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CURRENT TOPICS IN CHAPTER 15 CROSS-BORDER CASES

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RECOGNITION OF CHAPTER 11 CASES BY FOREIGN COURTS

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Daniel M. Glosband
Goodwin Procter LLP/CBInsolvency LLC
dglosband@goodwinlaw.com
glosband@cbinsolvency.com

RECOGNITION OF CHAPTER 11 CASES BY FOREIGN COURTS

"Foreign debtors" whose "home country" is not the U.S. - businesses incorporated outside the U.S. and with little or no U.S. operations - have often attempted to use chapter 11 to restructure.[1] The chapter 11 eligibility threshold is low – money in a retainer account will suffice as "property in the United States" – and the chapter 11 case will encompass "property wherever located".[2] Prior to the adoption of the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law") by the U.S. and other countries, the success or failure of such foreign debtor chapter 11 cases turned on broad support and the absence of convincing objections by non-U.S. interested parties. The efficacy of the chapter 11 case was tested in the context of a motion to dismiss filed under section 305(a)(1) and the U.S. court considered a mix of factors

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[1] Oscar Couwenberg and Stephen J. Lubben, *Corporate Bankruptcy Tourists*, 70 The Business Lawyer 719, 726 (2015) (identifying over 300 "foreign debtor" cases between 2005 and 2012).

[2] 11 U.S.C. § 109(a), (d) combine to limit eligibility to be a debtor under chapter 11: "(a)… 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;" "(d) Only a …
… may be a debtor under chapter 11 of this title." Foreign debtors with no prior business or assets in the United States can become eligible by placing a small amount of assets in the U.S. *See e.g. In re* Yukos Oil Co. *("*Yukos*"),* 321 B.R. 396, 407 (Bankr. S.D. Tex. 2005 (~$480,000 in a bank account)); *In re* Global Ocean Carriers Ltd*., 251 B.R. 31* (Bankr. D. Del. 2000) (few thousand dollars in bank account and unearned portion of U.S. counsel's retainer). 11 U.S.C. § 541 creates an estate comprised of all of the debtor's property wherever located.

with an overlay of comity.[3] Ultimately, the U.S. court had to be comfortable that its exercise of jurisdiction would be worthwhile and the chapter 11 results would be respected by necessary parties.[4]

If the home country of a foreign debtor has adopted the Model Law or Model Law-type provisions, its courts could be asked to grant recognition of the chapter 11 case and to enforce orders entered in the U.S. This process either substitutes or superimposes the objective recognition factors of the Model Law for the more subjective "best interests" standard of section 305(a)(1).[5] Recent decisions by *foreign* courts suggest that the fundamental criterion remains the same: support by key parties for the U.S. proceeding breeds success while serious opposition begets failure.[6]

PRE-MODEL LAW SUCCESS: AVIANCA[7]

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[3] "§ 305**(a)** The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
(1) the interests of creditors and the debtor would be better served by such dismissal or suspension…"

[4] See, e.g., Monitor Single Lift I Ltd., et al, 381 B.R. 455 (Bankr. S.D.N.Y. 2008) (refusing to dismiss a case by an English debtor and its Cayman Islands and U.S. subsidiaries after analysis of the applicable factors: "These factors …include: (1) the economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought…Where there is a pending foreign insolvency proceeding, concerns of comity must be taken into account and deference must be given to the foreign proceedings." Id. at 464-465. "After due consideration of all seven factors, the Court concludes that the Bondholders failed to demonstrate a basis for granting the extraordinary relief sought under 305(a)(1). While there are ongoing proceedings involving at least one PLC subsidiary in Scotland, the Scottish proceeding does not directly affect the administration of PLC's estate before this Court, and the Debtors have offered sound arguments why this chapter 11 case better protects PLC's contractual rights, and therefore the rights of PLC's creditors as a whole, than could proceedings in either the Cayman Islands or the United Kingdom." Id. at 466-467. *Cf. In re* Compania de Alimentos Fargo, S.A., 376 B.R. 427 (Bankr. S.D.N.Y. 2007) (dismissing an involuntary chapter 11 case filed against a debtor that was actively pursuing restructuring in Argentine proceedings).
Fargo, S.A., 376 B.R. 427, 434 (Bankr.S.D.N.Y. 2007);

[5] The Model Law requires that the foreign proceeding be either a foreign main proceeding or a foreign nonmain proceeding, meaning that the debtor must have its COMI or an establishment in the country of the foreign proceeding. This could spell doom for the recognition of chapter 11 case if jurisdiction is based only on minimal property in the U.S. A little pre-chapter 11 planning could result in the debtor creating an establishment in the U.S.

[6] Northshore Mainland Services Inc., et al, 2015/COM/00039 (31 July 2015) (Bahamas Supreme Court); 19 Entertainment Limited, [2016] EWHC 1545 (Ch) (29 April 2016) (England and Wales High Court); Legend International Holdings, Inc., [2016] VSC 308 (2 June 2016) (Supreme Court of Victoria); UCI Holdings Limited, [2016] NZHC 1228 (9 June 2016) (New Zealand High Court).

[7] *In re* Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1, 8 (Bankr. S.D.N.Y. 2003) ("Avianca") ("Today, especially in a reorganization, the presence of creditors in a jurisdiction, the power of a court to exert judicial power over them, and the willingness of other creditors to submit to the jurisdiction of the court, is often a more important factor than the presence of assets . . . .") *Id.* at 13).

Avianca S.A., the national airline of Colombia had been in business since 1919. It filed a Chapter 11 case in New York in 2003. Avianca was indebted to its aircraft lessors (located primarily in the U.S.) for $290 million; owed $27.7 million to holders of notes issued by the Bank of New York; owed an additional $15 million to other creditors in the United States; and owed $115 million to creditors located in Colombia (a very large part of which comprised pension and tax obligations).

Two aircraft lessors and a parts supplier brought motions to dismiss the case under sections 305(a)(1) and 305(a)(2).[8] The aircraft lessors agreed on lease restructuring terms but the supplier went forward. The motions were based generally on the argument that a U.S. bankruptcy court should not hear a case involving a non-U.S. company whose main center of activities was abroad and which had more non-U.S. creditors than domestic U.S. creditors.

The Bankruptcy Court (Gropper, J.) denied the motions to dismiss because:

- There was no showing that Avianca would be better served by dismissal and relegation to a Colombian proceeding which likely had no jurisdiction over the lessors and major financial creditors, so it was in best interest of the debtor and creditors under 11 U.S.C. §305 (a)(1) to continue the case.

- There was no foreign proceeding pending in Colombia, as required for dismissal under §305(a)(2).

- Avianca was able to continue operating which benefitted all the parties, including the public.

The court explained the broad principle for a successful foreign debtor chapter 11:

> A complaint by a Colombian creditor that it was unfairly treated by the application of U.S. bankruptcy principles might have raised different equities and different issues, but there has been no such claim made in this case. Indeed, as discussed above, the Debtor's principal Colombian creditors have participated fully in the Chapter 11 proceedings. Consent is often a critical factor in determining the proper scope of a bankruptcy court's jurisdiction. See *Hong Kong and Shanghai Banking Corp., Ltd. v. Simon (In re Simon),* 153 F.3d 991, 997 (9th Cir.1998); *Nakash v. Zur (In re Nakash),* 190 B.R. 763, 770 (Bankr. S.D.N.Y.1996). Avianca has been able to obtain not only an effective standstill from its Colombian creditors without a formal filing, but the major creditors have actively participated in and supported these cases.[9]

PRE-MODEL LAW FAILURE: YUKOS[10]

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[9] Avianca, 303 B.R. 1, 14.
[10] *In re* Yukos Oil Co. *("*Yukos*"),* 321 B.R. 396

Yukos Oil Company was a Russian-incorporated company and the parent of over 200 subsidiaries organized in Russia, Cyprus, the BVI, the U.S. and the UK. Most assets and nearly all 100,000 employees were in Russia but there were significant U.S. and Western European investors.

The Russian government retroactively assessed $27.5 billion in taxes, jailed Yukos' CEO, froze its assets and bank accounts and announced an auction sale of its largest subsidiary. Management responded by authorizing a chapter 11 filing and transferring $1,000,000 to its U.S. law firm. A motion to dismiss was filed by a bank.

While several grounds were advanced to support dismissal, the case was dismissed based on the "totality of the circumstances." In essence, the court could not enforce jurisdiction over the critical party, the Russian government, so the chapter 11 would have been futile:

> Yukos seeks to substitute United States law in place of Russian law, European Convention law, and/or international law, and to use judicial structures within the United States in an attempt to alter the creditor priorities that would be applicable in the law of other jurisdictions. Yukos appears to hope to subordinate its tax debt, and to transfer causes of action it believes it holds, into a trust for continued litigation…Additionally, it is not clear that this court can obtain personal jurisdiction of the pertinent parties sufficient to grant much of the relief sought in the instant case. The vast majority of the business and financial activities of Yukos continue to occur in Russia. Such activities require the continued participation of the Russian government, in its role as the regulator of production of petroleum products from Russian lands, as well as its role as the central taxing authority of the Russian Federation.[11]

POST-MODEL LAW – TWO SUCCESSES AND TWO FAILURES (in chronological order)

When a foreign court considers whether to assist a U.S. chapter 11 and focuses through the lens of the Model Law or the common law (in British Commonwealth countries), the technical analytics are different than those applied by a U.S. court but the broad principle is unchanged – broad support allows the chapter 11 to succeed and broad antagonism torpedoes it.

FAILURE: BAHA MAR

The Baha Mar case presents the opportunity to compare the reported decisions of a foreign court and the U.S. court concerning an attempt to use chapter 11 to reorganize a primarily Bahamian development. Baha Mar is a massive $3.5 billion resort in the Bahamas containing four hotels, a Jack Nicklaus golf course and more than 40 restaurants. The resort was expected to create 5,000 new jobs and a $130m payroll – adding around 12 percent to the Bahamas' GDP.

[11] Yukos at 411.

Baha Mar entities filed Chapter 11 bankruptcy cases in Delaware on June 29, 2015.[12] Northshore Mainland Services was a Baha Mar subsidiary incorporated in Delaware and the only one of the 15 chapter 11 debtors not incorporated in the Bahamas. Northshore and some of the other subsidiaries, through a cash management system, had bank accounts in the U.S., although several subsidiaries opened accounts with initial deposits of $10,000 in the weeks prior to filing. The Debtor owed $2.33 billion to the Export-Import Bank of China ("CEXIM"), $140 million unsecured debt to a Bahama subsidiary of a Chinese construction company ("CCA") and listed over 5,100 creditors, 3500 of which were in the Bahamas.

The Debtor commenced an ancillary proceeding in the Bahamas on June 30, 2015 seeking the equivalent of recognition and enforcement of the Chapter 11 automatic stay. CCA, CEXIM and the Attorney General of the Bahamas opposed. After a preliminary July 22, 2015 ruling dismissing the requests for assistance, the Bahamas Supreme Court (Justice Ian Winder) issued a written opinion detailing the reasons for dismissal.[13] While the court discussed several grounds for dismissal, the technical basis was a unique legal gap: Bahamas had passed the Companies Winding Up Amendment Act 2011 ("CWUA") which contained Model Law-like provisions governing ancillary assistance to foreign proceedings. Assistance was to be available only to designated countries and the list of designated countries had not been promulgated.[14]

The CWUA enactment pre-empted the court's pre-existing "inherent jurisdiction to grant recognition and provide assistance in insolvency matters…"[15] The court said that it could not legislate in the absence of the designated country list by continuing to apply the common law. Nonetheless, the court considered the merits of the requests "in the event that I am wrong as to the effect of the CWUA."[16] On the merits, the court adopted the general common law rule of the British Commonwealth countries that (absent legislative authorization) assistance will only be granted to foreign proceedings emanating from the country of the debtor's incorporation and that foreign proceedings of a debtor domiciled in the forum country will not be recognized. In addition the court stated denial of assistance was proper, "…in the context of this dispute, as none of the Applicants' 2,500 employees, the Government, the Lender, the Contractor, CBL or any of the other creditors…could ever have had an expectation that if insolvency should intervene the laws of the District of Delaware or the United States would govern or be engaged at all."[17] "The only insolvency proceedings, which can give true effect to the principal of modified universality, would be a unitary insolvency proceeding in the Bahamas."[18]

In the meanwhile, on July 16, 2015, the Bahamian Attorney General had presented a petition to the Bahamian Supreme Court to wind up all of the Bahamian debtors and on September 4, 2015

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[12] *In re* Northshore Mainland Services, Inc., 537 B.R. 192 (Bankr. D. Del. 2015).
[13] Northshore Mainland Services, Inc., et al, Commonwealth of the Bahamas Supreme Court, 2015/COM/Com/00039 (July 31, 2015). ("Bahamas Opinion).
[14] The list has since been published and includes the U.S. See http://www.internationallawoffice.com/Newsletters/Insolvency-Restructuring/Bahamas/Lennox-Paton/Bahamas-designates-list-of-relevant-foreign-countries
[15] Bahamas Opinion, ¶ 32.
[16] *Id.* ¶ 48.

[18] *Id.* ¶ 62. The Bahamian Court also found that the relief sought by the applicants violated Bahamian public policy, which protects the rights of secured creditors to enforce their security interests free from stay.

the court appointed liquidators. However, it initially limited their powers to preserving the debtors' assets and promoting a compromise.

The bankruptcy court hearing on motions to dismiss the chapter 11 cases filed by CEXIM and CCA was held on August 28, 2015 and the decision issued on September 15, 2015. The court rejected a §109(a) objection, finding that all debtors had property in the U.S. and some had places of business. It also denied an argument that the cases were filed in bad faith and that was "cause" for dismissal under §1112 (b): "The events leading up to the bankruptcy filing clearly show Debtors on the edge of a financial precipice. The Debtors contemplate using the rights and protections offered by the Bankruptcy Code to reorganize their financial affairs and complete the Project, which is in the best interests of all stakeholders… The totality of the facts and circumstances surrounding the Debtors' chapter 11 filings do not support a determination of bad faith. The cases will not be dismissed under Bankruptcy Code §1112."[19]

The court then focused on § 305(a)(1) and the totality of the circumstances to determine whether dismissal would be in the interests of the debtor and its creditors. Ultimately, the refusal of the parties to compromise – bemoaned by both the U.S. and Bahamian courts – led the bankruptcy court to dismiss the chapter 11 cases: "The Debtors' preference for restructuring under the protections of the United States Bankruptcy Code is understandable and entitled to some weight. Chapter 11 of the United States Bankruptcy Code, with all stakeholders participating, under these circumstances, would be an ideal vehicle for the restructuring of this family of related companies with the ultimate goal of finishing a project said to be 97% complete and, upon its exit from chapter 11, to be in sound financial footing, with appropriate treatment of creditors. I am consequently disappointed that the parties have been so far unable to formulate a consensual exit strategy, whether that would involve taking a plan to confirmation or providing for an agreed dismissal as part of a consensual resolution of their disputes… "[20] In a footnote, the Delaware court noted; "Justice Winder also expressed his disappointment in the parties' inability to work out a compromise, writing: 'It is extremely regrettable that the parties have not found a way to resolve this dispute given what is at stake for all parties and the numerous opportunities afforded for a resolution to happen.'"

SUCCESS: 19 ENTERTAINMENT

19 Entertainment Limited ("19 Entertainment") was one of nearly 50 direct and indirect subsidiaries of CORE Entertainment Inc. CORE and its subsidiaries ("CORE Group") all filed chapter 11 petitions in the United States Bankruptcy Court for the District of Delaware on April 28, 2016.[21] The CORE Group is in the entertainment business and is perhaps most well known as the producer of American Idol. Unique among the members of the CORE Group, 19 Entertainment was incorporated in England and had its registered office in London.

The CORE Group had defaulted on its secured bank debt and 19 Entertainment's former CEO had served a demand for nearly $3 million that could have led to winding-up proceedings in the UK. To prevent this, 19 Entertainment sought recognition of its chapter 11 case under the UK's

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[19] Northshore Mainland, 537 B.R. 192, 203.
[20] *Id.* at 206.
[21] *In re* AOG Entertainment, Inc., et, al, Case No. 16-11090-smb (Bankr. S.D.N.Y. 2016).

Cross –Border Insolvency Regulations 2006 (the "2006 Regulations"), the UK enactment of the UNCITRAL Model Law. As the declaration of the president of certain of the debtors stated:

> While the Debtors believe that the commencement of a foreign winding-up proceeding by Mr. Fuller [the former CEO] would be stayed pursuant to the Bankruptcy Code's automatic stay, the Company is prepared to take all precautions necessary to prevent Mr. Fuller's actions to distract the Company's attention and resources away from its chapter 11 reorganization efforts or to jeopardize valuable assets held by Debtor 19 Entertainment Limited. To that end, in conjunction with its chapter 11 filing in the United States, the Company will commence an ancillary recognition proceeding under the Cross-Border Insolvency Regulations 2006, which implements the UNCITRAL Model Law in Great Britain, in the English High Court located in London, England (the "**UK Court**" and such proceedings, the "**UK Proceeding**"). Given the fact that the Company believes that 19 Entertainment Limited's center of main interests is located in the United States, the Company will be seeking recognition of these chapter 11 cases by the UK Court as a "foreign main proceeding.[22]

On the day following the chapter 11 filings, the UK court heard and granted 19 Entertainment's application for recognition, apparently on an *ex parte* basis.[23] The decision illustrates the contrast between the English common law approach (as discussed in Baha Mar, above) and the UNICTRAL Model Law approach (as embodied in the 2006 Regulations). The former permits assistance only to foreign proceedings of companies domiciled in the foreign jurisdiction while the latter permits assistance to companies which have their domicile in the forum country and their center of main interests (or an establishment) in the foreign jurisdiction. As the UK Court notes:

> …it is very clear that, although the registered office of the company is in London, at New Bridge Street, it is, in fact, the paradigm case of a letterbox company because its business, direction and operation is now entirely conducted in the United States of America and, in particular, in Los Angeles. It has closed down, as I mentioned a moment ago, its London office; its directors are United States citizens and are resident there. Its board meetings are held in the United States. The Company's website, or rather that of the group to which it belongs, makes it clear that it is a Los Angeles-based concern with a Los Angeles telephone number. Further, the major creditors of the company are in the United States and its business dealings are also conducted there, as is its banking….In my judgment, the fact that its COMI is situated in that country is extremely clear and I shall approach this case on that basis. [24]

[22] *Id.,* Docket No. 3, ¶ 53.
[23] In the Matter of 19 Entertainment Limited and in the Matter of the Cross-Border Insolvency Regulations 2006, [2016] EWHC 1545 (CH), (England and Wales High Court (Chancery Division) April 29, 2016) ("UK Decision").
[24] *Id.* at ¶P 4, 6.

The UK Court goes on to find similarities between chapter 11 and "the administration order regime applicable in England" and acknowledges that "… the effect of the Model Law is to give to the English court the possibility of enabling the position of a company which is in Chapter 11 Bankruptcy in the United States, to be put on a similar footing in England with regard to any action against it by creditors, such as it would be if proceedings were being conducted in the United States."[25]

Before granting relief, the UK Court addressed the requirements that the 19 Entertainment's chapter 11 case be a "foreign proceeding" and that the applicants, the debtor's directors, be foreign representatives. The UK Court easily concluded that the chapter 11 was a foreign proceeding under Article 2 of the Model Law and the 2006 Regulations; i.e. "a collective judicial or administrative proceeding in a foreign state pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation."[26]

To conclude that the applicants comprised a foreign representative under Article 2; i.e. "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding,", the UK Court relied on an affidavit of the debtor's U.S. counsel. The evidence explained that §1107 of the Bankruptcy Code gave the debtor in possession the functions and duties of a trustee and that this sufficed to qualify the directors as foreign reresentative.

The UK Court entered an order recognizing the chapter 11 case as a foreign main proceeding (triggering an automatic stay under Article 20) and also entered discretionary relief specifically staying enforcement of security, seizure of assets, appointment of an administrative receiver and the presentment of any winding-up petition or application for appointment of an administrator:

> I turn then to the question of discretionary relief. As I have explained already, there is a degree of urgency in the matter which is now before me, in the light of Mr. Fuller's position and in the light of his entitlement, within a matter of days, to commence winding up proceedings. If discretionary relief were to be granted, he would not be able to take that step, nor would other creditors. In my judgment, it is entirely consistent with the policy behind the adoption of the Model Law that I should grant relief of a kind which is similar to the moratorium relief provided in para. 43 of sch. B1 of the 1986 Act.

FAILURE: LEGEND INTERNATIONAL HOLDINGS, INC.

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[25] *Id.*, at ¶ ¶ 10, 11.
[26] *Id.* ¶ 14.

Moving from England to its former protectorate Australia, a different Delaware chapter 11 case bit the dust.[27] Legend International Holdings, Inc. ("Legend") was incorporated in Delaware but its main business was phosphate mining and processing in Queensland.   A dispute with investors led to an arbitral award of over $12 million USD against Legend. The Supreme Court of Victoria entered a judgment enforcing the award on December 31, 2015. On April 11 2016, the judgment creditors filed a winding-up application against Legend; on May 8, 2016, Legend filed a chapter 11 petition in Delaware[28]; and on May 10, 2016, Legend's representative filed a petition seeking recognition of the chapter 11 case under the Cross Border Insolvency Act 2008, Australia's enactment of the UNCITRAL Model Law.

The Australian Court rejected the judgment creditors' argument that recognition should be denied because the chapter 11 proceedings were manifestly contrary to Australia's public policy: "In any event, I do not consider, provided all other criteria are met as required by Chapter 11, seeking protection of Chapter 11 is contrary to public policy. After all, Chapter 11 is designed to achieve protection. The concept and goals of Chapter 11 are not that far removed from the voluntary administration regime under the Corporations Act."

The absence of a place of business in the U.S., on the other hand, posed a problem for recognition. After analyzing what exactly "registered" meant for purposes of the Article 16 presumption that "the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests" the court concluded that it could mean either the location designated in the debtor's corporate filings (Delaware) or the principal office shown in its SEC filings (Australia); i.e. Legend had two registered offices.[29] But if Delaware were presumed to be the COMI, the presumption was rebutted by "proof to the contrary."

Interestingly, the Australian Court quoted heavily from an earlier Australian decision, Ackers v. Saad, that looked to U.S. precedent for help in defining the test for COMI.[30] The Ackers decision looked to the Bear Stearns cases (District Judge Sweet), Betcorp (Bankruptcy Judge Markell) and a paper by Bankruptcy Judge Gropper.[31] The Ackers Court also looked to the guidance of the EU Insolvency Regulation as applied by the European Court of Justice:

> "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."
>
> The Court continued (*Eurofood* [2006] Ch at 541-542 [33]-[34]):

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[27] *In re* Legend International Holdings, Inc.(as debtor in possession) v. Legend International Holdings, Inc. [2016] VSC 308 (Supreme Court of Victoria. June 2, 2016) ("Legend Australia").
[28] Legend International Holdings, Inc., Case No. 16-11131(BLS) (Bankr. D. Del. May 8, 2016) ("Legend U.S.").
[29] Legend Australia, ¶ 81.
[30] Ackers v. Saad Investments Company Limited, [2010] FCA 1221 (Federal Court of Australia, October 22, 2010).
[31] *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund Limited, 389 BR 325 (S.D.N.Y. 2008); *In Re* Betcorp Limited 400 VR 266 (Bankruptcy District of Nevada, 2009)

"33 That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.

After reviewing a list of determinative factors suggested by the parties, such as where directors reside and act, where primary assets are located, where principal place of business is located, where accounting is performed and where capital is raised, the Australian Court stated:

> I conclude that the overwhelming 'proof' identifies Legend's COMI as in Australia. Apart from the Delaware regulatory requirements, and apart from Legend being originally incorporated in Delaware, the preponderance of Legend's activities are conducted in Australia. Australia is Legend's COMI. To the extent needed to rebut the presumption in Article 16(3), IFFCO and Kisan have done so. Accordingly, I determine that the Chapter 11 proceeding is not a foreign main proceeding.[32]

The Australian Court also found no evidence of an establishment in the U.S. and denied recognition as either a foreign main proceeding or a foreign non-main proceeding. Meanwhile, back in the U.S., the Australian liquidators and the U.S Trustee moved to dismiss the chapter 11 case and on July 25, 2016 Judge Shannon entered an order dismissing the case.

SUCCESS: UCI HOLDINGS LIMITED

On June 2, 2016, UCI International, LLC and 11 affiliated entities, including its parent UCI Holdings Limited, filed chapter 11 petitions in the United States Bankruptcy Court for the District of Delaware.[33] UCI made replacement auto parts, had recently lost major contracts with retailers and General Motors, was suffering from Chinese competition and was unable to make an out-of-court deal with bondholders to reduce its indebtedness.[34] Among the first day pleadings was Debtor's Motion for an Order Authorizing Brian Whittman, the CRO, to Act as Foreign Representative pursuant to Section 1505 of the Bankruptcy Code.[35] The Motion stated, inter alia,:

> Debtor UCI Holdings is a limited liability company registered in New Zealand and is the intermediate parent of the other Debtors and their respective non-Debtor subsidiaries. In connection with these chapter 11

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[32] Legend, supra, ¶ 123.
[33] *In re* UCI International, LLC et al, Case No. 16-11354 (Bankr. D. Del. 2016).
[34] UCI International Files for Chapter 11 Bankruptcy Protection, Wall Street Journal, June 2, 2016.
[35] *Id.,* Docket No. 16. § 1505 provides: "A trustee or another entity (including an examiner) may be foreign country on behalf of an estate created under section 541. An entity authorized to act under this section may act in any way permitted by the applicable foreign law."

> cases, UCI Holdings intends to commence recognition proceedings in New Zealand—akin to a chapter 15 proceeding under the Bankruptcy Code—to protect any and all interests there and to ensure an orderly chapter 11 process. In order for New Zealand courts to recognize these chapter 11 cases as a "foreign proceeding," Brian Whittman, on behalf of UCI Holdings, must make a showing to the New Zealand courts that he is authorized to act for UCI Holdings in New Zealand proceedings.

An Order granting the Motion entered on June 3, 2016.[36] On June 9, 2016, the High Court of New Zealand (the "New Zealand Court") accepted the Bankruptcy Court's designation of the foreign representative and granted his request for provisional relief, essentially adopting the chapter 11 automatic stay pending a hearing on recognition of the U.S. chapter 11 case.[37] The UCI case parallels 19 Entertainment in that UCI Holdings was a New Zealand corporation; i.e. registered in the forum country not in the country of the foreign proceeding. The New Zealand Court treated the request for interim relief similarly to a request for "freezing orders" under its rules, considering the following factors:

> (a) a good arguable case that the applicant will succeed (i.e. it is capable of tenable argument and supported by sufficient evidence);[8]
> (b) a risk that the property will be dissipated or disposed of, defeating execution of a judgment; and
> (c) the balance of convenience and the overall interests of justice must be weighed.

The New Zealand Court accepted evidence that there was a strong likelihood that the UCI Holdings' chapter 11 case would be recognized as a foreign main proceeding and entered the requested stay. The application was not entirely *ex parte*, as in 19 Entertainment; notice was given to a creditor under a revolving credit agreement but was not given to bondholders.

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[36] *Id.*, Docket No. 77.

[37] The application was filed under the New Zealand enactment of the UNCITRAL Model Law, the Insolvency (Cross-Border) Act 2006; Article 19 (like Bankruptcy Code section 1519) permits provisional, pre-recognition relief.

9 Brook. J. Corp. Fin. & Com. L. 152

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Article

*152 THE CURIOUS DISAPPEARANCE OF CHOICE OF LAW AS AN ISSUE IN CHAPTER 15 CASES

Allan L.

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but largely ignored and consider whether these decisions would have been less parochial, and the goals of chapter 15 promoted, if it had been explicitly acknowledged that a choice of law was required and considered. Finally, it is argued that choice of law analysis can promote another of the principal goals of the Model Law and chapter 15: cooperation among courts and estate representatives of different nations. [10]

I. CHOICE OF LAW ANALYSIS IN U.S. CROSS-BORDER INSOLVENCY CASES

Choice of law was not a major issue in most bankruptcy cases in the past, in part because bankruptcy jurisdiction was traditionally territorially based, premised on a country's *in rem* control over property within its borders. [11] Traditional bankruptcy theory would thus subject a debtor's ***155** property within the jurisdiction of the court to the local insolvency regime, ordinarily to the exclusion of application of any other law. [12]

The more modern cases that have considered choice of law in a bankruptcy context have generally applied a "center of gravity" analysis, deferring to the law of the jurisdiction with the most substantial interest in the matter in dispute. For example, in *Hong Kong and Shanghai Banking Corp., Ltd. v. Simon (In re Simon)*, [13] the court said, "under the Bankruptcy Code, the bankruptcy court must consider the status and progress of other nations' insolvency proceedings in determining how to manage domestic bankruptcies. In most cases, the court will defer to where the 'center of gravity' of multiple proceedings exists, if one can be ascertained." [14] Choice of law issues were considered most thoroughly in *Maxwell Commc'n Corp. plc v. Societe Generale plc (In re Maxwell Commc'n Corp. plc)*. [15] There, insolvency proceedings were pending in London and New York regarding Maxwell Communications Corp., the London-based holding company of an international publications empire. [16] Three banks based in London but amenable to suit in New York had been repaid the principal of their debt during the ninety days prior to the U.S. filing. [17] There was no dispute that if U.S. preference law were applied in the U.S. chapter 11 case, the debtor would very likely be able to recover more than $30 million for the benefit of the estate-- a sizable sum for the day. [18] If, on the other hand, English law were applied, the debtor would likely be unable to satisfy the more stringent ***156** requirements of the English preference statute. [19] Not surprisingly, the banks were sued in the United States, and the debtors argued that U.S. law should apply. [20]

The Bankruptcy Court and the District Court, on first appeal, explicitly dealt with the choice of law issue. [21] Chief Judge Brozman in the Bankruptcy Court found that English law should be applied on two grounds. The first was the so-called presumption against extraterritoriality, a doctrine that U.S. laws do not apply to extraterritorial conduct unless the statute explicitly provides for such a result (and extraterritorial application is constitutionally permissible). [22] The second ground is more relevant for present purposes. The court said:

> The traditional federal choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the controversy .... The court is required to evaluate all of the various contacts each jurisdiction has with the controversy in terms of their relative importance with respect to a particular issue and make a reasoned determination as to which jurisdiction's laws and policies are implicated to the greatest extent. [23]

The court took note of the "more radical" approach of its appointed expert, Professor Jay L. Westbrook, who advocated for application of the "home country" law--i.e., the law of the debtor's principal place of business or, to use a chapter 15 term, center of main interests (even though the term probably had not yet been coined). [24] It concluded:

> ***157** In any event, whether one applies the Restatement's traditional choice-of-law analysis or Professor Westbrook's more radical approach, the conclusion is inescapable that, as Professor

> Westbrook concluded, English law ought govern resolution of these suits. MCC was a publicly-owned holding company, incorporated in England and run, for all intents and purposes, by MCC executives out of Maxwell House in London subject to the direction of an English board of directors. MCC negotiated its loans with these defendants in England and provided that English law would govern resolution of any disputes arising therefrom. The challenged transfers occurred in England and the recipients, two of which were English banks, were located in England. It is certainly questionable whether the defendants reasonably could have expected U.S. law to apply. [25]

The court's final words were, "[b]ecause I find that English law ought govern, considerations of comity dictate that these suits be dismissed." [26]

The result in the District Court, the court of first appeal, was similar, although the District Court placed the choice of law portion of its opinion under the heading, "Comity," and noted "courts have naturally looked to international choice of law principles in attempting to apply this canon of statutory construction." [27] At the Second Circuit, the next and final appellate level, the Court did not rely on the presumption against extraterritoriality. [28] It agreed that there was "a true conflict" between U.S. and English law, "necessitating the application of comity principles to ascertain the compass of the [Bankruptcy] Code." [29] It applied "traditional choice of law principles" through the prism of comity and found that English law should prevail because, among other things, "England has a much closer connection to these disputes than does the United States," and "England has a stronger interest than the United States in applying its own avoidance law to these actions." [30] It rejected the position of the examiner in the case, who argued that all of the provisions of a unitary bankruptcy statute must be ***158** applied in a given proceeding, and that, as a result, the *lex fori concursus* or law of the forum (the United States) necessarily governed. [31] Its conclusion was that "[a]though a different result might be warranted were there no parallel proceeding in England--and, hence, no alternative mechanism for voiding preferences--we cannot say the United States has a significant interest in applying its avoidance law." [32]

The "traditional federal choice of law rule" applied by the Bankruptcy and District Courts in *Maxwell* and implicitly by the Second Circuit was also recognized in a proceeding under § 304 of the Bankruptcy Code, the predecessor to chapter 15. [33] In *In re Koreag, Controle et Revision S.A.* [34] a foreign representative sought an order transmitting property located in New York to Switzerland for administration in a Swiss insolvency proceeding pending there. [35] The Second Circuit held that the federal common law rule and the conflicts principles of New York, where the litigation was pending, both called for "an interest analysis" to determine which of the conflicting laws of two jurisdictions should prevail. [36] It concluded:

> Switzerland's primary interest is in the administration of [the debtor's] insolvency estate. New York's primary interest is in defining and protecting the property interests of its citizens and those who do business there. Thus, New York law is more closely related to the particular property dispute at issue. We conclude that New York law should apply. [37]

Although a "center of gravity" or "interest analysis" has been applied in most plenary bankruptcy proceedings where the issue has arisen, as well as in an application for relief under § 304 of the Bankruptcy Code (such as in *Koreag*), note should be taken of a distinct line of authority that has developed in cases where U.S. creditors of foreign debtors have sought to litigate issues arising out of a foreign insolvency proceeding in the U.S. courts, and the defendant moved to dismiss, citing the principle of comity and arguing that the dispute should be subject to the exclusive jurisdiction of the foreign insolvency court. For example, in *JP Morgan Chase Bank v. Altos Homos de Mexico, S.A. de C.V.*, the dispute was between a Mexican ***159** debtor and a group of banks in the United States who held a security interest, under

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a loan agreement governed by New York law, in receivables earned by the Mexican company from customers in the United States and held in a collection account in New York. [38] The banks sued in the United States for a declaration that they owned the funds in the collection account, and the Mexican debtor moved to dismiss on grounds that principles of international comity counseled deference to the foreign bankruptcy court. [39] The Second Circuit held that the case should be dismissed on comity grounds, observing that "[w]e have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding." [40]

Strictly speaking, *Altos Homos* and similar cases raise the question as to which court should decide the dispute, not the law that the court should apply. Nevertheless, there is an assumption that a U.S. court should decide an issue of U.S. or local law. For example, the *Altos Homos* court distinguished its prior opinion in *Koreag* by reaffirming *"Koreag*'s rule that U.S. courts may resolve *bona fide* questions of property ownership arising under local [U.S. or State] law while a foreign bankruptcy proceeding is ongoing without deferring to the parallel foreign proceeding on grounds of international comity." [41] The implication is that the U.S. court should decide an issue of local law. In another § 304 case, *Bank of New York v. Treco (In re Treco)*, [42] the court held even more explicitly that funds could not be remitted to the Bahamas if a security interest created under U.S. law and held by a U.S. creditor were impaired, and that the U.S. court should decide whether the creditor was in fact secured under local law. In any event, the structure of the Model Law and chapter 15, like § 304, makes it clear that if the foreign representative wants relief in the United States, the U.S. courts will make the final determination. [43] Therefore, although cases outside of chapter 15 continue to follow principles similar to those set out in *Altos* ***160** *Homos* [44] under chapter 15, foreign representatives must satisfy specific statutory standards that significantly constrain its approach of strong deference to the foreign court, as well as the foreign law.

II. THE CHOICE OF LAW PRINCIPLES OF THE LEGISLATIVE GUIDE, THE EU REGULATION AND THE GLOBAL RULES

Recent analysis of cross-border choice of law principles in the legal literature reveals a split of authority between use of the *lex fori concursus* as a governing rule and a more nuanced analysis based on a center of gravity or interest analysis.

The *lex fori concursus* is the law of the jurisdiction where the insolvency proceeding is pending. Its foremost advocate for use in cross-border cases is UNCITRAL, which drafted the Model Law. [45] Although the Model Law contains no specific provisions dealing with choice of law, UNCITRAL has also adopted a Legislative Guide "to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations." [46] The Legislative Guide's position on choice of law issues is strictly in favor of the law of the state where insolvency proceedings are pending. It acknowledges that a choice of law must be made where there is a cross-border conflict, but it resolves all but two such conflicts in favor of the *lex fori concursus*, declaring that "[t]he insolvency law of the State in which insolvency proceedings are commenced (*lex fori concursus)* should apply to all aspects of the commencement, conduct, administration and conclusion" of an insolvency proceeding. [47] The *lex fori concursus* thus governs not only procedural matters but also the treatment of contracts, setoff rights, treatment of secured creditors, and distribution of proceeds. [48] Only two exceptions are acknowledged as subject to another law: "the effects of insolvency proceedings on the rights and obligations of the participants in a payment or settlement system or in a regulated financial market" [49] and "the effects of insolvency proceedings on rejection, continuation and modification of labour contracts." [50] The Legislative Guide does not explain why these two quite distinct matters should be subject to a law other than ***161** the *lex fori concursus*, except that the rights of local employees and those subject to a regulated market are frequently subject to special protections in insolvency proceedings. [51]

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The position taken by the Legislative Guide, it is submitted, is based on the proposition that adherence to the *lex fori concursus* will provide certainty with respect to the effect of insolvency proceedings on the rights and claims of parties affected by those proceedings so long as the forum of the insolvency case is also the debtor's 'center of main interests.' The basic principle has been forcefully advocated by Professor Westbrook, the expert appointed in the *Maxwell* case and author of the 'radical' approach (as described by the Bankruptcy Judge there) that English law should apply because it was the debtor's home country law. Westbrook contends:

> a clear home-country rule that permits creditors to anticipate that one law will control most aspects of a default will greatly benefit predictability and contribute to Transactional Gain. Because we cannot always apply the home-country rule, we must settle for a strong presumption in its favor as we consider each choice of law problem. [52]

The position of the Legislative Guide is not, however, taken by the European Union Insolvency Regulation--the one statute on cross-border insolvency law that does specifically deal with choice of law. [53] The EU Regulation, which is in force in all member states of the EU except Denmark, is designed to coordinate insolvency proceedings throughout the EU and to require cooperation among courts and estate representatives. [54] Unlike the Model Law, the EU Regulation contains express provisions relating to the "Law Applicable." [55] Like the Legislative Guide to the Model Law, the EU Regulation starts with the *lex fori consursus*, providing that the "law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their ***162** closure." [56] Nevertheless, there are several exceptions to the primacy of the *lex fori concursus*, including not only the two matters recognized in the Legislative Guide (labor and financial contracts), but also third parties' security rights in collateral not located in the state of the opening of the proceeding; [57] setoff "permitted by the law applicable to the insolvent debtor's claim"; [58] contracts relating to immoveable property; [59] and the effects of insolvency proceedings on lawsuits pending at the time of the opening of proceedings. [60] The EU statutory rules are thus far more nuanced than the principles of the Legislative Guide.

Rules similar to those in the EU Regulation have also been proposed in a study published by the American Law Institute and the International Insolvency Institute entitled "Global Rules on Conflict-of-Laws Matters in Insolvency Cases." [61] The Global Rules, like the conflict of law rules in the EU Regulation, recognize numerous exceptions to the general rule, application of the *lex fori concursus.* [62] Exceptions include, in addition to those relating to labor and financial contracts, [63] protection of the *in rem* rights of secured creditors under the law of a state other than that of the foreign main proceeding; [64] protection of setoff rights; [65] and defenses to avoidance proceedings, unless the law of the state other than the forum "has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the selection of the law of that state as the law to govern the transaction in question. [66] The Reporters explain that a more limited

range of exceptions to the dominant role of the *lex concursus* is unlikely to prove commercially convenient or acceptable to the majority of parties engaged in international trade and business, given the present stage of uneven development of national laws governing such sensitive matters as security interests, set-off, and transaction avoidance. We therefore ***163** proclaim our allegiance to the alternative approach embodied in articles 415 of the EU Regulation (notably in articles 5, 6, and 13) whereby additional exceptions to the application of the *lex concursus* are permitted, under controlled circumstances .... [67]

A further question is whether the position taken by the UNCITRAL Legislative Guide--strict application of the *lex fori concursus*--or the more nuanced position of the European Regulation is more faithful to the Model Law and to its American counterpart, chapter 15 of the Code. As noted above, the Model Law and chapter 15 are silent on the issue

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of choice of law, and they do not rule out strict application of the *lex fori concursus*. Nevertheless, it is submitted that several provisions of the Model Law and chapter 15 weigh in favor of the nuanced approach. For example, both the Model Law and chapter 15 require that before substantive relief is granted, "the court must be satisfied that the interests of creditors and other interested persons, are adequately protected." [68] Article 21(2) of the Model Law and its U.S. counterpart, § 1521(b), require that creditors in the enacting state be adequately (sufficiently) protected if the court, at the foreign representative's request, entrusts the distribution of all or part of the debtor's assets in the enacting state to the foreign representative. [69] Section 1507 of the U.S. version of the Model Law provides that "additional assistance" beyond that available under §§ 1519 and 1521 can be granted only if "consistent with the principles of comity" and only if such relief "will reasonably assure-

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

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

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

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

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns. [70]

***164** The statute, especially in the form adopted in the United States, thus contains material limitations on a receiving court's authority to adopt and enforce the *lex fori concursus*. [71]

Three recent major chapter 15 decisions in the United States have used the provisions of chapter 15 relating to sufficient protection and additional assistance to sustain application of U.S. law and to reject the *lex fori concursus*. [72] Each of the cases relied in part on the concept of "sufficient protection." One of them relied more substantially on the holding that the requested relief was additional assistance available only under limited circumstances provided in § 1507. It is submitted that each case would have been better decided if the choice of law issue had been recognized and if a choice of law analysis had been performed. Such analysis would give better effect to principles of sufficient protection and additional assistance than the vague and somewhat parochial tests that the courts used.

III. THREE ILLUSTRATIVE CASES

A. *IN RE* QLMONV A AG

Arguably the most important recent chapter 15 case was *Jaffé v. Samsung Electronics Co., Ltd.*, [73] which involved the liquidation of a German company, Qimonda, once one of the world's largest manufacturers of dynamic random access memory devices. [74] Qimonda had licensed its patents, critical to the semiconductor business, to the giants of the industry, including Samsung, Intel, IBM, and many others. [75] Under German law, Qimonda's liquidator, Michael Jaffe, was empowered to reject the licenses and relicense the patents at a profit, for the benefit of all creditors of the estate but at the expense of the pre-bankruptcy licensees. [76] The ability of a debtor to reject intellectual property licenses (and thereby, benefit the estate) had been the rule of law in the United States prior to the addition of § 365(n) to the Bankruptcy Code in 1988, [77] which gives the licensee of a ***165** patent the option of retaining its rights under the license for the duration

of the contract.[78] When Qimonda's liquidator asked for an order under chapter 15 enforcing his right under German law to reject the U.S.-based licenses, he presented the U.S. courts with what, it is submitted, is a conflict of law dispute.

There were several U.S. decisions in the *Qimonda* litigation. The first Bankruptcy Court decision allowed Jaffe to reject the licenses.[79] On appeal the District Court reversed and sent the case back, indicating strongly its view that § 365(n) is fundamental to the ability of licensees to innovate and compete and that failure to apply it would violate U.S. public policy,[80] contrary to § 1506.[81] On remand, the Bankruptcy Court agreed, although it also held that application of German law would deprive creditors of sufficient protection under § 1522 of chapter 15, which provides that a court may grant relief "only if the interests of creditors and other interested entities, including the debtor, are sufficiently protected."[82] On further appeal directly to the Fourth Circuit, that court properly ignored the public policy branch of the decision below; it did not find that § 365(n) represented a policy that was so fundamental to core U.S. legal principles that failure to enforce it would be "manifestly contrary to the public policy ***166** of the United States" within the meaning of § 1506.[83] The Fourth Circuit rested its decision instead on the principle of sufficient protection, concluding that

the bankruptcy court properly recognized that Jaffe's request for discretionary relief under § 1521(a) required it to consider "the interests of the creditors and other interested entities, including the debtor" under § 1522(a) and that *it properly construed § 1522(a) as requiring the application of a balancing test*. Moreover, relying on the particular facts of this case and the extensive record developed during the four-day evidentiary hearing, we also conclude that the bankruptcy court reasonably exercised its discretion in balancing the interests of the licensees against the interests of the debtor and finding that application of § 365(n) was necessary to ensure the licensees under Qimonda's U.S. patents were sufficiently protected.[84]

The Fourth Circuit's opinion is replete with reference to the patents at issue being U.S. patents, and it notes that Jaffe requested in his chapter 15 petition that he be entrusted with the "administration of all of Qimonda's assets within the territorial jurisdiction of the United States, which largely consisted of the 4,000 U.S. patents."[85] But the identity of the beneficiaries of the decision is not clear--whether they are holders (whether U.S. or foreign) of patents whose scope was defined as the territory of the United States; or U.S. citizens entitled to use the patents anywhere in the world; or U.S. citizens entitled to use the patents in the United States.[86]

***167** The Fourth Circuit decision endorsed the action of the Bankruptcy Court in balancing the harm to the "U.S. creditors" and the harm to the German estate in determining whether the holders of the "4,000 U.S. patents" would be "sufficiently protected" under § 1522(a) by virtue of application of German law.[87] As noted above, § 1522(a) requires that creditors and other interested parties, including the debtor, be sufficiently protected by any relief granted under § 1521.[88] The use of § 1522(a) to protect one subclass of creditors at the expense of another is questionable. The language of § 1522(a) does not distinguish between U.S. creditors and foreign creditors, implying that sufficient protection should be provided to the worldwide creditors of a debtor.[89] Examined from a worldwide perspective, the "interests of creditors and the debtor" provided for in § 1522(a), were all poorly protected by the action of the U.S. court in showing preference for one subset of creditors (the U.S. creditors) over other creditors generally.

At least one court in the United States has rejected the notion of construing the § 1522(a) requirement of sufficient protection by reference to the nationality or place of business of the creditor. In *SNP Boat Service v. Hotel Le St. James*,[90] the court noted that § 1521(b) requires that "the interests of creditors *in the United States"* be sufficiently protected before the court may "entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative ...."[91] By contrast, § 1522(a), on which the court relied in *Qimonda*, does not distinguish among creditors, and the *SNP Boat Service* judge quoted the statement in the Guide to Enactment of the Model Law that disavows the proposition that Article 22 (the source of § 1522) invites a court to distinguish between local and

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other creditors.[92] Nevertheless, the Fourth Circuit's decision in ***168** *Qimonda* rejected this construction of § 1522(a), relying on a reference to "local creditors" in paragraph 35 of the 1997 version of the Guide to Enactment, a very general, introductory description of the purposes of the Model Law that was omitted when the Guide to Enactment was revised in 2013.[93]

Even if *Qimonda* is arguably wrong in its analysis of § 1522(a), it is an authoritative construction of a U.S. statute by an appellate court and an important precedent.[94] Further, § 1507 of the statute, as adopted in the United States, also provides a special degree of protection to creditors in the United States.[95] In the Model Law, article 7 looks like a throwaway; it merely provides, "[n]othing in this Law limits the power of a court or a *[insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State]* to provide additional assistance to a foreign representative under other laws of this State."[96] In the United States, the provision of "additional assistance to a foreign representative under [the Bankruptcy Code] or under other laws of the United States" is circumscribed or enhanced, as the case may be, by three provisos: (i) the additional assistance is subject to the specific limitations stated elsewhere in chapter 15; (ii) the provision of additional assistance must be "consistent with the principles of comity"; and (iii) the additional assistance must reasonably satisfy the same conditions to relief contained in former § 304, which chapter 15 replaced.[97]

Thus, in the United States, the sufficient protection provisions of §§ 1521(b) and 1522(a) are not the only parts of chapter 15 that are relevant ***169** to the protection of local creditors. Section 1507 potentially provides an even more potent weapon. The importance of that provision is demonstrated by the decision of the Fifth Circuit in *In re Vitro S.A.B. de C. V.*[98]

B. *IN RE* VITRO

In *Vitro*, the U.S. courts declined to enforce, under chapter 15, a Mexican plan that discharged $1.2 billion of bonds guaranteed by the debtor's operating subsidiaries through partial payment under the debtor's plan.[99] The bondholders held instruments governed by New York law, the issuers had submitted to the jurisdiction of the New York courts, and the holders obtained judgments in New York against the subsidiaries.[100] The Mexican plan in effect released the subsidiaries from their financial debts through a plan that did not pay certain creditors of the subsidiaries in full.[101] The subsidiaries had never filed in the bankruptcy proceedings,[102] and these third-party releases were questionable, at best, under U.S. law.

The *Vitro* court relied in a footnote on the same sufficient protection analysis of § 1522(a) as *Qimonda*.[103] However, its principal rationale for refusing to recognize the Mexican plan was § 1507(b)(4), which requires that the "distribution of proceeds of the debtor's property [must be] substantially in accordance with the order prescribed by" the Bankruptcy Code.[104] In the *Vitro* decision, the Court found that the relief sought by the Mexican debtor amounted to enforcement of third-party releases, that such relief was not available under the general provisions of §§ 1521 and 1522, that such relief would be "additional assistance under § 1507," and that "the ***170** bankruptcy court correctly determined that relief was precluded by § 1507(b)(4)."[105]

In order to reach its decision, the Fifth Court had to reconcile the provisions of § 1507, providing for "additional assistance," with the general provisions of § 1521, which authorizes "any appropriate relief."[106] On the face of the statute, it is not at all clear where relief under § 1521 (and § 1522, which modifies it) is appropriate and where it should be considered additional assistance under § 1507. The *Vitro* opinion attempts to reconcile the two by a three-step analysis, considering first whether the relief sought is specifically enumerated in § 1521(a) or (b), and, if not, considering whether

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it is "appropriate relief available under § 1521. [107] The Court in *Vitro* said that such "appropriate relief was "relief previously available under Chapter 15's predecessor, § 304" and then concluded that "[o]nly if a court determines that the requested relief was not formerly available under § 304 should a court consider whether relief would be appropriate as additional assistance under § 1507." [108] This is a debatable conclusion. [109] In any event, the point for purposes of this Article is that the provisions of ***171** § 1507, and § 1507(b)(4) in particular, will in certain cases provide an alternative basis than the sufficient protection provisions of § 1522(a) for refusing relief sought by a foreign representative. [110]

Before drawing any conclusions from these highly visible cases, it is useful to consider one less well-known decision that also relied on the principle of sufficient protection to deny relief to a foreign representative.

C. *IN RE* SIVEC SRL

A third recent decision of the U.S. courts, and one that also rests on the principle of sufficient protection, is *Sivec*, litigation growing out of an American company's purchase of parts manufactured by an Italian enterprise for use on a construction project in Qatar. [111] The American company had retained in escrow 10% of the purchase price of the parts to cover claims made during a two-year warranty period ending in July 2009. [112] By that date, the Italian company had filed for a *concordato preventivo* [113] under Italian law, a plan had been confirmed, and the seller's retainage claim against the U.S. company was apparently the only asset of the Italian estate. [114] The Italian judicial receiver duly filed a chapter 15 petition and obtained recognition of the Italian proceeding as a foreign main proceeding, but he was granted very little other relief. [115] The U.S. courts denied the receiver's request for a stay of ongoing litigation in Oklahoma of a breach of contract claim by the U.S. purchaser, and the Italian receiver ended up counterclaiming for turnover of the retainage in escrow. [116] After a jury found that the Italian receiver was entitled to $952,840 on the warranty retainage claim, while the American purchaser was entitled to $1,744,043 on its breach of contract claim, the American purchaser moved in the ***172** bankruptcy court for permission to set off its breach of contract claim against its liability on the balance of the escrow (eliminating any liability), and the Italian receiver moved for an order remitting the portion of the escrow to which he was found entitled to Italy. [117]

The decision of the U.S. bankruptcy court is colored by the failure of the Italian estate to give reasonable notice of the proceedings to the U.S. purchaser; by an abortive, badly handled "request for comity" emanating from Italy; by uncertainty whether the late claim would be admitted in Italy; and by a lack of clarity as to whether setoff rights would be recognized in Italy. [118] In any event, the bankruptcy court held that "[c]omity is only to be extended so long as the interests of U.S. creditors are sufficiently protected, and so long as any actions taken are not manifestly contrary to the public policy of the United States." [119] The bankruptcy court further held that it was "unconvinced that the interests of U.S. creditors have been or will be protected in the Italian proceeding." [120] Finally, the court held that under U.S. bankruptcy law, the American purchaser "is a secured creditor to the extent of its right to setoff against the retainage it holds," and its treatment "in Italy would be vastly different than in the United States: its security interest is not merely threatened in the Italian proceeding, it does not exist." [121] It rejected the request of the Italian receiver for comity or turnover of the property because it did not believe the purchaser's "interests will be sufficiently protected if it is ordered to turnover the funds and file a claim in Italy, and because the equities and law support recoupment and setoff." [122]

IV. THE CHOICE OF LAW ISSUE

In each of the three cases discussed above, the U.S. court resolved the issue in favor of providing sufficient protection to a subset of U.S. creditors. *Vitro* further decided that the relief sought by the foreign representative was additional

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assistance barred by a specific condition in § 1507 that provides the U.S. courts with broad discretion to deny relief. [123] Although the cases all ignore conflict of laws as an issue, it is submitted that they would have been better decided by explicit recognition that each required a choice of law and that a choice of law analysis would have informed the novel concepts of "sufficient protection" and "additional assistance."

In *Qimonda*, the most difficult of the cases, the Fourth Circuit endorsed a test that it said the bankruptcy court had reasonably applied, balancing the ***173** harm to holders of the 4,000 "U.S. patents" if German rejection law prevailed against the harm to the German liquidator if § 365(n) of the Bankruptcy Code applied. [124] It found that such a balancing test was the appropriate way to enforce § 1522(a). [125] If it arguably erred in using § 1522(a) to weigh the rights of one group of creditors against another, it could have reached the same result by reliance on § 1507 and treatment of the relief sought by the German liquidator as "additional assistance." [126]

It is suggested that a case like *Qimonda* would be better decided--and would more likely be decided in favor of the application of foreign law--if it were acknowledged that the concept of sufficient protection calls for application of choice of law principles rather than a balancing of the harm to "them" against the harm to "us." *Qimonda* involved the rights of the administrator of an insolvent estate as a consequence of the default of one of the parties to a contract. The Legislative Guide to the Model Law, the EU Regulation, and the Global Rules deem the contractual rights of an insolvent estate after default an issue to be governed by the *lex fori concursus* or, in the case of *Qimonda*, German law. [127] This principle recognizes the benefits of uniform treatment of all unsecured creditors throughout the world. It is not certain that this principle would have carried the day and outweighed the concern of the court in *Qimonda* over the effect of rejection on patent rights and entrepreneurship. Even if the result would not have been different upon a choice of law analysis, the courts would at least have construed the novel term, sufficient protection, by reference to familiar concepts. Hopefully, they would have given more weight to the *lex fori concursus*, and the concept of sufficient protection would not have been based on a balancing test that finds no explicit support in either the statute or in the previous resolution of choice of law issues in cross-border insolvency disputes.

It would also have been constructive for the courts in *Qimonda* to consider that traditional contract conflict principles in the United States start with the rule that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." [128] If the holders of the 4,000 U.S. patents in *Qimonda* had signed license agreements that provided that German law would govern, the parties' own agreements would point in the direction of application of foreign law and would constitute evidence that the U.S. licensees should have recognized the risk they were taking by contracting ***174** with a German party. They could not reasonably claim to be insufficiently protected by application of German law. Traditional U.S. conflicts law would point in the same direction, on the argument that Germany had a stronger interest in the application of its law, providing for the uniform treatment of licensees worldwide, than the U.S. had in the application of its law, especially if the licensees were not all U.S. entities. [129]

Similar comments may be made with regard to the decision in *Sivec*. The court decided the issue on the basis of the sufficient protection of the U.S. creditor of the Italian estate. [130] The U.S. creditor in *Sivec* did not have to rely on the general sufficient protection provisions of § 1522(a) but could more appropriately rely on the specific requirement of § 1521(b) that a court must be "satisfied that the interests of creditors in the United States are sufficiently protected" before it can "entrust the distribution of all or part of the debtor's assets located *in the United States* to the foreign representative ...." [131] Although the decision of the bankruptcy court did not take note of the different wording of § 1522 and § 1521(b), there was ample evidence of lack of protection of the rights of the U.S. creditor in the failure of the Italian debtor to give adequate notice of the Italian proceedings, and to make clear how the interests of the U.S. party would be protected in Italy. [132]

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In any event, the real issue in *Sivec* was whether U.S. or Italian law ought to govern the right of the U.S. creditor to set off its claim against the Italian debtor against the escrow account it was holding, presumably in Oklahoma. As noted above, the Italian debtor argued that Italian law recognizes a right of setoff. Thus, it is not entirely clear there was a conflict of laws. If, however, Italy does not recognize that creditors who owe debts to a bankruptcy estate have a preferred right to offset claims against the bankrupt, there would have been a direct conflict. As with almost every other issue, the Legislative Guide would decide this conflict in favor of application of the *lex fori concursus*, or Italian law. The Global Rules (and traditional U.S. conflicts principles), however, are more nuanced. Recognizing a conflict among national laws in the recognition of setoff rights, the Global Rules (like the EU Regulation) provide that "[i]nsolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim." [133] Under ***175** the Global Rules, it would appear that the Italian debtor's claim was governed by Oklahoma law, which is presumed to be the law applicable to the escrowed funds and was certainly the law of the *situs* of the funds. [134] On this analysis, the case was properly decided in favor of the creditor. Moreover, under U.S. law, the right of setoff that the U.S. creditor possessed is viewed as similar to a right of a secured party in collateral. [135] Under the Global Rules, the *in rem* rights of a secured creditor under the law of a state other than that of the foreign main proceeding are also respected. [136] On this basis, *Sivec* would not have been justified in stripping the U.S. creditor of its U.S. property rights, and the U.S. creditor would have been entitled to sufficient protection against this result.

In *Vitro*, the principal question was whether it was appropriate to apply Mexican law to discharge the debt of creditors of an affiliate of the debtor by providing them with a partial distribution from the bankruptcy estate. [137] Under U.S. law such "third-party releases" are valid only under narrow circumstances, and they are invariably rejected in the Fifth Circuit, where the *Vitro* chapter 15 case was pending. [138] Under Mexican law, applicable at the time of the *Vitro* plan, third-party releases were presumably valid, and a Mexican court had confirmed the *Vitro* plan. [139] The choice of law issue was whether to apply the majority U.S. rule or Mexican insolvency principles. Neither the recommendations of the Legislative Guide nor the Global Rules deal explicitly with the rights of creditors of an affiliate of the debtor.

As discussed above, the Fifth Circuit decided the case by reference to the conditions to "additional assistance" in § 1507 and, secondarily, by reliance on sufficient protection in § 1522(a). [140] It is suggested that the analysis would have been clarified by application of U.S. conflict of law principles. The protections that the U.S. creditors received from the ***176** guarantees by Vitro's non-debtor subsidiaries were governed by New York law and were confirmed by New York judgments. [141] The subsidiaries were not debtors under any bankruptcy law, and there was no *lex fori concursus*, as there were no insolvency proceedings involving the subsidiaries. [142] It is suggested that a choice of law analysis would place the center of gravity in the United States rather than in Mexico, or would deem the United States to have the greater interest in the application of its laws.

V. CHOICE OF LAW AND "COOPERATION" AND "COORDINATION"

Choice of law analysis could also help resolve another issue that arises in many cross-border insolvency cases. One of the salient principles of chapter 15 and the Model Law on which it is based is the requirement of "cooperation" and "coordination." Articles 25 and 26 of the Model Law, adopted in the United States as §§ 1525 and 1526 of chapter 15, require cooperation "to the maximum extent possible" between courts and between estate representatives. [143] Although the mandate of §§ 1525 and 1526 is similar to the common law doctrine of comity, and although there are many decisions under chapter 15 that speak warmly of comity and cross-border cooperation, there appears to be no reported decision of any U.S. court that enforces cooperation as a binding statutory obligation.

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Cooperation and coordination would more likely become a reality if choice of law principles were more frequently used to resolve conflicts that inevitably arise. The potential that a choice of law analysis can resolve even the thorniest cross-border conflict is illustrated by a well-known dispute arising from the Lehman Brothers failure. In *Lehman Brothers Special Financing Inc. v. BNY Corporate Trustee Services Ltd.*, [144] the U.S. court declared unenforceable, by virtue of U.S. insolvency law, a provision in certain collateralized swap agreements that changed the order of priority of payment upon an event of default, including a bankruptcy default. [145] The movant and debtor in question was Lehman Brothers Special Financing Inc. (LBSF), and the default was occasioned by the bankruptcy of Lehman Bros. Holdings Inc. (LBHI), its ultimate parent and the "credit support provider" for LBSF's payment obligations under the swaps. [146] The change in the order of priority was a critical provision in the agreements: prior to a default, the contracts provided that LBSF would have the right to receive ***177** payment under the swaps (and would presumably be obligated to pay the bondholders); after an event of default, when the bondholders would presumably be unpaid, the trustee, on behalf of the bondholders, would have priority rights over the collateral. [147] The conflict of law issue arose because the swaps had been entered into in England, and the collateral was there.

At the time of the decision by the U.S. bankruptcy court, there had already been extensive litigation in England regarding the priority rights of the parties, and the English courts had ruled that the change in priority was valid and enforceable and did not violate an "anti-deprivation principle" under English law. [148] The U.S. court recognized that its decision had "the potential for conflicting rulings due to differences in the law being applied by each tribunal to the underlying dispute." [149] Nevertheless, it found that "the English Courts did not take into account principles of United States bankruptcy law"; that as general matter "'courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States'"; [150] and that the English decision was not entitled to preclusive effect or to comity. [151] Reaching the U.S. bankruptcy law issues, the court found that the change in priority was invalid as an *ipso facto* provision, that the change had been triggered by the filing of LBHI, and that it was unenforceable under U.S. law. [152] It recognized that "[t]his decision places BNY [the defendant in the United States] in a difficult position in light of the contrary determination of the English Courts confirming that Noteholder Priority applies to claims made against it in England by [the Plaintiff] Perpetual." [153] In conclusion, it called

for the parties, this Court and the English Courts to work in a coordinated and cooperative way to identify means to reconcile the conflicting judgments. The Court directs that the parties attend a status conference to be held on the next available omnibus hearing date in the Debtors' cases ***178** for purposes of exploring means to harmonize the decisions of this Court and the English Courts. [154]

This conclusion, it is suggested, left the conflict wholly unresolved. A choice of law determination, deciding whether to apply English or U.S. law to determine the validity of the disputed contractual provision, would have pointed the way to a resolution of the conflict and would thus have promoted one of the major goals of the Model Law and chapter 15, cooperation among courts and among estate administrators.

CONCLUSION: CHOICE OF LAW UNDER CHAPTER 15

Based on the text and developing law under chapter 15 in the United States, it seems difficult to maintain the position taken by the Legislative Guide that the *lex fori concursus* should govern virtually all issues in a cross-border insolvency case. No U.S. case has so held, and the provisions of chapter 15 relating to sufficient protection and the requirement that the five subsections of § 1507 be satisfied if "additional assistance" is to be granted make it likely that a strict *lex fori concursus* rule will not be readily adopted in the United States. Certainly, the requirement of § 1521(b) that creditors "in the United States" be sufficiently protected before property is turned over to a foreign representative would protect secured creditors against loss of their collateral located in the United States by application of foreign law. [155] In a

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proceeding under chapter 15 and especially in cases involving security interests under chapter 15, absolute deference to the *lex fori concursus* cannot be maintained.

Nevertheless, even if total deference to the *lex fori concursus* cannot be maintained under chapter 15, recognition of the choice of law issues that arise in chapter 15 cases would give appropriate weight to the importance of the *lex fori concursus* as a matter of principle and frame the issues by reference to familiar concepts such as the "center of gravity." In many cases it would appropriately inform and circumscribe the scope of novel and undefined terms such as "sufficient protection," and "additional ***179** assistance," and point the way to a resolution of disputes in accordance with the intent of the statute.

Footnotes

a1 United States Bankruptcy Judge, Southern District of New York (2000-2015) and Adjunct Professor, Fordham Law School. The author would like to thank his colleague, Judge Martin Glenn, for helpful comments.

1 Chapter 15 was adopted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) [hereinafter the Act]. The Act repealed § 304 of the Bankruptcy Code, a much shorter provision that had authorized an ancillary proceeding to recognize and enforce orders and decrees of foreign insolvency courts. 11 U.S.C. § 304, *repealed by* Pub. L. No. 109-8, 119 Stat 23 (2005). Chapter 15 "incorporates" the Model Law on Cross-Border Insolvency, which was drafted by UNCITRAL, the United Nations Commission on International Trade Law, to "provide effective mechanisms for dealing with cases of cross-border insolvency ...." U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, PRMBL., U.N. Sales No. E.14.V.2 (2014) [hereinafter MODEL LAW]. The preamble to the Model Law is § 1501(a) of the United States Bankruptcy Code (hereinafter the Code); the articles of the Model Law generally use the same numbering as the sections of chapter 15 (e.g., Article 2 is § 1502, Article 3 is § 1503, etc.).

2 11 U.S.C. § 1522(a) (2006).

3 11 U.S.C. § 1521(b) (2006). Sufficient protection is the United States version of "adequate protection," the term used in Articles 21 and 22 of the Model Law. MODEL LAW, *supra* note 1, arts. 21-22. The United States version was renamed so as not to confuse the concept of protection as used in the Model Law with "adequate protection" of secured creditors under domestic U.S. bankruptcy law. H.R. REP. No. 109-31(1), 115, *reprinted in* 2005 U.S.C.C.A.N. 88, 178; *see also In re* Tri-Cont'l Exch. Ltd., 349 B.R. 627, 636 (Bankr. E.D. Cal. 2006). Neither "sufficient protection" as used in chapter 15 nor "adequate protection" as used in the Model Law is defined in the statute.

4 11 U.S.C. § 1507(2006).

5 *Id.*

6 *See infra* text accompanying notes 70 and 95.

7 *See* Jaffe v. Samsung Elec. Co., Ltd. (*In re* Qimoda), 737 F.3d 14 (4th Cir. 2013).

8 Section 1501 of chapter 15, substantially identical to the Preamble of the Model Law, provides that:
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 with the objectives of-
(1) cooperation between-
(A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
(B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases ....
11 U.S.C. § 1501 (2006). Its goal was to replace territorialism with what has been called the principle of modified universalism, described as "a pragmatic approach that seeks to move steadily toward the ideal of universal proceedings while accepting the reality of step-by-step progress through cooperation." Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 716 (2005); Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT'L L. 819, 824 (2007) (modified universalism "is the approach embodied in the UNCITRAL Model Law on Cross-Border Insolvency (the 'Model Law') enacted as Chapter

15 of the United States Bankruptcy Code ('Chapter 15') and also by the E.U. Regulation on Cross-Border Insolvencies (the 'E.U. Reg.')") (footnotes omitted); Leif M. Clark & Karen Goldstein, *Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies*, 46 TEX. INT'L L.J. 513, 524 (2011) ("In 2005, when the United States enacted the Model Law as Chapter 15 of the Bankruptcy Code, it continued its commitment to the ideals of modified universalism."). Even before the adoption of chapter 15, it was held that by virtue of the adoption of former § 304, "international comity is a policy that Congress expressly made part of the Bankruptcy Code." Maxwell Commc'n Corp. pic v. Societe Generale (*In re* Maxwell Commc'n Corp. plc), 93 F.3d 1036, 1052 (2d Cir. 1996). Comity has been defined as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 16364-(1895).

9 It should be noted that most of these cases were plenary proceedings under the U.S. bankruptcy laws and were not ancillary proceedings involving the request of a foreign estate representative for recognition and relief of the type encompassed in chapter 15 and its predecessor, § 304. Nevertheless, it is submitted that their approach to the choice of law issue is relevant.

10 *See* 11 U.S.C. §§ 1525-27 (2006); MODEL LAW, *supra* note 1, arts. 25-27.

11 *See. e.g.*, Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 448 (2004) ("A bankruptcy court's *in rem* jurisdiction permits it to 'determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world."') (quoting 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 108.70 [1] (3d ed. 2004)); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 362 (2006) ("Bankruptcy jurisdiction, at its core, is *in rem*.").

12 Nolte v. Hudson Nav. Co., 31 F.2d 527 (2d Cir. 1929) (equity receivership); Prudential Ins. Co. of Am. v. Land Estates, 110 F.2d 617 (2d Cir. 1940) (receivership). A notable exception was *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527 (1983), where U.S. bondholders of a Canadian railroad challenged the action of the Canadian parliament in ratifying a modern day restructuring, substituting new bonds with a lower interest rate for the old bonds without the consent of the bondholders. The Supreme Court, Justice Harlan dissenting, held that there was no constitutional protection against the impairment of contracts in Canada, and "that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes." *Id.* at 537. It concluded "that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere." *Id.* at 538.

13 Hong Kong and Shanghai Banking Corp., Ltd. v. Simon (*In re* Simon), 153 F.3d 991 (9th Cir. 1998).

14 *Id.* at 999; *see also* Official Comm. of Unsecured Creditors v. Transpacific Corp. (*In re* Commodore Int'l, Ltd.), 242 B.R. 243, 256 (Bankr. S.D.N.Y. 1999), *aff'd*, No. 00CIV.1679(SAS), 2000 WL 977681 (S.D.N.Y. July 17, 2000) (center of gravity in United States); Kriegman v. Cooper (*In re* LLS Am., LLC), Adversary No. 11-80093-PCW11, 2012 WL 2564722 (Bankr. E.D. Wash. July 2, 2012) (center of gravity analysis); Florsheim Grp. Inc. v. USAsia Int'l Corp. (*In re* Florsheim Grp., Inc.), 336 B.R. 126, 130 (Bankr. N.D. Ill. 2005) (center of gravity test); *In re* Int'l Admin. Servs., Inc., 211 B.R. 88, 95 (Bankr. M.D. Fla. 1997) (foreign state had greater interest in regulating entities conducting business in its territory).

15 Maxwell Commc'n Corp. plc v. Societe Generale (*In re* Maxwell Commc'n Corp. plc), 93 F.3d 1036 (2d Cir. 1996).

16 *Id.* at 1040.

17 *Id.*

18 *Id.* at 1043.

19 *Id.* ("British law imposes an additional condition--it limits avoidance to those situations where placing the transferee in a better position was something the debtor intended. *See* Insolvency Act 1986 § 239(5).").

20 *Id.*

21 Maxwell Commc'n Corp. v. Barclays Bank plc (*In re* Maxwell Commc'n Corp. plc), 170 B.R. 800, 816-18 (Bankr. S.D.N.Y. 1994); Maxwell Commc'n Corp. v. Societe Generale plc (*In re* Maxwell Commc'n Corp. plc), 186 B.R. 807, 818-24 (S.D.N.Y. 1995).

22 *In re Maxwell Commc'n*, 170 B.R. at 809. The Supreme Court has developed the doctrine in cases such as *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), and, more recently, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010). There is conflicting authority as to the extent to which "Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate." *Compare* Kismet Acquisition, LLC v. Icenhower (*In re* Icenhower), 757 F.3d 1044 (9th Cir. 2014), *and* French v. Liebmann (*In re* French), 440 F.3d 145 (4th Cir. 2006), *with* Barclay v. Swiss Fin. Corp. Ltd. (*In re* Midland Euro Exch. Inc.), 347 B.R. 708, 717 (Bankr. CD. Cal. 2006), *and* Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 513 B.R. 222 (S.D.N.Y. 2014).

23 *Maxwell Commc'n*, 170 B.R. at 816 (citations omitted).

24 *Id.* at 816-17. The "center of main interests" of a debtor in a chapter 15 case is presumed, in the absence of evidence to the contrary, to be the location of its registered office, 11 U.S.C. § 1516(c) (2006), but the presumption can be overcome. *See* Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 137 (2d Cir. 2013). The center of main interests is then determined by a series of tests, such as "the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *Id.* at 137 (quoting *In re* SPhinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007)). The location most importantly corresponds to the jurisdiction known to creditors as "the place where the debtor *conducts the administration of his interests on a regular basis* and *is therefore ascertainable by third parties." Id.* at 136 (quoting Council Regulation 2000/1346, On Insolvency Proceedings, pmbl. para. 13, 2000 O.J. (L 160) 1, 2 (EC)) (emphasis in original).

25 *Maxwell Commc'n Corp. plc*, 170 B.R. at 817 (footnotes omitted).

26 *Id.* at 818.

27 Maxwell Commc'n Corp. plc v. Societe Generale plc (*In re* Maxwell Commc'n Corp. plc), 186 B.R. 807, 818-24 (S.D.N.Y. 1995). Judge Scheindlin agreed that application of U.S. preference law would offend the presumption against extraterritoriality. *Id.* at 820. She also agreed that "[t]he bankruptcy court clearly did not abuse its discretion in finding that traditional choice of law principles 'point decidedly towards the application of U.K. law.'" *Id.* at 822 (quoting *In re Maxwell Commc'n*, 170 B.R. at 818).

28 Maxwell Commc'n Corp. plc v. Societe Generale plc (*In re* Maxwell Commc'n Corp. plc), 93 F.3d 1036 (2d Cir. 1996).

29 *Id.* at 1050.

30 *Id.* at 1051-52.

31 *Id.* at 1052.

32 *Id.*

33 The legislative history of § 1521 states that the "section does not expand or reduce the scope of relief previously available under § 304. H.R. REP. No. 109-31(1), at 116 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 178. The Bankruptcy Court in *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund. Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *affd*, 389 B.R. 325 (S.D.N.Y. 2008), found that chapter 15 imposes a more rigid procedural structure for recognition of a foreign proceeding than § 304, but, like § 304, affords a court "substantial discretion and flexibility" in fashioning relief. *Id.* at 126 (citing Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019 (2007)).

34 Koreag, Controle et Revision S.A. v. Refco F/X Assoc, Inc. (*In re* Koreag, Controle et Revision S.A.), 961 F.2d 341 (2d Cir. 1992).

35 *Id.* at 346.

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36 *Id.* at 351.

37 *Id.*

38 JP Morgan Chase Bank v. Altos Homos de Mexico, S.A. de C.V., 412 F.3d 418, 420 (2d Cir. 2005).

39 *Id.* at 422.

40 *Id.* at 424. The line of cases referred to, all in the Second Circuit, include *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240 (2d Cir. 1999); *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996 (2d Cir. 1993); and *Cunard SS. Co. Ltd. v. Salen Reefer Services AB*, 773 F.2d 452 (2d Cir. 1985). The *Altos Hornos* court did not find it necessary to perform much analysis in order to find the parties' choice of New York law to govern the security agreement "unavailing," brushing aside the security agreement and the debtor's submission to jurisdiction in New York because "the fact that such clauses are in an agreement does not preclude a court from deferring on grounds of international comity where deference is otherwise warranted." *Altos Hornos*, 412 F.3d at 429. The Court appeared unconcerned that the lower courts in Mexico had repeatedly refused to recognize the security interest of the U.S. banks and that "[o]nly recently [after six years] did the Mexican federal court rule in J.P. Morgan's favor." *Id.* at 428.

41 *Altos Hornos*, 412 F.3d at 426.

42 Bank of New York v. Treco (*In re* Treco), 240 F.3d 148 (2d Cir. 2001).

43 *See* 11 U.S.C. § 1501 (2006) (defining the scope and purpose of chapter 15).

44 *See* Oui Fin. LLC v. Dellar, No. 12 CIV. 7744(RA), 2013 WL 5568732 (S.D.N.Y. Oct. 9, 2013); *cf.* Barclays Bank PLC v. Kemsley, 44 Misc.3d 773 (N.Y. Sup. Ct. 2014) (extending comity to U.K. insolvency discharge).

45 *See* MODEL LAW, *supra* note 1.

46 U.N. COMM'N ON INT'L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW, intro. para. 1, U.N. Sales No. E.05.V.10 (2005), *available at* http:// www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf [hereinafter LEGISLATIVE GUIDE].

47 *Id.* rec. 31.

48 *Id.* rec. 31(h)(j),(q).

49 *Id.* rec. 32.

50 *Id.* rec. 33.

51 For special protection afforded in the U.S. Bankruptcy Code to employees and participants in financial markets, see, e.g., 11 U.S.C. §§ 502, 546(e) (2006).

52 Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 470 (1991). Westbrook's analysis is supported by the structure of the Model Law, which provides for recognition of a "foreign main proceeding" at the location of the debtor's "center of main interests" or "COMI." *See* MODEL LAW, *supra* note 1, art. 17(2)(a). *See also* Jay Lawrence Westbrook, *Universalism and Choice of Law*, 23 PENN ST. INT'L L. REV. 625, 630 (2005) ("Given the rapid movement of assets around the world today, no rule can provide a reasonable prediction about the results of a bankruptcy case except a universalist system applying the bankruptcy law of the center of the debtor's main interests."). Westbrook would in fact locate a debtor's COMI based in part on the COMI having a sophisticated bankruptcy law capable of being applied universally.

53 Council Regulation 2000/1346, On Insolvency Proceedings, recital 13, 2000 O.J. (L 160) 1 (EC), *available at* http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32000RI346&from=en [hereinafter EU Regulation].

54 *Id.* recital 2, 3.

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55 *Id.* art. 4.

56 *Id.* art. 4(2). This encompasses not only procedural, but also many substantive matters, such as the admission of claims, the effects of insolvency proceedings on contracts, and the rules relating to the "voidness, voidability or unenforceability of legal acts detrimental to all creditors." *Id.* arts. 4, 2(h), (e), (m).

57 *Id.* art. 5.

58 *Id.* arts. 6, 9, 10.

59 *Id.* an. 8.

60 *Id.* art. 15.

61 AM. LAW INST., *Global Rules on Conflict-of-Laws Matters in Insolvency Cases, in* TRANSNATIONAL INSOLVENCY: GLOBAL PRINCIPLES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES ann. at 200 (2012), *available at* http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm [hereinafter *Global Rules*]. Professors Bob Wessels and Ian Fletcher are the reporters. The rules have not yet been formally adopted by the American Law institute.

62 *Global Rules, supra* note 61, Statement of the Reporters.

63 *Id.*

64 *Id.* r. 15-16.

65 *Id.* r. 17-18.

66 *Id.* r. 23.

67 *Id.* at 3.

68 *See* MODEL LAW, *supra* note 1, art. 21. The United States changed the term to "sufficiently protected" and omitted the phrase "the court must be satisfied." Section 1522(a) reads: "The court may grant relief under section 1519 or 1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a) (2006).

69 11 U.S.C. § 1521(b); Model Law, *supra* note 1, art. 21.

70 11 U.S.C. § 1507(b). These are the factors that a court was directed to consider in determining whether to grant relief under § 304 of the Bankruptcy Code, the predecessor to chapter 15.

71 A recent decision makes the point explicitly that these limitations act as "a brake" on application of comity, or application of the *lex fori concursus*. In *In re Vitro*, the court first noted, among other things, that "[i]n applying the principles of comity, we 'take[ ] into account the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law."' *In re* Vitro S.A.B. de C.V., 701 F.3d 1031, 1053 (5th Cir. 2012) (quoting *In re* Artimm, S.r.L., 335 B.R. 149, 161 (Bankr. CD. Cal. 2005). The court then went on to discuss "certain requirements and considerations that act as a brake or limitation on comity, and preclude granting the relief requested by a foreign representative." *Id.* at 1054 (citing §§ 1506, 1507 and 1521 of chapter 15 of the Code).

72 *See infra* Section III.

73 Jaffe v. Samsung Elec. Co., Ltd., 737 F.3d 14 (4th Cir. 2013).

74 *Id.* at 17.

75 *Id.* at 18.

76 *Id.* at 20.

77 Act of Oct. 18, 1988, Pub. L. No. 100-506, 102 Stat. 2538.

78 Section 365(n)(1) provides:
If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect--
(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for--
(i) the duration of such contract; and
(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.
11 U.S.C. §365(n)(1)(2006).

79 *In re* Qimonda AG, No. 09-14766-RGM, 2009 WL 4060083 (Bankr. E.D. Va. Nov. 19, 2009), *aff'd in part, remanded in part sub nom. In re* Qimonda AG Bankr. Litig., 433 B.R. 547 (E.D. Va. 2010).

80 *In re* Qimonda AG Bankr. Litig., 433 B.R. 547, 571 (E.D. Va. 2010).

81 Section 1506, based on Article 6 of the Model Law, provides that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506.

82 *In re* Qimonda AG, 462 B.R. 165, 180-83 (Bankr. E.D. Va. 2011), a*ffd sub nom*. Jaffe v. Samsung Elec. Co., Ltd., 737 F.3d 14, 21 (4th Cir. 2013).

83 Jaffe v. Samsung Elec. Co., Ltd., 737 F.3d 14 (4th Cir. 2013) (quoting *In re* Qimonda AG, 433 B.R. 547, 565 (E.D. Va. 2010) (citations omitted)).

84 *Id.* at 18 (emphasis added).

85 *Id.* at 17 ("The principal assets of Qimonda's estate consisted of some 10,000 patents, about 4,000 of which were *U.S. patents*.") (emphasis added). The term "within the territorial jurisdiction of the United States" is a defined term in chapter 15. 11 U.S.C. § 1502(8) (2006). It means (i) for tangible property, "property located within the territory of the United States," and (ii) for intangible property, such as patents, property "deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States." *Id.*

86 The Fourth Circuit returned to the question of the "territorial jurisdiction of the United States" in a footnote that rejected the position of the United States, which had filed an *amicus* brief that expressly refused to endorse the position of any of the parties in the case. The U.S. government argued instead that the decisions below had improperly restrained the operation of a German statute in Germany. The Fourth Circuit stated in response that the bankruptcy court had properly
conditioned its grant of power to Jaffe to "administer the assets of Qimonda AG *within the territorial jurisdiction of the United States"* with the limitation that he was taking the company's U.S. patents subject to the preexisting licenses, which he was obliged to treat in a manner consistent with § 365(n). As a result, Jaffe is precluded from rejecting the U.S. patent licenses *as a matter of U.S. law* Although this limitation may have indirect effects in the German proceeding, it does not represent an impermissible application of U.S. law extraterritorially.
Jaffé, 737 F.3d at 25, n.3 (emphasis in original). This is about as close as the court came to a conflict of laws analysis.

87 *Id.* at 26-29.

88 11 U.S.C. § 1522(a) (2006).

89 *Id.*

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90 SNP Boat Serv. v. Hotel Le St. James, 483 B.R. 776, 782-83 (S.D. Fla. 2012).

91 *Id.* at 782, 784-85 (emphasis added).

92 The Guide to the Enactment of the Model Law on Cross-Border Insolvency states the following:
In many cases the affected creditors will be "local" creditors. Nevertheless, in enacting article 22, it is not advisable to attempt to limit it to local creditors. Any express reference to local creditors in paragraph 1 would require a definition of those creditors. An attempt to draft such a definition (and to establish criteria according to which a particular category of creditors might receive special treatment) would not only show the difficulty of crafting an appropriate text but would also reveal that there is no justification for discriminating [among] creditors on the basis of criteria such as place of business or nationality.
Guide to Enactment, in MODEL LAW, *supra* note 1, para. 198, substantially similar to para. 163 of the 1997 version of the Guide. U.N. COMM. ON INT'L TRADE LAW, *Guide to Enactment, in* MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.99.V.3 (1997) [hereinafter 1997 GUIDE TO ENACTMENT].

93 Paragraph 35 of the 1997 version of the Guide stated:
The Model Law contains provisions such as the following to protect the interests of the creditors (in particular local creditors), the debtor and other affected persons: the availability of temporary relief upon application for recognition of a foreign proceeding or upon recognition is subject to the discretion of the court; it is expressly stated that in granting such relief the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected (article 22, paragraph 1); the court may subject the relief it grants to conditions it considers appropriate; and the court may modify or terminate the relief granted, if so requested by a person affected thereby (article 22, paragraphs 2 and 3).
1997 GUIDE TO ENACTMENT, *supra* note 92, para. 35.

94 Moreover, a similar construction of the term sufficient protection was seemingly reached in a footnote in the decision of the Fifth Circuit in *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1067 n.42 (5th Cir. 2012), discussed further *infra* Part III.B.

95 See 11 U.S.C. § 1507(2006).

96 *See* MODEL LAW, *supra* note 1, art. 7.

97 11 U.S.C. § 304, *repealed by* Pub. L. No. 109-8, 119 Stat 23 (2005). *See supra* text at note 70 for the conditions to the grant of additional assistance in § 1507. The only change from the conditions in former § 304 is that comity, which was formerly listed as condition (5), is now in the preamble as a general requirement, in that all assistance must be "consistent with the principles of comity." 11 U.S.C. § 1501.

98 *In re Vitro S.A.B. de C. V.*, 701 F.3d 1031.

99 *Id.* at 1037-38.

100 *Id.* at 1040.

101 *Id.* at 1039.

102 *Id.*

103 Its analysis was brief, the *Vitro* court noting that even if the relief sought by the Mexican representative did not constitute additional assistance, subject to § 1507, "enforcement of this Plan would be precluded under § 1522 for failing to provide an adequate 'balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief."' *Id.* at 1067 n.42 (quoting *In re* Int'l Banking Corp. B.S.C., 439 B.R. 614, 626 (Bankr. S.D.N.Y. 2010)). Nevertheless, use of § 1522(a) in the *Vitro* case would appear to be more readily justified than in *Qimonda*, because in *Vitro* the U.S. creditors objecting to the Mexican plan held more than $1.2 billion of bond debt that was initially issued by subsidiaries of Vitro and that Vitro assumed and paid in part in its plan. The only other "creditors" of any size were the intercompany claims held by the subsidiaries and controlled by the parent; they outvoted the bonds in the plan approval process only because Vitro had apparently undertaken what the Fifth Circuit called steps "orchestrating a balance transfer of several billion dollars between itself and its subsidiaries, turning those subsidiaries into creditors, prior to entering into the

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concurso proceeding and failing promptly to disclose the existence of these newly minted insider creditors." *Id.* at 1053. In other words, the vast majority of general creditors not controlled by the debtor was not sufficiently protected.

104 11 U.S.C. § 1507(b)(4) (2006).

105 *In re Vitro*, 701 F.3d at 1060.

106 *Id.* at 1057-61. Section 1521 provides without qualification that upon recognition, "the court may, at the request of the foreign representative, grant any appropriate relief, *including* ...." 11 U.S.C. § 1521 (2006) (emphasis added). Section 1521 then goes on to identify seven specific forms of relief, but its use of the word "including" prior to the list is "not limiting." *See* 11 U.S.C. § 102(3) ("'includes' and 'including' are not limiting").

107 *Vitro*, 701 F.3d at 1054.

108 *Id.*

109 The Court relied on a passage in the legislative history of § 1521, which stated that the relief available under § 1521 was not intended to reduce or enlarge the relief formerly available under § 304. *See* H.R. REP. NO. 109-31(1), 116, *reprinted in* 2005 U.S.C.C.A.N. 88, 178. There is accordingly a basis for the *Vitro* court's conclusion that § 1521 relief is so limited, and that any further relief would be additional assistance subject to the conditions of § 1507. However, the conditions to the grant of "additional relief in § 1507 are the same as those that conditioned relief under former § 304. If § 1521 relief is limited to that available under former § 304, and if § 304 had the same conditions to relief as § 1507, the logical result of the *Vitro* court's analysis is that assistance under § 1507 is identical to that also made available under § 1521. Any such conclusion must be rejected by virtue of the very different wording of the sections as well as the fact that § 1507 relief is "additional assistance," i.e., additional to that otherwise available under the statute. It is submitted that the legislative history did not get it right. A differently focused analysis would seemingly rely on the difference between the language of § 1521 (appropriate relief) and that of § 1507 (additional assistance). *See In re* Sino-Forest Corp., 501 B.R. 655, 664 nn.3-4 (Bankr. S.D.N.Y. 2013); *In re* Atlas Shipping A/S, 404 B.R. 726, 741 (Bankr. S.D.N.Y. 2009). *See also* CT Inv. Mgmt. Co., LLC v. Cozumel Caribe, S.A. de C.V. (*In re* Cozumel Caribe S.A. de C.V.), 482 B.R. 96 (Bankr. S.D.N.Y. 2012), a case involving funds deposited in the United States by a Mexican debtor. The Bankruptcy Court held that it would not be manifestly contrary to U.S. public policy to issue a temporary stay and give the parties an opportunity to litigate issues regarding the funds in a Mexican court, or to temporarily recognize a Mexican court order that had enjoined the U.S. creditors from applying the funds in escrow to the debt, noting that U.S. bankruptcy courts issue such temporary injunctions where appropriate. *Id.* at 112-13. The court nevertheless conditioned the stay on the parties promptly proceeding to determine the issues in Mexico. *Id.* at 115. *Cozumel Caribe* is also one of the rare chapter 15 cases that that have noted the need to consider conflicts issues in determining the issues in dispute. *Id.* at 115 n. 17.

110 The Fifth Circuit's decision made it plain that a Mexican plan does not have to conform to U.S. bankruptcy law in order to obtain additional assistance under § 1507. *See In re* Vitro S.A.B. de C.V., 701 F.3d 1031 (5th Cir. 2012). It quoted an earlier § 304 decision where the Fifth Circuit said, "the foreign laws need not be identical to their counterparts under the laws of the United States; they merely must not be repugnant to our laws and policies." *Id.* at 1044 (quoting Schimmelpenninck v. Byrne (*In re* Schimmelpenninck), 183 F.3d 347, 365 (5th Cir. 1999)). The *Vitro* court also stressed that "[g]iven Chapter 15's heavy emphasis on comity, it is not necessary, nor to be expected, that the relief requested by a foreign representative be identical to, or available under, United States law." *Id.* at 1053 (citing *In re* Metcalfe & Mansfield Alternative Inv., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) (a case that had enforced third-party releases in a chapter 15 proceeding)). However, the result in *Vitro* was to reject the Mexican plan on the ground that it did not follow the order of distribution in a U.S. case closely enough.

111 *In re* Sivec SRL, 476 B.R. 310 (Bankr. E.D. Okla. 2012).

112 *Id.* at 313.

113 *Concordato preventivo* is a form of reorganization under Italian law. *See* Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655, 658 (2d Cir. 1997) (under Italian law, the *Concordato Preventivo* "contains provisions that permit restructuring of debts in a fashion similar to Chapter 11 of the United States bankruptcy laws.").

114 *In re Sivec SRL* 476 B.R. at 313.

115 *Id.* at 315.

116 *Id.*

117 *Id.* at 316-17. The American company would presumably be permitted to file a (late) claim for its breach of contract damages, but this was not entirely clear.

118 *Id.* at 318-22.

119 *Id.* at 320, 324 (citing §§ 1501(a)(3), 1506, 1507(b), 1521, 1522 of chapter 15).

120 *Id.*

121 *Id.*

122 *Id.* at 328.

123 *In re* Vitro S.A.B. de C.V., 701 F.3d 1031, 1060 (5th Cir. 2012).

124 Jaffe v. Samsung Elec. Co., Ltd., 737 F.3d 14, 29-31 (4th Cir. 2013).

125 *Id.* at 31.

126 11 U.S.C. § 1507(2006).

127 *See* LEGISLATIVE GUIDE, *supra* note 1, rec. 31; EU Regulation, *supra* note 53, art. 4; *Global Rules, supra* note 61, r. 15, 17, 22-23.

128 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1971).

129 It is recognized, as stated in § 187 of the Restatement of Conflicts, that there are issues, such as the effect of the insolvency of one of the parties, and that the parties to a contract cannot resolve through a choice of law clause in their contract. *Id.* It is suggested, nevertheless, that the choice of German law to govern the contract would point toward application of German insolvency law in this situation.

130 *In re* Sivec SRL, 476 B.R. 310, 324 (Bankr. E.D. Okla. 2012).

131 11 U.S.C. § 1521(b) (2006) (emphasis added).

132 *See In re* Sivec SRL, 476 B.R. 310.

133 *See Global Rules, supra* note 61, r. 17.

134 Although all of the applicable facts in *Sivec* are unknown, due to the absence of a choice of law analysis, it is assumed that the Italian debtor's claim against the U.S. counterparty was governed by the laws of Oklahoma, where the escrow was located. The law governing the underlying contract claim against the Italian debtor is also unknown, but it is assumed that the effects of that claim in the Italian proceeding were governed by Italian law.

135 Another way to analyze the issues would be to view the U.S. party as having a security interest in the escrow account by virtue of its setoff rights. The U.S. court, in fact, found that under U.S. law, the American creditor would be considered to have a security interest in the escrow fund and that remission of the funds to Italy would erode or eliminate that interest. *Sivec*, 476 B.R. at 320, 324. Assuming that Italian law would eliminate the U.S. security interest--and the facts do not clearly establish it--the governing choice of law question would be whether the rights of the creditor should be governed by the location of the collateral or the law governing the insolvency.

136 *Global Rules, supra* note 61, r. 15.

137 *In re* Vitro S.A.B. de C.V., 701 F.3d 1031, 1038-39 (5th Cir. 2012).

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138 Cases in the Fifth Circuit "seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions." *In re* Pac. Lumber Co., 584 F.3d 229, 252 (5th Cir. 2009) (collecting cases).

139 *In re Vitro*, 701 F.3d at 1039-40.

140 *Id.* at 1053-61.

141 *Id.* at 1040.

142 *Id.* at 1043.

143 *See* MODEL LAW, *supra* note 1, aarts. 25, 26; 11 U.S.C. §§ 1525, 1526 (2006).

144 Lehman Bros. Special Fin. Inc. v. BNY Corporate Tr. Servs. Ltd., 422 B.R. 407 (Bankr. S.D.N.Y. 2010).

145 *Id.* at 418-20.

146 *Id.* at 411. The chapter 11 filing of LBSF took place on October 3, 2008; the filing by the parent took place two weeks earlier on September 15, 2008.

147 *Id.* at413-l4.

148 *Id.* at 410-11. In the English courts, the plaintiff was Perpetual Trustee Company Limited, an English company that held the credit-linked synthetic portfolio notes, and the defendant was BNY Corporate Trustee Services, a corporate trustee doing business in England which apparently held the collateral. *See* Perpetual Tr. Co. Ltd. v. BNY Corporate Tr. Servs. Ltd., [2009] EWHC (Ch) 1912; [2009] EWCA (Civ) 1160.

149 *Lehman Bros.*, 422 B.R. at 411. The principles of the decisions of the lower English courts in effect when the U.S. case was decided were later affirmed in a different case by the U.K. Supreme Court, which did not deal in any substantive manner with the ruling in the United States. *See* Belmont Park Inv. PTY Ltd. v. BNY Corporate Tr. Servs. Ltd., [2011] UKSC 38.

150 *Lehman Bros.*, 422 B.R. at 417 (quoting Pravin Banker Assoc. Ltd. v. Banco Popular del Peru, 109 F.3d 850, 854 (2d Cir. 1997)).

151 *Id.* at 416-17.

152 *Id.* at 418-19.

153 *Id.* at 423.

154 *Id.*

155 One case that dealt explicitly with the provision of sufficient protection to a secured creditor under chapter 15 is *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006). There, a creditor who asserted a judgment lien against property of the foreign debtor in the United States objected to chapter 15 recognition and asserted that it would not be sufficiently protected if the foreign representative was able to use the collateral. The court held that if the creditor in fact held a security interest in the property, the creditor was entitled to sufficient protection, which would be in effect the same adequate protection afforded secured creditors in plenary cases in the United States. As an interim measure, the foreign representative was accordingly permitted to take possession but not to repatriate the collateral. Pre-chapter 15 authority under § 304 of the Bankruptcy Code also required that the U.S. security interests held by creditors be protected. *See* Bank of New York v. Treco (*In re* Treco), 240 F.3d 148 (2d Cir. 2001), *supra* text accompanying note 42.

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