is part of Austrian civil procedure and is supplemented by specific laws and decrees of the Austrian Minister of Justice. Clearly there are also limita-

tions in that respect. Austria has not enacted any blocking statutes, but as a general rule only such measures which fall into the general jurisdiction of courts and do not violate Austrian laws will be enforced.

That, of course, raises issues in connection with U.S. discovery, which is a concept with which most European countries will feel unfamiliar or even very uncomfortable.

The third aspect is criminal law. As to legal assistance in criminal matters, there are several European Union regulations and even a number of multilateral treaties to which the U.S. is a party and specific bilateral treaties between the United States and Austria providing for mutual legal assistance, including sharing confiscated profits or prosecuting crimes and preventing crimes. Again, on the national level, under Austrian law the Austrian public prosecutors are explicitly empowered to provide judicial aid to foreign authorities.

To conclude, the concept of universalism is not simply a one-way street. To successfully apply it, it requires strategic planning and a bi-directional approach in order to obtain and maximize the desired effect.

With that I conclude and thank you.

MR. SHEEHAN: Before you leave the podium, let me ask you this: are there any proceedings occurring in Austria right now involving Madoff or more accurately Bank Austria?

MR. PITKOWITZ: There are, yes. A number of them.

MR. SHEEHAN: What I find fascinating—obviously I don't want to get into the strategies of our case here—is the degree in which we could actually participate in some fashion there in a variety of different capacities.

Perhaps if you could just in general talk about when there is an ongoing criminal proceeding in Austria. In the United States, my experience is that you've got to stay away from the criminal: you can't use a criminal prosecution as any kind of leverage or get involved with it in at all, and yet in Austria it seems a bit different. Nikolaus, could you talk about that?

MR. PITKOWITZ: Certainly, yes. In fact all three routes have been pursued in Austria. And the criminal route is one which is of particular interest, because it enables the Trustee to participate in a certain way in proceedings which overcomes an issue which Austrian law would not otherwise permit, namely, discovery. We do not have a discovery regime in Austrian civil law. On the other hand, in criminal proceedings in Austria, the public prosecutor has very powerful means to force document production, to force information which go actually beyond U.S. discovery in some aspects, and that is a means which we have been able to utilize in some ways in Austria.

MR. SHEEHAN: The reason I raise that here is one of the things that surprised me, as more of a general practitioner, was that, in light of the limitations that we encounter in discovery in Europe, there are avenues to obtain information, avenues that I would not have supposed existed until I got involved and started working with Nikolaus and his team, and that are available to one in a very legitimate and open and above-board way.

This case has been a tremendous learning experience. As Mark Kornfeld said, I talk about this case, the Madoff case, as being like a soap opera and your first day at law school, because every issue we have seemingly is an issue that you haven't encountered before. So when we get into the foreign jurisdictions on a practical level, it is fascinating some of the stuff you find out and some of the things you can utilize as tools. This is so notwithstanding the fact that, overall, as Nikolaus pointed out and as Nick said, discovery in Europe is nowhere near what we talk about here in the United States.

In the United States, for example, pre-litigation there is Rule 2004 in bankruptcy, which basically the courts have characterized as a fishing expedition. And then post-complaint you have the federal rules of discovery. So you have much broader and more powerful discovery tools available here in the United States. But on the other hand, getting that discovery out of foreign individuals and foreign corporations is very difficult: it is not so easy to do.

So we are always balancing those two in considering how we go forward in terms of discovery in each of those cases. And from jurisdiction to jurisdiction it varies; it's not always the same.

MR. MOSER: May I give an example of how utilizing the Cross-Border Insolvency Regulations we can achieve a different kind of discovery outcome? And that is that you can apply as a foreign trustee in England for recognition, and then utilize what we called Section 236 of the Insolvency Act, the section which enables a trustee to ask people who have information relating to the business of the company that is in liquidation to provide that information. And it's not connected with ongoing litigation. In fact, it is expressly not connected to ongoing litigation. This is an example of finding what instruments I can use here to help me get where I need to go. And that's quite an important and helpful tool.

MR. KORNFELD: When I was listening to Nick and Dave talk about *Rubin*, it occurred to me that that's not an abstract concept for the Madoff litigation. It is actually a very significant and specific example of how important it is.

One of the major feeder funds that our Panel Chair Gonzolo Zeballos works on is the Harley Fund, and Harley was a fund that chose not to appear in the United States, even though it theoretically could have filed a significantly large customer claim. We obtained in the Unit-

ed States a default judgment against Harley for about a billion dollars. So the application of *Rubin* to that real-life example is absolutely critical in terms of being able to chase money around the world. So it's not just theory; it is actual real life for us day-to-day.

Before we do Q and A, I'd be remiss if we didn't recognize two people. First Amanda Remus from Baker who makes us get here and allows us to perform at this level. Without her, none of us would be here. And secondly Natasha Carbajol, who took the laboring oar on the materials in your book, which is the long-form version of today's narrative with all of the detail and footnotes and all the cites. She deserves recognition and credit for marshaling that through. I just wanted to make sure we recognize them before we go on.

MR. ZEBALLOS: As we turn to Q and A, I'm going to ask the first question, because I can.

Both Nick and Nikolaus, in discussing the context of *Rubin* and of the Austrian principles of universality and how they are implemented, made mention of comity and reciprocity.

So I guess I was wondering, Nick, if *Rubin* goes forward, how does the comity and reciprocity analysis play out? And does the request have to come from the court, or can it come from a requesting party?

And Nikolaus, that latter question would also go to you as well.

MR. MOSER: Well, as I said, *Rubin* is a common-law concept, so it's not written down in a very clear way where it can say this is exactly how it works or is likely to work. But the broad answer is that it does not require reciprocity at all. That's the whole point. The English courts are saying, "We don't mind if this is a request from a Madagascan court or a Polish court or whatever: As long as there is a properly obtained bankruptcy judgment from a court which was seized of the administration of that estate worldwide, we will recognize it." So it is attempting to reach a very pure position without requiring others to collaborate, and I think it will require a court to make that request, or there must certainly be a court judgment for that to be recognized by the English courts.

MR. PITKOWITZ: To speak from the Austrian perspective, for judicial assistance in civil law matters we had actually for a long time a reciprocity requirement. That requirement was removed by our constitutional court, because the reciprocity had to be determined by the Ministry of Justice, and that was considered to be an inappropriate interference into the division of powers. Indeed, if you go the civil law path you don't have any reciprocity requirement: you only have the requirement that it must not conflict with Austrian law. If you go the insolvency law path in Austria, you likewise do not have a reciprocity requirement: you have the preliminary requirement, which is similar to the United Kingdom, that the requests made must not violate Austrian public policy, so that there's a general protection for Austrian public policy. And on the criminal path, of course, there is also no reciprocity requirement given for any action. And here, as I already mentioned, there is much broader scope of application.

MR. ZEBALLOS: Thank you. With that we'll open up questions to the floor. Yes.

AUDIENCE MEMBER: I'm curious, Mr. Kornfeld, you've mentioned that the legal landscape is changing in real time, and I find that concept fascinating. All of you gentlemen, would you say that the Madoff cases and everything that has developed out of the Madoff fraud has sped up a movement toward universalism or maybe given it some steam?

MR. KORNFELD: I'll borrow a line that Gonzolo has used before: "Landmark cases make landmark law." The short answer is I'm not sure that it is necessarily speeding up universalism. I think that it's moving in that direction, but I'm not sure that we are completely there yet. I think that's still to be determined as to whether that's actually going to be the ultimate endgame of all of this.

If I were forecasting, I wouldn't say that's something coming in the very, very near term, but there are certainly a lot of indicators that suggest that that would be, first, desirable and, second, more possible and more potentially probable than it once was. But I don't think we are there yet. That's my view, but I defer to my colleagues to the left and right, the two Nicks.

MR. PITKOWITZ: As for the so-called pure universalism in Europe, I think that has only been implemented in the winding up directive when it comes to winding up of credit institutions. And Austria in fact has a very peculiar provision which implements that pure universalism if there is a contractual obligation. If there is reciprocity given, then foreign courts would be permitted—because that is really the outflow of the other side of universalism—to collect evidence in Austria. So Austria would open its doors to a foreign court to take actions in Austria, which is pure universalism really. However, there are limitations, and one of the limitations—which probably reduces the practical applicability of this reciprocity concept—is that the parties must voluntarily submit to those actions of the foreign court. And a second limitation is that there must be an opinion of the Austrian Federal Foreign Ministry that it will not be against the national interests of Austria to grant assistance to that foreign court.

MR. MOSER: My short answer is that I don't see how there can't be a connection between cases like Madoff and Lehman's and maybe MF Global and a faster development in the law. Because when you file this many cases, this many claims, you're going to get this many judgments, and that's what becomes the law. Not neces-

sarily in a uniform straight line, but that's how the law develops. So I think there has to be a connection.

AUDIENCE MEMBERS: Do differences in preference periods give rise to public policy objection?

MR. MOSER: Well, in England that hasn't yet been tested, but my feeling is no, it won't. As long as the claim is broadly similar, that will be fine for the English courts. If you've got a difference, which is a material difference—rather in England we look back generally two years—let's say six months or two years and you've got a look-back period which is twenty years, that may well cross the boundary. But otherwise broadly similar is okay.

MR. PITKOWITZ: I would say the same applies for Austrian.

AUDIENCE MEMBER: I would like to address this to Mr. Sheehan and Mr. Moser. Mr. Sheehan, you've talked about the difficulty of getting a prejudgment attachment in the U.S. in contrast with that with the ease of getting a freezing order in U.K., which I assume is a Mareva injunction or something similar. Were you able to take that freezing order back to the United States and accomplish the blocking of assets that you wanted to accomplish, or what happens?

MR. SHEEHAN: Well, I'm going to let Nick handle that question. But it wasn't easy. What I meant by that is it was just different.

I had spoken earlier of the freezing order we achieved in the U.K. in connection with the Sonja Kohn litigation, and the question was: While it seemed easier to get that in the U.K. than to get it in the United States, I think, quite frankly, we put on a very good case: that is, our Queen's counsel did, together with the support of Taylor Wessing, our solicitors. It was a very dynamic, powerful case. It incorporated a lot of the history of what the fraud was all about, and you'll hear more about that in the next panel.

But in terms of utilizing it here in the United States, we haven't even looked at doing it that way. It is interesting, and it is a good question. We have been looking at it from the standpoint of utilizing it in Europe, in Austria and in Gibraltar and other places where we know assets lie. But actually I'm going to take that one back to the office and go down to see Judge Lifland and ask him.

MR. MOSER: The answer is that the English court can grant an order—and you're right, they used to be called Mareva injunctions. We've tried to modernize the language and call them freezing orders now. The court could say that the freezing order is applicable worldwide, but so what? You actually have to go to the jurisdictions where you want to have it endorsed, and, armed with the judgment of the learned English judge, say to that local judge, "Please, would you follow the line that Mr. Justice Moser came up with. You know, it would be nice." So you have to apply.

AUDIENCE MEMBER: But actually my question was, did you try to take that Mareva injunction to the United States, and did you get any use of it?

MR. SHEEHAN: No, we have not done that. Yet.

AUDIENCE MEMBER: Well, I hate to expose my ignorance of bankruptcy law, but I do get CLE credit for this. There were several references to prerequisites for entry into the blissful world of modified universalism, and one of those seemed to be that you had to have a judgment from a court which was universally seized of the bankruptcy's assets. I just wondered how does a court become that kind of a court: does it say, "All right, we are the court that is universally seized" and everybody else agrees? Or do you have fights over that?

MR. SHEEHAN: Very briefly, the question is, "How do you become a court that is universally seized of the assets of the estate so you can exercise power worldwide in fact?"

AUDIENCE MEMBER: So that that judgment might have a chance of getting into the Austrian courts and being recognized.

MR. MOSER: Yes, so that you can take advantage of *Rubin* in the U.K. and the equivalent in Austria. And the answer is that the English court will look at the status of the foreign court which is asking for this assistance or requiring this assistance and have a look whether or not it appears that that is the court of the main interest. This has not been tested yet, but if you've got two courts seeking to come up with different approaches, then I imagine the English court will speak to both of them and try to get those courts to collaborate. Because one of the by-products of *Rubin* is that it's not just about enforcement of foreign bankruptcy judgments; it is also about cooperation and assistance to foreign bankruptcy courts. You don't get through the gates to this blissful world, as you put it, unless there is that cooperation going on. So I think that's how it would play out.

AUDIENCE MEMBER: Under *Rubin*, does the English court review the jurisdictional basis of the default judgment? In other words, whether the English company actually had a jurisdictional presence in the United States? Or do they just accept the U.S. court's determination that it did have jurisdiction?

MR. MOSER: Yes, the point is that the English company that the judgment is against doesn't have to have any place of business in the United States or have any grounds on which the U.S. courts may say that it is connected. It is just a counter-party, and it's just got a judgment against it. So it could have no connection with the United States, save that it received money out of a com-

pany which is now in a bankruptcy process in the United States.

So all the English court is looking at, apart from the jurisdiction of the American court over the American company which is now in bankruptcy, is that the judgment has been properly obtained in accordance with the American process; that it was served according to the American process on the English company; that the English company had an opportunity to appear, and didn't; and that the judgment is therefore a properly obtained default judgment.

III. Tracing and Attaching Assets Worldwide

MR. ZEBALLOS: The second panel this morning is going to address legal and jurisdictional complexities involved in multinational investigations in pursuit of asset recovery.

What are the practical challenges of investigating, tracing, and recovering assets worldwide in the context of an intricate international fraud insolvency proceeding? In a world where billions of dollars can be transmitted around the globe at the click of a mouse, the challenge faced by lawyers seeking to trace and attach assets is quite frankly daunting.

As counsel to the SIPA Trustee in the liquidation of Bernard L. Madoff Investment Securities LLC, Panel Two moderator Oren Warshavsky is leading the investigations and litigations on behalf of the SIPA Trustee in several multibillion dollar lawsuits against several financial institutions. These cases involve the flow of assets in myriad jurisdictions in cases that involve HSBC, UBS and Cohmad Securities.

Oren is a Baker Hostetler partner and he's a member of Baker Hostetler's Task Force on Complex Financial Fraud. With that I'm pleased to turn over the program to Mr. Warshavsky.

OREN WARSHAVSKY: Good morning. I thought that I would start, as the moderator of the panel, to talk a little bit about what we did to start tracing assets in this fraud. Gonzolo brought up some of the big cases we have, which are the HSBC case and the UBS case. Just to give you an idea of the scope and the size, I'll take one of those cases, which is the HSBC case. It is called the HSBC case because HSBC is really the anchor defendant. But in that case and related to that case we have dozens of feeder claims. Billions of dollars that went in and out of Bernard L. Madoff Securities, going through various countries.

While I was sitting in back during the last panel I tried to list those countries alphabetically. I should have done it beforehand, but what came to mind were Austria, Bermuda, British Virgin Islands, Cayman Islands, England, France, Germany, Gibraltar, Ireland, Israel, Lichtenstein, Luxembourg, Monaco and Switzerland. That's one case.

We have this throughout a variety of cases: we see money moving in and out. But looking at these cases and building these cases, I think we have a great panel that's actually going to tell you how we started to build some of these cases. But I thought we'd take a step or two back and tell you how we started to figure out these cases and how to build them.

In many cases it goes back to the beginning of the engagement, day one, where we come in. There's the investigation at Madoff's old offices in the Lipstick Building; we have two and a half floors and millions and millions of documents, forty-five years of records. And our job really was to reconstruct those forty-five years, figure out what went in and what went out, figure out where the money went, who participated.

We worked obviously with forensic accountants (not lawyers), who helped put together some of the information about where the money went, where it came from, who were the principal players. But as we were building the case, what we had to figure out and what we wanted to know was, who else was involved? Where was the money going? Where was it, other than in customers' hands? Other than the innocent victims, whom should we look at?

Also we looked at the unusual transfers, where there were transfers which somehow defied logic. We looked at these transfers where no one could make heads or tails of it. In some cases we found people like Jeffrey Picower, whom you may have heard about. The Trustee settled that matter for over $5 million a little over a year ago. Those were the types of cases where it was easy—well, I don't want to say easy, but relatively easy—to figure out the ins and outs of where the cash came from, where it was going, and what were the irregularities.

But then there were people and entities that we knew much less about, who were shrouded in mystery. In the last panel you heard Mark Kornfeld and David Sheehan talk a little bit about the people that marketed Madoff. We would start to see the people that marketed Madoff from the very beginning. For some of them, we couldn't figure out how they got paid—what was happening.

The first person we started to look into was a guy from Boston, Robert Jaffe. You may have heard the name. His father-in-law—just for some background—was Bernard Madoff's first big customer. At the same time that the Picower settlement was announced, we settled with Robert Jaffe's father-in-law, Carl Shapiro, for $550 million. Because of the Picower settlement no one paid attention, but anywhere else that's a lot of money.

Then we have this fellow Robert Jaffe. Different people are writing to us, "Hey, Robert Jaffe put my money

into Madoff." We didn't see any record. We couldn't figure out how this guy got paid. Where was all the money going? And the accounts led up to maybe close to a billion dollars of money funneled in by just this one individual. With Robert Jaffe, we then found out that he had set up a company—and we pled this in our case—that he would actually write to Bernie every quarter and say, "Bernie, my number for this period is…"—and then he'd pick a number, say, $500,000—and he would take it as a long-term capital gain. He would take it by telling Bernie the number. A few days after Bernie received the letter showing the number, there would be a securities transaction showing up on Mr. Jaffe's statement; there would be a purchase of securities from a year or two earlier, and then a sale of securities. And that would somehow always come to the exact number, which would be the referral fee.

So Robert Jaffe: we looked at him and we asked ourselves, "What else could he be involved in? Where was he?" It turned out that he was an officer of a company called Cohmad. Cohmad, as it turns, out was a broker/dealer that was housed inside BLMIS, Bernard L. Madoff Securities. So we started to take a look at who Cohmad was: Cohmad actually referred over fourteen hundred of Madoff's accounts.

Well, now we were really getting to something. So we wanted to figure out, who is Cohmad? How did they get paid? Where did that money go? We found out that Cohmad actually kept something that we call the Cohmad cash database, which tracked the principal in everybody's account. So if customer one put in one hundred dollars on day one, on day ten, or year ten, even if it showed it had an account balance, a fictitious account balance of ten thousand dollars. Thus Cohmad knew the precise amount of principal that was invested, and it knew it for every customer. It also knew when the customers actually took out more than their principal. And Cohmad had that running total; that's how it calculated its cash and its commissions. So we started to investigate.

We looked at this database and began querying it. To give you an idea of what we would see, you heard Mr. Kornfeld talk about Fairfield Sentry. Cohmad got credit for referring Fairfield Sentry. We would see other feeder funds, like Primeo Fund. But we would also see the apocryphal grandmothers in Queens and Florida who didn't have any money at all; those were also Cohmad customers. We plugged these numbers into the database; we would look through it and run the database, and, sure enough, we could pretty closely correlate to the amount of commissions we saw being paid out.

Then part of our investigation started looking at the documents. We were continually looking at the documents as well, these millions of documents. What we saw was that there were certain documents that looked like commission reports, monthly commission reports, that Cohmad would run. That is one right there [referring to slide]. And what you'll see on the very bottom of it, it says SK 86,000. All right, what's SK? We had no idea what it was. It was the beginning of the case, and we were taking a look and asking, "Who is SK?" We couldn't find a Cohmad broker with the initials SK. We couldn't find anybody else who gets paid with the initials SK. We couldn't even really find a customer account which would match up to it.

Through more diligence—and you'll hear more from Mr. Pfeifer about this—we found out that this led to Sonja Kohn, and that's a name you're going to hear more about as we discuss matters within the panel.

I spoke a few moments ago about the HSBC case and all the various feeder funds in all the various countries we're in and tracing assets through. In the HSBC case, all the funds that were involved in that had Sonja Kohn's fingerprints on them.

That's part of what we started to unwind. That's part of the asset tracing process that we had to go through here. I'm going to turn it over in a moment to Mr. Pfeifer, but ultimately, we had thousands of cases and there were about a hundred cases where there are what we call bad faith cases and dozens of feeder funds that we are suing. Each one had a story just like that, where it started out looking like one unusual person in Boston, and it turned into a loose network of people who were affiliated with each other who were all somehow profiting on the back end of Madoff, from all of whom we are going to try and recover assets to build up the pot to pay off the victims of Madoff's crimes.

On the panel with me today is Timothy Pfeifer, my partner, and he's also a member of Baker Hostetler's Task Force on Financial Fraud. One of the main focuses of Timothy's practice is the Foreign Corrupt Practices Act.

To my immediate left is Dr. Ferdinand Graf. Dr. Graf is a founding partner of Graf & Pitkowitz, one of the leading Austrian law firms. He's admitted in both Austria and New York. He mainly acts for international clients in corporate and commercial matters, including representations before Austrian courts and institutions. Graf & Pitkowitz was appointed the Austrian counsel to the Trustee. You heard a little earlier from Mr. Pitkowitz, who is Dr. Graf's partner. In his assignment here and relative to this panel, Dr. Graf is especially advising on cross-border effects of ongoing European and U.S. litigation.

Next to Dr. Graf is John Harris. Mr. Harris is qualified as a solicitor in England, where he worked for fifteen years in insolvency litigation, and now an attorney in the Cayman Islands, also working on part of that HSBC action I mentioned earlier. He works with the firm of Higgs Johnson and acts as Cayman counsel to the U.S. Trustee, Irving Picard.

Next to Mr. Harris is Mr. Pfeifer, whom I mentioned. To his immediate lift is Ralph Siciliano, a member of the law firm Tannenbaum Helpern. His practice is focused on securities litigation and government investigations.

TIMOTHY PFEIFER: Good morning, everybody. Thanks for taking the time to come hear us today.

As Oren said, my training has been involved with the Foreign Corrupt Practices Act, which always requires a certain amount of psychology. All of us as lawyers in this particular bankruptcy have also become psychologists in order to figure out what it is that all of these people are doing that relates to Bernard Madoff's Ponzi scheme. We've talked about that from a number of different angles today. What we have discovered over time is that many, many people contrived to profit themselves using various structures: some liked the Cohmad structure that Oren described here; some liked a structure that I'll describe on another chart over there, to enrich themselves. That makes it more complicated for the Trustee to identify what money is left to BLMIS: what monies were generated; what was the money going in and what was the money going out; and where it went. And as we all have been talking about today, it often went abroad. So it requires an identification exercise and a location exercise, and it then requires invoking the rules and laws of foreign countries in order to actually attach and retrieve those assets.

Today I'll tell you a particular story about a particular defendant and a group of folks that relates to a vast number of the cases that the Trustee has brought here. Of the thousand cases that the Trustee has brought, I would say scores overlap and interrelate in a way that implicates both the United States and, as we have discussed and will show, a number of jurisdictions in Europe and elsewhere. That's a pretty comprehensive list, and there is more. We find out about more and more every day.

So I'm going to expose this little chart here, so indulge me. This is just a small piece of some of the structures that were built around and involved with Bernard Madoff's Ponzi scheme. In this case, it relates to the HSBC case that Oren heads up, and it interrelates with any number of the feeder fund cases that we have brought. It also interrelates most specifically with the RICO case the Trustee has brought. It is the one single case where the Trustee has invoked the Racketeering, Influence and Corrupt Organizations Act statute to deal with a unique set of circumstances. It is obviously a very powerful law that's been built to deal with organized crime. The more you learn about this structure and the people involved in the activities that they were undertaking, the more you realize that their activities involve crimes such as money laundering, transactions in monetary instruments, and other what we call predicate acts. So in this unique circumstance the Trustee has invoked this unique and powerful law to redress the activities of these defendants who have contrived to profit on the Ponzi scheme and enriched themselves while taking money from the victims of BLMIS.

The structure here centers around Sonja Kohn, who was identified as somebody who was paid initially by Cohmad. As Oren explained, we've identified people who also built structures around BLMIS.

In this particular structure, Ms. Kohn received money directly from Bernard Madoff in the form of what appears to be payments for research that she provided to Mr. Madoff. Now you might ask what does Mr. Madoff need research for: he's running a Ponzi scheme! And in fact he doesn't need research for anything. What Ms. Kohn had done is create volumes and volumes of paper that she tendered to Mr. Madoff, who would then in turn pay her millions and millions and millions of dollars over the years in exchange for this material that he didn't use, that nobody in his company paid attention to, because it's not relevant to anything that he was doing. It wasn't research in how to run a Ponzi scheme. It was research that was largely collected from the Internet and other public sources.

This is a particular structure that ties back to my experience as an FCPA practitioner, because people use this type of structure all the time to cover bribes. Let's say Oren, is, say, the Minister of Finance in a particular country, and I want to bribe him. So instead of, like in the old days, Oren giving me a suitcase of money or I giving Oren a suitcase of money, what we do is enter into a little contract. Like, "Hey, I'll consult with you for a million dollars." I tender the consultancy contract, he gives me the money, and the deal is done that way. When in fact he's simply executing a license or whatever it is that I need him to do that I'm bribing him for.

This structure is almost identical to that. What she appears to have been paid for instead of the research was in fact funneling money into the Ponzi scheme through a number of structures, which are the feeder funds that Oren was discussing that are related primarily to HSBC, who provided administrative and custodial and other services to these entities primarily incorporated in the Caribbean and elsewhere.

Now, by the Trustee's estimation, this group of feeder funds fed in over $9.1 billion into the Ponzi scheme over the course of a very short period of time. As a matter of fact, this activity really got going around 2005, which is when the UniCredit group, an Italian banking consortium—and as Mr. Pitkowitz referenced, the economies of these particular countries at this point aren't doing terribly well, and UniCredit has lost about sixty-five percent of its value over the last year—were involved in administering or providing services to these funds. Through this structure, the $9.1 billion entered into the Ponzi scheme, which is over half of what we think is the total actual

cash lost in BLMIS. So you can see the substantial nature of these particular structures. So as Mr. Sheehan pointed out, although it is very appropriate to think of this as an affinity fraud, this is very heavily tied into the world's global financial institutions and structures and products. Because, as David mentioned, there are derivatives products and other financial vehicles that are all predicated on Bernard L. Madoff's Ponzi scheme.

So in addition to the money that Ms. Kohn and her family and her companies received directly from Bernard Madoff, apparently in return for bringing in this money through these vehicles, she and her companies, including an Austrian bank, which is a partial subsidiary of Bank Austria, called Bank Medici, owned almost entirely by Ms. Kohn and a very small piece by Bank Austria itself, who managed to profit very heavily off this enterprise, also apparently received money on fees that were taken from the money going into the scheme. So she was getting paid from both sides. She was getting paid directly by Bernie, and she was getting paid and enriched by the multiple fees on the money coming in.

As Dave likes to point out, nobody gave us this chart. We built this based on research and investigation over the course of time and learning to understand what it is that these entities and people were doing. Because at first blush it doesn't always make a lot of sense. You ask, "Why is this person doing this thing?" And we all have to communicate and talk to each other and work together every day to figure out how these things interrelate. Because the case is so vast, there are so many lawyers working on it that we must be in constant communication in order to understand what certain things are. We bring these facts to each other all the time. We'll say, "Oren, who is this guy?" Oren will say, "Oh, I think he's this"—and we learn and do research and figure out what's going on, and we try to build that into our undertaking to recover all the money that we can.

So the Trustee needed a unique set of tools in order to redress this type of structure. As I've already mentioned, we have invoked the RICO statute, and what we have also done is initiate a proceeding in England, as Dave and others were speaking of before and as we will discuss further. That English action sought to redress the liquidation of Madoff's London affiliate, which is called Madoff Securities International Limited, or, as we say, MSIL.

The MSIL action over in London has been brought by the Liquidators there and initially by the Trustee himself against the directors of that entity and against Ms. Kohn and certain other entities that also received payments directly out of the London affiliate. Because the payment schemes and flows are multifarious in this case, it is very, very difficult to see how everything moves around here, and we undertake a very intricate analysis to do this at all times.

One of the tools that we had available to us in England that we didn't have available to us in the United States—or that is treated differently in the United States—is the prejudgment attachment that David was discussing earlier. That freezing application, or Mareva injunction as it is commonly known, allows you to freeze the assets of a defendant prior to receiving a judgment. Now, the reason it's not typically available in the United States is that it has a very high evidentiary standard you need to reach in order to have a court invoke its powers to bring somebody back and force them to disclose where their money is and tender it back to the jurisdiction. That is, frankly, to tender it to the court prior to a judgment being rendered.

The standard is very, very high in England as well. It's not capriciously rendered in England; it's not something where the English courts say, "Oh, fine, freeze the assets then." That is not how it works. We had to submit to the court very detailed evidence of the financial wrongdoings, and shenanigans frankly, of certain of these defendants that are all implicated in this structure to the English judge. And the English judge, upon examining this material, decided that the standard was met and the Trustee and Madoff Securities International Limited and its Liquidators were entitled to the relief.

So I'm going to read you a couple little quotes from the judge himself that gives you an indication of what he saw when we presented this material to the English court in open court. Let me back up just a little bit first. Madoff's crimes attracted other people's bad acts, and so not everything that happened here was the result of some direct conversation between Bernie and other wrongdoers. The people built their own schemes. And when the facts of this particular structure were presented, like I said, the judge said, "This doesn't look right," and he looked very carefully at the financial and forensic accounting that we presented to him, and he decided that in fact, "This stinks, and I'm going to freeze the money." For example, when explanations were given as to why certain monies were flowing in a certain way by the defendants, the judge noted that putting the money into the hands of other trusted members of the family, your daughter or your mother, et cetera is a classic fraudster's money laundering. If there was ever a case which cries out for a trial and not reaching a firm conclusion about any of this, this is it. And the judge obviously agreed.

In late November the judge handed down his judgment and issued a proprietary injunction, the Worldwide Freezing Proprietary Order, which we discussed at the end of the last panel. It can be taken and enforced elsewhere, in other jurisdictions. And that's an effort the Trustee is undertaking in any number of countries where the assets of these defendants are located, including Israel, Austria, Switzerland, elsewhere, and we continue to find more and more every day.

The judge noted that it appeared that the defendants in this case who were undertaking to justify this structure and activity were saying, essentially, "It would be frightfully inconvenient for me to tell you what I've done with your money or to be prevented from continuing to use it," and the judge said the explanations didn't cut much ice, and again the Trustee agrees. And we and the English liquidators showed a sufficient risk of dissipation, based on the activity that he had been presented with in terms of financial accounting, that it was clear that delay would allow the defendants to continue to dissipate the assets, and hence he put the freezer in place, and also ordered the undertaking of identification of all of this particular defendant's assets up to the amount which was frozen, which happened to be twenty-seven million pounds. That's a lot of money, for anybody, even somebody who has managed to profit as handsomely off of this structure as this defendant had. And the court ordered the defendant to repatriate those assets to the jurisdiction of London, which was also a very powerful injunctive tool. And the defendant was ordered to trace where each dollar came from the day that it was received to the present day: we currently are awaiting that disclosure.

I'll talk a little bit about the chart itself and show you just how this particular structure allowed this particular defendant to profit. It seems complicated, but it is actually pretty simple. What you've got is Bernard Madoff in the middle of the chart. This is Bernie's New York Ponzi scheme, BLMIS. This is his London affiliate. Ms. Kohn, for graphic purposes, exists on both sides of the chart, because Ms. Kohn appears to be involved in two important aspects of this particular structure, both of which center around BLMIS and its London affiliate, where she received money directly from both. That is why we were able to bring the action here in the United States under the RICO statute and in London under the relevant laws there.

On this side you have Ms. Kohn and her family and certain folks that under the RICO statute the Trustee has alleged conspired with her in order to execute this scheme. What you have here, in between Bernie and herself, are four companies that are incorporated in New York, in Gibraltar, in Italy and also again in New York, although this particular company seems to slip around the world. It was once registered at her mother's house; it was once registered in the BVI. It's very difficult to pin down just where ERKO exists, but be that as it may, we sued it. These are the companies by which she received the direct payments from Bernard Madoff in exchange for the purported research that these companies then generated and tendered to Bernie, that he summarily disregarded.

This money then was distributed amongst her family and these companies and multiple other small entities that were also set up—often for what appears to be only the purpose of receiving money from Bernard Madoff for purported research payments. As we have alleged, these six feeder funds brought in more than $9.1 billion, along with a certain smattering of small direct accounts, which are the much more classic accounts brought in through Cohmad and through others that were direct BLMIS accounts that Sonja Kohn was also credited with bringing in. But when you add those up, they are small potatoes compared to the billions and billions of dollars that went through HSBC, UniCredit and Bank Austria.

Through this structure Ms. Kohn owned companies on the back end: Harold Asset Management, owned by her trust and her family; Bank Austria worldwide, a wholly owned subsidiary of Bank Austria that existed only to receive the fees generated by money going in through these funds, and all sorts of various small other players who got a piece of the action as well. So money goes in, profit is made, and we are seeking a recovery. Money leaves the Ponzi scheme directly, customer property, other people's money, goes out to her family.

This is but a small example of all of the structures that are built around a giant, vastly complicated and deliberately obfuscatory scheme where a lot of people made a lot of money, and the Trustee is looking to recover. If we could make a similar chart for every single case, it would be incomprehensible and fill the room. And it would also frankly intersect in certain ways, some more directly than others, but the lines would connect between so many of these players. It's almost overwhelming. But we are endeavoring to retrieve the assets, identify them and invoke the laws of various jurisdictions in order to get it back. Thank you.

FERDINAND GRAF: Good morning and thank you for having me here. I think by now you have an idea why we have two Austrian lawyers on the panel.

We have had quite an impact on this case. I've been asked to talk about enforcement measures in Austria, and I will do so with a focus on U.S. plaintiffs cases and this special case. My talk is in two segments: one is enforcing existing foreign orders in Austria, and the second part is independent measures available under Austrian law.

So in regard to the first part on enforcing foreign orders in Austria from the point of view of the U.S. plaintiff, the general rule is that orders of a U.S. court in general civil and commercial matters will not be enforced in Austria. This is due to lack of confirmed reciprocity, and while Nikolaus pointed out that, in the area of judicial assistance, reciprocity is no longer required, Austria requires reciprocity for the enforcement in civil and commercial matters.

There is an exception, or there is a segment in which Austria takes a more liberal approach, and this has been briefly touched upon, this intervention regime. Austria, irrespective of reciprocity, is enforcing intervention decisions rendered by foreign courts. The Austrian law is not

yet completely clear, based on decisions of the Supreme Court, in regard to which foreign decisions that will be enforced as necessary for an intervention proceeding and which decisions will not be enforced under this provision, because they are only regarded as related to an intervention proceeding.

The Austrian courts will probably look at the interpretation of the European intervention regulation, which has similar language to the Austrian act. And the criteria that will be relevant in such a decision will depend on which court rendered the decision. So if it is the bankruptcy court, it is more likely it will be regarded as a decision that can be enforced as necessary to the intervention proceeding. And the courts will also look on the question whether the claim could have been brought without the intervention. So if it is a claim that arises necessarily out of the intervention proceeding, then it will be enforced.

For our purposes in this matter, we of course encouraged the Trustee to take the necessary steps, since the law is in development in Austria, and we regarded it as likely that a broad interpretation would be taken up by the Austrian courts, meaning that decisions that formerly have not been enforceable in Austria could be enforced under the regime of the Austrian Intervention Act.

A much more straightforward regime applies to decisions issued by European courts. So the worldwide freezing order that Timothy talked about is a decision taken by a member state of the European Union, and it falls under the regime of the so-called Brussels 1 Regulation. That's the regulation of jurisdiction, recognition and enforcement of judgments in civil and commercial matters.

The first part is recognition. There is no formal proceeding if a decision is rendered that qualifies under the Brussels 1 Regulation: it is automatically recognized by all other member states. There are some exceptions to this general rule, like public policy, and it is generally more difficult for ex parte proceedings. So if a decision is rendered in a proceeding where the defendant had no chance to present its case, this will not be enforced under Brussels 1 or it will not be recognized under the Brussels 1 Regulation.

First step recognition; second step enforcement. The enforcement proceedings are formal proceedings, so the judgment is taken from the judgment state to the enforcement state, and the domestic authorities kind of translate the foreign measures into their own tools that they have available under the law of the enforcement state. This is not always an easy process, because the various countries in the EU have distinctly different legal measures, especially in the area of interim measures. Basically it is up to the enforcement country to find the most appropriate leading measure that satisfies the rule that the decision in the judgment state should be given the same effects in the enforcement state that it has in the judgment state.

In practice, this regime of free movement of judgments within Europe means that there's a distinct possibility that a foreign plaintiff is treated better than a plaintiff in a purely local scenario. Talking about the worldwide freezing order, Austrian courts do not recognize this tool, so you will not get a worldwide freezing order as an Austrian plaintiff in an Austrian proceeding. However, as the worldwide freezing order has been issued, it can travel via the Brussels 1 Regulation also to Austria, and the Austrian courts will enforce the order. It is an order rendered not in *ex parte* proceeding, but in a contested proceeding, so that the exceptions under Brussels 1 do not apply.

Just very briefly, are there separate remedies available for a U.S. plaintiff that wants to pursue claims against Austrian assets of persons located in Austria? Are there generally speaking interim measures available to secure a money claim? Yes, there are. Austrian enforcement regulators know these provisions from sequestration of assets, or prohibition to dispose of assets or to pledge assets and so on. Are they enforceable by a U.S. plaintiff? Most likely not, because they are only available to secure the status quo during a proceeding and for the purpose of enforcing a final judgment. Thus if the final judgment is not enforceable in Austria, you will not get the interim measure. So in civil and commercial matters, it is not an option for a U.S. plaintiff. It is more specific only for a plaintiff who pursues its actions in a court whose judgment will not be enforced in Austria.

A second issue is whether a U.S. plaintiff can come to Austria and bring its main proceedings in Austria. Of course it can, but it will find out that Austrian law is less plaintiff-friendly than U.S. law. One of the key issues is discovery under the Austrian law. There is, frankly speaking, no discovery in civil and commercial cases.

Also on the cost side, it is quite problematic to sue in Austria. We have significant court fees ranging from 1.2 percent to up to two percent in the higher instances, always measured by the amount in dispute. So if you filed a large claim, you will you have to pay a significant court fee. In addition, a U.S. plaintiff will be asked to give security for the likely legal costs of the defendant. Austrian civil procedure operates on the principle that the loser pays the costs of the proceeding. And in order to protect the defendant in case the defendant wins, a U.S. plaintiff will be required to pay security for the likely amount of these legal fees.

The last point I want to talk about was really taken away by my partner on the first panel: that was about tying a criminal proceeding with a civil law claim. That's an interesting tool, because it combines the possibility to have the public authorities, the prosecutor, investigate the matter and the plaintiff can ride on the back of the prosecutor with the civil law claim. The prosecutor not only has the obligation to investigate the crime but also

the basis for the civil law claim. There are no cost consequences, so no filing fee. And the suspects, if they are not convicted, have no claim against the private participant who joins the proceeding to get cost compensation.

There is one downside. In ninety-nine percent of all cases the criminal court will not issue a judgment on a civil law claim, especially in complex financial cases. The criminal court will ask the plaintiff to go to the civil court, so there again, the court fees and security deposit will be payable. But of course the plaintiff at that time is in a much better position because it has had access to the criminal file, and it's had some kind of discovery and can better judge whether to take the next step and bite into the cost issue for a civil proceeding.

So much for the Austrian side. John.

JOHN HARRIS: Thank you very much. Good morning. It's a privilege and a pleasure to be invited to speak here today, together with Nick Moser, to represent the British Empire.

You may think, having seen the news coverage of Mr. Romney's banking arrangements, that I'm coming from the Evil Empire.

I'm going to say a few things just generally about the Cayman Islands for the benefit of anyone here who is not familiar with them. But then I'm going to talk about some of the remedies available in Cayman, and particularly the confidentiality issues that apply in Cayman.

A lot of what I'm going to say has a more general application, because the litigation that we have been doing in Cayman for the Trustee has not really reached the stage of the asset tracing and enforcement stage.

The Cayman Islands are a British overseas territory. The legal system is very closely related to that of the U.K. The principal court is called the Grand Court of the Cayman Islands, and it is broadly equivalent to the High Court in London. There is a right of appeal to the Court of Appeal and then the final right of appeal from Caymans to the Privy Council in London, which as most of you know, is known as the U.K. Supreme Court by a different name.

Most attorneys in the Cayman Islands are expatriates, mainly from England and other jurisdictions in the Commonwealth. Some American lawyers generally come here and find they can't practice in Cayman, which is desperately unfair. And Commonwealth precedence and authorities are the cites in Cayman; the court normally follows decisions of the English courts and other Commonwealth courts.

We have a varied group of judges hearing financial cases: a couple of Jamaicans; an Englishman; an Irishman; a Scotsman; and a Canadian.

The UNCITRAL Model has not been adopted in Cayman, but there is a general statement from the judges that the court will seek to give effect to the principles of comity. And the Cayman courts will generally allow foreign judgments to be enforced in the Cayman Islands, provided they are final judgments and the courts which make them have jurisdiction. That normally means either that the defendant was subject to the jurisdiction of that court or chose to submit to it.

So I'll look at the remedies available first, and I'll mention freezing orders. By and large the position of the Cayman Islands is the same as it is in England: freezing orders and proprietary injunctions are available. The legal tests and the burdens of legal proof that you have to get over to obtain those orders are more or less the same, although in my personal experience, I think the judges in Cayman are perhaps not quite as demanding as the English judges, and I've seen freezing orders being given in Cayman where in my view there has been no real risk of assets being dissipated or removed at all. But I wouldn't go chasing an order in Cayman if I didn't have that evidence, because I think you'd be vulnerable on appeal.

Freezing orders are very useful in Cayman because they give you a way around the legal complexities. With a freezing order you can get auxiliary orders for the disclosure of ownership of property, for access to registers of information—not public registers, but rather government registers of ownership of property and ownership of shareholders in companies. Those are not available to the public at all, but if you can get a court to order access to them ancillary to a freezing order, then you can get around that.

There's a little controversy in Cayman at the moment in regard to freezing orders about whether you need a cause of action in Cayman. And we have had a to and fro between two of our Justices, Quin and Cresswell, but they seem to have reached the position where, although they both think you should be able to get a Mareva order where you don't have a cause of action within the Cayman Islands, you can't. They suggested the legislation should be changed to allow that.

Enforcement of foreign judgments I've already mentioned. We of course are looking closely at the *Rubin* case as well. We have an equivalent claim pending in Cayman, which is awaiting the outcome in the Supreme Court. As a matter of public policy, the Court won't generally enforce an order which has been obtained by fraud or which appears to be contrary to justice. And it also won't enforce any order which relates to foreign taxes or penalties. And that can be relevant if you're bringing a claim based on regulatory proceedings. If you're a receiver appointed by the SEC, you need to look very carefully at what your judgment in the U.S. is for. Because if it is for disgorgement of unpaid taxes or something, that's not going to be enforceable in Cayman. For the same reason, a lot of

exemplary and punitive damage judgments generally are not enforceable in the Cayman Islands either.

Once you have got your judgments enforced or recognized in Cayman, you can enforce in all the usual ways: all the same remedies that are available in England and by different names in the U.S. are generally available there.

Obviously the key point for any asset tracing exercise is information. As I've said, information in Cayman is limited. It has their upside on the tax side, and that's not without reason. Most information about ownership of property is not publicly available. Other options, such as letters of request, are quite frequently used. All I'll say is essentially if you're getting a letter of request for use in Cayman, take it up with a Cayman attorney before you get the wording of your letter finalized in your home court. As a general rule, any request that includes the words "all documents" will fail. And I've lost count of the number of U.S. attorneys who can't seem to understand that. Other types of orders are available, such as Norwich Pharmacal and Bankers Trust. If you can make a prima facie case, particularly in the case of fraud, the court will do its best to help you. Those orders are often usually accompanied with what is known as a gag order, which prevents the person being ordered to give the information from disclosing in any way or tipping off the wrongdoer that proceedings are pending. So I'll skip through that and come to the confidentiality issue, which is what's different about Cayman.

The laws on confidentiality in Cayman are very draconian. We have a lot of confidential relationships, which is known by the acronym CRPL. And there are very strict criminal sanctions for the unauthorized disclosure of confidential information. And confidential information in this context means any information which relates to property and which is imparted in the course of professional dealings within the Cayman Islands. So professional means anyone providing a service: a banker; an accountant; an attorney. In Cayman we have a very heavy emphasis in the economy on investment funds. Investment managers would fall within this as well. So CRPL won't apply to every request for information, but probably nearly all. The law is intended to protect information that is held by a professional on behalf of a principal. So it is the banker's customer, the attorney's client. And I'll say that with investment funds in Cayman it is almost inevitable that a confidential relationship will exist, and you need to be clear about whether CRPL does apply, because the consequences get very serious. Even requesting disclosure, asking for information, is in breach of CRPL: It is a criminal offense with a very hefty fine and two years in jail. So I generally find that U.S. attorneys make sure it is me that passes the question forward.

Before you can give information out which would be covered by CRPL, you have to go to the court and get the direction from the court allowing you to disclose it. That's whether or not you're making a disclosure voluntarily or under a court order. So if a respondent to a Banker's Trust order is ordered by the court to provide some information, he then has to go back to the court again and get another order telling him if he's actually allowed to do that. And generally the directions that the court will give are aimed at protecting the interests of third parties, so the directions will be to ensure that the information which is provided is only used for the purpose for which it has been provided and to make sure that the confidentiality is preserved. And it doesn't go outward to anyone else beyond the people it is supposed to go to.

The public policy provisions of CRPL are what drive that. And I wouldn't want you to assume because of that that the Cayman courts are hostile to requests for information from people like the Trustee in the Madoff case. The courts do try to assist the victims of fraud, victims of crime. And CRPL is not intended to be a blocking statute. It is not intended to stifle a just claim. If you can make out your case of fraud, that will be the end of it, and the court will assist you to the best extent that it can.

And I'll just mention that a final point on CRPL is that it doesn't apply in the case of information given in criminal proceedings, and Cayman does have a mutual assistance treaty with the U.S. All I can say is the wheels of criminal justice in the Cayman Islands turn incredibly slowly, so if you need to rely on the criminal authorities, you're probably in desperate straits anyway.

That's a very quick run through the procedures in Cayman, and I'll turn it over to Ralph.

RALPH SICILIANO: Thanks, John.

Good morning, everyone. Just picking up on what John said about confidentiality, I can't help but depart for a second. It seems the real challenge, when you're representing an adviser here in Manhattan and you get a voluntary request from the SEC to give all the information about your investors and the fund in the Cayman Islands, is that you're really in a quandary because of this confidentiality requirement. It is a very interesting interplay between how we have to deal with the authorities here and in the Caymans.

I'm going to talk this morning about New York law, with which most of you are familiar. But we thought it would be a good idea to just give an overview of what New York law says about securing the recovery of assets prior to judgment. Unlike many of the jurisdictions that you've heard about this morning, the remedies available to a private litigant under New York law to secure the recovery of assets prior to judgment are fairly limited. The courts in New York, both federal and state, do not have the broad authority to freeze a defendant's assets simply to assure that there will be a recovery of a money judgment at the end of a case.

For example, the New York Court of Appeals decision in *Credit Agricole* was pretty emphatic. It stated that our courts have consistently refused to grant general creditors, such as any litigant like BLMIS or anyone else, a preliminary injunction to restrain a debtor's asset transfers that allegedly would defeat satisfaction of any anticipated judgment.

Interestingly, the Court of Appeals talked about the authority to issue a preliminary injunction, a freeze order, and it said that the preliminary injunction has to concern potential harm to the plaintiff's rights respecting the subject of the action. And a money judgment claim is not the subject of the action which would entitle you to freeze particular assets that would satisfy that money judgment.

Similarly, the U.S. Supreme Court has held that an unsecured creditor seeking money damages in an action in federal court is not entitled to a preliminary injunction or freeze order under Rule 65. That was the *Grupo Mexicano* case. And the Court said a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property. And it referred to one of the seminal cases in Britain, and the U.S. Supreme Court said the decision issuing a pre-judgment injunctive remedy in Britain has been viewed by commentator as a dramatic departure from prior practice.

So let me talk then about what you can do in terms of securing or freezing assets prior to judgment in connection with a money judgment action in New York. First of all, keep in mind that some of the remedies I'm talking about are available in federal court pursuant to Rule 64 of the Federal Rules.

The most generally used ground is the order of attachment. That's an order where, under Article 62, under certain circumstances you can freeze assets prior to judgment. But the grounds are pretty limited. Typically it is where you're suing a defendant who does not reside in the state, or you're suing a foreign corporation that's not qualified to do business in the state. In order to get an order of attachment against a defendant, you need personal jurisdiction over the defendant, unless you're going to be limited to quasi in rem jurisdiction, which I'll talk about in a moment.

I'll highlight three of the grounds. I talked about where you're suing a defendant who doesn't reside in the state, a foreign corporation that's not qualified, also where a defendant does reside in the state, but you can't serve him. Also, the classic ground for an order of attachment is where the defendant, with the intent to defraud its creditors or frustrate the enforcement of a judgment that might be rendered, has assigned, disposed or encumbered or secreted or removed the assets from the state.

Now, the Second Department issued a decision talking about that last ground, and it emphasized the level of proof that's required to establish that ground. Fraudulent intent must be demonstrated. The court said that fraudulent intent really must have existed in the defendant's mind. Allegations raising a suspicion of intent to defraud is not enough, and merely showing that assets were removed from the jurisdiction is not enough. The courts have held a very high standard in establishing that element.

How do you get an order of attachment? You can get it *ex parte*, but then you have to promptly follow up with notice to the defendant and get confirmation of the order of attachment. And that confirmation procedure is the result of several constitutional challenges to attaching assets even before the defendant has any idea he's been sued. Once the order of attachment is issued, you then have to go about getting it served on the garnishee, the entity that has the assets. Here there is a mechanism under Article 62 which essentially borrows the mechanisms under Article 52 of the CPLR that talks about who is the proper garnishee.

If any of you have gone through the process of trying to collect a judgment and getting the right garnishee, you know it is pretty tricky. For example, the statute lays out that if the asset that you're going after is a limited partnership interest, you have to serve the general partner. If it is a certificate of stock, you have to serve the corporation, and there are various entities identified. You've got to get your order of attachment served on the right person to get ahold of the asset. By the way, what you're doing is creating a lien, first of all, that gets priority over anybody else who might get possession of that asset. But getting that lien also is a tricky process, because there are timing steps that have to be taken. If you don't take all of those steps, just like judgment enforcement, you're going to lose your lien, and you're basically going to have to start all over again.

With personal property in New York City you have to give the order of attachment to the sheriff, and the sheriff has to go to the garnishee, and hopefully the garnishee will hand over the asset. But if the garnishee doesn't, whether it's a bank or any other entity, you then have to take another step within a specified period of time to order the turnover of those assets. As you might suspect, many garnishee are not too quickly going to say to the sheriff, "Oh, sure, here's the assets, you can have them"—because they are worried about being sued.

Real property, by the way, is very easy to attach. All you do is have the sheriff—in New York City at least—file the order of attachment with the local clerk, and that attaches the asset.

Let me talk a little bit about *quasi in rem*. That's where you attach an asset, and that's the jurisdiction that you have and that the court has. But the significant limitation is that your recovery is going to be limited to that asset.

There has also been a constitutional challenge to that process. And Dave Siegel has a discussion in his treatise about the cases which led to a limitation of even that remedy. Essentially, courts in New York, although they will not have personal jurisdiction and that's why you're using quasi in rem, are still going to require you to show some connection between the jurisdiction and that asset or the defendant and the asset or the claim and the asset. And there are these very arcane cases where somebody might be suing somebody in Colorado or maybe overseas, and they learn they have an insurance policy and the parent of the insurance company is in Manhattan, and they'll try to attach the proceeds in Manhattan. And that's where you get into trouble, because the connections are so tenuous.

Another remedy to remind you about that you're probably familiar with but may not use too often is the temporary receiver. The CPLR has a provision where you can get a receiver appointed at the beginning of the case and have that receiver take possession and control of the assets of the defendant. But a significant limitation is that the assets have to be the subject of the action, and that's again limiting.

Then also there's the notice of pendency, which, as you know, we as lawyers can just file and put a lien on real property. That can be a very effective remedy but also a very dangerous one, because the lien can be significantly debilitating to the defendant. But once again, that remedy can only be used where the real property is at issue. Of course, Mr. Madoff doesn't have this problem—but if there were real property that was actually transferred, then it would be.

Essentially the bottom line is that your hands are very much tied as a plaintiff/litigant when you're seeking a money judgment and you're worried that those assets are going to go somewhere else. And that's in sharp contrast, as we've seen, to the international freeze orders.

Thank you.

MR. WARSHAVSKY: We do have time for a couple of questions if anybody has any. Yes.

AUDIENCE MEMBER: For Mr. Graf. Was the English *Mareva* order against Sonja Kohn recognized in Austria, and, if it was, what was the practical enforcement effect? Did you serve it on banks? Did the banks actually freeze assets?

MR. GRAF: I'm not sure with all these ongoing issues we can talk, frankly speaking. But recognition itself is not a formal procedure, though it is recognized in every member state of the European Union—just by the very fact it has been issued. So if it's a proceeding and an order has been issued against Ms. Kohn, the courts have to accept it.

The enforcement steps are not that easy in the different countries because, as I said before, the measures available under English law go much further than Austrian law. To give an example under the Austrian law, the creating of a lien in the course of an interim measure proceeding is not available. The law explicitly says no pledge can be created in as an interim measure. So if an order has in rem effect, similar to a pledge, these issues arise and have to be resolved.

AUDIENCE MEMBER: Can you tell me a little bit more about what happened to Sonja Kohn? Is she in jail?

And also have you gotten cooperation from her? And how much cooperation on this kind of thing did you get from Madoff as well?

MR. PFEIFER: You want to handle the Madoff question, and I'll handle Sonja?

MR. WARSHAVSKY: Sure. The question is what's the status of Sonja Kohn, and how did she and/or Mr. Madoff help in creation of that chart. The short answer from Mr. Pfeifer.

MR. PFEIFER: First, I can't comment on any cooperation we did or did not receive from Ms. Kohn. But second, I do not believe or understand that she is incarcerated in any way.

AUDIENCE MEMBER: Will there be subsequent transferee lawsuits against the shareholders of the Sonja Kohn fund, such as the Harold Fund and other funds?

MR. WARSHAVSKY: The question, for those in the back, is whether or not there would be subsequent transferee actions against the shareholders of the different funds. I can answer part of that, as can a few others on the panel, which is as follows: there are already some of those subsequent transfer actions taking place. What a subsequent transfer action is, for anyone who doesn't know, is really just following the money out of the funds. The fund after all is just the various investors.

But both John and Tim might be able to answer that. Do you have anything to add?

MR. PFEIFER: I don't, actually, to that question. I'm sorry.

AUDIENCE MEMBER: More particularly, there have been approximately four hundred defendants sued in the Fairfield cases, and essentially every shareholder has been sued, as far as we can see. And the question is that, as you know, tens of thousands of investors around the world who really want to know whether they are going to be subject to claw-back claims, and that seems to me something that should be disseminated. It doesn't mean that you have to say more than that, but are all of the investors in all of the Madoff funds going to be sued for all of the redemptions which they received, as has been the case

in the Fairfield funds and appears will be the case in the subsequent transferee cases that the Trustee is bringing against Fairfield and Kingate?

MR. WARSHAVSKY: There is a lot baked into that question. I think the question is ultimately whether the Trustee intends to sue individuals who redeemed from these different funds, if I understand the question correctly.

I don't think we would comment on ongoing litigation. I think ultimately when you talk about what the liquidators of a foreign fund do vis-a-vis their customers, they don't necessarily consult with us, nor do we have any participation in those actions. So any fund that's in liquidation will have its own claims, perhaps against its own customers. We have very strict requirements to show—if the Trustee is to bring a subsequent transferee action, there's a very specific legal requirement, which is that basically somebody either took out money in bad faith or received more money than he or she should have.

MR. ZEBALLOS: I think we have time for one more question.

AUDIENCE MEMBER: There was a mention in the earlier panel about the purchase of claims in Madoff transactions. I was just wondering what impact that's having on negotiations for settlement and certainly a big impact in Europe in their case. So what difference has it been making that it has been securitized?

MR. WARSHAVSKY: The question was what effect, if any, the diminution of value of claims in the claims market may have on the Trustee.

Ultimately, I don't think we can really comment on ongoing settlement negotiations. There may be lawsuits already filed that you can look to, but beyond that we really couldn't comment on that.

But I think the comment made by Mr. Kornfeld in the first panel was that certainly to the extent the value of the claims dropped, there is going to be less funding for people who want to repay the Trustee.

MR. ZEBALLOS: I think we're just about out of time. So there is no break, and we will go right into the next panel.

IV. Chapter 15, Comity, and Related Bankruptcy Issues

MS. DAVIS: Our third and final panel of the day will focus its discussion on Chapter 15 of the United States Bankruptcy Code, related comity issues, and the authority of the U.S. Bankruptcy Court, in light of the U.S. Supreme Court's recent decision in *Stern v. Marshall*.

The moderator for our panel today is Judge Elizabeth Stong, who has served as a U.S. Bankruptcy Judge for the Eastern District of New York since 2003.

I'll turn it over to Judge Stong.

ELIZABETH STONG: Megan, thank you so much. And thank you to our fabulous audience for sticking with us. There are blessings and curses associated with being the final session of a half-day panel, essentially running until the statutorily prohibited time of nearly 1:00 o'clock. So it's the home stretch, and we are going to make it worth your while. And we want you to participate, because you are experts now on all these issues. So we look to you for your input and your questions. We have got some great topics with which to engage you, I think.

There have been two terrific segments so far. The drawback—love the drawback—is many things that are worth saying may have been said already, but the benefit is that in this hour and fifteen minutes or so we really hope to pull this all together for you, and to do that first by stepping back and posing the question: Just what exactly is this Chapter 15 all about anyway?

Chapter 15 came into the Bankruptcy Code, Title 11 of the United States Code, with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. That was a somewhat controversial piece of legislation in some ways, but not in the Chapter 15 context, as you'll be hearing. So we will begin by looking in the rearview mirror to get some history and context on Chapter 15. We will learn a little about Section 304. For the bankruptcy lawyers in the room, you know this already: that was the predecessor to the principles that underlie Chapter 15. As for Chapter 15, what's it doing there? How does it help? What is its role in the bankruptcy process?

Susan Johnston, to my left, is going to take us through that. To give you a little bit on Susan's background, she's counsel to Covington & Burling. She advises debtors and creditors, and she has a particular focus in bankruptcy litigation. That will be clear when you hear a little bit about her tremendous background: She represents debtors, creditors' committees, secured, unsecured creditors, leaseholders, indentured trustees, equity holders and whomever is out there who needs a bankruptcy lawyer. She was an Assistant United States Attorney in the Southern District of New York, and so is a former public servant as well. She's a member of the International Insolvency Institute and the American Law Institute. She's a regular delegate for the III at the UNCITRAL Working Group meetings.

Susan will be our guide as we try to get a sense of Chapter 15, what it is all about and what animates it.

Next, we'll look a little bit at the windshield and think about some of the big issues in Chapter 15 today. Who can bring one? Who is eligible? Where should it be brought? Where should we look to? What is the center of main interests or COMI? Does it matter when COMI was established—was it last week? Is that something we

should be concerned about? And what can a foreign representative do anyway?

Our guide for this process as we look out the windshield is going to be Jim Garrity. Jim is a partner at Morgan Lewis & Bockius in the business and finance practice and represents debtors, creditors and court-appointed fiduciaries in that role in Chapter 11 and in cross-border cases. Jim is a Fellow of the American College of Bankruptcy, a member of INSOL and the International Insolvency Institute. Like Susan, a former public servant, Jim was a Bankruptcy Judge in the Southern District of New York. And I wish I could say we had been colleagues, but he served from 1992 to 2001, and I came to the bench in 2003. He was also an Assistant United States Attorney in the Southern District of New York. So Jim will help us look out the windshield and help us understand the who, where and what of Chapter 15.

Finally, we are going to look a little out to the horizon and think about how this is all working in practice. We'll do this through the example of the Fairfield Liquidators case and how in that situation Chapter 15 was used for the litigators in the room.

There were some two hundred twenty actions brought since August 2010 in the United States Bankruptcy Court in that context. That's a lot of litigation. And Rich Levin is going to be our guide through this process. Rich is to my left. He's a partner at Cravath Swaine & Moore in the corporate department. He chairs the restructuring practice, and in that capacity he has represented just about every participant in the bankruptcy process, including debtors, creditors, acquirers through Chapter 11, where an awful lot of mergers and acquisitions happen these days. His industry clients have included companies in manufacturing, auto technology, energy, utility, finance, telecom, real estate, retail, restaurant, gaming and agricultural industries. It might be easier to list the industries where he has not had a client.

Rich currently serves as the Vice Chair of the National Bankruptcy Conference, which is a pretty important entity in the world of U.S. bankruptcy law revision and reform. He's a member of their board and a Fellow of the American College of Bankruptcy and an III, International Insolvency Institute, member. He's consulted with the World Bank and Central Bank of Brazil in forming their bankruptcy law.

He was counsel some years ago—also in public service—to the House Judiciary Committee. And one of the primary authors—I guess when he was in high school—of the United States Bankruptcy Code. But this wasn't enough for me: I want to know more about Rich Levin and I Googled Rich Levin—

RICHARD LEVIN: Did you know I was president of Yale University?

That's the other Rich Levin.

JUDGE STONG: 1,600,000,000 hits on Google. So you'll have to talk to Rich at lunch if you want to know the rest of the things about him.

I thought I was on to something here, so I Googled Jim Garrity, and I got 164,000 Google results for Jim. And I figured well, I think I knew Susan pretty well, because she and I are lucky enough to serve as delegates together from time to time at the UN. So I Googled Susan Power Johnston and 64,400,000 results on Google for Susan Power Johnston.

So Susan, back where we started, look in the rearview mirror, and tell us where this Chapter 15 came from, a little history, context and basic principles. Thank you very much.

SUSAN JOHNSTON: I'm afraid now that Judge Stong has undercut her credibility with the people in this room, though she may be able to earn it back.

JUDGE STONG: I'll do my best.

MS. JOHNSTON: Chapter 15 is part of a solution for the fundamental problem that arises from the fact that we have a global economy: we have entities and businesses that have assets and operations in multiple countries all over the world. They have a single advantage. Governments are located in one headquarter place. Global companies usually have a single cash management system which means money from around the world is swept every day, put into a concentration account and then used as needed to fund the operations of the company. When they fail, they fail not in a unitary way, but around the world in every country: every operation fails. So the goal, the concern that the insolvency practitioners around the world are focused on, is how to maximize value across borders. How to ensure that creditors who traded with global entities, lent to them, who lent to a global enterprise, can have their contract rights honored and have their expectations filled. This is fundamental, but it is vital to the proper functioning of the global economy.

At the same time it is important to honor local policies and local legislative priorities, because every country believes that the way it deals with things like tax, employee obligations, and secured liens is the right way to deal with those issues, and countries are not willing to have their legislative choices interfered with by the headquarters of Lehman in New York.

Lehman is a good example of this problem. When it failed, its cash management system was cut off in the U.K. because the U.K. entity had to file at opening of business, and that cut off funds that normally would have been swept and available globally.

Olympia & York, which Judge Garrity had experience with, is another example of a multinational corporate

enterprise that failed in the U.K., in Canada and the U.S. at the same time, but there was no uniform governance after the failure.

But Madoff creates a problem from a slightly different perspective, because it is no longer an operating entity. The Stanford Bank case is another problem where you have multiple jurisdictions, competing claims, competing control efforts. You've got the receiver, the SEC receiver in the United States, which takes the position that it should be in control. And you have the Caribbean Liquidator, and they have competed in Canada and the U.K. and in Switzerland to be recognized as the proper authority to organize the collection of assets in that case.

The problem that all of these cases demonstrates is that there is no global mechanism to achieve this laudable goal of maximizing value. There is no treaty, there is no convention, there is no such thing as a cross-border statute that permits entities to organize themselves post-insolvency to get value to their creditors. And one of the problems that I think was alluded to in the first panel this morning is that countries have different ways of approaching this kind of problem. From one extreme to the other, the territoriality principle is the idea that every nation state takes control of what's within its borders, and liquidates and distributes assets to its creditors—and only if there is a surplus left over after its creditors are satisfied in full would the courts even consider the possibility of moving assets to satisfy claims of creditors in other jurisdictions.

The contrast to that is the universality principle, which is really an academic's dream at this point, because it is the idea that, for example in the Lehman case, Judge Peck in the Southern District of New York would have had total control over the maximization of value across borders in that case around the world. It would centralize control over the cross-border insolvencies in one single forum. All of the debtor's assets, wherever located, would be subject to the exclusive jurisdiction of that court.

The benefits of that kind of regime would be that all similarly situated creditors around the world would be treated the same. It would minimize administrative expenses, because we bankruptcy lawyers are expensive no matter where you find us. It would maximize the benefit of all the stakeholders and maximize the possibility of a successful restructuring.

An example of where that worked pretty well, at least up to the point of the sale, is the recent Nortel sale of patents, in which all of the various administrators and debtors who were responsible for Nortel entities around the world agreed that it was best to get together and sell the patents as a whole. That worked great, and they made a lot of money. But now they are trying to figure out how to divide the money, and that creates problems that they have not yet figured out how to deal with.

That's an example of why universality doesn't really work, because you can't really get different jurisdictions, who have jurisdiction over their assets, to share those assets with others. There is this general preference for local jurisdictions over how they apply their law. As I suggested earlier, there are incompatibilities in the way insolvency laws work across the world and so on. So one of the ways courts have dealt with this absence of statutory or treaty opportunities for maximizing value is to engage in informal ad hoc protocols, which are agreements, really, between the insolvency representatives of one jurisdiction and of another jurisdiction dealing with whatever issue they have to deal with in their particular case. Sometimes these protocols are nothing more than an explicit acknowledgment that each court has jurisdiction over what it has. They also usually provide for informal or formal means of cooperation and discussion between the courts. But as you can see from some of the discussion of Chapter 15 earlier today, Chapter 15 actually codifies some of that and has actually replaced the need for some of these informal protocols for countries that have adopted Chapter 15.

If you don't have Chapter 15 or a Model Law that is similar to it, then you do need to be able to fall back on the possibility of these informal protocols. That was a digression, sorry, but that brings me back to Chapter 15.

So as Judge Stong indicated, it was adopted in 2005 by Congress as part of the Bankruptcy Abuse Prevention and Consumer Protection Act, which sometimes we call BAPCPA. It was based as closely as Congress thought was appropriate on the UNCITRAL Model Law, which was drafted on UNCITRAL's Working Group V on insolvency. That group is comprised of delegates from all the nation states that are members of UNCITRAL, and also nongovernmental organizations with particular expertise in government insolvency.

The members of Working Group V are judges from these member states, practitioners, academics, and regulators. The U.S. delegation is comprised of two bankruptcy judges, a person from the Department of State, and a bankruptcy lawyer with extraordinary expertise in this area. The mandate of Working Group V is to address problems and issues that arise in cross-border insolvencies. It is pretty wide ranging. The expertise is deep. The group that's meeting now has been chaired by the same chair for fifteen or twenty years, a long time. The continuity provides tremendous energy, enthusiasm, support.

JUDGE STONG: It is a remarkably productive group, given that it meets twice a year.

MS. JOHNSTON: UNCITRAL adopted the Model Law that the Working Group drafted on May 30, 1997. It drew the Model Law in turn, looking way back in the

rearview mirror, on the European Union regulation on insolvencies. And that regulation is a very good and useful prototype for this kind of cross-border problem, because, of course, in the EU you have a number of different countries, but they are all members of the European Union. And it reflects the view that, in order for the internal markets in the EU to function properly, the cross-border proceedings should be efficient and they should cooperate.

The European Union took, I think, pretty close to a universal approach to this. They took the view that a single forum located within one of the EU countries should have jurisdiction—that is, the forum that has jurisdiction over the place where the debtor has a center of main interest should control the main insolvency proceeding.

The center of main jurisdiction law applies to all of the proceedings that take place. Once the court has opened the main proceeding, the courts in the other EU case may only open secondary proceedings, which are ancillary to, supportive of, the main proceeding, and all other courts in the European Union have to defer to that initial determination that the initial court has COMI.

This obviously results in a lot of forum shopping: the first to file gets the choice of law. Also the first to file may be able to pick a jurisdiction that is particularly supportive of reorganization, one where the insolvency law is particularly well developed and ripe. So a number of countries have tried to file in the U.K.

MR. LEVIN: We call that bankruptcy tourism.

MS. JOHNSTON: Bankruptcy tourism, although I don't know that that's such a bad idea. Because if the U.K. has pretty good laws on reorganization, why should a company not be able to benefit from that, even if it is a bit of a stretch on the jurisdictional front!

MR. LEVIN: Absolutely true. Those are the arguments. Germany just amended its restructuring laws to take effect on March 1st. I got an email from a European firm this morning describing it and saying in effect that we now might see a lot more companies filing in Germany rather than the U.K.

MS. JOHNSTON: The problem with that is another problem for cross-border insolvencies, which is that Germany is a civil law country. The U.K. obviously is a common law country, and I'll be interested to see more about the German statute. Because from talking to people from Germany at the UNCITRAL meetings, it sounds as if their old insolvency law was not particularly well suited to reorganization and maximization of value. So that will be interesting to see how that goes.

Just as a footnote, the Working Group V has drafted a number of texts that are useful in interpreting the Model Law and consequently interpreting Chapter 15. I've noticed the bankruptcy courts have more and more referred to them. One is the Practice Guide on Cross-Border Insolvency Cooperation. This one talks about protocols, and it lists all the known protocols and discusses them. Another is the Legislative Guide on Insolvency Law. We have a colleague in the bankruptcy world who wears funny hats when he does panels and keeps everybody awake. When he takes a position, he puts on a particular hat and so forth. I don't have hats, but I have books.

The Legislative Guide on Insolvency Law, another good resource, talks about factors that legislators ought to take into account when they are thinking about amending their insolvency laws. Because it reflects the thinking of the Working Group on things like the Model Law. It's a useful resource to try to interpret it.

JUDGE STONG: There is another piece to this. They are available on the web site UNCITRAL.org and I believe they are downloadable and searchable. A very useful resource.

MS. JOHNSTON: And they are free. The download is free.

Chapter 15 has a section that explicitly requires the courts in interpreting Chapter 15 to look to international resources, which is delightful, but it is also not always appreciated in some areas. I think it is one of the few areas of the law in which the courts are directly instructed to look at international resources because of the international origin and the need to interpret the law consistently throughout the countries that have adopted the Model Law. That's because it defeats the purpose of having a Model Law that's adopted in a number of jurisdictions if the courts of each jurisdiction treat it differently.

JUDGE STONG: From a judicial perspective I can tell you there's a statute that applies, and we are going to be looking at the language of the Code, and it is an interesting and useful thing that Section 1508 of Title 11 of United States Code specifically makes this reference. I think it is a practice point, and it is a good thing for the lawyers to be aware of. As a judge, I can tell you it is a good resource to see that written into the words of the Code. I'm not aware of a similar provision directing one to consider the international origin of a statute, in this case Chapter 15. I can't think of another provision in the United States Code that is like that, and it's useful to have it there.

MS. JOHNSTON: Even though we have that provision, there still has, I guess, inevitably arisen differences in interpretation, which I think Jim will address later.

The problem with the Model Law is that it has only been adopted in eighteen other countries. Six of them are common law English-speaking countries, and the rest are countries like Eritrea, Mauritius, Montenegro, Romania, Serbia, Slovenia, and also some larger countries like Greece, Japan, Mexico and so on. But you can only use Chapter 15 for cross-border facility if you have a recipro-

cal similar statute in the other countries. So we continue to push.

If any of you are from countries that have not yet adopted this, do please adopt it.

Chapter 15 has four fundamental principles: recognition; access; relief; and cooperation. These are the lynchpins of how Chapter 15 works for the benefit of foreign administrators. Recognition requires the foreign bankruptcy proceeding to have extraterritorial effect in the United States. That means that a foreign representative can come to the U.S. and ask a U.S. bankruptcy court to enter an order that, for example, extends the stay that was issued in the foreign jurisdiction to all litigation proceedings in the United States affecting that company, that debtor. If you didn't have that, then you'd have to do the kinds of things discussed in the panel earlier this morning. You would have to seek letters rogatory. You would have to ask an individual U.S. court to enforce an order, and that would have to be done on the basis of comity here. In other jurisdictions that have a civil law legal system, you'd have a very hard time doing that, unless they had a statute explicitly permitting it.

After you're recognized, Chapter 15 gives you access to the U.S. courts for these kinds of actions: you can get discovery; you can get a stay; you can marshal assets; you can commence litigation for the purpose of collecting assets and then distributing them abroad.

The relief that is available is set out in Chapter 15. There are specific kinds of relief that are specifically alluded to, but in addition there's a catch-all provision, which is 1507, which says that, in addition to the specified forms of relief, it is within the judge's discretion, given the application of comity, to provide other ad hoc forms of relief. So that a foreign representative can ask for almost anything, and as long as the judge believes that it will not violate the fundamental rights of U.S. creditors, the judge has discretion to do it.

And then I guess the final and very important part of Chapter 15 is the cooperation and coordination sections, which explicitly authorize a U.S. bankruptcy judge to cooperate with foreign judges and to coordinate the cases. That can be achieved through a variety of means. The judges can speak to each other; they can write each other letters; they can give each other transcripts of the hearings, provided they can be translated. There is the concept that a judge can appoint an examiner to facilitate cooperation. Judge Garrity did this before, in the *Olympia York* case. And that's very important, because it enables judges who are dealing with similar assets and similar issues to attempt to find ways to coordinate and reconcile them. Sometimes they really can't. Sometimes there are simply differences in law that cannot be reconciled, but they can at least talk about it.

In the *Lehman* case there are two decisions, one in the U.K. and one in the U.S., about the applicability of what's called the flip clause in a derivative contract. That is, when the debtor goes into bankruptcy, whether a flip clause, which diverts funds from the debtor to a creditor is unenforceable, an ipso facto clause. You can't enforce a clause that's been triggered merely by an event of bankruptcy. In the U.K. that's not so. And it has been litigated in both jurisdictions. They have come to completely different conclusions, and I'm not quite sure where it is going to end up. But if we had a universal approach, that wouldn't happen.

I've got about two seconds to talk about comity in Chapter 15. Before we had Chapter 15, the U.S. bankruptcy courts could recognize actors in foreign jurisdictions if they felt that comity permitted it. And it was a wide-ranging, fact-intensive inquiry that often delayed the actual initiation of relief. Under Chapter 15, the recognition procedure is generally very simple. You give your judge the order, and it says you're the foreign representative, and the judge is supposed to recognize you, in words and substance. So there is no comity involved in recognition. That's a matter of statute.

Comity comes in when in considering what kind of relief the U.S. bankruptcy court is able to provide to the foreign representative. There are some things that are explicitly provided for, like the automatic stay and so on, but even with respect to that, I think the judge could consider whether it was appropriate to give that kind of relief if the judge felt the comity didn't justify it.

There is a public policy exception to comity; I think that was raised earlier today. The question was asked whether the avoidance provisions would come within the public policy exceptions, and my own view is probably not. I mean public policy is supposed to be the broadest possible public policy of the United States applied—interpreted really—very narrowly. I'm not quite sure I've seen a case yet in which the judge said that—maybe there is one case.

MR. LEVIN: Yes, the *Golden Honey* case, the Israel case. The actual language of the statute is whether the provision is manifestly contrary to the public policy of the United States. So it is not just the result would be different, but it is really offensive to U.S. policy.

MS. JOHNSTON: So far no judge, except for the *Golden Honey* judge, concluded that the thing presented to him or her as a violation of public policy actually rose to that level.

There is an understandable desire of the bankruptcy judges, with all due respect, to be cooperative and to fulfill their mandate to cooperate with foreign jurisdictions. So they are reluctant, I think sometimes, to follow what limits are available in the statute to enable them to protect U.S. interests. It is an interesting area, because it is still a

relatively new statute. It is only seven years old, and the jurisprudence is not yet fully developed in a lot of areas. So it's a great place to practice because there are all these holes, and you can make almost any argument that you can creatively come up with—don't you agree?—as to why public policy should apply.

MR. LEVIN: You can make almost any argument you can come up with in Chapter 15 because it is so new.

JUDGE STONG: This reminds me of that instruction, which is, "If the facts are on your side, argue the facts; if the law is on your side, argue the law." If neither the facts nor the law are on your side, what do you argue? Public policy.

I think it is an important safety net in these kinds of statutes, which was necessary to be written in, but which probably rarely is directly implicated.

From a judicial perspective, I think there are a couple of footnotes that are worth adding.

It is a comparatively small number of countries, though some significant jurisdictions, that have adopted the cross-border model law along the lines of Chapter 15. But the concepts are well-known among the judges who sit in the business or commercial courts, courts of first instance in many significant commercial jurisdictions. They are well-known to those judges because those judges may participate in UNCITRAL; they may participate in the III or INSOL or World Bank meetings convened from time to time of the commercial judiciary who deal with these issues. So even if the law is not on the books, the concepts may be familiar to the judges before whom you may be appearing or with whom your co-counsel may be dealing. There is more knowledge out there than the bare list of adopting countries would reflect. I say this based on my experience in working with a lot of those judges and training some of them in South America and North Africa and Middle East and Europe. In one of my capacities as a bankruptcy judge I chair the International Judicial Relations Committee. And judges care a lot about these issues and getting them right. And they are complex, they don't come up that often, and they require courts to think about how court systems should work—sometimes at the highest level.

There is a tool, and it is available in about forty languages, for court-to-court communications. Susan described some of these. It is a protocol—I think it is called for court-to-court communications—crafted by the III and endorsed in effect by the National Conference of Bankruptcy Judges. So you can find that also on the Internet. Because it has the imprimatur of the NCBJ, it is a useful thing, probably known to you, not to the United States Bankruptcy Judge before whom you may be. It certainly is something they can be directed to if somehow they don't know it.

Susan, thank you very much for giving us about two hours of material in the twenty minutes or so you had.

Over to Jim to take us through eligibility, recognition and powers of these foreign representatives in Chapter 15 after recognition. Jim Garrity.

JAMES L. GARRITY, JR.: Thank you, Judge.

What I'm going to try to focus on here in the next couple of minutes are really the first three of the four principles that Susan touched upon. That's access, recognition and relief.

I think it's important to have an understanding as to how this develops, because when you then look at how these issues come up in the context of the Chapter 15 proceedings, particularly when you're dealing with the offshore funds, I think it will help to inform you with regard to what relief might be available and those sorts of things.

But very, very simply, as Susan has indicated, what Chapter 15 does is give a foreign representative a right of direct access to the U.S. courts, and it is through a single forum. And what Section 1509 of the Code says is in effect, "If you're a foreign representative, and you want to seek relief in the U.S. courts for matters really other than just a collection of an account receivable or that sort of thing, you've got to come through the Bankruptcy Court; you've got to petition the court pursuant to Chapter 15." And as we'll talk about in a second, that process is very, very simple, and it's meant to be done in a very mechanical way. We'll talk in a minute about how some of the courts have looked at the whole process of recognition. And to Susan's point, while the recognition is supposed to be very, very simple and direct, the relief that you can get varies, depending upon the type of foreign proceeding that you have. But it also varies with regard to matters like comity and best interest and that sort of thing.

You start from the proposition that you want relief, if you're a foreign representative. We'll talk about that in a second. You want relief, and in the U.S., other than to collect a receivable, you've got to come to the Bankruptcy Court and to file your petition and to get recognition. You have a right of direct access; no litigation around it. And if you establish that you otherwise are eligible to be a Chapter 15—to be in a Chapter 15 case—you'll get that recognition.

Now, the downside is if you fail to come that way, if you fail to petition the Bankruptcy Court and you have a foreign representative: we cite a case, the *Jones* case out of the Eastern District of New York. A foreign representative came in seeking relief, I think it was actually injunctive relief. The court said, "Well, look, you haven't gone through the Chapter 15 process; I'm not going to hear the matter." And the court denied the relief, subject to the party going through the Chapter 15.

The other piece of it is that, if you apply, and you're denied eligibility, what the court can do in the order is make it very, very clear that you're not entitled to relief. The bankruptcy court in the order denying the request and dismissing the action can indicate that in the order. So that when you then go—and I think it may be in the statute – to file your proceeding in the other court, out of the Bankruptcy Court, what you have to do is you have to establish that you have gotten relief under Chapter 15 from the appropriate court. So that again, you start from the proposition you've got to go through the Bankruptcy Court if you're a foreign representative.

Now, what's a foreign representative? What's a foreign proceeding? The key definitions are in the Bankruptcy Code Sections 101(23) and (24). The 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 liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding. The foreign proceeding has got to be a collective judicial or administrative proceeding in a foreign country. It is very, very important when you consider these.

What courts will do, as they consider whether or not to grant eligibility, is really parse Section 101(23)—which is the section that contains the definition of foreign proceeding—into seven elements. And what the courts look at is whether the proceeding is either judicial or administrative, or whether it is collective in nature. Well, what do you mean by collective in nature? Just instinctively you know that if it is something that benefits all or benefits all of the interested parties, that's collective, as opposed to a proceeding that benefits only a particular class of creditors. If it's only a particular class of creditors, you're not going to get that relief. Or if you're there for a particular class creditor, you won't get that kind of relief. It's got to be a proceeding that's in a foreign country; that's usually not in dispute. Maybe some creative stuff, but I'm sure that's one way to do it. And it has to be conducted under a law that's related to insolvency or the adjustment of debts.

What really the House Report said is that Chapter 15 should be available not only to debtors that are technically insolvent or facing liquidation, but also to debtors in financial distress and may need to reorganize. That makes sense, because, under the U.S. Code, we have the provisions in Chapter 7 that deal with liquidation and in Chapter 11 that deal with reorganization.

And another element is that the debtor's assets and affairs are subject to the control or supervision of a foreign court. Now "foreign court" is broadly defined. It's defined to include a judicial or other authority competent to control or supervise a foreign proceeding. So what you have in many cases are proceedings that are being conducted pursuant to the authority of some oversight of administrative proceeding. And in our cases we talk about some of those instances when they are administrative proceedings, not judicial proceedings. But because they are done in a collective way, and they otherwise satisfy the standards that are required for eligibility under 15, they will get that kind of relief.

I think that probably is also to Susan's point of recognition. That is, all the countries that will buy into this don't oversee and handle the liquidations in the same way that we do. Some are done judicially; some are through administrative bodies.

Finally, that the proceeding is for the purpose, as we said, of reorganization or liquidation. Again, trying to allow foreign representatives to try to cast as wide a net as you can.

Now, when you then talk about access, and Susan touched upon this, the question is, how do you commence a case? The case is commenced in a very, very simple way. You file a petition to commence a Chapter 15 case, and the statute lays out what you have to show in filing the case. Now, it's very simple to commence the case. As we said, we'll talk in a second about the fact that the relief that you can get will vary. But one of the things you can get immediately upon the commencement of the case, before the court has determined whether to give recognition to the case, is some interim relief. You get it only if you can establish that it's urgently needed to protect assets or otherwise to protect the operations, the financial well being, of the foreign debtor.

Going back to the filing requirements: it's not unlike a Chapter 11 petition, for those of you who have seen them. It's a simple document. What you have to establish under Chapter 15, what you have to give the court, is a certified copy of the decision that commences the foreign proceeding, a certificate from the foreign court affirming the existence of a foreign proceeding, or, absent that, any evidence that's acceptable to the court of the existence of a foreign proceeding. So again, really what the foreign representative is doing is coming in and saying, "Hey, look, I have started, I have commenced, or there is a foreign proceeding pending in a foreign court in a foreign country." And what is supposed to happen is then for the court to look at it in a very mechanical way and say, "Okay, you've made your showing; therefore, I am granting recognition to this foreign proceeding."

Now there are requirements: you have to provide translations, certified translations, things like that, so that the Bankruptcy Court that gets the proceeding can very, very quickly make the determination.

Now, when you file the proceedings—and you've probably heard this before—there are two types. You are coming in and you're saying, "I am here because this is a main proceeding, this is a foreign main proceeding, as opposed to a foreign non-main proceeding." Now, the sig-

nificance is that, if it is a main proceeding, a foreign main proceeding, relief that is available under Chapter 15 will come automatically, just as a matter of law, once you get the recognition. If it's a non-main proceeding, you don't get that relief as a matter of law. You can request it and attempt to get it, but you're not necessarily entitled to it.

Now, the other thing that we've seen a lot recently, especially in the fund cases, is the issue of foreign main proceedings. The foreign main proceeding is the place where there is a center of main interest, and what the Bankruptcy Code says is that there is a presumption that a foreign corporation's center of main interest is its registered place of business.

So you come into court, you establish there is a foreign proceeding pending, you establish where the entity has its registered place of business, and you should be able to get relief of the proceeding at the center of main interest as a foreign main proceeding. The issue that generally arises is that in some cases, the court will look at the petition and say, "You know what, there is not a center of main interest here and there's not a foreign main proceeding here, and there's not a foreign non-main proceeding." For a foreign non-main proceeding, what you have to establish is that there is an establishment in the place where the matter is filed. Basically, what that says is that it's got to be a place where there is some nontransitory economic activity. You've got to be doing something there, and at least what the cases are saying is that it is not enough that there are merely assets in this particular place.

MR. LEVIN: Or a mail drop.

MR. GARRITY: Or a mail drop, even better. What we are seeing is that, although it is supposed to happen very mechanically and very quickly, with these offshore funds—where you have the master funds, the feeder funds, with all of the activity being done in the U.S.—there are issues complicating the process. We saw it in the *Bear Stearns* case, we saw it in the *Basis Yield* case, and we saw it in the *SPhinX* case.

What happens is that the courts are looking at these cases and taking different approaches as to how proactive they may be in making a determination as to whether the matter is a foreign main proceeding, a foreign non-main proceeding, or nothing. Although there is a presumption, and very, very frequently, as we have seen in *Basis Yield* and *Bear Stearns*, parties come in and don't dispute it. The foreign representative files a foreign main proceeding, saying, "Give me my relief." The courts are now looking behind that. In *Bear Stearns*, the court concluded there wasn't a foreign main proceeding, because all they had in the Cayman Islands, to Rich's point, was a mail drop and nothing else there. Judge Lifland looked at that and said, "Well, there's no business being done there, so it's not a non-main proceeding, and it's not a main proceeding because that's all that's there." He looked and concluded that relief was denied because it was neither a foreign main nor non-main proceeding, and what he said is, "You can always file for Chapter 11, because all your operations are in the U.S. anyway."

So again, what is supposed to be, and what was thought to be, and what Congress wanted to be, a very, very simple mechanical process to get recognition done very, very quickly and inexpensively, has become, given the unique set of circumstances surrounding these fund cases, much more complex. And I think we see the case law developing in these instances where we have the funds that are offshore.

Now, the relief. There are really three types of relief. We talked about the provisional relief and the kinds of things that you can get. You can get stays; you can get the right to entrust assets in the foreign representative. Basically, at the outset of the case, before recognition, if there's an urgent need for that, the court has the ability to stay things, to make sure that assets remain in the U.S., so that they can ultimately get utilized or distributed through the proceedings.

One of the things we talk about is the automatic stay and other provisions being available under Chapter 15. Anything where you're talking about a stay or the right to entrust assets, et cetera, is limited to the assets that are in the territorial jurisdiction of the United States. To Susan's point, you couldn't go and in an effort to get cooperation with other courts, many of which don't have the concept of recognizing the concept of an automatic stay, say that in effect, "Because we see that there's a stay, we are going to stay any proceedings against property anywhere." It is limited only to the assets in the U.S.

MS. JOHNSTON: That's why shipping bankruptcy cases never succeed.

MR. LEVIN: Right. But since we are talking about Fairfield, Fairfield Liquidators have taken the position that the territorial limitation does not apply. They haven't won on that one yet, but they have taken that position.

MR. GARRITY: Okay. Very quickly, automatic relief. You get automatic relief if it is a foreign main proceeding.

And then, as we said, permissive relief is recognized for both foreign main and non-main proceedings. And again, the materials list out what the types of things, types of relief that you can get. There is this additional assistance under 1507 that Susan discussed, where basically it is saying that, as long as it is not contrary to U.S. law or anything specifically in Chapter 15, if it is otherwise fair, if it is otherwise appropriate, a court can give additional assistance that is not expressly set forth in the statute.

So I think my time is pretty much done. Thank you, Your Honor.

JUDGE STONG: Take all the time you need; we always like to have a good record. But we have a pretty good record here in terms of hearing the framework for eligibility and recognition and what exactly these foreign representatives can do when they are in place.

Rich, take us through an example in the Fairfield Liquidator case of how Chapter 15 was useful there. And if you'd like to just talk about the potential breadth that a bankruptcy court sometimes asserts that it has, remind us what happened last term in the Supreme Court in *Stern v. Marshall*.

MR. LEVIN: I'm going to start off with what I call Bankruptcy Jurisdiction 101 in five minutes.

Now, bankruptcy jurisdiction was a very complicated topic until the Supreme Court decided *Stern v. Marshall* last June—and then it got more complicated. So bear with me. And the reason I'm doing this is because it all comes into play in what happened in the Fairfield Liquidation case, the Chapter 15 case here in New York.

So Bankruptcy Jurisdiction 101. All of the bankruptcy jurisdiction is vested in the U.S. district courts, not in the bankruptcy courts. U.S. district courts are created under Article 3 of the Constitution: life tenure, salary protection, authorized exercise of judicial power in the United States.

Now, bankruptcy jurisdiction is then carved up into two categories of proceedings: Core proceedings and noncore proceedings, which are sometimes called related proceedings. Core proceedings are those proceedings that arise under Title 11 or arise in a case under Title 11. "Arise under Title 11" means that the substantive right that is being asserted is granted by a provision of the Bankruptcy Code. "Arise in a case under Title 11" means it's something that comes up during a case and only happens in a bankruptcy case; it's not able to be pursued outside of bankruptcy had there been no bankruptcy. For example, an ordinary common law action. So that's "arise in the case" "or arise under Title 11." That's core.

Noncore are matters that are related to the bankruptcy case but are not core. They don't fall into one of those two categories, but they have some effect on the assets or liabilities in the bankruptcy case and are therefore in some fashion related. As I said, they are sometimes called "related proceedings." The statute gives sixteen examples of what are core proceedings, although the courts have said that the fact that it's listed in an example is not dispositive if the question is whether it is core or determining that it's not core. In other words, the list is nonexclusive, but it is also not inclusive, I might say. The mere fact that it is listed does not mean that it is going to be found to be core, because of the broader statement, "arising in" and "arising under," that I mentioned earlier.

Avoiding power proceedings, that is, proceedings to recover preferences or fraudulent transfers, are listed as core proceedings. And another thing that is listed as a core proceeding is a proceeding for a recognition of a foreign proceeding under Chapter 15 and other matters arising in a Chapter 15 case. All right, we've got core, noncore.

Jurisdiction is in the district court. All authority to handle core and noncore proceedings is referred by the district court to the bankruptcy judges in the district. That's a standing order of reference in every one of the ninety-four judicial districts. Core proceedings are referred to the bankruptcy judges, who are not appointed under Article 3 of the Constitution, to hear and to determine. Noncore proceedings are referred for a recommended decision, somewhat like referring something to a magistrate.

Appeals from decisions in core proceedings and hearings on the recommendations in noncore proceedings go back to the district courts. By the way, the referral is automatic. It doesn't happen by an order in every case. There's a standard order; it is automatic. That's the setup. District court jurisdiction, reference to the bankruptcy court.

Next, withdrawal. District courts may withdraw the reference of any proceeding at any time, that's how they maintain control, at least theoretically, and must withdraw the proceeding if the action requires a substantial consideration of both the Bankruptcy Code and laws regulating organizations or activities affecting interstate commerce. In other words, commerce law statutes. That's a mandatory withdrawal.

The next way you get something out of the bankruptcy court is if the bankruptcy court may abstain for cause from any proceeding. Abstention means allowing the proceeding to go forward either in state court or federal district court. Withdrawal only means going up to federal district court. If a state court proceeding is commenced and is pending, it is noncore, and there is no other basis for federal jurisdiction, other than the bankruptcy jurisdiction, it involves a state law claim and it can be timely adjudicated in the state courts, or it won't slow down the administration of the bankruptcy. So if those elements are established, the bankruptcy court must abstain from the proceeding and allow it to go forward in state court.

Last piece of this puzzle. *Stern v. Marshall.* Last June the Supreme Court held that the bankruptcy judges may not issue final decisions, that is, hear and determine, in proceedings to recover assets for the estate. That is, ordinary common law claims, contractor tort claims, and by implication any avoiding power claims like preferences and fraudulent transfers, even though they are listed as core proceedings. Bankruptcy courts have statutory authority to hear and determine, but the Supreme Court held that unconstitutional. There are minor exceptions,

but very nuanced, and the courts are struggling with trying to figure out how to apply this ruling. The language is very broad, the principles are very broad, but the Supreme Court said, "We mean this to have only a very narrow application." And the courts are having a fit, as we'll see in the Fairfield case. So let's talk about Fairfield.

Fairfield was the largest feeder fund. It went into liquidation in the British Virgin Islands, in the High Commercial Court there, in July 2009. These dates are going to be somewhat important, so I am going to give them to you, so see if you can stay with me on this one.

The liquidators' general purpose, what they set out to do, was to recover the payments that the Fairfield funds had made to their shareholders over the prior six years in redeeming their shares. You know the way these investment funds work is that you invest by subscribing to shares. You take out your investment by having your shares redeemed by the fund. You get cash, you give the shares back to the fund. The Fairfield liquidators set out to figure out, "How do we bring back in the money that was sent out on redemptions, so we can satisfy the Trustee's claim against the fund for $3 billion in withdrawals from Madoff that were withdrawn and the fund were subject to fraudulent transfer liability to the Madoff Trustee?"

Their first thought was that they were going to bring common law claims against the former shareholders under a theory of mistake of fact. What was the mistake? "We, Fairfield, thought Madoff was for real; turns out he was a fraud. That was a mistake. We paid these redemptions based on valuation of the shares in the fund, which turned out to be zero or nominal value."

The second idea they had was to bring claims under the BVI Insolvency Act. They are called undervalued transactions and unfair preference. They are very analogous to our fraudulent transfer and preference laws. So first thing, liquidators were appointed in July 2009. They filed twenty actions in the BVI against numerous former shareholder defendants under the common law mistake theory between September 2009 and March 2010, over a six-month period.

The light goes on: the liquidators decide to take a different tack come April 2010. Starting in April 2010, for about the next three months, they file one hundred forty actions in the New York Supreme Court against all of these—some of the same former shareholders and any other former shareholders—on the theory that the subscription agreement that the shareholders signed for the shares consented to New York court jurisdiction, consented to service of process by mail out of New York.

The defendants argued that the redemptions were not made under the subscription agreement; those were made under a different agreement. But the liquidators took the position that they had New York jurisdiction, and they thought it would be easier—I'm not privy to their thinking, we are representing defendants in these actions—to pursue these actions in New York rather than in BVI, and they filed one hundred forty actions.

As we are in the middle of this three-month process of filing actions, they are taking the position 1509, as Jim said, that this was a mere collection action. They said, "To be sure, let's go get recognition under Chapter 15 of the BVI liquidation proceeding so that our actions are in the state court in New York, we have access to the court. We don't have access to the court except for simple collection actions, we get recognition." They filed a recognition petition in the Bankruptcy Court, and get assigned the same judge who is handling the Madoff bankruptcy case, Judge Lifland.

In July of 2010 Judge Lifland grants them recognition. There was a dispute in that case about whether they should be recognized, and that dispute is on appeal to the Second Circuit right now. The dispute was whether Fairfield funds were operated out of New York, or greater Connecticut. That's where they did all their business. All they had in the BVI was a registered office and a mail drop. Judge Lifland had previously ruled that that was not enough for the COMI to be in the home jurisdiction, in the registered office jurisdiction.

But here the foreign proceeding had been pending for fifteen months. And the foreign liquidators had been active in winding up the process. Judge Lifland held that COMI is determined as of the time of the filing of the Chapter 15 case, not the time of the filing of the foreign proceeding. And he held that therefore the COMI was in the BVI, and he granted recognition as a foreign main proceeding. That issue is up on appeal to the Second Circuit. Other courts have gone the other way on that issue.

Once recognition was granted, the liquidators did two things to enhance their recoveries. First, they took forty of the actions that were pending in the New York Supreme Court and removed them to the bankruptcy court. One thing I didn't mention about bankruptcy jurisdiction is that, as there is removal from state court to federal district court, if the bankruptcy court has jurisdiction of an action, the plaintiff or the defendant for that matter can remove the action to the bankruptcy court. So they remove forty of these actions to the bankruptcy court between July and September of 2010. And then from September 2010 they didn't file in state court anymore; now they had direct access to the bankruptcy court. From September 2010 to about September 2011 they filed about another one hundred seventy, one hundred eighty, more of these actions based on this common law theory of mistake and unjust enrichment. The bankruptcy court administratively consolidated all two hundred-some actions.

The defendants in the removed actions first moved for mandatory abstention. I told you what that was, state

law action, common law, pending in the state court, timely adjudication, no basis for bankruptcy jurisdiction, no basis for federal jurisdiction other than the bankruptcy law; they moved for mandatory abstention. And they moved to withdraw the reference of the proceeding so that the district court would hear their mandatory abstention motion.

The district court decides this is not a commerce clause/bankruptcy law issue: "I'm going to let the bankruptcy court decide the mandatory abstention motion." It goes back to the bankruptcy court. In May of 2011 the bankruptcy court denies mandatory abstention; determines that the proceedings are core; they are not noncore. Why? Under that provision I said was a list of core proceedings, other matters under Chapter 15. Didn't matter that this was a common law action suing to augment the estate, which would normally be a related proceeding; the bankruptcy court seized on the language in the statute that says other matters related to Chapter 15 are core. That was a month before *Stern v. Marshall* came down from the Supreme Court.

Stern v. Marshall comes down, it mixes up bankruptcy jurisdiction. Nobody is quite sure, but everybody kind of gets the idea that, in regard to a common law action, a bankruptcy court is not going to have jurisdiction or authority to decide that.

The defendants in these state court actions to remove the actions appeal the remand decision to the district court. In September of 2011—now we are talking five months ago—Judge Preska rules that the proceedings are in fact noncore proceedings and mandatory abstention applies. She then remands the proceedings back to the bankruptcy court, but she grants leave for an interlocutory appeal, so that is pending at the Second Circuit, as to whether it is core or noncore, whether mandatory abstention applies.

Meanwhile, in the BVI—a quick word in my one-minute left—the BVI judge dismisses all of the twenty actions that the liquidators have filed in the BVI on BVI law grounds. That is on appeal to the Court of Appeal for the Eastern Caribbean. It was argued last week, and we expect a decision in the next few months on that one.

And Judge Lifland, sitting with one hundred seventy or one hundred eighty actions that were not the subject of this remand proceeding, says, "I am suspending everything until all of these appeals get resolved." And that's where the Fairfield matter stands today.

JUDGE STONG: So there you have it. I hope you'll join me in giving our fabulous super star panel a round of applause.

A couple of quick takeaways for you. I hope you agree: you ignore this area at peril. Keep your passport up to date. You now need one to go to the Caribbean.

Nearly every federal judicial district has had at least one Chapter 15 case, so don't assume this only relates to you if you are here in New York or maybe just south in Delaware. Nearly every jurisdiction has had one.

Here are some easy takeaways. Remember these web sites.

UNCITRAL.org. When this happens, when you least expect it, you can get these materials from that web site.

The III web site. You can get a copy of the Cross-Court Communication Protocols, translated into about forty languages. They have the approval of the National Conference of Bankruptcy Judges. That's not a bad place to start.

And hear is some breaking news for you. On Friday, the American Law Institute is going to receive a report at its council on Transnational Insolvency Principles. I expect to be able to find this as a report to the council as soon as next week in the ALI web site.

MR. JAGLOM: Thank you very much. Thank you to all of our panelists and our program Co-Chairs for a terrific program.

Chapter 15 and Coordinating a Complex Global Bankruptcy Proceeding

By David Sheehan, Mark Kornfeld, Natacha Carbajal, Nikolaus Pitkowitz, and Nick Moser

I. Introduction

As the world now knows, the Ponzi scheme carried out by Bernard L. Madoff was a truly international scandal. In order to fuel the Ponzi scheme and sustain the proverbial "pyramid," Madoff would not and did not limit himself to capital within the United States. It was not possible for Madoff to rely solely on the assistance of U.S.-based individuals and financial institutions. Had he done so, the scheme would have collapsed and his fraud would have undoubtedly been uncovered much earlier than December 2008.

In order to fulfill his obligation to maximize the recovery of Customer Property[1] and equitably distribute it to Madoff's many victims, the Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act ("SIPA") cannot confine his recovery efforts to the territorial boundaries of the United States. Rather, he must literally "follow the money"—wherever it is located[2]—and avail himself of all legal means to try and recover it. At this still early stage in the recovery efforts for the BLMIS estate, a large percentage of transferees among the thousands of defendants are located abroad, including some of the largest Madoff "feeder funds," such as Fairfield Sentry Limited (British Virgin Islands, or "BVI"), Kingate Funds (BVI), and Harley International (Cayman) Limited (Cayman Islands).[3] It is estimated that foreigners received avoidable and recoverable transfers well in excess of $5 billion.[4] Foreign defendants, and the Customer Property they still hold, are located in diverse jurisdictions throughout Europe, Latin America, Asia, Africa, the Caribbean, and the Middle East.

The questions surrounding how to strategically and optimally coordinate the recovery of Customer Property are of paramount importance to the Trustee. The purpose of this article is to familiarize the reader with some of these strategic, practical and procedural considerations, and thereby provide an overview of how to create the architecture for a successful global bankruptcy proceeding.

This Part I provides the reader with useful background on Chapter 15 and provides a context for the discussion to follow. Part II of this article will discuss Chapter 15 of the Bankruptcy Code ("Code"), which was enacted in 2005 to implement the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"),[5] and provides the legal framework within the United States for recognizing foreign bankruptcy proceedings. Part III will discuss some of the strategic considerations and legal obstacles faced by the Trustee when devising a litigation strategy aimed at maximizing recovery of Customer Property on a global basis. Specifically, Part III will discuss (i) personal jurisdiction/*forum non conveniens*; (ii) discovery and procedural concerns; (iii) the enforcement of U.S. judgments abroad; and (iv) whether, in light of the recent Supreme Court decision in *Morrison v. National Australia Bank Ltd.*, Section 550 of the Code can be applied extraterritorially.[6] Finally, Parts IV and V of this article will provide, as an illustration, the Austrian and British perspectives on many of these strategic questions.

II. Chapter 15

A. Background

In 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (referred to as "BAPCPA"), [7] Congress amended the Code and created Chapter 15. The essence and language of Chapter 15 derives from the Model Law. As of 2010, seventeen other countries and territories had adopted in whole or in large part the Model Law.[8] Chapter 15, in its adoption of the Model Law, was enacted with the intention of providing a streamlined process for parties seeking relief in U.S. courts related to foreign insolvency proceedings.

B. History of Pre-Chapter 15 Bankruptcy Relief—Section 304

Prior to the enactment of Chapter 15, parties seeking recognition of foreign proceedings through ancillary proceedings in the United States had to seek relief under Section 304 of the Code. In 1978, Congress overhauled the United States Bankruptcy system by enacting the Bankruptcy Reform Act of 1978. One of the sections included therein was Section 304. Congress specifically addressed international insolvencies by including in Section 304 five factors that bankruptcy courts should consider when determining whether to defer to a foreign proceeding (and allow a foreign court to administer an insolvency proceeding) and providing procedures for the commencement of an ancillary proceeding to the foreign proceeding in a U.S. bankruptcy court. The five factors were: (1) just treatment of all holders of claims; (2) protection of United States claim holders against prejudice and inconvenience; (3) prevention of fraudulent dispositions of property; (4) distribution in substantial accordance with the United States Bankruptcy Code; and (5) the opportunity for a fresh start for the debtor.[9]

"Section 304 was a breakthrough when it was adopted in 1978, putting the United States among the most advanced countries in the world in providing deference

toward foreign proceedings and active cooperation with those proceedings."[10] However, many shortcomings resulted from Section 304 as the global marketplace expanded and the lack of uniformity and certainty in international insolvency law grew increasingly problematic.[11]

C. Creation of Chapter 15—Legislative History and Intent

1. Discussion of Model Law

Congress sought to nurture a more consistent set of insolvency laws by expressly incorporating a statement of the underlying principles within the statute.[12] In doing so, Congress mimicked the intent of the Model Law, which provides that it is designed "to provide expedited and direct access for foreign representatives to the courts of the enacting State" and to "avoid the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications that might otherwise have to be used."[13]

2. Comity

Comity is the doctrine which accounts for "the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law."[14] As noted by Justice Gray in *Hilton v. Guyot*:[15]

> "Comity," in the legal sense, 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.[16]

Through the revision of the Code with BAPCPA and the creation of Chapter 15, Congress specifically acknowledged the principles of comity between nations in legislating transnational insolvencies.[17]

D. Basics of Chapter 15

"From the other direction, Chapter 15 has a broader impact than the provision it replaces, § 304 of the Bankruptcy Code. It centralizes every aspect of the international practice."[18] Once a party petitions[19] a bankruptcy court for recognition by commencing a Chapter 15 proceeding,[20] the bankruptcy court will need to determine whether the foreign proceeding should be granted recognition. Section 1517 requires recognition of a foreign proceeding when: (i) the foreign proceeding for which recognition is sought is a foreign main proceeding or foreign non-main proceeding within the meaning of Section 1502; (ii) the foreign representative[21] applying for recognition is a person or body; and (iii) the petition meets the requirements of Section 1515.[22] Recognition must be granted to a foreign proceeding as a foreign main proceeding if the debtor's center of main interests (or "COMI") is in the country of its main foreign proceeding or as a foreign non-main proceeding if the debtor has an "establishment"[23] in the country of its main foreign proceeding.[24]

1. Recognition: COMI

The establishment of the COMI of debtors seeking recognition has not been an easy feat. COMI is not defined in the statute. Chapter 15, directly quoting the Model Law,[25] affords a statutory presumption[26] that the COMI is the place where the debtor has its registered office. However, the statutory presumption may be rebutted,[27] pursuant to the language of the Code itself. As such, COMI has been a hotly litigated topic in many Chapter 15 proceedings.[28]

Seemingly in an effort to address the uncertain nature of the COMI analysis, an amendment to the Federal Rules of Bankruptcy Procedure was made to include Rule 1004.2, effective 1 December 2011. "This rule requires a chapter 15 petition to identify which country is its center of main interests (COMI). It also requires the filing of a list of every country in which a case involving the debtor is pending. This information should make it easier for the court and parties to decide if the foreign proceeding is a 'main' or 'non-main' proceeding."[29]

2. Main vs. Non-Main Proceedings

In terms adopted from the Model Law, the Code allows a foreign representative to gain recognition of a foreign proceeding as either a foreign main or non-main proceeding.[30] A foreign main proceeding is defined as a "foreign proceeding pending in the country where the debtor has the center of its main interests."[31] A foreign non-main proceeding is defined as any other proceeding "pending in a country where the debtor has an establishment."[32] The Code further defines "establishment" as "any place of operations where the debtor carries out a nontransitory economic activity."[33]

3. Timing of Recognition

Another issue affecting the determination of recognition is the point in time at which to determine the COMI or the existence of an establishment. Parties have argued that the point of time at which COMI should be measured is either the date of the filing of the foreign proceeding or the date of the filing of the Chapter 15 proceeding. Few courts have determined the COMI of an entity and whether an establishment exists as of the date of the filing of the Chapter 15 petition.[34]

4. Effects of an Order of Recognition

The entry of an order granting recognition of a foreign proceeding as a foreign main proceeding automatically grants:[35] the application of Sections 361 and 362 with

respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States; the application of Sections 363, 549, and 552 to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate; the ability of the foreign representatives to operate the debtor's business and exercise the rights and powers of a trustee under and to the extent provided by Sections 363 and 552; and the application of Section 552 to property of the debtor that is within the territorial jurisdiction of the United States.

Importantly, Section 362 provides the protection of the automatic stay.[36] Section 1509 provides that a foreign representative has the capacity to sue and be sued in a court in this country, that the foreign representative may apply for appropriate relief in such court, and that "a court in the United States shall grant comity or cooperation to the foreign representative."[37] In addition, while not explicitly delineated in the Code, recognition permits the foreign representatives to seek other relief available in bankruptcy courts, including Rule 2004 relief and other discovery.

5. Additional Relief Available Under Chapter 15

Foreign representatives, having gained recognition, can seek "any appropriate relief" that is "necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors." Section 1521 of Chapter 15 identifies this relief as including: (i) extending the automatic stay beyond that provided automatically by Section 1520; (ii) providing for the examination of witnesses or the taking of evidence concerning the debtor's assets, affairs, rights, obligations or liabilities; (iii) granting any additional relief that may be available to a trustee under the U.S. Bankruptcy Code, except for relief under the avoidance powers of the U.S. Bankruptcy Code; and (iv) entrusting the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person (including an examiner), authorized by the court, "provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected."[38] The court granting the relief must do so "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected"[39] and the court may condition the relief accordingly to accomplish this requirement, such as by conditioning relief on a bond or security payment.

Section 1507(a) also provides for the additional assistance that a bankruptcy court may provide a foreign representative.[40] Section 1507(b) directs the assisting court to 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 [the Bankruptcy Code]; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[41]

Foreign representatives might avail themselves of this section to seek assistance with the enforcement of U.S. orders, judgments, decrees in jurisdictions abroad or the enforcement of foreign orders, judgments and decrees in the U.S. or on assets held in the U.S.

Foreign representatives can also act independently in seeking affirmative relief. "It has been generally assumed for many years that foreign representatives can appear in our courts and pursue an affirmative cause of action in their own right."[42] Recent bankruptcy court decisions have held that the two-year tolling period for the statute of limitations to commence adversary proceedings pursuant to the Code applies to Chapter 15.[43]

6. Effects of an Order of Dismissal

Once a case has been dismissed, bankruptcy courts will no longer grant comity to any foreign proceedings unless and until another court deals with it. Many courts have also permitted the foreign representative to request a stay or dismissal of a lawsuit on the basis that a foreign insolvency proceeding is pending, that the lawsuit interferes with that proceeding, and that the lawsuit should be stayed or dismissed on grounds of comity.[44]

7. Concurrent Proceedings

Generally, in keeping with the principles of comity as they existed prior to the creation of Chapter 15, U.S. courts have respected the existence of foreign insolvency proceedings and stated the importance of dismissing bankruptcy actions where there is already a foreign proceeding in place:

> We have recognized one discrete category of foreign litigation that 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.[45]

8. Chapter 15 Proceedings and Madoff

While the Trustee has not needed to avail himself of the relief available under Chapter 15, he has needed to navigate Chapter 15 proceedings as to many of the foreign defendants who are in liquidation.[46] In particular, Chapter 15 has been an important consideration in litigations involving many foreign and international feeder funds that serviced BLMIS.

On 22 July 2010, the Bankruptcy Court for the Southern District of New York entered an Order[47] granting the petitions of the liquidators for recognition of the liquidation proceedings of Fairfield Sentry Limited, Fairfield Sigma Limited, and Fairfield Lambda Limited (collectively "Fairfield"), pending in the British Virgin Islands, as foreign main proceedings pursuant to Chapter 15. The joint liquidators of Fairfield, one of the world's largest feeder funds, then entered into a historic cooperation and settlement agreement[48] with the Trustee, including that of prosecuting redeemers.

The considerations added by these Chapter 15 proceedings involving parties from which the Trustee sought, seeks or will seek recovery further complicate an already elaborate scheme. However, while it has been necessary for the Trustee to consider Chapter 15 as a potential creditor for these foreign debtors, he has had the benefit of dealing with a homegrown Code, albeit complex and developing. However, Chapter 15 is only one legal framework within which the Trustee has had to operate.

III. Strategic Considerations in Coordinating a Global Bankruptcy Case

Although the United States Congress has tried to adopt a flexible, anticipatory statute for issues which may arise in cross-border insolvencies, it is not necessarily the case that a U.S. trustee will meet the same flexibility in jurisdictions abroad. As such, when constructing the architecture of the global Madoff litigation strategy, it was necessary for the Trustee to think broadly about the kinds of legal challenges he would expect to face when suing foreign defendants in the United States Bankruptcy Court for the Southern District of New York. This Part III will discuss as illustrations four of those issues: (a) personal jurisdiction/*forum non conveniens*; (b) discovery; (c) the enforcement of U.S. judgments abroad; and (d) whether, in light of the recent Supreme Court decision in *Morrison v. National Australia Bank Ltd.*, Section 550 of the Code can be applied extraterritorially.

A. Personal Jurisdiction and *Forum Non Conveniens*

Whether the Trustee can successfully establish that foreign defendants named in adversary proceedings are subject to the personal jurisdiction of the United States Bankruptcy Court for the Southern District of New York is, as one might imagine, one of the most important strategic considerations underlying the fundamental strategic question of *where* the Trustee should sue to recover Customer Property. A related consideration is that of *forum non conveniens*, pursuant to which the court considers whether the action is more appropriately heard in the courts of another country.

1. The Personal Jurisdiction Inquiry

Rule 4 of the Federal Rules of Civil Procedure and its corollary in the Federal Rules of Bankruptcy Procedure, Rule 7004(f), establish that a U.S. bankruptcy court can subject a foreign defendant to personal jurisdiction if "the exercise of [such] jurisdiction is consistent with the Constitution and laws of the United States."[49] Courts in the Second Circuit have interpreted personal jurisdiction broadly for plaintiffs suing foreign defendants in bankruptcy matters.[50] This broad interpretation is tempered by an analysis of due process.

This due process analysis entails a two-step inquiry. First, the court must establish that the defendant has sufficient "contacts with the forum state to justify the court's exercise of personal jurisdiction."[51] In most cases, the relevant forum is the state in which a defendant is sued. However, because Bankruptcy Rule 7004(f) is a federal long-arm provision, the court must evaluate the defendant's contacts *with the United States*, rather than with any particular state.[52] Second, if the court is satisfied that there are sufficient minimum contacts with the United States, it must then assess whether the exercise of personal jurisdiction would be reasonable under the circumstances.

It is important to note that across the spectrum of adversary proceedings brought by the Trustee, there are different types of foreign defendants, and the personal jurisdiction inquiry will necessarily differ with respect to each defendant. First, there are direct or *initial transferees*: This category comprises all individuals and feeder funds that held an account with BLMIS as a "customer" and, therefore, received avoidable transfers directly from BLMIS. Second, there are indirect investors or *subsequent transferees*:[53] This group includes individuals and/or institutional investors, many of whom received stolen money from "initial transferee" feeder funds; funds of funds that were directly invested in "initial transferee" Madoff feeder funds (e.g. Fairfield Sentry Limited); and general partners, management and/or other service providers to the "initial transferee" feeder funds who received Customer Property in the form of compensation and fees for services rendered.

a. Minimum Contacts

The minimum contacts analysis in the Madoff cases is straightforward and, at this point, relatively uncontroversial. Judge Lifland, the U.S. Bankruptcy Judge presiding over the liquidation of the BLMIS estate, has held that "foreign defendants who profited by their maintenance of BLMIS accounts and receipt of transfers subjected themselves to [the] personal jurisdiction of [the Bankruptcy]

Court with regard to the Trustee's claims arising from such transfers."[54]

Nevertheless, the Trustee has had to strategically consider motions to dismiss for want of personal jurisdiction. For example, certain service providers[55] have argued that they have absolutely no contact at all with the United States, since they are located in and operate entirely abroad. In response, the Trustee must make a *prima facie* showing that general or specific jurisdiction exists over each of these defendants. Specific jurisdiction exists "where a foreign defendant purposefully directs his activities at residents of the forum, and the underlying cause of action arises out of or relates to those activities."[56] General jurisdiction exists "when the defendant is engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction."[57]

Courts in the Second Circuit have demonstrated a willingness to treat legally distinct entities as one in certain circumstances and, accordingly, attribute the contacts of one to the other for purposes of the minimum contacts inquiry.[58] Here, because the service providers at issue in these cases tend to be subsidiaries or affiliates of larger banking entities which have a strong, commercial presence in New York, the Trustee may argue that such derivative jurisdiction exists over these entities. Indeed, a "foreign corporation may be subject to the jurisdiction of the New York courts based on the presence and activities…of an affiliated entity" when the New York entity is either an "agent"[59] or a "mere department"[60] of the foreign corporation.[61] To determine whether an agency or mere department relationship exists such that the exercise of jurisdiction would be appropriate, courts "look to realities rather than to formal relationships."[62]

The reality here is that the Trustee has repeatedly seen service providers to Madoff feeder funds working within the framework of multinational banking institutions that have a strong presence in New York—and corresponding frequently with their New York counterparts in order to establish and maintain their relationships with the Madoff feeder funds and to cultivate additional business from those funds. Those types of contacts have been held sufficient to establish personal jurisdiction against foreign defendants.[63]

b. Reasonableness

In addition to the minimum contacts component of the jurisdictional inquiry, the Trustee must consider the question of whether the court's exercise of personal jurisdiction over a foreign defendant would be reasonable under the circumstances. This question is often framed as whether subjecting a foreign defendant to jurisdiction in the United States would comport with "traditional notions of fair play and substantial justice."[64] Courts examine the "totality of the circumstances to determine whether a foreign defendant has "purposely avail[ed] itself of the privilege of conducting activities within the forum State…such that [the Defendant] should reasonably anticipate being hauled in to Court there."[65] Once the minimum contacts test is satisfied, "the exercise of jurisdiction is favored" and the burden is on the foreign defendant to make a "compelling case" as to why the exercise of such jurisdiction would be unreasonable.[66]

Foreign defendants typically rely on the following criteria to establish that the court's exercise of jurisdiction would be unreasonable: "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief[;][67] (4) "the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction;" and (5) "the Federal Government's interest in its foreign relations policies."[68]

As an initial matter, however, the Second Circuit has taken the position that, to the extent that litigation in the United States imposes any burden on a foreign defendant, that burden "provide[s]…only weak support, if any, because 'the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago.'"[69] Moreover, courts have held that "often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the [foreign] defendant."[70]

While it remains to be seen exactly how future jurisdictional arguments from foreign defendants will be resolved in Madoff-related litigation brought by the Trustee, given the strong U.S. interest in adjudicating these lawsuits—a massive Ponzi scheme with billions of dollars running through New York entities and bank accounts—it is not expected that foreign defendants will get significant traction in trying to meet their burden when it comes to an adjudication in New York being "unreasonable."

2. The Related *Forum Non Conveniens* Inquiry

Formal rules of personal jurisdiction are just one strategic consideration with respect to where to bring multinational bankruptcy litigation. Another related important consideration that falls within the rubric of the jurisdictional inquiry is the relevance of the common-law doctrine of *forum non conveniens*,[71] which "permits a court to decline jurisdiction when the convenience of the parties and the interests of justice indicate a foreign forum would be the more appropriate forum."[72] The decision whether to dismiss a case on the ground of *forum non conveniens* "lies wholly within the broad discretion of the district court and may be overturned only when…that discretion has been clearly abused."[73] The Second Circuit has instructed the lower courts to employ a three-step analysis when considering whether to dismiss a case on the ground of *forum non conveniens*. First, the court must determine the degree of deference properly accorded the plaintiff's choice of forum.[74] Second, the court must

consider whether the alternative forum proposed by the defendants is adequate.[75] Third, it must balance the public and private interest factors implicated in the plaintiff's choice of forum.[76]

a. Deference Given to a U.S. Plaintiff's Choice of Its Home Forum

Because of the substantial deference given to a U.S. plaintiff's choice of its home forum in the Second Circuit, unless a foreign defendant can present evidence that a U.S. plaintiff was motivated by strategic forum-shopping reasons when initiating the action,[77] "the balance of interests must *strongly favor* the defendant to justify dismissal of [a] plaintiff's complaint" on the ground of *forum non conveniens*.[78] Indeed, the Second Circuit has emphasized that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[79] It is highly unlikely, if not impossible, for any of the foreign defendants in cases brought by the Trustee in the Bankruptcy Court for the Southern District of New York—where he was appointed—to establish that the Trustee's choice of forum was motivated by strategic "forum-shopping."[80] Accordingly, the Trustee's choice of forum will be entitled to significant deference.

b. Existence of Adequate Alternative Forum

The Second Circuit characterizes a defendant's proposed "alternative forum [a]s adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute."[81] Moreover, a change in substantive law does not normally receive substantial weight in the overall inquiry.[82] Given this rubric, it is anticipated that a number of foreign defendants might be able to establish that there is an adequate alternative forum in which the case can be heard.[83] Nevertheless, this will not be dispositive of the *forum non conveniens* motion. Because of the deference that the court must afford the Trustee's choice of a U.S. forum, a foreign defendant seeking to dismiss the Trustee's action on *forum non conveniens* grounds must demonstrate that the balance of public and private interest factors weighs so strongly in its favor that dismissal would be appropriate. This is seen as unlikely in the Trustee's actions.

c. Balancing of Relevant Public and Private Interest Factors

The Second Circuit has identified the following private interest factors as relevant to the *forum non conveniens* inquiry: (1) ease of access to evidence; (2) the availability of compulsory process for the attendance of unwilling witnesses; (3) the cost of willing witnesses' attendance; (4) if relevant, the possibility of a view of premises; and (5) all other factors that might make the trial quicker or less expensive.[84] It has also identified the following public interest factors as relevant: "(1) administrative difficulties associated with court congestion; (2) the unfairness of imposing jury duty on a community with no relation to the litigation; (3) the 'local interest in having localized controversies decided at home'; and (4) avoiding difficult problems in conflict of laws and the application of foreign law."[85]

The application of these individual factors in each specific case naming a foreign defendant is likely to differ. With respect to the private interest factors, courts in the Second Circuit have typically decided that the existence of cooperative evidence-gathering mechanisms, like the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"),[86] neutralize the first two factors.[87] With respect to the public interest factors, courts in the Second Circuit have typically been unwilling to recognize any administrative difficulties with court congestion[88] and have been very clear that they have the requisite expertise and experience to decide conflict-of-laws issues and, where necessary, apply foreign law.[89] The one public interest factor that, in all cases, will weigh in favor of the Trustee is the local interest in adjudicating the case. Finally, it is not the Trustee's burden to prove that the factors weigh in his favor. Rather, foreign defendants bear the burden of proving that these factors not only weigh in their favor, but *weigh so heavily in their favor* that the court should dismiss on the ground of *forum non conveniens*.

B. Procedural Discovery Challenges

The Trustee also must consider potential procedural discovery challenges associated with foreign defendants sued in the United States, as well as from non-parties located abroad from whom the Trustee seeks to obtain relevant evidence.[90] Challenges that have arisen already in the discovery context have included consideration of customer privacy, service of process, blocking statutes and other confidentiality considerations.[91] There are a number of mechanisms available to the Trustee when seeking discovery—including the Federal Rules of Civil Procedure, the Hague Evidence Convention and international judicial assistance. The best mechanisms in a given matter may depend on whether the discovery being sought is from a party defendant to the Trustee's litigation or from a non-party located abroad.

1. Discovery from Foreign Defendants

In litigation against a foreign defendant, discovery issues sometimes arise when the foreign defendant opposes discovery because it represents that it has a contradictory obligation to comply with a foreign country's "blocking statute."[92] In addition to citing blocking statutes, a foreign defendant seeking to resist or restrict discovery may, depending on its jurisdiction, also raise issues of "bank secrecy" (e.g., Swiss banks) and "data privacy" (relating to underlying customers).[93]

Defendants may often argue that discovery must proceed under the mechanisms established by the Hague

Evidence Convention rather than under the Federal Rules of Civil Procedure. In the often-quoted *Aérospatiale* case, the Supreme Court characterized the procedures set forth in the Hague Evidence Convention as "optional" and expressly held that "the Hague Convention does not divest the District Court of jurisdiction to order discovery under the Federal Rules of Civil Procedure."[94] Moreover, the Supreme Court in *Aérospatiale* established "that a foreign blocking statute does not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate the statute."[95] With specific reference to the French blocking statute, the Court observed that "the language of the [foreign blocking] statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by [a foreign government] over a United States district judge."[96]

Aérospatiale directs the lower courts to consider five factors in deciding whether comity allows a foreign law to limit discovery: (1) the importance to the…litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[97] The fifth *Aérospatiale* factor—the balancing of national interests—has been characterized as the "most important," because "it directly addresses the relations between sovereign nations."[98]

In addition to the five *Aérospatiale* factors, the Second Circuit has directed lower courts to consider the following two additional factors when a foreign defendant raises a foreign blocking statute in opposition to discovery: (1) any hardship the responding party would suffer if it complied with the discovery demands; and (2) whether the responding party has proceeded in good faith.[99] Utilizing these factors, courts in the Second Circuit have consistently found the French blocking statute unworthy of enforcement as a matter of comity.[100] And, recently, the Southern District of New York found the same with respect to China's bank secrecy law.[101]

The Second Circuit has long recognized that trustees of the Securities Investor Protection Corporation "vindicate important public interests."[102] Moreover, courts in the Second Circuit have characterized as an important national interest the enforcement of statutory schemes that are designed to ensure the integrity of the U.S. financial markets.[103] In this case, there is a strong balance of national interests in favor of the Trustee.

2. Discovery from Foreign Non-Parties

If a foreign non-party witness is willing to come to the United States, "discovery may proceed in the same way that U.S. domestic discovery would."[104] If, however, a foreign non-party witness is unwilling to come to the United States, the Trustee must utilize the methods available under the Hague Evidence Convention, where applicable,[105] unless the witness is otherwise subject to the court's subpoena power and personal jurisdiction.[106] In countries that are not signatory to the Hague Evidence Convention, the Trustee's options for gathering evidence will depend on the internal laws of each country.[107] Some jurisdictions, like Canada, appear to be quite accommodating to U.S. discovery efforts. Whereas others may, in the case of an unwilling non-party witness, require the Trustee to proceed via letters rogatory.

Of course, in all jurisdictions, the Trustee will face the nearly universal aversion to broad, U.S.-style pre-trial discovery. Nevertheless, thus far, the Trustee has been successful in obtaining targeted information necessary for his investigation and litigations with the assistance of local counsel, targeted discovery requests, and the general willingness of even non-parties to discuss the Madoff affair and how they were personally affected.

C. Enforceability Abroad of Judgments Rendered in the United States

Many of the foreign defendants named by the Trustee will not have assets in the United States. This makes the enforceability of U.S. judgments abroad critical to the Trustee's recovery. In addition, the Trustee must strategically consider how to proceed when defendants have sought bankruptcy protection abroad.

1. Generally

The United States is not party to any bilateral or multinational treaty dealing with recognition or enforcement of foreign judgments. In fact, international treaties do not play a particularly important role in the judgment enforcement context except with respect to certain regional agreements, most notably the European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.[108] In any case, the enforcement abroad of judgments rendered in the United States is, by and large, a matter of the national law of each individual country in which a successful U.S. plaintiff seeks enforcement. As noted in Part I above, this means that the Trustee has had to consider, encounter, and interact with the judgment recognition and enforcement regime of more than a dozen countries.[109]

"[I]n looking comparatively at transnational recognition and enforcement practice, one finds a basic similarity of frameworks in the national laws of the various countries, even though the solutions may be slightly different."[110] Notwithstanding the particularities of each individual country, "most countries agree that recognition and enforcement of foreign judgments is appropriate, subject to particular limitations. And most agree on the criteria that should be considered in shaping recogni-

tion and enforcement practice, even when they come to different resolutions about which of those criteria to adopt."[111] In fact, in recent years, "even some notable outliers to judgment recognition, such as Sweden and the Netherlands, have carved out judicial exceptions to non-recognition, and in 2004 Belgium changed its *revision au fond* procedure, such that review on the merits is no longer permitted."[112]

While the legal framework of judgment enforcement practice is similar in many countries, interpretation of the applicable laws and/or cases tends to differ in the following five important areas: (1) the types of judgments that should be entitled to enforcement;[113] (2) the appropriate criteria applied to determine whether a particular proceeding was fair and impartial such that enforcement of the resulting judgment would be appropriate; (3) the extent to which a foreign judgment must violate national public policy such that refusal to enforce that judgment would be appropriate; (4) the sufficiency of the jurisdictional link between the defendant and the forum from which the judgment was issued; and (5) whether reciprocity is a necessary prerequisite to enforcement.[114]

Of these five criteria, the type of judgment and the jurisdictional link between the foreign defendant and the United States are likely to be the most critical factors to any judgment obtained by the Trustee against a foreign defendant. To evaluate the sufficiency of the jurisdictional link, countries "will generally consider from their own perspective whether the original forum was an appropriate place to litigate the dispute such that the resulting judgment" should be enforced.[115] National practice with respect to this particular criterion varies significantly.

Some countries, like Germany and Italy, employ what is referred to as "the 'mirror principle': that is, if a country permits the exercise of a particular basis of jurisdiction over a foreign defendant by its courts, it will accept a similar assertion of jurisdiction by a foreign court as an appropriate basis of jurisdiction in the recognition/enforcement context."[116] In other countries, like France, a foreign court is deemed to have jurisdiction for purposes of enforcing a foreign judgment if there is a significant link between the foreign court and the French defendant (a "*lien caracterise*") as long as the plaintiff's choice of forum was not fraudulent.[117]

2. *Rubin v. Eurofinance SA*

In contrast, in England the approach has traditionally been substantially different. Prior to the seminal *Rubin v. Eurofinance SA* case,[118] which carved out a special exception for default judgments rendered in the bankruptcy context, England accepted far more limited bases on which a foreign court could exercise jurisdiction for purposes of recognition/enforcement (namely, presence, residence, and various forms of consent/submission to jurisdiction) than those exercised by the English courts under Rule 6.20 of the Civil Practice Rules.[119] The British High Court of Justice Court of Appeal held in *Rubin* that a foreign bankruptcy proceeding to recover money from debtors could be recognized and enforced under the Model Law, despite the fact that the foreign proceeding was distinct from the primary, collective insolvency proceedings.[120] The effects of the holding in *Rubin*, which changed the landscape dramatically, are still unknown. Thus far, *Rubin* has affected the efforts of the Trustee as discussed further in Part V below.[121]

D. Extraterritorial Application of U.S. Law: the *Morrison* Issue

1. Overview—The Supreme Court's Decision in *Morrison*

Another challenge and strategic consideration facing the Trustee (which was not a direct issue when the Trustee was appointed in 2009), is the so-called "*Morrison* issue," namely whether the Code can properly be applied to foreign defendants and foreign transfers. In June 2010, the Supreme Court issued *Morrison v. National Australia Bank*,[122] which served in the context of a federal securities litigation to circumscribe significantly extraterritorial application of U.S. securities law. In *Morrison*, the Supreme Court reaffirmed the traditional presumption against extraterritoriality articulated by the Supreme Court in *EEOC v. Aramco,*[123] and overturned nearly three decades of jurisprudence that extended application of the anti-fraud provisions of the U.S. securities laws based on either the "conduct test" or the "effects test."

The concurring Justices, Stevens and Ginsburg, took issue with the majority for focusing too narrowly on statutory text as the ultimate pronouncement of Congressional intent. The concurring Justices pointed out that "even *Aramco*—surely the most extreme application of the presumption against extraterritoriality…contained numerous passages suggesting that the presumption may be overcome without a clear directive."[124] In addition, the concurring Justices noted that Supreme Court "cases both before and after *Aramco* make perfectly clear that the Court continues to give effect to '*all available evidence* about the meaning' of a provision when considering its extraterritorial application, lest we defy Congress' will."[125]

2. *Morrison* and the Bankruptcy Code

Many Madoff defendants in actions brought by the Trustee are now relying on *Morrison* in support of motions to withdraw the reference to Bankruptcy Court, as well as motions to dismiss.[126] The relationship between *Morrison* and the Code remains an open issue. In fact, since the *Morrison* decision was issued, some courts have simply allowed a trustee to recover transfers of Customer Property from foreign defendants without analyzing whether this constituted an extraterritorial application of the Code.[127]

In other substantive areas of law, the lower courts have adopted tests that best reflect the particular statute at issue when determining whether the presumption against extraterritoriality is triggered. For example, in the securities context, the Southern District of New York has characterized the Exchange Act as focusing on domestic *transactions*.[128] In the RICO context, courts in the Second Circuit have characterized the relevant focus as the domestic enterprise.[129]

One might expect the courts to adopt a similar, statute-specific approach with respect to the Code. If that is the case, courts may continue to employ the "center of gravity" test that bankruptcy courts have traditionally relied upon for determining whether a particular provision of the Code requires an extraterritorial application of the Code.[130] For example, in *Maxwell Comm. Corp. v. Barclays Bank (In re Maxwell)*,[131] the Bankruptcy Court stated the following with respect to extraterritoriality:

> Not every transaction that has a foreign element represents an extraterritorial application of our laws. The Court must look at the facts of a case to determine whether they have *a center of gravity* outside the United States. Thus, for example, a transfer made in the U.S. by a foreign national to a foreign national conceivably could be considered a domestic transaction. So, too, a transfer made overseas to a U.S. creditor of a U.S. debtor could be considered a domestic transaction.

The *Maxwell* court warned that characterizing any transfer that occurs partially outside the borders of the United States as extraterritorial "would have potentially dangerous implications" as a creditor could "simply arrange to have the transfer made overseas" in order to characterize it as extraterritorial.[132]

3. The text in the Bankruptcy Code Supports Extraterritorial Application

Whether or not courts will continue to apply the "center of gravity" test in the bankruptcy context, there is textual support to conclude that the Code, Section 550 in particular (which vests the Trustee with authority to recover avoidable transfers), applies extraterritorially. Section 541 of the Code defines "property of the estate" as comprising property "*wherever located and by whomever held*," including property located abroad.[133] Moreover, Section 1334(e) of the U.S. Code, governing the judiciary and judicial procedure, confers upon the district court in which a bankruptcy case is commenced exclusive *in rem* jurisdiction over all of the property of the estate, "wherever located."[134] Because avoidable and, alternatively, avoided transfers are considered "property of the estate," it follows that Section 550 is properly viewed as having extraterritorial application. This proposition is supported by case law.[135]

4. Legislative History Supports the Proposition that Section 550 of the Bankruptcy Code Applies Extraterritorially

In addition to the text of the Code, the legislative history supports the notion that Section 550 applies extraterritorially.[136] Congress specifically provided the bankruptcy courts with a broad jurisdictional grant so that "under appropriate circumstances," they could "assert insolvency jurisdiction outside [the] territorial limits" of the United States.[137] In its discussion of an early version of Section 550, the Commission on the Bankruptcy Laws of the United States disapproved of variations in treatment between domestic and foreign subsequent transferees.[138] Thus, when determining whether Section 550 applies extraterritorially, courts should take into account the fact that the purpose of the Code is to facilitate marshaling the debtor's assets and to enable an equitable distribution of such assets.[139]

IV. The Austrian Perspective: What Happens if the Cowboy Leaves the Saloon?

A. Introduction

According to the Merriam Webster Dictionary, a cowboy is a person who tends cattle. The British Collins dictionary defines a cowboy also as a person who is an irresponsible or unscrupulous businessman. Similarly, a saloon can be understood in different ways in the United States and in Britain. Either as a bar serving spirits or—in Britain—as a closed car with four doors, front and rear seats, and a separate trunk. In the United States, that type of car body would usually be referred to as a sedan.

Based on these definitions, in the United States the statement "the cowboy leaves the saloon" would generally be understood in such a way that the cattle caretaker is stepping out of the bar. In Europe, quite differently, it could be an unscrupulous businessman stepping out of a limousine.

When even in countries sharing the same language the same term terms can have other meanings, even bigger problems arise when another language is being used. The issue is magnified when it comes to legal language. Legal terms as understood by a U.S. lawyer may, and often will, have an entirely different meaning in Europe. A different meaning can go so far that an entirely different legal concept is designated by a similar term.

This Part IV attempts to address that "translational" problem between the United States and Europe and, in particular, to address practical issues that come up if a trustee appointed under U.S. insolvency laws needs to act in Europe and requires judicial assistance from European courts or authorities. These may include the following tasks:

- Will the powers of a U.S. trustee be recognized in Europe, or will it be necessary to open secondary insolvency proceedings for that purpose?
- How can European individuals or entities be properly served?
- Will a Rule 2004 subpoena be given effect?
- What can be done to overcome the fact that U.S.-style discovery may not be admissible?
- To what extent can a U.S.-appointed trustee cooperate with foreign criminal authorities?

These issues will be addressed herein from an international, a European, and an Austrian law perspective. After a discussion of general aspects, the different regimes in connection with insolvency, civil law and criminal law will be described.

B. General

As a general rule, the European courts take a functional approach and thus attempt to determine if their home concept corresponds to the concept in regard to which judicial assistance is being sought. Consequently, if a U.S. insolvency trustee acts abroad, that trustee's acts may not always trigger the foreign insolvency rules but, depending on their nature, may also fall within other legal concepts. In particular, there are three distinct and separate fields under which such acts may fall: insolvency law; civil law; and criminal law.

Consequently, when a U.S. trustee requires service of documents in Austria, such as the filing of a common law complaint against persons or entities residing in Austria, several aspects may need to be taken into account. As to the powers of the trustee, the general insolvency provisions may give guidance. As to the service of documents, general civil law rules will need to be regarded. As to the discovery connected with the complaint, criminal law provisions could be relevant.

Once the legal nature of the cross-border act is determined, the next issue is to find out whether there are any multinational or bilateral treaties or other instruments which govern the judicial assistance between the U.S. and Europe in that respect. Even without an explicit treaty, legal assistance can be based on comity or the customs of international law. Austrian authorities, for example, abide by the Hague Service Convention, even though Austria is not a party to the Convention.

Reciprocity is often a prerequisite for a state to provide legal assistance to another state. In fact, in Austria until 1983 the reciprocity requirement for judicial assistance in civil law matters was explicitly stipulated by law. However, this provision was removed with a reform of the Civil Procedure Act in 1983, implementing a decision of the Federal Constitutional Court that had found that the required procedure for establishing the existence of reciprocity, under which courts would have to rely on a decision of the Ministry of Justice, breached the constitutional requirement of separation of powers. With removal of that requirement, it has become clear that the Austrian law requirement that courts must provide legal assistance is no longer dependent upon reciprocity.[140]

C. Insolvency

The first issue that arises is how to translate the term insolvency into concepts understood in Europe. The Insolvency Regulation[141] attempts to find a common definition for insolvency within Europe. It does so by providing general confines in its Article 1: Under Article 1, insolvency proceedings entail the *partial or total divestment of a debtor and the appointment of a liquidator*. The Insolvency Directive then specifically lists the proceedings for each Member State which fall under its scope. For the United Kingdom these are, for example: (i) winding up by or subject to the supervision of the court; (ii) creditors' voluntary winding up (with confirmation by the court); (iii) administration; (iv) voluntary arrangements under insolvency legislation; and (v) bankruptcy or sequestration. The E.U. Insolvency Regulation then generally exempts certain financial businesses from its application, such as insurance undertakings, credit institutions, and certain investment undertakings. The Insolvency Regulation also defines "winding-up proceedings" as proceedings involving realizing the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of assets.

Under Article 15 of the Insolvency Regulation, the effects of insolvency proceedings on a pending lawsuit concerning an asset or a right of which the debtor has been divested are to be governed solely by the law of the Member State in which that lawsuit is pending. That provision gave rise to a heated debate a short while ago in the *Elektrim* case, when a U.K. court had to decide if a Polish law under which an arbitration clause became ineffective in the event of the opening of insolvency proceedings would have an effect on arbitrations pending in the U.K. The U.K. court denied such legal effect, on the basis of Article 15 and also in reliance on Austrian Supreme Court decisions in that respect. When the same issue was brought in front of the Swiss Supreme Court, it could not rely on E.U. norms and thus gave effect to the Polish law and declared the arbitration clause to be ineffective.

Section 240 of the Austrian Insolvency Code provides for the recognition of foreign insolvency proceedings in Austria on the basis of Austrian national insolvency law.[142] Accordingly, foreign insolvency proceedings are to be recognized in Austria if the prerequisites, *i.e.*, (i) focus on the debtor's interest in another country, and (ii) similarity of the insolvency proceedings, are met.[143] This is generally true for decisions rendered in U.S. insolvency proceedings.[144]

Despite the broad language of the Austrian insolvency law, Austrian courts will not automatically recognize every decision of a foreign insolvency court. Only such decisions will be recognized which are required in connection with the insolvency proceedings. In that respect, the Austrian law will generally rely on the foreign law. Also, as a general rule, if a decision is made in the insolvency proceedings that requirement will *prima facie* be deemed to have been met. Claims aimed at voiding transactions will typically not be considered under Austrian law to fall under that rule, since these are asserted in Austria in separate proceedings.

D. Civil Law

International judicial assistance in civil law matters is primarily governed by the Hague Conventions, to which a large number of states have acceded and which form an international level on the "standard" for cross-border judicial assistance. In particular the following instruments are relevant.

- The Hague Statute.[145] This sets out the general framework for instruments under the Hague Convention and has also been ratified by the United States.
- The Hague Civil Procedure Convention.[146] The United States is not a Contracting State to this Convention.
- The Hague Service Convention.[147] The United States is a party to this Convention. Although Austria is not a party, Austria nevertheless applies this Convention in practice out of comity.
- The Hague Evidence Convention.[148] The United States is a party to this Convention, but Austria is not.

Judicial assistance in civil law matters is governed by a number of instruments on the European Union level. First and foremost is the Brussels I Regulation,[149] which in particular contains rules on preliminary measures[150] and recognition and enforcement of foreign decisions,[151] and, on a broader basis, there is the Lugano Convention.[152] Furthermore the Service Regulation[153] and the Evidence Regulation[154] contain relevant provisions.

Beyond the Conventions and Regulations, Austrian courts have, irrespective of reciprocity, a general duty to provide legal assistance to any foreign court. That is part of Austrian civil procedure, as set forth in Sections 38 through 40 of the Austrian Jurisdiction Code.[155]

The provisions of legal assistance are supplemented in Austria by a number of other laws: the Federal Act on the Service of Official Documents[156] regulates the service of documents; and the Austrian Code on Civil Procedure Code (ACCP) contains further provisions regarding service of documents[157] and taking of evidence.[158] The Austrian Ministry of Justice has furthermore issued decrees to specify international judicial assistance.[159]

E. Criminal Law

Legal assistance in criminal matters can be based on the following multilateral Treaties:

- United Nations Convention of 15 November 2000 against Transnational Organized Crime.
- Agreement on Mutual Legal Assistance between the European Union and the United States of America signed on 1 February 2003 (entered into force on 25 June 2010).
- Agreement on Extradition between the European Union and the United States of America signed on 1 February 2003 (entered into force on 25 June 2010).

Between Austria and the U.S. certain treaties have been concluded:

- Treaty between the Republic of Austria and the United States of America on mutual legal assistance in criminal matters ("Mutual Legal Assistance Treaty") signed 23 February 1995.[160] Supplemented by the Protocol to the Mutual Legal Assistance Treaty, as contemplated by Article 3(2) of the Agreement on Mutual Legal Assistance between the European Union and the United States of America signed 25 June 2003; in force since 1 February 2010.[161]
- Extradition Treaty between the Austrian Republic and the United States of America signed 8 January 1998.[162] Supplemented by the Protocol to the Extradition Treaty, as contemplated by Article 3 (2) of the Agreement on Extradition between the European Union and the United States of America signed 25 June 2003; in force since 1 February 2010.[163]
- Treaty between the Austrian Republic and the United States of America on the sharing of confiscated proceeds of crimes (Asset Sharing Agreement); in force since 15 March 2011.[164]
- Treaty between the Austrian Republic and the United States of America on the intensification of cooperation with regards to the prevention and fighting against criminal offenses; signed on 15 November 2011, but not yet in force.

On a general European Union level, the mutual assistance in criminal matters between Member States is primarily governed by the Council Act of 29 May 2000, establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.[165] The Convention is accompanied by numerous additional documents setting up a framework

for cooperation in criminal matters, including rules on the standing of victims in criminal proceedings, simplified extradition procedures, exchange of information from criminal records, mutual recognition of orders freezing property or evidence, the European evidence warrant, financial penalties, etc.[166]

On a national Austrian level, in criminal matters the Public Prosecutor Office is generally competent to perform judicial assistance for both domestic and foreign judicial authorities.[167]

V. The British Perspective: A Summary of *Rubin v. Eurofinance* and "Universal Bankruptcies"

The *Rubin* case has the potential to change over one hundred years of English law, if the Supreme Court (the highest court in the U.K. and, in effect, the highest court of the various off-shore jurisdictions in which the Trustee is pursuing bankruptcy claims) upholds the decision of the Court of Appeal when it considers the case in May 2012. The Trustee has "intervened" in the case and so will have an influence on the outcome. This summary looks at the impact of *Rubin* on the enforceability of bankruptcy judgments internationally, which is an ongoing process in the Madoff liquidation. Similar issues arise (but are not covered here) in relation to the coordination of international bankruptcies (as opposed to the enforcement of judgments across borders).

A. The Big Picture

Universalism in bankruptcies has been a long-held aim of English and U.S. law. In England:

> The principle of modified universalism has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and U.K. public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution… Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one.[168]

This view was followed in *Rubin* in the Court of Appeal: "There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives world-wide recognition and it should apply universally to all the bankrupt's assets."[169]

In the U.S., Professor Jay Westbrook has adopted similar views and coined the phrase "modified universalism":

> A pragmatic development of universalism, moving toward the ultimate goal within the practical limits established by the markets and by local laws at any particular time and place… On a national legislative level [note: the reference to legislation is not thought to exclude common law developments along the same lines], it presses for less rigid rules for multinational debtors. Under existing laws, it adopts a worldwide perspective that seeks results as close to those achievable under a true universalism as national laws will permit in the circumstances of each case.[170]

Professor Westbrook also coined the phrase "grab rule" as another term for territorialism or pluralism, where local courts deal with local assets for local creditors rather than submitting to a single, international process. It is the opposite of universalism. He considered that such an approach is outdated in the modern world since: "[t]he local availability of valuable assets will often be fortuitous and unpredictable and will grow even more unpredictable as assets become ever more quickly transferable from country to country."[171]

While the above encapsulates trends in English insolvency law, the principle of private international law that has prevailed for over one hundred years is more protectionist. Put simply, a judgment *in personam* of a foreign court was, until recently, not enforceable by the English court under English common law unless the judgment debtor submitted in some way to the jurisdiction of the foreign court. That submission does not merely occur by the judgment debtor carrying on business in the territory of the foreign court, since that is relevant to the matters underlying the claim itself. Rather, the court looks to see whether the judgment debtor brought itself within the scope of the foreign proceedings. This could be a contractual submission to the jurisdiction of the court or it could be by virtue of the service of proceedings on the party while that party is voluntarily present in the foreign territory.

Recent cases, culminating in *Rubin*, have changed this. The courts have carved out a separate class of judgment—those deriving from bankruptcies—which are treated differently. For the avoidance of doubt, this deals with the common law position. The EC Insolvency Regulations and the implementation by certain states of the UNCITRAL Model Law on Insolvency govern the recognition and enforcement of foreign bankruptcy proceedings between those states. It will be for the Supreme Court in *Rubin* to decide whether this approach should now remain the law.

B. The Economic Issues

The lead taken by English courts in universalism can be explained by those courts identifying from the eighteenth century that such an approach would benefit English businesses, which were trading internationally to a far greater extent than businesses from the countries with which they traded. When considered in an "England versus the rest of the world" context, the English courts could see that, overall, English businesses would benefit from the promulgation of a universalist approach to enable assets to be distributed through a central process regardless of where in the world they were situated. In the eighteenth century, English companies were doing business the world over, to a greater extent than perhaps any other nation.

There is, therefore, a strong economic underpinning to the whole idea of a bankruptcy judgment being enforceable against a defendant in circumstances where a judgment *in personam* is not. Professor Westbrook describes the economic benefits of universalism in the following way:

> If every creditor knows in advance that the debtor's home-country [ie COMI] avoidance rules will be applied to all pre-bankruptcy transactions, the costs and risks of credit extension under various circumstances will be far more predictable than they are today. For example, the extent and timing of permissible setoffs will be known, so that the benefits of requiring maintenance of balances in lending banks can be calculated. The costs and benefits of obtaining security can be better predicted as well, in part because the degree of protection provided to the unsecured creditor body can be assessed. Even more obviously, creditors will be better situated to evaluate the competing risks presented by a proposed restructuring of a troubled debtor, knowing the extent to which self-help by non-cooperating creditors will be curable through a bankruptcy filing.
>
> Such a cooperative regime would have the further advantage of serving the distributional policies of one highly interested state in each case, as opposed to the present situation where the ultimate worldwide distribution is frequently inconsistent with the policies, including the common policies, of all interested states. For example, the effect of chaos in the management of multinational default may be to permit sophisticated creditors to evade all avoidance rules and seize all of the value of a company, leaving employees in many countries without the benefit of their statutory priorities.[172]

"The reductions in cost for many millions of transactions would benefit the local citizens of any given country far more than any net loss they might suffer in particular defaults."[173]

C. The Practical Position if *Rubin* is Upheld by the Supreme Court:

If the Supreme Court upholds the Court of Appeal's decision in *Rubin*, then it is likely to be in a way that allows a foreign (i.e., non-U.K., non-Cayman Islands/ BVI/ Bermudian/Gibraltarian, etc.) bankruptcy trustee with a properly obtained default bankruptcy judgment (such as an avoidance claim but not an ordinary civil claim which just happens to be brought by the bankruptcy trustee) to ask (but, really, require) the local court which is bound by the decision in *Rubin* to enforce that judgment as if it were a judgment of the local court. It is likely that the local court will need to recognize the bankruptcy judgment as deriving from a bankruptcy claim that is similar to one in the territory of the local court (but it is clear that most mature legal systems have similar anti-avoidance claims in bankruptcies, so there will usually be adequate similarity) and that there is no public policy ground (such as a fraudulently obtained judgment) that would override the local court's obligation to assist. In essence, it will no longer be an effective defense strategy to avoid submitting to the jurisdiction of the trustee's home court.

Indeed, a judgment debtor's decision to try to avoid submitting to the trustee's home court's jurisdiction has been criticized in a number of recent cases, including *Rubin* in the Court of Appeal. The English judges have seen this approach to trying to avoid liability as somewhat distasteful. For example, Lord Ward in *Rubin* (Court of Appeal):

> The respondents were fully aware of the claims being brought against them. After taking advice they chose not to participate in the New York proceedings. They took their chance that it would be difficult to bring proceedings [in the U.K.], possibly because [the plaintiff] is not amenable to winding up; possibly because the greater part of the transactions impugned in New York could not have been attacked here because the repugnant activity took place before 4 April 2006 when the EC Insolvency Regulations came into effect. Whatever their reasons, they made an informed judgment. I have no sympathy for them when it transpires that they were wrong.[174]

The outcome mentioned above, if it happens, has the effect of enabling U.S. bankruptcy law to be enforced across the world (or so much of the world as is subject to English law), so that fraudulent preferences and other voidable transactions can be recovered into the U.S. bankruptcy and then distributed to all creditors (universally). Professor Adrian Briggs, one of the most respected English academics on private international law, comments: "The fundamental and intuitive reason for giving effect to the rules and risks of foreign law is that this was part of the package to which the contractor subscribed. The reasoning may be a little rough but it works well enough."[175]

Put another way, the risk analysis for those undertaking international business or investing internationally will have to take into account the insolvency laws of whichever jurisdiction it is considered the counter-party has its Center of Main Interest, which in itself could be a moving target. And English courts will have to get more familiar with the bankruptcy laws of the countries within which English subjects do their business. It will be a big step forward toward universalism in bankruptcy proceedings.

Endnotes

1. Section 78*lll*(4) of the Securities Investor Protection Act ("SIPA") defines "Customer Property" as "cash and securities…at any time received, acquired, or held by or for the account of a debtor from or for the securities account of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted."
2. 11 U.S.C. § 541(a) states, in relevant part, "[t]he commencement of a case under…this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held…."
3. These funds are all in liquidation proceedings abroad. Some of the foreign liquidators have sought recognition of the foreign liquidation proceedings by the U.S. Bankruptcy Courts pursuant to Chapter 15. See generally Part II D.8 *infra.*
4. The amount of principal lost by investors in the Ponzi scheme is currently valued at approximately $17 billion.
5. U.N. Sales No. E.99.V.3 (1999), available at http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf. Subsequent related publications include Legislative Guide on Insolvency Law (2004), UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the "Practice Guide") (2009), UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of enterprise groups in insolvency [pre-release] (2009), and The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective [pre-release] (2011), all available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html.
6. 11 U.S.C. § 550, "Liability of transferee of avoided transfer."
7. Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 801, 119 Stat. 23 (2005), codified at 11 U.S.C. §§ 1505 *et seq.* (2005).
8. http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (noting that the list of countries identified as having adopted the Model Law in whole or in part "is only indicative of the enactments that were made known to the UNCITRAL Secretariat").
9. Krause, Janovsky, & Lebowitz, *Relief Under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies*, 64 Fordham L. Rev. 2591 (1996), available at http://ir.lawnet.fordham.edu/flr/vol64/iss6/6.
10. Westbrook, *Chapter 15 and Discharge*, 13 Am. Bankr. Inst. L. Rev. 503, 503-504 (2005).
11. For example, the application of the Section 304(c) recognition factors by different courts and the differential applications of the automatic stay protection were problematic. *See* Westbrook, *Chapter 15 At Last*, 79 Am. Bankr. L.J. 713, 721, 726 (2005) ("Section 304 did not provide for recognition of a foreign bankruptcy proceeding as such. It simply gave the United States courts the authority to open an ancillary proceeding and grant various forms of relief to the representative of a foreign main proceeding if the statutory criteria were satisfied. By contrast, the Model Law specifically provides for a petition for recognition to open an ancillary case under Chapter 15…[A] major change is that recognition is granted to a foreign main proceeding without reference to criteria like those formerly set forth in § 304(c). In addition, an automatic stay issues upon recognition reducing the need for one or more specific injunctions tailored to each case.").
12. "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. *See also* HR Report No 109 to 131, pt 1, at 110, as reprinted in 2005 U.S.C.C.A.N. 88, 172; Gropper, *Current Developments in International Insolvency Law: A United States Perspective, Bankruptcy & Reorganizations: Current Developments 2011*, 938 PLI/Comm 1023 (2011) (stating that "[i]t is important to note that the National Bankruptcy Review Commission, in recommending adoption of the UN-CITRAL Model Law as part of its report in 1997, was of the belief that adoption of the Model Law would not represent a significant change from current U.S. law" and citing United States National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* 361 (1997)).
13. Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency 28.
14. *Société Nationale Industrielle Aérospatiale v. District Court*, 482 U.S. 522 (1987) (Blackmun, J., dissenting).
15. *Hilton v. Guyot*, 159 U.S. 113, 163–64, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895).
16. *Id.*
17. *In re Maxwell Communication Corp. plc by Homan*, 93 F.3d 1036, 1046 (2d Cir. 1996) (citing 11 U.S.C. § 304 and S. Rep. No. 989, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5821 (explaining § 304)).
18. Westbrook, note 11 *supra*, 79 Am. Bankr. L.J. at 714.
19. Unlike in other chapters of bankruptcy, the Chapter 15 petition is not an "order for relief" (the actual court order determining that a debtor is subject to the control of the bankruptcy court). Under other chapters of bankruptcy, when a voluntary case is commenced, the order for relief is automatic upon the filing of the petition—that is, the petition acts as the order for relief. In a contested involuntary case, the order for relief is entered only after the court is satisfied that the debtor should be in a bankruptcy proceeding. Similarly, under Chapter 15, the order for relief is the order granting recognition. *See generally* Deutsch & Vazquez, *Introduction to Chapter 15*, 29 Am. Bankr. Inst. J. No. 4 (May 2010).
20. Judge Lifland granted recognition to the foreign representatives of Fairfield Sentry Limited. See *infra* for more information.
21. Often the foreign representative will be a provisional or official liquidator.
22. Section 1515 requirements direct that a petition include a certified copy of the decision to commence the foreign proceeding, a certificate from the foreign court affirming the existence of the foreign proceeding and appointment of the foreign representative,

and any other evidence that is acceptable to the bankruptcy court if the requirements of Sections 1515(b)(1) to (2) cannot be satisfied. 11 U.S.C. § 1515.

23. See 11 U.S.C. § 1502 for definitions of "foreign main proceeding," "foreign non-main proceeding" and "establishment."

24. 11 U.S.C. § 1517(a) provides that "after notice and a hearing, an order recognizing a foreign proceeding shall be entered" if certain requirements are met. Section 1517(b) provides:

    > (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 non-main proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.

25. *See* Model Law Art. 63.

26. 11 U.S.C. § 1516(c) provides, "In the absence of evidence to the contrary, the debtor's registered office,…, is presumed to be the center of the debtor's main interests." *See generally In re SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff'd*, 2007 WL 1965597 (S.D.N.Y. 3 July 2007).

27. The legislative history makes it clear, moreover, that "[t]he ultimate burden as to each element [of recognition] is on the foreign representative, although the court is entitled to shift the burden to the extent indicated in section 1516." H.R. Rep. 109–31, pt. 1, 109th Cong. 1st Sess. at 112–113 (2005). The legislative history also indicates that the statutory presumption of Section 1516(c) may be of less weight in the event of a serious dispute: "[t]he presumption that the place of the registered office is also the center of the debtor's main interest is included for speed and convenience of proof where there is no serious controversy." *Id. In re SPhinX, Ltd.*, note 26 *supra*, 351 B.R. at 117.

28. *In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009); *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009); *Tri-Continental*, 349 B.R. 627; *In re Chiang*, 437 B.R. 397, 403 (Bankr. C.D. Cal. 2010); *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1019 (5th Cir. 2010).

29. Truitt, *Rule and Form Changes Effective Dec. 1, 2011*, 30 Am. Bankr. Inst. J. 14 (December-January 2012) (further noting that "[t]he COMI statement and the list of countries can be challenged by a 'motion for a determination' up until seven days prior to the hearing date on the petition").

30. 11 U.S.C. § 1517(a)(1).

31. 11 U.S.C. § 1502(4).

32. 11 U.S.C. § 1502(5).

33. 11 U.S.C. § 1502(2).

34. *See Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1025 (5th Cir. 2010) (finding COMI as being in the United States based on individual's contacts as of the date of the filing of the Chapter 15 petition); *In re Betcorp Ltd.*, 400 B.R. 266, 290-92 (Bankr. D. Nev. 2009) (granting recognition of foreign proceedings taking place at Debtor's COMI); *In re British American Ins. Co. Ltd.*, 425 B.R. 884, 909-11 (Bankr. S.D. Fla. 2010) (denying recognition); *In re Fairfield Sentry, Ltd.*, 440 B.R. 60 (Bankr. S.D.N.Y. 2010) (granting recognition).

35. 11 U.S.C. § 1520.

36. *Cf.* Klidonas, *The Automatic Stay in Chapter 15: The Global Stay Applicable Only in Chapter 11 Cases*, 29 Am. Bankr. Inst. J. 38, 81 (2010) (analyzing *In re JSC BTA Bank*, No. 10-10638, 2010 Bankr. LEXIS 2496 (Bankr. S.D.N.Y. 23 Aug. 2010), where Bankruptcy Court held that the automatic stay does not apply but did "propose[] a different set of facts in which the debtor would have been able to enforce the automatic stay in a chapter 15 case").

37. 11 U.S.C. § 1509(b)(3).

38. 11 U.S.C. § 1521(a)-(b).

39. 11 U.S.C. § 1522(a)-(b).

40. 11 U.S.C. § 1507(a).

41. 11 U.S.C. § 1507.

42. Gropper, note 12 *supra*, 938 PLI/Comm 1023 (2011) (discussing *Clarkson Co. v. Shaheen*, 716 F.2d 126, 127 (2d Cir. 1983)).

43. *In re Fairfield Sentry*, 452 B.R. 52 (Bankr. S.D.N.Y. 2011) (holding that the two-year tolling period of Section 108 of the Bankruptcy Code applies in Chapter 15 case). *See also In re Bancredit Cayman Ltd. (in Liquidation)*, 2007 WL 3254369 (Bankr. S.D.N.Y. 2007) (denying foreign representatives' application to clarify recognition order by expressly rendering the tolling provision of Section 108 applicable as premature in the absence of an actual controversy regarding the applicable statute of limitations).

44. *See, e.g., Cunard S.S. Co. v. Salen Reefer Servs.*, 773 F.2d 452, 460 (2d Cir. 1985); *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999); *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418 (2d Cir. 2005) (limiting *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341 (2d Cir.), *cert. denied*, 506 U.S. 865 (1992)); *Ecoban Finance Ltd. v. Grupo Acerero del Norte, S.A. de C.V.*, 108 F. Supp. 2d 349 (S.D.N.Y. 2000), *aff'd*, 2 Fed. Appx. 80 (2d Cir.), *cert. denied*, 534 U.S. 814 (2001).

45. *Royal and Sun Alliance Ins. Co. of Can. v. Century Int'l. Arms, Inc.*, 466 F.3d 88, 92-93 (2d Cir. 2006).

46. *See* note 3 *supra*.

47. *Picard v. Fairfield Sentry et al. (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 09-1239 (Bankr. S.D.N.Y.) (Dkt. 47).

48. *Id.*

49. Federal Rule of Bankruptcy Procedure 7004(f) states, "Personal Jurisdiction. If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 of the Federal Rules of Civil Procedure made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code." *See generally Picard v. Chais (In re Bernard L. Madoff Inv. Secs. LLC)*, 440 B.R. 274, 278 (Bankr. S.D.N.Y. 2010) (citing *Cruisephone, Inc. v. Cruise Ships Catering & Servs., N.V. (In re Cruisephone, Inc.)*, 278 B.R. 325, 331 (Bankr. E.D.N.Y. 2002); *Savage & Assocs., P.C. v. Banda 26, S.A. (In re Teligent, Inc.)*, Nos. 01–12974, et al., 2004 WL 724945, at *4 n. 11 (Bankr. S.D.N.Y. 30 Mar. 2004); *North v. Winterthur Assurances (In re North)*, 279 B.R. 845, 852–53 (Bankr. D. Ariz. 2002) ("[T]he Bankruptcy Rules effectively provide for worldwide service of process, limited only by the due process clause of the Fifth Amendment, which requires only that the defendant have the requisite minimum contacts with the United States, rather than with the forum state.").

50. *GMAM Inv. Funds Trust I v. Globo Comunicações e Participações S.A. (In re Globo Comunicações e Participações S.A.)*, 317 B.R. 235, 250 (S.D.N.Y. 2004) (holding that if the bankruptcy court found, "after sufficient factfinding procedures, that it could assert personal jurisdiction over Globopar consistent with Due Process requirements, and should not apply other recognized abstention doctrines grounded on comity or public policy, there is no reason why the court could not issue an order asserting control over all of Globopar's assets, wherever located"). *See also In re Enron Corp.*, 316 B.R. 434, 444 (Bankr. S.D.N.Y. 2004) (citing *NationsBank, N.A. v. Macoil, Inc. (In re Med–Atlantic Petroleum Corp.)*, 233 B.R. 644, 653 (Bankr. S.D.N.Y. 1999) and *Owens–Illinois, Inc. v. Rapid American Corp. (In re Celotex Corp.)*, 124 F.3d 619, 630 (4th Cir. 1997)).

51. *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 164 (2d Cir. 2010) (citing *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)). When engaging in the jurisdictional inquiry, bankruptcy courts in New York may apply the jurisdictional provisions under Section 302 of the New York Civil Practice Law and Rules (the "CPLR"). *See Picard v. Chais*, note 49 *supra*, 440 B.R. at 280 ("As section 302

of the CPLR does not reach as far as the Constitution permits, due process will be satisfied if the New York long arm statute is satisfied.") (citing *Newbro v. Freed*, 337 F. Supp. 2d 434 (S.D.N.Y. 2004)) (additional citation omitted). In arguing juridiction, the Trustee may rely on case law analyzing minimum contacts with the United States as a whole (e.g. bankruptcy cases) as well as case law analyzing the jurisdictional grounds under § 302 of the CPLR.

52. *Picard v. Chais*, note 49 *supra*, 440 B.R. at 278; *Bickerton v. Bozel (In re Bozel)*, 434 B.R. 86, 97 (Bankr. S.D.N.Y. 2010) ("Because valid service of process pursuant to Rule 7004(d) is sufficient to establish personal jurisdiction, state long-arm statutes are inapplicable, and 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."). *See also In re Enron Corp.*, 316 B.R. 434, 440, 444–46 (Bankr. S.D.N.Y. 2004) (citing *In re Pintlar Corp.*, 133 F.3d 1141 (9th Cir.1998), and *Anheuser-Busch, Inc. v. Paques, Inc. (In re Paques, Inc.)*, 277 B.R. 615, 632-3 (Bankr. E.D. Pa. 2000)).

    As a practical matter, New York is often the most relevant forum for the jurisdictional inquiry in the Madoff cases brought by the Trustee. This is because the forum-related contacts for the foreign defendants named in adversary proceedings brought by the Trustee related to their Madoff and BLMIS-related dealings, and (among other things) the money at issue in such cases was placed in New York, in a New York bank account, and was transferred through New York wire transfer.

53. The Trustee's authority to recover Customer Property from the subsequent transferees is derived from Section 550 of the Bankruptcy Code, which provides as follows:

    > [T]o the extent that a transfer is avoided…, the Trustee may recover, for the benefit of the estate the property transferred or, if the court so orders, the value of such property, from—
    >
    > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
    >
    > (2) any immediate or mediate transferee of such initial transferee.

    11 U.S.C. § 550(a)(1)-(2). Many of the adversary proceedings brought by the Trustee against the initial transferee defendants also named the subsequent transferee defendants to whom Customer Property was transferred. However, because the Trustee's investigation is ongoing—and because 11 U.S.C. § 550(f) provides that the statute of limitations for suing a subsequent transferee is one year after avoidance of the initial transfer—the Trustee has continued, and will continue, to sue subsequent transferees to recover Customer Property.

    For example, following the Fairfield Sentry liquidation, the Trustee has sought to recover against subsequent transferees, including: *Picard v. Falcon Private Bank Ltd. (f/k/a AIG Private Bank AG) (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 11-02923 (Bankr. S.D.N.Y.); *Picard v. Bank Julius Baer & Co. Ltd. (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 11-02922 (Bankr. S.D.N.Y.); *Picard v. Merrill Lynch Bank (Suisse) SA (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 11-02910 (Bankr. S.D.N.Y.); *Picard v. BNP Paribas Arbitrage SNC (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 11-02796 (Bankr. S.D.N.Y.); *Picard v. Somers Dublin Limited, Somers Nominees (Far East) Limited (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 11-02784 (Bankr. S.D.N.Y.); *Picard v. Caceis Bank Luxembourg, Caceis Bank (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 11-02758 (Bankr. S.D.N.Y.); *Picard v. Nomura International PLC (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 11-02759 (Bankr. S.D.N.Y.); *Picard v. ABN AMRO Bank N.V. (now known as THE ROYAL BANK OF SCOTLAND, N.V.), ABN AMRO Bank (Switzerland) AG (f/k/a ABN AMRO Bank (Schweiz) (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 11-02760 (Bankr. S.D.N.Y.)); *Picard v. KBC Investments Limited (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No.11-02761 (Bankr. S.D.N.Y.); *Picard v. Lighthouse Investment Partners LLC, d/b/a Lighthouse Partners, Lighthouse Supercash Fund Limited, Lighthouse Diversified Fund Limited (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 11-02762 (Bankr. S.D.N.Y.). A complete list can be found on the Trustee's website: http://madofftrustee.com/.

54. *Picard v. Chais* note 49 *supra*, 440 B.R. at 278 (citing *Picard v. Cohmad (In re Bernard L. Madoff Inv. Secs. LLC)*, 418 B.R. 75, 80-81 (Bankr. S.D.N.Y 2009)).

55. *See generally Picard v. Trotanoy (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 10-05208 (Bankr. S.D.N.Y.), Motions to Dismiss by Hyposwiss Private Bank Geneve S.A. (f/k/a/ Anglo-Irish Bank (Suisse) S.A., f/k/a Marcuard Cook & Cie S.A.) (Dkt. 17, 22), and Motion to Dismiss filed by Access International Advisors Ltd. (f/k/a Alternative Advisors Limited) (Dkt. 33-34) (following a Motion to Dismiss filed by Hyposwiss Private Bank Geneve S.A. (f/k/a/ Anglo-Irish Bank (Suisse) S.A., f/k/a Marcuard Cook & Cie S.A.) (Dkt. 17, 22), and a Motion to Dismiss by Trotanoy Investment Company Ltd. and Palmer Fund Management Services Limited (Dkt. 18-19), and a Motion to Dismiss filed by Access International Advisors Ltd. (f/k/a Alternative Advisors Limited) (Dkt. 33-34). Several parties also filed Motions to Withdraw the Reference (Case. No. 11-cv-07112).

56. *Picard v. Chais* (*In re Bernard L. Madoff Inv. Secs. LLC*), note 49 *supra*, at 279 (internal citations omitted).

57. *Kargo, Inc. v. Pegaso PCA, S.A. de C.V.*, 2008 WL 2930546, No. 05 Civ. 10528, at *3 (S.D.N.Y. 29 July 2008) (internal citations omitted). General jurisdiction is a more difficult standard for a plaintiff to meet. *See generally Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984).

58. As a threshold matter, it is important to note that the standards applied to veil-piercing and similar theories for purposes of jurisdiction are less stringent than those applied for purposes of liability. *302 Storm LLC v. Telenor Mobile Commc'ns AS*, No. 06 Civ. 13157, 2006 WL 3735657, at *13 n. 8 (S.D.N.Y. 15 Dec. 2006) ("Establishing the exercise of personal jurisdiction over an alleged alter ego requires application of a less stringent standard than that necessary to pierce the corporate veil for purposes of liability."); *Quebecor World (USA), Inc. v. Harsha Associates, L.L.C.*, 455 F. Supp. 2d 236, 243 (W.D.N.Y. 2006) ("Establishing the exercise of personal jurisdiction over an alleged alter ego requires application of a "less onerous standard" than that necessary for equity to pierce the corporate veil for liability purposes under New York law"); *Dakota Indus., Inc. v. Ever Best Ltd.*, 28 F.3d 910, 915 (8th Cir. 1994); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981).

    Moreover, contrary to the assertions raised thus far by certain foreign defendants, New York courts apply New York—not foreign—law to determine whether an entity is subject to jurisdiction in New York based on the New York contacts of a related entity. *Quebecor World (USA), Inc. v. Harsha Associates, L.L.C.*, 455 F. Supp. 2d 236, 243 (W.D.N.Y. 2006); *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 230 F. Supp. 2d 376, 384-86 (S.D.N.Y. 2002) (relying on New York law to find that German corporation was "doing business" in New York because corporation's New York subsidiary was conducting a core component of its business in New York); *Statharos v. New York City Taxi and Limousine Commission*, 198 F.3d 317, 324 (2d Cir. 1999); *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131 (2d Cir.1991).

59. *See Picard v. Chais*, note 49 *supra*, at 279 (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619–20, 112 S.Ct. 2160, 119 L. Ed. 2d 394 (1992) (finding minimum contacts where defendant, *inter alia*, appointed a financial agent in New York), and *Smith v. Matias, (In re IFS Fin. Corp.)*, Adv. Nos. 04–3789, et al., 2007 WL 2692237, at *11 (Bankr. S.D.Tex. 11 Sept. 2007) ("[P]ersonal jurisdiction is present if [defendant] gave another authority to act on his behalf and the agent's contacts in his agency capacity are sufficient to establish specific personal jurisdiction.")).

60. *See Dorfman v. Marriott Int'l Hotels, Inc.*, No. 99 CIV 10496 (CSH), 2002 WL 14363, at *2 (S.D.N.Y. 3 Jan. 2002) (holding "[i]f the subsidiary functions as a mere department of the parent or acts as the parent's agent in New York, then the parent will be subject to jurisdiction in New York."). Similarly, "[w]here a parent corporation is present in New York, its foreign subsidiary may be subject to New York jurisdiction if the subsidiary is a mere department of the parent or if the parent acts as the subsidiary's agent in New York." *Id.* (internal citations omitted). *See also Transfield ER Cape Ltd. v. Indus. Carriers*, 571 F.3d 221, 224 (2d Cir. 2009) (discussing "alter ego" relationships).

61. *Erick Van Egeraat Assoc. Architects v. NBBJ LLC*, No. 08 Civ. 7873 (JSR), 2009 WL 1209020, at *5 (S.D.N.Y. 29 April 2009) (citing *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Co.*, 751 F.2d 117, 120 (2d Cir. 1984)).

62. *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.*, 508 F. Supp. 1322, 1344 (E.D.N.Y. 1981).

63. *See generally In re Parmalat Securities Litigation*, 381 F. Supp. 2d 283 (S.D.N.Y. 2005); *Erick Van Egeraat Associated Architects B.V. v. NBBJ LLC*, No. 08 Civ. 7873, 2009 WL 1209020, at *1 (S.D.N.Y. 29 April 2009); *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 864 (2d Cir. 1996).

64. *Chloe*, note 51 *supra*, 616 F.3d at 164 (*citing Int'l Shoe*, 326 U.S. at 316).

65. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 -243 (2d Cir. 2007) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L. Ed. 2d 1283 (1958), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L. Ed. 2d 490 (1980)) (internal citations omitted).

66. *Chloe*, note 51 *supra*, 616 F.3d at 165 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)). When minimum contacts have been established, "the burden shifts to [the plaintiff] to present a "compelling case" that establishing personal jurisdiction would be unreasonable." *Bickerton v. Bozel (In re Bozel)*, 434 B.R. 86, 100 (Bankr. S.D.N.Y. 2010) (citing *Picard v. Cohmad (In re Bernard L. Madoff Inv. Secs. LLC)*, 418 B.R. 75, 881 (Bankr. S.D.N.Y 2009) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. at 477), and *AstroPower*, 335 B.R. at 321 (quoting *Grand Entm't Group, Ltd. v. Star Media Sales*, 988 F.2d 476, 483 (3d Cir. 1993)).

67. *Chloe,* note 51 *supra*, at 164 (quoting *Asahi Metal Indus. Co. v. Super. Ct. of California*, 480 U.S. 102, 113-14 (1987)).

68. *Bickerton v. Bozel (In re Bozel)*, note 52 *supra*, 434 B.R. at 100 (quoting *GMAM Inv. Funds Trust I v. Globo Comunicações e Participações S.A. (In re Globo Comunicações e Participações S.A.)*, 317 B.R. 235, 257-58 (Bankr. S.D.N.Y. 2004)).

69. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 130 (2d Cir. 2002) (quoting *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 574 (2d Cir. 1996)).

70. "When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *Bickerton v. Bozel (In re Bozel)*, note 52 *supra*, 434 B.R. at 100 (Bankr. S.D.N.Y. 2010) (quoting *Asahi Metal Indus. Co. v. Super. Ct. of California*, 480 U.S. at 114)); *First Capital Asset Mgmt., Inc. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 403 (S.D.N.Y. 2002).

71. For a while the circuits were split on the question of whether a court was required first to establish that it could exercise personal jurisdiction over defendant before conducting the *forum non conveniens* analysis to determine whether it should decline to exercise that jurisdiction in favor of an alternative forum. *Compare Dominquez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650, 652-54 (5th Cir. 2005) (*per curiam*) (holding that court must resolve jurisdictional issues before conducting *forum non* analysis), *with In re Arbitration* between *Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 497-98 (2d Cir. 2002) (holding that court may dismiss a case on *forum non conveniens* grounds without resolving jurisdictional issues). The Supreme Court thereafter resolved this split, holding that "[a] district court…may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007). As a practical matter, however, foreign defendants frequently raise lack of personal jurisdiction and *forum non conveniens* as alternative arguments in one motion.

    For example, in *Picard v. Trotanoy*, two of the defendants have moved to dismiss the actions for lack of personal jurisdiction and, as an alternative argument, on the grounds of *forum non conveniens. See generally Picard v. Trotanoy (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 10-05208 (Bankr. S.D.N.Y.), Motion to Dismiss filed by Trotanoy Investment Company Ltd. and Palmer Fund Management Services Limited (Dkt. 18-19) and Motion to Dismiss filed by Access International Advisors Ltd. (f/k/a Alternative Advisors Limited) (Dkt. 33-34).

72. *Gross v. British Broadcasting Corp.*, 386 F.3d 224, 227 (2d Cir. 2004).

73. *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (en banc) (internal quotation omitted).

74. *Norex Petroleum, Ltd. v. Access Indus.,* 416 F.3d 146, 153 (2d Cir. 2005).

75. *Id.*

76. *Id.*

77. The Second Circuit has directed the lower courts to consider the totality of circumstances in order to evaluate whether a plaintiff's choice of forum reflects *bona fide* reasons of convenience or, rather, strategic forum-shopping considerations. *Norex*, note 74 *supra*, 416 F.3d at 154-55. This is because "the degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on the degree of convenience reflected by the choice in a given case." *Id.* at 154 (internal quotation omitted). Courts in the Second Circuit evaluate the following factors when assessing the motivations underlying a plaintiff's choice of forum: the convenience of the plaintiff's residence vis-à-vis the chosen forum; the availability of witnesses or evidence in the forum; the defendant's amenability to suit in the forum; the availability of appropriate legal assistance; and other reasons relating to convenience or expense. *Id.* at 155 (quoting *Iragorri*, note 73 *supra*, 274 F.3d at 72).

78. *Gross v. British Broadcasting Corp.*, 386 F.3d 224, 227 (2d Cir. 2004) (emphasis added). *See also Sinochem*, note 71 *supra*, 549 U.S. at 430 ("a defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." When the plaintiff's choice is not his home forum, however, the presumption in the plaintiff's favor "applies with less force," for the assumption that the chosen forum is appropriate is in such cases "less reasonable.") (citations omitted.)

79. *Norex*, note 74 *supra*, 416 F.3d at 154.

80. In a recent opinion, the Southern District of New York dismissed a case brought by foreign investors who had invested in foreign-based Madoff feeder funds on *forum non conveniens* grounds. *In re Herald, Primeo, and Thema Securities Litigation*, No. 09 Civ. 289 (RMB), 2011 WL 5928952 (S.D.N.Y. 29 Nov. 2011). This decision was predicated on the court's finding that the foreign plaintiffs' choice of a U.S. forum was entitled to "less deference" for two reasons: first, because none of the plaintiffs were U.S. citizens or residents, *id.* at *11; and, second, because it appeared that their decision to sue in the United States was motivated by forum-shopping, *id.* at *12. Specifically, the court determined that the foreign plaintiffs were seeking to take advantage of the U.S. class action device and that they were looking to bring claims under RICO which would entitle them to higher damages than they would otherwise be entitled to in their respective countries. *Id.* Other cases brought by foreign investors in foreign-based Madoff feeder funds have

also been dismissed for this same reason. *See, e.g.*, *In re Banco Santander Sec–Optimal Litig.*, 732 F. Supp. 2d 1305, 1311, 1329-45 (S.D. Fla. 2010), *aff'd sub nom. Inversiones Mar Octava Limitada v. Banco Santander S.A.*, No. 10–14012, 2011 WL 3823284 (11th Cir. 30 Aug. 2011) (*per curiam*); *Erausquin v. Notz, Stucki Mgmt. (Bermuda) Ltd.*, No. 09 Civ. 7846 (WHP), 2011 WL 3734387, at *8-*15 (S.D.N.Y. 25 Aug. 2011). By contrast, to date, no case brought by the Trustee in bankruptcy court has been subject to a successful *forum non conveniens* challenge.

81. *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 75 (2d Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004).

82. *See, e.g.*, *Piper Aircraft Co. v. Hartzell Propeller*, 454 U.S. 235, 236 (1982); *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1076 (S.D.N.Y. 1992), *aff'd*, 990 F.2d 71 (2d Cir. 1993); *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 450 (2d Cir. 1975).

83. Of course, the outcome of this factor will differ for each of the alternative *fora* proposed by the foreign defendants. The court will likely require testimony from experts in each of these regarding the existence of comparable causes of action.

84. *DiRienzo v. Philip Services Corp.*, 294 F.3d 21, 29-30 (2d Cir. 2002) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), and *Iragorri v. United Technologies Corp.*, note 73 *supra*, 274 F.3d at 73-74).

85. *Id.* at 31 (quoting *Gilbert*, note 84 *supra*, 330 U.S. at 508-09; citing *Iragorri*, note 73 *supra*, 274 F.3d at 74).

86. Hague Evidence Convention, 7 Oct. 1972, 23 U.S.T. 2555, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=82.

87. *In re: Assicurazioni Generali S.p.A. Holocaust Ins. Lit.*, 228 F. Supp. 2d 348, 362 (S.D.N.Y. 2002) (collecting cases) ("[N]umerous courts have held that the use of international letters rogatory is a viable alternative to *forum non conveniens* dismissal.").

88. *Rahl v. Bande*, 328 B.R. 387, 408 (Bankr. S.D.N.Y. 2005) (stating that the Southern District of New York "has the resources to adjudicate complex litigation"); *Cromer Fin. Ltd. v. Berger*, 158 F. Supp. 2d 347, 355 (S.D.N.Y. 2001) (noting that courts in the Southern District of New York "have shown themselves more than able to address the issues that arise in complex actions in an expeditious and comprehensive manner").

89. *Id.* at 411 (quoting *Manu Int'l S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 67-68 (2d Cir. 1981), that "'the need to apply foreign law is not in itself a reason to apply the doctrine of *forum non conveniens*,' and [courts] must guard against an excessive reluctance to undertake the task of deciding foreign law, a chore federal courts must often perform").

90. Discovery challenges regarding domestic parties and non-parties is not covered here, since the focus of this article is the international context of the proceedings.

91. The majority of the discovery in this case, to date, has proceeded pursuant to Federal Rule of Bankruptcy Procedure 2004.

92. Blocking statutes are laws enacted in one jurisdiction to obstruct the local (extra jurisdictional) application of a law enacted in another jurisdiction. "French Blocking Statute is a French criminal statute that prescribes sanctions for a French national or corporation who engages in the discovery process of a foreign judicial system without using the procedures established under the Hague Evidence Convention." *In re Global Power Equipment Group Inc.*, 418 B.R. 833, 839 (Bankr. D. Del. 2009) (citing French Penal Code Law No. 80–538). "It is well settled that a foreign blocking statute does not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate the statute." *Old Ladder Litigation Co., LLC v. Investcorp Bank B.S.C.*, 2008 WL 2224292, at *5 (S.D.N.Y. 2008) (quoting *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544, 107 S.Ct. 2542 (1987)).

93. *See generally* Federal Rule of Bankruptcy Procedure 9037, "Privacy Protection for Filings Made with the Court."

94. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 540 (1987). *See also Dietrich v. Bauer*, No. 95 Civ. 7051 (RWS), 2000 WL 1171132, *4-*5 (S.D.N.Y. 16 Aug. 2000): "The discovery procedures provided by the Hague Convention…are neither the exclusive nor even, necessarily, the first means for obtaining discovery from a foreign entity, as compared with the Federal Rules of Civil Procedure."

95. *Id.* at 544 n.29.

96. *Id.*

97. *Id.* at 544 n.28.

98. *Madanes v. Madanes*, 186 F.R.D. 279, 286 (S.D.N.Y. 1999); *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 245-46 (S.D.N.Y. 2010).

99. *See, e.g.*, *Milliken*, note 98 *supra*, 758 F. Supp. 2d at 246; *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 439 (E.D.N.Y. 2008); *Reino de España v. Am. Bureau of Shipping*, 2005 WL 1813017, at *3 (S.D.N.Y. 2005).

100. *E.g.*, *Compagnie Francaise d'Assurance Pour le Commerce v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984); *Bodner v. Banque Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000); *In re Vivendi Universal, S.A. Securities Litig.*, 2006 WL 3378115, at *4 (S.D.N.Y. 2006); *Strauss*, note 99 *supra*, 249 F.R.D. at 439; *In re Air Cargo Shipping Services Antitrust Litigation*, 2010 WL 1189341 (E.D.N.Y. 29 Mar. 2010). One Southern District decision went so far as to characterize the French blocking statute as "a sham law." *Minpeco S.A. v. Conticommodity Services, Inc.*, 116 F.R.D. 517, 528 (S.D.N.Y. 1987).

101. *Milliken*, note 98 *supra*, 758 F. Supp. 2d at 246.

102. *In re Exec. Sec. Corp.*, 702 F.2d 406, 410 (2d Cir. 1983). *See also Sec. Investor Prot. Corp. v. Charisma Sec. Corp.*, 352 F. Supp. 302, 306 (S.D.N.Y. 1972) ("A trustee and his counsel…are persons selected for quasi-public service by a public agency and presented to the [c]ourt for appointment by the agency to conduct proceedings in which there is a substantial public interest at stake").

103. *See, e.g.*, *Minpeco*, note 100 *supra*, 116 F.R.D. at 523 ("The United States has a strong national interest in enforcing its antitrust and commodities fraud laws…to ensure the integrity of its financial markets."); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 112 (S.D.N.Y. 1981) (recognizing the "vital national interest in maintaining the integrity of the securities markets against violations committed and/or aided and assisted by parties located abroad").

104. Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 910 (2007).

105. *Tulip Computers Int'l B.V. v. Dell Computer Corp.*, 262 F. Supp. 2d 358 (D. Del. 2003) (quoting *Orlich v. Helm Bros., Inc.*, 160 A.D.2d 135, 143, 560 N.Y.S. 2d 10 (1990): "When discovery is sought from a non-party in a foreign jurisdiction, application of the Hague [Evidence] Convention…is virtually compulsory.").

106. *First Am. Corp v. Price Waterhouse LLP*, 154 F.3d 16 (2d Cir. 1998).

107. The U.S. State Department's webpage on judicial assistance, available at http://travel.state.gov/law/judicial/ provides information for selected countries but it is not comprehensive.

108. Council Regulation (EC) 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

109. For example, in this case, some parties have strategically avoided the jurisdiction of the United States with the intent to oppose the enforcement of a U.S. default judgment in their local jurisdiction. *See, e.g.*, *Picard v. Harley International (Cayman) Limited (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. Pro. No. 09-01187 (Bankr. S.D.N.Y.) (Dkt. 15).

110. Linda Silberman *et al.*, Civil Litigation in Comparative Context at 532 (West 2007).

111. *Id.*

112. *Id.*

113. *See, e.g., Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 702, 706 (1982) (explaining that the personal jurisdiction requirement flows from the Due Process Clause to "recognize[] and protect[] an individual liberty interest" and that under this requirement "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding"). As noted above and discussed below in conjunction with the *Rubin* case, the consideration of default judgments has been critical in the Trustee's efforts thus far.

114. *Id.* at 545. Traditionally, many countries also evaluated the choice-of-law analysis of the rendering court but, with the notable exception of Portugal, choice of law is no longer a relevant inquiry in the judgment enforcement context. *Id.* at 547.

115. Silberman, *Some Judgements on Judgments: A View From America*, 19 King's Coll. L.J. 235 (2007).

116. Linda Silberman, note 110 *supra*, at 546.

117. *Id.* (citing *Prieur v. Montenach*, Cass. Civ. 1st Sect., 23 May 2006).

118. *Rubin and Lan (Joint Receivers and Managers of The Consumers Trust) v. Eurofinance SA and others* [2010] EWCA (Civ) 895, [2011] 2 W.L.R. 121 (Eng.) (appeal pending).

119. Linda Silberman, note 110 *supra*, at 546.

120. *Rubin and Lan (Joint Receivers and Managers of The Consumers Trust) v. Eurofinance SA and others* [2010] EWCA (Civ) 895, [2011] 2 W.L.R. 121 (Eng.) (appeal pending).

121. "Shortly after the High Court issued its opinion in *Rubin v. Eurofinance*, at least one bankruptcy judge in the U.S., Hon. Burton R. Lifland, in the case of *In re Bernard L. Madoff Investments Securities LLC*, has relied on this decision and sought assistance directly from a foreign court in Gibraltar to enforce a default judgment rendered against several foreign defendants in adversary proceedings in connection with that case. As in *Rubin*, the foreign defendants in the Madoff case were properly served and did not appear." Barrack, Vibbert, Bolton, *English High Court Recognizes, Enforces U.S. Court Judgments in Adversary Proceedings*, 30 Am. Bankr. Inst. J. (2010).

122. 558 U.S. __, 130 S. Ct. 2869 (2010). The Court quoted from the *Aramco* case as follows: "'Unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" *Id.* at 2877.

123. 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.").

124. *Morrison*, note 122 *supra*, 130 S. Ct. at 2891.

125. *Id.* (citing *Sale v. Haitian Centers Council, Inc.*, 509 U. S. 155, 177 (1993) (emphasis added), and *Hartford Fire Ins. Co. v. California*, 509 U. S. 764 (1993) (declining to apply presumption in assessing question of Sherman Act extraterritoriality reorganizing that the presumption can be overcome through judicial precedent)).

126. *See, e.g.*, *Picard v. Oreades Sicav et al.* (as filed by BNP Paribas Investment Partners Luxembourg S.A., BGL BNP Paribas S.A. and BNP Paribas Securities Services S.A.) (11-cv-07763-JSR); *Picard v. Equity Trading Portfolio Ltd. et al.* (as filed by BNP Paribas Arbitrage SNC) (11-cv-07810-JSR); *Picard v. ABN AMRO Bank N.V. (presently known as the Royal Bank of Scotland, N.V.) et al.* (as filed by Rye Select Broad Market XL Portfolio Ltd.) (11-cv-06848-JSR); *Picard v. ABN AMRO Bank N.V. (currently known as the Royal Bank of Scotland, N.V.) et al.* (as filed by ABN AMRO Incorporated, ABN AMRO Bank, N.V.) (11-cv-06878-JSR); *Picard v. ABN AMRO (Ireland) Ltd. (F/N/A Fortis Prime Fund Solutions Bank (Ireland) Ltd.) et al.* (as filed by Rye Select Broad Market XL Portfolio Ltd.) (11-cv-06849-JSR); *Picard v. ABN AMRO (Ireland) Ltd. (F/N/A Fortis Prime Fund Solutions Bank (Ireland) Ltd.,) et al.* (as filed by ABN AMRO Custodial Services (Ireland) Ltd., ABN AMRO Bank (Ireland), Ltd.) (11-cv-06877-JSR); *Picard v. Banco Bilbao Vizcaya Argentaria, S.A.* (11-cv-07100-JSR); *Picard v. Federico Ceretti et al.* (as filed by Federico Ceretti, Carlo Grosso, FIM Limited and FIM Advisers LLP) (11-cv-07134-JSR); *Picard v. Primeo* (11-cv-06524-JSR) (all raising issues of extraterritoriality in pending motions to withdraw the reference and/or motions to dismiss).

127. *See, e.g.*, *Picard v. Chais (In re Bernard L. Madoff Inv. Secs. LLC)*, 440 B.R. 274 (Bankr. S.D.N.Y. 2010). *See also In re Mastro*, No. 04-16841, 2011 WL 4498834, at *34 (Bankr. WD. Wash. 27 Sept. 2011).

128. *See, e.g.*, *SEC v. Compania Int'l Fin. S.A.*, 11 Civ. 4904, 2011 WL 3251813, at *6 (S.D.N.Y. 29 July 2011); *In re Optimal U.S. Lit.*, No. 10 Civ. 4095, 2011 WL 1676067, at *11-*12 (S.D.N.Y. 12 May 2011); *Basis Yield Alpha Fund v. Goldman Sachs Group, Inc.*, No. 10 CV 4537, 2011 WL 3251813, at *3-*4 (S.D.N.Y. 21 July 2011).

129. *See, e.g.*, *Cedeño v. Intech Group, Inc.*, 733 F. Supp. 471, 474 (S.D.N.Y. 2010); *European Comm. V. RJR Nabisco, Inc.*, No. 02 CV 5771, 2011 WL 843957, at *5-*6 (E.D.N.Y. 8 March 2011).

130. *See, e.g.*, *Picard v. Chais (In re Bernard L. Madoff Inv. Secs. LLC)*, *In re Mastro*, No. 04-16841, 2011 WL 4498834, at *34 (Bankr. WD. Wash. 27 Sept. 2011); *Schwin Bicycle Co. v. AFS Cycle & Co. Ltd.*, 248 B.R. 328, 335-36 (Bankr. N.D. Ill. 2000); *Kipperman v. Onex Corp.*, 411 B.R. 805, 864 (N.D. Ga. 2009); *In re Phasfire Holdings L.P. v. Owen Bird Law Corp.*, No. 06-10307, 2008 WL 763742, at*1-2 (Bankr. N.D. Cal. 20 March 2008).

131. 170 B.R. 800, 809 (Bankr. S.D.N.Y. 1994) (emphasis added).

132. *Id.* at 816.

133. 11 U.S.C. § 541 (emphasis added). *See also Deak & Co. v. Soedjono (In re Deak & Co.)*, 427 (Bankr. S.D.N.Y. 1986) (collecting cases) (relying on Section 541's "comprehensive and broad definition of property of the estate" to find that court could entertain avoidance claim with respect to shares held in overseas account); *In re Whiting Pools, Inc.*, 462 U.S. 198, 204–05 (1983) (noting that Congressional reports on the Bankruptcy Code "indicate that § 541(a)(1)'s scope is broad. Most important,…§ 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the…Code."); *In re Brown*, 734 F.2d 119, 123 (2d Cir. 1984) ("The phrase 'all legal or equitable interests of the debtor in property' [used in § 541(a)(1)] has been given the broadest possible interpretation."); *In re National Safe Center, Inc.*, 41 B.R. 195, 196 (Bankr. D. Hi. 1984) (Debtor's estate includes property in the custody of Customs Service even though such property has not entered into the "stream of commerce" and technically is not in the United States.); *In re Filipek*, 35 B.R. 339, 341 (Bankr. D. Hi. 1983) (Non-disclosure of foreign assets constitutes a failure to comply with the terms of § 541(a)).

134. 28 U.S.C. § 1334(e).

135. *Hong Kong and Shanghai Banking Corp., Ltd. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th Cir. 1998) ("Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate."); *Diaz-Barba v. Kismet Acquisition, LLC*, 2010 WL 2079738, at *8, 10 (S.D. Cal. 20 May 2010) ("[w]ith some exceptions the bankruptcy court's authority under Section 550(a) to recover property is coextensive with its authority to avoid fraudulent transfers"; "The provisions of the Bankruptcy Code, as they relate to property in the bankruptcy estate, apply extraterritorially.").

136. *See generally* H.R. Rep. No. 595 (1977) at 88 (distinguishing bankruptcy from other areas of the law because of the public interest in the proper administration of bankruptcy cases and the fact that bankruptcy cases may affect hundreds of scattered and ill-represented creditors).

137. H.R. Rep. 109-31 (2005) at 107.

138. See *The Report of the Commission on the Bankruptcy Laws of the United States*, Section 4-609, Note 1 (1973).

139. Indeed, "[b]ankruptcy courts have consistently held that 11 U.S.C. § 550 is designed to restore the estate to the financial condition that would have existed had the transfer never occurred." *Bakst v. Wetzel (In re Wetzel)*, 518 F.3d 874, 877 (11th Cir. 2008).

140. Bajons in Fasching, 1 Kommentar zu den Zivilprozessgesetzen [Commentary to Civil Procedure Codes] (2d ed.), § 38 *Jurisdiktionsnom* [Jurisdiction Code] margin note 29 *et seq.* Except in the case of direct collection of evidence by a foreign court in Austria where—beyond European Union rules—reciprocity is still mandated.

141. European Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

142. Sections 240 to 242 of the Austrian Insolvency Law read in English translation as follows:

> *Basic Principle*
>
> Section 240 (1) The effects of insolvency proceedings commenced in another state and judgments handed down in such proceedings shall be recognized in Austria, if 1. the center of main interests of the debtor is situated in another state and 2. the main characteristics of the insolvency proceedings are comparable to Austrian proceedings, especially with regard to Austrian creditors being treated equal to creditors from the state of the commenced proceedings.
>
> (2) There shall be no recognition, inasmuch as 1. bankruptcy or composition proceedings were commenced or interim precautions were ordered in Austria or 2. the recognition would lead to a result apparently conflicting with Austrian public policy.
>
> (3) Commencement of a foreign insolvency proceeding does not preclude commencing and conducting Austrian bankruptcy or composition proceedings.
>
> (4) Granting execution on the grounds of files and documents, which 1. are necessary to conduct the insolvency proceedings, 2. enforceable in another state and 3. should be recognized in Austria pursuant to paragraphs 1 and 2 demands, that they were declared enforceable in Austria in proceedings pursuant to sections 82 through 86 Enforcement Code. For other files and documents the granting of enforcement is governed in accordance with the provision pursuant to section 79 et seq Enforcement Code.
>
> *Foreign Insolvency Administrators*
>
> Section 241 (1) The insolvency administrators and their representatives may exercise all the powers conferred on them by the state of commencement of proceedings in Austria.
>
> (2) In exercising their powers they shall comply with the Austrian law in particular with regard to the procedures for realizing assets and informing employees. The powers do not include coercive measures or the right to decide in legal proceedings or disputes.
>
> (3) The insolvency administrator shall give evidence of his appointment by a certified copy of the decision appointing him or by any other certificate issued by the authority or court with jurisdiction in the state of appointment, whereas a translation into German may be demanded.
>
> *Announcements and Entries in the Register*
>
> Section 242 (1) Sections 218 and 219 shall be applied to foreign insolvency proceedings accordingly, if their effects have to be recognized according to section 240. The insolvency administrator demanding the announcement or the entry in the register has to prove the existence of the conditions for the recognition according to section 240 (1) item 1 by public instrument. If the debtor claims that the conditions for such recognition are not met, the competent court according to paragraph 63 shall decide on that matter.
>
> (2) Upon request by the foreign insolvency administrator, the Commercial Court Vienna shall announce publicly the continuation of the enterprise.

143. *See* Konecny/Schubert, Konkursordnung [Insolvency Code] § 240 Margin Notes 10, 9 with reference to U.S. Chapter 11 proceedings (*Sanierungsverfahren*, which are recognizable in Austria). In the case at hand, Chapter 7 is applicable.

144. *See* Kodek, *Die Beklagte mit der tiefen Tasche CAUSA BAWAG*, Die Presse 21 January 2006; Kodek*, Die BAWAG und das amerikanische Konkursrecht*, Zak 2006/317.

145. Statute of the Hague Conference on Private International Law as adopted on 31 October 1951 (entered into force on 15 July 1955), as amended 30 June 2005 (entered into force on 1 January 2007). Founding Parties are: Federal Republic of Germany, Austria, Belgium, Denmark, Spain, Finland, France, Italy, Japan, Luxembourg, Norway, the Netherlands, Portugal, the United Kingdom of Great Britain and Northern Ireland, Sweden and Switzerland. As of 30 June 2005, in addition to the founding Member States mentioned in the Preamble, the following States had accepted the Statute: Albania, Argentina, Australia, Belarus, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, People's Republic of China, Croatia, Cyprus, Czech Republic, Egypt, Estonia, Georgia, Greece, Hungary, Iceland, Ireland, Israel, Jordan, Republic of Korea, Latvia, Lithuania, Malaysia, Malta, Mexico, Monaco, Morocco, New Zealand, Panama, Paraguay, Peru, Poland, Romania, Russian Federation, Serbia and Montenegro, Slovak Republic, Slovenia, South Africa, Sri Lanka, Suriname, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United States of America, Uruguay, Venezuela.

146. Hague Convention of 1 March 1954 on Civil Procedure. Signatories:Albania, Argentina, Austria, Belarus, Belgium, Bosnia and Herzegovina, China, People's Republic of, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, Iceland, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine. In addition the following are non-member states of the Organization: Armenia, Holy See, Kyrgyzstan, Lebanon, Moldova, Republic of, Uzbekistan.

147. Hague Convention of 15 November 1965 on the Service abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Signatories: Albania, Argentina, Australia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, China, People's Republic of, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Korea, Republic of, Latvia, Lithuania, Luxembourg, Malta, Mexico, Monaco, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela. In addition the following are non-member states of the Organization: Antigua and Barbuda, Bahamas, Barbados, Belize, Botswana, Kuwait, Malawi, Pakistan, Saint Vincent and the Grenadines, San Marino, Seychelles.

148. Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters: Signatories: Albania, Argentina, Australia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, China, People's Republic of, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Israel, Italy, Korea, Republic of, Latvia,

Lithuania, Luxembourg, Malta, Mexico, Monaco, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela. In addition the following are non-member states of the Organization: Barbados, Kuwait, Liechtenstein, Seychelles, Singapore.

149. Council Regulation (EC) 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

150. Article 31.

151. Article 32 *et seq.*

152. Convention of 10 June 2009 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Contracting Parties are European Community, Denmark, Iceland, Norway, Switzerland.

153. Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents) and repealing Council Regulation (EC) 1348/2000.

154. Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

155. § 38 (1) Courts within the jurisdiction of this act must provide legal assistance to foreign courts upon request, as long as specific directives in this respect (treaties, government declarations, ministerial orders) do not establish anything else. (2) Judicial assistance must be denied: 1. if, according to the relevant domestic provisions, the requested act is not part of the area of operations of Austrian courts; in case that the requested act is in the area of operations of another domestic authority, the requested court can forward the letter rogatory to the respective competent authority; 2. if an act is requested that is illegal according to the laws that are binding for the domestic court. 3. [Rescinded by Art. II Z 10 BGBl. Nr. 135/1983.]

    § 39 (1) The requested judicial assistance is to be granted according to the laws that are binding for the requested court. As far as it is permissible under these laws, the requested court has to make all arrangements and dispositions ex officio in order to comply with the request. (2) When granting legal assistance, it is only admissible to differ from the provisions in the domestic legal system, if the observation of a specific procedure as required by foreign law was expressly requested, and if this procedure does not seem to be forbidden by any provision in the domestic legal system. (3) Concerning the participation of the requesting court in the taking of evidence, Article 12 of Council Regulation (EC) No 1206/2001 shall be applied accordingly, even if the requesting court is not from a Member state to this Regulation.

    § 39a [Rules regarding direct collection of evidence by foreign courts in case of reciprocity.]

    § 40 If the granting of judicial assistance is refused by the requested court, or in case that controversies arise with regard to the execution or any other aspect of the letter rogatory between the requesting and the requested court, the respective Higher Regional Court superior to the requested court shall decide—upon demand from the requesting foreign court or any other competent foreign authority—on the legitimacy of the refusal or any other aspect of the controversy without anterior oral proceedings.

156. Federal Law Gazette BGBl I 2004/10.

157. Sections 87 *et seq.*; Section 121 ACCP.

158. Sections 266 *et seq.* ACCP.

159. Decree concerning International Judicial Assistance and other Legal Relations to Foreign Countries in Civil Matters contains rules regarding request for the service of documents from the U.S. (See in particular p. 29 *et seq.*: Section 23 paragraph 3, 6 and 7). Austrian Ministry of Justice Decree of 25 June 2003 reforming the service of documents to the USA in civil matters. (Applies only to service into U.S. territory.) The Austrian Ministry of Justice issued the Regulation on the service of documents to persons abroad via postal services in legal proceedings concerning civil matters which governs the service of documents by certified mail according to the rules of the World Postal Services (*Weltpostverkehr*) into, inter alia, U.S. territory.

160. Austrian Federal Law Gazette BGBl III 107/1998.

161. Austrian Federal Law Gazette BGBl III 7/2010.

162. Austrian Federal Law Gazette BGBl III 216/1999.

163. Austrian Federal Law Gazette BGBl III 5/2010.

164. Austrian Federal Law Gazette BGBl III 28/2011.

165. OJ 2000/C197/1 and Protocol, OJ 2001/C326.

166. *See* http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/index_en.htm.

167. See, for example, the following provisions of the Austrian Penal Procedure Code (APPC):

    > § 20 (3) APPC The public prosecutor office is also competent for the execution of requested judicial assistance from both domestic and foreign judicial authorities, as long as other provisions do not determine otherwise.
    >
    > § 76 (3) APPC In the communication with foreign authorities, international treaties, the Federal Act on the Extradition and Mutual Administrative Assistance, the Federal Act on the judicial cooperation in criminal matters with Member States from the European Union and the Act on Police Cooperation have to be applied.

168. Lord Hoffman, *HIH Insurance*, [2008] 1 WLR 852.

169. Lord Ward, *Rubin v. Eurofinance*, [2010] EWCA Civ 895.

170. Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles and the EU Insolvency Regulation*, 76 Am. Bankr. L.J. at 1.

171. *Id.*

172. Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 Brook. J. Int'l L. 499 (1991). Note that this article was written in 1991, so prior to UNCITRAL model law and the E.U. insolvency regulation).

173. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 Am. Bankr. L.J. 457 (1991).

174. [2010] EWCA Civ 895.

175. Briggs, *Recognition: Foreign Judgments or Insolvency Proceedings?* [2010] LMCLQ 523.

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Offshore Asset Recovery: Investigations and Legal Proceedings

By Timothy S. Pfeifer, Denise D. Vasel, and Ralph A. Siciliano

I. Overview

Investigating and administering a massive and complicated bankruptcy, such as that of Bernard L. Madoff Investment Securities LLC ("BLMIS"), is a massive and complicated task. Although Mr. Madoff's Ponzi scheme is correctly understood to be a classic affinity scheme, this is only part of the story. BLMIS was also a global Ponzi scheme of truly breathtaking scope and scale that involved closely interlinked financial products and many of the world's largest financial institutions in scores of foreign jurisdictions. Billions of dollars from, among many other places, Europe, the Middle East, South America, and Asia flowed both in and out of BLMIS's JPMorgan Chase account in New York over the decades. Tracing the assets of the BLMIS estate that have left New York is, to say the least, a difficult process.

Foreign judicial systems, of course, may operate differently than that of the United States, and may have a very different concept of the power and standing of a bankruptcy trustee or of bankruptcy itself, as set forth in the previous article.[1] A bankruptcy trustee, however, as a creature of statute, will often receive more deference than a creditor, liquidator, or receiver from a foreign court. Indeed, most non-U.S. jurisdictions have a judicial or statutory process by which they will recognize a U.S.-based trustee.[2]

Administering a modern, global bankruptcy requires precise and anticipatory legal and strategic analysis to ensure: (i) maximum recovery for the domestic estate; and (ii) compliance with multifarious international rules and customs. The ability to successfully gather information from, and "freeze" assets in, non-U.S. jurisdictions can materially affect a trustee's ability to achieve maximum recovery in a modern, global bankruptcy, whether predicated on fraud or otherwise. Many non-U.S. jurisdictions offer pre-judgment mechanisms that can assist a bankruptcy trustee, both in tracing the estate's assets and in "freezing" those assets. Many of these extraordinary remedies are not available under New York or U.S. law. Hence, despite the inherent difficulties facing a trustee operating abroad, the rewards to the estate can be significant. This article sets forth certain of those mechanisms and, when appropriate, examples of their use.

II. Conducting a Thorough, Effective, and Legal International Investigation

A. Threshold Issue Spotting and Legal Research

When it appears that certain property of the estate has been physically transferred out of the United States, certain legal questions must be thoroughly analyzed prior to any effort to identify and locate such assets. It is imperative to understand the interplay among the laws of all competing jurisdictions. Based on documents or other information in a trustee's possession, the first step is to identify all the jurisdictions where relevant individuals, entities, and, ultimately, assets may be located.

Then, if applicable, it is critical to identify and understand any cross-border insolvency rules that may be germane to the bankruptcy proceedings. These structures can simplify the task and promote a salutary international comity that will ease a trustee's efforts abroad. As set forth fully in the previous article,[3] Chapter 15 of the U.S. Bankruptcy Code incorporates the Model Law on Cross Border Insolvency of the U.N. Commission on International Trade Law ("UNCITRAL"). The Model Law serves to aid cooperation, legal certainty, and fair and efficient administration of cross-border insolvencies among U.S. courts, trustees, and debtors, and foreign courts and authorities.[4] The general trend toward principles of "universality" in bankruptcy favors recognition of a single proceeding, even for default orders.[5]

B. Competing Foreign Bankruptcies

A common complication is when foreign parties, such as investors or even potential targets of adversary proceedings in the United States (or other ancillary litigation), have also filed for bankruptcy in their home jurisdictions. This can affect strategic decisions by the U.S. trustee, such as whether to cooperate formally or to share information through informal channels. In these situations, one must consider not only the rules and regulations affecting the central bankruptcy proceeding, but also those of a foreign bankruptcy trustee or liquidator asserting their own cross-border insolvency claims against the same parties (and in some cases, making claims to the same assets).

As a general rule, there can be only one main proceeding in relation to an insolvent party. This is known as the "Highlander Principle." Competing claims may receive comity, but will be considered ancillary to the main proceeding.[6] Comity allows a country to recognize the legislative, executive, or judicial act of another country, with due consideration to its international duty, convenience to the parties, and the protection of the rights of its own citizens.[7] The purpose of the principle is to extend respect to the authority of the courts of one nation to legislate and control the issues which concern its own citizens.[8] U.S. bankruptcy law, in fact, provides that "a court in the United States shall grant comity or cooperation to the foreign representative."[9] The automatic stay provision of the

U.S. Bankruptcy Code Section 362 applies to protect the assets of a U.S. debtor from a competing foreign action.[10] This allows a trustee to protect assets located abroad from foreign liquidators "jumping the line."

C. Avoiding Local Investigatory Pitfalls

Truly understanding the local laws of the foreign jurisdictions in which a U.S.-based trustee is investigating is central. Each jurisdiction may have unique restrictions placed on informal evidence collection and formal discovery undertaken within their borders. Violation of these restrictions may result in civil or even criminal penalties, from which a trustee or his agents are not immune.[11] These include discovery restrictions, data privacy laws, human rights legislation, and the local application of international law.

For example, France, Switzerland, and Luxembourg have each enacted so-called "Blocking Statutes," which prohibit the informal collection of any documents obtained with a view toward use as evidence in litigation in the United States or elsewhere.[12] The stated animating purpose of such "Blocking Statutes" is to promote the use of international judicial assistance established through international treaties and agreements, such as The Hague Convention, rather than permitting the collection of evidence by individual parties without local judicial oversight.[13] In practice, however, they are often used to thwart the efforts of a U.S. bankruptcy trustee or private litigants in favor of local citizens.[14] Hence, "Blocking Statutes" operate to limit the evidence a U.S.-based trustee can acquire. These "Blocking Statutes," however, are often given little weight in U.S. courts.[15] This can create the quandary of requiring a foreign party to produce documents under a U.S. order, compliance with which may occasion criminal or civil penalties in the party's home jurisdiction.[16] This and similar tensions between competing interests and legal regimes can create friction within an investigation, and hinder the trustee's ability to work cooperatively with foreign parties.[17]

D. Fact-Based Investigation and Evidentiary Issues

Understanding and complying with the relevant law in foreign jurisdictions is the first and most meaningful step in administering a global bankruptcy. The actual investigation requires more of a "boots-on-the-ground" approach. When operating abroad, it is imperative to retain local counsel and/or investigators familiar with local law and custom and able to appear in local courts on the U.S. trustee's behalf. This may appear to be an unneeded expense. In both the short and long term, however, it is much cheaper to pay knowledgeable local counsel and investigators their local rate, rather than incur the unnecessary expense of a damaging legal mishap in jurisdictions in which the trustee's counsel are not qualified to practice. Moreover, in many circumstances only local investigators can access the needed records and witnesses.

E. Who Knows What?

To recover all available assets of the estate, a trustee must identify all parties with knowledge of the relevant facts. In a U.S. bankruptcy proceeding, this is typically done via the Rule 2004 discovery process. Such subpoenas are enforceable abroad against U.S. nationals,[18] as well as foreign entities or individuals otherwise servable in the U.S.[19] The process of serving and enforcing them, however, can be onerous. Hence, parallel alternative means of gathering information are critical. These may include: (i) conducting interviews (either personally or via investigators); and (ii) searching publicly available documents, records, and government databases. This effort is undertaken, of course, to identify the estate's assets, those who may know of their whereabouts, and those who may be liable to the estate for damages or otherwise. Locating the assets may be difficult, and require forensic computer analysis, forensic accounting analysis, location of commercial financing statements, and acquisition of judgments, liens and other public or quasi-public records. Certain foreign jurisdictions do not have Internet-based databases, and public records may only be obtained in person. Local counsel and investigators may also be aware of certain relationships that can make the information flow more smoothly.

F. Barriers to Information

Once potential evidence and witnesses are identified, certain challenges must be overcome to obtain testimony and documents.

Most foreign jurisdictions, for example, do not conduct or allow discovery in the same expansive manner as in the U.S. and may be hostile to any attempts to do so. There may be limited or no document discovery available abroad, and data privacy and human rights laws may prohibit one from obtaining even specifically identified documents. Even if a particular document may be examined abroad, local privilege rules may prevent the document's removal from a foreign jurisdiction for any purpose, much less for use in a U.S. lawsuit.[20]

Certain jurisdictions, such as Switzerland, the U.K., Luxembourg, and the Cayman Islands, top the Financial Secrecy Index's list as the most "opaque jurisdictions" in the world. As such, they provide the least transparency of the corporate and financial dealings conducted and assets held within their borders.[21] Such opacity is not unique, however, to foreign jurisdictions. The United States, led by Pennsylvania and Delaware, ranks fifth on the list.[22]

G. Practical Considerations

Investigations and evidence collection abroad frequently involve face-to-face meetings with potential adversaries and other interested parties. The venue for such a meeting is an important consideration. For example, meeting a potential adversary on his or her home turf may be less preferable than a more neutral location. One

should also always be aware of attracting the attention of local press and other interested parties (it's a small world after all). A location with more favorable information-sharing regimes may also be preferable. In some jurisdictions, it may be illegal for citizens to provide any information that can be used in a U.S. lawsuit.[23] Entering an agreement to return or destroy evidence at the close of the investigation or litigation may allay certain concerns that the information will become public or used in a manner that will potentially expose the individual (or others) to civil or even criminal liability. Of course, any settlement meetings that occur in connection with U.S. litigation, even if they take place abroad, are still protected under Federal Rule of Evidence Section 408, and may not be admissible as evidence in a U.S. trial.[24]

Once any evidence is obtained, steps must be taken to preserve it. This requires maintaining the integrity of the evidence through chain of custody, and thorough cataloging and tracking of productions. Preservation and monitoring may require the use of a third-party vendor, such as an online document discovery company or a storage facility.

III. Prosecution and Recovery: Choice of Venue

Of course, a New York remedy is a New York trustee's first option. But in many circumstances, it may make the most sense to seek pre-judgment attachment of the estate's assets located outside the United States. Mechanisms for such attachment in New York and abroad are set forth fully herein. Other options include pursuing a substantive claim, or, in the appropriate circumstances, participating in a foreign criminal proceeding that relates to local acts that harmed the estate. Both of these options require careful jurisdictional and forum considerations. As a general rule, the appropriate forum for prosecution of a claim is as an adversary proceeding within the U.S. bankruptcy itself, where the law applicable to the recovery of the action is in effect.[25] Certain jurisdictions make allowances for a trustee representing an estate that has suffered an injury as a result of potentially criminal activity in the local jurisdiction.[26] The trustee may then access certain of the local prosecutor's files, make submissions to the court, and potentially seek repatriation of the estate's assets.[27] When operating in a foreign jurisdiction, one must always be aware that once a court recognizes a party's ability to make a claim, that party may be subject to the jurisdiction of the local court. This may expose the trustee to counterclaims or other foreign legal actions.[28]

Commencing a foreign proceeding may be the most effective means of exercising jurisdiction over certain defendants or assets that may not otherwise be present in the United States.[29] Such a step requires careful consideration of: (i) how the local court may apply domestic law to the proceedings; (ii) the local court's discretion to evaluate the fairness of home country procedures; and (iii) whether the local court will justly consider protection of the U.S. debtor's assets versus protection of local creditors' interests.

IV. Pre-Judgment Relief Available in Certain Jurisdictions

A. New York

Generally, the remedies available under New York law to a private litigant (including a bankruptcy trustee) to secure the recovery of assets prior to judgment are limited. As set forth below, the remedies that are available are construed narrowly and, absent a strong showing by the plaintiff, courts are reluctant to restrain the transfer of a defendant's assets prior to judgment. Under Rule 64(a) of the Federal Rules of Civil Procedure ("FRCP"), the available New York remedies discussed below would be available in actions filed in federal courts located in the state of New York, with one exception noted below.[30]

1. Pre-Judgment Attachment of Property

a. Grounds of Attachment

The most widely recognized remedy to secure assets of a defendant prior to judgment is the pre-judgment attachment available under Article 62 of the New York Civil Practice Law and Rules ("CPLR"). The attachment remedy is most useful when suing an individual defendant who does not reside in the state or a foreign corporation which is not qualified to do business in the state. For the purposes of this discussion, it is assumed that the court that issues the order of attachment has personal jurisdiction over the defendant. If there is no basis for personal jurisdiction, there are only very limited circumstances in which an order of attachment may itself create the basis for "in rem" jurisdiction over the assets that are attached. Such "in rem" jurisdiction will be discussed in a separate section below. The discussion of the attachment remedy here will be limited to its use as a means to secure recovery of a judgment in an action in which the court has personal jurisdiction over the defendant.

The grounds for obtaining an order of attachment against the defendant's assets prior to obtaining a judgment are set forth in Section 6201 of the CPLR, which states as follows:

> An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants when:
>
> 1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or

4. the action is brought by the victim or the representative of the victim of a crime, as defined in subdivision six of section six hundred twenty-one of the executive law, against the person or the legal representative or assignee of the person convicted of committing such crime and seeks to recover damages sustained as a result of such crime under section six hundred thirty-two-a of the executive law; or

5. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53.

As the language of this section indicates, the grounds for attaching assets prior to judgment are fairly narrow and specific. Moreover, the courts have construed the grounds narrowly. For example, the third ground requires the plaintiff to show that "fraudulent intent really existed in the defendant's mind."[31] But "[a]llegations raising a suspicion of an intent to defraud" and "mere removal or assignment or other disposition of property" are not grounds for attachment.[32]

Also, note that the introductory paragraph of Section 6201 states that the attachment remedy is only available where the plaintiff is seeking a money judgment.

b. Procedure for Seeking Order of Attachment

CPLR Section 6211(a) provides that "[a]n order of attachment may be granted without notice, before or after service of summons and at any time prior to Judgment…." The order must "specify the amount to be secured" and "be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served." CPLR Section 6211(b) states that, where an order of attachment is obtained without notice to the defendant, the plaintiff is required to move for confirmation of the order within a specified period of time after levy. (See the discussion below regarding the levy on property of the defendant under an order of attachment.)

Section 6212(b) of the CPLR requires that the court granting an order of attachment direct the plaintiff to provide an undertaking of no less than five hundred dollars to secure the plaintiff's obligation to pay the defendant's costs and damages, including attorney's fees if the defendant obtains a judgment or it is determined that the plaintiff was not entitled to the attachment. Under Section 6212(e) of the CPLR, the plaintiff's liability for such costs and damages is not limited to the amount of the undertaking.

In connection with an order of attachment, the court is empowered under Section 6210 of the CPLR to issue a temporary restraining order prohibiting a garnishee of any property which is the subject of the order of attachment from transferring such property. Section 6220 of the CPLR states that at any time after an order of attachment is issued, a court also may order discovery concerning any property in which the defendant may have an interest.

c. Assets Subject to Attachment

Section 6202 of the CPLR describes the kinds of assets that are subject to an attachment and states that "any debt or property against which a money judgment may be enforced as provided in Section 5201 [of the CPLR] is subject to attachment." Section 6202 also states that the plaintiff must look to Section 5201 to determine the proper garnishee of the assets to be attached.

The kinds of assets described in Section 5201 that are subject to attachment include "any debt, which is past due or which is yet to become due, certainly or upon demand of the [defendant], whether it was incurred within or without the state, to or from a resident or non-resident…[and] may consist of a cause of action which could be assigned or transferred accruing within or without the state."[33] Attachable assets also include "property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested…."[34] Thus, both real and personal property of the defendant is subject to attachment. CPLR Section 5201 excludes from attachment certain categories of personal and real property which are described in Sections 5205 and 5206.

d. Proper Garnishee of Attachable Property

Section 5201(c) of the CPLR describes the "proper garnishee" for particular kinds of properties. These provisions are important with respect to certain intangible assets because a plaintiff needs to direct the sheriff to the correct person or entity upon which to serve the order of attachment, in order to assure that the property is prop-

erly attached and to create a priority lien in favor of the plaintiff in such property.

Section 5201(c)(1) states that, where the property interest consists of a right or share in stock of a corporation, the corporation itself is the proper garnishee; Section 5201(c)(2) provides that "[w]here property consists of a right or interest to or in a decedent's estate or any other property or fund held by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee"; Section 5201(c)(3) states that "[w]here property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the proper garnishee"; and Section 5201(c)(4) specifies the appropriate garnishee of negotiable instruments, including shares of stock evidenced by certificates.

e. Creating a Lien in Attached Assets in Favor of Plaintiff

Article 62 of the CPLR describes the steps that must be taken to create a lien in favor of the plaintiff in the defendant's property that is the subject of an order of attachment. Such a lien is necessary in order to prevent other parties from obtaining an interest in, or ownership of, the property prior to judgment. Under Section 6203 of the CPLR, such a lien is placed on the defendant's personal property by delivering the order of attachment to a sheriff of the county (or the city, in the case of New York City) in which the personal property is located or where the garnishee of such property may be served. Such a lien renders the plaintiff's interest in such property superior to the rights of any transferee of the property, except:

- a transferee who acquired the debt or property before it was levied upon for fair consideration or without knowledge of the order of attachment; or
- a transferee who acquired the debt or property for fair consideration after it was levied upon without knowledge of the levy while it was not in the possession of the sheriff.

A sheriff levies on personal property by serving "the order of attachment upon the garnishee, or upon the defendant if property to be levied upon is in the defendant's possession."[35] After levying upon the property, CPLR Section 6214(b) provides that the person served with the order of attachment is required to deliver the property to the sheriff, and if the garnishee fails to deliver the property to the sheriff, then under Section 6214(d) the plaintiff may commence a special proceeding to compel the garnishee to do so. If the property is not turned over to the sheriff within ninety days after levy is made, Section 6214(e) states that the levy is void. Thus, the plaintiff must act with diligence to assure that that proper and timely steps are taken to create its priority lien in personal property of the defendant.

A sheriff levies upon an interest in real property "by filing with the clerk of the county in which the property is located a notice of attachment."[36] "When a levy is made against real property, there is nothing further to be done; the filing with the county clerk does the whole job under CPLR § 6216."[37]

2. Quasi in Rem Proceedings

A plaintiff who is unable to establish that a New York court has personal jurisdiction over a defendant may nevertheless commence an action against such defendant in New York by attaching personal property (including bank accounts) or real property of the defendant through an order of attachment under Article 62 of the CPLR. However, the plaintiff's judgment will be limited to the value of the assets attached. Such actions are referred to as "quasi in rem." As noted by Professor Siegel, the United States Supreme Court "greatly restricted" the quasi in rem doctrine in the case of *Shaffer v. Heitner*,[38] on due process grounds, and, since *Shaffer*, courts have required some connection between the forum state and the defendant or the claim in order to recognize quasi in rem jurisdiction.[39] A quasi in rem action is commenced by obtaining and serving an order of attachment with respect to specific assets in the state of New York, and then serving the defendant outside of the state under CPLR Section 314(3).[40]

3. Temporary Receiver and Notice of Pendency

Two other means of securing recovery of assets in advance of a judgment are: (i) seeking the appointment of a temporary receiver over property which is the subject of the action under Article 64 of the CPLR; and (ii) filing a notice of pendency with respect to real property located in New York in which the defendant has an interest under Article 65 of the CPLR. A temporary receiver may be appointed by the court at the commencement or during the pendency of an action and may be authorized "to take and hold real and personal property until judgment in the action is rendered."[41] Under CPLR Section 6511(a), a notice of pendency is filed "in the office of the clerk of any county where property affected is situated…," and it may be filed by the plaintiff and does not require a court order. After such a notice is filed, under CPLR Section 6501, "[a] person whose conveyance or encumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party."

A factor that limits the utility of these two remedies is that they are only available in actions in which the property with respect to which the notice of pendency is issued or over which the temporary receiver is appointed is the subject of the dispute. In an action in which a notice of pendency is filed, "the judgment demanded [must] affect the title to, or the possession, use or enjoyment of, real

property, except in a summary proceeding brought to recover possession of real property."[42] Under CPLR Section 6401(b), a motion for a temporary receiver may only be made by a "person having an apparent interest in property which is the subject of an action." Consequently, these remedies are not available where the sole interest in the subject assets is to secure the payment of a money judgment.

4. Preliminary Injunction Freezing Assets Not Available in Action for Money Damages

Under New York law, courts are not permitted to enjoin a defendant from transferring assets prior to judgment where the relief demanded is a money judgment. In *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*,[43] the New York Court of Appeals stated that "our courts have consistently refused to grant general creditors a preliminary injunction to restrain a debtor's asset transfers that allegedly would defeat satisfaction of any anticipated judgment." In that case, the court noted that a court's authority to issue a preliminary injunction is based on Section 6301 of the CPLR, which authorizes a court to issue such an injunction where the threatened harm concerns "the plaintiff's rights *respecting the subject of the action*."[44] The Court of Appeals held that this condition of Section 6301 is not satisfied in an action where the plaintiff seeks monetary damages.[45]

Similarly, the United States Supreme Court has held that an unsecured creditor seeking money damages in an action filed in federal court is not entitled to a preliminary injunction under Rule 65 of the FRCP to prevent the debtor from transferring its assets.[46]

B. England and Wales

English law allows for claimants to secure both assets and information prior to a judgment in ways New York does not.

Generally, these mechanisms include: (i) pre-action compulsion to produce evidence; (ii) asset freezing orders (referred to in British parlance as "freezers"); and (iii) private search and seizure warrants, known for the cases in which they started as Norwich Pharmacal, Mareva, and Anton Piller orders respectively. Norwich Pharmacal relief primarily allows claimants to compel disclosure and the production of information which they otherwise may not be able to obtain. Freezers allow claimants to secure—*i.e.*, to freeze in place—the possible proceeds of a judgment, or other property that they may have a valid claim to. Search and seizure orders authorize claimants to enter and search defendant's premises, and are used primarily to obtain physical evidence.

1. Norwich Pharmacal Relief

Norwich Pharmacal relief (so called because it was first utilized in *Norwich Pharmacal Co. & Others v. Customs and Excise Commissioners*[47]) is a mechanism for claimants to seek relief from parties who may be involved in a wrongdoing, but will not necessarily be a party to the case. This relief may be sought against a party whose involvement was innocent (so long as that party is not just a mere witness) but has actual information. The most common use of Norwich Pharmacal relief is to allow the claimant to identify the proper defendant, although it is also common to seek Norwich Pharmacal relief from banks to obtain statements and records in fraud cases.[48] Other uses include: (i) enabling the claimant to trace assets; (ii) obtaining the source of information used in a publications; and (iii) securing other information to enable the claimant to properly plead his case. For these reasons, Norwich Pharmacal relief is often sought *ex parte*, and in conjunction with a gagging order.

To successfully obtain Norwich Pharmacal relief, a claimant must show: (i) that a wrong has been committed; (ii) no other relevant Civil Procedure Rules apply to the situation; (iii) the party against whom the relief is sought is likely to have the relevant documents; (iv) the third party (whether innocent or not) is involved in the wrongdoing and is not just an innocent witness; and (v) the order is necessary in the interest of justice (*i.e.*, to enable the action to be brought against the proper parties).[49] Norwich Pharmacal relief may be used in both criminal and civil proceedings.

2. Freezing Injunctions

English law provides for two types of freezing injunctions: (i) the personal injunction (also known as a Mareva injunction); and (ii) the proprietary injunction. Either type may be brought at any point in the proceedings, and be made *ex parte*.

a. The Personal (Mareva) Injunction

A personal injunction is used to prohibit the defendant from disposing of or dealing away its assets in order to defeat the claimant's claim. The personal injunction is sometimes referred to as a Mareva injunction, as its common use started in *Mareva Compania Naviera SA v. International Bulkcarriers SA*.[50] A personal injunction may be either domestic or worldwide in scope, depending on the location of the defendant's assets.

To obtain a domestic personal injunction, the claimant must demonstrate: (i) it is just and convenient for the court to grant the freezer; (ii) there is a substantive cause of action (the injunction is a remedy, and not a cause of action);[51] (iii) the defendant has assets in the jurisdiction (England and/or Wales);[52] and (iv) there is a real risk that the defendant will dissipate the assets. The claimant can identify such things as defendant's past actions, defendant currently moving assets out of the jurisdiction, the nature, value, and location of the assets, length of time that defendant has been in business, defendant's financial standing and credit history, evidence of defendant's dishonesty, and defendant's skill in moving or hiding assets.

The court may also take into consideration any delay on the part of the claimant in bringing the action.[53]

If a defendant does not have sufficient assets in England or Wales, then the claimant can seek a worldwide personal injunction.[54] The claimant must meet the same elements as above, but instead of demonstrating that the defendant has assets in the jurisdiction, the claimant must show that the defendant's assets in the jurisdiction are insufficient. This type of relief may be obtained against defendants who are not present in England or Wales. As a general rule, the claimant undertakes not to enforce the order in a foreign jurisdiction without the court's permission, or to seek an order of a similar nature from a foreign court.[55] When determining whether to grant a worldwide freezer, the court looks to: (i) the balance of the claimant's interest against other parties to the English proceeding; and (ii) whether the order would enable to the claimant to obtain relief in foreign proceedings that is superior to the relief given by the worldwide freezer. An English court may grant a freezer in support of a foreign action, but to be successful, a claimant must also demonstrate expediency.[56]

The application for a freezer may be made *ex parte*, but when a claimant proceeds that way, the court requires a "full and frank" disclosure of all material facts and matters that may influence the court. This requires the claimant to disclose any facts that may be disputed, and any arguments that may be advanced by the opposing party.

b. The Proprietary Injunction

A proprietary injunction is very similar to the personal injunction. Instead of making the claim to protect a potential judgment, the claimant is asserting that the defendant is holding property that rightfully belongs to the claimant. As such, the claimant need not establish a risk of dissipation to be successful.[57] The court will grant the order over the specific assets (or traceable proceeds) to which the claim relates. A proprietary order may also be domestic or worldwide.

3. The Search and Seizure Order

Also known as an Anton Piller order, from the case of *Anton Piller KG v. Manufacturing Processes Limited*,[58] the search and seizure order is principally used to obtain and preserve evidence. A search and seizure order requires the defendant to give claimant's solicitors access to its premises to search for and seize specified evidence. The search and seizure order is only available in limited circumstances.

To succeed on a search and seizure order, the claimant must show: (i) an extremely strong prima facie case; (ii) evidence of potential or actual serious damage; (iii) clear evidence that the defendant has in its possession incriminating documents or materials, and that there is a real possibility that defendant will destroy such materials before any application *inter partes* can be made; and (iv) the harm to the defendant will not be excessive.[59]

A search and seizure application is made without disclosure to the defendant. As such, the court requires the same kind of "full and frank" disclosure that it would for an *ex parte* freezer. The claimant must also make a cross-undertaking in damages at the time of its application. The search and seizure itself must be supervised by an independent solicitor whose duties run to the court that ordered the search and seizure. The defendant has the right to assert its privilege against self-incrimination during the procedure.[60]

C. Cayman Islands

1. Freezing Orders

Freezing or Mareva orders are available in the Cayman Islands on the same basis as applies in most other jurisdictions, as discussed in Part IV.B above. The ancillary relief available under a freezing order can also be invaluable in identifying ownership of assets, given that public information of that kind is extremely limited and constrained by intentionally restrictive confidentiality laws. (Cayman policy appears to favor the assets of people who need to hide assets from creditors, including theft victims.)

The routine practice in the Cayman Islands has generally been to obtain a local freezing order in support of a worldwide freezing order obtained elsewhere. The Grand Court will also make orders under the so-called *Chabra* jurisdiction, to freeze assets believed to be indirectly owned by the defendant.[61]

There has, however, been some controversy over whether a cause of action in the Cayman Islands is required for such on order to be obtained, or whether the need to secure enforcement of a potential future judgment of a foreign court is sufficient. At present, it seems that the Grand Court will not make a freezing order unless there is a cause of action in the Cayman Islands. This has been recognized to be unsatisfactory and the judiciary has recommended that the legislation be amended accordingly.

2. Letters of Request

The request must be specific and relate to identifiable sources. Roving inquiries or fishing expeditions will not be entertained, and the respondent cannot be ordered to give general discovery. In the case of a request that is too broadly worded, the court will attempt to sever the offending sections, if that is possible without changing the nature of the request.

3. Other Information Orders—Norwich Pharmacal and Banker's Trust

Norwich Pharmacal relief (disclosure necessary to obtain particulars of a cause of action) is available in the Cayman Islands to a similar extent as in England. In

addition, Cayman courts recognize a broader form of Norwich Pharmacal relief—so-called "Bankers Trust" relief (from the seminal decision of the English Court of Appeals in *Bankers Trust Co. v. Shapira*[62]), that can be used to trace, recover, and preserve assets to which a creditor has a proprietary claim.

Banker's Trust relief can be obtained by demonstrating a strong *prima facie* case of fraud or breach of trust, and that the target of the relief facilitated the wrongdoing in some way. Application is made without notice, and is generally sought against parties who owe a fiduciary duty to the alleged fraudster.

D. British Virgin Islands

1. Norwich Pharmacal and Banker's Trust Orders

Norwich Pharmacal and Banker's Trust orders have both been recognized by the BVI courts.[63] Bankers and registered agents of BVI companies tend to be the targets of such relief, and a recent BVI case confirmed that such entities may be deemed to have "facilitated" the wrongdoing simply through the act of incorporating the company.[64] BVI courts will also require a showing that: (i) the party possessing the information has innocently become involved in the infringement of the applicant's rights; (ii) the third party has relevant information; (iii) the applicant has a *prima facie* case against a wrongdoer whose identity could not be ascertained without the information sought; (iv) the information is not otherwise available; and (v) the applicant can and will pay for the third party's costs.[65] Often this relief is sought in conjunction with a gag order.[66]

2. Freezing Order

Freezing orders in the BVI are similar to those issued in England. They require the plaintiff to demonstrate that it has a good arguable case and that the subject matter of the claim is in danger if left in possession or control of the defendant.[67] They may also be obtained without notice to the defendant, in which case the plaintiff must make a "full and frank" disclosure to the court and demonstrate that the defendant would take action to defeat the purpose of the order if it received notice. The court may also require the plaintiff to provide a cross-undertaking. Often a freezer in the BVI is accompanied by a disclosure order, which may require a defendant to provide documentary evidence with respect to the frozen assets. In extreme cases, where the court determines that the freezer is insufficient, it may appoint a receiver, but this is rare.[68]

3. Liquidation

A creditor of an insolvent company may seek a court order to wind up a company if the company is insolvent or it is otherwise just and equitable to so wind up the company. A creditor may establish insolvency by demonstrating: (i) failure to meet a statutory demand; (ii) an unsatisfied judgment; (iii) balance sheet insolvency; or (iv) an inability to pay debts as they fall due. Liquidation is generally used when the insolvent company is the instrument of fraud.[69]

In addition to demonstrating insolvency, the creditor must have a good *prima facie* case, and have an admissible claim in liquidation. This process takes about six months and is considered a class remedy. Furthermore, the court will appoint a liquidator, who is afforded a raft of general investigatory powers.

4. Search Orders

Search orders in the BVI are similar to search orders in England. Although the legal mechanism for search orders exists in the BVI, there is no known instance of one being executed, because the targets of such orders are not generally located in the BVI. In theory, an applicant must show: (i) an extremely strong *prima facie* case; (ii) serious (potential or actual) damages; (iii) clear evidence that defendants have in their possession incriminating documents or things; and (iv) the real possibility that evidence will be destroyed.

E. Austria

The Austrian Code of Enforcement (*Exekutionsordnung*) allows a party, both before and during an action, to obtain a preliminary injunction to preserve a defendant's assets.[70] The law delineates among three types of preliminary injunctions: (i) preliminary injunctions for the protection of money claims; (ii) preliminary injunctions for the protection of other claims; and (iii) special preliminary injunctions for the protection of other rights. A preliminary injunction to secure monetary claims can be obtained by showing "subjective endangerment," that is, a probability that the defendant will take steps to hinder the enforcement of a court order by, for example, moving assets abroad.[71] Preliminary injunctions to secure other claims are used to protect the future enforcement of claims for performing specific acts, by way of preserving the object in the dispute. Special preliminary injunctions for the protection of other rights involve foreseeable violence or an imminent irreparable damage, and can be used to regulate a host of *ad interim* disputes relating to property or other rights.

Where the wrongdoer has also committed a criminal defense, the public prosecutor may order the temporary securing (*Sicherstellung*) of assets for the sole purpose of securing the victim's civil claims.

F. Italy

The Italian Code of Civil Procedure permits a number of interim and precautionary measures designed to preserve assets or evidence in anticipation of legal proceedings. These measures function: (i) to anticipate, by reason of urgency and provisionally, the possible outcome of the main proceedings (interim measures); (ii) to preserve a

particular state of affairs until the main proceedings have been concluded (precautionary measures); and/or (iii) to provide an immediate remedy to existing situations of danger or where damage is being caused (interim or precautionary measures, depending on the type of measure adopted).[72] Precautionary measures range from interim seizure orders to pre-trial investigatory measures, and to other provisions related to alimony, unemployment, and unfair competition.[73]

1. Civil Precautionary Proceedings

Civil precautionary proceedings include attachments to preserve assets and evidence, summary actions to protect titles of possession, and last resort measures to preserve a right whose exercise is endangered. A plaintiff seeking one of these remedies generally must show both *fumus boni iuris* (a reasonable appearance of the right on which the measure would be based) and *periculum in mora* (the danger of imminent and irreparable damage). Requests are made to the trial judge or, if made prior to the commencement of proceedings, to a judge who would have competence on the merits in the place where the order is to be executed. Although such a request may be made prior to (or during) a trial, the order will become ineffective if legal proceedings are not commenced within sixty days. Although such a request is usually made on notice, it may also be made *ex parte*.[74]

2. Attachment Results

Among the precautionary remedies provided by Italian law, attachments are the most typical and frequently used. *Sequestro giudiziaro* (or "judicial attachment") may be used when either: (i) there is an issue with real or personal property, the title to which is controversial; or (ii) with respect to commercial books or registers, or other documents which may be used as evidence of a credit when title concerning their exhibition is controversial and it is advisable to provide for their temporary custody.[75]

Sequestro conservativo (or "conservative attachment") is used to protect debtor's property when a creditor has reason to believe that the guarantees of the credit are jeopardized. There are two kinds, depending on the manner in which the property was taken: (i) *reintegrazione* (or "reintegration") is used in instances where the victim was deprived of property by force or violence; and (ii) *manutezione* (or "maintenance") is used in instances aimed at protecting against disturbances or deprivation of possession of real estate. Both actions must be brought within one year of the deprivation or disturbance.

3. Last Resort Precautionary Measure

As a last resort, a party may request that a court take extraordinary measures to protect a right where a party has reason to believe that during the period of time necessary to assert that right in ordinary proceedings, that right would be threatened by imminent and irreparable damages.[76] The court will not grant such measure if there are other means available, but the court may grant relief either before or during proceedings.[77]

G. Switzerland

The Swiss Federal Act on Debt Collection and Bankruptcy of 1889, as amended ("DCBA"), provides for civil attachment if the party seeking the attachment produces *prima facie* evidence that a claim exists against the debtor and that the debtor's assets are within the court's jurisdiction.[78] There are four general grounds for attachment: (i) the debtor has no fixed domicile in Switzerland; (ii) the debtor, with intent of evading obligations, has removed its assets, left the country, or intends to do so; (iii) the debtor's presence is merely transient; or (iii) the creditor has obtained from the Bankruptcy Court a definitive or provisional certificate of loss against the debtor.[79] By far the most commonly relied upon ground is that the debtor is not domiciled in Switzerland. However, in 1997 this ground was narrowed by an amendment which requires, in addition, that the debt have a sufficient connection to Switzerland.[80] Courts may require the party seeking attachment to post a bond, usually ten percent of the debt amount. A civil attachment may be issued *ex parte* prior to the filing of a complaint, but in such cases the creditor has ten days to "perfect" the attachment order by initiating legal proceedings.

The Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("Lugano Convention") also permits a Swiss court to recognize foreign provisional (including protective) measures,[81] but it will only do so once the defendant has the opportunity to be heard in the issuing court. On 1 January 2011 a new ground for attachment was added to Article 271 of the DCBA, which permits a creditor to attach assets owned by the debtor if the creditor is in possession of a document allowing for the definitive setting aside of objections in debt enforcement proceedings (such as a Swiss or foreign judgment, or court-approved settlement).[82] Although the party seeking the attachment must generally make a *prima facie* showing of the document's enforceability, to obtain an attachment in relation to judgments of courts in one of the Lugano Convention member states, a creditor only need to present the document itself along with a confirmation form as provided in the Lugano Convention.[83]

V. Asset Freezing in Action: The Case of Sonja Kohn

As is well-known, the Trustee of BLMIS and the U.K. receiver for Mr. Madoff's London affiliate, Madoff Securities International Limited ("MSIL"), sued Ms. Sonja Kohn in the courts of London in regard to millions of dollars that she received directly from Mr. Madoff over the course of his Ponzi scheme.

The particulars of claim and associated documents were filed in the Commercial Court in England on 8 December 2010. After the filing of the particulars of claim, the claimants moved for a worldwide proprietary injunction on 15 March 2011. In February 2011, Ms. Kohn submitted her first witness statement. She submitted her second witness statement in June 2011, and her third in September 2011. The court held a hearing on, among other things, the freezer, on 14 to 16 September 2011.

During the hearing, Justice Flaux noted that, "[p]utting the money into trusted other members of the family, your daughter or mother, et cetera, is classic fraudster's money laundering." The judge also noted at the hearing that "if ever there was a case…which cries out for a trial and for not reaching a firm conclusion about any of this until the end of the trial, this is it."

On 25 November 2011, the court handed down its judgment, which included an issuance of both a proprietary injunction and worldwide proprietary freezer. In the judgment, the court noted that the claimant had a good arguable case, the balance of convenience favors the claimant, and that such an injunction is just. To obtain the freezer, the court held that the claimant demonstrated a risk of dissipation. The court reasoned that the freezer was necessary, since Ms. Kohn claimed in her statements that she cannot be expected to identify, after all this time, which of her assets are traceable proceeds. That Ms. Kohn's defenses seemed to claim "it would be frightfully inconvenient to tell you what I've done with your money or to be prevented from continuing to use it" did not, as the court put it, "cut much ice."

Endnotes

1. *Sheehan et al., Chapter 15 and Coordinating a Complex Global Bankruptcy Proceeding*, 25 Int'l L. Practicum ___ (2012).
2. For a list of countries that have adopted the UN Commission on International Trade Law's Model Law on Cross Border Insolvency ("UNCITRAL") model law on cross-border insolvency that allows for foreign recognition of a U.S. Trustee, see http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.
3. *See* note 1 *supra*.
4. United States Courts, *Bankruptcy Basics, Chapter 15, Ancillary and Other Cross-Border Cases, available at* http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx.
5. Vazquez, *Cross-Border Bankruptcy Developments: The Movement Towards Universality in the United States, in* Annual Survey of Bankruptcy Law 634 (Thompson West, 2005).
6. Vazquez, note 5 *supra*, 637.
7. *Hilton v. Guyot*, 159 U.S. 113 (1895). *See also In re Board of Directors of Hopewell Intern. Ins. Ltd.*, 238 B.R. 25, 66 (Bankr. S.D.N.Y. 1999), *order aff'd*, 275 B.R. 699 (S.D.N.Y. 2002) (finding comity is "much more than a discrete element or factor to be considered as part of a larger analysis; it is a pervasive principle of international law which reflects the courts of one nation ought to respect the authority of another nation to legislate over, command, and adjudicate issues concerning its own citizens").
8. Vazquez, note 5 *supra*, 634.
9. 11 U.S.C. § 1509(b)(3).
10. Klidonas, *The Automatic Stay in Chapter 15: The Global Stay Applicable Only in Chapter 11 Cases*, 29 Am. Bankr. Inst. J. 38 (November 2010).
11. *See* European Union Directive on Data Protection, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:NOT. In the past people have been jailed for violating privacy laws in Italy, and the EU is considering harsher penalties across the board. *See* http://www.bloomberg.com/news/2010-10-20/european-union-may-propose-criminal-sanctions-fines-in-data-privacy-cases.html; http://www.law360.com/privacy/articles/290186/why-eu-data-protection-rules-matter-to-us-litigators.
12. *See* French Penal Code Law No. 80-538 of 16 July 1980 (modifying law No. 68-678 of 26 July 1968) (Fr.); Swiss Penal Code, Article 271 of the Supplementary Protection Certificate (Switz.); Directive 95/46/EC of the European Parliament, Article 25 (Lux.).
13. Boulmelh & Borysewicz, *Discovery in France Under the Hague Convention on the Taking of Evidence Abroad in Civil or Criminal Proceedings*, Courtois-Lebel & Associates, Paris, France, *available at* http://www.alfainternational.com/files/tbl_s12Publications/FileUpload92/201/Discovery%20in%20France.pdf.
14. *See, e.g.*, *In re Grand Jury Subpoena dated August 9, 2000*, 218 F. Supp. 2d 544 (S.D.N.Y. 2002) (refusing to recognize a foreign secrecy law which was being asserted to thwart application of the Foreign Corrupt Practices Act). *See also Snowden by and Through Victor v. Connaught Laboraties Inc.*, 138 F.R.D. 138, 140 (D. Kan. 1991) (refusing to apply a Canadian statute the court suspected "was passed to thwart the attempts of American courts to order discovery in cases involving Canadian defendants").
15. *See, e.g.*, *Strauss v. Credit Lyonnais*, 242 F.R.D. 199 (E.D.N.Y. 2007) (directing a non-U.S. bank over which the court had personal jurisdiction to turn over documents despite the fact that the production was prohibited by French secrecy laws and blocking statute, French Penal Code Law No. 80-538 of 16 July 1980 (modifying law No. 68-678 of 26 July 1968) (Fr.)).
16. *See, e.g.*, *In re Christopher X*, Cour de Cassation [Cass. Crim.], Paris, 12 Dec. 2007, Juris-Data No. 2007-83.228 (Fr.) (fining a French attorney €10,000 for violation of the French blocking statute when he sought information from a French citizen for use in U.S. legislation).
17. Grosdidier, *The French Blocking Statute, the Hague Evidence Convention, and the Case Law: the French parties responding to American discovery*, Haynes & Boone LLP, 24 Aug. 2011, *available at* http://www.haynesboone.com/french_blocking_statute.
18. *See* Bankruptcy Rule 9016; FRCP 45(b)(3); 28 U.S.C. § 1783. *See also Blackmer v. U.S.*, 284 U.S. 421 (1932); *Estate of Yaron Ungar v. The Palestinian Authority*, 412 F. Supp. 2d 328 (S.D.N.Y. 2006).
19. *See* Bankruptcy Rule 9016; FRCP 45(b)(2).
20. *See, e.g.*, Paris Bar Rules (*Règlement Intérieur du Barreaude Paris*), Art. 2 (discussing absolute and unlimited attorney-client privilege).
21. Tax Justice Network, Financial Secrecy Index, *available at* http://www.financialsecrecyindex.com/#which_jurisdictions.
22. Nevada, Wyoming, Utah, and Montana also allow for significant levels of corporate secrecy.
23. *See* main text accompanying note 12, *supra*, discussing blocking statutes in France, Switzerland, and Luxembourg.
24. *King v. Cessna Aircraft Co.*, No. 03-20482, 2010 WL 1839266, *2 (S.D. Fla. 6 May 2010) (finding for plaintiff's argument that FRCP 408 should apply to settlement talks in the U.S. or abroad, where "allowing the settlement agreements per se into evidence would greatly prejudice the Plaintiff and run contrary to the Rule 408").
25. Barton Legum, International Litigation Strategies and Practice Ch. 7 (American Bar Association, Section of International Law, 2005).

26. For example, in Austria a victim may be allowed to participate in a criminal proceeding under the Austrian Criminal Procedure Code §§ 65 *et seq*. For an overview of victims' ability to join or bring criminal actions in Europe, *see* http://law.jrank.org/pages/900/Criminal-Procedure-Comparative-Aspects-Prosecution.html.
27. Ivan Pavletic, *The Political Economy of Asset Recovery Processes*, International Centre for Asset Recovery, Working Paper Series, No. 07 (2009).
28. *See Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (finding that by submitting a claim against a bankruptcy estate, a creditor opens itself up to the equitable jurisdiction of the court); *In re Millenium Seacarriers, Inc.*, 419 F.3d 83 (2d Cir. 2005) (same).
29. Legum, note 25 *supra*, Ch. 7.
30. *See*, note 40 *infra*, with respect to orders of attachment issued prior to the commencement of quasi in rem proceedings.
31. *Computer Strategies v. Commodore Bus. Machs.*, 105 A.D.2d 167, 173 (N.Y. App. Div. 1984).
32. *Id.*
33. CPLR § 5201(a).
34. CPLR § 5201(b).
35. CPLR § 6214(a).
36. CPLR § 6216.
37. Siegel, New York Practice § 321 (5th ed. 2011).
38. 433 U.S. 186 (1977).
39. Siegel, note 37 *supra*, § 104.
40. *Id.* An order of attachment prior to the commencement of the action would not be available in federal court because, under Rule 64(a) of the Federal Rules of Civil Procedure ("FRCP"), state law provisional remedies are only available after the commencement of the action.
41. CPLR § 6401.
42. CPLR § 6501.
43. 94 N.Y.2d 541, 545 (2000).
44. *Id.* (emphasis added).
45. *Id.*
46. *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 321 (1999) (noting "the well-established general rule that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property").
47. [1974] AC 133.
48. *Norwich Pharmacal*'s New York analogy is "pre-action disclosure" under New York Civil Practice Law and Rules ("CPLR") § 3102(c).
49. Herbert Smith, *England and Wales* in P. Burrell and S. Bushell, eds., International Fraud and Asset Tracing 80 (2011).
50. [1975] 2 Lloyd's Rep 509.
51. Although a freezer may be brought prior to the particular claim being filed, the filing must be imminent.
52. The court may also grant a freezer against assets linked to the defendant, such as his or her spouse's assets, companies where the defendant is a shareholder, and special purpose bank accounts.
53. P. Burrell and S. Bushell, note 49 *supra*, at 83.
54. *Derby & Co Ltd v. Weldon (No.1)*, [1990] Ch. 48 (Court of Appeal (Civil Division)).
55. *Id.*
56. P. Burrell and S. Bushell, note 49 *supra*, at 86.
57. *Cherney v. Neuman*, [2009] EWHC 1743 (Ch) at [101]-[102].
58. [1976] Ch 55).
59. P. Burrell and S. Bushell, note 49 *supra*, at 90-91.
60. *Tate Access Floors Inc. v. Boswell*, [1991] Ch. 512 (Chancery Division).
61. *TSB Private Bank International SA v. Chabra*, (1992) 1 WLR 231 (Ch.D).
62. [1980] 1 WLR 1274.
63. *See* Kenney, *British Virgin Islands: Combating International Fraud*, 4 Feb. 2010, *available at* http://www.mondaq.com/article.asp?articledid=73746 [hereinafter "Kenney"].
64. *JSC BTA Bank and Fidelity Corp. Services Ltd. et al.*, HCVAP 2010/035. *See also* Kite, *Enforcing Judgments in the BVI*, Hong Kong Law. No. 1 (Jan. 2007), *available at* http://www.harneys.com/files/articles/enforcement%20of%20judgements.pdf.
65. Thorp & Robey, *British Virgin Islands* in P. Burrell and S. Bushell, eds., International Fraud and Asset Tracing 36 (2011).
66. Norwich Pharmacal relief cannot be used to reveal details of a company's shareholding if the company has issued bearer bonds, which BVI companies do.
67. Thorp & Robey, note 65 *supra*, at 36.
68. *Id.*
69. *Id.*
70. Austrian Enforcement Act, Section 379 *et seq.*
71. Georg E. Kodek, *Preliminary Proceedings in the Austrian Legal System* 253, 261, *available at* http://biblio.juridius.unam.mx/libros/4/1652/16.
72. European Commission, *European Judicial Network, Interim and Precautionary Measures—Italy, available at* http://ec.europa.eu/civiljustice/interim_measures/interim_measures_ita_en.htm.
73. *Id.*
74. *Id.*
75. *Id.*
76. Italian Code of Civil Procedure, Article 700.
77. *Id.*
78. Federal Statute on Debt Enforcement and Bankruptcy of 11 April 1889, SR/RS 281.1 (hereinafter DCBA).
79. *Id.* at Article 271.
80. Swiss Bankruptcy Act: Restrictions for Freezing Orders, http://www.internationallawoffice.com/Newsletters/Detail.aspx?r=241.
81. *See* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Article 47, 20 Oct. 2010 (entered into force 1 Jan. 2011) [hereinafter Lugano Convention], *available at* http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/intrea/depch/misc/conlug2.Par.0014.File.tmp/mt_090325_en.pdf.
82. DCBA, Article 271. *See also* PLC—Recent and Future Developments in Swiss Attachment Law, http://crossborder.practicallaw.com/1-502-2505.
83. *See* Lugano Convention, Exhibit 5.

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The Madoff Feeder Fund Cases—Chapter 15, Comity, and Related Bankruptcy Issues

By Richard Levin, James L. Garrity, Jr., and Susan Power Johnston

I. Introduction: The Goals of Chapter 15

The overarching purpose of Chapter 15 is to provide predictability in international insolvency cases to foster international trade. Chapter 15 accomplishes this in several ways. First, it enables representatives of foreign insolvent entities to obtain relief from U.S. bankruptcy courts in support of foreign insolvency proceedings. Second, it provides a streamlined process for recognition of foreign proceedings. Third, it fosters communication and coordination among national courts with concurrent jurisdiction over an insolvent entity. Finally, it harmonizes U.S. bankruptcy law on cross-border insolvency with laws of other jurisdictions that have adopted similar laws.

A. Background

There is no global international regime that provides uniform regulation of all insolvencies across all national borders. As a result, two polar concepts have evolved, in both court decisions and legal theory, to address cross-border international insolvencies: territoriality and universality.

1. Territoriality

The territoriality approach—employed by most nation states (including the United States) in the past and by some nations into the present—strictly limits the effect of bankruptcy laws to the territory over which the nation state's courts have effective jurisdiction. As a consequence, territoriality requires each nation having jurisdiction over parts of a multinational corporation to apply its own local laws to the disposition of assets and distributions to creditors, without regard to competing foreign orders. The concept recognizes the fact that a national court cannot enforce its orders extraterritorially, and usually denies recognition to foreign insolvency proceedings.

Territoriality may, and indeed probably will, interfere with maximization of value for the benefit of all constituents of a multinational enterprise and will inevitably multiply administrative costs and decrease liquidation values. Moreover, it may not ensure uniform treatment of similarly situated creditors, which is a goal of most modern insolvency regimes. Nor does the territoriality concept provide predictability for global enterprises, or for entities dealing with global enterprises, because the results of a multinational insolvency will depend on the local law applied. Moreover, territoriality complicates coordination of multinational insolvencies. Thus conflicts between jurisdictions can erupt as different laws and legal theories are applied to the same facts, as courts jockey for control over assets, and as parties forum shop. Indeed, it permits strategic behavior to advance private interests to the detriment of the creditors as a whole.[1]

2. Universality

In contrast, the universality approach would centralize control over cross-border insolvencies in a single forum, placing all of the debtor's assets, wherever located within the exclusive jurisdiction of the court in which the bankruptcy case is pending, regardless of the location of the debtor's assets, operations or creditors.

Some of the benefits of a universal regime include: (i) consistent treatment for similarly situated creditors; (ii) minimization of administrative expenses; (iii) maximization of value for the benefit of all stakeholders; and (iv) maximization of the possibility of successful restructuring or sale of multinational enterprises.[2]

Universality is not, however, practical in today's world for several reasons: (i) the difficulty, if not the impossibility, of exerting jurisdiction over assets located abroad; (ii) local sovereignty concerns; (iii) the general preference for application of local law to local concerns such as rights *in rem*, claims arising from taxation and employment, lien priority and security interests, and categorization and treatment of preferences; (iv) the incompatibilities in insolvency laws from country to country; and (v) the absence of applicable treaties to enforce orders extraterritorially.

Although common law judges in Canada, the U.S. and the UK have implemented cross-border restructurings that reflect universality by developing various ad hoc means of communication and coordination among the respective national courts,[3] it has proven difficult to extend these mechanisms to civil law jurisdictions, whose judges cannot act beyond their specific statutory authority, or to jurisdictions whose insolvency laws reflect a territoriality approach. Many universality theorists have therefore moved to a more practical approach, referred to as "modified universality." In modified universality, the goals of control and consistency are met by having a central administrative forum in one country, and one or more ancillary proceedings, intended to complement and assist such a plenary case, in other countries. The effort to apply substantive law consistently across national borders is dropped, but the focus on procedural coordination and centralization is maintained.

Chapter 15 exemplifies the modified universality doctrine. It provides procedural mechanisms for foreign representatives to obtain local assistance to marshal and preserve assets for the benefit of stakeholders as a whole,

and it recognizes and honors the primacy of the foreign court with jurisdiction over the foreign main proceeding. At the same time, it assures foreign creditors of equal access and equal treatment with domestic creditors and preserves the ability of the U.S. bankruptcy court to modify relief to ensure U.S. creditors are treated fairly by the foreign court and the foreign insolvency representative. Chapter 15 is, however, silent about choice of law, leaving that to be determined on an ad hoc basis depending on the relevant facts.

B. The History of Chapter 15

Chapter 15, adopted by Congress as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), is based on the Model Law on Cross-Border Insolvency (the "Model Law"). The Model Law was drafted by UNCITRAL's Working Group V, which is comprised of delegates from the nations that are members of UNCITRAL and also from nongovernmental organizations with particular expertise in international insolvency. Its members are jurists, practitioners, academics and regulators. The U.S. delegation, for example, is comprised of two bankruptcy judges, a bankruptcy lawyer and a representative from the Department of State. The mandate of the Working Group is to address problems and issues arising in cross-border bankruptcies.

UNCITRAL adopted the Model Law on 30 May 1997. The Model Law was drawn upon by Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings (the "EU Regulation").

The EU Regulation reflects the view that, for the proper functioning of the internal markets in the EU, cross-border insolvency proceedings should operate efficiently and effectively. The European Union determined that a single forum (located within the European Union) with jurisdiction over the place where the debtor has its center of main interests ("COMI") should control the main insolvency proceeding. Once a court has opened a main proceeding with respect to the debtor, the courts in other EU member states may open only secondary proceedings, and only where the debtor possesses an establishment in that EU member state. Once a court has determined that the debtor's COMI is within its jurisdiction, so that its proceedings are the main proceedings, all other courts in EU member states must defer to that determination.

The COMI decision under the EU Regulation determines choice of law. With certain specified exceptions, the law applicable to insolvency proceedings and their effects will be the law of the state of the opening of proceedings. The COMI decision is consequently of extreme importance in the European Union. Not surprisingly it has resulted in what is often perceived as forum shopping, sometimes to jurisdictions with favorable substantive laws on a topic of concern to the creditors, and sometimes to jurisdictions with insolvency regimes that are particularly favorable to reorganization (such as the U.K.).

The EU Regulation applies only to cross-border insolvencies that fall entirely within the European Union, and is thus of no direct assistance or application to multinational insolvencies of entities with assets, operations or establishments both within and outside the European Union. However, some have suggested that the EU countries will eventually apply the EU Regulation to non-EU countries.[4] The EU Regulation itself is now under revision.

UNCITRAL has recommended that countries adopt the Model Law for several reasons. Thus increased cross-border trade has led to a greater occurrence of cases in which a debtor has assets in more than one country. Moreover, when a debtor has assets in multiple jurisdictions, there is often an urgent need for cross-border cooperation and coordination in the supervision and administration of the debtor's affairs. In addition, inadequate cooperation and coordination reduces the possibility of rescuing a financially troubled but viable business, makes it more likely that the assets will be concealed or dissipated, and hinders fair administration. Many countries currently lack a legislative framework to permit cross-border coordination and communication, and the Model Law will assist countries to modernize their legislation on cross-border insolvency.[5] Finally, international trade and investment will benefit from a fair and internationally harmonized body of legislation on cross-border insolvency.

In addition to the Model Law, Working Group V and the UNCITRAL staff have drafted several other related texts, which have also been adopted by UNCITRAL. All of these texts are available for free download on the UNCITRAL website, UNCITRAL.org:

- *The 1997 Guide to Enactment of the Model Law.*
- *The Legislative Guide on Insolvency Law.* This was adopted by UNCITRAL in 2004 to assist the establishment of an efficient and effective legal framework to address the financial difficulty of debtors, and is intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or when reviewing the adequacy of existing laws and regulations. It aims at achieving a balance between the need to address the debtor's financial difficulty as quickly and efficiently as possible and the interests of the various parties directly concerned with that financial difficulty, principally creditors and other parties with a stake in the debtor's business, as well as public policy concerns.
- *The Practice Guide on Cross-Border Insolvency Cooperation.* Adopted by UNCITRAL in 2009, it explores ways in which bankruptcy courts, judges

and practitioners have cooperated to maximize values for stakeholders, including the use of protocols. The Practice Guide is not intended to be prescriptive, but rather to illustrate how the resolution of issues and conflicts that might arise in cross-border insolvency cases could be facilitated by cross-border cooperation, in particular the use of such agreements, tailored to meet the specific needs of each case and the particular requirements of applicable law. The Practice Guide includes a number of sample clauses to illustrate how different issues have been, or might be, addressed—they are not intended to serve as model provisions for direct incorporation into a cross-border agreement. It also includes summaries of the cases in which the cross-border agreements that form the basis of the analysis were used.

- *The Legislative Guide on Insolvency Law, Part III: Treatment of Enterprise Groups in Insolvency*. This expands the Legislative Guide to address the problems facing multinational enterprise groups in the insolvency context.
- *The UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.* This document offers general guidance on the issues a judge might need to consider when addressing international insolvency concerns.

Working Group V continues to address ways to facilitate cross-border insolvencies, including refining the COMI concept used in the Model Law and focusing on the particular problems of insolvent multinational corporate enterprises, which are not covered under the Model Law.

The United States enacted the Model Law in 2005. The United States had been one of the countries urging UNCITRAL to address the problems of cooperation in cross-border insolvencies, and the U.S. delegation was a significant participant in the Working Group V negotiations which ultimately led to the Model Law.[6] The Model Law was "enthusiastically" embraced by the United States National Bankruptcy Review Commission.[7] Chapter 15 was part of every proposed bankruptcy legislation between 1999 and 2005, when BAPCPA finally passed, and had "virtually unanimous bipartisan support."[8]

The legislative history reveals that Chapter 15 was drafted to follow the Model Law as closely as possible, and that the drafters hoped that other countries would also enact their own versions of the Model Law, since the more countries that have similar legislation the easier it will be to achieve rational results in multinational cross-border insolvencies. By demonstrating willingness to honor orders of foreign courts administrating multinational insolvencies, the U.S. hopes that other countries will reciprocate by enacting and then enforcing the Model Law.[9]

Since Chapter 15 was enacted, U.S. courts have routinely looked to the Model Law, the Guide to Enactment, the Legislative Guide, Reports on the Model Law cited therein, the UNCITRAL Case Law on Uniform Texts ("CLOUT"), and the papers recording the Working Group's deliberations on all of these texts for elucidation of the meaning of various provisions of Chapter 15 and to ensure that they interpret the chapter in a manner consistent with versions of the Model Law enacted in other countries.[10] Section 1508 of Chapter 15, entitled "Interpretation," provides that, in interpreting this chapter, a court is to consider its international origin, and the need to promote an application of this chapter in a manner that is consistent with the application of similar statutes adopted by foreign jurisdictions.

The legislative history of Section 1508 explicitly directs courts to consult these UNCITRAL materials in interpreting Chapter 15:

> This provision follows conceptually Model Law article 8 and is a standard one in recent UNCITRAL treaties and model laws.... Interpretation of this chapter on a more uniform basis will be aided by reference to the Guide and the Reports cited therein, which explain the reasons for the terms used and often cite their origins as well. Uniform interpretation will also be aided by reference to CLOUT, the UNCITRAL Case Law on Uniform Texts, which is a service of UNCITRAL. CLOUT receives reports from national reporters all over the world concerning court decisions interpreting treaties, model laws and other text promulgated by UNCITRAL. Not only are these sources persuasive, but they advance the crucial goal of uniformity of interpretation. To the extent that the United States courts rely on these sources, their decisions will more likely be regarded as persuasive elsewhere.

The Model Law has now been adopted in eighteen other countries.[11] Notably, only six of these enacting countries are common law countries. The others are civil law countries which, before enacting the Model Law, had no access to common law principles of comity with which to assist foreign debtors.

II. Chapter 15's Four Fundamental Principles: Recognition, Access, Relief and Cooperation

A. Recognition

Chapter 15 contemplates that the bankruptcy court will "recognize" a representative of a foreign debtor as

having authority to act on behalf of the foreign debtor. Granting recognition is a condition precedent to any relief under Chapter 15, and unless the foreign representative is recognized by the U.S. bankruptcy court, it is not entitled to any relief from the bankruptcy court. The bankruptcy court by design has limited discretion in considering whether to grant recognition, although it retains a fair amount of discretion to determine the consequences of recognition.

Recognition permits a foreign bankruptcy proceeding to have extraterritorial effect within the United States: that is, it means that the U.S. court will, absent violation of fundamental U.S. policies or discrimination against U.S. creditors, honor and enforce an order of the foreign court with respect to the foreign debtor and its assets.

In the absence of an explicit provision for recognition like that provided in Chapter 15, foreign representatives seeking the assistance of domestic courts would be relegated to a variety of different approaches, not tailored to the needs of international trade and investment.

Common law jurisdictions have applied comity in deciding when to assist foreign representatives. For example, under former Bankruptcy Code Section 304, the courts were required to perform a complicated comity analysis in deciding whether to grant recognition: the court was required to consider what will best assure an economical and expeditious administration of such estate, consistent with

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

When permitted under their governing statutes, civil law jurisdictions have issued enabling orders referred to as exequaturs. It is also possible to seek enforcement of foreign insolvency orders relying on legislation for enforcement of foreign judgments. In addition, letters rogatory for transmitting requests for judicial assistance may also provide assistance in enforcing orders of foreign courts.

However, none of these approaches ensure predictability: all are ad hoc, and all involve subjective judgments by the courts. On the other hand, Chapter 15 provides a legislative solution to this predicament: the foreign representative is formally recognized as authorized to act for the foreign debtor, with all of the explicit rights and remedies provided in Chapter 15.

B. Access

Following recognition, representatives of foreign debtors and foreign creditors are granted access to U.S. courts under Chapter 15. The access principle "establishes the circumstances in which a 'foreign representative' has rights of access to the court (the receiving court) in the enacting State from which recognition and relief is sought."[12] Access "permits the foreign representative to seek a temporary 'breathing space' and allows the receiving court to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency."[13]

Access to United States bankruptcy courts is provided to representatives of foreign insolvent entities for a variety of purposes, including the following.

- Enforcement of orders of the national court with jurisdiction over the main insolvency proceedings.
- Stay of U.S. proceedings pending against foreign debtors.
- Provision of discovery of U.S. entities or U.S. assets of the foreign debtors.
- Location and collection of U.S. assets owned by foreign debtors.
- Transmission of assets to the foreign proceeding for distribution to stakeholders.

Section 1512 of Chapter 15 also ensures that a foreign representative, following recognition, is entitled to participate as a party in interest in a case regarding the debtor under the Bankruptcy Code. Finally, Section 1513 of Chapter 15 ensures that foreign creditors have the same rights regarding the commencement of and participation in a case under the Bankruptcy Code as domestic creditors.

C. Relief

Chapter 15 specifies the relief to which the foreign representative is entitled both before and following recognition. The relief principle refers to three distinct situations. In cases where an application for recognition is pending, interim relief may be granted to protect assets within the jurisdiction of the receiving court. If a proceeding is recognized as a "main" proceeding, automatic relief follows. Additional discretionary relief is available in respect of "main" proceedings and relief of the same character may be given in a proceeding that is recognized as "non-main."[14]

While recognition is pending, as well as after the foreign representative is recognized by the U.S. bankruptcy court, the foreign representative is entitled to a variety

of forms of relief explicitly authorized by the statute, depending on whether the foreign proceeding is a main or a non-main case.[15]

Under Section 1507 the foreign representative may also request additional unspecified and ad hoc relief, which the court may grant after considering the same factors that used to govern recognition under former Section 304.

D. Cooperation and Coordination

These principles place obligations on both courts and insolvency representatives in different states to communicate and cooperate to the maximum extent possible, to ensure that the single debtor's insolvent estate is administered fairly and efficiently, with a view to maximizing benefits to creditors.[16]

1. Cooperation

Chapter 15 mandates that a U.S. court is to cooperate and communicate with a foreign court or a foreign representative, either directly or through a trustee, subject to the right of parties in interest to notice and participation. The cooperation may be achieved through any appropriate means, including appointing an examiner, coordinating proceedings, or entering into agreements concerning cooperation. A U.S. court may enter an order under Chapter 15 authorizing a trustee or another entity, including an examiner, to act in a foreign court on behalf of a bankruptcy estate which was created in a regular bankruptcy case pending under the U.S. Bankruptcy Code.

To facilitate cooperation, Bankruptcy Code Section 1518 requires the foreign representative to keep the U.S. court notified of any changes that may occur after the foreign representative has been recognized by the court, and Bankruptcy Rule 2015 requires that the foreign representative file any notice required by Bankruptcy Code Section 1518 within fourteen days after the date when the representative becomes aware of the subsequent information. Finally, Bankruptcy Code Section 1525(a) mandates that "the court shall cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee."

2. Communication

Bankruptcy Code Section 1525(b) authorizes the court to communicate "directly with, or to request information or assistance directly from, a foreign court or a foreign representative, subject to the rights of a party in interest to notice and participation." The legislative history demonstrates how important this concept was to the drafters, who noted that the rights of courts to communicate with other courts in worldwide insolvency cases was of central importance.

However, the communication right must be exercised with due regard to the rights of the parties. Bankruptcy Rule 5012 addresses this issue:

> Except for communications for scheduling and administrative purposes, the court in any case commenced by a foreign representative shall give at least 20 days' notice of its intent to communicate with a foreign court or a foreign representative. The notice shall identify the subject of the anticipated communication and shall be given in the manner provided by Rule 2002(q). Any entity that wishes to participate in the communication shall notify the court of its intention not later than 5 days before the scheduled communication.

Chapter 15 does not direct particular methods of communication among courts and insolvency representatives, but it suggests ways in which such communication may occur. For example, Bankruptcy Code Section 1525(b) provides that the court is "entitled" to communicate directly with or to request information or assistance directly from a foreign court or a foreign representative, subject to the rights of parties in interest to notice and participation. Bankruptcy Code Section 1526(b) makes a similar provision for direct communication among the trustee, or any person authorized by the court (including an examiner), foreign courts and foreign representatives, subject to the same rights of notice and participation. Finally, Bankruptcy Code Section 1527(2) provides that communication of information may be made by "any means considered appropriate by the court."

In practice, courts have communicated with foreign courts by: (i) exchanging letters between the domestic and the foreign judges; (ii) providing transcripts of hearings to the foreign court; and (iii) joint hearings or joint conferences.

The American Law Institute, in association with the International Insolvency Institute, has promulgated and adopted certain Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Communication Guidelines"). It is intended that the Communication Guidelines may be adopted, after whatever modifications may be necessary to meet either the procedural law of the relevant jurisdiction or the particular circumstances of a given case, by any court presiding over a multinational proceeding to facilitate any communications between and among the courts that are necessary to ensure coordination of such proceedings. Neither Chapter 15 nor the Bankruptcy Rules specifically allude to the Communications Guidelines, although nothing in Chapter 15 precludes their adoption in an appropriate case, and in fact they have been routinely adopted by a number of U.S. bankruptcy judges as part of protocols.

Chapter 15 is also intended to facilitate cooperation and coordination of U.S. bankruptcy courts with foreign courts when U.S. domestic debtors require the assistance

of foreign courts. For example, if a U.S. bankruptcy case under another chapter of Title 11 and a foreign proceeding are both pending concerning the same debtor, the U.S. court is directed by Bankruptcy Code Section 1529 to seek cooperation and coordination with the foreign proceeding under Bankruptcy Code Sections 1525, 1526, and 1527. If the U.S. bankruptcy case is pending at the time that the petition for recognition of a foreign proceeding is filed, any relief granted under Bankruptcy Code Section 1519 (the relief that may be granted upon filing before recognition) and under Bankruptcy Code Section 1521 (the relief that may be granted after recognition) must be consistent with the relief granted in the pending U.S. case, and Bankruptcy Code Section 1520 (which lists certain limited automatic effects of recognizing a foreign proceeding) does not apply, because it would limit the Bankruptcy Code provisions applicable in an already pending plenary U.S. bankruptcy case.

III. Role of Comity in Chapter 15

A. Nature of Comity

"Comity of courts" or "judicial comity" is defined as the principle whereby courts "decline to exercise jurisdiction over matters appropriately adjudged elsewhere." "Prescriptive comity" is "the respect sovereign nations afford each other by limiting the reach of their laws."[17]

The most widely accepted definition of comity came in the decision of the U.S. Supreme Court in *Hilton v. Guyot*,[18] in which Justice Gray defined it as "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."[19]

The comity concept has been part of U.S. law since at least 1895, when the Supreme Court ruled that "comity is part of our law, and must be ascertained and administered by the courts."[20]

Extending comity to foreign insolvency proceedings is particularly appropriate. Granting comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. Consequently, U.S. courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities, even before Chapter 15 was enacted.

There is a public policy exception to the doctrine of comity—when significant non-constitutional U.S. policies, particularly regulatory or compliance-oriented policies, are perceived as being in conflict with the bankruptcy laws of another jurisdiction, comity may not be extended. That exception is explicitly embodied in Bankruptcy Code Section 1506, which is titled "Public policy exception," and which provides, "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."

B. Application of Comity in Chapter 15

Comity is no longer relevant in the decision to grant recognition to a foreign proceeding. That decision should be based purely on the foreign representative's credentials—the certified order of the foreign representative's appointment—and on the question of whether the foreign case is a main or a non-main proceeding.

Comity does, however, have a continuing role in Chapter 15. Bankruptcy Code Section 1509(b)(3) requires that a U.S. court grant comity to a foreign representative, once the foreign proceeding has been recognized. The obligation to grant comity—by enforcing orders issued by foreign courts adjudicating foreign insolvency proceedings—is not discretionary, and is limited only by the obligation not to contravene fundamental U.S. public policy in granting comity, or to discriminate against U.S. creditors.

If another country's laws are extremely different from those of the United States, a U.S. court will not relegate a U.S. creditor to treatment under those laws, but will conclude, pursuant to well settled comity principles, not to defer to such laws. This requirement necessitated a detailed analysis of the foreign law in question under former Bankruptcy Code Section 304.

Application of Section 1507,[21] which permits the bankruptcy court to provide assistance to the foreign representative beyond the forms of assistance explicitly delineated in Chapter 15, should require a similar analysis. According to the legislative history of Bankruptcy Code Section 1507(a):

> This section is intended to permit the further development of international cooperation begun under section 304, but is not to be the basis for denying or limiting relief otherwise available under this chapter. The additional assistance is made conditional upon the court's consideration of the factors set forth in the current subsection 304(c) in a context of a reasonable balancing of interests following current case law... Although the case law construing section 304 makes it clear that comity is the central consideration, its physical placement as one of six factors in subsection (c) of section 304 is misleading, since those factors are essentially elements of the grounds for granting comity. Therefore, in subsection (2) of this section, comity is raised to the introductory language to make it clear that it is the central concept to be addressed.[22]

The concept of comity and the case law decided under former Bankruptcy Code Section 304(c) thus remain relevant to consideration of the provision of additional assistance under section 1507. They may also remain relevant in considering limits on relief under Bankruptcy Code Section 1522, to ensure protection of all parties in interest.

C. Other Potential Applications of Comity in Chapter 15 Cases

Some kinds of proceedings do not qualify for recognition under Chapter 15. For example, Bankruptcy Code Section 1501 excludes the following from recognition:

- A foreign proceeding for a foreign bank that has a U.S. branch.
- A foreign proceeding for a foreign railroad.
- A proceeding for a foreign individual debtor eligible for a case under Chapter 13.
- A proceeding for a foreign stockbroker or commodity broker.[23]

In addition, Bankruptcy Code Section 1517 limits recognition to foreign main or non-main proceedings. It does not, on its face, permit any proceedings that are not foreign main or foreign non-main proceedings to be recognized. As a result, neither an ancillary foreign proceeding similar to a Chapter 15 case nor a foreign proceeding in a country where the debtor has neither an establishment nor its COMI are qualified for recognition because they are neither main nor non-main proceedings.

Under former Section 304, all of these types of proceedings could be recognized and the foreign representatives could be afforded relief. There does not seem to be a principled reason to deny them relief. Courts have, however, denied recognition in several cases because they were neither main nor non-main proceedings in their country of origin.[24]

Judge Samuel L. Bufford has suggested that Chapter 15 does not necessarily deny all relief to such "tertiary" proceedings. In particular, the sections dealing with cooperation and communication with foreign courts, and the sections dealing with coordination of concurrent proceedings, could be available even if a case is not a main or a non-main proceeding.[25] And Bankruptcy Code Section 1509 (d) provides that, "If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States." Significantly, this provision is phrased in a permissive way: if the court concludes that the foreign representative is not entitled to any relief, it may enter such an order. But it appears to be left open to the court not to block such relief.

Judge Bufford notes that how and in what forum the foreign representative could obtain such relief is not clear.[26] Under the pre-Chapter 15 common law, the bankruptcy courts were able to provide relief to foreign representatives of foreign proceedings that were not limited to main or non-main.[27]

If the common law comity cases survive the enactment of Chapter 15, such relief should continue to be available outside and independent of Chapter 15. But to date no such cases have been filed, and it is not clear how they would be presented.

IV. Eligibility, Recognition[28]

A. Chapter 15 Contemplates Direct Right of Access by Foreign Representatives to U.S. Courts Through a Single Point of Entry

Congress intended that Chapter 15 be the "exclusive door to ancillary assistance to foreign proceedings, with the goal of controlling such cases in one court."[29] Section 1509 of the Bankruptcy Code is the statutory vehicle for achieving that goal.

Thus Section 1509(a) of the Bankruptcy Code provides that a foreign representative may commence an ancillary proceeding by filing a petition for recognition under Section 1515 of the Bankruptcy Code.[30] In that way, the statute gives foreign representatives a right of direct access to United States courts.

If the court grants recognition of the foreign proceeding, the foreign representative is free to appear in U.S. state and federal courts on matters relating to the foreign proceeding. Indeed, by application of Section 1509(b), if the court grants recognition of a foreign proceeding under Section 1517, (i) the foreign representative has the capacity to sue and be sued in a United States court;[31] (ii) the foreign representative may apply directly to a United States court for appropriate relief in that court; and (iii) a court in the United States will grant comity or cooperation to the foreign representative.[32]

If the court denies recognition, the foreign representative is barred from obtaining relief from any other court,[33] except for the limited purpose of collecting a claim or account receivable of the foreign debtor.[34] In this way, Section 1509 implements the so-called "single point of entry" for a foreign representative seeking access to a state or federal court in the United States,[35] and courts routinely dismiss actions commenced by foreign representatives who have not obtained orders of recognition under Chapter 15.[36]

B. Existence of Foreign Proceeding

Section 101(23) of the Bankruptcy Code 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.[37]

Section 101(24) of the Bankruptcy Code defines "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.[38]

In considering whether a proceeding is a "foreign proceeding," courts parse Section 101(23) into seven elements, each of which must be satisfied before the underlying action will be classified as a "foreign proceeding."[39] Those elements are:

- a proceeding;[40]
- that is either judicial or administrative;[41]
- that is collective in nature;[42]
- that is in a foreign county;
- that is authorized or conducted under a law related to insolvency or the adjustment of debts;[43]
- in which the debtor's assets and affairs are subject to the control or supervision of a foreign court;[44] and
- which proceeding is for the purpose of reorganization or liquidation.[45]

C. Commencement of a Chapter 15 Case

Section 1504 of the Bankruptcy Code states that the filing of a petition for recognition under Section 1515 commences a case under Chapter 15.[46] Nonetheless, except in cases where relief is "urgently needed" to protect the assets of the creditors,[47] relief is not available to the foreign representative until the entry of an order of recognition of the foreign proceeding.[48]

Section 1515 of the Bankruptcy Code describes the procedural requirements for filing a petition for recognition under Section 1504. In part, it directs that a petition for recognition be accompanied by (i) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative (translated into English); (ii) a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative (translated into English); or (iii) absent evidence referred to above in (i) and (ii), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.[49]

The recognition procedure is designed to be a "simple expeditious structure to be used to obtain recognition."[50] To help expedite that process, but not to preclude the introduction of contrary evidence, Section 1516(b) of the Bankruptcy Code permits the court to presume that: (i) the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative, if the foreign court's decision or certificate so states; and (ii) documents submitted in support of the petition for recognition are authentic, whether or not they have been legalized.[51]

The term "center of main interests" ("COMI") is not defined in the Bankruptcy Code or the Model Code. However, in furtherance of the recognition process, Section 1516(c) of the Bankruptcy Code creates a rebuttable presumption that a foreign corporate debtor's COMI is its registered place of business.[52] Rule 301 of the Federal Rule of Evidence is applicable in Chapter 15 cases. By application of that rule, the evidentiary presumption notwithstanding, the burden of proving COMI remains at all times with the foreign representative.[53]

D. Prerequisites for Recognition of Foreign Proceeding

Section 1517 of the Bankruptcy Code directs that, for a foreign proceeding to gain recognition within the framework of Chapter 15, the foreign proceeding for which recognition is sought must be a foreign main proceeding or foreign non-main proceeding within the meaning of Section 1502, the foreign representative applying for recognition is a person or body, and the petition must meet the requirements of Section 1515.[54] Recognition under Section 1517 of the Bankruptcy Code is not a "rubber stamp exercise."[55] Even in the absence of an objection, the trend is for courts to undertake their own jurisdictional analysis and grant or deny recognition under Chapter 15 as the facts of each case warrant, and the foreign representative bears the burden of proving eligibility.

E. Relief Available under Chapter 15

Relief under Chapter 15 is available only in respect of a foreign proceeding that is either a foreign main or foreign non-main proceeding. A proceeding that is neither is ineligible for recognition under Chapter 15.[56]

1. Provisional Relief[57]

Provisional relief is available during the "gap period" between the filing of the petition the entering of an order for recognition, but only where relief is "urgently needed to protect the assets of the debtor or the interest of the creditors." Such provisional relief terminates when the petition for recognition is granted, unless extended by court order. The relief includes, but is not limited to, the following:

- Staying execution against the debtor's assets.
- Entrusting all or part of the assets in the United States to the foreign representative where the assets are susceptible to devaluation.
- Suspending the debtor's right to transfer any right or interest in an asset.

- Providing for the examination of witnesses or documents concerning the debtor's assets, affairs, rights and obligations.
- Granting certain other related relief that may be available to a trustee.

2. Automatic Relief[58]

Automatic relief is available where the foreign proceeding is recognized as a "foreign main proceeding." Certain provisions of the Code are automatically applicable, including but not limited to (i) an automatic stay (or equivalent injunction) under Section 362, preventing creditor collection efforts with regard to the debtor or its assets located in the United States; (ii) the right of an entity asserting an interest in the debtor's United States assets to "adequate protection" of that interest under Section 361; and (iii) restrictions on the debtor's right to use, sell or lease its U.S. property outside the ordinary course of business under Section 363. Other provisions of the Bankruptcy Code apply by way of "additional assistance" in the Bankruptcy Court's discretion and only if in the interest of creditors and other interested parties, including the debtor.

4. Permissive Relief[59]

Permissive relief is available where a foreign proceeding is recognized as a "foreign main" or "foreign non-main proceeding." Thus the court may grant permissive relief only if the interests of interested entities, including the debtor, are sufficiently protected. Relief available to a foreign representative upon recognition of a foreign main or foreign non-main proceeding includes the following:

- Staying proceedings against the debtor or executions against the debtor's property.
- Suspending the right to transfer, encumber, or dispose of the debtor's property.
- Providing for the examination of witnesses.
- Granting certain other forms of relief available to a trustee.
- Extending provisional relief previously granted.

Note that the court may place conditions on a grant of provisional or permissive relief as it deems appropriate, including the posting of a security bond.

F. Foreign Main Proceeding vs. Foreign Non-main Proceeding

Section 1502(4) defines the term "foreign main proceeding" to mean "a foreign proceeding pending in the country where the debtor has the center of its main interests."[60] Chapter 15 and the Model Law are silent on the factors that are relevant to the determination of a disputed COMI. However, as previously noted, pursuant to Section 1516(c), absent 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.

Section 1502(5) defines the term "foreign non-main proceeding" to mean "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."[61] For these purposes, the term "establishment" means any place of operations where the debtor carries out "non-transitory economic activity."[62] Accordingly, a foreign proceeding that is premised only on the presence of assets in a foreign country is not eligible for recognition under Chapter 15.

G. Disputes Regarding COMI or Establishment

In cases where a debtor's COMI or Establishment are in dispute, the court must resolve two threshold issues: (i) it must ascertain the factors it will consider in making the determination of whether the debtor has a COMI or an establishment in the foreign country; and (ii) it must fix the appropriate date on which to make that determination.[63] Case law is instructive in resolving those issues.

1. Factors Relevant to Determination of Location of COMI

When the COMI of a corporate debtor is at issue, some courts equate COMI with the concept of a "principal place of business."[64] The Bankruptcy Code does not state the type of evidence relevant to a determination of a debtor's COMI. To fill that void, courts frequently utilize the following non-exclusive list of factors in assessing a corporate debtor's COMI. Among those are the following:

- The location of the debtor's headquarters.
- The location of those who actually manage the debtor (which conceivably could be at 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 a majority of the creditors who would be affected by the case.
- The jurisdiction whose law would apply to most disputes.[65]

As with corporate debtors, the Bankruptcy Code does not define an individual debtor's COMI. However, Section 1516(c) states that an individual's "habitual residence" is presumed to be the COMI.[66] Some courts have likened the concept of "habitual residence" to that of domicile, which is established by "physical presence in a location coupled with an intent to remain there indefinitely."[67] Other factors examined by the courts include: (i) the length of time spent in the location; (ii) the occupational or familial ties to the area; and (iii) the location of the individual's regular activities, jobs, assets, investments, clubs, unions, and institutions of which he is a member.[68]

An issue that has arisen, particularly in Chapter 15 cases involving off-shore funds, is whether, in the absence of an objection to COMI, a court is bound by the presumption in Section 1516(c), so that the court is precluded from considering evidence of record, or requesting the submission of evidence. Some courts hold that even in the absence of an objection to COMI, they will not "rubber stamp" a petition for recognition and the foreign representative will bear the burden of proving that the proceeding is either a foreign main or foreign non-main proceeding, particularly if there is evidence in the record that COMI is not in the place of the debtor's registered offices. Two cases are particularly instructive.

In the case of *In re Bear Stearns*,[69] two Cayman Islands exempted limited liability companies (the "Funds"), with registered offices in Cayman Islands, were the subject of liquidation proceedings conducted pursuant to the Companies Law of the Cayman Islands under the supervision of the Cayman Grand Court. The Funds were master funds in a master-feeder structure. They invested in miscellaneous financial products, including investment-grade structured finance securities, asset-backed securities, swaps, securitizations, derivatives and currencies. PFPC Inc. (Delaware) (the "Administrator"), a Massachusetts corporation, served as the Funds administrator and maintained and stored the Funds' books and records in Delaware. Bear Stearns Asset Manager Inc., a New York corporation located in New York, acted as the Funds' investment manager. Other assets, consisting of accounts receivables from broker dealers, were located in the United States and Europe, although the Funds' investment registers were located in Dublin, Ireland, and the Funds' investors consisted of two Cayman Islands and one U.K. entity.

The joint provisional liquidators appointed by the Grand Cayman Court (the "Petitioners") filed petitions pursuant to Section 1515 of the Bankruptcy Code, seeking recognition of the liquidation proceedings as foreign main or, alternatively, foreign non-main proceedings. The petitions were unopposed and the Petitioners contended that the court was required to recognize the liquidation proceedings as foreign main proceedings. "In other words, the Petitioners contended] that [the] Court should accept the proposition that the Foreign Proceedings are main proceedings because the Petitioners say so and because no one else says they aren't."[70] The Bankruptcy Court rejected that contention. Relying on the plain language of Section 1516(c) and the Model Law's Guidelines, the court held that the presumption in Section 1516(c) did not preclude a court from calling for or assessing other evidence in determining COMI, provided that it did so in accordance with applicable procedural law.[71] After considering evidence in the record, the court concluded that the Funds' COMI was in the United States and that the Funds did not have an "establishment" in the Cayman Islands. Accordingly, it denied the petition for recognition.[72] On appeal, the District Court affirmed. In relevant part, the District Court observed that Section 1516(c) "creates no more than a rebuttable evidentiary presumption which may be rebutted notwithstanding a lack of party opposition," and found that the court did not err in considering the evidence of record or in dismissing the petition.[73]

In the case of *In re Basis Yield*,[74] the court-appointed liquidators (the "Liquidators") of an exempted limited liability company incorporated under Cayman Islands law (the "Fund") subject to liquidation proceedings in the Cayman Islands sought recognition of the Cayman Islands liquidation proceedings under Chapter 15. The Chapter 15 petition disclosed that the Fund's registered office was in the Cayman Islands, that it was a master fund whose investors (consisting of two feeder funds) and investment manager were domiciled in the Cayman Islands, and that the Fund's books and records, attorneys and auditors were located in the Cayman Islands. No party objected to the petition or offered evidence to rebut the evidence submitted in support of the petition. Nonetheless, the court noted that the petition was "strikingly silent" as to: (a) the nature and extent of the Fund's business activities in the Cayman Islands (or when those activities were conducted); (b) whether the Fund staffed any employees or managers in the Cayman Islands; (c) whether any of the Fund's assets were in the Cayman Islands; (d) the location from which the Fund was in fact managed, notwithstanding the Cayman Islands domicile of the manager.[75] It also noted that Citigroup, a creditor of the Fund, commented on the Liquidator's failure to address those issues in the Chapter 15 petition, and that, in any event, "the failure to address these matters…was apparent to any observer—including the Court, which did not need a stakeholder's written submission to note the deficiency."[76]

The court issued a preliminary injunction requested by the Liquidators and scheduled a hearing on the petition for recognition. In doing so, the court directed that the recognition hearing would be an evidentiary hearing and that, without precluding the Liquidators from introducing any other evidence that they might consider relevant or helpful to the court, that they were to use best efforts "to introduce evidence sufficient for the Court to make factual findings with respect to a fair number of specified matters—some of which would at least arguably be relevant to a determination as the whether the Cayman Islands were [the Fund's] COMI, or whether [the Fund] maintained an establishment there."[77] Thereafter the Liquidators sought and obtained the Court's permission to file a motion for summary judgment granting recognition of the proceeding as a "foreign main proceeding," in advance of the recognition hearing. In that motion, they relied on the limited factual record contained in the petition, and the presumption that Fund's COMI was in the place of its registered office.

Although that motion was unopposed, the court denied it, finding that it was not bound by the presumption and that the Liquidators had not adduced sufficient evidence to establish that the Fund's COMI was in the Cayman Islands.

2. Relevant Time Period for Determining Location of COMI

The debate around the correct COMI date turns on whether COMI should be measured on the date the underlying foreign proceeding was commenced,[78] or on the date of the commencement of the Chapter 15 case.[79] Because Bankruptcy Code Section 1502(4) is written in the present tense,[80] courts favoring application of the Chapter 15 petition date approach argue that a plain reading of the statute mandates that position:

> While section 1502 does not expressly discuss a temporal framework for determining COMI, the grammatical tense in which it is written provides guidance to the court…Congress's choice to use the present tense requires courts to view the COMI determination in the present, i.e. at the time the petition for recognition was filed.[81]

Courts using the Chapter 15 petition date in determining COMI also cite consistency as a reason for the bright-line rule. In the case of *In re Betcorp*,[82] the Bankruptcy Court for the District of Nevada considered, in determining whether the Australian liquidation of an Australian gaming company could be recognized a foreign main proceeding, whether the appropriate temporal snapshot was the date of filing of the Chapter 15 petition, or the company's operational history. The liquidator sought recognition of the Australian proceeding as a foreign main proceeding under Chapter 15. 1st Technology LLC, a U.S. based-company pursuing patent infringement against Betcorp in U.S. District Court, opposed the petition. After reviewing the COMI factors, the Bankruptcy Court turned to timing. Ultimately, the Bankruptcy Court held that the Australian proceeding could be recognized as a foreign main proceeding. In doing so, the court determined that consideration of Betcorp's operational history for purposes of establishing COMI would frustrate the goals of the statute:

> Giving consideration to a debtor's operational history increases the possibility of competing main proceedings, thus defeating the purpose of using the COMI construct. Requiring courts to give weight to the debtor's interests over the course of its operational history may destroy the uniformity and harmonization that is the goal of employing the COMI inquiry.[83]

The Bankruptcy Court further noted that a debtor's COMI filing was more readily ascertainable by third parties as of the date of the Chapter 15, and pointed out that reviewing the debtor's prior activities could lead to denial of a recognition in the appropriate country due to past activities, once again frustrating the point of the inquiry:

> [An inquiry into the debtor's past interests] decreases the effectiveness of the insolvency proceeding for which recognition is sought, and it may lead to a suboptimal distribution of the debtor's assets, inasmuch as nonrecognition where recognition is due may forestall much need inter-nation cooperation.[84]

The bankruptcy court in the case of *In re Fairfield Sentry Limited*[85] also determined that the date of the Chapter 15 petition was the appropriate measure following the application of a "totality of the circumstances" analysis. There, the bankruptcy court considered two British Virgin Islands investment vehicles that had previously invested in Madoff-controlled funds. Following the commencement of BVI liquidation proceedings, the appointed liquidators filed petitions under Chapter 15, seeking recognition of the BVI proceedings as foreign main proceedings, or, in the alternative, foreign non-main proceedings. Certain claimants objected, asserting that New York was the proper COMI, based on the Debtors' historic business activities.

Amidst concerns of "the potential for mischief and COMI manipulation," the bankruptcy court declined to follow a bright line rule based on the wording of the statute.[86] In reaching a determination that the COMI as of the date of the Chapter 15 filing was nevertheless applicable, the bankruptcy court noted, among other things, that (i) the debtors had ceased doing business more than eighteen months before the Chapter 15 petition and seven months prior to the commencement of the BVI liquidation proceedings; (ii) the debtors had no place of business, management or tangible assets located in the United States; (iii) the liquidators were directing and coordinating the debtors' business affairs in the BVI, maintaining liquid assets there, and had transferred significant books and records there; and (iv) to the extent that contingent claims constituted assets located in New York, they were entitled to no more weight than claims based in other jurisdictions.[87]

On appeal, the District Court affirmed the opinion of the Bankruptcy Court, favorably citing *In re Ran*, *In re Betcorp* and *In re BAIC*.[88] In discussing the Bankruptcy Court's totality of the circumstances approach, the District Court found that the appellants "presented no evidence to support a finding of an opportunistic shift of Sentry's COMI or any biased activity or motivation to distort factors to establish a COMI in the BVI."[89]

In the case of *In re Millennium Global Emerging Credit Master Fund Limited*,[90] the Bankruptcy Court for the Southern District of New York found that the statutory language required the COMI determination to be made as of the date of commencement of the underlying foreign proceeding, not the date of the Chapter 15 petition. In that case, a liquidation of a Bermuda-based master fund and feeder fund (the "Funds") was commenced as a result of the Funds' inability to meet a margin cal1.[91] The Bermudan liquidators of the Funds sought recognition of the liquidation as foreign main proceedings under Chapter 15 in order to investigate the Funds, conduct discovery and provide for distribution of recovered property to creditors.[92] One of the potential targets of the liquidators' investigation objected to the Chapter 15 petition, asserting that the Debtors' COMI should be determined to be in the United Kingdom, the location of the Funds' investment manager, numerous creditors and creditors meetings, the Funds' prime broker, and alleged pending litigation.[93]

The Bankruptcy Court rejected the various decisions finding that the date of the Chapter 15 petition was the appropriate date for the COMI determination. Instead, the Bankruptcy Court determined that previous courts misconstrued the plain language of the statute, finding that by substituting the words "principal place of business" in place of "center of main interests," it was clear that the drafters were referring to a debtors' place of business prior to its liquidation, since "[a] debtor does not continue to have a principal place of business after liquidation is ordered and the business stops operating."[94] Turning from the language of the statute to policy, the Bankruptcy Court found further that a rule determining COMI as of the date of the Chapter 15 filing was a construction that allowed COMI "to be used as a shield against foreign creditors," and one that invited forum shopping.[95]

Accordingly, the Bankruptcy Court found that "the construction of the term COMI that avoids the use of Chapter 15 as a shield by absconding debtors looks to the time period on or about the commencement of the foreign case whose recognition is sought."[96] After applying various COMI factors, the Bankruptcy Court determined that the Funds' COMI as of the date of commencement of the liquidation was Bermuda, and held that the Bermuda liquidation proceedings were entitled to recognition as foreign main proceedings.[97]

3. Factors Relevant to Determination of Whether There Is an Establishment in the Country Where the Debtor Has Petition for Recognition of a Foreign Non-main Proceeding

To have an establishment in a country, the debtor must conduct business in that country.[98] Bankruptcy courts have also made the following findings with respect to finding an establishment.

- The bankruptcy court will not find an establishment based solely on the existence of an insolvency proceeding.[99]
- The mere presence of a letterbox in a company's registered location will not constitute an establishment.[100]
- Evidence of some management of an asset in a jurisdiction may be sufficient to constitute an establishment.[101]
- Where the debtor (i) had property where it conducted business, (ii) retained employees, (iii) maintained accounts relating to its business, (iv) had existing clients, (v) was involved in the local market and (vi) had a place of operations where it conducted nontransitory business, a debtor had provided evidence of its establishment in the foreign jurisdiction where proceedings were pending, and was entitled to recognition of a foreign non-main proceeding.[102]
- The appropriate time for a determination of whether the debtor has an establishment in a country is the same as the relevant time period for determining location of COMI.[103]

4. Requirement of Assets or Need for Information in U.S.

Chapter 15 does not actually require a foreign entity to have assets in the United States. The requirement comes from Section 109(a) of the Bankruptcy Code (made applicable through Section 103(a)[104]), which provides that, "Notwithstanding 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."[105] Instead, as previously discussed, Section 1504 provides that a Chapter 15 case is commenced by filing a petition for recognition of a foreign proceeding under Section 1515, which in turn requires that any such petition for recognition be accompanied by

- A certified copy of the decision commencing such foreign proceeding and appointing the foreign representative; and
- A certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
- in the absence of evidence referred to in the first two paragraphs, any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.[106]

Likewise, Section 1501(b) provides for a broad application of Chapter 15, without the requirement for assets in the U.S., where (i) the assistance is sought in the United States by a foreign court or a foreign representative in

connection with a foreign proceeding; (ii) assistance is sought in a foreign country in connection with a case under this title; (iii) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or (iv) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding the Bankruptcy Code.[107]

As to what constitutes assets in the U.S., the courts have not really addressed this conflict nor opined on what would constitute assets in the U.S. for purposes of meeting the requirement under Section 109(a). And there does not appear to be much in the secondary literature on what constitutes U.S. property in a Chapter 15 context. To the contrary, Judge Gropper recently noted that a foreign debtor need not to have any U.S. assets:

> The absence of tangible property or a place of business of a debtor in the United States is not fatal to a case under Chapter 15, designed as it is to provide assistance to a foreign proceeding... Section 1528 specifically provides that the foreign debtor must have assets in the United States in order for a plenary case under another chapter to be initiated, leading to the conclusion that the statute contemplates the commencement of a Chapter 15 case even where there are no assets of the debtor in the United States.[108]

Much of the case law under the now repealed Section 304 ancillary proceedings also does not really address what constitutes U.S. property so much as what are the jurisdictional requirements for ancillary proceedings.[109]

Under traditional analysis of Section 109(a) requirement to foreign debtors, a nominal amount of assets would constitute sufficient assets to qualify such entity for a chapter 11 petition.[110]

V. Powers of Foreign Representatives in Chapter 15 after Recognition

A. Stay of Proceedings against Debtor's Assets

Section 1521 specifically provides that, upon recognition of a foreign proceeding, whether main or non-main, at the request of the foreign representative, the court may grant a stay of (i) 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 be stayed under Section 1520(a); and (ii) the execution against the debtor's assets to the extent it has not been stayed under Section 1520(a).

In turn, Section 1520(a) provides for the application of the automatic stay under Sections 361 and 362 upon the recognition of a foreign proceeding that is a foreign main proceeding with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States.

However, the stay does not (automatically) apply to proceedings in jurisdictions outside of the U.S. Consider *In re JSC BTA Bank*,[111] where the bankruptcy court granted recognition to insolvency proceeding in Kazakhstan as a foreign main proceeding. The JSC Bank had no tangible assets or employees or business in the U.S., but had some accounts at correspondent U.S. banks. There was a commercial dispute over the alleged default of a $20 million loan agreement governed by Swiss law between JSC Bank and the Swiss branch of a French bank, which also had no business or tangible U.S. assets. The dispute was pending arbitration in Switzerland when the Chapter 15 petition was filed, and the foreign representative sought to suspend the arbitration, filing a motion in the Chapter 15 case for contempt of stay when the Swiss arbitration proceeded and resulted in a judgment against JSC Bank. But the bankruptcy court was not persuaded by the foreign representative's argument that the recognition of a Chapter 15 petition served to impose a worldwide stay or judicial/arbitration proceedings. The court found that the foreign representative's broad interpretation of Section 1520(a), while possible, was beyond the scope intended by Congress and would lead to absurd results.

B. Ability to Collect, Administer and Sell Assets

Again, Sections 1520 (addressing effects of recognition of a foreign main proceeding) and 1521 (relief that may be granted in both main and non-main proceedings) sets forth the range of authorized actions for a foreign representative. Section 1520(a) states, in part, that Sections 363, 549 and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate, and unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by Sections 363 and 552.[112]

Similarly, Section 1521(a)(5) provides that the court may grant relief, including "entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court." A number of cases involving turnover, sale, and administration of assets by foreign representatives have been reported in recent years.[113]

Nevertheless, note that turnover of assets may implicate avoidance powers, which are prohibited under 11 U.S.C. 1521(a)(7), which is discussed below.

C. Ability to Investigate, Take Discovery and Access U.S. Courts

Section 1521(a)(4) also enables a foreign representative to take discovery through the U.S. courts, 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."[114]

D. Limitation on Use of U.S. Bankruptcy Avoiding Powers

Avoidance powers under the Bankruptcy Code are specifically excluded from the list of available relief that a court may grant to a foreign representative upon the recognition of a foreign proceeding. Thus, a foreign representative must file a Chapter 7 or 11 petition to prosecute avoidance actions under U.S. law. Thus Section 1521(a)(7) states that, "The Court may grant 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)."[115] And Section 1523 further provides that "Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under section 522, 544, 545, 547, 548, 550, 553, and 724(a)."

When a foreign proceeding is a foreign non-main proceeding, the court must be satisfied that an action under subsection (a) of Section 1523 relates to assets that, under United States law, should be administered in the foreign non-main proceeding.[116]

But under the Fifth Circuit's recent case in *Tacon v. Petroquest Resources Inc.* (*In re Condor Ins. Ltd.*),[117] a foreign representative does not need to file a Chapter 7 or 11 petition to utilize avoidance powers under foreign laws through a Chapter 15 case. In *Tacon*, the debtor, Condor Insurance Ltd., a Nevis corporation, was in a winding up proceeding in Nevis. The appointed joint liquidators, as foreign representatives, also filed a Chapter 15 in the U.S., and the Bankruptcy Court recognized the Nevis proceeding as a foreign main proceeding. The foreign representatives then filed an AP seeking to recover from Condor Guaranty, Inc. $313 million as a fraudulent transfer under Nevis law. The Fifth Circuit, reversing the lower courts, held that a court has authority to grant relief under Section 1527(a) under foreign avoidance laws. It reached its conclusion based upon a plain reading of the language that nothing therein suggested additional exceptions, an analysis of the structure, purpose and history of Chapter 15 to advance the goals of comity, and the cases interpreting Section 304, the predecessor to Chapter 15, which provided significant discretionary relief by the courts.

VI. Limited Authority of Bankruptcy Courts under *Stern v. Marshall*

A. Background and History

1. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*

The Bankruptcy Reform Act of 1978[118] established bankruptcy courts as "adjuncts" of the federal district courts and vested the bankruptcy courts with pervasive jurisdiction over "proceedings arising under title 11 or arising in or related to a case under title 11." In 1982, however, in its plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[119] the Supreme Court held that vesting such broad jurisdiction in a non-Article III court was unconstitutional. The Court determined that the bankruptcy court could constitutionally "adjudicate, render final judgment, and issue binding orders in" matters that are "at the core of the restructuring of the debtor-creditor relationship," but not those matters that are merely "related to" a bankruptcy case, including "a traditional contract action arising under state law, without the consent of the litigants, and subject only to ordinary appellate review."

In the Bankruptcy Amendments and Federal Judgeship Act of 1984,[120] Congress responded to the *Northern Pipeline* decision by designating the non-Article III bankruptcy judges in a district as "a unit of the district court to be known as the bankruptcy court."[121] The pervasive jurisdiction over bankruptcy proceedings was vested in the district courts, and the district courts were authorized to refer all or any portion of a bankruptcy case or proceeding to the bankruptcy judges for the district. Since the Act, all federal district courts have issued standing orders to automatically refer bankruptcy cases and proceedings to the bankruptcy judges.[122]

The 1984 Act also divided bankruptcy proceedings into two classes: "core" proceedings and "related" proceedings. Bankruptcy judges have statutory authority to hear and to determine "all core proceedings arising under title 11, or arising in a case under title 11," subject to ordinary appellate review.[123] In a proceeding that is not core, but that is related to a case under title 11, bankruptcy judges have authority under the 1984 Act only to make a report and recommendation to the district court, which reviews the bankruptcy court's findings and recommendation de novo.[124]

2. *Granfinanciera, S.A. v. Nordberg*

In 1989, the Supreme Court issued another important ruling affecting the authority of the bankruptcy courts in *Granfinanciera, S.A. v. Nordberg*.[125] At dispute in that case was the defendant's right to a jury trial in a bankruptcy trustee's action to recover a money judgment on a fraudulent transfer claim from the defendant, who had not filed a proof of claim in the underlying bankruptcy case. The Supreme Court affirmed the defendant's Seventh Amendment right to a jury trial, reasoning that the trustee's action was for money, "made of the stuff of the traditional actions at common law tried by courts at Westminster in 1789," and it sought to augment, not divide up, the bankruptcy estate. On this basis, the Court ruled that the action was not within the Court's exception to Article III for "public rights" (matters arising between the government and others that are susceptible to judicial

review but do not require it) and therefore, the defendant was entitled to a jury trial.

Both *Northern Pipeline* and *Granfinanciera* limited the authority of bankruptcy courts by imposing the traditional judicial requirements of Article III and the Seventh Amendment[126] on actions to augment the estate.

3. *Katchen v. Landy* and *Langenkamp v. Kulp*

The Supreme Court, in its 1966 decision in *Katchen v. Landy*,[127] had approved the authority of a bankruptcy judge to issue a final judgment in a preference action where the defendant had filed a proof of claim in the underlying bankruptcy case. There, the Court's ruling was based on Section 57g of the Bankruptcy Act,[128] which provided that the bankruptcy court must disallow a proof of claim if the claimant had received a preference or fraudulent transfer and did not return it. Section 57g thereby converted what would otherwise be an action to augment the estate, in which the defendant might be entitled to a jury trial if it had not filed a proof of claim, to a part of the claims allowance process, in which the claimant is not entitled to a jury trial.

The Supreme Court reaffirmed the distinction between a defendant who has filed a proof of claim and one who has not by its 1990 decision in *Langenkamp v. Kulp*,[129] based on Section 502(d) of the Bankruptcy Code,[130] which is identical in substance to former Section 57g. There, the Supreme Court reiterated the principle propounded in its previous *Granfinanciera* and *Katchen* decisions: by filing a proof of claim, the claimant submits the resolution of its claim to the equitable authority of the bankruptcy court, along with any counterclaim or other action whose resolution is integral to the claims allowance process. Thus, under the modern view of the bankruptcy court's authority, counterclaims such as actions to avoid pre-bankruptcy transfers, to a creditor's proof of claim are integral to the restructuring of the debtor-creditor relationship, and therefore within the permissible authority of the bankruptcy court to resolve without a jury, because such counterclaims must be determined in order to determine the allowability of the creditor's claim.

B. *Stern v. Marshall*

1. Background and Procedural History

At age 26, Vickie Lynn Smith, a.k.a. Anna Nicole Smith, became the third wife of J. Howard Marshall, II, an 89-year-old oil tycoon and one of the richest men in Texas, about a year before J. Howard died. Shortly before J. Howard's death, Vickie filed a lawsuit against his son, Pierce Marshall, in Texas state probate court, alleging that Pierce fraudulently induced J. Howard to exclude Vickie from J. Howard's will. Following J. Howard's death, Vickie filed for bankruptcy in California. Pierce filed a claim in Vickie's bankruptcy case alleging that she had defamed Pierce through statements of her lawyers. Pierce also sought a declaration that his defamation claim was not dischargeable in Vickie's bankruptcy. Vickie countered by asserting truth as a defense to Pierce's allegations and filed a counterclaim for tortious interference with a gift she expected from J. Howard.[131]

The bankruptcy judge granted Vickie summary judgment on Pierce's defamation claim and a judgment in Vickie's favor on her tortious interference counterclaim and awarded her nearly $475 million in damages.[132] On appeal, the district court determined that, because its factual connection to Pierce's claim was too tenuous, Vickie's counterclaim was not a "core proceeding" in which the bankruptcy judge could issue a final determination.[133] Instead, it treated the bankruptcy judge's judgment as a report and recommendation and conducted an independent review of the record and trial. Despite the fact that a Texas state court had in the meantime decided the issue in Pierce's favor in a jury trial, the district court decided against Pierce and awarded Vickie approximately $90 million in damages. After a reversal by the Ninth Circuit Court of Appeals, followed by a reversal and remand by the Supreme Court, on the issue of the so-called "probate exception" to federal subject matter jurisdiction, the Ninth Circuit held that Vickie's tortious interference counterclaim was not a core proceeding, and the bankruptcy judge's judgment was therefore not a final judgment.[134] As a consequence of the Ninth Circuit's conclusion, the Texas state court's judgment was the first final judgment on the issue, and was entitled to preclusive effect. The Supreme Court granted certiorari.

2. The Supreme Court's Decision

In contrast to the Ninth Circuit, the Supreme Court[135] held that Vickie's counterclaim was a core proceeding under the plain text of 28 U.S.C. § 157 (b)(2)(C),[136] and the bankruptcy judge therefore had statutory authority to enter a final judgment on Vickie's counterclaim. The Court acknowledged that, by filing a proof of claim in Vickie's bankruptcy case, Pierce consented to the bankruptcy judge's entering a final judgment on his proof of claim, including matters affecting the claim's allowance under Section 502(d) of the Bankruptcy Code. However, the Supreme Court limited the scope of the consent to those counterclaims that "stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process." Therefore, while the bankruptcy judge was authorized to enter a final judgment on Vickie's counterclaim under the statute, the bankruptcy court, as a non-Article III court, lacked constitutional authority to do so.

The Supreme Court's rationale in its holdings stemmed from the baseline principle in *Northern Pipeline* that assigning a claim arising under state law to a non-Article III judge for adjudication violates Article III of the Constitution. The Court recognized the limited exception to this rule in cases involving "public rights," but the "public rights" exception extends "only to matters arising between individuals and the Government in connection

with the performance of the constitutional functions of the executive or legislative departments that historically could have been determined exclusively by those branches." The Court determined that Vickie's counterclaim for tortious interference did not fall within this limited class of cases—it did not stem or flow from a federal statutory scheme or depend on the will of Congress, and it was not limited to a particularized area of law for which the bankruptcy court was particularly suited to examine and determine the issue. Finally, the Court drew a distinction between actions that involve the administration of the estate, including those necessary to resolve the allowance of claims against the estate, and those actions that seek merely to augment the estate. While the former class of actions falls within a bankruptcy judge's constitutional authority to determine, the Supreme Court suggested that the latter category does not. Since Vickie's tortious interference counterclaim was not necessarily resolved as part of determining whether Pierce's defamation claim was allowed, it served merely to augment the estate and did not fall within the bankruptcy judge's authority to administer the estate through the claims allowance process.

3. Implications of *Stern v. Marshall*

Following *Stern v. Marshall*, it is clear that, by filing a proof of claim, a creditor consents to the bankruptcy judge's authority to enter a final judgment on the proof of claim, including matters surrounding its allowance under Section 502(d) of the Bankruptcy Code. It is also clear that the consent to determine a creditor's proof of claim does not constitute consent to the bankruptcy judge's entering a final judgment on a counterclaim unless it "stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." A bankruptcy judge may not have constitutional authority to issue final judgment on a matter, even if that matter is defined as a "core proceeding" under the statute.

Apart from these clear outcomes, several questions remain unanswered. For one, the Court declined to provide any meaningful clarity regarding the scope of the public rights exception. In a bankruptcy context, this leaves open the question whether claims that arise under the Bankruptcy Code are within the public rights exception under the theory that they derive from a federal statutory scheme. In derogation of this theory, the Court seemed to imply, in dicta, that even Bankruptcy Code avoiding power actions, such as fraudulent conveyances and avoidable preferences, while arising from federal statute, may still be outside the bankruptcy judge's constitutional authority to adjudicate unless they are necessarily resolved within the claims allowance process. Thus, it is unclear whether a bankruptcy judge may determine a preference or other avoiding power claim arising from the Bankruptcy Code in a case where the defendant has not filed a proof of claim, for example. At the same time, however, the Court also suggested that its holding would apply only in a narrow set of cases, so that the decision would not "meaningfully change[] the division of labor" between the bankruptcy judges and Article III courts. But the Court failed to address this issue squarely.

Additionally, the Court left unanswered how a bankruptcy judge is to dispose of a matter that is a "core proceeding" under the statute, but which the judge may not finally determine under Article III. May a bankruptcy judge treat such a matter as a "related" proceeding and issue a report and recommendation to the district court? The statute does not authorize for this treatment of matters. After *Stern v. Marshall*, it is unclear how bankruptcy judges are to address these matters.

C. Application of *Stern v. Marshall* in BLMIS Feeder Fund Cases

Questions raised in *Stern v. Marshall* have already found their way into the litigation of actions brought by Irving Picard, the BLMIS trustee, against both BLMIS customers redeeming shareholders of BLMIS feeder funds. Many of the defendants in the trustee's subsequent transferee actions have filed motions with the district court to withdraw the reference of the actions to the bankruptcy court.[137] District Judge Rakoff has withdrawn the reference in many of the actions. In his 29 November 2011 memorandum order withdrawing the reference in five such actions,[138] Judge Rakoff identified questions raised by *Stern v. Marshall* and implicated in the subsequent transferee actions as a basis for withdrawal. He ordered the actions withdrawn from the bankruptcy court to address (among other questions) (i) whether the bankruptcy court may issue a final judgment to avoid fraudulent transfers (under the Bankruptcy Code), and (ii) whether, if the bankruptcy court may not finally determine such actions, it has the authority to render findings of fact and conclusions of law.

Stern v. Marshall may have a similar impact on the litigation of the actions brought by the Fairfield liquidators against shareholders of the Fairfield funds whose shares were redeemed. Even if these actions are core proceedings (as determined by Judge Lifland of the Bankruptcy Court in his decision denying the motion of some defendants to remand the actions to state court,[139] though reversed by Judge Preska on appeal[140]) the bankruptcy judge may lack constitutional authority to determine the actions, since there is no bankruptcy estate in a chapter 15 case against which the defendants could have filed proofs of claim. With no claims allowance process, the *Fairfield* actions are really only claims to augment the Fairfield estate in the BVI, and therefore fall outside of the bankruptcy judge's constitutional authority to decide under *Stern*. Further, if the actions are core proceedings, the bankruptcy judge may also lack statutory authority to issue proposed findings of fact and conclusions of law on the matters. Considering the view held by some that

a bankruptcy court is a less-than-ideal forum in which to defend the *Fairfield* actions, the implications of *Stern v. Marshall* could prove meaningful in the *Fairfield* cases by effectively removing them in any capacity from the bankruptcy court.

VII. Chapter 15 in Practice—How the Fairfield Liquidators Used Chapter 15

A. Background

Fairfield Sentry Limited was a Business Company registered in the British Virgins Islands ("BVI") to serve as a "feeder fund" permitting largely non-U.S. entities to invest with Bernard L. Madoff Investment Securities LLC ("BLMIS"). Sentry was the largest of the BLMIS feeder funds, with BLMIS account statements reflecting more than $7 billion in assets (representing approximately ninety-five percent of Sentry's total assets) supposedly held by BLMIS. Sentry's investors purchased redeemable, voting shares in the fund, permitting the investors to redeem the shares at their net asset value, as calculated by the fund's board of directors. Two other related funds, Fairfield Sigma Limited and Fairfield Lambda Limited, were indirect feeder funds established to permit foreign currency investment in BLMIS through Sentry. Together, the Fairfield funds collected investments from nearly one thousand investors.

When Madoff's massive Ponzi scheme was uncovered in December 2008, it became clear that money obtained from BLMIS investors was not used to purchase the securities reflected on the investors' account statements, but rather was used to fund the withdrawals of previous investors. In other words, billions of dollars of assets supposedly held in various BLMIS customer accounts had, in reality, been paid to other BLMIS customers as returns of principal and purported profits or otherwise misappropriated by Madoff.

Following this discovery, the directors of the Fairfield funds suspended redemptions of the funds' shares, and in Spring 2009, shareholders applied to the Commercial Division of the High Court of Justice, British Virgin Islands for appointment of liquidators to manage the winding up of the funds under the BVI insolvency regime.

B. Liquidation Proceedings Under the Insolvency Act of the British Virgin Islands

Liquidation proceedings in the BVI are governed by the BVI Insolvency Act of 2003, the corporate insolvency law of the BVI. The Act provides "a mechanism for insolvent persons to enter into arrangement with their creditors, an administration procedure for companies, the receivership of companies and foreign companies, [and] the liquidation of companies…."[141] The BVI Insolvency Act contains provisions similar to those found in the insolvency laws of England.

Lambda's liquidation proceeding in the BVI was commenced by the application of one of its secured creditors on 27 February 2009, in accordance with Part VI of the BVI Insolvency Act, seeking the appointment of a liquidator. The liquidation proceedings of Sentry and Sigma commenced on 21 April and 23 April 2009, respectively, when shareholders of each fund made similar applications to the BVI Court. On 23 April 2009, the BVI Court granted the application of Lambda's shareholders, ordering that the Lambda fund be wound up in accordance with the BVI Insolvency Act,[142] and on 21 July 2009, the BVI Court did the same for the Sentry and Sigma funds.[143] The Honorable Justice Edward Bannister, Q.C., the presiding judge of the Commercial Division of the Eastern Caribbean Supreme Court, is currently assigned to the Fairfield liquidation proceedings.

Joint liquidators were appointed by the BVI Court to obtain custody and control of the funds' assets and to act on the funds' behalf to liquidate the funds' assets (although only one is currently serving). Under the BVI Insolvency Act, the liquidators are officers of, and are subject to the close supervision of, the BVI Court.[144] The liquidators are required to seek authority from the BVI Court to enter into a settlement or other arrangement with a creditor or holder of a claim or to commence, continue, discontinue or defend any action of other legal proceeding. As a matter of BVI law, the management functions of the funds are entirely vested in the liquidators, subject to BVI Court approval, and the directors of the funds have little or no authority in the liquidation.

C. Recognition by the United States Bankruptcy Court

Section 1517(a) of the Bankruptcy Code requires recognition of a foreign proceeding if (1) it is a foreign proceeding pending in a country where the debtor has an "establishment" or the "center of its main interests" (or "COMI"), (2) the applying foreign representative is a "person or body" and (3) the petition is accompanied by certain required certifications.[145] If these requirements are met, the foreign proceeding must be recognized by the bankruptcy court as a foreign main proceeding if it is pending in the country where the debtor has its COMI. Otherwise it must be recognized as a foreign non-main proceeding.[146]

On 7 May 2010, the BVI court authorized the liquidators, in accordance with Section 472 of the BVI Insolvency Act, to seek recognition of the Fairfield funds' liquidation proceedings in the United States under Chapter 15 of the United States Bankruptcy Code. The liquidators filed Chapter 15 petitions for recognition of the foreign liquidation proceedings before the United States Bankruptcy Court for the Southern District of New York on 14 June 2010, alleging that the Funds' COMI was in the BVI. Bankruptcy Judge Burton R. Lifland was assigned the case.

The bankruptcy court granted the Fairfield liquidators' petitions on 22 July 2010, recognizing the BVI liquidation proceedings as a foreign main proceeding and the liquidators as foreign representatives under the Bankruptcy Code.[147] Judge Lifland reasoned that, although the funds had operated almost exclusively in New York before their liquidation proceedings, the business of the liquidation was in the BVI since the liquidation proceedings were sufficient to establish their COMI as of the date of the commencement of the Chapter 15 case. The bankruptcy court's recognition automatically accorded the funds the benefit of the Bankruptcy Code's automatic stay, which, among other things, barred all actions and proceedings against the funds and their property in the United States.[148] However, to preserve settlement efforts, the liquidators agreed that the stay would not apply to the adversary proceeding commenced in the bankruptcy court by the BLMIS trustee, Irving Picard, against the Fairfield funds to recover withdrawals from the funds' BLMIS customer accounts. The recognition order also permitted the liquidators to conduct discovery under the Bankruptcy Code and Bankruptcy Rules.

The plaintiffs in a putative derivative action on Sentry's behalf in New York Supreme Court objected to recognition and filed an appeal from the recognition order on the grounds that the Fairfield funds' COMI was not in the BVI and they did not have an establishment in the BVI, thereby precluding recognition as either a foreign main proceeding or a foreign non-main proceeding. The United States District Court for the Southern District of New York affirmed the recognition order on 16 September 2011.[149] The plaintiff filed a notice of appeal of the decision to the Court of Appeals for the Second Circuit.[150] The appeal is pending.

D. The Liquidators' Actions to Recover Redemption Payments

In efforts to recover payments made by the Fairfield funds to their shareholders, the liquidators have filed over two hundred twenty recovery actions against the shareholders and unnamed beneficial owners represented by nominee shareholders. One controversial aspect of the Bankruptcy Court's recognition of the Fairfield liquidation proceedings is that it potentially provided the liquidators with what many view as a more favorable forum to litigate these actions. The liquidators have filed actions in three separate jurisdictions: the BVI Court; New York Supreme Court; and the United States Bankruptcy Court.

1. The BVI Court Actions

Between September 2009 and March 2010, the Fairfield liquidators filed twenty protective writs in the BVI Court to recover redemption payments from the funds' shareholders whose shares the funds had redeemed before the discovery of the BLMIS fraud. The liquidators asserted two causes of action: the payment of the redemption price was made under a mistake of fact, because the net asset value of the shares was nil or at least far below the redemption price, and the payment of the redemption price was effected under a mutual mistake.[151]

On 16 September 2011, the BVI Court entered a judgment on certain "preliminary issues" in the proceedings.[152] As part of that judgment, the BVI Court determined that the redeeming shareholders gave good consideration in exchange for the redemption payments, and the liquidators should not be permitted to recover the redemptions payments on the basis that the net asset value of the shares was calculated using information that later proved unreliable for reasons not connected to the redeeming shareholders. On the basis of the preliminary issues judgment, the BVI Court granted summary judgment to the defendants in the actions before the BVI Court on 10 October 2010.[153] The liquidators have appealed that judgment.

2. New York Supreme Court Actions

Beginning in April 2010, the liquidators of the Fairfield funds filed over one hundred forty actions in the Supreme Court of the State of New York against shareholders whose shares the funds had redeemed, seeking to recover redemption proceeds under common-law causes of action, including mistaken payment, money had and received, unjust enrichment and constructive trust. On 3 and 7 September 2010, following the United States Bankruptcy Court's recognition of the Fairfield foreign main proceedings, the liquidators removed fifty-nine of the New York state court actions to the United States District Court, where they were automatically referred to the Bankruptcy Court and assigned to Judge Lifland. The liquidators discontinued the remaining state court actions.

In response to the removal, defendants in forty-one of the New York state court actions promptly moved the Bankruptcy Court to abstain from adjudicating the actions and to remand the actions to the New York Supreme Court.[154] The motions were made under 28 U.S.C. § 1334(c), which requires a bankruptcy court to abstain from hearing a proceeding if the proceeding is "based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section [which is the bankruptcy jurisdictional section]…and can be timely adjudicated, in a State forum of appropriate jurisdiction" and under 28 U.S.C. § 1452(b), which permits remand "on any equitable ground."

In addition to the motions to remand or abstain, defendants in the actions removed from New York state court filed motions at the District Court under 28 U.S.C. § 157(d) to withdraw the automatic reference of the actions to the Bankruptcy Court, so that the District Court would

hear the remand and abstention motions.[155] The motions requested relief under the so-called "permissive withdrawal" prong of 28 U.S.C. § 157(d), which provides that a district court may withdraw the reference "for cause shown."[156] To evaluate "cause" under this permissive basis for withdrawal, courts in the Second Circuit focus on considerations of "efficiency and uniformity" in the administration of bankruptcy law, typically addressing whether the claim is a core proceeding or a non-core proceeding as a threshold issue before turning to "questions of efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors."[157]

On 22 November 2010, Judge Preska of the District Court denied the defendants' motions to withdraw the reference.[158] Since the Bankruptcy Court had not yet determined whether the claims at issue were core proceedings, Judge Preska left that determination to the Bankruptcy Court and decided that the preliminary nature of the proceedings and the Bankruptcy Court's familiarity with the "complex Madoff factual context" favored adjudication before the Bankruptcy Court as more efficient and uniform.

Judge Lifland denied the defendants' motions to remand or abstain on 23 May 2011.[159] The defendants appealed the decision to the District Court. On 19 July 2011, Judge Preska of the District Court reversed Judge Lifland's order denying remand of the New York state court actions.[160]

While the abstention and remand motions were pending, the liquidators amended most of the previously filed complaints to add causes of action for recovery of the redemption payments as "unfair preferences" and "undervalue transactions" under Sections 245 and 246, respectively, of the BVI Insolvency Act. According to the actions, the payments to redeeming shareholders are recoverable under the Act because they (1) were made while the fund was insolvent or caused the fund to become insolvent, (2) were made during the period between two years prior to the onset of insolvency and the appointment of the liquidators and (3) improved the position of the shareholders over that which they would have been in had the payments not been made (unfair preference) and were not given in exchange for adequate consideration (undervalue transaction).[161]

The defendants in the proceedings subject to the abstention and remand motions argued that the court should not consider the amendments to the complaints in determining the abstention and remand motions. They argued that, under general principles applicable to a remand motion, the court must determine the motion based on the state of the record as of the filing of the notice of removal.[162] The standard for mandatory abstention includes the requirement that the claim be based on a state law claim or cause of action. The addition of the BVI law claims, if considered in the remand proceeding, might vitiate that ground. Ultimately, Judge Preska determined that the amendments to the complaints did not affect her decision, either because the "State law claim or cause of action" requirement was satisfied, since the underlying cause of action not be based on federal law, or because the essence of the BVI Insolvency Act claims was essentially the same as the initial common law claims.[163]

The liquidators sought and obtained from Judge Preska an order under 28 U.S.C. § 1292(b) authorizing an interlocutory appeal of her decision to the United States Court of Appeals for the Second Circuit.[164] The liquidators have now filed their motion under Fed. R. App. Proc. 5(a) with the Court of Appeals for leave to appeal Judge Preska's order.[165] If the Court of Appeals upholds the decision, the Bankruptcy Court will hear evidence of the New York state courts' ability to adjudicate the actions timely and effectively before determining whether the actions should proceed in state court.

3. Post-Recognition Actions in the Bankruptcy Court

Beginning in August 2010, the liquidators filed more than one hundred seventy complaints in the Bankruptcy Court against shareholder banks (and their associated beneficial owner-customers) whose shares the funds redeemed, bringing the total number of actions pending in the bankruptcy court as of 14 December 2011 to 230,[166] including those originally brought in the New York state court system.

The complaints include common-law restitution claims for unjust enrichment, monies had and received, mistaken payment and constructive trust.[167] Each of these claims is founded on the common allegation that at the time payments were made to those shareholders in redemption of their tendered shares, the net asset value of the shares was calculated on the mistaken belief that the funds' BLMIS account statements reflected accurate values of securities. In late 2010 and early 2011, after receiving authorization from the BVI Court, the liquidators amended most of the complaints in the actions to add statutory claims under the BVI Insolvency Act for "unfair preferences" and "undervalue transactions."[168] Complaints that the liquidators have filed since then included those claims in the original complaints.

In response to the litigation on the New York state court defendants' remand or abstain motions and the summary judgment of the BVI Court, the Bankruptcy Court issued an order on 19 October 2011 staying all of the redeemer actions pending "developments in connection with" the appeals from the BVI Court's summary judgment and Judge Preska's 19 September order.[169] Since then, several defendants in the New York actions have filed an application with the BVI Court under Section 273 of the BVI Insolvency Act to revoke the liquidators'

authority to litigate the redeemer actions in the United States. That application is currently pending.

E. Settlement Between the Fairfield Liquidators and the BLMIS Trustee

On 18 May 2009, Irving Picard, the trustee for the liquidation of the BLMIS estate, commenced an adversary proceeding in the Bankruptcy Court against the Fairfield funds, seeking to recover approximately $3.05 billion that Sentry allegedly received from BLMIS during the six-year period before the commencement of the BLMIS liquidation proceeding.[170] The complaint asserted claims against the Fairfield funds for recovery of preferential transfers under Section 547 of the Bankruptcy Code and fraudulent transfers under sections 544 and 548 of the Bankruptcy Code and the New York Fraudulent Conveyance Act. As noted above, the Chapter 15 recognition of the Fairfield funds' foreign proceedings did not stay Picard's action against the funds.

On 9 May 2011, the Fairfield liquidators and Picard reached a settlement agreement to dispose of Picard's action against the Fairfield funds. Under the agreement, Picard receives a cash payment of $70 million from the liquidators. Sentry receives an allowed claim of $230 million in the BLMIS case, reduced from Sentry's net investment balance plus payment of $1.263 billion. In addition, Picard obtains a judgment against each of Sentry, Sigma and Lambda for $3.054 billion, $752.3 million and $52.9 million, respectively, which represents the full amount of the voidable transfers Picard sought to recover from the funds in his action. Under the settlement agreement, enforcement of the judgment is stayed, however. It will be satisfied instead by a sharing, according to various percentages specified in the agreement, of amounts that the liquidators recover in their litigation against the Fairfield funds' management, service providers and investors and amounts that Picard recovers in subsequent transferee litigation against the funds' investors under section 550 of the Bankruptcy Code, which permits a bankruptcy trustee that avoids a preference or fraudulent transfer to recover the property transferred from the initial transferee or from a subsequent transferee of the initial transferee, subject to certain limitations.

On 7 and 8 June 2011, the BVI Court and the Bankruptcy Court, respectively, approved the settlement agreement.[171]

Endnotes

1. *See* Samuel Bufford, United States International Insolvency Law at 20 (Oxford: 2009).
2. *See id.*, 21-22.
3. *See Practice Guide on Cross-Border Insolvency Cooperation* (the "Practice Guide"), adopted by UNC1TRAL in 2009, which summarizes and discusses protocols and other ad hoc methods adopted by courts and insolvency practitioners to address issues arising from cross-border multinational insolvencies.
4. *Practice Guide* at 719.
5. Bufford, note 1 *supra*, at 15.
6. Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L. J. 713, at 718 (2005).
7. *Id.*
8. *Id.*
9. *Id.* at 718-719.
10. *See* House Report No. 109-31, Pt. 1, 109th Cong., 1st Sess. 109.
11. Australia (2008), Canada (2009), Colombia (2006), Eritrea (1998), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), United Kingdom (2006), British Virgin Islands (2003).
12. UNCITRAL, The UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective, ("The Judicial Perspective") ¶ 13(a).
13. *Id.* ¶ 26(a).
14. *Id.* ¶ 13(c).
15. See Bankruptcy Code §§ 1519–1521.
16. The Judicial Perspective, note 12 supra, ¶ 13(d).
17. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S. Ct. 2891, 2920, 125 L. Ed. 2d 612 (1993).
18. *Hilton v. Guyot*, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895).
19. *Id.*, 16 S. Ct. at 163.
20. S*omportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (2d Cir. 1971), cert. denied, 405 U.S. 1017 1972).
21. Section 1507(a) provides: "Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States." Section 1507(b) provides that in determining whether to provide such additional assistance, the court should consider

    > whether such additional assistance, consistent with the principles of comity, will reasonably assure the (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.

    These standards are identical to the standards set out in former Section 304 for a court to consider in deciding whether to grant a Section 304 petition, with the exception that the reference to comity is now placed in the prefatory section rather than receiving its own section, in recognition that comity should be the overarching criteria.
22. House Report No. 109-31, Pt. 1, 109th Cong., 1st. Sess. 109 (2005).
23. 11 U.S.C. § 1501(c). *See also* Bufford, note 1 *supra*, p. 46.
24. *See, e.g., In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Inc.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008). The Bankruptcy Court observed that the foreign representative was not without remedy—it could file a chapter 11 proceeding. 374 B.R. at 132. However, 11 U.S.C. § 1511 provides that a foreign representative can only file a case under Section 301, 302 or 303 after recognition. While this may be a drafting flaw, as the Court observed at n. 15, it is nevertheless the language of the statute and has not been corrected since *Bear Stearns* was decided.

25. Bufford, note 1 *supra*, pp. 47, 54.

26. Bufford, note 1 *supra*, at 57.

27. *See* cases discussed in Bufford, note 1 *supra*, at 57.

28. Chapter 15 "incorporate[s] the Model Law on Cross-Border Insolvency" drafted by UNCITRAL, the United Nations Commission on International Trade. 11 U.S.C. § 1501(a). Section 1508 of the Bankruptcy Code directs that "[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 U.S.C. § 1508. *See also* H.R. Rep. at 105 (Chapter 15 "incorporates the Model Law on Cross Border Insolvency to encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases...[in order to] provide greater legal certainty for trade and investment as well as to provide for the fair and efficient administration of cross-border insolvencies which protects the interests of creditors and other interested parties, including the debtor.") Accordingly, courts frequently look to the Model Law and the Model Law's Guide to Enactment published by UNCITRAL in interpreting Chapter 15. The Model Law and Guide to Enactment are available at: http://www.uncitral.orgiuncitral/on/commission/sessions/30th.hml.

29. H.R. Rep. No. 109-31, 10th Cong. 1st Sess. 100 (2005) at 109 ("H.R. Rep.").

30. 11 U.S.C. § 1509(a).

31. The foreign representative's exposure to suit is limited to matters relating to the foreign proceeding. *See* 11 U.S.C. § 1510 ("The sole fact that a foreign representative files a motion under section 1515 does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose.").

32. 11 U.S.C. § 1509(b).

33. Section1509(d) gives the court tools to give effect to a denial of recognition. It provides that "[i]f the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States." 11 U.S.C. § 1509(d).

34. Even in the face of a denial of recognition, Section 1509(f) preserves the right of a foreign representative "to sue in a court of the United States to collect or recover a claim that is property of the estate." 11 U.S.C. § 1509(f).

35. In *In re Lida*, 377 B.R. 243 (9th Cir 2007), described the "single point of entry" concept, as follows:

> While Model Law article 9 merely requires that the foreign representative be "entitled to apply directly to a court," § 1509 erects a structure in which the foreign representative passes through the bankruptcy court for a recognition decision, the specified consequences of which are that the foreign representative gains the capacity to sue and be sued in United States courts and the authority to apply directly to a court in the United States for appropriate relief, and that all courts in the United States must grant comity or cooperation to the foreign representative. 11 U.S.C. § 1509. Congress specifically intended that control of these questions be concentrated in the bankruptcy court.
>
> The primacy of the bankruptcy court's authority over whether ancillary assistance will be granted to a foreign representative is reinforced by authorization for the bankruptcy court to issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation in another court in the United States if recognition is denied. 11 U.S.C. § 1509(d).

Id. at 257 (footnotes omitted).

36. *See, e.g., United States v. J.A. Jones Constr. Group, LLC*, 333 B.R. 637 (E.D.N.Y. 2005) (court held that it lacked authority to honor Canadian court-appointed receiver's request for a stay of proceeding against the foreign debtor because receiver had failed to obtain an order under Chapter 15 recognizing the proceedings in Canada as "foreign proceedings"); *Andrus v. Digital Fairway Corp.*, 2009 WL 1849981 at *3 (N.D. Tex. 26 June 2009) (court denied defendant's request for stay of litigation where defendant had not commenced a Chapter 15 case. "A motion to stay in federal court draws no strength from the unrelated matter of potential Chapter 15 proceedings or the myriad of outcomes possible in them.").

37. 11 U.S.C. § 101(23).

38. 11 U.S.C. § 101(24). *See, e.g.*, *In re Tri-Continental Exchange, Ltd.* 349 B.R. 627 (Bankr. E.D. Cal. 2006). In that case, the court found that liquidators of insurance companies organized as international business companies under the laws of the nation of St. Vincent and the Grenadines ("SVG") that were the subject of winding-up proceedings in the Eastern Caribbean Supreme Court, High Court of Justice, were authorized by that court to administer the liquidation of the debtor's assets and affairs in the SVG and thus were foreign representatives within the meaning of 11 U.S.C. § 101(24).

39. *See, e.g.*, *In re Betcorp Limited*, 400 B.R. 266, 277 (Bankr. D.Nev. 2009); *In re Gold & Honey Ltd.*, 410 B.R. 357, 367 (Bankr. E.D.N.Y. 2009) (*citing In re Betcorp*).

40. In *In re Betcorp*, note 39 *supra*, 400 B.R. at 277, the court noted that while the term "proceeding," as used in cases under title 11, "has a fairly circumscribed meaning" and is "used to refer to in-court events, such as hearings, as well as being used to refer to self-contained lawsuits brought within a particular case," in the context of Chapter 15 the term "requires a broader definition in order to achieve the statutory directive of interpretation consistent with the understandings and the usages of international law and the UNCITRAL Model Law." That court found that, in the context of corporate insolvencies, the "hallmark of a 'proceeding' is a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets." *Id* at 278.

41. In many instances, the foreign representative is seeking recognition of a judicial proceeding. Less common are cases where the foreign proceeding is administrative in nature. *In re Tradex Swiss, A.G.*, 384 B.R. 34 (Bankr. D. Mass. 2008), is an example of a case in which a U.S. court granted recognition in an administrative proceeding. The court held that a proceeding commenced by the Swiss Federal Banking Commission (the "Commission") was a "foreign proceeding," since (i) the Commission acts as a liquidator of banks and securities brokers, (ii) the Commission's proceeding is an administrative proceeding under a law relating to insolvency, and (iii) the Commission itself is within the definition of "foreign court" under section 1502(3) and is an authority competent to control or supervise a foreign proceeding. *See also In re Betcorp*, note 39 *supra*, 400 B.R. at 284 (for purposes of Bankruptcy Code sections 101(23) and 1502, Australian Securities and Investment Commission, as the body governing online gaming company that was the subject of a members' voluntary winding up under Australian law, was an authority competent to control and supervise a foreign proceeding).

42. The requirement that a proceeding be a "collective" in nature is "intended to limit the application of Chapter 15 proceedings that benefit creditors as a whole, and to exclude proceedings that are for the benefit of a single creditor." See Hammer & McClintock, *Understanding Chapter 15 of the United States Bankruptcy Code: Everything you Need to Know about Cross-Border Insolvency Legislation in the United States*, 15 L & Bus. Rev. Am. 257 at n. 20 (Spring 2008) (*quoting* Griffins & Smith, *Transatlantic Insolvency Jurisdiction—The interplay between Chapter 15 of the U.S. Code and the EU Insolvency Regulation*, 21 J. Int'l Banking L. & Reg. 435, 435-46 (2006)). *See In re Betcorp*, note 39 *supra*, 400 B.R. at 281 ("A collective proceeding is one that considers the rights and obligation of all creditors. This

is in contrast, for example, to a receivership remedy instigated at the request, and for the benefit of, a single secured creditor.") *Compare In re British American Ins. Co. Ltd.*, 425 B.R. 884, 902 (Bankr. S.D. Ha. 2010) (Bahamian insolvency proceedings and a judicial action pending in Saint Vincent and the Grenadines ("SVG") were "collective" proceedings because both intended to protect creditors as well as policyholders, both gave creditors an opportunity to be heard, and in both, the creditors would be notified if assets became available for distributions), *with In re ABC Learning Centers Limited*, 445 B.R. 318 (Bankr. D. Del. 2010), on reconsideration in part (21 January 2011) (receivership under Australian law conducted for the sole benefit of secured creditors not a collective proceeding) and *In re Gold & Honey, Ltd.*, note 39 *supra*, 410 B.R. at 369-70 (Israeli receivership proceeding initiated at the request of secured creditor under Israeli Companies Ordinance, which did not require secured creditors to consider the rights and obligations of all creditors, is not a "collective" proceeding).

43. The legislative history explains that the phrase "under a law relating to insolvency of adjustment of debt" is intended to make clear that "Chapter 15 is available not only to debtors that are technically insolvent or facing liquidation but also to debtors who are in financial distress and may need to reorganize." H.R. Rep. at 118.

44. Section 1502 of the Bankruptcy Code broadly defines the term "foreign court" to mean "a judicial or other authority competent to control or supervise a foreign proceeding." 11 U.S.C. § 1502(3). In many cases it is self evident that a foreign court or other authority is overseeing the assets and affairs of a foreign debtor. *See, e.g., In re BAIC*, note 42 *supra*, 425 B.R. 905 (no question that foreign courts were supervising foreign proceedings because relevant statutes directed that court-appointed judicial managers of the British American Insurance Company, Limited in the Bahamas and Saint Vincent and the Grenadines ("SVG") were subject to the supervision of the Bahamas and SVG courts, respectively); *In re Betcorp*, note 39 *supra*, 400 B.R. at 284–85 (liquidators who had direct control of assets and affairs of Australian online gaming company regulated by the Australian Securities and Investment Commission ("ASIC") that was the subject of a members' "voluntary winding up" under Australian law were subject to the control of both ASIC, as an "authority competent to control a foreign proceeding" and to the judicial authority of the Australian courts); *In re Tradex Swiss A.G.*, note 41 *supra*, 384 B.R. 34 (Swiss Federal Banking Commission was "other authority competent to supervise foreign proceeding."

    Whether the foreign debtor's assets and affairs were subject to court supervision was at issue in *In re Oversight & Control Commission of Avanzil, S.A.*, 385 B.R. 525 (Bankr. S.D.N.Y. 2008). In that case, an "Oversight Commission" established pursuant to a court approved "*convenio*," or payment plan, in a case (a "*suspension de pagos*") brought under Spain's 1992 Suspension of Payments Act ("SOPA"), sought relief under Chapter 15. A creditor moved to dismiss the case, arguing, among other things, that because the "judicial intervenors" appointed by the Spanish Insolvency Court had been discharged, the court no longer exercised control and supervision of the debtor's assets for the purpose of reorganization. As a preliminary matter, the court found that as a general matter, the "*suspension de pagos*" fit "squarely within the definition of foreign proceeding." *Id.* at 533 (footnote omitted). The court explained that:

    > The SOPA concerns insolvency and adjustment of debt. The proceeding is a collective judicial proceeding in which the debtor reaches a payment agreement with its creditors subject to the approval of the insolvency court. Trustees are appointed, and the assets and affairs of the debtor are subject to control or supervision by the Spanish court for the purpose of reorganization or liquidation.

    Id. Having determined that the *suspension de pagos* easily qualified as a "foreign proceeding," the court had to consider whether the Spanish court's sanction of the payment plan, coupled with the appointment of the Oversight Commission so altered the status of the case that it no longer qualified as a "foreign proceeding." The bankruptcy court found that the Spanish Insolvency Court retained control and supervision over the proceedings such that they remained subject to the control of the Spanish court. Among other things, the bankruptcy court noted that the Spanish court retained the power to oversee payment of claims, settle disagreements and liquidate the debtor if it failed to make payments under the plan. *Id.* at 534. The bankruptcy court also found that the *suspension de pagos* did not lose its character as a proceeding for the purpose of reorganization, because the payment of claims was a critical element of the reorganization. *Id.*

45. *See, e.g., In re Betcorp*, note 39 *supra*, 400 B.R. at 284 (a voluntary winding up is a statutory process under the laws of Australia through which a company is liquidated).

46. 11 U.S.C.§ 1504.

47. Section 1519 authorizes the court to provide relief upon the filing of a Chapter 15 petition for relief.

48. As explained below, the nature and extent of relief available to a foreign representative upon recognition of a foreign proceeding depends on whether the foreign proceedings are foreign main or foreign non-main proceedings.

49. 11 U.S.C. § 1515(b). The petition must also 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). Section 1515(d) directs that the documents be translated into English. It also gives the court discretion to "require a translation into English of additional documents."

50. H.R. Rep. at 112.

51. 11 U.S.C. § 1516.

52. 11 U.S.C. § 1516.(c) ("In the absence of evidence to the contrary, the debtor's registered office or habitual resident in the case of an individual, is presumed to be the center of the debtor's main interests.").

53. Fed.R. Evid. 301 states:

    > In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of nonpersuasion.

    In case of *In re Tri-Continental*, note 38 *supra*, 349 B.R. at 635, the court explained application of Section 1516(c) as follows:

    > In effect, the registered office (or place of incorporation) is evidence that is probative of, and that may in the absence of other evidence be accepted as a proxy for, "center of main interests." The registered office, however, does not otherwise have special evidentiary value and does not shift the risk of nonpersuasion, i.e., the burden of proof, away from the foreign representative seeking recognition as a main proceeding.
    >
    > Thus, if the foreign proceeding is not in the country of the registered office, then the foreign representative has the burden of proof on the questions of "center of main interests." Correlatively, if the foreign proceeding is in the country of the registered office, and if there is evidence that the center of main interests might be elsewhere, then the foreign representative must prove that the center of main interests is in the same country as the registered office.
    >
    > It follows that the burden of proof as to the "center of main interests" is never on the party opposing "main" status and that such an opponent has only a

burden of going forward to adduce some evidence inconsistent with the registered office warranting a conclusion of "main" status.

54. 11 U.S.C. § 1517(a). The statutory mandate is subject to a narrow public policy exception in Section 1506, which permits a court to refuse recognition "if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. In *In re SPhinX, Ltd*, 351 B.R. 103, 115 n.15 (Bankr. S.D.N.Y. 2006) ("*SPhinX I*"), *aff'd,* 371 B.R. 10 (S.D.N.Y. 2007) ("SPhinX"), the court noted that the public policy exception "has been narrowly interpreted on a consistent basis in courts around the world. The word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States."

55. *See, e.g.*, *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 40 (Bankr. S.D.N.Y. 2008).

56. *See, e.g.*, *Ran v. Lavie* (*In re Ran*), 607 F.3d 1017, 1022 (11th Cir. 2010), *citing In re Bear Stearns High-Grade Structured Credit Strategies Master Fund*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007) ("*Bear Stearns I*"), *aff'd,* 389 B.R. 325 (S.D.N.Y. 2008) ("*Bear Stearns II*").

57. 11 U.S.C. § 1519.

58. 11 U.S.C. § 1520.

59. 11 U.S.C. § 1521.

60. 11 U.S.C. § 1502(4).

61. 11 U.S.C. § 1502(5).

62. 11 U.S.C. § 1502(2). "In contrast to COMI, '[t]he existence of an establishment is essentially a factual question, with no presumption in its favor'." *In re Ran*, note 56 *supra*, 607 F.3d at 1026 (*quoting In re Bear Stearns II*, note 56 *supra*, 389 B.R. at 338).

63. *See, e.g.*, *In re Millennium Global Emerging Credit Master Fund Limited*, 458 B.R. 63, 71 (Bankr. S.D.N.Y. 2011).

64. *See In re Bear Stearns (I)*, note 56 *supra*, 374 B.R. at 129 (*citing In re Tri-Continental Exchange Ltd.*, note 38 *supra*, 349 B.R. at 633-34).

65. *See, e.g.*, *In re SPhinX I*, note 54 *supra*, 351 B.R. at 117; *In re Bear Stearns I*, note 56 *supra*, 374 B.R. at 128; *In re Tradex*, note 41 *supra*, 384 B.R. at 42-43; *In re Ernst & Young, Inc.*, 383 B.R. 773, 779 (Bankr. D. Colo. 2008); *In re Basis Yield*, note 55 *supra*, 381 B.R. at 47.

66. 11 U.S.C. § 1516(c).

67. *In re Ran*, note 56 *supra*, 607 F.3d at 1022 (*citing Texas v. Florida*, 306 U.S. 398 (1939)).

68. *In re Ran*, note 56 *supra*, 607 F3d 1017 is particularly instructive. There, the Fifth Circuit affirmed the denial of a petition for recognition of an Israeli bankruptcy proceeding under Chapter 15 for an individual debtor because it did not qualify as a foreign main or foreign non-main proceeding. In doing so, the court found that neither the debtor's COMI, nor his "establishment," were located in Israel at the time the petition for recognition was filed.

    In that case, Ran was an Israeli businessman and promoter when he encountered financial difficulties in the late 1990s. He was a director or shareholder in almost one hundred Israeli companies, some of them publicly owned. One such company was Israel Credit Limes Supplementary Financial Services Ltd. ("Israel Credit"), a public company founded by Ran for which he served as CEO. Credit Lines raised millions of dollars from investors and owned interests in numerous other companies. Ultimately, Credit Lines was put into liquidation through an Israeli bankruptcy proceeding and the court-appointed receiver is asserting claims against Ran for millions of dollars of damages.

    In 1997, an involuntary bankruptcy case was commenced against Ran in the Israeli district court of Tel Aviv-Jaffa and Zuriel Lavie was appointed receiver under that case. Ran left Israel before the involuntary proceeding was commenced and has never returned. As of the commencement of the Chapter 15 case in 2006, Ran carried on no business in Israel and had not done so since 1998.

    The court held that a review of the objective factors proved that Ran's COMI was in the United States. Specifically, the court considered the following: (i) Ran along with his family left Israel nearly a decade prior to the filing of the petition; (ii) Ran had no intent to return to Israel; (iii) Ran had established employment and a residence in Houston, Texas; (iv) Ran was a permanent legal resident of the United States and his children were United States citizens; and (v) Ran maintained his finances exclusively in Texas.

69. *In re Bear Stearns I*, note 56 *supra*.

70. *Id.*, 374 B.R. at 129.

71. *Id.*

72. *Id.* at 132-33.

73. *In re Bear Stearns II*, note 56 *supra*, 389 B.R. at 335.

74. *In re Basis Yield*, note 55 *supra*.

75. *Id.* at 42.

76. *Id.* (Footnote omitted).

77. *Id.*

78. *See also In re Ran*, note 56 *supra*, 607 F.3d at 1025-26 (relevant date is the date of the commencement of the Chapter 15 case); *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 65-66 (Bankr. S.D.N.Y. 2010), *aff'd*, 2011 WL 4357421, * 6 (S.D.N.Y. 16 Sept. 2011) (applied "totality of circumstances test" to find that date of commencement of Chapter 15 case controls); *In re British Am. Ins. Co. Ltd.*, 425 B.R. 884, 910 (Bankr. S.D. Fla. 2010) (same); *In re Betcorp Ltd.*, note 39 *supra*, 400 B.R. at 290-91 (same).

79. *See, e.g.*, *In re Millennium Global*, note 63 *supra*, 458 B.R. at 71 (relevant date is the date underlying foreign proceeding is commenced).

80. Section 1502(4) states that a "'foreign main proceeding' means a foreign proceeding pending in the country where the debtor has the center of its main interests" (emphasis added).

81. *See In re Ran*, note 56 *supra*, 607 F.3d at 1025.

82. *In re Betcorp*, 400 B.R. 266.

83. *In re Betcorp*, note 39 *supra*, 440 B.R. at 291. *See also In re Ran*, note 56 *supra*, 607 F.3d at 1025; *In re Brit. Am. Ins. Co. Ltd.*, note 78 *supra*, 425 B.R. at 909-10 ("If all recognition proceedings, wherever pending, consider the latest available evidence, there is a greater likelihood that the appropriate foreign main and foreign non-main proceedings will be recognized as such in a consistent manner").

84. *In re Betcorp*, note 39 *supra*, 400 B.R. at 291. *See also In re Ran*, note 56 *supra*, 607 F.3d at 1025-26.

85. 440 B.R. 60 (Bankr. S.D.N.Y. 2010), *aff'd,* 2011 WL 4357421 (S.D.N.Y. 16 Sept. 2011).

86. *In re Fairfield Sentry Limited*, note 85 *supra*, 440 B.R. at 65-66 ("The jurisprudence emerging from [*In re Ran*, *In re Betcorp* and *In re British Am. Ins. Co. Ltd.*] does not preclude looking into a broader temporal COMI assessment where there may have been an opportunistic shift to establish COMI (i.e. insider exploitation, untoward manipulation, overt thwarting of third party expectations).").

87. *Id.*

88. *In re Fairfield Sentry Limited*, note 85 *supra*.

89. *Id.* at *7.

90. 458 B.R. 63 (Bankr. S.D.N.Y. 2011).

91. *Id.* at 64.

92. *Id.* at 67.

93. *Id.* at 68.

94. *Id.* at 72. With respect to reorganizing entities, the Bankruptcy Court stated the following:

> Although a debtor in a reorganization case may continue to have a principal place of business, this is the place of business of the reorganizing entity, not the debtor. In any event, a liquidating company, like the debtors in the case at bar, does not have a principal place of business, and the drafters of the Model Law would not have employed the term with a reorganization case in mind because reorganization is rare in most countries outside the United States.

Id. at 73.

95. *Id.* at 75 ("Use of Chapter 15 petition date as the date for determining recognition…gives *prima facie* recognition to a change of residence between the date of opening proceedings in the foreign nation and the Chapter 15 petition date.").

96. *Id.*

97. *Id.* at 83. In the alternative, the Bankruptcy Court also determined that the liquidation proceedings were entitled to recognition as foreign main proceedings even if the appropriate date of determination was the date of the Chapter 15 petition. *Id.* at 86.

98. *In re British Am. Ins. Co. Ltd.*, note 78 *supra*, 425 B.R. at 915. ("The location should constitute a 'seat for local business activity' for the debtor") (*quoting Bear Stearns (I)*, note 56 *supra*, 374 B.R. at 131).

99. *Id.* "If the 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 third, more nebulous category of proceedings that are neither foreign main nor foreign non-main. But the third category was clearly envisioned by the drafters."

100. *In re Millennium Global*, 458 B.R. at 84 (*citing Bear Stearns (I)*, note 56 *supra*, 374 B.R. at 128).

101. *Id.* at 85.

102. *In re British Am. Ins. Co. Ltd.*, note 78 *supra*, 425 B.R. at 916.

103. *See, e.g.*, *In re Ran*, note 56 *supra*, 607 F.3d at 1027 (establishment is determined as of the date of the application for recognition under Chapter 15); *In re British Am. Ins. Co. Ltd.*, note 78 *supra*, 425 B.R. at 915 (same). *But see In re Millennium Global*, note 63 *supra*, 458 B.R. at 76 (the appropriate date to determine whether the foreign debtor has an establishment in the foreign nation is on or about the date of the commencement of the foreign proceeding for which foreign recognition is sought).

104. 11 U.S.C. § 103(a) states: "Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(n), 555 through 557, and 559 through 562 apply in a case under Chapter 15."

105. *See also* 28 U.S.C. § 1410 (addressing venue of a Chapter 15), which states:

> A case under Chapter 15 of title 11 may be commenced in the district court of the United States for the district—
>
> (1) in which the debtor has its principal place of business or principal assets in the United States;
>
> (2) if the debtor does not have a place of business or assets in the United States, in which there is pending against the debtor an action or proceeding in a Federal or State court; or
>
> (3) in a case other than those specified in paragraph (1) or (2), in which venue will be consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative.

106. See, e.g., Johnston, Conflict Between Bankruptcy Code §§ 109(a) and 1515: Do U.S. Bankruptcy Courts Have Jurisdiction Over Chapter 15 Cases If the Foreign Debtor Has No Assets Or Presence in the U.S.? 17 J. Bankr. L. & Prac. (October 2008) (noting that Chapter 15 "does not require that the foreign debtor have assets or a presence in the U.S. [which] reflects Congress's intent to streamline the procedures…so as to provide the U.S. bankruptcy courts with maximum flexibility to provide assistance to foreign representatives and foreign courts in cross-border insolvencies.").

107. *See also In re Oversight and Control Commission*, note 44 *supra*, 385 B.R. at 539-40 (granting recognition to foreign proceeding where foreign debtor had no U.S. assets, for the purpose of utilizing discovery and injunction relief).

108. *In re Toft*, 453 B.R. 186, 192-93 (Bankr. S.D.N.Y. 2011).

109. *See, e.g.*, *In re Gee*, 53 B.R. 891 (Bankr. S.D.N.Y. 1985); *In re Brierly*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992).

110. *See, e.g., GMAM v. Globo Comunicacaoes e Participacoes S.A. (In re Globo Comunicacaoes e Participacoes)*, 317 B.R. 235, 249 (S.D.N.Y. 2004) (reversing the bankruptcy court's dismissal/abstention of involuntary Chapter 11 petition of Brazilian company and holding that debtor's U.S. bank account, containing $32,000 and equity interest in a Delaware corporation established debtor's eligibility under Section 109); *In re Yukos Oil Co.*, 321 B.R. 396 (Bankr. S.D. Tex. 2005) (concluding that Russian oil company's deposit of $480,000 into a U.S. bank account less than one week prior to the petition date conferred standing to be a Chapter 11 debtor under Section 109(a), but the court then found "cause" to dismiss the case, in part because debtor's contemplated reorganization was extremely limited).

111. 434 B.R. 334 (Bankr. S.D.N.Y. 2010).

112. As noted in Colliers, this subsection "goes beyond the Model Law in making this relief automatic and recognizes the possibility that a foreign representative of a foreign main proceeding may need to continue the operation of a business to preserve or enhance value." 8 Collier on Bankruptcy ¶ 1520.01 (16th ed. 2011).

113. *See id.*, ¶ 1521.02. *See also In re Grand Prix Assocs. Inc.*, No. 09-16545, 2009 WL, 1850966 (Bankr. D.N.J. 26 June 2009) (authorizing a sale of assets under section 363 by foreign representative); *In re Lee*, 348 B.R. 799 (Bankr. W.D. Wash. 2006) (entry of permanent injunction); *In re RSM Richter Inc. v Aguilar* (*In re Ephedra Prods. Liability Litig.*), 349 B.R. 333 (S.D.N.Y. 2006) (enforcement of claims resolution procedure); *In re Atlas Shipping A/S*, 404 B.R. 726, 744 (Bankr. S.D.N.Y 2009) (granting comity to dissolve attachment of assets and entrusting administration of same under 1521(a)(5)); *In re Tri-Continental Exch. Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006) turnover of funds for administration).

114. *In re Glitnir Banki HF*, No. 08-14757, 2011 WL, 3652764 (Bankr. S.D.N.Y. 19 Aug. 2011) (authorizing foreign representative to undertake discovery pursuant to Rule 2004); *In re Thow*, 392 B.R. 860 (Bankr. W.D. Wash. 2007) (authorizing foreign representative to take Rule 2004 examination of the debtor): The issue before the Court in *Thow* was media access to the 2004 examinations, which the Court denied; *Cf. In re Toft*, note 108 *supra*, 453 B.R. at 189 (denying request of German foreign representative to access existing emails of debtor stored on U.S. ISPs as against public policy).

115. Interestingly, this limitation on avoidance powers is not found in the corresponding provision (Article 21) of the Model Law, upon which Chapter 15 is based.

116. Likewise, Section 1523 roughly tracks the equivalent provision of the Model Law. *See* Model Law, Art. 23. In the Guide to Enactment (to the Model Law), ¶ 166, it is noted that "The provision is drafted narrowly in that it does not create any substantive right regarding such actions and also does not provide any solution involving conflict of laws. The effect of the provision is that a foreign representative is not prevented from initiating such actions by the sole fact that the foreign representative is not the insolvency administrator appointed in the enacting State."

117. 601 F.3d 319 (5th Cir. 2010).

118. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

119. 458 U.S. 50 (1982).

120. Pub. L. 98-353, 98 Stat. 333 (1984).

121. 28 U.S.C. § 151.

122. *See, e.g.*, Standing Order M-61 Referring to Bankruptcy Judges for the Southern District of New York of Any and All Proceedings Under Title 11, dated 10 July 1984 (Ward, Acting C.J.).

123. 28 U.S.C. § 157(b).

124. 28 U.S.C. § 157(c).

125. 492 U.S. 33 (1989).

126. It is settled that a bankruptcy court may not conduct a jury trial. Thus, the right to a jury trial in an action effectively eliminates a bankruptcy court's authority to hear the trial of the action.

127. 382 U.S. 323.

128. Former 11 U.S.C. § 93(g), repealed by Pub. L. 95-598, § 401, effective 1 October 1979.

129. 498 U.S. 42 (1990).

130. 11 U.S.C. § 502(d).

131. During the appeals process, both Vickie and Pierce died, and their executors (Howard Stern and Elaine Marshall, respectively) carried on the litigation.

132. *Marshall v. Marshall* (*In re Marshall*), 253 B.R. 550 (Bankr. C.D. Cal. 2000).

133. *Marshall v. Marshall* (*In re Marshall*), 275 B.R. 5 (C.D. Cal. 2002).

134. *Marshall v. Stern* (*In re Marshall*), 600 F.3d 1037 (9th Cir. 2010).

135. *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

136. According to the statute, "[c]ore proceedings include, but are not limited to—…(C) counterclaims by the estate against persons filing claims against the estate."

137. *See, e.g.*, Motion to Withdraw the Reference, *Picard v. Trotanoy Inv. Co.*, Case No. 11-07112 (JSR), ECF 1 (S.D.N.Y. 7 Oct. 2011).

138. *Picard v. Flinn Invs., LLC*, Case No. 11-5223 (JSR), ECF 20 (S.D.N.Y. 29 Nov. 2011).

139. *Fairfield Sentry Ltd. v. Theodoor GGC Amsterdam*, Adv. Pro. No. 10-03496 (BRL), ECF 268 (Bankr. S.D.N.Y. 23 May 2011).

140. *In re Fairfield Sentry Ltd., et al. Litigation*, Case No. 11-00224 (LAP), ECF 23 (S.D.N.Y. 19 Sep. 2011).

141. Enacting Statement of the BVI Insolvency Act, 2003.

142. Order of Bannister, J., Matter No. BVIHCV2009/74, 23 April 2009.

143. Orders of Bannister, J., Matter Nos. BVIIICV2009/136, BVIHCV2009/139, 21 July 2009.

144. BVI Insolvency Act, 2003 § 184.

145. 11 U.S.C. §§ 1502, 1515, 1517(a).

146. 11 U.S.C. § 1517(b).

147. *In re Fairfield Sentry Ltd.*, Case No. 10-13164, ECF 47 (Bankr. S.D.N.Y. 22 July 2010). In a similar case, another judge of the Bankruptcy Court for the Southern District of New York has ruled that COMI should be measured as of the time of the commencement of the foreign proceeding, not of the Chapter 15 case. *In re Millennium Global Emerging Credit Master Fund Ltd.*, note 63 *supra*.

148. *See* 11 U.S.C. § 1520.

149. Case No. 10-07311 (GBD), ECF 46 (S.D.N.Y. 16 Sept. 2011).

150. *Id.*, ECF 54 (14 Oct. 2011).

151. Judgment, 10 October 2011, BVIHC (COM) Claim No. 2010/30, ¶¶ 2, 3.

152. Judgment, 16 September 2011, BVIHC (COM) Claim No. 2010/30.

153. Judgment, 10 October 2011, BVIHC (COM) Claim No. 2010/30.

154. *See, e.g.*, Motion to Remand and for Abstention, *Fairfield Sentry Ltd. v. HSBC Private Bank (Suisse) SA*, Adv. Pro. No. 10-03633 (BRL), ECF 10 (Bankr. S.D.N.Y. 4 Oct. 2010), and similar motions in Adv. Pro. Nos. 10-3622, 10-3624, 10-3626, 10-3627, 10-3628, 10-3629, 10-3630, 10-3631, 10-3632, 10-3633, 10-3634, 10-03635, 10-3636, 10-3640, 10-3751, 10-3754, 10-3761, 10-3764, 10-371/, 10-3779, 10-3781, 10-3782, 10-3785, 10-3788. A defendant in an additional (forty-second) action filed a remand or abstain motion on 3 March 2011.

155. *See, e.g.*, Memorandum of Law in Support of Motion to Withdraw the Reference, *Fairfield Sentry Ltd. v. HSBC Private Bank (Suisse) SA*, Adv. Pro. No. 10-03633 (BRL), ECF 4 (Bankr. S.D.N.Y. 21 Sept. 2010).

156. Under the same section, the district court must withdraw the reference if "resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d).

157. *See Orion Picture Corp. v. Showtime Networks Inc. (In re Orion)*, 4 F.3d 1095, 1101 (2d Cir. 1993).

158. Memorandum & Order, *In re Fairfield Sentry Ltd., et al. Litigation*, Case No. 10-7340 (LAP), ECF 15 (S.D.N.Y. 22 Nov. 2010).

159. Memorandum Decision & Order, *Fairfield Sentry Limited v. Theodoor GGC Amsterdam*, Adv. Pro. No. 10-03496 (BRL), ECF 268 (Bankr. S.D.N.Y. 25 May 2011).

160. Opinion & Order, *In re Fairfield Sentry Ltd., et al. Litigation*, Case No. 11-MC-224 (LAP), ECF 11 (S.D.N.Y. 19 July 2011) (hereinafter "Preska Remand Order").

161. *See* BVI Insolvency Act, 2003 §§ 245, 246.

162. Supplemental Memorandum of Law in Support of Motion to Remand and for Abstention 9, *Fairfield Sentry Limited v. Theodoor GGC Amsterdam*, Adv. Pro. No. 10-03496 (BRL), ECF 127 (Bantu. S.D.N.Y. 31 Jan. 2011).

163. Preska Remand Order 47, note 160 *supra*, n.16.

164. Order, *In re Fairfield Sentry Ltd., et al. Litigation*, Case No. 11-MC-224 (LAP), ECF 24 (S.D.N.Y. 12 Oct. 2011).

165. *Fairfield Sentry Ltd. v. HSBC Private Bank (Suisse) SA*, Case No. 11-4425, ECF 1 (2d Cir. 26 Oct. 2011).

166. Excluding actions that have been dismissed.

167. *See, e.g.*, Complaint, *Fairfield Sentry Ltd. v. Banque Syz & Co. SA*, Adv. Pro. No. 10-03513 (BRL), ECF 1 (Bankr. S.D.N.Y. 17 Aug. 2010).

168. *See, e.g.*, Amended Complaint, *Fairfield Sentry Ltd. v. Banque Syz & Co. SA*, Adv. Pro. No. 10-03513 (BRL), ECF 15 (Bankr. S.D.N.Y. 5 Jan. 2011).

169. Amended Order Staying Redeemer Actions, *Fairfield Sentry Limited v. Theodoor GGC Amsterdam*, Adv. Pro. No. 10-03496 (BRL), ECF 418 (Bankr. S.D.N.Y. 19 Oct. 2011).

170. Complaint, *Picard v. Fairfield Sentry Ltd.*, Adv. Pro. No. 09-01239 (BRL), ECF 1 (Bankr. S.D.N.Y. 18 May 2009).

171. *See* Order Approving Settlements, *Picard v. Fairfield Sentry Ltd.*, Adv. Pro. No. 09-01239 (BRL), ECF 107 (Bankr. S.D.N.Y. 8 July 2011).

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The New Law of Arbitration in France: New Features to Reaffirm Paris as a Venue for International Arbitration

By Luc Bigel, Julien Soupizet, and Todd J. Fox

I. Introduction

Thirty-one years ago, France adopted what has been described as one of the first modern arbitration laws.[1] Since then, practitioners' comments, doctrinal theses and innovative case law rendered by the French courts have pushed toward updating the French arbitration law in order to maintain Paris as an important arbitration venue.[2] In the last few years this has become more pressing, as competing jurisdictions such as England[3] and Germany[4] have launched campaigns to strengthen their position as venues for international arbitration,[5] and there has been talk of possibly moving the ICC Arbitration Secretariat and Court from Paris to Geneva or Vienna.

Following an interesting law-making process, where the original draft was prepared by the French Commission on Arbitration (CFA) in 2003[6] and then reviewed jointly by the CFA, the Ministry of Justice and arbitration practitioners,[7] the French government finally enacted the long awaited Decree on the reform of French domestic and international arbitration law (the "Decree").[8] This new law was dated 13 January 2011 and entered into force on 1 May 2011.

The first concern for the reform was that the mechanics of French arbitration law had (as in the U.S.) become increasingly dependant on a large body of case law, which could impede its comprehension by both foreign and domestic lawyers. Accordingly, the primary motivation for reform was not so much the improvement of the existing rules, but rather the codification of all those court decisions. Second, the grounds for setting aside awards or appeals of enforcement orders needed to be amended: The grounds needed revision, but French judges, despite being extremely favorable to arbitration, could not modify the existing rules merely through decisions. Third, the reform of the existing arbitration law was an opportunity to insert refinements into the existing law.

As a general comment, this reform is more than a "restatement" but less than a revolution: It breathes life into the existing rules while remaining faithful to the French policy of *in favorem arbitrandum.*

For traditional reasons and as a matter of legislative choice,[9] French arbitration law has been based on the distinction between domestic and international arbitration,[10] the demarcation line being that "[a]n arbitration is international when it involves the interests of international trade."[11] In this respect, a recent decision by the French Supreme Court (*Cour de cassation*) held that the "internationality" of an arbitration refers to the dispute touching upon an interest that economically relates to more than one state.[12] Interestingly, this definition has not been amended by the Decree, and "internationality" remains an issue for the courts.

The possible deletion of this distinction between domestic and international within the framework of the new law was discussed, but the legislature chose finally to maintain it in the Decree. The Decree replaces the former Book IV of the French Code of Civil Procedure (*Code de Procédure Civile)* (CPC) with a new Book IV, setting out under Title I the rules on domestic arbitration (Articles 1442 to 1503 of the CPC) and under Title II the rules of international arbitration (Articles 1504 to 1527 of the CPC). Article 1506 acts as the cornerstone of this new piece of legislation by listing provisions which apply to both domestic and international arbitration. This means that some of the provisions applicable to international arbitration are to be found in the domestic provisions.

Notwithstanding the decisive contributions of the Decree to domestic arbitration law, the authors of this article wish to focus solely on the salient lines and the mechanics of the reform of the international arbitration law. To achieve this purpose, we propose to follow the order of an arbitration from the arbitration agreement to the enforcement of the award.

II. Analysis of the New Decree

A. Implementing the Arbitration: The Arbitration Agreement

The new set of provisions regarding arbitration agreements codifies most of the decisions rendered by French courts in this area. The former system drew a distinction between domestic and international arbitration agreements. Whereas some formal requirements were necessary for domestic arbitration, international arbitration was more flexible and, as a result, there were no set conditions regarding the form of the arbitration agreement, although its existence—which could be oral—had to be proven.[13]

According to new Article 1507 of the CPC relating to international arbitration, "an arbitration agreement is not subject to any requirements as to its form."[14] This article is not a radical change, and rather confirms the existing case law.[15] Theoretically, this provision allows oral arbitration agreements, but its implications are negligible in practice for reasons of evidence. In practice, the purpose of Article

1507 is to avoid the challenge of arbitration agreements for formal reasons and to ease the admissibility of arbitration agreements by reference.[16]

Moreover, the principle that arbitration agreements are autonomous and separate agreements, until now established only by case law,[17] has been codified in Article 1447, which applies to both domestic and international cases. This provision expressly affirms the principle of severability, declaring that an arbitration clause is to be unaffected by defects in the main contract. This enables the arbitration clause to survive (as a separate agreement) the demise of the main contract, and thereby preserves the jurisdiction of an arbitral tribunal to declare the main contract invalid or unenforceable.

B. Protecting the Arbitration: The Principle of Competence-Competence

The long-standing rule of competence-competence,[18] as developed in French case law, has two effects: On the one hand, it gives the power to the arbitral tribunal to decide upon its own jurisdiction by resolving any objections in that respect (positive effect), and on the other hand it prohibits court interference in determining the competence of the arbitrators at the outset of the arbitral process (negative effect).[19]

The new French law spells out in express terms the powers of the arbitral tribunal to decide upon its own competence and expressly recognizes both the positive (Article 1465) and negative (Article 1448) effects of the competence-competence principle. This recognition is probably one of the most important features inserted in the Decree.

This first effect is embodied in Article 1465, which provides that "the arbitral tribunal has exclusive jurisdiction to decide over any objections to its competence." Thus, unlike the law of some jurisdictions, such as the U.S.[20] or Germany,[21] French law treats the arbitral tribunal's authority to rule on any challenge to its jurisdiction as exclusive, at least until the arbitration is concluded and an award is rendered.

As for the negative effect of competence-competence, this means that the arbitrators must be the *first* judges of their own jurisdiction and courts must refrain from hearing any substantive arguments on that issue. New Article 1448 of the CPC provides that, if a party contests the court's jurisdiction based on an arbitration agreement,[22] state courts must decline jurisdiction over the case unless the arbitral tribunal has not yet been constituted and the arbitration agreement is manifestly void or inapplicable.

State courts will have the opportunity to hear these arguments, but only at a later stage, in the case of the setting aside or enforcement of an award.

C. Conducting the Arbitration: The Arbitration Principles

Once the arbitration begins, several principles are applicable in establishing the fairness of the procedure and in supporting the arbitration by making it more effective. These "backbone" principles have been inserted into the Decree to guide the parties and the arbitral tribunal through the whole arbitration process, but in particular during the conduct of the arbitral proceedings.

1. The Insertion of the Principle of Due Process

The Decree expressly references the principle of due process. Article 1510 provides that, irrespective of the procedure adopted by the parties, the arbitral tribunal must ensure that the parties are treated equally and must uphold the principle of due process. This new article codifies French case law on that subject.[23]

The insertion of the principle of due process in French arbitration law is inspired by Swiss law,[24] which expressly included such a guarantee for the parties to arbitration. The UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") also references this principle in its Article 18, which states that: "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

In addition, practitioners will note that the Decree also embraces the principle of loyalty of procedure. Article 1464(3) states that "[b]oth parties and arbitrators shall act diligently and in good faith in the conduct of the proceedings." Although these principles of procedural justice have already been applied by French courts,[25] their codification embraces a symbolic value. It will be up to the French judges to define their exact ambit of application.

2. The Introduction of the Notion of Estoppel

French case law has developed and then confirmed[26] a doctrine similar to estoppel as a means of preventing unfair and contradictory behavior in arbitration proceedings.[27] Even if the notion of estoppel is not *per se* a concept emanating from civil law countries, the mechanism has proven to be efficient within the framework of international arbitration.[28] Estoppel has been said to be rarely applied in continental European arbitrations,[29] but its underlying rationale—a party is precluded by considerations of good faith and equity from acting inconsistently with its own statements or conduct—exists under concepts such as abuse of right or *venire contra factum proprium.*

New Article 1466 provides that a party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner is to be deemed to have waived its right to avail itself of such irregularity. The Report appended to the Decree highlighted that the introduction of the notion of estoppel was closely connected to the concept of bad faith. Accord-

ingly, this provision should be considered together with Article 1464(3), which stipulates that the parties and the arbitrators are to act diligently and in good faith in the conduct of the proceedings.

3. The Absence of Confidentiality

Although parties often seem to assume that arbitration is confidential, in fact that may often not be the case. Indeed, in the United States neither the Federal Arbitration Act nor the Uniform Arbitration Act contains provisions requiring the parties or the arbitrators to keep the arbitration proceedings in which they are involved confidential. Although the Decree contains a new provision on confidentiality in Article 1464(4), it only applies to domestic arbitration.

However, the lack of a confidentiality provision in the Decree regarding international arbitration does not mean that international arbitration proceedings in France may not be confidential. If the parties wish to benefit from the confidentiality regime provided for domestic arbitration, they can specifically include mention of it in their arbitration agreement. It is also suggested that they might contractually determine the consequences of its breach.[30] The parties could also choose institutional rules which contain confidentiality obligations.[31] It is notable that the ICC Rules on Arbitration, which are the institutional rules most often used in France, contain no confidentiality obligations.

French law is seeking to embrace the recent trend in favor of transparency in international arbitration, notably with regard to international investment disputes.[32] Accordingly, the default rule for international arbitration remains that the parties have no confidentiality obligations unless they choose them.

D. Supporting the Arbitration: The Involvement of Courts

As detailed above, the recognition of the principle of competence-competence adopted in the Decree highlights the non-interference of the state courts in the arbitration procedure.

However, modern laws of arbitration, to which the Decree pertains, offer assistance procedures for parties in order to constitute the arbitral tribunal. As discussed below, the Decree also codifies the possibility for parties to have recourse to a state judge to obtain documentary evidence.

1. Court Support in the Constitution of the Arbitral Tribunal: the *juge d'appui*

Parties choose arbitration precisely because they do not want the intrusion of state courts in the resolution of their dispute. Parties may, nonetheless, need court assistance when setting up their arbitration or when the constitution of the arbitral tribunal is hindered.

One of the main features of the former arbitration law was the introduction of a supporting judge for issues related to the arbitration proceedings (the so-called *juge d'appui*).[33] The powers and jurisdiction of this judge were enshrined in former Article 1493 of the CPC, which expressly provided for the judge's assistance and cooperation when parties would meet any difficulties in constituting the arbitral tribunal, especially for appointment of the arbitrators.

New Articles 1459 and 1460, together with new Article 1505, formally adopt and expand the role of a specific judge to support arbitrations. For international arbitration, the *juge d'appui* is centralized in the President of the Paris Court of First Instance (*Président du Tribunal de Grande Instance de Paris*). The jurisdiction of the supporting judge is extended in the Decree, since the *juge d'appui* is now authorized to rule on objections against the appointment of arbitrators and to rule on the extension of delays.

The supporting judge's jurisdiction is delineated in Article 1505 of the CPC. The *juge d'appui* may be appealed to when either (i) the arbitration proceedings take place in France, (ii) the parties have agreed that French arbitration law will be the procedural law of their arbitration, (iii) the parties have expressly consented to have French courts deal with any procedural issues, or (iv) one of the parties is facing a possible denial of justice. Interestingly, this last instance of court assistance implements the ruling in a case, known as the *NIOC* case, by which the French Supreme Court held that the French supporting judge may have jurisdiction over a case when the parties are facing the risk of a denial of justice.[34]

It should be noted that recourse to this judge for assistance with the appointment of arbitrators is only on a subsidiary basis. Article 1452 of the CPC provides that, if the parties have failed to agree on a procedure for appointing the arbitrator(s), the "person responsible for administering the arbitration" or, if there is no such person, the judge acting in support of the arbitration, is authorized to proceed with an appointment.

The *juge d'appui* is to resolve any difficulty in the appointment of the arbitral tribunal after having verified that the arbitration agreement is not "manifestly void" or "manifestly not applicable." He or she will not make any substantive assessment on the validity or scope of the arbitration agreement. This rule, which existed in the former rules of international arbitration, was maintained in the Decree.

2. The Assistance of State Courts for Evidentiary Matters

One of the major innovations of the Decree is the possibility of seeking the assistance of state courts for the production of evidence in the possession of third parties.

Article 1469 of the CPC formally recognizes the possibility for a party to the arbitration desiring access to evidence in the possession of a third party to address this concern to the Court of First Instance (*Tribunal de Grande Instance*), after having been invited by the arbitral tribunal to do so.

The Report accompanying the Decree[35] noted that the authority of the arbitrators is by definition limited because third parties are excluded from the arbitration. This may be a means to establish implicitly that evidentiary matters between the parties must be resolved by the arbitral tribunal.

Lastly, it should be noted that the competent judge to rule over such matters is not to be confused with the *juge d'appui*. The judge for purposes of Article 1469 of the CPC is also the *Président du Tribunal de Grande Instance*, but his jurisdiction follows the regular lines of jurisdiction of the French Code of Civil Procedure.

E. Finalizing the Arbitration: The Enforcement of Awards and Their Challenge

The new rules on the award and the challenging of an award also favor the efficiency of the arbitration. The basic principles remain unchanged, but the Decree adds new features.

1. Setting Aside the Award

The reform has left unchanged the possibility for the parties to challenge the award, and has only slightly rephrased the grounds on which a challenge can be triggered. Article 1520 of the CPC lists five limited grounds on which an award can be set aside: (i) the arbitral tribunal wrongly upheld or declined jurisdiction; (ii) the arbitral tribunal was not properly constituted; (iii) the arbitral tribunal ruled without complying with the mandate conferred upon it; (iv) the principle of due process was violated; or (v) recognition or enforcement of the award is contrary to international public policy.

One of the most important novelties of the Decree is that the action to set aside the award does not automatically suspend the enforcement of the award or the order enforcing the award.[36] An original mechanism has been set up to temper this principle: If the enforcement of the award could cause great harm to a party or generate important difficulties, the first President of the Paris Court of Appeals may set conditions to the enforcement of the award and even suspend it through summary proceedings.[37]

A second novelty regarding the setting aside of an award is that the Decree introduces the possibility for the parties to expressly waive their right to bring an action for setting aside an award.[38] This waiver[39] focuses any challenge of the award at the place of its enforcement (rather than at the seat of arbitration)[40] since, even when parties agreed to waive their right to set aside the award, they will retain their right to appeal the enforcement order (*exequatur*) on the grounds listed in Article 1520 of the CPC.[41] This feature is innovative, especially considering its broad ambit in comparison to the situation in other countries where such a waiver is available only when none of the parties has its domicile, usual or habitual residence, or place of business in that country.[42]

2. Time to Set Aside the Award

Under the previous rules, an action to set aside the award could not be brought until one of parties had obtained an enforcement order and notified the other party of the award by service of process (*signification*). This rule allowed the parties some time before having to consider whether they might seek to set aside the award or simply appeal the enforcement order.

Under the Decree, the delay for setting aside the award has been significantly changed, since an action to set aside can now be brought as soon as the award is rendered.[43] There is no longer any need to first seek an enforcement order. The delay of one month begins to run from the date the award has been notified by service (*signification*).[44] Thus, arbitration practitioners must be vigilant on this point, since in practice applications to set aside an award rendered in France must now be made within one month following notification of the award instead of one month from service of an enforcement order.

3. Revision of the Award

The procedure for possible revision of the award has now been clearly organized. According to Article 1502 of the CPC, the parties may bring an application for revision before the arbitral tribunal that rendered the award.

Under domestic arbitration rules, if the arbitral tribunal cannot be reconvened, the Court of Appeal having jurisdiction over enforcement of the award would also have jurisdiction over the revision of the award. This rule cannot be transposed to international arbitration for obvious reasons, so that, if the arbitral tribunal cannot be reconvened, probably a new arbitral tribunal would have to be appointed for revision of the award.[45]

III. Conclusion

The French arbitration community has shown great enthusiasm for this reform, which it considers to be extremely favorable and which should serve to reaffirm Paris as one of the top international arbitration centers in the world.[46]

In 1981, France was one of the first states to adopt a favorable law on arbitration,[47] and France has since developed a progressive and pro-arbitration stance. This reform codifies, liberalizes, and modernizes the existing arbitration law. It remains to be seen whether in practice the refinements of the Decree of 2011 will be as efficient as

expected and will reinforce Paris's reputation as a city of lights on the international arbitration scene.[48]

Endnotes

1. Decree No. 80-354 of 14 May 1980 for domestic arbitration and Decree No. 81-500 of 12 May 1981 for international arbitration; Fouchard, *Le nouveau droit français de l'arbitrage* [*The New French Arbitration Law*], RDI Comp. 29 (1982); Fouchard, *La réforme de l'arbitrage international en France—Introduction: spécificité de l'arbitrage international* [*The Reform of International Arbitration in France—Introduction: the Peculiarity of International Arbitration*], Revue de l'Arbitrage [French Arb. Rev.] 449 (1981).
2. Grandjean, *La France se dote d'un nouveau droit de l'arbitrage* [*France Sets up a New Arbitration Law*], Les Echos, 20 Jan. 2011, at 12.
3. See the 2007 brochure of the English Law Society entitled "England and Wales: The Jurisdiction of Choice—Dispute Resolution, *available at* http://www.lawsociety.org.uk/documents/downloads/jurisdiction_of_choice_brochure.pdf, which was a government-sponsored offensive to promote England and Wales, and especially London, as a jurisdiction for international arbitration.
4. See the 2008 brochure of the German Bar Association, sponsored by the German Ministry of Justice, entitled "Law—Made in Germany," which praises Germany's legal system and Germany as a place of arbitration, *available at* http://www.lawmadeingermany.de/.
5. See Wilske & Fox, *The Global Competition for the "Best" Place for International Arbitration–Myth, Prejudice, and Reality Bits*, in Klausegger *et al.*, eds., Austrian Arbitration Yearbook. 2009, at 383 (2009).
6. Delvolvé *et al.*, Revue de l'Arbitrage [French Arb. Rev.] 499 (2006). *See* http://www.parisarbitration.com.
7. *See* Lonné, *La modernisation du droit français de l'arbitrage–Questions à Emmanuel Gaillard,* [*The Modernization of French Arbitration Law–Questions to Emmanuel Gaillard*], 426 Lexbase Hebdo 1 [Weekly Case L. Rev.] (2011).
8. Decree No. 2011-48 of 13 January 2011, J.O., 14 Jan. 2011, at 9, relating to the arbitration reform; Kleiman & Spinelli, *Long Awaited Arbitration Law Reform Finally Passed,* Int'l L. Office, 20 Jan. 2011. *See also* Jarrosson & Pellerin, *Le droit français de l'arbitrage après le décret du 13 janvier 2011* [*French Arbitration Law After the Decree Dated 13 January 2011*], Revue de l'Arbitrage [French Arb. Rev.] 5 (2011); Harb & Lobier, *New Arbitration Law in France: The Decree of January 13, 2011,* 26 Mealey's Int'l Arb. Rep. 26 (2011); Derains & Soule, *France's New Arbitration Law Successfully Streamlines the Arbitral Process*, Com. Disp. Res. 49 (7 Apr. 2011); Brousolle, *Réforme de l'arbitrage: le Décret du 13 janvier 2011* [*Arbitration Reform, Decree Dated 13 January 2011*], 68 les Petites Affiches [Legal Notices] 15 (2011); Chenu, *L'autonomie de la clause compromissoire après le décret du 13 janvier 2011* [*The Autonomy of the Arbitration Clause after the Decree Dated 13 January 2011*], 19 les Petites Affiches [Legal Notices] 3 (2011); Heitzmann & Schwartz Miralles, *The 2011 French Arbitration Reforms in Comparative Perspective,* 26 Mealey's Int'l Arb. Rep. 36.
9. Fouchard *et al.*, Traité de l'arbitrage commercial international [Treatise of International Commercial Arbitration] 3 (1996).
10. Unlike Germany, whose Code of Civil Procedure does not distinguish between domestic and international arbitration.
11. Former CPC art. 1492 and new CPC art. 1504.
12. Cass. 1e civ, 16 Jan. 2011, Docket No. 09-10198. *See* Delpech, *Critère de l'arbitrage international: définition économique [The International Arbitration Criterion: Economic Definition]*, 5 Dalloz 312 (2011).
13. Kleiman & Spinelli, *La réforme du droit de l'arbitrage, sous le double signe de la lisibilité et de l'efficacité [The Arbitration Form: Between Legibility and Efficiency]*, 27 Gaz. Pal. 14 (27 Jan. 2011).
14. This rule is an exception to the requirements of Article II of the New York Convention of 1958.
15. The "*Dalico*" case, Cass. 1e civ, 20 Dec. 1993, Docket No. 91-16.828; the "*Prodexport*" case, Cass. 1e civ, 3 June 1997, Docket No. 95-17.603.
16. Jarrosson & Pellerin, note 8 *supra*, at 64.
17. The "*Gosset"* case, Cass. 1e civ, 7 May 1963, *in* La Semaine Juridique–Edition Générale [Law Weekly–General Ed.] 13405 (1963) (Commentary of Berthold Goldman). *See also* UNCITRAL Model Law Art 6(1).
18. This principle is sometimes expressed in French as "*Compétence de la compétence*" or in German as "*Kompetenz-Kompetenz.*"
19. Gaillard & Banifatemi, *Negative Effect of Competence-Competence*: *The Rule of Priority in Favour of the Arbitrators*, *in* Gaillard & Di Pietro, eds., Enforcement of Arbitration Agreements and International Arbitral Awards–The New York Convention in Practice 257 (2008).
20. *See* Berman, *The "Gateway" Problem in International Commercial Arbitration* […] Yale J. Int'l L. […] 2011; Reetz, *The Limits of the Competence-Competence Doctrine in United States Courts*, 5 Disp. Resol. Int'l 5, 7 (2011).
21. *See* Section 1032(2) and (3) of the German Code of Civil Procedure:

    > (2) Prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible.
    >
    > (3) Where an action or application referred to in subsection 1 or 2 has been brought, arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the court.

22. A court may not decline jurisdiction on its own motion. *See* CPC art. 1448(2).
23. Kleiman & Spinelli, note 13 *supra*, at 9.
24. Art. 182 of the Swiss International Private Law Act.
25. Court of Appeal of Paris, 22 Jan. 2009, Docket No. 07-19492.
26. The *"Golshani"* case, Cass. Civ 1e, 6 July 2005, Docket No. 01-15.912; The *"Income"* case, Cass. Civ 1e, 6 May 2009, Docket No. 08-10.281; the "*Merial*" case, Cass. Civ. 3e, Feb. 3, 2010, Docket No. 08-21.288. *See* Pinsolle, *Golshani c/ Gouvernement de la République d'Iran*, 4 Rev. Arb. 993 (2005). *See also* Bigel, *Controlling Estoppel under French Arbitration Law*, 27 Int'l Litig. Q. 24 (2010).
27. It must be noted that this principle could already be found in the ICC Rules (art. 33) and the UNCITRAL Model Law (art. 4).
28. Bigel & Markert, *Estoppel in France and Germany: The Introduction of Foreign Legal Features in Continental Laws of Arbitration*, 15 NYSBA Int'l Chap. News, No. 2, at 25 (2010).
29. *See* Born, International Commercial Arbitration 1194 (2009); Hanotiau, *The Parties to the Arbitration Agreement*, in Liber Amicorum en l'honneur de Serge Lazareff 323, 325 (2011).
30. Gaillard & Jacomy, *France Adopts New Law on Arbitration*, 245 N.Y.L.J. 15 (24 Jan. 2011).
31. *See, e.g.,* the DIS, LCIA, ICDR or WIPO Arbitration Rules.
32. Lazareff, *Confidentiality and Arbitration: Theoretical and Philosophical Reflections,* ICC Int'l Court of Arb. Bull.–Spec. Supp. 81 (2009).
33. *See* Béguin *et al.*, *Un second souffle pour l'arbitrage* [*A Second Breath for Arbitration*], 11 La Semaine Juridique-Edition Générale [Law Weekly–General Ed.] 546 (2011).
34. The *"NIOC"* case, Cass. 1e Civ. 1 Feb. 2005, Docket No. 01-13742.

35. *See* Report of the Prime Minister accompanying the Decree.

36. Conversely, the order denying enforcement cannot be challenged.

37. Gaillard & de Lapasse, *Le nouveau droit français de l'arbitrage interne et international [The New French Law of Domestic and International Arbitration]*, 3 DALLOZ 187 (2011). *See* CPC art. 1526(2).

38. CPC art. 1522.

39. This has been added for international as well as domestic arbitration.

40. It must be noted that the seat of arbitration is mentioned only once in the whole Decree, which corresponds to the drafters' intention to give less importance to the law of the seat of arbitration.

41. CPC art. 1522(2).

42. For example, Belgium, Switzerland or Sweden.

43. CPC art. 1519(2).

44. CPC art. 1519.

45. Kleiman & Spinelli, note 13 *supra*, at 9.

46. *See* Ross, *France Reveals New Arbitration Law*, GLOBAL ARB. NEWS, 14 Jan. 2011; Kleiman & Spinelli, *New Arbitration Law Reform: The Market's Verdict*, INT'L L. OFFICE, 27 Jan. 2011.

47. France was followed by the Netherlands in 1986, Switzerland in 1987, and England in 1996.

48. Boccara, *Arbitrage: regards croisés d'un arbitre et d'un directeur juridique* [*Arbitration: Views of an Arbitrator and an In-house Counsel*], 44-46 GAZ. PAL. 6 (15 Feb. 2011); Nourissat, *Le nouveau droit français de l'arbitrage (décret n°2011-48 du 13 janvier 2011 portant réforme de l'arbitrage)* [*The New French Law of Arbitration (Decree n°2011-48 dated 13 January 2011)*], 3 PROCEDURES 6 (2011).

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A Survey of Recent Canadian Developments in Cross-Border Litigation

By Ken MacDonald

I. Introduction

This article will review selected recent developments in the Canadian law of cross-border litigation.

The most notable development is that the test for deciding whether a court has jurisdiction over a non-resident defendant (jurisdiction *simpliciter*) and whether it will assert that jurisdiction (*forum non conveniens*) has been made more objective and predictable. This may help a foreign plaintiff wishing to avail itself of Canadian pre-trial remedies such as *Mareva* injunctions (to freeze a defendant's assets) and Norwich orders (which allow access to a defendant's bank records or other information needed to determine the viability of a proceeding), or to avail itself of Canadian laws that provide for damages to relatives of personal injury tort victims, or other advantages in Canadian law.

Another, related, development is that the test for jurisdiction in defamation cases over non-resident defendants now is easier for plaintiffs. Thus such plaintiffs will more likely be able to take advantage of Canada's substantive law of defamation, which is more favorable to plaintiffs than is the law in the U.S.

In the area of enforcement of foreign judgments, one of the defenses to enforcement, namely, breach of natural justice, has arguably been widened to cover breach of a meaningful right to be heard. Also, Canada has abolished its long-standing blanket prohibition against enforcement of foreign, non-monetary judgments. Now enforcement is decided on a case-by-case basis, and several foreign non-monetary judgments have been enforced recently.

These are just some of the recent developments reviewed below.

II. Changes to the Law Regarding Jurisdiction Over an Out-of-Province Defendant in Tort Cases

At common law in Canada, a court can have jurisdiction over a defendant on three grounds: (i) that the defendant resides in the province; (ii) that the defendant consents (or attorns) to jurisdiction (e.g., by way of a forum selection clause in a contract, or by defending the case on its merits, or by bringing a counterclaim); or (iii) that, although the defendant resides outside the province, a real and substantial connection exists between the forum and the case's subject matter or the defendant. In a recent pair of cases the Supreme Court of Canada has modified the test for determining whether a real and substantial connection exists. The new test applies at least to tort cases, but may also be extended to non-tort cases in the future. The test now is based on objective factors that connect the case to the forum. Discretionary, subjective considerations have been removed, so as to make the test more predictable. The cases reached the Supreme Court not because of unusual facts, but because of widespread sentiment that the existing law[1] was in need of review. For that reason the Ontario Court of Appeal convened a special, five-judge panel. There were several interveners in that court as well as at the Supreme Court.

In both cases—*Van Breda v. Village Resorts Ltd., Club Resorts et al.* and *Charron v. Village Resorts Ltd., Club Resorts et al.*[2]—the plaintiffs were Canadians involved in accidents at resorts in Cuba. Van Breda was catastrophically injured, and Charron drowned. In both cases, the plaintiffs had arranged their vacations in Canada, from different companies. Both resorts were managed by Club Resorts, a company located in the Cayman Islands, and which had marketed the resorts in Ontario. The plaintiffs sued the parties from whom they had bought their vacations, the management of the resorts, and others, including defendants from Canada, Cuba, and the Cayman Islands. All defendants had challenged the jurisdiction of the Ontario court to hear the cases, saying Ontario lacked jurisdiction, or, in the alternative, even if Ontario had jurisdiction, Cuba was clearly the more suitable forum. The Supreme Court ruled that the plaintiffs could sue in Canada. In *Van Breda* the real and substantial connection was a contractual relationship formed in Canada with the resort. In *Charron*, the plaintiff had no contract with a Cuban company but nonetheless there was a real and substantial connection in that the resort carried on business in Ontario, not just by advertising but also with an office and frequent visits by staff to promote its resorts.

The law prior to *Van Breda* and *Charron* can be summarized as follows: The court would first consider the following factors to determine whether a real and substantial connection existed between the case and the forum:

- the connection between the forum and the plaintiff's claim;
- the connection between the forum and the defendant;
- any unfairness to the defendant in assuming jurisdiction;
- any unfairness to the plaintiff in not assuming jurisdiction;

- the involvement of other parties to the suit;
- the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- whether the case is interprovincial or international in nature;
- comity, and the standards of jurisdiction, recognition, and enforcement prevailing elsewhere.

If the court determined a real and substantial connection exists, the court had a basis to assume jurisdiction, and would then proceed to decide whether there was a forum elsewhere that was clearly more appropriate (i.e. the discretionary *forum non conveniens* analysis), based on the following, non-exhaustive set of factors:

- the location of the majority of the parties;
- the location of key witnesses and evidence;
- the jurisdiction where the factual matters arose;
- in contract cases, where the contract was made;
- the applicable substantive law;
- the difficulty in applying any applicable foreign law;
- geographic factors suggesting a natural forum;
- avoidance of a multiplicity of proceedings;
- loss of juridical advantage;
- discouragement of forum shopping;
- special considerations in oppression cases.

Several commentators had observed that the foregoing approach was too subjective, too complicated and insufficiently predictable. As well, there has been a tendency to merge considerations pertaining to the *forum non conveniens* test into the real and substantial connection analysis, in part because the factors for identifying a real and substantial connection include fairness to the plaintiff and to the defendant.[3] Also, some had called for the law to be harmonized with the Court Jurisdiction and Proceedings Transfer Act ("CJPTA"), a Uniform Law Conference model law that codifies the principles for jurisdiction *simpliciter* and *forum non conveniens,* and that has been enacted in three Canadian provinces, British Columbia, Saskatchewan and Nova Scotia, as well as in the Yukon Territory.[4] The biggest difference between the common law and the CJPTA had been that under the CJPTA a real and substantial connection is to be presumed if certain facts exist connecting the case to the province.[5]

In a unanimous decision the Supreme Court has made two main changes. The first is that, borrowing from the CJPTA, a real and substantial connection is to be presumed (subject to rebuttal) if one or more of certain, objective, factors that connect the subject matter of the litigation with the forum exist. If no recognized presumptive connecting factor applies, the court should not accept jurisdiction.

What are those factors? The Supreme Court indicated that, in tort cases, these presumptive connecting factors include the following:

- The defendant is domiciled or resident in the province.
- The defendant carries on business in the province.
- The tort was committed in the province.
- A contract connected with the dispute was made in the province.

The Supreme Court made clear that neither the mere fact the plaintiff is present in the jurisdiction, nor that damage was incurred there, nor considerations such as fairness, comity and efficiency, would constitute presumptive connecting factors, and they are not to be considered in determining whether there is a real and substantial connection (jurisdiction *simpliciter).* The Supreme Court made clear that over time courts may identify more presumptive connecting factors, i.e. connections giving rise to a relationship with the forum that is similar to the four factors listed above. However, the Supreme Court was far less specific or expansive about this than the CJPTA or the Ontario Court of Appeal. That Court had ruled that the presumptive connecting factors are all but two of the fifteen factors listed in Ontario's Rule 17.02 of the Rules of Civil Procedure regarding service out of the jurisdiction, e.g., that property is situate in Ontario and, in tort cases, that the tort was committed in Ontario.[6]

The Court of Appeal had said that, if none of the Rule 17.02 factors apply, the plaintiff has the burden to show a real and substantial connection. In light of the Supreme Court ruling, if none of the four factors listed above apply, the plaintiff's burden would be to show that a new presumptive connecting factor applies.

To rebut the presumption of jurisdiction, the defendant must show that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum, or that the relationship is weak. For example, if the connecting presumptive factor is that the defendant carries on business in the forum, the defendant must show that the subject matter of the litigation is unrelated to the defendant's business there.

The second change is to more clearly separate and distinguish the real and substantial connection test, as to whether the court has jurisdiction (i.e. jurisdiction *simpliciter*), from the discretionary test as to whether the court should exercise that jurisdiction or leave the case for another court elsewhere (i.e. *forum non conveniens*), as is the case in the CJPTA. The court may consider *forum non conveniens* only after having first determined it has juris-

diction, and then only if the defendant invokes *forum non conveniens.* The defendant has the burden to show that another forum is clearly more appropriate; this is because normally jurisdiction should be exercised once it is properly assumed. The *forum non conveniens* doctrine gives the court a "residual power to decline…jurisdiction in appropriate but limited circumstances…to assure fairness to the parties and the efficient resolution of the dispute."[7] To establish *forum non conveniens*, the defendant must show a presumptive connecting factor connecting the subject matter of the litigation to the other forum; in this respect the common law differs from the CJPTA. The defendant then must show that forum is clearly more appropriate, based on factors such as "the locations of the parties and witnesses, the cost of transferring the case, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the enforcement or recognition of judgments, and the relative strengths of the connections of the two parties."[8] These factors are among the usual *forum non conveniens* factors in the case law and in the CJPTA.

Loss of juridical advantage, often considered an important factor in the *forum non conveniens* analysis, was a concern for the plaintiffs in *Van Breda* also, in that if Cuban law applied instead of Ontario law, the relatives would not be entitled to damages for loss of the companionship, care or guidance that the injured plaintiff could no longer provide, or to damages to compensate them for housekeeping, nursing or other services they provide to the injured plaintiff. However, loss of juridical advantage does not necessarily follow from a decision to move the case to a jurisdiction with different laws. Choice of law is an issue separate and distinct from choice of forum. In other words choosing Ontario as the jurisdiction does not necessarily mean that the law of Ontario is the applicable law. Indeed under Canadian choice of law principles for tort cases, the proper, applicable law is the law of the place where the tort was committed (*lex loci delicti*). The Supreme Court rightly pointed out that "a court may be too quick to assume the proper law naturally flows from the assumption of jurisdiction"[9] but did not rule on which law—Ontario law or Cuban law—would govern in these cases. In *obiter*, the Court commented that "to use [the factor of loss of juridical advantage] in a *forum non conveniens* analysis too extensively may be inconsistent with comity in an international context." However, the Court stated that the decision is left to the trial judge, whose decision will be entitled to deference on appeal.

III. Changes to the Law Regarding Jurisdiction Over an Out-of-Province Defendant in Defamation Cases

Two recent Supreme Court of Canada decisions—*Black v. Breeden*[10] and *Editions Ecosociete Inc. v. Banro Corp.*[11]—address jurisdiction in cross-border defamation cases. In *Black*, a media magnate sued several defendants, most of whom resided in New York or Illinois, for defamatory statements made in the U.S. which were subsequently circulated in Ontario. The defendants moved for a stay, arguing that the Ontario court lacked jurisdiction *simpliciter*, and in the alternative, that either New York or Illinois were clearly a more suitable forum than Ontario. The Court held that even a single instance of the defamatory statement being published in Ontario would suffice as a factor connecting the case to Ontario, thus placing the onus on the defendants to rebut the presumption of jurisdiction *simpliciter.*[12]

That even very limited publication suffices for the presumption of jurisdiction comes out very clearly in the companion case of *Editions Ecosociete.* The book alleged to be defamatory was published in Quebec, with five thousand copies printed, only ninety-three of which were distributed to bookstores in Ontario. Copies were also available through the publisher's website and Ontario public libraries, from which a single copy had been checked out. Nonetheless, this was the basis on which the Supreme Court found that Ontario courts have jurisdiction.

In its *forum non conveniens* analysis in *Black* and in *Editions Ecosociete,* the Supreme Court indicated that the plaintiff's desire to sue in the jurisdiction where the plaintiff's reputation would face the greatest damage is an important consideration as to fairness. In *Black,* that jurisdiction was Ontario, where Black had lived most of his life. In fact, this factor, plus the Court's determination that Ontario law was the applicable law, outweighed several other factors that favored Illinois or New York in *Black*, including comparative convenience and expense for parties and witnesses (most of whom were in the U.S.), avoidance of a multiplicity of proceedings (there were proceedings in Illinois and Delaware, not for libel, but in which the focus would be the truth of the allegedly defamatory statements), and enforceability of the judgment (a Canadian judgment for libel might not be enforceable in the U.S.). In *Editions Ecosociete* also, the fact the plaintiff's reputation faced more substantial risk in Ontario was a key reason why the Court held that the case should proceed in Ontario, not Quebec.

The question of which jurisdiction's law applies is often an important factor in the *forum non conveniens* analysis, and particularly in these two defamation cases because the Canadian law of defamation differs from American law in important ways that favor the plaintiff. The court will presume that the allegedly defamatory statement is false, and that it caused damage to the plaintiff's reputation. The defendant must rebut these presumptions. Moreover, in Canada plaintiffs who are public figures need not prove the statement was made with malice. In both *Black* and in *Editions Ecosociete,* although the defamation occurred both inside and outside Ontario, the court held that Ontario law was applicable, without explanation. The Court commented, albeit in *obiter*, that an exception might be made to the *lex loci delicti* principle in defamation cases,

such that the law of the place where harm to the plaintiff's reputation would be most substantial would govern.

IV. Other Jurisdictional Issues

A. Forum of Necessity

In *Van Breda*, the Ontario Court of Appeal, borrowing again from the CJPTA, endorsed the concept of a forum of necessity. That means that, even if the defendant is not in the province, has not consented or attorned to jurisdiction, and there is no real and substantial connection, a court may assume jurisdiction over a foreign defendant in exceptional cases "where there is no other forum in which the plaintiff could reasonably seek relief." The CJPTA also provides for forum of necessity.[13] The Supreme Court declined to address forum of necessity in *Van Breda*.

B. Forum Selection Clauses and the Court Jurisdiction and Proceedings Transfer Act

As stated in the *Z. I. Pompey Industrie* case, at common law in Canada, forum selection clauses ("FSCs") are enforced unless there is "strong cause" not to enforce it.[14] However, the CJPTA codification of principles regarding jurisdiction does not address the effect, if any, of FSCs on jurisdiction. The Supreme Court of Canada has ruled that the CJPTA codification is comprehensive.[15] As such, arguably it leaves no place for an otherwise valid FSC. If the CJPTA does not exclude FSCs, where do they fit in? Appellate courts in British Columbia and Saskatchewan have now considered this, and have reached the same conclusion: Courts must apply the *Pompey* principles, not in the determination of jurisdiction *simpliciter* but in the *forum non conveniens* analysis whether to decline jurisdiction.[16] Consideration of the FSC comes under the rubric of one of the statutory factors to be considered, namely, "the fair and efficient working of the Canadian legal system as a whole."[17] The existence of an FSC is a weighty factor that may be reason enough by itself to decline jurisdiction; it is not merely one factor among many to be considered. As well, the court in *Pompey* indicated that consideration of an FSC is an inquiry separate and apart from the *forum non conveniens* analysis, and therefore the CJPTA does not affect the law of FSCs.[18]

C. Standard of Appellate Review on Questions of Jurisdiction of an International Arbitral Tribunal

The Ontario Court of Appeal has recently decided that the standard of correctness, not reasonableness, applies on appellate review of an international arbitral tribunal's decision as to its jurisdiction. In *Mexico v. Cargill*[19] the government of Mexico challenged an award for damages, arguing that the decision dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. Was the standard of review on this issue correctness or reasonableness?

The Court of Appeal held that the tribunal had to be correct in its determination that it had the ability to render the award it did. Such an assessment did not involve a review of the merits. The court decision departs from a series of Canadian cases stating that international arbitral tribunals deserve a high degree of deference. That the tribunal's decision is outside its jurisdiction is one of the limited grounds for setting aside an arbitral award under the UNCITRAL Model Law on International Commercial Arbitration.[20]

D. Substituted Service of Statements of Claims Where Service of Claim in Foreign Country Is Impractical

Generally speaking, in Canada statements of claim or other legal documents that start a legal proceeding are to be served personally on the defendant. In circumstances where personal service proves impractical, the court has the power to authorize service by other means ("substituted service") or, if the defendant has already received the statement of claim by other means, to validate such other means ("validated service").

The rules of court in many Canadian jurisdictions require that service on defendants residing in foreign countries bound by the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters ("the Hague Convention") must be served in accordance with the Hague Convention. The Ontario Superior Court of Justice has recently ruled that in such cases the plaintiff has no recourse to substituted or validated service. In *Khan Resources Inc. v. Atomredmetzoloto JSC*,[21] the plaintiff attempted to serve a statement of claim on a Russian company in which the Russian Federation owns a more than eighty-percent interest. The plaintiff did so through the only means of service in the Russian Federation that is available under the Hague Convention, namely, to ask Russia's Central Authority under the Hague Convention to serve the claim. The plaintiff complied with the requirements of the Convention, e.g., providing a translation of the claim. Nonetheless, the Central Authority refused service, explaining the refusal with only a bald reference to Article 13 of the Hague Convention, which provides that a state may refuse service where service would "infringe its sovereignty or security." The plaintiff obtained an opinion from its law firm in Moscow, Baker and McKenzie, to the effect that to challenge the Central Authority's decision in Russia would entail an application to a certain Russian court, or to another higher authority, at a cost of Fifty Thousand Dollars, and that success would be unlikely due to political interference. The plaintiff therefore sought an order (on the grounds that the defendant was clearly aware of the claim) validating the existing service or allowing for substituted service.

The motions court gave an order validating the service, noting that the Russian government itself had stepped in to render service via the Hague Convention impractical, so as to block the proceeding, contrary to the purpose of the Hague Convention. This writer notes that

many Russians take their disputes to foreign courts, such as those in the United Kingdom—even disputes with other Russians. On appeal the decision was reversed. The Court held that the Ontario Rules of Civil Procedure and the Hague Convention must be interpreted such that the Hague Convention must be followed in all cases where applicable, and therefore the Rules of Civil Procedure regarding substituted service, dispensing with service and validating service are not available if the Hague Convention applies. The Court also found that Article 13 of the Hague Convention, although not referred to in the Rules of Civil Procedure or elsewhere in Ontario statute law, had nonetheless been implemented and therefore had become law in Ontario. Thus Ontario is legally bound to respect the Russian Federation's refusal under Article 13 to serve the claim. This decision is under further appeal to the Ontario Court of Appeal.

V. Issues Involving Foreign Judgments and Awards

A. Enforcement of Foreign Judgments—the Natural Justice Defense

There are three well-established defenses to the enforcement of a foreign judgment: (i) there was a breach of natural justice in the foreign proceeding; (ii) the judgment had been obtained by fraud; and (iii) enforcement would be contrary to public policy.[22] The Supreme Court has now left the door open to new, additional defenses in *Beals v. Saldanha*.[23] Some Canadian motions courts recently considered whether to add a new defense, namely, denial of a meaningful opportunity to be heard.[24] The Ontario Court of Appeal has now decided, in *United States v Yemec*,[25] not to recognize the new defense, on the ground that it is no different from the existing defense of breach of natural justice. The ruling arguably widens implicitly the latter defense.

The Supreme Court of Canada in *Beals v Saldanha* stated that "natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend."[26] Limitations on that opportunity are not necessarily a breach of natural justice. For example, the fact that the foreign court's rules do not allow for *viva voce* evidence is not a breach.[27]

In *Yemec,* the United States sought to enforce an Illinois court's judgment for an injunction barring Yemec from telemarketing to the United States. Yemec's defense was not that he had received no notice of the proceeding in which the judgment was issued, but instead that he had been denied a meaningful opportunity to be heard. He alleged that he had been unable to access funds and evidence necessary for his defense of the U.S. proceedings, because the U.S. had obtained an *ex parte* order freezing his account and had seized his business records. On the U.S.'s motion for summary judgment for enforcement, the motions judge had ruled that, while Yemec had not established any of the traditional defenses, there ought to be a trial on this new defense. The motions court judge in *Yemec* stated that the existing natural justice defense pertains to the procedures and processes of the foreign court, whereas the new defense would pertain to how the litigation was conducted.[28] The Ontario Court of Appeal, in upholding enforcement of the judgment, held that a "'meaningful opportunity to be heard' is indistinguishable from the natural justice defence."[29]

That the defense of breach of natural justice includes loss of a meaningful right to be heard arguably enhances the existing standard of natural justice. As to what constitutes a meaningful right, the facts of *Yemec* are not so instructive, in that the Court of Appeal held that Yemec did in fact have access to evidence and money.

B. Enforcement of Foreign Arbitral Awards—Limitation Periods

The Supreme Court of Canada has ruled in *Yugraneft v. Rexx*[30] that recognition and enforcement of foreign arbitral awards is subject to the limitations period in the law of the jurisdiction where the award is to be enforced, even where the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and the UNCITRAL Model Law on International Commercial Arbitration are in effect. The result of this case was that the enforcement of a Russian award in Alberta was barred by the expiration of the limitations period.

Although the New York Convention creates an obligation to recognize and enforce eligible foreign arbitral awards, and limits the grounds on which enforcement may be refused, it also says that recognition and enforcement shall be "in accordance with the rules of procedure of the territory where the award is relied upon." The New York Convention is silent as to time limits for enforcement. The Court held that limitations periods constitute a rule of procedure, not substantive law, and thus may be applied to the enforcement of foreign arbitral awards.

The Court said that the question was whether the legislature that enacted the limitations period in question intended that it apply to recognition and enforcement proceedings, and, if so, whether such time limits fall within the ambit of the "rules of procedure" as that term is used in the New York Convention. The Court held in the affirmative on both questions. The Alberta Limitations Act provides a two-year limitations period for all causes of action except certain matters for which separate limitations periods have been established. The law establishes a ten-year period for the enforcement of judgments. The court rejected Yugraneft's argument that the foreign award should be considered a judgment. As such, no separate limitation period applied to the award, and thus the two-year period applied.

The Supreme Court of Canada had ruled earlier in a choice of laws case, *Tolofson v. Jensen*,[31] that limitations periods are substantive law, not procedural law. Yugraneft argued that, as such, Alberta's limitations period is not a rule of procedure within the meaning of the New York Convention and thus not applicable. The court rejected that argument, saying that *Tolofson* is irrelevant to this case.

The Court also clarified that the limitations period does not begin to run until the judgment creditor knows, or would know if it had exercised reasonable diligence, that the debtor has assets in a given province.

C. Enforcement of Foreign Non-Monetary Judgments

Until 2006, Canadian law did not permit the recognition or enforcement of foreign non-monetary judgments (e.g., judgments granting an injunction)—not even non-monetary judgments from other parts of Canada. Only foreign judgments for damages could be recognized or enforced. In *Pro Swing v. Elta Golf*,[32] the Supreme Court of Canada opened the door to enforcement of foreign non-monetary judgments. The Court ruled that enforcement of non-monetary judgments would be subject to all the requirements for enforcement of monetary judgments, but also would be subject to judicial discretion governed by a number of factors. A review of non-monetary judgment enforcement cases since *Pro Swing* shows that courts have enthusiastically embraced their new powers to enforce non-monetary judgments.

First let us briefly review the requirements for enforcement of foreign monetary judgments and the *Pro Swing* decision. The first requirement is that the foreign court that issued the foreign judgment must have had jurisdiction over the case, in accordance with Canadian principles of jurisdiction. That is, the defendant must have resided in the issuing court's jurisdiction, or attorned to the issuing court's assumption of jurisdiction, or there must have been a real and substantial connection between that jurisdiction and the subject matter of the case. Second, the judgment must be final. Third, Canadian courts will not enforce foreign penal judgments or judgments to collect taxes. In addition, there are several defenses to enforcement, namely, breach of natural justice, fraud in obtaining the judgment, and that enforcement would be contrary to public policy.

In *Pro Swing*, the Court identified several additional factors to govern the decision whether to enforce a non-monetary judgment, including:

- Whether the judgment is clear enough that the defendant knows what is expected of him or her.
- Whether the judgment clearly states its territorial scope.
- Whether the judgment is limited in its scope, and whether alternative remedies available to the plaintiff would be more appropriate.
- Did the issuing court retain power to issue further orders?
- The size of the burden that enforcement would place on the judicial system. (That is, is that burden consistent with what would be entailed for domestic litigants?)
- The impact of enforcement on third parties.
- Whether enforcement would expose litigants to unforeseen obligations, or consequences they would not face under the foreign law.
- Whether the enforcing court must venture into uncertain territory to interpret the foreign judgment.

The Court said the requirement of finality as applied to equitable orders is "indispensible" but is more complex than for a common law order, and thus "could be the object of further commentary."

On the matter of extraterritoriality, the Court acknowledged that permitting the enforcement of foreign non-monetary orders means that "the separation of judicial systems is thus likely to be altered, since a domestic court enforcing a foreign non-money judgment may have to interpret and apply another jurisdiction's law…. [Enforcement of foreign] equitable orders will require a balanced measure of restraint and involvement by the domestic court that is otherwise unnecessary when the court merely agrees to use its enforcement mechanisms to enforce a debt." Thus, there must be "judicial discretion enabling the domestic court to consider relevant factors so as to ensure the orders do not disturb the structure and integrity of the Canadian legal system."[33]

The foreign injunction in question in *Pro Swing* required the defendant to, among other things, stop selling certain golf equipment that infringed a trademark, to deliver up all offending golf equipment, and to provide an accounting for sales. The Court declined to enforce it for several reasons, including (i) the territorial reach of the injunction was not clearly stated; (ii) one of the orders was a contempt order and thus (in Canada, but not in the United States) quasi-criminal in nature, and to enforce it would expose the defendant to unforeseen obligations; three, the accounting for sales included sales outside the scope of the trademark protection, and thus enforcement would offend the principle of territoriality, and four, involvement of the Canadian court might not be warranted because enforcement was not worthwhile in that it appeared the defendant was insolvent.

In *United States v. Yemec*,[34] the Ontario Court of Appeal considered the *Pro Swing* factors, and in particular the Supreme Court's comments quoted above about extraterritoriality and restraint, relied upon by the defendant. An

Illinois court had issued an injunction against Yemec, who had been involved in telemarketing Canadian and foreign lottery tickets to Americans, barring him from "telemarketing, in any manner, of any product or service to any person in the U.S." In deciding to enforce the injunction, the court dismissed Yemec's restraint argument with little discussion, noting that Yemec had not raised the argument in the court below, nor appealed the broad scope of the injunction in the U.S. proceeding. The court found that the complete prohibition against telemarketing was "[not] unfair or unreasonable," in that Yemec's marketing had violated U.S. law. With respect, a prohibition broader than the telemarketing of lottery tickets, or for that matter a prohibition even of telemarketing done in a fashion that complies with the U.S. law, constitutes a penal order under Canadian law, which is not enforceable.

McClintock v. McGriskin[35] dealt with a judgment from Tennessee for a permanent injunction restraining McGriskin from dealing in the assets of McClintock, and ordering her to repay certain funds to McClintock. The injunction had been issued on default, despite ample notice, and McGriskin had taken no steps to vary, set aside or appeal the injunction. McGriskin had at one time been the conservator of the assets of McClintock, an elderly widow residing in Tennessee. A wealth advisor in Tennessee retained by McGriskin had transferred over a million dollars from McClintock's bank accounts in Tennessee to McGriskin. The issuing court clearly had jurisdiction, and the injunction was clearly worded and was an appropriate remedy in the circumstances. On these facts, the Ontario court was right to enforce the judgment. However, the injunction did not state whether it applied to property outside Tennessee. The Ontario court did not address the territorial scope of the foreign injunction, perhaps because the same judgment also imposed a constructive trust specifically on a house in Port Hope, Ontario.

In *Scotia Capital Inc. v. Caribbean Commodities Inc. et al.*, an unreported decision, the Ontario Superior Court of Justice recognized an order of the Grand Court of the Cayman Islands that appointed PWC Corporate Finance & Recovery as receiver of accounts of certain companies that held, in Canadian banks, certain funds linked to some accounting irregularities. Recognition of the order enabled the receiver to take control of the funds in Canada.

Endnotes

1. Namely, the approach articulated in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (O.C.A.).
2. 2012 SCC 17 (S.C.C.); [2010] O.J. No. 402 (O.C.A.).
3. See paragraphs 50-56 and 81-82 of the O.C.A's decision in *Van Breda*, note 2 *supra*.
4. *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, ch. 28; *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, ch. C-41.1; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c.2; *Court Jurisdiction and Proceedings Transfer Act*, S.Y. c. 64 a. 3136. Alberta, Manitoba, and Ontario are also considering enacting a CJPTA.
5. For example, in tort cases, that the tort was committed in the province, in contract cases, that the contract was substantially performed there, in property cases, that the property (movable or immovable) is in the province. See s. 10 of the British Columbia CJPTA (SBC 2003, ch. 28).
6. The two Rule 17.02 factors to which the Court of Appeal would not give such presumptive effect, because they are not reliable indicators of a real and substantial connection, are damage incurred in Ontario (R. 17.02 (h)), and necessary or proper party outside Ontario (R. 17.02 (o)).
7. *Van Breda*, note 2 *supra*, para. 104.
8. *Id.*, para. 110.
9. *Id.*, para. 111.
10. 2012 SCC 19.
11. 2012 SCC 18.
12. Para 19-20.
13. CJPTA, SBC 2003, ch. 28, s. 6.
14. *Z. I. Pompey Industrie v. ECU-Line N.V.* [2003] 1 S.C.R. 450.
15. *Teck Cominco Metals v. Lloyd's Underwriting* [2009] 1 S.C.R. 321.
16. In British Columbia, *see Viroforce Systems Inc. v. R & D Capital Inc.* 2011 BCCA 260, 336 D.L.R. (4th) 570; *Preymann v. Ayus Technology Corp.* [2012] B.C.J. No. 106, 2012 BCCA 30. In Saskatchewan, *see Microcell Communications Inc. v. Frey*, 2011 SKCA 136; *Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137.
17. s. 10 (2) (f) in the Saskatchewan statute, and s. 11 (2) (f) in the British Columbia statute, both cited *supra* in note 4.
18. *Pompey*, note 14 *supra*, at paragraph 21. *See also Preymann*, note 16 *supra*, at paragraph 37.
19. 2011 ONCA 622.
20. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. See chapters 34 and 36.
21. [2011] O.J. No. 4793 (Master Graham); [2012] O.J. No. 1059 (O'Marra J.).
22. Of course one can defend against enforcement if one can show that one or more of the requirements for enforcement have not been met. Those requirements, briefly summarized, are that the issuing court had properly exercised jurisdiction (in accordance with Canadian principles, as described above), that the judgment is for an exact amount, that it be final and conclusive, and that it not be a penal order.
23. [2003] 3 S.C.R. (4th) 1.
24. *United States v. Yemec* (2009) 97 O.R. (3d) 409 (S.C.J.); *King v. Drabinsky* (2008), 91 O.R. (3d) 616.
25. [2010] O.J. No. 2411 (O.C.A.).
26. *Beals*, note 23 *supra*.
27. *Cook Nook Hazelton Lanes v. Trudeau Corp. (2003)*, 48 C.P.C. (5th) 330. (S.C.J.).
28. *Yemec*, note 24 *supra*, at para. 172.
29. *Id.*, at para. 27.
30. [2010] 1 S.C.R. 649.
31. [1994] 3 S.C.R. 1077.
32. [2006] 2 S.C.R. 612.
33. *Pro Swing*, note 32 *supra*, at paragraphs 13-15.
34. *Yemec*, note 25 *supra*.
35. [2010] O.J. No. 5511.

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Distribution Laws in Central America

By Hernán Pacheco Orfila

I. Introduction

During the late 1960s and early 1970s many Latin American countries adopted special legislation to regulate the relationship between foreign suppliers and domestic distributors, agents or sales representatives. Most of these laws and regulations contained provisions that overzealously protected the interests of the local distributor or agent, often to the significant detriment of the interests of the foreign supplier.

The proponents of such laws justified the need for special legislation with the argument that many foreign companies came to the region, hired a sales representative or appointed a distributor who, after investing significant resources in opening and creating a market for the foreign product or service, was terminated without cause once the market matured. In many cases the relationship between the foreign company and the local agent or distributor was not properly documented, leaving the terminated party without recourse. Under the special legislation, termination in those circumstances triggered an indemnification mechanism, the characteristics and particularities of which varied from one country to the other.

With the liberalization of markets and economic integration, most of the countries in the region have now modified their legal regimes concerning distribution and agency.

This article summarizes the most relevant aspects of distribution and agency in the Central American countries and focuses in particular on the consequences of termination for the foreign supplier.

II. Costa Rica

A. Generally

Costa Rica is one of the few countries in Latin America that still has special legislation to regulate the relationship between local distributors, dealers or agents and foreign suppliers. This set of rules is contained in Law number 6209, the Law for the Protection of Representatives and Distributors of Foreign Companies, of 24 February 1978, and its regulations, found in Executive Decree number 8599 of 9 March 1978. Law number 6209 was recently amended by Law number 8629,[1] which implemented the commitments assumed by the country under the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA).

According to Article 1, Paragraph a) of Law 6209, a "foreign company" is defined as:

> Any individual or company domiciled abroad which carries on commercial activities within the country, directly or through branch offices, agents or subsidiaries.

A "distributor" is further defined as:

> Any individual or company, which, by means of an agreement with a foreign company, imports or manufactures in the country, goods for distribution within the national market, acting at its own expense and risk.

A "representative" or "agent" is defined as:

> Any individual or company which in a continuous and autonomous manner —with or without legal representation— prepares, promotes, facilitates or accomplishes the sale or distribution of goods or services which foreign companies sell or render in the country.

Before the amendments, Law 6209 contained particular features that tended to over-protect the rights and interests of those individuals or entities qualified as representatives or distributors of foreign companies under Costa Rican Law. The current regime brings more balance between the foreign companies and the local distributors or representatives.

Law 6209 has been declared of Public Order, which means that it is paramount to the free will of the parties. Therefore, the parties cannot include in a distribution or representation contract any term or condition that would conflict with the provisions of Law 6209, nor can they take exception to any one of the law's provisions based on their private agreement: those provisions of the distribution agreement that contradict Law 6209 are deemed null and void.

For example, there is abundant jurisprudence which in no uncertain terms establishes that the existence of a distributorship need not be documented in a formal written contract. To the contrary, Costa Rican courts have ruled that when Law 6209 makes reference to a *"contract"* or an *"agreement,"* it includes not only a formal written instrument, but also an undocumented commercial relationship between the parties. In other words, the mere fact that a commercial relationship between a foreign supplier and a local individual or entity conducting business in such capacity exists suffices to constitute a distributorship,

thus rendering the parties subject to the provisions of Law 6209.

Costa Rican courts have been very flexible concerning the evidence acceptable to demonstrate the relationship. Thus correspondence, witnesses, purchase or supply orders etc. have been accepted by Costa Rican judges as sufficient to substantiate such a commercial relationship.

The courts have also ruled that, even if it not explicitly provided for in the corresponding agreement, a relationship established with a local representative or distributor can become exclusive in nature, if the foreign company maintains contact solely with that distributor or representative for an extended period of time. Nevertheless, the concept of presumptive exclusivity has been changed upon enactment of the DR-CAFTA amendments[2] and the amended text of the law establishes that the local distributor or representative is entitled to terminate a relationship with a foreign company, with liability to the latter, if the foreign company appoints another distributor or representative when the existing relationship is exclusive, provided such exclusivity has been explicitly agreed upon in the agreement.

Before the DR-CAFTA amendments, the scope of the protection of Law 6209 went so far as to force the parties to submit disputes to the jurisdiction of the Costa Rican courts. As a result, Costa Rican civil courts traditionally sustained the exclusivity of the Costa Rican courts over the handling of disputes under Law 6209.

However, the Costa Rican Constitutional Court declared this provision partially unconstitutional, thereby changing the traditional position of the courts. The Constitutional Court held that the provisions contravened a number of international conventions and in resolutions number 10352 of 22 November 2000, 02655-2001 of 4 April 2001, and 12712-2001 of 14 December 2001 allowed the submission of a dispute under a distribution relationship to arbitration, even if the forum for such arbitration is abroad, provided the applicable law is Law 6209.

The DR-CAFTA amendments implemented the Constitutional Court's resolutions by amending Article 7 as follows:

> The rights of the representative, distributor or manufacturer by virtue of this Law cannot be relinquished.
>
> The absence of an explicit provision for the resolution of controversies in the representation, distribution or manufacturing agreement shall be considered a presumption of the parties' intention to resolve any dispute by binding arbitration. Said arbitration may take place in Costa Rica. Despite the foregoing, said presumption shall not apply if a party objects to the arbitration.

The Law 6209 also regulates the causes for termination of a distribution or representation relationship.

B. Consequences of Termination

Under Article 5 of Law 6209, the only grounds for termination which will not result in liability for the foreign company are:

a. Offenses and misdemeanors committed by the representative or distributor against the property and reputation of the foreign company committed by the representative, by the distributor or by the manufacturer.

b. Incompetence or negligence attributable to the representative, distributor or manufacturer, declared by one of the judges of the Civil Court of its domicile, as well as a decrease or a prolonged and substantial stagnation in sales, due to causes attributable to the representative, distributor or manufacturer. The establishment of quotas or official restrictions on the importation or sale of the product or service shall presume the non-existence of the relationship, unless proven otherwise.

c. Violation on the part of the representative, distributor or manufacturer of the trade secret and loyalty due to the foreign company, by the disclosure of facts, knowledge or techniques relative to the organization, the products and the operation of the foreign company, acquired during its commercial relations with the foreign company.

d. Whatever other serious fault on the part of the representative, distributor or manufacturer relative to its contractual or legal duties and obligations with the foreign company.

e. Termination of the agreement upon the expiration of the term or giving the prior notice established in the agreement.

f. Termination of the agreement notified in advance to the representative, distributor or manufacturer within at least ten months, when the agreement does not indicate an expiration date or in the absence of a provision regarding prior notice.

Termination for any other cause will render the foreign company liable to pay compensation, which includes re-purchase of the inventory, plus ten percent to cover finance charges and, if taken to litigation, an importation ban on its products may be ordered by the judge until a guarantee bond is placed to satisfy the court that the obligations will eventually be fulfilled.[3]

The Law also allows the local distributor or representative to rescind the agreement for causes attributable to

the foreign company, in which case, the foreign supplier would be held liable to pay an indemnification, even though the local distributor or representative terminated the relationship.

Accordingly, Article 4 contains an exhaustive list of instances construed as just causes for termination of the distributorship by the local distributor, representative or manufacturer, for which the foreign company is liable:

a. Offenses and misdemeanors by the company's officials against the property and the reputation of the representative, distributor or manufacturer.

b. The termination of activities of the foreign company, unless it is due to causes beyond their control.

c. The unjustifiable restriction on sales, imposed by the foreign company, which may result in a reduction in the volume of business carried out by the representative, distributor or manufacturer.

d. Lack of payment of commissions or fees earned by the representative, distributor or manufacturer.

e. The appointment of a new representative, distributor or manufacturer, when the affected ones have exercised the representation, distribution or manufacture on an exclusive basis and such exclusivity has been explicitly established in the agreement.

f. All unilateral modifications introduced by the foreign company to the contract of representation, distribution or manufacture, which impair the rights and interest of their representative, distributor or manufacturer.

g. Whatever other serious fault committed by the foreign company which impairs the contractual or legal rights and obligations that it maintains with its representative, distributor or manufacturer.

h. Termination of the agreement before the expiration term or without giving the prior notice established in the agreement.

i. Termination of the agreement without giving a notice to the representative, distributor or manufacturer at least ten months in advance.

According to Article 3 of Law 6209, if the distribution agreement is terminated, the foreign supplier must purchase the inventory of its products from the distributor, at a price including the cost of the products, plus a reasonable percentage for the investment made. This percentage is to be determined by the Ministry of Economy, Industry and Commerce.

The foregoing is further regulated in the Regulations to Law 6209, which establish the following additional obligations of the foreign company in the event of termination:

a. Pay all outstanding commissions, as well as those that may eventually arise from business in process of formalization at the moment of cancellation of the contract.

b. Purchase the inventory of products, at cost, including direct and local expenses plus taxes, plus ten percent (10%) to cover financial expenses.

If the foreign company terminates the agreement for reasons not contemplated in the list of just causes for termination contained in Law 6209, the local company is entitled to sue and claim damages according to Article 10 bis of Law 6209, as amended under DR-CAFTA.

It is relevant to point out that, prior to the DR-CAFTA amendments, the Law contemplated a fixed indemnification mechanism based on average gross profit over a period of time.

Article 10 bis, now states:

> Damages and losses: When, pursuant to the provisions of this Law, a claim seeking damages and losses is filed, the damage caused or which can necessarily be caused as a direct and immediate consequence of the violation of the provision or the right, must be fully compensated in accordance with principles of fairness. The Civil Code applies to this matter…

Moreover, Article 10 bis provides that the judge may order a prudential guaranty bond, which shall be proportional to the amount of indemnification claimed, when the interested party demonstrates that the defendant does not have sufficient assets in the country to respond to an adverse ruling.[4]

III. El Salvador

A. Generally

While El Salvador does not have a special law that regulates distributorship or agency agreements, it has incorporated provisions in its Commerce Code to regulate such commercial relationships. Chapter III of the Commercial Code regulates commercial agents, such as (i) dependent agents (articles 384- 391); (ii) representative agents or distributors (articles 392- 399-B); and (iii) intermediary agents (Articles 400-410).

In general terms, the law establishes that the parties may freely negotiate the terms and conditions of their contractual relationship. However, the law contains certain provisions that tend to protect the distributor or representative agent. Thus the section related to representative agents or distributors in the Commercial Code in-

cludes articles that contain specific rules to establish just causes for termination; proceedings for the calculation of the indemnification; payment of commissions if there is no written agreement; and other relevant aspects of the commercial relationship between a distributor or representative agent and its supplier or principal.

The Salvadorian Commercial Code also stipulates the following causes that allow the Principal to terminate, modify or refuse to prolong the relation of distribution:

- Breach of the agency, representation or distribution contract.
- Fraud by the agent, representative or distributor, without prejudice of the criminal prosecution.
- Serious ineptitude or neglect of the agent, representative or distributor.
- Continuous decrease in the sale or distribution of the articles for reasons attributable to the agent, representative or distributor.
- Disclosure of confidential information, without prejudice of prosecution or claim for indemnification.
- Actions taken by the agent, representative or distributor that jeopardize the introduction, sale or distribution of the products.

The El Salvadoran Commercial Code also contains provisions to protect the distributor from unilateral acts of the principal, such as the termination, modification or refusal to renew the relation of distribution without reasonable cause, and granting the distributor the right to sue the principal for indemnification. This indemnification could extend to the following:

- Expenses by the distributor to benefit the distribution business and that, as a result of the termination of the relationship, cannot be recovered.
- Value of the investments made in equipment or facilities, acquired solely with the purpose to carry on the distribution.
- The value of existing merchandise that could be difficult or impossible to sell due to the termination of the relationship.
- The amount of the gross income obtained by the distributor during the last three years of the relationship.
- The value of the credits that the distributor had granted to third parties, in order to facilitate the distribution of the merchandise.

For example, Article 395 states that, if there is not any specific agreement on commissions, the agent or distributor is entitled to receive a commission proportional to the magnitude of business concluded through its activities, in accordance with the customary practices of the territory.

If a business transaction is not completed for reasons attributable to the principal, the agent or distributor will still be entitled to the full commission. Furthermore, if the agent or distributor has exclusive rights over a specific territory, it will be entitled to receive a commission for any and all business conducted by the principal in that territory, whether or not the agent participated directly in the business transactions.

Pursuant to Article 399-A, disputes generated by the application of these provisions will be handled through an abbreviated proceeding at the competent courts of the domicile of the representative agent or distributor.

In the event that the principal is a foreign company and it is sentenced to pay compensation to a local distributor or representative agent for breach of contract, the Code establishes that the principal will not be allowed to perform business in the country until it pays the indemnification or until it places a guarantee in court to secure payment thereof.

B. Consequences of Termination

Article 397 establishes that either party may terminate the contractual relationship through written notification to the other party three months in advance. In the event of termination of the contractual relationship, the representative agent or distributor will be entitled to the value of the pending commissions earned during the term of the contract.

However, if the principal does not terminate the agreement based on any of the just causes for termination listed in Article 398 of the Commerce Code, or if the principal unilaterally modifies or does not renew the term of the agreement without just cause, the distributor can request an indemnification that can extend to recovery of promotion costs, non-recoverable investments, repurchase of stock, payment of accounts receivable and payment of gross profits during the last three years or fraction thereof.

Article 399-B further establishes that the distributor or agent is entitled to terminate the commercial relationship, with liability of the principal, when the latter unilaterally modifies the agreement in detriment of the distributor's or representative agent's rights and interests. In such case, the distributor or agent is entitled to the same indemnification and compensation established in Article 397.

IV. Guatemala

A. Generally

In 1998, Guatemala repealed Decree 78-71, which formerly regulated agency, distribution and license agreements under a very inflexible and protectionist regime.

These commercial relationships are now regulated by the Commerce Code (amended by Congressional Decree 8-98), and new agreements can be negotiated and executed in accordance to the free will of the parties.

B. Consequences of Termination

The mechanisms and consequences of termination of agency or distribution agreements vary, depending on whether the agreement existed prior to 11 November 1998. Under the former Decree 78-71 an agreement of this nature could be terminated only upon the occurrence of the following triggering events:

- Mutual consent of the parties.
- Expiration of the term.
- Just cause.
- Decision of the agent, distributor or representative, subject to 3 months advance notice.
- Unilateral decision of the supplier or principal, provided proper compensation for damages is paid.

As a result of the abrogation of Decree 78-71 and the adoption of Congressional Decree 8-98, the causes and consequences of termination (with or without just cause) are now regulated in Article 290 of the Commerce Code. Therefore, depending on the termination scenario, different outcomes and consequences come into play.

Termination may take place by mutual written consent of the parties or by expiration of the term in agreements with definite term.

In the event the commercial relationship is terminated by the distributor or agent, it must notify the principal at least three months in advance. At the principal's request, the agent or distributor is obligated to render accounts information and reimbursement of goods/merchandise at CIF price.

Termination under the foregoing scenarios does not trigger any responsibility or liability for any party and neither of them incurs in any severance/indemnification obligation.

1. Principal's Termination Decision

In the event the principal decides to terminate the relationship, it becomes liable for all damages and losses caused to the agent, unless a just cause for termination exists. No requirement of prior notice exists if the principal wants to terminate the agreement.

2. Just Cause for Termination

The party responsible for termination with just cause is liable for damages caused to the other party. To that effect, the following are regarded as just cause for termination:

- In regard to any of the parties:
  - Lack of fulfillment or infringement by the other party of the duties agreed upon;
  - Crimes against the property or person of one of the parties by the other; and
  - Refusal to issue the reports and accounts relative to the business, in the time and manner agreed upon.
- In regard to the principal:
  - Unauthorized disclosure to third parties of any fact, data, password or formula classified as confidential; and,
  - Unjustified decreases in the agreed sales average.
- In regard to the agent, distributor or representative:
  - Whenever the principal performs acts that directly or indirectly prevent, or tend to prevent, the agent from fulfilling or complying with the agreement.

If indemnification is not established in the relevant agreement, the local distributor can request damages (which include promotional costs, non-recoverable investments, stock, labor obligations, etc.).

With the enactment of DR-CAFTA, through Congressional Decree 11-2006, two main innovations in regard to the relationship with a local distributor or agent were introduced. The first is the possibility to submit disputes of this nature to arbitration, whether in Guatemala or abroad. The second is the obligation for distributors, agents or representatives to register themselves with the Mercantile Registry.

V. Honduras

A. Generally

Honduras has a specific set of rules to regulate distributorships under Supreme Decree 549, entitled "Law of Agents, Distributors and Representatives of National and Foreign Companies." However, upon enactment of DR-CAFTA for Honduras, that is, as of 1 April 2006, a new set of rules introduced relevant reforms to the rules set forth in the Supreme Decree.

The just causes for termination are established as follows:

- Distributor's failure to abide by the essential obligations of the contract.
- Fraud or abuse of trust in the fulfillment of the agent's (distributor's) obligations.
- Negligence of the agent/distributor resulting in the loss of market share.

- Refusal by the distributor to provide reports and accounts or to exercise liquidation pertaining to the business within the time frame and fashion agreed upon.
- Disclosure of confidential information without authority.
- Bankruptcy, insolvency, inability to make payments or any other legal disablement according to normal business practices.
- Any action initiated by the distributor that jeopardizes the business or level of sales.

B. Consequences of Termination

If the foreign company terminates the agreement without just cause, it may be forced to pay an indemnification to the distributor pursuant to Article 14 of the Law. The indemnification obligation includes the following components:

- All expenses incurred by the local distributor that cannot be recovered due to the modification, non-renewal or termination of the agreement.
- The value of the investments made by the agent or distributor for the benefit of the foreign company, as long as the agent or distributor is not able to use them, in accordance with the depreciation schedules applied for the payment of income tax for machinery.
- The value of the merchandise and spare parts in stock that will not be used as a result of the termination or non-renewal.
- The amount of the annual gross profit obtained by the distributor, agent or representative during the last five years of the distributorship, agency or representation agreement, and if the agreement has a shorter term, five times the amount of the average annual gross profit for the number of years the agreement has been in force.

However, upon approval of the law to implement DR-CAFTA, several modifications were introduced:

- The expiration and non-renewal of the term of the agreement is now considered just cause for termination. Under Supreme Decree 549 the supplier who refused to renew the contract without just cause was subject to pay a significant pecuniary compensation to the local dealer or agent.
- The parties may freely agree on forms of indemnification in case of termination by the supplier without just cause.
- If the indemnification is not established in the agreement, to allow the parties to submit the issue to arbitration.

The Implementation Act of the DR-CAFTA, which entered into force on 24 March 2010, states that for every written contract of representation, distribution or agency signed after the Treaty's entry into force, Articles 4, 6, 14, 15 and 22 of Decree 549 will be applied. In other words, in order to be a concessionaire, it is no longer a requirement to be Honduran or for the company to be Honduran. The amendment further eliminates the concept of presumptive exclusivity, the compensation for termination of contract, the right to impound the supplier's goods, as well as the quality of preferred creditor.

The Conciliation and Arbitration Act (Decree 161-2000) reformed Article 21 of Supreme Decree 549, which now reads:

> The controversies that arise between the grantor and the concessionaire will be solved by conciliation at first instance, if there is no agreement, or if there is a partial one, the controversy will be submitted to arbitration or to judicial proceedings.

VI. Nicaragua

A. Generally

Nicaragua regulates distribution and agency agreements in the general provisions contained in its Commerce Code. It has no special law to regulate this type of commercial relationship. The Law of Representatives and Distributors of Foreign Companies was abrogated in 1998. However, the Courts have held that, based on Article 18 of the Civil Code, distribution relationships in force and documented prior to July 1998 are still governed by that protectionist body of rules.

B. Consequences of Termination

The consequences for the parties in case of termination are those established in the corresponding agreements and, in lieu thereof, the possibility of applying the indemnification for damages contemplated in the Code of Commerce in case the termination violates contractual obligations.

VII. Panama

A. Generally

Panama does not have specific legislation to regulate distributorship and agency. The terms and conditions of such commercial relationship are left to the free will of the parties as negotiated in the relevant agreement. In the absence of contractual provisions, the relationship is governed by the provisions contained in its Commerce Code. The Code of Commerce does not explicitly regulate, nor does it define, these types of relationships, although it has provisions common to commercial contracts, which are applicable to distribution and agency in regard to those

aspects not contemplated by the parties in their agreements. Further, the Code of Commerce does regulate the Commercial Mandate, some of which principles could be applied to distribution or agency relationships.

For over twenty years, Cabinet Decree No. 344 of 31 October 1969 regulated agency and distribution in Panama. However, on 2 August 1989 the Supreme Court declared that Decree No. 344 was unconstitutional, based on the arguments that it infringed competition rules, due process, granted disproportional benefits and privileges and violated the Constitutional Principle of no confiscation of goods, freedom of choice and market access. The exclusive nature that the Decree vested upon distribution and agency relationships was viewed as a restriction to free competition, with negative monopolistic effects in detriment of consumers and the freedom to choose.

Law 45 of 31 October 2007 regulates consumer protection and competition. This law has as its primary object to insure and protect free economic competition and free market access, thereby eradicating monopolistic practices and other restrictions to an efficient operation of the market of goods and services, to preserve the superior interest of consumers.

While it is generally accepted that the above Supreme Court decision did not eliminate the possibility for an agent and its principal or for a distributor and its supplier to agree on certain exclusive terms and conditions of their relationship, the effects on the market of such exclusive covenants are subject to review at any time, in accordance with the provisions of Law 45.

B. Consequences of Termination

The consequences for the parties in the event of termination are those established in the relevant agreements and, in lieu thereof, the right to seek indemnification for damages to the extent contemplated by law in the event of a termination that violates contractual obligations.

Under Panamanian law it is perfectly acceptable to submit a dispute involving a distribution or agency relationship to arbitration in Panama or abroad and to regulate the relationship between the contracting parties pursuant to foreign law.

Endnotes

1. Published in the Official Gazette No. 243 of 18 December 2007.
2. In addition, the presumption was contrary to the Law for the Promotion of Competition and Consumer Protection (Law 7472 of 20 December 1994), which prohibits any and all types of monopolistic practices, including exclusive contracts, that may be against free competition.
3. Pursuant to article 242 of the Costa Rican Civil Procedures Code, the judge may order injunctive relief under special circumstances.
4. Article 9 of Law 6209, repealed by Law 8629 under the DR-CAFTA, stated that the foreign company was required to render a guarantee covering the total amount of the indemnities claimed by the representative, distributor or manufacturer, and that amount was determined by the judge.

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