BANKRUPTCY WITHOUT BORDERS: A COMPREHENSIVE GUIDE TO THE FIRST DECADE OF CHAPTER 15

PETER M. GILHULY,[·] KIMBERLY A. POSIN,[··] AND ADAM E. MALATESTA[···] OF LATHAM & WATKINS LLP

CONTENTS

[·] Peter M. Gilhuly is a partner in the Los Angeles office of Latham & Watkins LLP and the co-Chair of the firm's global Restructuring, Insolvency & Workouts Practice.

[··] Kimberly A. Posin is a partner in the Los Angeles office of Latham & Watkins LLP and a member of the firm's Restructuring, Insolvency & Workouts Practice.

[···] Adam E. Malatesta is an associate in the Los Angeles office of Latham & Watkins LLP and a member of the firm's Restructuring, Insolvency & Workouts Practice.

INTRODUCTION

Chapter 15, the newest chapter of title 11 of the United States Code (the "Bankruptcy Code"), was enacted in 2005 as part of a worldwide effort to foster the orderly administration of cross-border restructurings. With an emphasis on comity, chapter 15 provides for and encourages unprecedented cooperation among the courts of different jurisdictions in an effort to provide a coordinated approach to administering the assets of a debtor with a business presence that transcends country borders. It also creates access to U.S. courts for foreign debtors once a foreign insolvency proceeding has been recognized by allowing foreign representatives to apply directly to a U.S. court for appropriate relief. By establishing objective eligibility requirements for recognition, chapter 15 fosters predictability and reliability that could not have been achieved under its predecessor statute.

Fifty-eight chapter 15 cases were filed in 2014, while forty-eight chapter 15 cases were filed in just the first six months of 2015 — a 60% increase.[1] As chapter 15 becomes a more widely used tool in the restructuring arsenal of international debtors, U.S. courts will continue to shape its structure and application. The purpose of this Article is to provide a practical guide to the provisions of, and practice under, chapter 15, as well as an analysis of pertinent case law, to form a useful road map for navigating this important and evolving area of law.

I. ORIGINS AND PURPOSE OF CHAPTER 15

Chapter 15 is based on the Model Law on Cross-Border Insolvency (the "Model Law"),[2] which was promulgated by the United Nations Commission on

---

[1] ADMIN. OFFICE OF THE U.S. COURTS, U.S. Bankruptcy Courts—Business and Nonbusiness Cases Filed, by Chapter of the Bankruptcy Code, District and County—During the 12-Month Period Ending December 31, 2014, http://www.uscourts.gov/statistics/table/f-5a/bankruptcy-filings/2014/12/31; ADMIN. OFFICE OF THE U.S. COURTS, U.S. Bankruptcy Courts—Business and Nonbusiness Cases Filed, by Chapter of the Bankruptcy Code—During the Three-Month Period Ending March 31, 2015, http://www.uscourts.gov/statistics/table/f-2-three-months/bankruptcy-filings/2015/03/31; ADMIN. OFFICE OF THE U.S. COURTS, U.S. Bankruptcy Courts—Business and Nonbusiness Cases Filed, by Chapter of the Bankruptcy Code—During the Three-Month Period Ending June 30, 2015, http://www.uscourts.gov/statistics/table/f-2-three-months/bankruptcy-filings/2015/06/30. In comparison, there were 728,833 chapter 7 cases and 8,980 chapter 11 cases filed in 2013; 619,069 chapter 7 cases (a 15% decrease) and 7,234 chapter 11 cases (a 20% decrease) filed in 2014; and 284,386 chapter 7 cases (an 8% decrease) and 3,518 chapter 11 cases (a 3% decrease) filed in the first six months of 2015. *See id*; ADMIN. OFFICE OF THE U.S. COURTS, U.S. Bankruptcy Courts—Business and Nonbusiness Cases Filed, by Chapter of the Bankruptcy Code—During the 12-Month Period Ending December 31, 2013, http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2013/12/31.

[2] *See* UNCITRAL Model Law on Cross Border Insolvency with Guide to Enactment and Interpretation, (2014) [hereinafter UNCITRAL Model Law and Guide], *available at* http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf. As of February 2013, the Model Law had been enacted in each of the following countries: Australia (2008), British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2003), Canada (2005), Colombia (2006), Eritrea (1998), Great Britain (2006), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of

International Trade Law ("UNCITRAL") at its Thirtieth Session held in May 1997. The United States was an active participant in the discussions leading to the adoption of the Model Law. Indeed, the Model Law "represents a culmination of a long standing effort by the United States and other countries to develop a uniform system guiding needed cooperation."[3] Thirty-six UNCITRAL members, including the United States, participated in final negotiations concerning the Model Law.[4] Forty observer states and thirteen international organizations were also involved in these negotiations.[5]

The Model Law was designed to address:

> inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment . . . . Fraud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions, is an increasing problem, in terms of both its frequency and its magnitude.[6]

The Model Law was "expressly designed to be integrated into local insolvency law."[7] UNCITRAL's Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (the "UNCITRAL Guide") urges countries to make at most only minor changes to the Model Law in the course of its adoption.[8] Thus, when Congress adopted chapter 15 as part of the Bankruptcy Abuse Prevention and

---

Korea (2006), Romania (2002), Serbia (2004), Slovenia (2007), South Africa (2000), Uganda (2011), and the United States of America (2005). *See In re* British Am. Ins. Co., 488 B.R. 205, 212 (Bankr. S.D. Fla. 2013). The Model Law "is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place." UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 1. The UNCITRAL Guide was drafted because it was believed that the Model Law "would be a more effective tool for legislators if it were accompanied by background and explanatory information." *Id*. at ¶ 9.

[3] Tacon v. Petroquest Res. Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 322 (5th Cir. 2010).

[4] *See id.*

[5] *See id.*

[6] UNCITRAL Legislative Guide on Insolvency Law, at 310 (2005), *available at* http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf.

[7] *In re Condor Ins. Ltd.*, 601 F.3d at 322.

[8] *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, ¶ 20 ("[I]t is recommended that States make as few changes as possible in incorporating the model law into their legal systems."); *see also* Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 720 (2005) ("Because Chapter 15 so closely follows the Model Law, the next most useful interpretive document is the Guide prepared by the UNCITRAL staff in connection with the promulgation of the Model Law").

Consumer Protection Act of 2005 ("BAPCPA"),[9] it generally made only narrow and limited departures from the Model Law.[10]

Because each section of chapter 15 is based on a corresponding article in the Model Law, "if a textual provision of Chapter 15 is unclear or ambiguous, the Court may then consider the Model Law and foreign interpretations of it as part of its 'interpretive task.'"[11] If, however, a particular chapter 15 provision is "not directly patterned" on the corresponding article of the Model Law, the Model Law is, of course, of "less relevance" to the court's interpretation of that provision.[12]

Thus, in interpreting chapter 15, courts are expected to "consider its international origin, and the need to promote an application of [chapter 15] that is consistent with the application of similar statutes adopted by foreign jurisdictions."[13] In enacting chapter 15, Congress encouraged reliance on the

---

[9] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 134 (codified as amended at 11 U.S.C. §§ 1501-1532 (2012)).

[10] *See In re Condor Ins. Ltd.*, 601 F.3d at 322 (noting that, in enacting chapter 15, "[a]ny departures from the actual text of the Model Law . . . were as narrow and limited as possible") (quoting Westbrook, *supra* note 8, at 720).

[11] *In re* Loy, 432 B.R. 551, 560 (E.D. Va. 2010) (citing *In re Condor Ins. Ltd.*, 601 F.3d at 321); *In re* Int'l Banking Corp. B.S.C., 439 B.R. 614, 625 (Bankr. S.D.N.Y. 2010) (citing *In re Loy*, 432 B.R. at 560); *see also* Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB de C.V. (*In re* Vitro SAB de C.V.), 701 F.3d 1031, 1050 (5th Cir. 2012) (holding that, in a chapter 15 case, "the correct analogy is not to whether a debtor meets Chapter 11's definition of a 'debtor in possession,' but whether it meets that definition originally envisioned by the drafters of the Model Law and incorporated into § 101(24)"); Lavie v. Ran (*In re* Ran), 607 F.3d 1017, 1022–23 (5th Cir. 2010) (noting that the Bankruptcy Code does not define "habitual residence," as used in section 1516(c), and considering foreign courts' interpretations of the phrase); *In re* JSC BTA Bank, 434 B.R. 334, 340 (Bankr. S.D.N.Y. 2010) ("Section 1508 represents an instruction to take into account more than the words used within a particular section of chapter 15 and is a license to depart where appropriate from the well-settled rule of statutory interpretation that a court should prefer specific provisions over the general when striving to uncover the meaning of a statute. . . . This is the one chapter of the Bankruptcy Code predicated on the concept of international coordination and cooperation and that encourages bankruptcy courts to look beyond the shores of the United States for interpretative guidance.") (internal citations omitted); *In re* Betcorp Ltd., 400 B.R. 266, 289 n.32 (Bankr. D. Nev. 2009) ("Looking at . . . foreign cases is appropriate. Section 1508 states in interpreting phrases such as 'center of main interests,' 'the court shall consider' how those phrases have been construed in other jurisdictions which have adopted similar statutes. This means looking not only at domestic cases, but also at cases decided by the courts of other countries."); *In re* Loy, 380 B.R. 154, 164 (Bankr. E.D. Va. 2007) ("Chapter 15 is unique in the Bankruptcy Code in that it specifically instructs courts to consider the international origins of Chapter 15 and apply Chapter 15 in a manner consistent with the application of the Model Law by foreign jurisdictions.").

[12] *In re Loy*, 432 B.R. at 561 ("Section 1508's rule of interpretation is obviously less applicable where the contested issues 'do not implicate provisions of chapter 15 derived from the Model Law,' but instead 'arise from provisions that Congress specially added in adapting the Model Law to the U.S. bankruptcy code.'") (quoting *In re* Pro-Fit Holdings Ltd., 391 B.R. 850, 857 (Bankr. C.D. Cal. 2008)).

[13] 11 U.S.C. § 1508 (2012); *see In re Ran*, 607 F.3d at 1020 ("The statutory intent to conform American law with international law is explicit in the text of Section 1501(a), and also is expressed in Section 1508[.]"); *In re* Toft, 453 B.R. 186, 196 n.10 (Bankr. S.D.N.Y. 2011) ("Under § 1508 of the Bankruptcy Code, the provisions of chapter 15 are to be interpreted in a manner that promotes consistency with foreign application of similar laws."); *In re JSC BTA Bank*, 434 B.R. at 340 ("Section 1508 requires the Court to consider the international origin of chapter 15 when construing the plain language of each of the individual component provisions of chapter 15."); *In re Betcorp*, 400 B.R. at 283 n.23 ("While . . . the suggested reading . . . is somewhat contrary to plain meaning, this court will use the definition found in section 1502(3)

UNCITRAL Guide (and the reports cited therein), "which explain the reasons for the terms used and often cite their origins, as well," and the UNCITRAL Case Law On Uniform Texts, which "receives reports from national reporters all over the world concerning court decisions interpreting treaties, model laws, and other text promulgated by UNCITRAL."[14] These sources are intended to "advance the crucial goal of uniformity of interpretation."[15]

The Regulation on Insolvency Proceedings (the "EU Regulation"), as adopted by the European Union Council, sheds further light on how chapter 15 should be viewed and interpreted and focuses upon creating a framework for the commencement of proceedings and for the automatic recognition and cooperation between the different member states.[16] The EU Regulation applies in cross-border cases among all members of the European Union except Denmark.[17] After its promulgation in 2000, the EU Regulation went into effect on May 31, 2002.[18] Because the European Union was unable to agree, for nonbankruptcy reasons, on an earlier draft law, known as the European Union Convention on Insolvency Proceedings (the "EU Convention"), the controlling instrument is a regulation rather than a law.[19] Even though the EU Convention was never adopted, the UNCITRAL Guide's references to the EU Convention are still relevant and valid, as the

---

to construe section 101(23). This deviation from accepted methods of statutory interpretation is justified by the international context of this case, and by Congress' directives, contained in section 1501 and 1508, to construe chapter 15 so that it is consistent with international understandings."); *In re* SPhinX, Ltd., 351 B.R. 103, 118 (Bankr. S.D.N.Y. 2006) ("[I]n keeping with its international context, chapter 15 directs courts also to obtain guidance from the application of similar statutes by foreign jurisdictions[.]"); *see also* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 8 ("In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.").

[14] H.R. REP. NO. 109-31, pt. 1, at 109-10 (2005); *see id.* at 106 n.101 (noting that UNCITRAL's Report on the adoption of the Model Law and the UNCITRAL Guide "should be consulted for guidance as to the meaning and purpose of [the Model Law's] provisions"); *see also In re* Tri-Continental Exch., 349 B.R. 627, 633 (Bankr. E.D. Cal. 2006).

[15] *Id.*; *see In re* British Am. Ins. Co., 488 B.R. 205, 212 (Bankr. S.D. Fla. 2013) ("International uniformity is a primary goal of the Model Law and thus of chapter 15.") (citing 11 U.S.C. §§ 1501(a), 1508); *In re* Lee, 472 B.R. 156, 180 (Bankr. D. Mass. 2012) ("[A] crucial goal is 'uniformity of interpretation.'") (quoting *In re Tri-Continental Exch.*, 349 B.R. at 633).

[16] *See* Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, art. 1, 2000 O.J. (L 160) 1–18 (as amended). In fact, the EU Regulation was finalized one year before the Model Law and uses many common concepts. *See also In re* Tien Chiang, 437 B.R. 397, 401 (Bankr. C.D. Cal. 2010). However, the EU Regulation does not provide any procedure for recognition by the courts of an EU member state of insolvency proceedings initiated in a non-EU member state or any procedure for recognition of an insolvency proceeding when the debtor's center of main interests is located outside of the EU member states. *See* Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, art. 3(1)–(2), 2000 O.J. (L 160) 1-18 (as amended); *In re* Ran, 390 B.R. 257, 267 (Bankr. S.D. Tex. 2008). The Report on the Convention on Insolvency Proceedings (the "EU Report") authored by Miguel Virgos and Etienne Schmit provides "useful guidance when interpreting the Regulation." *Id.* at 266.

[17] *See* Ian F. Fletcher, *The European Union Regulation on Insolvency Proceedings*, CROSS-BORDER INSOLVENCY: A GUIDE TO RECOGNITION AND ENFORCEMENT 16 (2003), http://www.insol.org/pdf/cross_pdfs/Acm%20Fletcher.pdf.

[18] *See id.*

[19] *See id*. at 16–20.

UNCITRAL Guide was drafted when it was expected that the EU Convention would be adopted, and the final text of the EU Regulation and the EU Convention are "identical in all material respects."[20]

On December 12, 2012, the European Commission (the "Commission") submitted a proposal to amend the EU Regulation citing five main shortcomings: (1) the EU Regulation's scope does not cover pre-insolvency proceedings or hybrid proceedings (where existing management remains in place); (2) difficulties in determining which member state is competent to open insolvency proceedings and allegations of forum shopping through relocation; (3) obstacles created by secondary proceedings; (4) problems relating to the rules on publicity of insolvency proceedings and the lodging of claims; and (5) the EU Regulation does not contain specific rules dealing with the insolvency of a multi-national enterprise group.[21] On February 5, 2014, the European Parliament voted overwhelmingly in favor of the Commission's proposal[22] and, on June 6, 2014, the EU's Justice Council backed the Commission's proposal.[23] On December 4, 2014, the EU justice ministers published a draft recast text amending the EU Regulation (the "Recast EU Regulation") and it was adopted by the Justice Council on March 12, 2015.[24] The Recast EU Regulation addresses several of the perceived shortcomings of the EU Regulation and most provisions of the Recast EU Regulation will enter into force in 2017.[25]

Chapter 15 was enacted as part of "an effort by the United States to harmonize international bankruptcy proceedings for the benefit of American businesses operating abroad."[26] It is intended to promote:

> cooperation between United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; the protection and

---

[20] *In re Ran*, 390 B.R. at 266.

[21] *See Commission Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings*, at art. 1.2, COM (2012) 744 final (Dec. 12, 2012).

[22] *See* European Commission Press Release MEMO/14/88, Insolvency: European Parliament Backs Commission Proposal to Give Viable Businesses a 'Second Chance' (Feb. 5 2014) (noting there were 580 votes for, 69 against, and 19 abstentions).

[23] *See* European Commission Press Release MEMO/14/397, Modern Insolvency Rules: EU Ministers Back Commission Proposal to Give Honest Businesses a Second Chance (Jun. 6 2014) (stating the agreement would create better conditions for businesses as well as creditors).

[24] *See* Richard Tett and Katharina Crinson, *The recast of EC Regulation on Insolvency Proceedings: a welcome revision*, CORPORATE RESCUE AND INSOLVENCY, April 2015, at 64.

[25] *See id.*

[26] Tacon v. Petroquest Res. Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 322 (5th Cir. 2010).

> maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses.[27]

The "international origins" of chapter 15 is a dominant and consistent theme that underlies its provisions and distinguishes chapter 15 from other chapters of the Bankruptcy Code. Indeed, chapter 15 is the only chapter of the Bankruptcy Code predicated on international coordination and cooperation and that encourages courts to look beyond the United States for interpretative guidance.

As the Fifth Circuit noted in *Tacon v. Petroquest Res. Inc.*:

> Providing access to domestic federal courts to proceedings ancillary to foreign main proceedings springs from distinct impulses of providing protection to domestic business and its creditors as they develop foreign markets. Settled expectations of the rules that will govern their efforts on distant shores is an important ingredient to the risk calculations of lenders and corporate management. In short, Chapter 15 is a congressional implementation of efforts to achieve the cooperative relationships with other countries essential to this objective. The hubris attending growth of the country's share of international commerce rests on a nourishing of its exceptionalism not its diminishment.[28]

Chapter 15 invokes the jurisdiction of U.S. bankruptcy courts to assist in the administration of foreign insolvency and restructuring proceedings.[29] Its most basic objective, which should guide all interpretations of chapter 15,[30] is "to provide effective mechanisms for dealing with cases of cross-border insolvency."[31]

Chapter 15 replaced section 304[32] as the Bankruptcy Code's operative procedure for addressing cross-border insolvencies. Nevertheless, many of the principles of chapter 15 are consistent with its predecessor.[33] Chapter 15, like

---

[27] *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 126 (Bankr. S.D.N.Y. 2007); *accord* 11 U.S.C. § 1501(a) (2012). The purpose of the Model Law is substantially the same. *See* UNCITRAL Model Law and Guide*, supra* note 2, Part One, Preamble.

[28] *In re Condor Ins. Ltd.*, 601 F.3d at 329.

[29] *See id.* ("Chapter 15 was intended to facilitate cooperation between U.S. courts and foreign bankruptcy proceedings[.]").

[30] *See* Lopez v. ML # 3, LLC, 607 F. Supp. 2d 1310, 1313 (N.D. Fla. 2009) (finding that when a statute includes an explicitly-stated purpose, it should be interpreted consistently therewith "even when a canon of construction might otherwise be thought to point in a different direction").

[31] 11 U.S.C. § 1501(a); *see also In re* Qimonda AG, 462 B.R. 165, 178 (Bankr. E.D. Va. 2011), *aff'd* Jaffé v. Samsung Elecs. Co., 737 F.3d 14, 24 (4th Cir. 2013) ("Among other relief, chapter 15 allows the foreign representative of an insolvency proceeding in another country involving a debtor with assets in the United States to petition a U.S. bankruptcy court for recognition of the foreign proceeding.").

[32] Unless otherwise specified, all section references refer to the United States Bankruptcy Code, 11 U.S.C. § 101, *et. seq*.

[33] *See In re* Atlas Shipping A/S, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009) ("[M]any of the principles underlying § 304 remain in effect under chapter 15.").

section 304, specifically contemplates that U.S. courts should be guided by principles of comity and cooperation in deciding whether to grant relief to foreign representatives[34] as evidenced by the references to comity throughout chapter 15.[35] For example, section 1509 requires the court to grant comity or cooperation to the foreign representative if it grants recognition under section 1517, and section 1507 explicitly directs the court to consider comity in granting additional assistance to the trustee.[36] The rationale behind the prevalence of the comity concept in chapter 15 is that "[d]eference to foreign insolvency proceedings will often facilitate the distribution of the debtor's assets in an equitable, orderly, efficient, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion."[37] Chapter 15 mandates that U.S. courts cooperate "to the maximum extent possible" with foreign courts and representatives.[38]

While chapter 15 replaced section 304 and provided a more structured framework for recognizing foreign proceedings, in certain instances, courts still look to former section 304 case law in interpreting chapter 15.[39] Congress enacted

---

[34] "Foreign Representative" means "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 2(d). The term "person" includes individuals, partnerships, and corporations, but does not include governmental units. *See* 11 U.S.C. § 101(41); *see also In re* The Irish Bank Resolution Corp. (In Special Liquidation), 2014 Bankr. LEXIS 1990, at *37 (Bankr. D. Del. Apr. 30, 2014). A foreign representative may include "debtors in possession, including those that may not meet Chapter 11's definition of debtors in possession," and, where the debtor retains enough authority over its affairs to be a debtor in possession, the debtor may appoint a foreign representative. Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB de C.V. (*In re* Vitro SAB de C.V.), 701 F.3d 1031, 1042 (5th Cir. 2012); *see also In re* OAS S.A., 533 B.R. 83, 95–98 (Bankr. S.D.N.Y. 2015). In addition, courts have held that the foreign court need not authorize an individual to act as the foreign representative. *See In re Vitro SAB De C.V.*, 701 F.3d at 1047 ("Section 101(24) – defining the term 'foreign representative' – is wholly devoid of any statement that a foreign representative must be judicially appointed. The definition's requirement that a representative be 'authorized in a foreign proceeding' is certainly compatible with appointment by a foreign court, but it is hardly necessary. As the district court observed, it would be equally compatible with a requirement that an individual be appointed 'in the context of' a foreign proceeding. It could also mean during, or in the course of, a foreign proceeding.") (internal citations omitted); *In re OAS S.A.*, 533 B.R. at 95 ("[T]he Bankruptcy Code does not require the judicial authorization or appointment of the foreign representative.") (citing *In re Vitro SAB De C.V.*, 701 F.3d 1031).

[35] *See* 11 U.S.C. § 304(c) (repealed 2005).

[36] *See* 11 U.S.C. §§ 1509(b)(3), 1507.

[37] *In re* Artimm, S.r.l., 335 B.R. 149, 161 (Bankr. C.D. Cal. 2005).

[38] *Id*. at 159.

[39] *See In re* Atlas Shipping A/S, 404 B.R. 726, 744 n.14, 738–39 (Bankr. S.D.N.Y. 2009) ("In short, while chapter 15 replaced § 304 and provided a more structured framework for recognizing foreign proceedings, Congress specifically granted courts discretion to fashion appropriate post-recognition relief, consistent with the principles underlying § 304."); *see also* Tacon v. Petroquest Res. Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 328 (5th Cir. 2010) ("Congress intended that case law under section 304 apply unless contradicted by Chapter 15."); *In re* AJW Offshore, Ltd., 488 B.R. 551, 561–62 (Bankr. E.D.N.Y. 2013) ("The legislative history to Chapter 15 directs courts to use case law interpreting former 304 in interpreting current Chapter 15 issues, unless the former 304 is contradicted by the current provisions of Chapter 15.") (citing H.R. REP. NO. 109-31, pt. 1, at 145 (2005)); *In re* SPhinX, Ltd., 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006) (internal citations omitted) ("Although chapter 15 replaced section 304 of the Bankruptcy Code, which previously governed cases ancillary to foreign proceedings, chapter 15 maintains—and in some respects enhances—the

former section 304 as part of the Bankruptcy Reform Act of 1978. Prior to its enactment, United States bankruptcy law did not provide specific procedures by which a foreign bankruptcy trustee could obtain relief in the United States to facilitate a foreign bankruptcy proceeding.[40] Section 304 was enacted to provide a remedy, in addition to comity, for dealing with issues related to foreign insolvency proceedings.[41] The primary purpose of section 304 was to aid foreign insolvency proceedings by providing a uniform federal mechanism through which a foreign representative could obtain judicial assistance in administering assets in the United States and prevent a scramble for such assets by local creditors.[42] To effectuate this purpose, section 304 afforded bankruptcy courts substantial flexibility to fashion appropriate remedies in handling ancillary proceedings.[43] In providing bankruptcy courts with such flexibility, Congress aimed to uphold "[p]rinciples of international comity and respect for the judgments and laws of other nations[.]"[44]

A section 304 case was "an ancillary case in which a United States bankruptcy court [was] authorized to apply its processes to give effect to orders entered in a foreign insolvency proceeding" in order to "help further the efficiency of foreign

---

'maximum flexibility,' . . . that section 304 provided bankruptcy courts in handling ancillary cases in light of principles of international comity and respect for the laws and judgments of other nations."); Westbrook, *supra* note 8, at 720.

[40] *See* Goerg v. Parungao (*In re* Goerg), 844 F.2d 1562, 1567 (11th Cir. 1988) (noting that section 304 had no predecessor in the Bankruptcy Act of 1898); *In re* Axona Int'l Credit & Commerce, Ltd., 88 B.R. 597, 605 (Bankr. S.D.N.Y. 1988) ("Under the [Bankruptcy] Act, a foreign representative did not have authority to institute a bankruptcy proceeding in a United States Bankruptcy Court."); Westbrook, *supra* note 8, at 718 (stating section 304 "for the first time codified United States notions of comity and cooperation with foreign courts in bankruptcy matters").

[41] *See In re Goerg*, 844 F.2d at 1567 (Section 304 "was intended to deal with the complex and increasingly important problems involving the legal effect the United States courts will give to foreign bankruptcy proceedings.") (quoting Cunard S.S. Co. v. Salen Reefer Services AB (*In re* Cunard), 773 F.2d 452, 454 (2d Cir. 1985)); *In re Axona*, 88 B.R. at 605–06; *In re* Gee, 53 B.R. 891, 896 (Bankr. S.D.N.Y. 1985) ("In enacting section 304, . . . Congress provided a mechanism for the courts in this country to aid foreign courts and accommodate the increasing number of foreign insolvency proceedings having extraterritorial effects within the United States.").

[42] *See* Bank of N.Y. v. Treco (*In re* Treco), 240 F.3d 148, 156 (2d Cir. 2001) ("[T]he overriding purpose of § 304 is to prevent piecemeal distribution of a debtor's estate.") (quoting Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (*In re* Koreag, Controle et Revision S.A.), 961 F.2d 341, 358 (2d Cir. 1992)); *In re Cunard*, 773 F.2d at 454–55 ("In order to administer assets in the United States and to prevent dismemberment by local creditors of assets located here, the representative of a foreign bankrupt may commence a section 304 proceeding, rather than a full bankruptcy case."); *In re* Manning, 236 B.R. 14, 21 (B.A.P. 9th Cir. 1999).

[43] *See In re Koreag*, 961 F.2d at 348 ("A bankruptcy court is given broad latitude in fashioning an appropriate remedy in a § 304 proceeding."); *In re Manning,* 236 B.R. at 21 (quoting H. K. & Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 998 (9th Cir. 1998)).

[44] *In re Cunard*, 773 F.2d at 455 (quoting H.R. REP. NO. 95-595, at 324–25 (1978)); *see also In re Goerg*, 844 F.2d at 1567–68 ("Consistent with 'principles of international comity and respect for the judgments and laws of other nations,' Congress intended that the bankruptcy courts have 'maximum flexibility' in fashioning appropriate orders.") (quoting H.R. REP. NO. 95-595, at 325 (1978)); *In re Manning,* 236 B.R. at 21 ("Section 304 'expresses Congressional recognition of an American policy favoring comity for foreign bankruptcy proceedings.'") (quoting Remington Rand Corp. v. Bus. Sys., Inc., 830 F.2d 1260, 1271 (3d Cir. 1987)).

insolvency proceedings involving worldwide assets."[45] A foreign representative retained the ability to use non-bankruptcy courts or commence a full-fledged bankruptcy proceeding "if the estate in the United States [was] substantial or complicated enough to require a full case for proper administration."[46] Section 304(b) listed three general categories of relief that the bankruptcy court could grant to a foreign representative seeking judicial assistance in the administration of a foreign proceeding.[47] Generally, under section 304(b), the bankruptcy court could: (1) enjoin the commencement or continuation of any action against the property involved in the foreign proceeding or the debtor concerning such property, including the enforcement of a judgment or the creation or enforcement of a lien; (2) order the turnover of such property to the foreign representative; and (3) order other appropriate relief.[48]

In deciding whether to grant relief under section 304(b), bankruptcy courts were to be guided by what would:

> best assure an economical and expeditious administration of such estate, consistent with (1) just treatment of all holders of claims against or interests in such estate; (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 such estate; (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by [the Bankruptcy Code]; (5) comity; and (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[49]

Chapter 15, which applies to cases filed in bankruptcy courts on or after October 17, 2005, replaced section 304 as the statutory scheme for proceedings ancillary to foreign bankruptcies.[50] Pursuant to section 1501(c), chapter 15 does not apply to (1) a proceeding concerning an entity, other than a foreign insurance company,[51] identified by exclusion in section 109(b);[52] (2) an individual who has

---

[45] *In re Goerg*, 844 F.2d at 1568.

[46] *In re Cunard*, 773 F.2d at 456.

[47] *See* 11 U.S.C. § 304(b)(1)–(3) (repealed 2005).

[48] *See id.*

[49] *Id.* § 304(c) (repealed 2005).

[50] *See In re* Artimm, S.r.l., 335 B.R. 149, 157 (Bankr. C.D. Cal. 2005) ("Congress repealed § 304 and replaced it with chapter 15, an entirely new statutory scheme based on the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law in 1997.").

[51] The possibility that an entity that is ineligible to be a debtor under the Bankruptcy Code, like a foreign insurance company, could be the subject of a chapter 15 proceeding necessitated a special definition of "debtor." Therefore, for the purposes of chapter 15, "debtor" means "an entity that is the subject of a foreign proceeding." 11 U.S.C. § 1502(1) (2012).

[52] Section 109(b) excludes, among other entities, railroads, domestic insurance companies, banks, savings banks, cooperative banks, savings and loan associations, building and loan associations, foreign banks, savings banks, cooperative banks, savings and loan associations, building and loan associations or credit

debts within the limits specified in section 109(e) and who is a citizen of the United States or an alien lawfully admitted for permanent residence in the United States;[53] or (3) an entity subject to a proceeding under the Securities Investor Protection Act of 1970, a stockbroker subject to subchapter II of chapter 7 of the Bankruptcy Code, or a commodity broker subject to subchapter IV of chapter 7.[54] In addition, courts may not grant relief under chapter 15 with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable state insurance law or regulation for the benefit of claim holders in the United States.[55] On the other hand, chapter 15 does apply where (1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding; (2) assistance is sought in a foreign country in connection with a case under the Bankruptcy Code; (3) a foreign proceeding and a case under the Bankruptcy Code with respect to the same debtor are pending concurrently; or (4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under the Bankruptcy Code.[56]

To determine whether a particular Bankruptcy Code section is applicable in a chapter 15 proceeding, courts will first consider the plain language of section 103 and section 1521, which is discussed in detail below, to determine whether the requested relief is explicitly permitted or denied.[57] Section 103(a) provides, in relevant part, as follows: "Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15."[58] There has been some debate about whether the

---

unions that have a branch or agency in the United States. *See* 11 U.S.C. § 109(b); *see also* Flynn v. Wallace (*In re* Irish Bank Resolution Corp. (In Special Liquidation)), 2015 U.S. Dist. LEXIS 101600, at *5–7 (D. Del. Aug. 4, 2015) (rejecting argument that the debtor, an Irish bank, was ineligible for chapter 15 protection under section 1501(c)(1) because it had branches in the United States more than ten months prior to the filing of the chapter 15 petition and holding that "the plain language of the statute clearly indicates that the relevant time period to consider is the date of the filing of the Chapter 15 petition, not the debtor's entire operational history").

[53] "The reference to section 109(e) essentially defines 'consumer debtors' for purposes of the exclusion by incorporating the debt limitations of that section, but not its requirement of regular income. The exclusion adds a requirement that the debtor or debtor couple be citizens or long-term legal residents of the United States. This ensures that residents of other countries will not be able to manipulate this exclusion to avoid recognition of foreign proceedings in their home countries or elsewhere." H.R. REP. NO. 109-31, pt. 1, at 106 (2005). "Although the consumer exclusion is not in the text of the Model Law, the discussions at UNCITRAL recognized that such exclusion would be necessary in countries like the United States where there are special provisions for consumer debtors in the insolvency laws." *Id.* (citing U.N. Comm'n on Int'l Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, ¶¶ 60, 66, U.N. Doc. A/CN.9/442 (1997)).

[54] *See* 11 U.S.C. § 1501(c).

[55] *See id.* § 1501(d).

[56] *See id.* § 1501(b). The Model Law applies in the same circumstances. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 1(1).

[57] *See In re* AJW Offshore, Ltd., 488 B.R. 551, 557–58 (Bankr. E.D.N.Y. 2013).

[58] 11 U.S.C. § 103(a); *see, e.g.*, *In re* Fairfield Sentry Ltd., 452 B.R. 52, 58–62 (Bankr. S.D.N.Y. 2011) (finding tolling provisions of section 108 applicable to chapter 15 case even though not explicitly included in

Bankruptcy Code sections that apply in a chapter 15 case are limited to those sections explicitly listed in section 103 or in chapter 15.[59]

II. GENERAL PROVISIONS OF CHAPTER 15

A. International Obligations of the United States

To the extent that chapter 15 conflicts with an obligation of the United States arising out of a treaty or other agreement to which the United States is a party with one or more other countries, the requirements of the international obligation will prevail.[60] While such international obligations of the United States take precedence over chapter 15, courts will attempt to read chapter 15 and the treaty or international agreement so as not to conflict, particularly if the international obligation addresses a subject matter that is less directly related to the case before the court than chapter 15.[61]

B. Jurisdiction and Statutory Requirements

While a plenary proceeding may be commenced under a different chapter of title 11 following recognition of a foreign proceeding, chapter 15 cases all begin as

---

section 1520(a)(3) due to the plain language of section 103 making chapter 1 of the Bankruptcy Code applicable in chapter 15 cases); Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, 82 AM. BANKR. L.J. 269, 313 (2008) ("Rights afforded by Chapter 1, such as extensions of time under § 108, apply in a Chapter 15 case by virtue of § 103(a). Thus, there should be no need to obtain an order under § 105, 1507, or 1521 declaring that § 108 is applicable in a Chapter 15 case."); H.R. REP. NO. 109-31, pt. 1, at 115 (2005) ("Section 108 of the Bankruptcy Code provides the tolling protection intended by Model Law article 20(3).").

[59] *Compare In re* Lee, 472 B.R. 156, 178 (Bankr. D. Mass. 2012) (holding that neither section 541(a) nor 541(c)(1) are applicable in a chapter 15 case because neither is listed in section 103) *with In re* Pro-Fit Holdings Ltd., 391 B.R. 850, 865–66 (Bankr. C.D. Cal. 2008) ("It is highly unlikely that a court can simply ignore all the rest of the bankruptcy code and the other provisions relating to bankruptcy cases in the United States, just because they are not specifically mentioned in chapter 15 or § 103. The better reading is that many other provisions of the bankruptcy code can be applicable in a chapter 15 case: Some should apply in most cases, while others should be applied only on a case by case basis.") *and In re AJW Offshore, Ltd.*, 488 B.R. at 557 (holding that where chapter 15 is silent as to the applicability or inapplicability of other sections of the Bankruptcy Code, determining whether the foreign representative is entitled to use such provisions "requires an analysis of the relevant provisions of Chapter 15 and related Bankruptcy Code provisions, case law under prior § 304, and consideration of whether granting such relief is in the interests of international comity").

[60] *See* 11 U.S.C. § 1503; *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 3; *see also* Andrus v. Digital Fairway Corp., 2009 U.S. Dist. LEXIS 54800, at *4 n.1 (N.D. Tex. June 26, 2009) ("The bankruptcy court may not recognize the foreign proceeding if recognition . . . violates international agreements to which the United States is a party."); UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 91 ("Article 3 . . . express[es] the principle of supremacy of international obligations of the enacting State over internal law[.]").

[61] *See* H.R. REP. NO. 109-31, pt. 1, at 107 (2005); *see also* UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 92 ("In enacting the article, the legislator may wish to consider whether it would be desirable to take steps to avoid an unnecessarily broad interpretation of international treaties.").

ancillary proceedings in which recognition is sought under section 1504.[62] Section 1504 provides that a chapter 15 case is commenced by filing a petition for recognition of a foreign proceeding under section 1515.[63] Pursuant to 28 U.S.C. section 1410, the petition for recognition must be filed in the district:

> (1) in which the debtor has its principal place of business or principal assets in the United States; (2) if the debtor does not have a place of business or assets in the United States, in which there is pending against the debtor an action or proceeding in a Federal or State court; or (3) in a case other than those specified in paragraph (1) or (2), in which venue will be consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative.[64]

Section 1504 varies considerably from Article 4 of the Model Law, which was designed to designate the court or authority that would exercise jurisdiction over a foreign proceeding.[65] In the United States, designation to the appropriate court is set

---

[62] *See* Jaffé v. Samsung Elecs. Co., 737 F.3d 14, 24–25 (4th Cir. 2013) ("Chapter 15 . . . authorizes an 'ancillary' proceeding in a United States bankruptcy court that is largely designed to complement and assist a foreign insolvency proceeding[.]"); *In re* JSC BTA Bank, 434 B.R. 334, 340 (Bankr. S.D.N.Y. 2010) ("Section 1504 makes clear that any case commenced under chapter 15 is 'ancillary' to a foreign proceeding pending elsewhere."); *In re* Daewoo Logistics Corp., 461 B.R. 175, 178 (Bankr. S.D.N.Y. 2011) (same); *In re* SPhinX, Ltd., 351 B.R. 103, 120 n.22 (Bankr. S.D.N.Y. 2006) ("[C]ases under chapter 15 are ancillary *regardless* whether the foreign proceeding is main or nonmain."); H.R. REP. NO. 109-31, pt. 1, at 106 (2005) ("Cases brought under chapter 15 are intended to be ancillary to cases brought in a debtor's home country, unless a full United States bankruptcy case is brought under another chapter."). "The title 'ancillary' in the title of . . . section [1504] and in the title of . . . chapter [15] emphasizes the United States policy in favor of a general rule that countries other than the home country of the debtor, where a main proceeding would be brought, should usually act through ancillary proceedings in aid of the main proceedings, in preference to a system of full bankruptcies . . . in each state where assets are found." *Id.* at 108.

[63] *See* 11 U.S.C. § 1504; *see also* SNP Boat Serv. S.A. v. Hotel Le St. James, 483 B.R. 776, 782 (S.D. Fla. 2012); *In re* Loy, 432 B.R. 551, 563 (E.D. Va. 2010) ("Section 1504 . . . provides that a Chapter 15 case is commenced with the filing of the petition for recognition."); *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 331 (S.D.N.Y. 2008) ("Section 1504 provides that a Chapter 15 case ancillary to a foreign proceeding is commenced by filing a petition."); United States v. J.A. Jones Constr. Grp., LLC, 333 B.R. 637, 638 (E.D.N.Y. 2005) ("[R]elief under Chapter 15 is available only after a foreign representative commences an ancillary proceeding for recognition of a foreign proceeding before a bankruptcy court."); *In re* Ernst & Young, Inc., 383 B.R. 773, 776 (Bankr. D. Colo. 2008) ("Pursuant to § 1504, a case under Chapter 15 is commenced by a foreign representative filing a petition for recognition of a foreign proceeding under § 1515.").

[64] 28 U.S.C. § 1410 (2012). Section 1410(3) "borrows the language (and hence the standard) used for consideration of change of venue, so that case law construing 28 U.S.C. § 1412 will be of assistance in construing 28 U.S.C. § 1410(3). The statute adds one additional consideration to the factors listed in the case law—regard for the relief sought by the foreign representative. That is consistent with the larger goal of fostering international cooperation in this area of the law." 1 COLLIER ON BANKRUPTCY, ¶ 13.05[2], at 13–59 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) (internal citations omitted).

[65] *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 4 ("The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by *[specify the court, courts, authority or authorities competent to perform those functions in the enacting State]*."); H.R. REP. NO. 109-31, pt. 1, at 107–08 (2005).

forth in 28 U.S.C. section 1334.[66] District courts in the United States have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11 and original and exclusive jurisdiction of all other cases under title 11.[67]

Although jurisdiction in the United States is granted to the district courts in the first instance, cases under title 11 and proceedings arising under title 11, or arising in or related to cases under title 11, may be referred to bankruptcy courts.[68] Referral of such matters is accomplished pursuant to a local rule or standing order in every district court in the United States.[69] Once the district court refers a case or proceeding, the bankruptcy court has statutory authority to hear and determine cases under title 11 and core proceedings arising under title 11 or arising in a case under title 11.[70] Pursuant to 28 U.S.C. section 157(b)(2)(P), "recognition of foreign proceedings and other matters under chapter 15" are "core proceedings."[71] While a

---

[66] *See* 28 U.S.C. § 1334; H.R. REP. NO. 109-31, pt. 1, 107–08 (2005).

[67] *See* 28 U.S.C. § 1334(a), (b).

[68] *See id.* § 157(a) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.").

[69] *See In re* British Am. Ins. Co., 488 B.R. 205, 219 (Bankr. S.D. Fla. 2013) (Referral to the bankruptcy court of any and all matters covered by 28 U.S.C. § 1334 "has been accomplished in every district in the United States by standing orders of reference."); *Hearing on the Impact of the Supreme Court's Decision in Stern v. Marshall Before House Judiciary Comm. Subcomm. on Courts, Commercial and Admin. Law* (2012) (statement of Hon. Feeney, United States Bankruptcy Judge, District of Massachusetts, President of the Nat'l Conference of Bankr. Judges) ("Since 1984, every district court in the United States has adopted a local court rule or permanent standing order that automatically refers bankruptcy cases to the bankruptcy courts."). District courts may, for cause shown, withdraw, in whole or in part, any case or proceeding referred under 28 U.S.C. § 157. *See* 28 U.S.C. § 157(d).

[70] *See* 28 U.S.C. § 157(b)(1). However, in *Stern v. Marshall*, the Supreme Court held that while the bankruptcy court had the statutory authority to issue a final and binding decision on a compulsory counterclaim based exclusively on a right assured by state law, it nonetheless lacked the constitutional authority to do so as an Article I court. *See* Stern v. Marshall, 131 S. Ct. 2594 (2011); *see also In re* Fairfield Sentry Ltd., 458 B.R. 665, 687–88 (S.D.N.Y. 2011) (concluding that the claims at issue were "classic common law claims for money had and received or mistaken payment" rather than "independent federal claims or even independent foreign law claims" and holding that an Article I court could not adjudicate the claims to a final judgment). The *Stern* decision, therefore, created a third category of claims. In addition to the "core" and "non-core" claims outlined in 28 U.S.C. § 157, there exists a category of claims that are designated as core but that can only be adjudicated by an Article III judge. In *Exec. Bens. Ins. Agency v. Arkison*, the Supreme Court concluded that bankruptcy court judges may treat these so-called "*Stern* claims" as non-core and issue proposed findings of fact and conclusions of law subject to *de novo* review and entry of a final judgment by a district court. *See* Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014) ("When a court identifies a claim as a *Stern* claim, it has necessarily 'held invalid' the 'application' of § 157(b)—*i.e.*, the 'core' label and its attendant procedures—to the litigant's claim. In that circumstance, the statute instructs that 'the remainder of th[e] Act . . . is not affected thereby.' That remainder includes § 157(c), which governs non-core proceedings. With the 'core' category no longer available for the *Stern* claim at issue, we look to § 157(c)(1) to determine whether the claim may be adjudicated as a non-core claim—specifically, whether it is 'not a core proceeding' but is 'otherwise related to a case under title 11.' If the claim satisfies the criteria of § 157(c)(1), the bankruptcy court simply treats the claims as non-core: The bankruptcy court should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment.").

[71] 28 U.S.C. § 157(b)(2)(P); H.R. REP. NO. 109-31, pt. 1, at 108 (2005) ("[N]ew subsection (P) to section 157 of title 28 makes cases under [chapter 15] part of the core jurisdiction of bankruptcy courts if referred by

bankruptcy court may also hear non-core proceedings that are otherwise "related to" a case under title 11, in such cases, unless all parties to the proceeding consent to entry of a final order, the bankruptcy court may only submit proposed findings of fact and conclusions of law to the district court.[72]

In *British American Insurance Company v. Fullerton*, the Bankruptcy Court for the Southern District of Florida considered, among other things, whether it had "related to" jurisdiction over the debtor's complaint for damages for breach of fiduciary duty against its former directors.[73] The bankruptcy court noted that, outside of the chapter 15 context, courts in the Eleventh Circuit had adopted the Third Circuit's analysis in *Pacor, Inc. v. Higgins* to determine whether a civil proceeding is sufficiently related to a bankruptcy case to confer federal jurisdiction under 28 U.S.C. section 1334(b).[74] Under the *Pacor* test, "[a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate."[75]

While the *Pacor* test defines "related to" jurisdiction, in part, by reference to a proceeding's potential effect on administration of the "estate," the bankruptcy court rejected the argument that, because no estate is created under chapter 15, the adversary proceeding fell outside federal bankruptcy court jurisdiction.[76] Instead, the bankruptcy court substituted the chapter 15 case for the concept of the estate.[77] Because the outcome of the complaint would have liquidated significant claims of the debtor and could have augmented creditors' recoveries, the bankruptcy court

---

the district courts, thus completing the designation of the competent court."); *In re British Am. Ins. Co.*, 488 B.R. at 236 ("In the context of federal bankruptcy jurisdiction the word 'under,' as with the phrase 'arising under,' has traditionally referred to matters specifically authorized by the referenced statute[,] . . . section 157(b)(2)(P) should be read to include within the ambit of core chapter 15 matters the recognition procedure and requests for relief covered by the various provisions of chapter 15. Examples include a request for pre-recognition relief under section 1519, a request for a stay of execution under section 1521(a)(2), and a request for coordination with the foreign proceeding under section 1529.").

[72] *See* 28 U.S.C. § 157(c)(1)–(c)(2).

[73] *See In re British Am. Ins. Co*., 488 B.R. at 221–24.

[74] *See id.* at 222 (citing Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).

[75] *Id.* (quoting Miller v. Kemira, Inc. (*In re* Lemco Gypsum, Inc.), 910 F.2d 784 (11th Cir. 1990) and *Pacor*, 743 F.2d at 994).

[76] *See id.* at 223 ("[T]here is nothing in section 1334(b) limiting related to jurisdiction to cases under chapters 7, 9, 11, 12, and 13. By its own terms section 1334(b) confers subject matter jurisdiction over any proceeding 'related to a case under title 11.' A chapter 15 case is a case under title 11. Congress exhibited no desire to remove proceedings related to chapter 15 cases from the ambit of federal bankruptcy jurisdiction. To rely on case law developed entirely outside the chapter 15 context is misguided.").

[77] *See id.* ("In considering whether there is related to jurisdiction under section 1334(b) with regard to a proceeding connected to a chapter 15 case, it is appropriate to substitute the chapter 15 case itself for the concept of the estate. The inquiry becomes — does the action in any way impact upon the handling and administration of the chapter 15 case?"); *but see In re* Loy, 2009 Bankr. LEXIS 2143, at *18 (Bankr. E.D. Va. Aug. 3, 2009) ("This Court does not have 'related to' jurisdiction over the cause of action asserted by the Loys. The action has no impact whatsoever on the bankruptcy estate, simply for the reason that no estate is created upon the filing of a Chapter 15 petition. In any event, the underlying cause of action . . . does not alter the Debtor's rights, liabilities, options or freedom of action in any way pertaining to his bankruptcy proceeding.").

concluded that prosecution of the complaint "may impact both the plaintiff and the administration of the chapter 15 case, and thus satisfies both prongs of the *Pacor* test as applicable in chapter 15."[78]

The bankruptcy court also considered whether it also had jurisdiction under an alternative test developed by the Second Circuit in *Parmalat Capital Financial Ltd. v. Bank of America Corp*.[79] In *Parmalat*, which was decided under section 304, the Second Circuit considered the impact on the foreign proceeding, rather than on the ancillary case in the United States, in determining whether a court had "related to" jurisdiction.[80] The Second Circuit held that so long as the estate at issue, wherever located, could conceivably be affected by the action in question, the action was "related to" the chapter 15 case.[81] In *British American*, the bankruptcy court concluded that the complaint for damages for breach of fiduciary duty also satisfied the *Parmalat* test.[82]

Finally, the bankruptcy court considered whether it should abstain from adjudicating the plaintiff's claim pursuant to 28 U.S.C. § 1334(c)(1), which provides that "[e]xcept with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11."[83] The bankruptcy court determined that because subsection (c)(1) generally permits abstention from proceedings arising in, arising under or related to a title 11 case, "the words '[e]xcept with respect to a case under chapter 15 of title 11' must refer to matters arising under, arising in or related to a case under chapter 15, and not the

---

[78] *In re British Am. Ins. Co.*, 488 B.R. at 224.

[79] *See* Parmalat Capital Fin. Ltd. v. Bank of Am. Corp., 639 F.3d 572 (2d Cir. 2011).

[80] *See id.* at 579.

[81] *See id*. ("The fact that a § 304 proceeding, by definition, involves a bankruptcy estate located abroad does not short circuit the 'related to' analysis. In the context of § 1334(b), there is no need to distinguish between estates administered principally in foreign forums and those administered principally in domestic forums. . . . So long as the estate at issue in a § 304 proceeding, wherever located, may conceivably be affected by the state law actions, those state law actions are 'related to' the § 304 case."); *but see* 1 COLLIER ON BANKRUPTCY, ¶ 13.05[1], at 13-58.8 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015) ("The analysis laid out by the Second Circuit seems suspect, because it uses the word 'estate' to refer even to cases not brought under title 11. Section 1334(b) itself could not be referring to a case pending in another country, because the statute refers to cases pending under title 11. It remains to be seen whether the Second Circuit will reach the same conclusion with respect to chapter 15 ancillary cases.").

[82] *See In re British Am. Ins. Co.*, 488 B.R. at 224; *see also In re* Hellas Telcoms. (Lux.) II SCA, 524 B.R. 488, 515 (Bankr. S.D.N.Y. 2015) ("The outcome of this adversary proceeding would clearly have an effect on the Debtor's foreign estate, as it could potentially recover approximately €1 billion for the benefit of the estate. Notwithstanding that the Plaintiffs' claims are all state law claims brought in an adversary proceeding related to a chapter 15 proceeding, this adversary proceeding is related to a case under title 11.") (citing *Parmalat Capital Fin. Ltd.*, 639 F.3d at 579).

[83] 28 U.S.C. § 1334(c)(1) (2012); *see In re* CPW Acquisition Corp., 2011 Bankr. LEXIS 801, at *19–20 (Bankr. S.D.N.Y. Mar. 3, 2011) ("While 28 U.S.C. § 1334(c)(1) refers to comity with 'state courts' and with respect to 'state law,' several courts, including this Court, have extended 28 U.S.C. § 1334(c)(1) to foreign proceedings under the doctrine of international comity.") (citing *In re* Bozel S.A., 434 B.R. 86 (Bankr. S.D.N.Y. 2010) and *In re* Regus Bus. Ctr. Corp., 301 B.R. 122, 128–29 (Bankr. S.D.N.Y. 2003)).

chapter 15 case itself."[84] Under this interpretation, the bankruptcy court concluded that courts may not rely on section 1334(c)(1) to abstain from any proceeding arising under a provision of chapter 15, arising in a chapter 15 case, or related to a chapter 15 case.[85] Because the matter at issue in *British American* was related to a chapter 15 case, the bankruptcy court held that it could not abstain from hearing the complaint pursuant to 28 U.S.C. section 1334(c)(1).[86]

In addition to the jurisdictional issues noted above, a foreign representative seeking to commence an ancillary case under chapter 15 must also consider the statutory requirements of title 11.

For instance, in *Drawbridge Special Opportunities Fund LP v. Barnet*, the Second Circuit considered whether section 109(a), which requires that a debtor reside or have a domicile, a place of business or property in the United States, applies to the debtor in a foreign proceeding under chapter 15.[87] Overruling the bankruptcy court,[88] the Second Circuit held that section 103(a) makes all of chapter 1, including section 109(a), applicable to chapter 15.[89] Because the foreign

---

[84] *In re British Am. Ins. Co.*, 488 B.R. at 238 (rejecting the interpretation of "the phrase '[e]xcept with respect to a case under chapter 15 of title 11' to refer only to the chapter 15 case itself, and not to proceedings pursued within that chapter 15 case such as matters arising under chapter 15 or arising in or related to the chapter 15 case"); *see also* Firefighters' Ret. Sys. v. Citco Grp. Ltd., 796 F.3d 520, 526 (5th Cir. 2015) (holding that an interpretation of the phrase "[e]xcept with respect to a case under chapter 15 of title 11" to mean "that both the Chapter 15 case itself and cases 'arising in or related to' Chapter 15 cases are excluded . . . is more consistent with the plain language and purpose of the statute"); *In re* Fairfield Sentry Ltd., 452 B.R. 64, 83 n.19 (Bankr. S.D.N.Y. 2011), *rev'd on other grounds*, 458 B.R. 665 (S.D.N.Y. 2011) (concluding that "the statute would seem to exclude core and non-core proceedings that exist "with respect to" cases under chapter 15"); *but see* Abrams v. General Nutrition Cos., 2006 U.S. Dist. LEXIS 68574, at *21–26 (D.N.J. Sept. 25, 2006) (finding that the language of 28 U.S.C. § 1334(c) excludes only core proceedings arising "under" the chapter 15 case).

[85] *See In re British Am. Ins. Co.,* 488 B.R. at 240; *see also In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. 543, 589 (Bankr. S.D.N.Y. 2015) ("Since the Court may not abstain from hearing an adversary proceeding related to a case under chapter 15, the First Amended Complaint is not futile on international comity grounds."); *Firefighters' Ret. Sys.*, 796 F.3d at 528 ("[A] district court cannot permissively abstain from exercising jurisdiction in proceedings related to Chapter 15 cases."). While the court has discretion to abstain under 28 U.S.C. § 1334(c)(1), "abstention is required where (1) the motion to abstain was timely filed, (2) the action is based on state-law claims, (3) the action is non-core, (4) the sole basis for federal jurisdiction is 28 U.S.C. § 1334, (5) an action is commenced in state court, and (6) that action can be timely adjudicated in state court." *In re* Fairfield Sentry Ltd., 458 B.R. 665, 689 (S.D.N.Y. 2011) (citing 28 U.S.C. § 1334(c)(2)); *see also In re British Am. Ins. Co.*, 488 B.R. at 239 ("A related to matter . . . could be subject to abstention only under the mandatory provision set out in section 1334(c)(2).").

[86] *See In re British Am. Ins. Co.*, 488 B.R. at 238–39.

[87] *See* Drawbridge Special Opportunities Fund LP v. Barnet (*In re* Barnet), 737 F.3d 238, 246–51 (2d Cir. 2013).

[88] *See In re* Barnet, 2012 Bankr. LEXIS 6233, at *6–7 (Bankr. S.D.N.Y. Nov. 28, 2012) ("In granting recognition, this Court concluded, among other things, that there is no requirement that a foreign debtor be domiciled or have a residence, place of business or property in the United States for a foreign proceeding to be recognized under Chapter 15.").

[89] *See* 11 U.S.C. §§ 103(a), 109(a) (2012); *In re Barnet*, 737 F.3d at 247 ("Section 103(a) makes all of Chapter 1 applicable to Chapter 15. Section 109(a)—within Chapter 1—creates a requirement that must be met by any debtor. Chapter 15 governs the recognition of foreign proceedings, which are defined as proceedings in which 'the assets and affairs of the debtor are subject to control or supervision by a foreign court.' The debtor that is the subject of the foreign proceeding, therefore, must meet the requirements of

representatives, who were seeking discovery and other relief against certain entities in the United States,[90] made no attempt to establish that the debtor had a domicile, place of business, or property in the United States, the Second Circuit vacated the bankruptcy court's recognition order and remanded the case for further proceedings.[91]

In so holding, the Second Circuit rejected the various arguments advanced by the foreign representatives, including their initial assertion that section 109(a), which creates a requirement for debtors "under this title," did not apply because the foreign representatives were not "seeking recognition of a debtor and that no debtor appeared before the Bankruptcy Court; rather, [the foreign representatives]

Section 109(a) before a bankruptcy court may grant recognition of the foreign proceeding.") (quoting 11 U.S.C. § 101(23)); *but see In re Fairfield Sentry Ltd*., 458 B.R. at 679 n.5 (finding the presence of assets in the U.S. was not a prerequisite for chapter 15 assistance involving injunctive relief or discovery requests); *In re British Am. Ins. Co. Ltd*., 488 B.R. at 225 (finding debtor need not have assets in the U.S. for chapter 15 relief). The Second Circuit noted that Congress amended section 103 to state that chapter 1 applies to chapter 15 when it enacted chapter 15 and concluded that the timing of the amendment "strongly supports the conclusion that Congress intended Section 103(a) to mean what it says, namely, that Chapter 1 applies to Chapter 15." *In re Barnet*, 737 F.3d at 250. The Second Circuit also determined that none of chapter 15's "stated purposes are dispositive as they could all be accomplished with or without imposition of Section 109(a)" and that "the omission of Section 109(a), or its equivalent, from the Model Law does not suffice to outweigh the express language Congress used in adopting Sections 109(a) and 103(a)." *Id.* at 251.

[90] While chapter 15 may not be an appropriate means of taking discovery of U.S. persons where the debtor does not otherwise satisfy section 109(a), if required, 28 U.S.C. § 1782(a) permits federal courts to assist with discovery relating to foreign proceedings without the requirements of section 109. *See* 28 U.S.C. § 1782(a).

[91] *See In re Barnet,* 737 F.3d at 247. After the Second Circuit's decision in *In re Barnet*, the foreign representatives filed a second chapter 15 petition for recognition of an Australian liquidation proceeding. *See In re* Octaviar Admin. Pty Ltd., 511 B.R. 361, 364 (Bankr. S.D.N.Y. 2014). A defendant in litigation commenced by the foreign representatives objected to the petition for recognition. *See id.* The defendant asserted that the debtor's claims or causes of action should be deemed located in Australia, the debtor's domicile, "because causes of action, as intangible assets, are located where the plaintiff, rather than the defendant, is domiciled." *Id.* at 371. The bankruptcy court rejected this argument and concluded that:

> [T]he Foreign Representatives have asserted claims under U.S. law that involve defendants located in the United States and include allegations that certain funds were wrongfully transferred by [the defendant] and other U.S. entities to the United States. Although the causes of action that the Foreign Representatives assert . . . may be related to the transactions and issues in the Australian Litigation, they do not involve the same parties. As a general matter, where a court has both subject matter and personal jurisdiction, the claim subject to the litigation is present in that court.

Id. at 372. Because the debtor's claims and causes of action constituted "property located in the United States," the bankruptcy court held that the foreign representatives had satisfied the eligibility requirements of section 109(a). *Id.* The bankruptcy court also noted that the debtor had "property in the United States in the form of an undrawn retainer in the possession of the Foreign Representatives' counsel." *Id.* The bankruptcy court dismissed the argument that the "retainer was not paid to provide some legitimate economic function, but to game the requirements of section 109(a) to avoid dismissal of the First Chapter 15 Petition." *Id.* at 373. The bankruptcy court stated that it "must abide by the plain meaning of the words in the statute. Section 109(a) says, simply, that the debtor must have property; it says nothing about the amount of such property nor does it direct that there be any inquiry into the circumstances surrounding the debtor's acquisition of the property, and is thus consistent with other provisions of the Code that reject lengthy and contentious examination of the grounds for a bankruptcy filing." *Id.* at 373.

appeared seeking recognition of a foreign proceeding."[92] The Second Circuit concluded that "because the presence of a debtor is inextricably intertwined with the very nature of a Chapter 15 proceeding[,] . . . [i]t stretches credulity to argue that the ubiquitous references to a debtor in both Chapter 15 and the relevant definitions of Chapter 1 do not refer to a debtor under the title that contains both chapters."[93]

The Second Circuit was similarly unconvinced by the foreign representatives' argument that even if the foreign entity had to qualify as a debtor under title 11, it was only required to meet the chapter 15-specific definition of "debtor" in section 1502.[94] The Second Circuit held it could not "see how such a preclusive reading of Section 1502 is reconcilable with the explicit instruction in Section 103(a) to apply Chapter 1 to Chapter 15."[95]

The foreign representatives also maintained that application of section 109(a) to a debtor under chapter 15 would be inconsistent with section 1528 and 28 U.S.C. section 1410.[96] Section 1528, discussed in greater detail below, provides that "[a]fter recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States."[97] The foreign representatives reasoned that "the necessary implication is that a foreign main proceeding may be recognized even when there are no assets in the United States."[98] The Second Circuit held there was "nothing contradictory or disharmonious about applying Section 109(a) to Chapter 15 and then further requiring that Section 1528 is met before a case under another chapter of Title 11 may be commenced."[99]

The Second Circuit similarly rejected the foreign representatives' argument that applying section 109(a) to a debtor under chapter 15 would be inconsistent with 28 U.S.C. section 1410, which provides a venue for chapter 15 cases even when "the debtor does not have a place of business or assets in the United States[.]"[100] While deeming this argument "closer to the mark," the Second Circuit dismissed it on the grounds that 28 U.S.C. section 1410 was "purely procedural."[101]

---

[92] *In re Barnet,* 737 F.3d at 248 ("*First*, they argue that Section 109(a) creates a requirement for debtors 'under this title,' whereas [the foreign entity] is a debtor under the Australian Corporations Act, not under Title 11.").

[93] *Id*.

[94] *See id.* at 249; *see also* 11 U.S.C. § 1502(1) (defining debtor, for the purposes of chapter 15, as "an entity that is the subject of a foreign proceeding"). The term "debtor" is not defined in the Model Law.

[95] *In re Barnet*, 737 F.3d at 249.

[96] *See id.* at 250.

[97] 11 U.S.C. § 1528.

[98] *In re Barnet*, 737 F.3d at 250; *see also In re* Toft, 453 B.R. 186, 192 (Bankr. S.D.N.Y. 2011) ("Section 1528 specifically provides that the foreign debtor must have assets in the United States in order for a plenary case under another chapter to be initiated, leading to the conclusion that the statute contemplates the commencement of a chapter 15 case even where there are no assets of the debtor in the United States.").

[99] *In re Barnet*, 737 F.3d at 250.

[100] *Id.* (quoting 28 U.S.C. § 1410 (2012)).

[101] *Id.* at 250 ("Given the unambiguous nature of the substantive and restrictive language used in Sections 103 and 109 of Chapter 15, to allow the venue statute to control the outcome would be to allow the tail to wag the dog.").

Following the Second Circuit's ruling in *Drawbridge*, the Bankruptcy Court for the Southern District of New York considered whether the debtor in a foreign liquidation proceeding met section 109(a)'s eligibility requirements.[102] One day prior to the commencement of its chapter 15 case, Suntech Power Holdings Co. Ltd. ("Suntech Power") transferred $500,000 to a bank account held in the name of the parent of its bankruptcy professional.[103] Although the account was not in Suntech Power's name, the liquidators in the foreign proceeding argued that Suntech Power nonetheless owned the bank account and that it was thus eligible to be a debtor under section 109(a) because it held "property in the United States."[104] Applying New York law, the bankruptcy court held that while there is a presumption that the titleholder of an account is its owner, Suntech Power had rebutted this presumption by showing that its professional held title to the bank account as its agent.[105] Because Suntech Power had demonstrated that the bank account was its property, the bankruptcy court concluded that "[t]he establishment of this bank account . . . prior to the commencement of the chapter 15 proceeding was sufficient to render the Debtor eligible under 11 U.S.C. section 109(a)."[106]

In so holding, the bankruptcy court rejected the assertion that the foreign liquidators had acted improperly by opening the bank account to establish eligibility under section 109.[107] The bankruptcy court concluded:

> Interpreting the Bankruptcy Code to prevent an ineligible foreign debtor from establishing eligibility to support needed chapter 15 relief will contravene the purposes of the statute to provide legal certainty, maximize value, protect creditors and other parties in interests [sic] and rescue financially troubled businesses . . . Shutting the door on the Debtor, where it has no other access, will hinder the restructuring of this multi-national business as contemplated by chapter 15.[108]

---

[102] *See In re* Suntech Power Holdings Co., 520 B.R. 399, 411–13 (Bankr. S.D.N.Y. 2014).

[103] *See id.* at 410.

[104] *Id.* at 411.

[105] *See id.*

[106] *Id.* at 412; *see also In re* Octaviar Admin. Pty Ltd., 511 B.R. 361, 372 (Bankr. S.D.N.Y. 2014) (holding that the debtor in an Australian liquidation proceeding met the requirements of section 109(a) because it had property in the United States in the form of "claims or causes of action" and "an undrawn retainer in the possession of the Foreign Representatives' counsel").

[107] *See In re Suntech Power Holdings Co.*, 520 B.R. at 411–13 ("Section 109(a) 'says nothing about the amount of such property nor does it direct that there be any inquiry into the circumstances surrounding the debtor's acquisition of the property, and is thus consistent with other provisions of the Code that reject lengthy and contentious examination of the grounds for a bankruptcy filing.' . . . The [bank] account satisfied the express requirements for eligibility under § 109(a)[.]") (quoting *In re Octaviar Admin. Pty Ltd.*, 511 B.R. at 373).

[108] *Id.* at 413 (internal citations omitted). The bankruptcy court further noted that "[d]espite the lack of a United States presence, [the debtor] owes a substantial amount of United States debt and requires recognition as a condition to the enforcement of the scheme of arrangement in the United States that the [foreign liquidators] hope to achieve in the Foreign Proceeding. Absent the enforcement of the scheme, . . .

In direct contrast to *Drawbridge* and *Suntech Power*, in *In re Bemarmara Consulting a.s.*, the Bankruptcy Court for the District of Delaware concluded that section 109(a) is not applicable in a chapter 15 proceeding.[109] In so holding, the bankruptcy court relied on several of the arguments dismissed by the Second Circuit, including the argument that section 109(a), which creates a requirement for debtors "under this title," did not apply because the foreign representative, rather than the debtor in the foreign proceeding, was petitioning the court for recognition in aid of that foreign proceeding.[110] The bankruptcy court also focused on the definition of "debtor" contained in section 1502 and concluded that there was nothing in that definition requiring a debtor to have assets.[111] The bankruptcy court's decision sets the stage for a potential circuit split on the application of section 109(a) in a chapter 15 case.[112]

C. Authorization to Act in a Foreign Country

Section 1505, which applies in all cases under title 11, authorizes a trustee or other actor (including an examiner) to act in a foreign country on behalf of the estate.[113] Unlike Article 5 of the Model Law, section 1505 requires the trustee or other actor to obtain court approval prior to acting abroad.[114] First-day motions

---

the Debtor will be hindered from ever establishing a United States presence or conducting future business in the United States for fear that creditors will seize its United States assets." *Id*.

[109] *See* Transcript of Hearing at 8–9, *In re* Bemarmara Consulting a.s., Case No. 13-13037 (Bankr. D. Del. Dec. 17, 2013) ("The decision of the Second Circuit is not controlling on this Court. And this Court does not agree with the decision of the Second Circuit. And it is the Court's belief that there is a strong likelihood that the Third Circuit, likewise, would not agree with that decision."). Notwithstanding its conclusion regarding the applicability of section 109(a), the bankruptcy court also found that the debtor's potential recovery from its counterclaim in the litigation pending in the District Court for the District of Delaware constituted an asset. *See id.* at 8.

[110] *See id.* at 9 ("Section 109(a) provides for Debtors under this title, and it is a Foreign Representative who is petitioning the Court, not the Debtor in the foreign proceeding. The Foreign Representative is asking for recognition in aid of that foreign proceeding. And the requirements of Section 109(a) do not control. Commentators have reflected on the possibility that it was a scrivener's error and that the intent was that 109(a) not apply.").

[111] *See id.* ("Section 1502 defines Debtor as an entity that is the subject of a foreign proceeding. And there was nothing in that definition in Section 1502 which reflects upon a requirement that Debtors have assets. A Debtor is an entity that is involved in a foreign proceeding, which is what we have here.").

[112] Even if section 109(a) is enforceable in a chapter 15 proceeding, it likely will not be a difficult hurdle for most foreign representatives to overcome. *See, e.g.*, *In re* Glob. Ocean Carriers, Ltd., 251 B.R. 31, 39 (Bankr. D. Del. 2000) (finding that the unearned portion of the retainer paid to the debtor's U.S. bankruptcy counsel was sufficient property to satisfy section 109); *In re* McTague, 198 B.R. 428, 431 (Bankr. W.D.N.Y. 1996) (permitting entity with mainly foreign operations and assets to be a debtor in a chapter 11 plenary case upon a showing of a mere "peppercorn" of property interests located in the U.S.).

[113] *See* 11 U.S.C. §§ 103(k)(1), 1505 (2012).

[114] *See id.* § 1505; UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 5 ("A *[insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State]* is authorized to act in a foreign State on behalf of a proceeding under *[identify laws of the enacting State relating to insolvency]*, as permitted by the applicable foreign law."). The purpose of the revision to the Model Law was "to ensure that the court has knowledge and control of possibly expensive activities." H.R.

should, therefore, include requests for authorization to act under section 1505 when appropriate.[115] Once authorized, the trustee or other actor may act in any manner permitted by the applicable foreign law.[116]

D. Public Policy Exception

Section 1506, which permits courts to abstain from acting under chapter 15 if such action would be "manifestly contrary" to United States public policy,[117] provides an overriding public policy exception to the entirety of chapter 15.[118] Despite the potential breadth of this exception, courts have concluded that Congress's use of the word "manifestly" substantially limits its scope to the most fundamental policies of the United States.[119] Thus, "those courts that have

---

REP. NO. 109-31, pt. 1, at 108 (2005). The revised language has "the collateral benefit of providing further assurance to foreign courts that the United States debtor or representative is under judicial authority and supervision." *Id.*

[115] *See* H.R. REP. NO. 109-31, pt. 1, at 108–09 (2005).

[116] *See* 11 U.S.C. § 1505.

[117] *Id.* § 1506; *see also* Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 139 (2d Cir. 2013) ("Section 1506 does not create an exception for any action under Chapter 15 that may conflict with public policy, but only an action that is 'manifestly contrary.'"). In *In re Qimonda AG Bankr. Litig.*, the district court noted that "[i]n drafting the Model Law, certain UNCITRAL members expressed the view that the words 'manifestly contrary' in § 1506 should refer only to those actions that raise constitutional concerns. Although [*In re* Ephedra Prods. Liability Litig., 349 B.R. 333 (S.D.N.Y. 2006)] does not address this view expressly, its holding implicitly rejects such a categorical distinction." *In re* Qimonda AG Bankr. Litig., 433 B.R. 547, 569 n.42 (E.D. Va. 2010).

[118] *See* 11 U.S.C. § 1506; *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 6; *see also* Jaffé v. Samsung Elecs. Co., 737 F.3d 14, 24 (4th Cir. 2013) ("[A]ll of the actions authorized in Chapter 15 are subject to § 1506[.]"); *In re* Rede Energia S.A., 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014) ("[A]ll relief under chapter 15, including relief requested under either section 1521 or section 1507, is subject to the limits in section 1506, which permits a court to decline to take any action, including granting additional relief pursuant to section 1521 or additional assistance pursuant to section 1507 of the Bankruptcy Code, if such action would be 'manifestly contrary' to the public policy of this country."); *In re* Vitro, S.A.B. de C.V., 473 B.R. 117, 123 (Bankr. N.D. Tex. 2012) ("Despite § 1506's limited scope, the statute has also been described as a 'safety valve' that offers 'specific protections' to creditors in Chapter 15 proceedings."). As the District Court for the Southern District of New York noted:

> Determining what foreign procedures are "manifestly contrary to the public policy of the United States" is . . . familiar territory to federal courts, who have long had to confront similar issues when determining whether or not to enforce foreign judgments rendered on the basis of foreign proceedings that were plainly fair but that did not include some commonplace of American practice. As early as 1895, . . . the Supreme Court determined that a foreign judgment should generally be accorded comity if "its proceedings are according to the course of a civilized jurisprudence," i.e., fair and impartial.

In re Ephedra Prods. Liab. Litig., 349 B.R. 333, 336 (S.D.N.Y. 2006) (quoting Hilton v. Guyot, 159 U.S. 113 (1895)).

[119] *See In re* ABC Learning Ctrs. Ltd., 728 F.3d 301, 309 (3d Cir. 2013) ("The purpose of the expression 'manifestly' . . . is to emphasize that public policy exceptions should be interpreted restrictively and that [the exception] is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.") (quoting U.N. Comm'n on Int'l Trade Law, *Guide to*

considered the public policy exception . . . have uniformly read it narrowly and applied it sparingly."[120]

Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, ¶ 89, U.N. Doc. A/CN.9/442 (1997)); *In re Qimonda AG Bankr. Litig.*, 433 B.R. at 568 (noting that there are "few decisions [that] address precisely when U.S. policy is 'fundamental,' thus warranting protection under section 1506"); *In re* SPhinX, Ltd., 351 B.R. 103, 115 n.15 (Bankr. S.D.N.Y. 2006) (quoting same); *see also In re Fairfield Sentry Ltd.*, 714 F.3d at 139 ("Section 1506 does not create an exception for any action under Chapter 15 that may conflict with public policy, but only an action that is '*manifestly contrary*.'"); Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB de C.V. (*In re* Vitro SAB de C.V.), 701 F.3d 1031, 1069 (5th Cir. 2012) ("The narrow public policy exception contained in § 1506 'is intended to be invoked only under exceptional circumstances concerning matters of fundamental importance for the United States.'") (quoting Lavie v. Ran (*In re* Ran), 607 F.3d 1017, 1021 (5th Cir. 2010)); *In re* Iida, 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007) ("This public policy exception is narrow and, by virtue of the qualifier 'manifestly,' is limited only to the most fundamental policies of the United States."); Collins v. Oilsands Quest, Inc., 484 B.R. 593, 597 (S.D.N.Y. 2012) ("[T]he legislative history of section 1506 makes clear that the public policy exception should be narrowly interpreted and is restricted to the most fundamental policies of the United States.") (internal quotations omitted); *In re* Millennium Glob. Emerging Credit Master Fund Ltd., 474 B.R. 88, 95 (S.D.N.Y. 2012) ("[T]he public policy exception to the Bankruptcy Code is a narrow one. It applies only to actions that violate the most fundamental policies of the United States.") (internal quotations and citations omitted); *In re* Grant Forest Prods., Inc., 440 B.R. 616, 622 (Bankr. D. Del. 2010) ("Congress has instructed that § 1506's public policy exception is to be interpreted narrowly, restricted to only the most fundamental policies of the United States.") (internal quotations omitted); *In re* Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009) ("While the legislative history of Section 1506 demonstrates that this exception should be applied narrowly, it should be invoked when fundamental policies of the United States are at risk."); *In re* Ernst & Young, Inc., 383 B.R. 773, 781 (Bankr. D. Colo. 2008) ("The legislative history to Chapter 15 indicates this exception . . . should be invoked only when the most fundamental policies of the United States are at risk.").

[120] *In re* Toft, 453 B.R. 186, 195–96 (Bankr. S.D.N.Y. 2011); *see also In re Fairfield Sentry Ltd.*, 714 F.3d at 139 ("The statutory wording requires a narrow reading."); *In re Vitro SAB de C.V.*, 701 F.3d at 1069 ("§ 1506 was intended to be read narrowly[.]"); *In re Iida*, 377 B.R. at 259 ("This public policy exception is narrow[.]"); *In re* Ashapura Minechem Ltd., 480 B.R. 129, 139 (S.D.N.Y. 2012) ("While Title 11 does not define what is 'manifestly contrary' to U.S. public policy, case law prescribes that this public policy exception should be construed narrowly."); *In re* Qimonda AG, 470 B.R. 374, 387 (E.D. Va. 2012) ("[T]hose courts that have addressed [section 1506] . . . have made one thing very clear: it should be invoked only in extremely narrow circumstances."); *In re Ephedra Prods. Liab. Litig.*, 349 B.R. at 336 (noting that "the Second Circuit expressly reaffirmed '[t]he narrowness of the public policy exception to enforcement [of foreign judgments]'") (quoting Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986)); *In re* Millard, 501 B.R. 644, 651 (Bankr. S.D.N.Y. 2013) ("The 'statutory mandate' that recognition be granted upon compliance with the requirements of sections 1517(a)(1), (2) and (3) is . . . indeed subject to a public policy exception, said by the Fifth Circuit to be 'narrow.'") (quoting *In re Ran*, 607 F.3d at 1021); *In re* Gerova Fin. Grp., Ltd., 482 B.R. 86, 94 (Bankr. S.D.N.Y. 2012) ("Section 1506's public policy exception . . . is narrowly drafted and must be narrowly construed."); *In re Vitro, S.A.B. de C.V.*, 473 B.R. at 122–23 ("Unfortunately, the Bankruptcy Code does not define what should be considered 'manifestly contrary to the public policy of the United States.' . . . Although few published opinions discuss the scope of section 1506, 'it appears well settled that the exception is to be construed narrowly.'") (quoting *In re* British Am. Isle of Venice, Ltd., 441 B.R. 713, 717 (Bankr. S.D. Fla. 2010)) ("By requiring the proposed action to be 'manifestly' contrary to public policy, Congress makes clear this provision must be interpreted restrictively.")); *In re* ABC Learning Centres Ltd., 445 B.R. 318, 335 (Bankr. D. Del. 2010) ("[The public policy] exception is to be narrowly construed."); *In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) ("[T]his public policy exception is narrowly construed."); *In re Ernst & Young, Inc.*, 383 B.R. at 781 ("The legislative history to Chapter 15 indicates this exception is to be applied narrowly[.]"); *In re* Tri-Continental Exch. Ltd., 349 B.R. 627, 638 (Bankr. E.D. Cal. 2006) ("Congress has indicated, with its use of the phrase 'manifestly contrary,' that this exception is to be narrowly construed, which view is consistent with the explication in the Guide."); *see also* H.R. REP. NO. 109-31, pt. 1, at 109 (2005) ("[Section 1506] follows the

At least three principles guide courts in their analysis of section 1506.[121] First, "[t]he mere fact of conflict between foreign law and U.S. law, absent other considerations, is insufficient to support the invocation of the public policy exception."[122] Second, "the public policy exception applies 'where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections[.]'"[123] Finally, (i) a foreign proceeding should not be recognized and an action in a chapter 15 proceeding should not be taken if recognizing such a proceeding or taking such an action "would impinge severely a U.S. constitutional or statutory right" and (ii) an action should not be taken in a

---

Model Law article 5 exactly, is standard in UNCITRAL texts, and has been narrowly interpreted on a consistent basis in courts around the world.").

[121] *See In re Qimonda AG Bankr. Litig.*, 433 B.R. at 570.

[122] *Id.* at 568, 570 ("[T]he fact that application of foreign law leads to a different result than application of U.S. law is, without more, insufficient to support § 1506 protection. This purely results-oriented approach has been rejected on the ground that '[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.' Thus, although a conflict between foreign law and U.S. law is a necessary prerequisite to the § 1506 analysis—for absent such conflict the comity and public policy exception questions become moot—that fact alone is not dispositive of whether an action taken in a Chapter 15 proceeding is 'manifestly contrary to the public policy of the United States.'") (quoting *In re Ephedra Prods. Liab. Litig.*, 349 B.R. at 336; 11 U.S.C. § 1506); *see also In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. at 697 ("The relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical. A U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court. The key determination . . . is whether the procedures used in [the foreign proceeding] meet our fundamental standards of fairness."); *In re Vitro SAB de C.V.*, 701 F.3d at 1069 ("[E]ven the absence of certain procedural or constitutional rights will not itself be a bar under § 1506.") (citing *In re Ephedra Prods. Liab. Litig.*, 349 B.R. at 336); *In re Ashapura Minechem Ltd.*, 480 B.R. at 139 ("A prerequisite to applying section 1506 is that there exist a conflict between foreign and U.S. law—however 'that fact alone is not dispositive.'") (quoting *In re Qimonda AG Bankr. Litig.*, 433 B.R. at 568); *In re* Irish Bank Resolution Corp. (In Special Liquidation), 2014 Bankr. LEXIS 1990, at *67 (Bankr. D. Del. Apr. 30, 2014) ("[T]he mere identification of a contrary statute or policy of the United States is insufficient, such conflict must be 'manifestly contrary' to U.S. policy."); *In re* Qimonda AG, 462 B.R. 165, 183 (Bankr. E.D. Va. 2011), *aff'd* Jaffé v. Samsung Elecs. Co., 737 F.3d 14, 24 (4th Cir. 2013) ("[T]he fact that application of foreign law leads to a different result than application of U.S. law is, without more, insufficient to deny comity. There can be little doubt that the whole purpose of chapter 15 would be defeated if local or parochial interests routinely trumped the forum law of the main proceeding.").

[123] *In re ABC Learning Ctrs. Ltd.*, 728 F.3d at 309 (quoting *In re Qimonda AG Bankr. Litig.*, 433 B.R. at 570)); *see also In re Ashapura Minechem Ltd.*, 480 B.R. at 139 ("[D]eference to a foreign proceeding should not be afforded in a [c]hapter 15 proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections.") (quoting *In re Qimonda AG Bankr. Litig.*, 433 B.R. at 570); *In re British Am. Isle of Venice, Ltd.*, 441 B.R. at 717 (quoting same); *see also In re Vitro SAB de C.V.*, 701 F.3d at 1069 ("The key determination required by this Court is whether the procedures used in [the foreign proceeding] meet our fundamental standards of fairness.") (quoting *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. at 697); *In re* SLS Capital, S.A., 2015 Bankr. LEXIS 2468, at *14 (Bankr. S.D.N.Y. July 20, 2015) (citing same); *see also In re Qimonda AG Bankr. Litig.*, 433 B.R. at 569 ("[C]ourts have, on public policy grounds, . . . declined to recognize foreign proceedings outside of the Chapter 15 context where . . . the foreign proceeding was conducted within a corrupt or unfair judicial system.") (citing Bridgeway Corp. v. Citibank, 201 F.3d 134, 139, 141–44 (2d Cir. 2000)); *In re Qimonda AG*, 462 B.R. at 183 ("[T]his court must determine whether the foreign proceeding was 'procedurally unfair[.]'").

chapter 15 proceeding where taking such action would frustrate a U.S. court's ability to administer the chapter 15 proceeding.[124]

Most courts that have considered public policy arguments have declined to apply the exception.[125] In deciding whether to deny recognition of a foreign proceeding under section 1506,[126] courts have considered and declined to invoke the public policy exception in the following circumstances:

1. where secured creditors in an Australian insolvency proceeding were permitted to realize the full value of their debts and tender the excess to the company rather than having to turn over the assets and seek distribution from the bankruptcy estate;[127]
2. where third parties in a liquidation proceeding in the British Virgin Islands ("BVI") did not have unfettered access to court records;[128]

---

[124] *See In re Qimonda AG Bankr. Litig.*, 433 B.R. at 570; *In re ABC Learning Ctrs. Ltd.*, 728 F.3d at 309; *In re Ashapura Minechem Ltd.*, 480 B.R. at 139; *In re Toft*, 453 B.R. at 195; *see also In re Qimonda AG*, 462 B.R. at 183 ("[T]his court must determine . . . whether the application of foreign law or the recognition of a foreign main proceeding would 'severely impinge' a U.S. statutory or Constitutional right in a way that would offend 'the most fundamental policies and purposes' of such right.").

[125] The relative scarcity of case law applying section 1506 may result from the fact that courts have often resorted to other determinative provisions of chapter 15 prior to analyzing the public policy implications of recognition or a requested action. *See In re Toft*, 453 B.R. at 195–96. As the bankruptcy court in *Toft* noted:

> Sparing application of [section 1506] . . . would also indicate that the public policy exception should ordinarily be resorted to only if another, more specific provision of chapter 15 does not govern the dispute, consistent with the principle that more specific statutory provisions usually prevail over general provisions. For example, a court can grant discretionary relief in a chapter 15 case "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." Similarly, . . . U.S. assets may be entrusted to a foreign representative for administration in the foreign case only if the court is satisfied that "the interests of creditors in the United States are sufficiently protected." In many cases, these provisions would appear adequate to resolve a dispute arising from a conflict between U.S. and foreign law, and the public policy exception would not have to be invoked.

Id.

[126] "Parties opposing the recognition of proceedings generally bear the burden of proof on applying public policy exceptions." *In re Ashapura Minechem Ltd.*, 480 B.R. at 139 (citing Telenor Mobile Commc'ns AS v. Storm LLC, 524 F. Supp. 2d 332, 356 (S.D.N.Y. 2007)).

[127] *See In re ABC Learning Ctrs. Ltd.*, 728 F.3d at 310–11 (explaining that "Australian law allows secured creditors to realize the full value of their debts, and tender the excess to the company, whereas secured creditors in the United States must generally turn over assets and seek distribution from the bankruptcy estate" and holding that recognition of Australian liquidation proceeding did not manifestly contravene public policy). The bankruptcy court in *In re ABC Learning Centers Limited* also found that "[w]hile not raised by [the objecting party] . . . inadequate notice might be grounds for refusal to grant recognition, pursuant to § 1506." *In re* ABC Learning Centres Ltd., 445 B.R. 318, 336 (Bankr. D. Del. 2010).

[128] *See* Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 140 (2d Cir. 2013) ("Morning Mist cannot establish that unfettered public access to court records is so fundamental in the United States that recognition of the BVI liquidation constitutes one of those exceptional circumstances contemplated in Section 1506. . . . The right to access court documents is not absolute and can easily give way to 'privacy interests' or other considerations. . . . Important as public access to court documents may be, it is not an exceptional and fundamental value. It is a qualified right; and many proceedings move forward in U.S. courtrooms with some documents filed under seal, including many cases in this Court. There is no basis

3. where parties objecting to recognition of a Brazilian bankruptcy proceeding alleged that (i) the Brazilian bankruptcy court entered a substantive consolidation order ex parte without procedural and substantive fairness to certain senior noteholders or due process of law, (ii) the Brazilian plan, which had yet to be submitted, would likely eliminate creditors' ability to avoid certain inter-debtor transfers, and (iii) because "there likely will be no redress for the [alleged fraudulent transfers] and no benefit to holders of claims against guarantors in Brazil, any distribution to [the senior noteholders] under a plan confirmed in . . . Brazil[] . . . will necessarily deviate materially from distributions that would occur under a United States plan";[129]

4. where a Brazilian bankruptcy court (i) permitted substantive consolidation notwithstanding certain creditors' arguments that a United States court would not have granted substantive consolidation under similar circumstances[130] and (ii) approved the debtor's plan and distribution scheme despite inconsistencies between Brazilian and American cram-down provisions and priority rules and notwithstanding the disparate treatment of similarly situated creditors;[131]

5. where parties objecting to recognition of an Irish proceeding alleged that (i) the foreign representatives lacked independence because they were required to follow the instructions of the Irish Minister of Finance;[132] (ii) the issuance of a deed of charge could not be challenged as a fraudulent

---

on which to hold that recognition of the BVI liquidation is manifestly contrary to U.S. public policy.") (internal citations omitted); *see also In re* Millennium Glob. Emerging Credit Master Fund Ltd., 474 B.R. 88, 95 (S.D.N.Y. 2012) ("The policy favoring openness in the courtroom is not [a fundamental policy of the United States]. . . . [A]lthough public policy strongly favors public access to court records and proceedings, 'the right is not absolute.' Furthermore, even if the public policy favoring openness in the courtroom were a fundamental policy of the United States, the public policy exception would not apply here because, whatever the policy favoring openness in the courtroom may mean, it does not mean that a trial court judge is obligated to allow into evidence testimony that he believes irrelevant to the dispute being argued. To the contrary: trial courts have broad discretion to determine when evidence is relevant to a given proceeding and to refuse to admit evidence it believes to be irrelevant or whose probative value is outweighed by the risk of undue delay or waste of time.") (quoting Video Software Dealers Ass'n v. Orion Pictures Corp. (*In re* Orion Pictures Corp.), 21 F.3d 24, 27 (2d Cir. 1994)).

[129] *In re* OAS S.A., 533 B.R. 83, 103–06 (Bankr. S.D.N.Y. 2015) ("Objections based on the speculation that the Brazilian Court will approve a plan or plans that permit substantive consolidation, unfair distributions or the elimination of creditor fraudulent transfer claims are premature. They depend on the contents and effect of one or more plans that the Brazilian Court has not yet approved and may never approve. Moreover, as is evident from the record, [objecting parties] have received due process in Brazil.").

[130] *See In re* Rede Energia S.A., 515 B.R. 69, 100–01 (Bankr. S.D.N.Y. 2014).

[131] *See id.* at 101–06.

[132] *See In re* Irish Bank Resolution Corp. (In Special Liquidation), 2014 Bankr. LEXIS 1990, at *64 (Bankr. D. Del. Apr. 30, 2014) ("The Objectors did not introduce any direct evidence that the Minister has exercised . . . authority in a manner that would conflict with United States laws. In fact, one of the Objectors' own experts . . . confirmed that all of the ministerial instructions issued to date are in fact consistent with the maximization of value for creditors[.] . . . In addition, the Foreign Representatives offered . . . uncontroverted testimony . . . that the Minister had disclaimed any ability to control the Special Liquidators in their day to day duties to administer the liquidation of [the debtor].").

preference under Irish law;[133] (iii) Irish law prevented the assertion of a claim for violation of transfer restrictions in the objecting parties' loan documents;[134] and (iv) the Irish proceeding discriminated against or disadvantaged U.S. citizens, deprived U.S. creditors of due process, was procedurally unfair on its face, violated the laws and rights of U.S. citizens, impaired the constitutional rights of creditors, and did not grant the same fundamental rights that creditors would receive in a U.S. bankruptcy court;[135]

6. where a foreign representative had not obtained permission from a U.S. court before exercising shareholder rights to vote to remove and replace directors and officers of the U.S. corporations owned by the debtor;[136]

7. where an Indian insolvency proceeding lacked "a formal statutory mechanism for creditor participation";[137]

---

[133] *See In re Irish Bank Resolution Corp.*, 2014 Bankr. LEXIS 1990 at *65 ("There is no mandatory element of recognition implicated by the alleged inability of parties to challenge the deed of charge as a fraudulent preference and the alleged solvency of IBRC. In addition, such alleged inability to challenge the deed of charge is likewise not in conflict with U.S. law.").

[134] *See id.* at *66 ("[T]he Objectors presented no evidence that the IBRC Act prevented or permitted such claims. Even assuming that the IBRC Act did bar such a claim, the Objectors failed to identify how such a claim prohibition would conflict with U.S. law."). The bankruptcy court in *In re Irish Bank Resolution Corp.* held that the parties objecting to recognition "failed to identify any conflict with the law of the United States[,]" and, moreover, that even if a conflict with U.S. law could be identified, the conflict "must arise under 'exceptional circumstances' involving matters of 'fundamental importance' to the United States." *Id.* at *67–68. The court noted that such "circumstances would ordinarily arise in circumstances (a) where 'the procedural fairness of the foreign proceeding is in doubt' or (b) where a 'U.S. constitutional or statutory right' is severely impinged." *Id.* at *68 (quoting *In re* ABC Learning Ctrs. Ltd., 728 F.3d 301, 309 (3d Cir. 2013)). In declining to invoke the public policy exception, the court concluded that:

> The Objectors can point to no evidence to show that the Irish Proceedings are not affording substantive and procedural due process protections. Furthermore, none of the issues raised by the Objectors involve constitutional or statutory rights available in the United States. . . . Rather, the IBRC Act has simply "established a different way to achieve similar goals" of United States statutes. Granting recognition of the Irish Proceeding would not only comport with the intent of section 1506 of the Bankruptcy Code, but, more importantly, would also support the strong public policy of the United States in favor of a universalism approach to complex multinational bankruptcy proceedings.

Id. at *69–70 (quoting and citing *ABC Learning Ctrs. Ltd.*, 728 F.3d at 306, 311).

[135] *See id.* at *58–60, *69–70 ("The Objectors can point to no evidence to show that the Irish Proceedings are not affording substantive and procedural due process protections. Furthermore, none of the issues raised by the Objectors involve constitutional or statutory rights available in the United States. Rather, the IBRC Act has simply established a different way to achieve similar goals of United States statutes.") (internal quotations and citations omitted); *In re* Irish Bank Resolution Corp. (In Special Liquidation), 2015 U.S. Dist. LEXIS 101600, at *11–12 (D. Del. Aug. 4, 2015) (rejecting the argument that the Irish proceeding "discriminates against U.S. creditors and deprives them of due process and other unspecified constitutional rights, in favor of benefitting the Irish government[,] . . . [because] the provisions objected to by Appellants parallel provisions in laws adopted by the United States in response to the global financial crisis").

[136] *See In re* Iida, 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007) (holding that the debtor failed to "articulate[] a fundamental policy of the United States that is offended by recognizing the Japanese bankruptcy proceeding").

8. where the foreign representative took inconsistent positions in a chapter 15 case and a Mexican insolvency proceeding regarding the amount of a creditor's claim;[138]

9. where foreign representatives sought to obtain an unbonded stay;[139]

10. where a court in Bermuda (i) allowed an involuntary bankruptcy case to be commenced by one creditor seeking to collect a single debt and (ii) gave the debtor the opportunity to avoid the appointment of liquidators by paying the petitioning creditor's claim in full;[140]

11. where the liquidator in a BVI proceeding had a conflict of interest and, in a U.S. bankruptcy case, a trustee in a similar position would likely have been disqualified from acting on behalf of the estate;[141]

---

[137] *In re* Ashapura Minechem Ltd., 480 B.R. 129, 141 (S.D.N.Y. 2012) (holding that the foreign proceeding was collective in nature and noting that "[n]othing in the case law suggests that if the proceeding is collective in nature its recognition can be deemed to be against public policy—nor do the facts warrant such a finding").

[138] *See In re* Cozumel Caribe, S.A. de C.V., 508 B.R. 330, 335–36 (Bankr. S.D.N.Y. 2014) ("The Court is concerned by the inconsistent positions taken by the Foreign Representative . . . on the key issue of the amount of CTIM's claim. But CTIM has not shown that the Court's grounds for granting recognition have ceased to exist or that continued recognition would be manifestly contrary to U.S. public policy. It may be that the Foreign Representative or his counsel should be subject to sanctions, but that is not presently before the Court, and vacating the Recognition Order at this stage of this case is not the appropriate sanction. Many of CTIM's contentions regarding the Foreign Representative's conduct were already raised by CTIM and considered by the Court in the Stay Decision. CTIM now seeks another bite of the apple, but it cannot use this Court to invalidate or circumvent proceedings in the Mexican courts. CTIM is not entitled to relief in this Court because it feels slighted by decisions or actions in Mexican court proceedings—proceedings that remain open and ongoing, with multiple parties pursuing ancillary or appellate relief. Dissatisfaction with rulings of the lower Mexican courts is the proper subject for Mexican appellate proceedings, but does not implicate the Recognition Order.").

[139] *See In re* Millard, 501 B.R. 644, 651 (Bankr. S.D.N.Y. 2013) ("The ability to take an appeal without posting of a supersedeas or similar bond is not at all contrary to U.S. public policy, much less is it 'manifestly' so. Section 362 effectively provides for such for garden variety U.S. debtors. . . . Nor, even if one looks at the issues more broadly, has the [objecting party] shown any exceptional circumstances concerning matters of fundamental importance to warrant invoking section 1506 to deny recognition."). While the *Millard* court ultimately rejected the argument that recognition should be denied under section 1506, it noted that "allowing debtor assets to be placed beyond the reach of the debtor's creditors might well be manifestly contrary to the public policy of the U.S." *Id.* at 650–53.

[140] *See In re* Gerova Fin. Grp., Ltd., 482 B.R. 86, 90, 94–96 (Bankr. S.D.N.Y. 2012) ("An involuntary bankruptcy petition filed in the United States must be supported by three or more creditors when, as here, there are more than 12 creditors in total. The three-creditor requirement . . . reflects a U.S. policy that a debtor not be forced into insolvency proceedings readily and that bankruptcy not ordinarily be used as a debt collection device available to a single creditor. Although these are important policies that Congress has continued to endorse, a contrary policy, permitting an involuntary case to be commenced by one creditor seeking to collect a single debt, would not violate a matter of 'fundamental importance' or not be in accord with 'the course of civilized jurisprudence.'") (internal citations omitted).

[141] *See In re* British Am. Isle of Venice, Ltd., 441 B.R. 713 (Bankr. S.D. Fla. 2010) ("The independence of estate representatives and professionals is indeed an important policy codified in the Bankruptcy Code. It is likely that a trustee in a United States bankruptcy case, presenting facts similar to those here, would be disqualified from acting on behalf of the estate. However, [t]he mere fact of conflict between foreign law and U.S. law, absent other considerations, is insufficient to support the invocation of the public policy exception. . . . The conflict of interest in this case does not rise to the level of severity required to trigger section 1506.") (internal quotations and citations omitted).

12. where objecting parties argued that U.S. creditors may receive less in a foreign proceeding than in a U.S. court;[142]

13. where the trustee in an English insolvency proceeding allegedly provided inadequate disclosure as to the origins of an order upon which a *lis pendens* was based and failed to obtain recognition of a foreign proceeding prior to filing the *lis pendens* in state court;[143] and

14. where a party-in-interest alleged that the debtors in a Cayman bankruptcy proceeding were solvent and had no need to wind up.[144]

In addition, when considering whether specific actions taken in chapter 15 proceedings violated public policy, courts have declined to apply the public policy exception in the following scenarios:

1. where the foreign representative sought an order recognizing and enforcing an order from a Canadian insolvency proceeding approving a claims resolution process that denied the objecting plaintiffs the right to a jury trial;[145]

2. where trustees sought extension of comity to a Brazilian order permitting the trustees to conduct an investigation confidentially and under seal;[146]

---

[142] *See In re* Ernst & Young, Inc., 383 B.R. 773, 781 (Bankr. D. Colo. 2008) (noting that "all wronged investors should share in the assets accumulated in the [foreign] Receivership Proceeding, regardless of nationality or locale").

[143] *See In re* Loy, 380 B.R. 154, 169 (Bankr. E.D. Va. 2007) (rejecting the debtor's argument that the trustee's conduct relating to the filing of a *lis pendens* "rises to the level that would cause [the court] to take action that is manifestly contrary to the public policy of the United States") (internal quotations omitted).

[144] *See In re* SPhinX, Ltd., 351 B.R. 103, 117 n.18 (Bankr. S.D.N.Y. 2006) ("[T]he RCM Trustee contends that the SPhinX Funds are solvent and have no need to be wound up; however, neither the RCM Trustee nor any other party-in-interest contends that liquidation is inimical to the Debtors. Thus it does not appear that the commencement of Cayman Islands winding up proceedings for these admittedly liquidating entities . . . would be 'manifestly contrary to the public policy of the United States.'") (quoting 11 U.S.C. § 1506 (2012)).

[145] *See In re* Ephedra Prods. Liab. Litig., 349 B.R. 333, 335 (S.D.N.Y. 2006). In *In re Ephedra Products Liability Litigation*, a Canadian insolvency court approved a claims resolution procedure that "provide[d] for mandatory mediation and, if the mediation result[ed] in a plan approved by specified majorities of creditors, for the estimation and liquidation of the remaining claims by a Claims Officer[.]" *Id.* Certain claimants, whose claims were asserted in U.S. lawsuits, objected to the request for an order in the U.S. recognizing and enforcing the claims resolution procedure. *See id.* at 334. These claimants argued that the claims resolution procedure, which "effectively denie[d] the objecting plaintiffs the right to jury trial that they would have retained if their cases went to trial in the United States," was "manifestly contrary to the public policy of the United States in that it deprive[d] the objectors of due process and trial by jury." *Id.* After dispelling the claimants' due process arguments, the district court concluded that while "the constitutional right to a jury trial is an important component of our legal system, . . . the notion that a fair and impartial verdict cannot be rendered in the absence of a jury trial defies the experience of most of the civilized world." *Id.* at 337. Perhaps significantly, the district court noted that the objecting claimants' "primary claim of 'prejudice' from the absence of a right to jury trial is simply that it will give them less of a bargaining position in negotiating a settlement of their claims[.] . . . Deprivation of such bargaining advantage hardly rises to the level of imposing on plaintiffs some fundamental unfairness." *Id*.

[146] *See In re* Transbrasil S.A. Linhas Aereas, 2014 Bankr. LEXIS 1891, at *5–6 (Bankr. S.D. Fla. Apr. 24, 2014) ("[I]t is undisputed that the court supervising the foreign main proceeding pending in the Brazilian bankruptcy has authorized the Trustees to conduct their investigation confidentially and under seal. . . . The appellate court with jurisdiction in Brazil justified sealing the investigation because it was concerned that

3. where a party-in-interest sought recognition and enforcement of a Canadian court order approving third party non-debtor releases;[147] and
4. where, after a Mexican district court entered an order prohibiting any action against the U.S. property of the debtor *and* its non-debtor affiliates, the foreign representative filed a motion to stay an adversary proceeding in which the plaintiff sought a declaratory judgment that certain funds were not property of the debtor and, therefore, not subject to the automatic stay.[148]

There have been a few cases, however, in which courts have denied recognition of a foreign proceeding or refused to grant the relief sought by a foreign representative on the grounds that doing so would be manifestly contrary to U.S. public policy. In *In re Gold & Honey, Ltd.*, in response to a creditor's continued attempts to have a receiver appointed in a foreign receivership proceeding, certain chapter 11 debtors sought a bankruptcy court order declaring that the automatic stay applied to the debtors' property wherever located and by whomever held and, in particular, to the receivership proceeding.[149] The bankruptcy court held that the automatic stay did, in fact, apply to the debtors' property wherever located and by whomever held and, although it did not reach the issue of whether the automatic stay specifically applied to the receivership proceeding, the court advised the creditor that if it proceeded before the foreign court in the receivership proceeding, it would be doing so "at its own peril."[150] The creditor, however, continued to prosecute the receivership proceeding and the foreign court determined that the receivership proceeding could proceed notwithstanding the stay order issued by the U.S. bankruptcy court and the pendency of the debtors' chapter 11 cases.[151] The

---

'the current communications' speed allows financial operations in a matter of minutes, and, as such, [the Trustee's] actuation, here or abroad, must not be disturbed by the obvious possibility of frustrating his initiative to localize [locate] the assets'. This Court understood those concerns and extended comity to the seal ordered in Brazil. Thus, continuation of the seal as permitted under section 107(b) is consistent with the purposes of Chapter 15. The wholesale notion that allowing filings under seal as permitted under the Bankruptcy Code is 'manifestly contrary to the public policy of the United States' under 11 U.S.C. §1506 is rejected.") (internal citations omitted); *see also* Marigrove, Inc. v. de Arruda Pinto, 2015 U.S. Dist. LEXIS 66312, at *21–23 (S.D. Fla. Mar. 30, 2015) (holding that the bankruptcy court in *In re Transbrasil S.A. Linhas Aereas* "did not abuse its discretion when it extended comity to the seal ordered in Brazil").

[147] *See In re* Sino-Forest Corp., 501 B.R. 655, 664–65 (Bankr. S.D.N.Y. 2013) ("In [the Second Circuit], where the third-party releases are not categorically prohibited, it cannot be argued that the issuance of such releases is manifestly contrary to public policy."); *In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685 (Bankr. S.D.N.Y. 2010) (granting comity to a Canadian order that included third-party non-debtor releases); *but see In re* Vitro, S.A.B. de C.V., 473 B.R. 117, 132 (Bankr. N.D. Tex. 2012).

[148] *See In re* Cozumel Caribe, S.A., de C.V., 482 B.R. 96 (Bankr. S.D.N.Y. 2012). The bankruptcy court in *In re Cozumel Caribe, S.A. de C.V.* concluded that "the stay relief sought by the Foreign Representative is not manifestly contrary to public policy. . . . Precautionary Measures extending protection to non-debtor affiliates may be important and appropriate in providing a debtor with a respite from creditors and a chance to reorganize." *Id.* at 112–13.

[149] *See In re* Gold & Honey, Ltd., 410 B.R. 357, 363 (Bankr. E.D.N.Y. 2009).

[150] *Id*.

[151] *See id.* at 364.

foreign receivers then filed petitions seeking recognition of the foreign receivership proceeding as a foreign main proceeding.[152]

In considering whether recognizing a foreign proceeding would have an adverse effect on public policy, the bankruptcy court reasoned that:

> Recognizing a foreign seizure of a debtor's assets postpetition would severely hinder United States bankruptcy courts' abilities to carry out two of the most fundamental policies and purposes of the automatic stay-namely, preventing one creditor from obtaining an advantage over other creditors, and providing for the efficient and orderly distribution of a debtor's assets to all creditors in accordance with their relative priorities. Moreover, condoning [the creditor's] conduct . . . would limit a federal court's jurisdiction over all of the debtors' property "wherever located and by whomever held," as any future creditor could follow [the creditor's] lead and violate the stay in order to procure assets that were outside the United States, yet still under the United States court's jurisdiction.[153]

Because recognizing the receivership proceeding "would reward and legitimize [the creditor's] violation of both the automatic stay and . . . [the bankruptcy court's orders] regarding the stay[,]" the bankruptcy court denied the petitioners' request for recognition.[154]

In *In re Toft*, the foreign representative initiated a chapter 15 proceeding to gain access to the debtor's email accounts, which were stored on the servers of internet service providers located in the United States.[155] The foreign representative requested that the bankruptcy court "recognize and 'grant comity' to the orders of the German and English Courts and enter an order enforcing the Mail Interception Order in the United States by compelling . . . [certain U.S. internet service providers] to disclose to [the foreign representative] all of the Debtor's e-mails currently stored on their servers and to deliver to [the foreign representative] copies of all e-mails received by the Debtor in the future."[156]

---

[152] *See id.* at 365.

[153] *Id*. at 372. The bankruptcy court distinguished *In re* Ephedra Prods. Liab. Litig., 349 B.R. 333 (S.D.N.Y. 2006) on the grounds that while "jury trials in bankruptcy courts are quite rare and not typically invoked in a claims allowance process[,] . . . allowing the offensive use of a stay violation here would severely impinge the value and import of the automatic stay." *Id*. The bankruptcy court also noted "the United States District Court [in *Ephedra*] only approved the Ontario claims resolution procedure after the Ontario court adopted certain procedural changes requested by the United States court 'to assure greater clarity and procedural fairness.'" *Id*. The bankruptcy court also differentiated *In re* Ernst & Young, Inc., 383 B.R. 773 (Bankr. D. Colo. 2008) because it did not "involve a fundamental policy of the United States." *Id.*

[154] *Id.* at 371.

[155] *See In re* Toft, 453 B.R. 186, 188 (Bankr. S.D.N.Y. 2011).

[156] *Id.* at 189.

Although the bankruptcy court acknowledged that "§ 1506 is to be narrowly construed and should be applied only where another, more specific limitation in the statute does not govern," it concluded, "this is one of the rare cases that calls for its application."[157] In so holding, the bankruptcy court noted that:

> [T]he relief sought by the Foreign Representative is banned under U.S. law, and it would seemingly result in criminal liability under the Wiretap Act and the Privacy Act for those who carried it out. The relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States. Such relief "would impinge severely a U.S. constitutional or statutory right."[158]

Courts have also relied on section 1506 to deny actions taken by a foreign representative in a chapter 15 case. In a case involving an insolvent semiconductor manufacturer, the bankruptcy court considered whether declining to apply section 365(n), which permits a third-party-licensee to retain certain rights under an intellectual property license that has been rejected by a debtor-licensor, would adversely threaten U.S. public policy favoring technological innovation.[159] The bankruptcy court concluded that:

> Although innovation would obviously not come to a grinding halt if licenses to U.S. patents could be cancelled in a foreign insolvency proceeding, the court is persuaded . . . that the resulting uncertainty would nevertheless slow the pace of innovation, to the detriment of the U.S. economy. Thus, the court determines that failure to apply § 365(n) under the circumstances of this case and this industry would 'severely impinge' an important statutory protection accorded licensees of U.S. patents and thereby undermine a fundamental U.S. public policy promoting technological innovation. For that reason, the court holds that deferring to German law, to the extent it allows cancellation of the U.S. patent licenses, would be manifestly contrary to U.S. public policy.[160]

Courts vary in their application of the public policy exception to the granting of third party non-debtor releases. In *Vitro, S.A.B. de C.V. v. ACP Master, Ltd.,* the

---

[157] *Id.* at 196.

[158] *Id.* at 198.

[159] *See In re* Qimonda AG, 462 B.R. 165, 167 (Bankr. E.D. Va. 2011), *aff'd* Jaffé v. Samsung Elecs. Co., 737 F.3d 14, 32 (4th Cir. 2013) (affirming that "potential harm to the Licensees would, in turn, threaten to 'slow the pace of innovation' in the United States, to the detriment of the U.S. economy").

[160] *Id.* at 185 (affirming bankruptcy court's decision "based on its application of § 1522(a)" rather than its application of the public policy exception in section 1506).

Bankruptcy Court for the Northern District of Texas concluded, "the protection of third party claims in a bankruptcy case is a fundamental policy of the United States."[161] Because the debtor's plan, as approved by the Mexican court, extinguished claims against non-debtor third parties, the bankruptcy court concluded that the plan was manifestly contrary to such policy of the United States.[162] In contrast, the Bankruptcy Court for the Southern District of New York has twice granted comity to Canadian orders that included non-debtor third-party releases.[163] In *In re Sino-Forest Corp.*, the bankruptcy court held that in the Second Circuit, "where the third-party releases are not categorically prohibited, it cannot be argued that the issuance of such releases is manifestly contrary to public policy."[164]

III. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO THE COURT

A. Direct Access of Foreign Representatives and Limited Jurisdiction

Section 1509, which is applicable regardless of whether a title 11 case is pending,[165] provides that a foreign representative may commence a case under section 1504 by filing a petition for recognition of a foreign proceeding under section 1515.[166]

---

[161] *In re* Vitro, S.A.B. de C.V., 473 B.R. 117, 132 (Bankr. N.D. Tex. 2012) ("[T]he protection of third party claims in a bankruptcy case is a fundamental policy of the United States. The *Concurso* Approval Order does not simply modify such claims against non-debtors, they are extinguished. As the *Concurso* plan does not recognize and protect such rights, the *Concurso* plan is manifestly contrary to such policy of the United States and cannot be enforced here."). Despite the bankruptcy court's ruling, the Fifth Circuit ultimately relied on sections 1507 and 1521 to deny recognition of the *Concurso* plan. *See* Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB de C.V. (*In re* Vitro SAB de C.V.), 701 F.3d 1031, 1070 (5th Cir. 2012) ("Because we conclude that relief is not warranted under § 1507, however, and would also not be available under § 1521, we do not reach whether the Concurso plan would be manifestly contrary to a fundamental public policy of the United States.").

[162] *See id*.

[163] *See In re* Sino-Forest Corp., 501 B.R. 655 (Bankr. S.D.N.Y. 2013); *In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 698 (Bankr. S.D.N.Y. 2010) (finding that the U.S. and Canada "share the same common law traditions and fundamental principles of law").

[164] *In re Sino-Forest Corp.*, 501 B.R. at 663, 665 (holding that comity was justified where the parties in the Canadian proceeding had a full and fair opportunity to litigate the issues and the Ontario court reached a reasoned and fair decision) (citing Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136 (2d Cir. 2005)).

[165] *See* 11 U.S.C. § 103(k)(2) (2012); *see also In re* British Am. Ins. Co., 488 B.R. 205, 227 (Bankr. S.D. Fla. 2013) ("Section 1509 applies whether or not a case under any provision of title 11 is pending. Even when no petition under chapter 15 has been filed, section 1509 is effective.") (citing 11 U.S.C. § 103(k)(2)).

[166] *See* 11 U.S.C. § 1509(a); Andrus v. Digital Fairway Corp., 2009 U.S. Dist. Lexis 54800, at *7 n.4 (N.D. Tex. June 26, 2009) ("Chapter 15 directs the petitioned court to receive information provided under petition by a proper foreign representative and then process it through a hearing and deliberation to establish the foreign proceedings' relevance to property in the United States, the interests of the parties, and other probative issues."). Section 1509 is far more nuanced than its model law equivalent. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 9 (providing only that "[a] foreign representative is entitled to apply directly to a court in this State").

Section 1509 establishes the bankruptcy courts as the gatekeepers for a foreign representative's access to the U.S. courts.[167] However, chapter 15 does not constrain a foreign representative from acts that do not require judicial assistance.[168] If a foreign representative does not seek to involve a court's comity or cooperation, he or she need not first seek foreign proceeding recognition.[169] While a foreign representative may commence a case under chapter 15 by filing a petition directly with the court without preliminary formalities,[170] recognition of the foreign proceeding is "a condition to further rights and duties of the foreign representative."[171] Once the bankruptcy court recognizes the foreign proceeding: (1)

---

[167] *See In re* Millard, 501 B.R. 644, 653 (Bankr. S.D.N.Y. 2013); *see also In re* Iida, 377 B.R. 243, 257 (B.A.P. 9th Cir. 2007) ("§1509 erects a structure in which the foreign representative passes through the bankruptcy court for a recognition decision, the specified consequences of which are that the foreign representative gains the capacity to sue and be sued in United States courts and the authority to apply directly to a court in the United States for appropriate relief, and that all courts in the United States must grant comity or cooperation to the foreign representative. Congress specifically intended that control of these questions be concentrated in the bankruptcy court.") (internal citations omitted); CT Inv. Mgmt. Co., LLC v. Carbonell, 2012 U.S. Dist. LEXIS 3356, at *7 (S.D.N.Y. Jan. 6, 2012); *In re* Soundview Elite, Ltd., 503 B.R. 571, 594 (Bankr. S.D.N.Y. 2014) (finding that, in the absence of a chapter 11 case, "chapter 15 recognition is in effect 'the ticket to entry' to the U.S. courts"); *In re British Am. Ins. Co.*, 488 B.R. at 227 ("Section 1509 . . . presents several related provisions addressing the ability of a foreign representative to pursue actions before federal and state courts in this country."); *In re* Loy, 380 B.R. 154, 164 (Bankr. E.D. Va. 2007) ("§ 1509 erects a structure in which the foreign representative must first pass through the bankruptcy court by way of a foreign proceeding recognition prior to applying to a court in the United States for relief requiring the comity or cooperation of that court."); H.R. REP. NO. 109-31, pt. 1, at 110 (2005) ("Subsections (b)(2), (b)(3), and (c) make it clear that chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings. The goal is to concentrate control of these questions in one court. That goal is important in a Federal system like that of the United States with many different courts, state and federal, that may have pending actions involving the debtor or the debtor's property. This section, therefore, completes for the United States the work of article 4 of the Model Law ('competent court') as well as article 9.").

[168] *See In re Iida*, 377 B.R. at 258.

[169] *See In re Loy*, 380 B.R. at 165 ("The qualification, found in § 1509(c), only requires that a foreign representative obtain prior recognition if he seeks the comity or cooperation of a court in the United States.").

[170] *See* H.R. REP. NO. 109-31, pt. 1, at 110 (2005); *see also* UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 108 ("Article 9 is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular action.").

[171] H.R. REP. NO. 109-31, pt. 1, at 110 (2005); *see also* Tacon v. Petroquest Res. Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 324 (5th Cir. 2010) ("Chapter 15 functions through the recognition of a foreign proceeding. Only with recognition does broad relief become available[.]"); Reserve Int'l Liquidity Fund, Ltd. v. Caxton Int'l Ltd., 2010 U.S. Dist. LEXIS 42216, at *14 (S.D.N.Y. Apr. 28, 2010) ("Chapter 15 makes clear that recognition is required before a foreign representative may avail themselves of the federal courts."); *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 331 (S.D.N.Y. 2008) ("Section 1509 permits the foreign representative to file the petition directly with the Bankruptcy Court, without need for preliminary formalities, but conditions any other court access by the foreign representative on recognition."); United States v. J.A. Jones Constr. Grp., LLC, 333 B.R. 637, 639 (E.D.N.Y. 2005) ("In the absence of recognition under chapter 15, this Court has no authority to consider [the Canadian interim receiver's] request for a stay[.]"); *but see In re* Bozel S.A., 434 B.R. 86, 94–95 (Bankr. S.D.N.Y. 2010) (allowing the liquidator appointed in the liquidation proceeding of a BVI company to seek relief in the chapter 11 case of its 100 percent owned subsidiary even though the foreign proceeding had not been recognized under section 1517); *but see* 8 COLLIER ON BANKRUPTCY, ¶ 1509.02, at 1509-5 (Alan N.

the foreign representative may sue and be sued in a court in the United States under section 1509(b)(1),[172] (2) the foreign representative may apply directly to a court in the United States for appropriate relief under section 1509(b)(2),[173] and (3) a court in the United States shall grant comity or cooperation to the foreign representative under section 1509(b)(3).[174]

It is unclear from the case law whether section 1509(b)(3) requires that a U.S. court grant comity or cooperation not only to the foreign representative, but also to the foreign court and the orders entered by that court. In *In re Qimonda AG Bankruptcy Litigation*, the District Court for the Eastern District of Virginia found that "§§ 1509(b)(3) and 1506, read *in pari materia*, provide that comity shall be granted following the U.S. recognition of a foreign proceeding under Chapter 15, subject to the caveat that comity shall not be granted when doing so would contravene fundamental U.S. public policy."[175] In *CT Inv. Mgmt. Co., LLC v. Cozumel Caribe, S.A. de C.V.*, however, the Bankruptcy Court for the Southern District of New York criticized *Qimonda* finding that:

> Granting comity to a foreign representative by providing access to courts in the United States is very different from granting the request by the foreign representative to extend comity to a foreign law, court order or judgment. If *Qimonda* were correct that comity

---

Resnick & Henry J. Sommer eds., 16th ed. 2014) ("[S]ection 1509 requires recognition of a foreign proceeding before the foreign representative of that proceeding can seek relief in a court in the United States and does [not] confine the recognition requirement to situations where the foreign representative seeks access to a U.S. proceeding involving a debtor that is also a debtor in a foreign proceeding. The *Bozel* case appears to be wrongly decided because it allowed a foreign representative of a foreign proceeding that had not been recognized under chapter 15 to appear in a U.S. court.") (internal citations omitted).

[172] *See* 11 U.S.C. § 1509(b)(1) (2012); *see also In re British Am. Ins. Co.*, 488 B.R. at 227 n.18 ("[Section 1509(b)(1)] is intended to relieve a foreign representative of the sometimes onerous requirements of diplomatic process, such as the need to seek consular assistance, in order to exhibit capacity to sue.").

[173] *See* 11 U.S.C. § 1509(b)(2).

[174] *See id.* § 1509(b)(3); *see also* Oak Point Partners, Inc. v. Lessing, 2013 U.S. Dist. LEXIS 56674, at *14 (N.D. Cal. Apr. 19, 2013) (denying defendant's motion to dismiss on grounds of international comity because "[d]efendant must first obtain recognition of the foreign proceedings through the bankruptcy court, before requesting comity from this Court"); *In re* Basis Yield Alpha Fund (Master), 381 B.R. 37, 45 (Bankr. S.D.N.Y. 2008) ("[A]fter a grant of recognition by the bankruptcy court (and subject to any limitations that the bankruptcy court may impose consistent with chapter 15 policy), access, comity and cooperation in other United States courts is mandatory."); *In re Loy*, 380 B.R. at 164 ("While § 1509(a) is seemingly constructed in permissive terms . . . , when taken together with the mandatory language of § 1509(c) . . . , § 1509 imposes a requirement on the foreign representative that he must first obtain foreign proceeding recognition before enlisting the comity or cooperation of a court of the United States."). The Bankruptcy Code requires that a "request for comity or cooperation by a foreign representative in a court in the United States other than the court which granted recognition shall be accompanied by a certified copy of an order granting recognition under section 1517." 11 U.S.C. § 1509(c).

[175] *In re* Qimonda AG Bankr. Litig., 433 B.R. 547, 565 (E.D. Va. 2010) ("Accordingly, the analysis must focus sharply on whether § 365(n) embodies the fundamental public policy of the United States, such that subordinating § 365(n) to German Insolvency Code § 103 is an action 'manifestly contrary to the public policy of the United States.'"); *see also Oak Point Partners, Inc.*, 2013 U.S. Dist. LEXIS 56674, at *13 ("Once a foreign main proceeding is recognized, . . . U.S. courts are required to grant comity to the foreign proceeding[.]").

> is *required* to be given to any foreign law, court order or judgment that is not manifestly contrary to U.S. public policy, there would be no point in having the foreign representative 'apply' to a U.S. court for discretionary relief. The only issue left open would be whether the requested relief is manifestly contrary to the public policy of the United States in violation of section 1506, leaving no room for the exercise of discretion; nothing about Chapter 15 supports such an interpretation.[176]

The phrase "the court" in the introductory clause of section 1509(b) is intended to refer to the chapter 15 court that granted recognition.[177] However, sections 1509(b)(1), (2) and (3) use the phrase "a court," in reference to other non-bankruptcy courts. "Section 1509(b)(3), thus, instructs other U.S. courts to grant comity or cooperation to foreign representatives so that they may have direct access to U.S. courts to exercise to fullest extent the rights granted under chapter 15."[178]

This structure distinguishes chapter 15 from its predecessor. Under former section 304, access to U.S. courts by a foreign representative was not dependent on recognition. Instead, relief under section 304 was discretionary and based on subjective, comity-influenced factors. "By establishing a simple, objective eligibility requirement for recognition, Chapter 15 promotes predictability and reliability. The considerations for post-recognition relief remain flexible and pragmatic in order to foster comity and cooperation in appropriate cases."[179]

---

[176] *In re* Cozumel Caribe, S.A., de C.V., 482 B.R. 96, 110 (Bankr. S.D.N.Y. 2012) (emphasis in original); *see id.* at 109 ("[N]othing in section 1509 commands that comity shall be given to all orders entered by a foreign court in a foreign insolvency proceeding. In short, other than providing access to courts in the United States, section 1509 is not a self-executing relief section of Chapter 15. Relief to a foreign representative must be based on sections 1507, 1519, 1520 and 1521, subject to limitations that may be imposed under section 1522."); *In re* SLS Capital, S.A., 2015 Bankr. LEXIS 2468, at *10 (Bankr. S.D.N.Y. July 20, 2015) (holding that section 1509(b)(3) did not provide the bankruptcy court with an independent basis for granting the foreign representative's motion for an order granting comity to a Luxembourg court's order interpreting a liquidation order, which, if it is to be granted, must be granted in accordance with section 1507); *In re* Elpida Memory, Inc., 2012 Bankr. LEXIS 5367, at *28 (Bankr. D. Del. Nov. 16, 2012) ("The purpose of section 1509 . . . is to allow the foreign representative access to, and standing in, courts in the United States other than the chapter 15 court. Importantly, section 1509(b)(3) requires only that a court grant comity to the foreign representative—not to the foreign court or the orders entered by such court. Thus, when read in the context of the remainder of section 1509 . . . , it is clear that section 1509(b)(3) does not require this Court to grant comity to orders of the [foreign] court; but instead, is meant only to streamline the foreign representatives' access to, and cooperation from, other, non-bankruptcy courts in the United States following recognition. The intent is that a foreign representative should be afforded standing in those courts—just as sections 323 and 1107 provide trustees and debtor-in-possession with standing where such standing would not otherwise exist."); *see also In re* Cozumel Caribe, S.A. de C.V., 508 B.R. 330, 336–37 (Bankr. S.D.N.Y. 2014) ("Granting comity to orders of a foreign court is not an all or nothing exercise—some orders or judgments in the same case or proceeding may merit comity while others may not.").

[177] *See In re Elpida Memory, Inc.,* 2012 Bankr. LEXIS 5367, at *28–29 n.40.

[178] *Id*.

[179] *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (S.D.N.Y. 2008); *see also* H.R. REP. NO. 109-31, pt. 1, at 110 (2005) ("Although a petition under . . . section 304 . . . [was] the proper method for achieving deference by a United States court to a foreign insolvency

Section 304, therefore, left open the possibility for abuse of comity by applying directly to any state or federal court regarding a matter involving a foreign proceeding.[180] Chapter 15 aims to prevent this potential for abuse.[181]

The primacy of the bankruptcy court's authority over whether ancillary assistance will be granted to a foreign representative is reinforced by section 1509(d), which authorizes the bankruptcy court, if recognition is denied, to "issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States."[182] Section 1509(d) is intended to ensure that a foreign representative cannot seek relief in any U.S. court if recognition under chapter 15 is denied.[183]

Notwithstanding the foregoing, a foreign representative's failure to commence a case or to obtain recognition under chapter 15 does not affect any right the foreign representative may have to sue in a U.S. court to collect or recover a claim that is the property of the debtor.[184] This limited exception to the prior recognition

---

proceeding . . . , some cases in state and Federal courts . . . granted comity suspension or dismissal of cases involving foreign proceedings without requiring a section 304 petition or even referring to the requirements of that section. Even if the result is correct in a particular case, the procedure is undesirable, because there is room for abuse of comity. Parties would be free to avoid the requirements of this chapter and the expert scrutiny of the bankruptcy court by applying directly to a state or Federal court unfamiliar with the statutory requirements. Such an application could be made after denial of a petition under this chapter.").

[180] *See* 8 COLLIER ON BANKRUPTCY, ¶ 1509.02, at 1509-4 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) ("Section 304 was not the exclusive vehicle for a foreign representative to seek relief nor was there a single venue for a section 304 proceeding. Thus, foreign representatives could, theoretically at least, try their luck in a variety of courts, with failure in one not precluding a second try in another. Cases seeking relief on pure comity grounds in courts other than the bankruptcy court were successful, with the risk that different principles could develop depending on the court and style of proceeding.").

[181] *See* H.R. REP. NO. 109-31, pt. 1, at 110 (2005) ("[Section 1509] concentrates the recognition and deference process in one United States court, ensures against abuse, and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor."); 8 COLLIER ON BANKRUPTCY, ¶ 1509.02, at 1509-4 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) ("Section 1509(b) places the control over assistance to a foreign representative of a foreign proceeding in a single court, the bankruptcy court in which a chapter 15 case may be commenced under the venue rules of 28 U.S.C. 1410.").

[182] 11 U.S.C. § 1509(d) (2012); *see also In re* Iida, 377 B.R. 243, 258 (B.A.P. 9th Cir. 2007); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd*., 389 B.R. at 333 ("If recognition is refused, then the bankruptcy court is authorized to take any action necessary to prevent the U.S. courts from granting comity or cooperation to the foreign representatives."); *In re* British Am. Ins. Co., 488 B.R. 205, 227 (Bankr. S.D. Fla. 2013) ("If the court denies recognition under chapter 15, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States."); *In re* Basis Yield Alpha Fund (Master), 381 B.R. 37, 45 (Bankr. S.D.N.Y. 2008) ("[I]f the bankruptcy court denies recognition, it may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States. Thus a decision as to recognition is a serious matter.").

[183] *See* H.R. REP. NO. 109-31, pt. 1, at 110 (2005) ("Subsection (d) has been added to ensure that a foreign representative cannot seek relief in courts in the United States after being denied recognition by the court under this chapter.").

[184] *See* 11 U.S.C. § 1509(f); *see also In re Iida*, 377 B.R. at 258 ("The sole specified exception to the requirement of prior recognition before obtaining comity or assistance from a court in the United States is that a foreign representative is permitted to sue in a court in the United States to collect or recover a claim that is property of the debtor. . . . § 1509(f) expressly permits a foreign representative to sue to collect or recover a claim that is property of the debtor without obtaining prior permission from a bankruptcy court.");

requirement allows a foreign representative to collect or recover a claim which is property of the debtor, such as an account receivable, without commencing a case or receiving recognition under chapter 15, even if such suit implicates the comity or cooperation of a court, so long as the court has both subject matter jurisdiction and personal and/or in rem jurisdiction.[185]

In addition, pursuant to section 1509(e), irrespective of whether the bankruptcy court grants recognition, and subject to sections 306 and 1510, a foreign representative is subject to applicable nonbankruptcy law.[186] This provision is intended to apply to foreign representatives in the same manner that 28 U.S.C. section 959 applies to domestic trustees.[187] "Section 1509 was thus intended to subject foreign representatives to suit with respect to their acts in their capacity as such under applicable nonbankruptcy law, regardless of whether a U.S. Bankruptcy Court had previously granted recognition" and should not be read to limit the effect of section 1509(b)(2).[188]

Significantly, section 1510 makes clear that the filing of a petition for recognition under section 1515 does not subject the foreign representative to the jurisdiction of U.S. courts for any other purpose.[189] If, however, a foreign

---

In re British Am. Ins. Co., 488 B.R. at 227 n.18 ("Section 1509(b)(1) does not limit the right of a foreign representative to sue in a state or federal court in the United States to collect or recover a claim that is property of the debtor, a matter specifically addressed in section 1509(f) . . . . Nor does section 1509 in any way limit the jurisdiction of any state or federal court to hear such a claim.") (internal citations omitted).

[185] *See* H.R. REP. NO. 109-31, pt. 1, at 110–11 (2005) ("Subsection (f) provides a limited exception to the prior recognition requirement so that collection of a claim which is property of the debtor, for example an account receivable, by a foreign representative may proceed without commencement of case or recognition under [chapter 15]."); *see also In re British Am. Ins. Co*., 488 B.R. at 227–28; *In re* Loy, 380 B.R. 154, 165 (Bankr. E.D. Va. 2007) ("Subsection (f) of § 1509 contains the exception to the requirement of § 1509 that a foreign representative's first step must be foreign proceeding recognition. . . . [A] foreign representative may—prior to or without obtaining prior permission of a bankruptcy court—sue to collect on a claim of the debtor, even if such suit implicates the comity or cooperation of a court. The legislative history of the statute indicates that this exception is to be narrowly applied.").

[186] *See* 11 U.S.C. § 1509(e); *see also In re Loy*, 380 B.R. at 165 n.2 ("Subsection (e) also seemingly provides an exception to the prior recognition requirement.").

[187] *See* CT Inv. Mgmt. Co., LLC v. Carbonell, 2012 U.S. Dist. LEXIS 3356, at *8–9 (S.D.N.Y. Jan. 6, 2012); *In re British Am. Ins. Co.*, 488 B.R. at 227–28 ("The foreign representative is of course subject to applicable nonbankrutpcy law[.]"); H.R. REP. NO. 109-31, pt. 1, at 110 (2005) ("Subsection (e) makes activities in the United States by a foreign representative subject to applicable United States law, just as 28 U.S.C. section 959 does for a domestic trustee in bankruptcy."). 28 U.S.C. § 959(a) provides that "[t]rustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property." 28 U.S.C. § 959(a) (2012).

[188] *CT Inv. Mgmt. Co.*, *LLC*, 2012 U.S. Dist. LEXIS 3356, at *9 (citing 11 U.S.C. § 1509(b)(2)).

[189] *See* 11 U.S.C. § 1510; *see also* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 10 ("The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application."); UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 109 ("Article 10 constitutes a 'safe conduct' rule aimed at ensuring that the court in the enacting State would not assume jurisdiction over all the assets of the debtor on the sole ground of the foreign representative having made an application for recognition of a foreign proceeding. The article also makes it clear that the application alone is not sufficient ground for the court of the enacting State to assert jurisdiction over the foreign representative as to matters unrelated to insolvency."); *id*. at ¶ 110

representative is subject to the jurisdiction of a U.S. court for reasons other than the filing of a chapter 15 petition, section 1515 does not affect jurisdiction on such grounds.[190]

Although modeled on section 306, which permits a bankruptcy court to condition any order under section 303 or 305 on compliance by the foreign representative with the bankruptcy court's orders, section 1510 does not provide for such conditional relief.[191] While the court has the ability under section 1522 to attach conditions to relief under sections 1519 and 1521, such authority is not intended to permit the imposition of jurisdiction over the foreign representative beyond the boundaries of the chapter 15 case and any related actions the foreign representative may take, such as commencing a case under another chapter of title 11.[192]

B. Access of Foreign Creditors

Except as provided in subsection (b), section 1513, which applies in all cases under title 11,[193] requires nondiscriminatory or "national" treatment of foreign creditors.[194] Thus, foreign creditors have the same commencement and participation rights as domestic creditors in title 11 cases.[195] Section 1513 does not, however, alter or codify current law regarding the prioritization of claims under section 507

("[A]n appearance in the courts of the enacting State for the purpose of requesting recognition would not expose the entire estate under the supervision of the foreign representative to the jurisdiction of those courts.").

[190] *See* UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 110 ("Other possible grounds for jurisdiction under the laws of the enacting State over the foreign representative or the assets are not affected. For example, a tort or a misconduct committed by the foreign representative may provide grounds for jurisdiction to deal with the consequences of such an action by the foreign representative.").

[191] *See* 11 U.S.C. § 306 ("An appearance in a bankruptcy court by a foreign representative in connection with a petition or request under section 303 or 305 of this title does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose, but the bankruptcy court may condition any order under section 303 or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court."); *id*. § 1510; H.R. REP. NO. 109-31, pt. 1, at 111 (2005). While sections 301 and 302 "probably should be" under section 306's "protective umbrella," sections 301 and 302 are not referenced in section 306. *See* 8 COLLIER ON BANKRUPTCY, ¶ 1510.01, at 1510-2 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014).

[192] *See* 11 U.S.C. § 1522; H.R. REP. NO. 109-31, pt. 1, at 111 (2005); *see also* 11 U.S.C. § 1509 (allowing the court to tailor the rights of a foreign representative to sue or apply for relief in another court "subject to any limitations that the court may impose consistent with the policy of this chapter").

[193] *See* 11 U.S.C. § 103(k)(1).

[194] *See id.* § 1513; *see also* H.R. REP. NO. 109-31, pt. 1, at 111 (2005); UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 118 ("With the exception contained in paragraph 2, article 13 embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such proceeding, should not be treated worse than local creditors.").

[195] *See* 11 U.S.C. § 1513(a); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 13(1); *see also In re* Awal Bank, BSC, 455 B.R. 73, 85 n.9 (Bankr. S.D.N.Y. 2011) ("Foreign creditors have an absolute right to file claims in U.S. proceedings.") (citing 11 U.S.C. §§ 1513, 1514).

("Priorities") or section 726 ("Distribution of property of the estate").[196] Congress deemed the law concerning the priority of foreign claims "unsettled" and, rather than attempting to resolve the issue, section 1513(b) allows for the continued development of case law.[197] Notwithstanding the foregoing, foreign creditors' claims under sections 507 and 726 may not be assigned a lower priority than nonpriority general unsecured claims solely because the claimant is a foreign creditor.[198]

Section 1513(b)(2) provides that sections 1513(a) and (b)(1) do not alter or codify current law as to the allowability of foreign revenue claims or other foreign public law claims and is an exception to chapter 15's general policy of nondiscrimination.[199] Such claims, including tax and Social Security claims, have been traditionally denied enforcement in the United States, both in and outside of bankruptcy proceedings.[200] Rather than codifying existing case law, section 1513 permits the judiciary to continue developing this area of law and allows for the Department of the Treasury to negotiate reciprocal arrangements with tax treaty partners on these issues.[201]

Section 1514 requires that whenever notice is to be provided to creditors generally or to any class or category of creditors, such notice shall also be given to all known foreign creditors or to foreign creditors in the notified class or category and acts as a corollary to the principle of equal treatment established by section 1513.[202] While such notice must generally be provided to foreign creditors on an individual basis, "[n]o letter or other formality is required."[203] Furthermore, the

---

[196] *See* 11 U.S.C. § 1513(b)(1); UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 13(2); *see also* 11 U.S.C. §§ 507, 726.

[197] *See* H.R. REP. NO. 109-31, pt. 1, at 111 (2005).

[198] *See* 11 U.S.C. § 1513(b)(1); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 13(2); *see also* H.R. REP. NO. 109-31, pt. 1, at 111 (2005) ("[F]oreign claims must receive the treatment given to general unsecured claims without priority, unless they are in a class of claims in which domestic creditors would also be subordinated.").

[199] *See* 11 U.S.C. § 1513(b)(2); H.R. REP. NO. 109-31, pt. 1, at 111–12 (2005). Although section 1513 is substantially in accord with Article 13 of the Model Law, subsection (b)(2) of section 1513 is unique to the Bankruptcy Code. *See* 11 U.S.C. § 1513(b)(2); UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 13.

[200] *See* H.R. REP. NO. 109-31, pt. 1, at 112 (2005) ("The Bankruptcy Code is silent on this point, so the rule is purely a matter of traditional case law.").

[201] *See* 11 U.S.C. § 1513(b)(2)(B) ("Allowance and priority as to a foreign tax claim or other foreign public law claim shall be governed by any applicable tax treaty of the United States, under the conditions and circumstances specified therein."); H.R. REP. NO. 109-31, pt. 1, at 112 (2005).

[202] *See* 11 U.S.C. § 1514(a); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 14(1); *see also* UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 121; H.R. REP. NO. 109-31, pt. 1, at 112 (2005) ("If a foreign creditor has made an appropriate request for notice, it will receive notices in every instance where notices would be sent to other creditors who have made such requests."). Like section 1513, section 1514 applies in all cases under title 11. *See* 11 U.S.C. § 103(k)(1). Because foreign creditor is not a defined term, "foreign addresses are used as the distinguishing factor." H.R. REP. NO. 109-31, pt. 1, at 112 (2005).

[203] 11 U.S.C. § 1514(b); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 14(2); *see also* UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 123 ("With regard to the form of individual notification, States may use special procedures for notifications that have to be served in a foreign

court has discretion to determine that, under the circumstances, another form of notification is more appropriate.[204]

When foreign creditors are to be notified regarding the commencement of a case, such notification must (1) specify the time period and place for filing proofs of claim, (2) indicate whether secured creditors need to file proofs of claim, and (3) contain any other information required to be included in such notification to creditors under title 11 and the orders of the court.[205]

In order to ensure that foreign creditors have a reasonable amount of time within which to receive notice or take an action, section 1514(d) requires that any rule of procedure or order of the court regarding notice or filing a proof of claim grant additional time to foreign creditors "as is reasonable under the circumstances."[206] Thus, subsection (p) was added to Rule 2002 of the Federal Rules of Bankruptcy Procedure[207] to provide that if "the court finds that a notice mailed within the time prescribed by these rules would not be sufficient to give a creditor with a foreign address to which notices under these rules are mailed reasonable notice under the circumstances, the court may order that the notice be supplemented with notice by other means or that the time prescribed for the notice by mail be enlarged."[208] In addition, unless the court for cause orders otherwise, a

---

jurisdiction (e.g. sending notifications through diplomatic channels). In the context of insolvency proceedings, those procedures would often be too cumbersome and time-consuming and their use would typically not provide foreign creditors timely notice concerning insolvency proceedings. It is therefore advisable for those notifications to be effected by such expeditious means that the court considers adequate.").

[204] *See* 11 U.S.C. § 1514(b); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 14(2); *see also* UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 122 ("[P]aragraph 2 in principle requires individual notification for foreign creditors but leaves discretion to the court to decide otherwise in a particular case (e.g. if individual notice would entail excessive cost or would not seem feasible under the circumstances).").

[205] *See* 11 U.S.C. § 1514(c); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 14(3); *see also* H.R. REP. NO. 109-31, pt. 1, at 112 (2005) ("The notice must specify that secured claims must be asserted, because in many countries . . . [secured] claims are not affected by an insolvency proceeding and need not be filed."); UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 126.

[206] 11 U.S.C. § 1514(d); *see also* H.R. REP. NO. 109-31, pt. 1, at 112 (2005). While section 1514 is substantially in accord with Article 14 of the Model Law, section 1514(d) is found only in the Bankruptcy Code. *See* 11 U.S.C. § 1514(d); UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 14.

[207] Unless otherwise stated, all Rules referenced herein shall refer to the Federal Rules of Bankruptcy Procedure.

[208] FED. R. BANKR. P. 2002(p)(1); *see* FED. R. BANKR. P. 2002 advisory committee's note ("[S]ubdivision (p)(1) is added to this rule to give the court flexibility to direct that notice by other means shall supplement notice by mail, or to enlarge the notice period, for creditors with foreign addresses. If cause exists, such as likely delays in the delivery of mailed notices in particular locations, the court may order that notice also be given by email, facsimile, or private courier. Alternatively, the court may enlarge the notice period for a creditor with a foreign address. It is expected that in most situations involving foreign creditors, fairness will not require any additional notice or extension of the notice period. This rule recognizes that the court has discretion to establish procedures to determine, on its own initiative, whether relief under subdivision (p) is appropriate, but that the court is not required to establish such procedures and may decide to act only on request of a party in interest.").

creditor with a foreign mailing address must be provided at least 30 days' notice of the time fixed for filing a proof of claim under Rule 3002(c) or Rule 3003(c).[209]

IV. RECOGNITION OF A FOREIGN PROCEEDING

A. The Application for Recognition of a Foreign Proceeding

As noted above in Section II(B), U.S. bankruptcy courts have the authority to hear and determine all core proceedings arising under title 11 or arising in a case under title 11 that are referred under 28 U.S.C. section 157(a). Core proceedings include "recognition of foreign proceedings and other matters under chapter 15 of title 11."[210] "Recognition" is defined as "the entry of an order granting recognition of a foreign main proceeding or a foreign nonmain proceeding" under chapter 15.[211] Because former section 304 lacked a recognition requirement and the structure of chapter 15 is far more rigid than its predecessor statute, case law interpreting former section 304 is not helpful in determining whether recognition of a foreign proceeding is appropriate under chapter 15.[212] In addition, equitable considerations should not bear on such a determination.[213] As the District Court for the Southern District of New York has noted:

> Prior to the enactment of Chapter 15, access to the United States courts by a foreign representative was not dependent on recognition; rather, all relief under section 304 was discretionary

---

[209] *See* FED. R. BANKR. P. 2002(p)(2); FED. R. BANKR. P. 2002 advisory committee's note ("Subdivision (p)(2) is added to the rule to grant creditors with a foreign address to which notices are mailed at least 30 days' notice of the time within which to file proofs of claims if notice is mailed to the foreign address, unless the court orders otherwise. If cause exists, such as likely delays in the delivery of notices in particular locations, the court may extend the notice period for creditors with foreign addresses. The court may also shorten the additional notice time if circumstances so warrant."); *see also* FED. R. BANKR. P. 2002(p)(3) ("Unless the court for cause orders otherwise, the mailing address of a creditor with a foreign address shall be determined under Rule 2002(g).").

[210] 28 U.S.C. § 157(b)(1),(2)(P) (2012).

[211] 11 U.S.C. § 1502(7).

[212] *See In re* Basis Yield Alpha Fund (Master), 381 B.R. 37, 46 (Bankr. S.D.N.Y. 2008) ("Thus, in contrast to the jurisprudence that developed under section 304 that emphasized discretion and flexibility (and that permitted U.S. judicial assistance for a wide array of judicial insolvency proceedings abroad), the new recognition regime under chapter 15 is procedurally quite rigid."); *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 132 (Bankr. S.D.N.Y. 2007) ("While much of the jurisprudence developed under section 304 is preserved in the context of new section 1507, section 304 did not have a recognition requirement as a first step. . . . Chapter 15, on the other hand, imposes a rigid procedural structure for recognition of foreign proceedings as either main or nonmain and thus the jurisprudence developed under section 304 is of no assistance in determining the issues relating to the presumption for recognition under chapter 15."); H.R. REP. NO. 109-31, pt. 1, at 113 (2005) ("The decision to grant recognition is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c) of the Bankruptcy Code.").

[213] *See In re* Loy, 380 B.R. 154, 168 (Bankr. E.D. Va. 2007) ("Congress did not include language in §§ 1509, 1515, or 1517 which suggests that a court is permitted to include equitable considerations in its determination of whether the prerequisites for foreign proceeding recognition have been met.").

> and based on subjective, comity-influenced factors . . . . By establishing a simple, objective eligibility requirement for recognition, Chapter 15 promotes predictability and reliability. The considerations for post-recognition relief remain flexible and pragmatic in order to foster comity and cooperation in appropriate cases.[214]

A foreign representative must receive chapter 15 recognition of a foreign proceeding prior to requesting comity or cooperation from a U.S. court.[215] In order to apply for recognition, the foreign representative must file a petition for recognition in compliance with the provisions of sections 1515 and 1517 and prove that the foreign proceeding is either a foreign main proceeding or a foreign nonmain proceeding.[216] A foreign main proceeding is a "foreign proceeding pending in the country where the debtor has the center of its main interests" and a foreign nonmain proceeding is "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."[217] In either case, the foreign representative must first establish the existence of a "foreign proceeding."

The foreign representative carries the burden of proof as to the existence of a "foreign proceeding" by proving each of seven criteria: (i) the existence of a proceeding; (ii) that is either judicial or administrative; (iii) that is collective in nature; (iv) that is in a foreign country; (v) that is authorized or conducted under a law related to insolvency or the adjustment of debts; (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and (vii) which proceeding is for the purpose of reorganization or liquidation.[218]

---

[214] *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (S.D.N.Y. 2008).

[215] *See* United States v. J.A. Jones Constr. Grp., LLC, 333 B.R. 637, 639 (E.D.N.Y. 2005) (finding that, in the absence of recognition under chapter 15, a federal court has no authority to grant a stay of litigation against a foreign debtor); *In re Loy*, 380 B.R. at 164–65. However, the District Court for the Eastern District of New York has granted a debtor temporary relief to allow it time to seek further relief under chapter 15 even before a petition for recognition was filed. *See J.A. Jones Constr. Grp., LLC,* 333 B.R. at 639 (finding that because all parties were aware of the foreign bankruptcy proceeding and of the debtor's insolvency and "given the comity that American courts should accord foreign bankruptcy proceedings," a 60-day stay of the litigation was appropriate to give the debtor additional time to seek a longer stay under chapter 15).

[216] *See* 11 U.S.C. §§ 1502(7), 1504, 1515.

[217] *Id.* § 1502(4)–(5). The Model Law's definitions are nearly identical. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 2(b), (c). In Canada, however, the existence of an "establishment" is not required in order to recognize a proceeding as a foreign nonmain proceeding. *See* Janis Sarra, *Northern Lights, Canada's Version of the UNCITRAL Model Law on Cross-Border Insolvency*, 16 INT'L INSOLVENCY REV. 19, 42 n.101–03 (2007) (providing an extensive overview of Canada's former and amended cross-border bankruptcy laws and explaining differences between such laws and the Model Law and/or chapter 15).

[218] *See* 11 U.S.C. § 101(23); *see also In re* Ashapura Minechem Ltd., 480 B.R. 129, 136 (S.D.N.Y. 2012). The UNCITRAL Guide provides that to fall within the scope of the Model Law, a foreign insolvency proceeding needs to possess certain attributes. These attributes include "basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding." UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 66. The Model Law

The first step in the analysis is to determine whether a proceeding exists. A "proceeding" has been identified as "acts and formalities set down in law so that courts, merchants and creditors can know them in advance, and apply them evenly in practice. In the context of corporate insolvencies, the hallmark of a 'proceeding' is a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets."[219] A court filing is not required in order to be considered a "proceeding."[220] In addition, the fact that a reorganization or liquidation plan in the foreign proceeding has already been approved will not prevent recognition so long as the foreign proceeding has not yet been closed.[221] Second, a proceeding must have "either an administrative *or* a judicial character."[222] This criterion is generally relatively easy to satisfy where a proceeding is found to exist.

Third, the petitioner must prove that the proceeding at issue is collective in nature. "A collective proceeding is designed to provide equitable treatment to creditors, by treating similarly situated creditors in the same way, and to maximize the value of the debtor's assets for the benefit of all creditors."[223] The Third Circuit has held that chapter 15 makes no exception for fully leveraged assets and has even found a collective action where the receivership pending in the foreign jurisdiction

---

defines "foreign proceeding" in substantially the same way as the Bankruptcy Code, except that section 101(23) is broader as it includes proceedings under laws relating to "adjustment of debt." *See* 11 U.S.C. § 101(23); UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 2(a).

[219] *In re* Betcorp Ltd., 400 B.R. 266, 278 (Bankr. D. Nev. 2009); *see also* Flynn v. Wallace (*In re* Irish Bank Resolution Corp. (In Special Liquidation)), 2015 U.S. Dist. LEXIS 101600, at *9 (D. Del. Aug. 4, 2015) (finding a "proceeding" to exist within the meaning of section 101(23) where the winding-up of the debtor was knowable in advance and controlled by Special Liquidators subject to supervision by the Finance Minister and High Court and where the Finance Minister's instructions were challengeable under public rules).

[220] *See In re Betcorp Ltd.,* 400 B.R. at 280 (finding an Australian voluntary winding up a "proceeding" even though it did not require an application or petition to an Australian court); *see also* Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, Recital ¶ 10, 2000 O.J. (L160) 1–18 (as amended) ("Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression 'court' in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings.").

[221] *See In re* Oversight and Control Comm'n of Avanzit, S.A., 385 B.R. 525, 534–40 (Bankr. S.D.N.Y. 2008) (granting recognition after approval of a plan in the foreign proceeding noting that "[s]ubstantial litigation and other liquidation activities may take place under the supervision and control of the bankruptcy court after the plan, or its equivalent, has been confirmed or approved").

[222] *In re Betcorp Ltd.*, 400 B.R. at 281; *see also In re Irish Bank Resolution Corp. (In Special Liquidation)*, 2015 U.S. Dist. LEXIS 101600, at *9–10 (finding an Irish proceeding administrative or judicial in nature where the majority of tasks to be undertaken by the Special Liquidators and Minister of Finance are administrative in nature, any creditor may seek a ruling of the High Court with respect to any question arising in the Irish Proceeding, and procedures applicable to the liquidation of the debtor are identical to those of any other corporate liquidation pursuant to 231 of Ireland's Companies Act of 1963).

[223] *In re Ashapura Minechem Ltd.*, 480 B.R. at 136–37; *see also In re Irish Bank Resolution Corp. (In Special Liquidation)*, 2015 U.S. Dist. LEXIS 101600, at *10 (finding Irish proceeding was collective in nature because it provided for the distribution of proceeds realized from the debtor's assets according to a priority distribution scheme set forth in the Companies Act); *In re Betcorp Ltd.*, 400 B.R. at 281 (noting that a "receivership remedy instigated at the request, and for the benefit, of a single secured creditor" is not a collective proceeding).

was run solely for the benefit of the debtor's secured creditors along with a separate liquidation.[224] Other characteristics of a collective action include: adequate notice to creditors under applicable foreign law, provisions for the distribution of assets according to statutory priorities, and a statutory mechanism for creditors to seek court review of the proceeding.[225]

Fourth, the proceeding must be located in a foreign country.[226] Fifth, the proceeding must be authorized or conducted under a law related to insolvency or the adjustment of debts.[227] The insolvency laws of a number of different countries have been found to satisfy section 101(23).[228] This requirement does not necessarily

---

[224] *See In re* ABC Learning Ctrs. Ltd., 728 F.3d 301, 308–09 (3d Cir. 2014) (recognition of foreign proceeding granted where both a liquidation proceeding and a receivership were pending in Australia even though the receivership left little for the liquidator to administer).

[225] *See In re Ashapura Minechem Ltd.,* 480 B.R. at 137; *In re* British Am. Ins. Co., 425 B.R. 884, 902 (Bankr. S.D.N.Y. 2010) ("[T]he word 'collective' in section 101(23) contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action. Notice to creditors, including general unsecured creditors, may play a role in this analysis. In determining whether a particular foreign action is collective as contemplated under section 101(23), it is appropriate to consider both the law governing the foreign action and the parameters of the particular proceeding as defined in, for example, orders of a foreign tribunal overseeing the action."); *In re* Gold & Honey, Ltd., 410 B.R. 357, 368–72 (Bankr. E.D.N.Y. 2009) (finding petitioners did not meet their burden of showing Israeli receivership proceeding was collective in nature because it did not require receivers to consider the rights and obligations of all creditors and the debtor's assets and affairs were not subject to control or supervision of a foreign court).

[226] *See, e.g.*, *In re Betcorp Ltd.*, 400 B.R. at 281 (finding debtor's wind up proceeding was located in a foreign country where the special resolution commencing the proceeding was made at a meeting in Australia, the debtor operated under the provisions of Australian law and the liquidators authorized to act for the debtor were appointed pursuant to Australian law and were citizens and residents of Australia).

[227] *See id.* at 281–82 ("For Betcorp's winding up to qualify as a foreign proceeding, the winding up must be authorized or conducted under a law related to insolvency or the adjustment of debts.").

[228] *See, e.g.*, SNP Boat Service S.A. v. Hotel Le St. James, 483 B.R. 776 (S.D. Fla. 2012) (French sauvegarde proceeding); *In re The Irish Bank Resolution Corp. (In Special Liquidation)*, 2014 Bankr. LEXIS 1990, at *47–49 (Bankr. D. Del. April 30, 2014) (Irish Companies Act, as modified by the IBRC Act); *In re* Bemarmara Consulting a.s., Case No. 13-13037 (KG) (Bankr. D. Del. Dec. 27, 2013) (Czech Republic's Insolvency Act); *In re* Daewoo Logistics Corp., 461 B.R. 175 (Bankr. S.D.N.Y. 2011) (Republic of Korea's Debtor Rehabilitation and Bankruptcy Act); *In re* Sivec Srl, 2011 Bankr. LEXIS 3206 (Bankr. E.D. Okla. Aug. 18, 2011) (Article 160 of the Italian Bankruptcy Law); *In re* Fairfield Sentry Ltd., 452 B.R. 52 (Bankr. S.D.N.Y. 2011) (liquidation proceedings before Commercial Division of High Court of Justice, British Virgin Islands); *In re* British Am. Isle of Venice, Ltd., 441 B.R. 713 (Bankr. S.D. Fla. 2010) (British Virgin Islands Insolvency Act of 2003); *In re* ABC Learning Ctrs. Ltd., 445 B.R. 318 (Bankr. D. Del. 2010) (voluntary administration proceedings pursuant to Australia's Corporations Act of 2001); *In re* Caribe, 2010 Bankr. LEXIS 6438 (Bankr. S.D.N.Y. Oct. 20, 2010) (Concurso Mercantil Proceeding in Mexico); *In re* Tien Chiang, 437 B.R. 397 (Bankr. C.D. Cal. 2010) (Canadian Bankruptcy and Insolvency Act); *In re* JSC BTA Bank, 434 B.R. 334 (Bankr. S.D.N.Y. 2010) (proceeding pending in Specialized Financial Court in Republic of Kazakhstan); *In re* RHTC Liquidating Co., 424 B.R. 714 (Bankr. W.D. Pa. 2010) (Canadian Company's Creditors Arrangement Act, R.S.C. 1985, ch. C-36); *In re* Oversight and Control Comm'n of Avanzit, S.A., 385 B.R. 525 (Bankr. S.D.N.Y. 2008) (Spain's 1922 Suspension of Payments Act); *In re* Tradex Swiss AG, 384 B.R. 34 (Bankr. D. Mass. 2008) (Articles 25(1) and 33(1) of the Swiss Banking Act); *In re* Tri-Continental Exch., 349 B.R. 627 (Bankr. E.D. Cal. 2006) (St. Vincent and Grenadines Companies Act, No. 8 of 1994 and related statutes); *In re* SPhinX, Ltd., 351 B.R. 103 (Bankr. S.D.N.Y. 2006) (Companies Law (2004 Revision) of the Cayman Islands); *In re* Lion City Run-Off Private Ltd., 2006 Bankr. LEXIS 5102 (Bankr. S.D.N.Y. Apr. 13, 2006) (Scheme of Arrangement under the Singapore

require the debtor to be insolvent or to contemplate use of any insolvency laws to adjust its debts.[229] Sixth, the assets and affairs of the debtor must be subject to control or supervision of a foreign court.[230] Section 1502 defines "foreign court" as "a judicial or other authority competent to control or supervise a foreign proceeding."[231] A foreign court would therefore include an administrative agency.[232] Finally, the purpose of the foreign proceeding must be for reorganization or liquidation.[233]

Section 1515 requires that a petition for recognition be accompanied by the following: (1)(a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; (b) a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative; or (c) in the absence of the forgoing documents, any other evidence acceptable to the court evidencing the existence of the foreign proceeding and of the appointment of the foreign representative;[234] and (2) a statement identifying all foreign proceedings with respect to the debtor that are

---

Companies Act); *In re* Lloyd, 2005 Bankr. LEXIS 2794 (Bankr. S.D.N.Y. Dec. 7, 2005) (Section 425 of the Companies Act of 1985 of Great Britain).

[229] *See In re Betcorp Ltd.*, 400 B.R. at 282; *see also* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, *Cross-Border Insolvency: Draft Legislative Provisions on Judicial Cooperation and Access and Recognition in Cases of Cross-border Insolvency*, p. 9, at n.2, U.N. Doc. A/CN.9/WG.V/WP.44 (Mar. 8, 1996) (explaining that phrase "or to another law relating to insolvency" contemplated to be included in definition of "foreign proceeding" was intended to "allude to the fact that liquidations and reorganizations might be conducted under other than, strictly speaking, insolvency laws (e.g., company laws)"), *available at* http://www.uncitral.org/pdf/english/travaux/insolvency/acn9-wg5-wp44-e.pdf.

[230] *See In re The Irish Bank Resolution Corp. (In Special Liquidation)*, 2014 Bankr. LEXIS 1990, at *50–51 (finding control or supervision by a court where the actions of the Minister of Finance were subject to judicial review and creditors could seek judicial review of questions posed in connection with the proceeding).

[231] 11 U.S.C. § 1502(3) (2012); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 2(e). There is some question whether the section 1502 definition of "foreign court" can be used to define that term in section 101(23) because definitions contained in section 1502 are intended to apply solely to chapter 15 provisions. *See In re Betcorp Ltd.*, 400 B.R. at 283 n.23 (using definition found in section 1502(3) to construe section 101(23) despite the "slight problem with the use and interpretation of 'foreign court' in section 101(23)"); *In re ABC Learning Centres Ltd.*, 445 B.R. at 332 (finding Australian proceeding was supervised by a foreign court even when "1) actions in the Australian courts related to liquidation proceedings are typically initiated by interested parties, 2) Australian courts give deference to a business' 'commercial judgment' and do not direct the day-to-day operations of a debtor, and 3) liquidators proceed with most of their duties without court involvement").

[232] *See In re Betcorp Ltd.*, 400 B.R. at 283 n.23 ("This deviation from accepted methods of statutory interpretation is justified by the international context of this case, and by Congress' directives, contained in section 1501 and 1508, to construe chapter 15 so that it is consistent with international understandings.").

[233] *See, e.g.*, *id.* at 284–85 (finding the final requirement of section 101(23) satisfied because the voluntary winding up proceeding "is a statutory process under the laws of Australia through which a company is liquidated").

[234] *See In re* Pro-Fit Holdings Ltd., 391 B.R. 850, 858 (Bankr. C.D. Cal. 2008) (finding notices of appointment of the foreign representative/administrator signed by a solicitor sufficient under section 1515(b)(3) to show both the existence of the foreign proceeding and the appointment of the foreign representative, neither of which requires a court filing under the Insolvency Act 1986 for England and Wales).

known to the foreign representative.[235] The certified copy of the decision and the certificate must be translated into English and, so long as these documents indicate the foreign proceeding is a foreign proceeding and that the person or body submitting the application is the foreign representative, the court is entitled to so presume.[236] Rule 1007(a)(4) requires that the foreign representative file the following additional documents with its petition for recognition: (1) a corporate ownership statement containing the information described in Rule 7007.1;[237] and (2) unless the court orders otherwise, a list containing the names and addresses of all persons or bodies authorized to administer foreign proceedings of the debtor, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and all entities against whom provisional relief is being sought under section 1519.[238]

The court is entitled to presume that any documents submitted in support of the petition are authentic regardless of whether or not they have "been legalized."[239] However, the foreign representative has a continuing obligation to file with the court a notice of change of status concerning (1) "any substantial change in the status of such foreign proceeding or the status of the foreign representative's appointment;" and (2) "any other foreign proceeding regarding the debtor that becomes known to the foreign representative."[240] The Bankruptcy Code requires that a petition for recognition be decided "at the earliest possible time."[241]

Subject to the public policy exception of section 1506 discussed above,[242] after notice and a hearing,[243] an order recognizing a foreign proceeding shall be entered if

---

[235] *See* 11 U.S.C. § 1515(b), (c); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 15(2), (3).

[236] *See* 11 U.S.C. §§ 1515(d), 1516(a); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 15(4), 16(1). The court may also request that additional documents be translated into English. *See* 11 U.S.C. § 1515(d).

[237] Rule 7007.1 requires the identification of any corporation, other than a governmental unit, that directly or indirectly owns 10% or more of any class of the corporation's equity interests. *See* FED. R. BANKR. P. 7007.1(a).

[238] *See* FED. R. BANKR. P. 1007(a)(4).

[239] 11 U.S.C. § 1516(b); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 16(2). "'Legalization' is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document." UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 128.

[240] 11 U.S.C. § 1518; *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 18; *see also In re* Cozumel Caribe, S.A. de C.V., 508 B.R. 330, 338 (Bankr. S.D.N.Y. 2014) ("Pursuant to this Order and the requirements of section 1518, . . . the Foreign Representative shall keep this Court informed of any developments involving not only the Foreign Debtor, but also the Guarantors and the Non-Debtor Affiliates, to the extent those developments affect the rights of . . . creditors of the Foreign Debtor in this chapter 15 case."). "Judges in several jurisdictions, including the United States, have reported a need for a requirement of complete and candid reports to the court of all proceedings, worldwide, involving the debtor. This section will ensure that such information is provided to the court on a timely basis. Any failure to comply with this section will be subject to the sanctions available to the court for violations of the statute." H.R. REP. NO. 109-31, pt. 1, at 114 (2005).

[241] 11 U.S.C. § 1517(c); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 17(3).

[242] *See supra* Section II.D.

(1) such foreign proceeding is a foreign main proceeding or a foreign nonmain proceeding,[244] (2) the foreign representative that submitted the petition is a person or body,[245] and (3) the petition meets the requirements of section 1515.[246] If these criteria are met, the foreign proceeding shall be recognized as either (1) a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests or (2) a foreign nonmain proceeding if the debtor has an establishment (as defined in section 1502) in the foreign country where the proceeding is pending.[247] If the foreign proceeding is neither a foreign main proceeding nor a foreign nonmain proceeding, then it is simply ineligible for recognition under chapter 15.[248] Only parties directly affected by the relief provided

---

[243] Pursuant to Rule 2002(q), at least 21 days' notice of a hearing on a petition for recognition must be provided and the notice must provide whether the petition seeks recognition of a foreign main proceeding or a foreign nonmain proceeding. *See* FED. R. BANKR. P. 2002(q)(1). Section 1514 contains requirements for notifying creditors with foreign addresses and provides specifications for notification of commencement of a case. *See* 11 U.S.C. § 1514. Rule 1010 provides service requirements for petitions for recognition of a foreign nonmain proceeding. *See* FED. R. BANKR. P. 1010, 7004(a) and (b).

[244] *See* 11 U.S.C. § 1517(a)(1).

[245] *See id.* § 1517(a)(2).

[246] *See id.* § 1517(a)(3). Under the Model Law, a foreign proceeding is to be recognized if (1) the foreign proceeding is a proceeding under Article 2(a) (and not only if it is a foreign main proceeding or a foreign nonmain proceeding); (2) the foreign representative applying for recognition is a person or body; (3) the application meets the requirements of Article 15(2); and (4) the application is submitted to the court referred to in Article 4. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 17(1). The ultimate burden of proof on each element is on the foreign representative. *See In re* The Irish Bank Resolution Corp. (In Special Liquidation), 2014 Bankr. LEXIS 1990, at *35 (Bankr. D. Del. Apr. 30, 2014).

[247] *See* 11 U.S.C. § 1517(b); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 17(2); *In re* ABC Learning Ctrs. Ltd., 728 F.3d 301, 306 (3d Cir. 2013) ("Mandatory recognition when an insolvency proceeding meets the criteria fosters comity and predictability, and benefits bankruptcy proceedings in the United States that seek to administer property located in foreign countries that have adopted the Model Law."); *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333–34 (S.D.N.Y. 2008) ("The objective criteria for recognition reflect the legislative decision by UNCITRAL and Congress that a foreign proceeding should not be entitled direct access to or assistance from the host country courts unless the debtor had a sufficient pre-petition economic presence in the country of the foreign proceeding."). At least one court has explicitly refused to read into section 1517 an additional requirement that the request for recognition be filed in good faith. *See In re* Millard, 501 B.R. 644, 654 (Bankr. S.D.N.Y. 2013) ("[W]hen 1517(a) says [recognition of a foreign proceeding] is 'subject to' one thing—section 1506, which . . . is the public policy exception—that sends a message to the judiciary that *it is not subject to other things that were not so included*.") (emphasis in original).

[248] *See* Lavie v. Ran (*In re* Ran), 607 F.3d 1017, 1022 (5th Cir. 2010); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd*., 389 B.R. at 334 ("If the debtor does not have its center of main interests or at least an establishment in the country of the foreign proceedings, the bankruptcy court should not grant recognition and is not authorized to use its power to effectuate the purposes of the foreign proceeding. Implicitly, in such an instance the debtor's liquidation or reorganization should be taking place in a country other than the one in which the foreign proceeding was filed to be entitled to assistance from the United States.") (internal citations omitted).

by a recognition order have standing to appeal its entry.[249] "Potential future harm" is not sufficient to confer standing to appeal a recognition order.[250]

Although recognition is mandatory where the aforementioned criteria are met, recognition under section 1517 is not a "rubber stamp exercise."[251] It remains the petitioner's burden to persuade the bankruptcy court by a preponderance of the evidence that the debtor's center of main interests is the location of the foreign proceedings or, in the alternative, that the debtor has an establishment in that place.[252] "Although sections 1515 and 1516 are designed to make recognition as simple and expedient as possible, the court may consider proof on any element stated."[253] Recognition of a foreign proceeding may also be modified or terminated to the extent that it is shown that the grounds for granting recognition were fully or partially lacking or have ceased to exist.[254] However, in such a case, the court is required to give due weight to possible prejudice to parties that have relied upon the order granting recognition.[255]

---

[249] *See* Drawbridge Special Opportunities Fund LP v. Barnet (*In re* Barnet), 737 F.3d 238, 242 (2d Cir. 2013) ("[I]n order to have standing to appeal from a bankruptcy court ruling, an appellant must be a person aggrieved–a person directly and adversely affected peculiarly by the challenged order of the bankruptcy court.").

[250] *See id.* at 243. However, the Second Circuit ultimately permitted the appeal of the recognition order to proceed because it was tied to the appeal of a subsequent discovery order, which the appellants did have standing to pursue. *See id*. at 246 ("[T]he Recognition Order was a necessary prerequisite to ordering discovery . . . The Recognition Order is properly before us, therefore, as it has merged with the subsequent discovery order.").

[251] *In re* Sivec Srl, 2011 Bankr. LEXIS 3206, at *3 (Bankr. E.D. Okla. Aug. 18, 2011); *see also In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 Bankr. LEXIS 4762, at *7 (Bankr. S.D.N.Y. Sept. 5, 2007) ("[R]ecognition under section 1517 is not to be rubber stamped by the courts. This Court must make an independent determination as to whether the foreign proceeding meets the definitional requirements of sections 1502 and 1517 of the Bankruptcy Code."); *but see In re* SPhinX, Ltd., 351 B.R. 103, 117, 120–21 (Bankr. S.D.N.Y. 2006) ("Because their money is ultimately at stake, one generally should defer, therefore, to the creditors' acquiescence in or support of a proposed COMI.").

[252] *See In re* Millennium Glob. Emerging Credit Master Fund Ltd., 474 B.R. 88, 91 (S.D.N.Y. 2012); *In re* Gerova Fin. Grp., Ltd., 482 B.R. 86, 90–91 (Bankr. S.D.N.Y. 2012).

[253] H.R. REP. NO. 109-31, pt. 1, at 112–13 (2005) ("The ultimate burden as to each element is on the foreign representative, although the court is entitled to shift the burden to the extent indicated in section 1516. The word 'proof' in subsection (3) has been changed to 'evidence' to make it clearer using United States terminology that the ultimate burden is on the foreign representative.").

[254] *See In re* Cozumel Caribe, S.A. de C.V., 508 B.R. 330, 334–38 (Bankr. S.D.N.Y. 2014) (denying motion to vacate recognition where foreign representative was alleged to have acted fraudulently, engaged in delaying tactics and failed to comply with reporting requirements because a court may only terminate recognition where "the grounds for granting it were fully or partially lacking and or have [entirely] ceased to exist" and the foreign representative's conduct did not implicate the grounds for recognition); *In re* Ernst & Young, Inc., 383 B.R. 773, 781 (Bankr. D. Colo. 2008) (finding petition met requirements of section 1515 prior to a full and final adjudication of alter ego and corporate governance issues recognizing that section 1517(d) would allow for the recognition determination to be modified or terminated in the future if necessary because the court believed the recognition determination was intended to be a summary determination).

[255] *See* 11 U.S.C. § 1517(d) (2012); *see generally In re* Loy, 2011 Bankr. LEXIS 2560, at *33 (Bankr. E.D. Va. June 30, 2011) (declining to certify for interlocutory appeal an order denying debtor's motion to revoke recognition). The Model Law does not include a similar requirement that weight be given to any possible prejudice to interested parties. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 17(4).

After a petition of recognition is granted, the chapter 15 case may be closed in the manner prescribed in section 350.[256] In the alternative, a foreign representative may seek, and the court, after notice and a hearing, may order, the dismissal of a case or the suspension of all proceedings in a case at any time if (1) the interests of creditors and the debtor would be better served by such dismissal or suspension;[257] or (2)(A) a petition for recognition of a foreign proceeding has been granted and (B) the purposes of chapter 15 would be best served by such dismissal or suspension.[258] Thus, there are two "tests" for dismissal under section 305(a); if either one is met, dismissal is appropriate.[259] Courts that have construed section 305(a)(1) have generally agreed that abstention under this provision is an extraordinary remedy.[260]

B. Provisional Relief While Petition for Recognition is Pending

Pursuant to section 1519(a), while a petition for recognition is pending, the court may grant certain provisional relief "where relief is urgently needed to protect the assets of the debtor or the interests of the creditors."[261] Such relief includes, but is not limited to:[262] (1) staying execution against the debtor's assets; (2) "entrusting the administration or realization of all or part of the debtor's assets located in the

---

[256] *See* 11 U.S.C. § 1517(d). Section 350(a) provides that "[a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case." *Id.* § 350(a). Practitioners should also consider relevant local rules when closing a chapter 15 case. In Delaware, the local rules provide procedures similar to those for closing chapter 11 cases. *See* Del. Bankr. L.R. 5009-2; Del. Bankr. L.R. 3022-1. However, pursuant to Rule 5009-2(b) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware, there is a presumption that the chapter 15 case has been fully administered if no objections are filed to the foreign representative's request for entry of a final decree. *See* Del. Bankr. L.R. 5009-2 ("If no objection has been filed by the United States Trustee or a party in interest within 30 days after the certificate is filed, there shall be a presumption that the case has been fully administered and the Court may close the case.").

[257] *See* 11 U.S.C. § 305(a)(1).

[258] *See id*. § 305(a)(2); *see also In re* RHTC Liquidating Co., 424 B.R. 714, 724–29 (Bankr. W.D. Pa. 2010) (denying motion to dismiss chapter 7 case where petition for recognition of foreign main proceeding had previously been granted after considering the chapter 15 objectives of comity, greater legal certainty for trade and investment, fair and efficient administration of cross-border insolvencies, the protection and maximization of the value of the debtor's assets, and the facilitation of the rescue of troubled business to protect investment and preserve jobs); *In re* Gerova Fin. Grp., Ltd., 482 B.R. 86, 93–94 (Bankr. S.D.N.Y. 2012).

[259] *See In re RHTC Liquidating Co.*, 424 B.R. at 720.

[260] *See, e.g.*, SNP Boat Service S.A. v. Hotel Le St. James, 483 B.R. 776, 787 (S.D. Fla. 2012) (finding that bankruptcy court abused its discretion in dismissing a chapter 15 case as a discovery sanction); *In re* Globo Comunicacoes E Participacoes S.A., 317 B.R. 235, 255 (S.D.N.Y. 2004).

[261] 11 U.S.C. § 1519(a). This section does not expand or reduce the scope of section 105. *See* H.R. REP. NO. 109-31, pt. 1, at 114 (2005).

[262] *See In re* Innua Can., Ltd., 2009 Bankr. LEXIS 994, at *7 (Bankr. D.N.J. Mar. 25, 2009) ("Section 1519(a)'s use of 'including' to mean that the list that follows is not exhaustive."); *In re* Pro-Fit Holdings Ltd., 391 B.R. 850, 866 (Bankr. C.D. Cal. 2008) (finding section 1519 is incomplete and "a number of other provisions of the bankruptcy code may be applied provisionally under § 1519 while an application for recognition is pending"); *see also* 11 U.S.C. § 105 ("The court may issue any order process, or judgment that is necessary or appropriate to carry out the provisions of this title."). Section 103 makes chapter 1, including section 105, applicable to chapter 15 cases. *See* 11 U.S.C. § 103.

United States to the foreign representative or another person authorized by the court, including an examiner,[263] to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;" and (3) any relief referred to in section 1521(a)(3), (4), or (7).[264] Any such relief that is granted by the court on a provisional basis automatically terminates when the petition is granted unless extended under section 1521(a)(6).[265] Provisional relief will be granted only if the interests of the creditors and other interested entities,[266] including the debtor, are sufficiently protected.[267] Courts are directed to focus on the interests of all creditors and not just U.S. creditors.[268] "To ensure a party's interests are 'sufficiently protected,' the bankruptcy court should balance the relief sought by the foreign representative against the interests of those affected by the relief, without unduly favoring one group of creditors over another."[269]

---

[263] Section 1104(d) applies to the appointment of an examiner under chapter 15 and any examiner appointed is required to comply with the qualification requirements imposed on a trustee by section 322. *See* 11 U.S.C. § 1522(d). Article 19(1) of the Model Law is substantially the same as section 1519(a), except that it does not specifically refer to an examiner. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 19(1).

[264] 11 U.S.C. § 1519(a); *see, e.g.*, *In re* Destinator Techns. Inc., No. 08-11003 (Bankr. D. Del. May 20, 2008) (granting, pursuant to section 1519, a provisional stay of proceedings and all rights and remedies against the foreign debtors and their business and property, a first priority lien on the foreign debtors' U.S. assets in connection with post-petition financing, and provisional application of section 363 and 364 to allow for the sale of the debtors' assets free and clear of liens).

[265] *See* 11 U.S.C. § 1519(b). The Model Law provides that such relief terminates when the petition is "decided upon." *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 19(3).

[266] In *In re Zhejiang Topoint Photovoltaic Co.*, the Bankruptcy Court for the District of New Jersey considered whether a non-creditor was an "interested entity" under section 1522(a). *See In re* Zhejiang Topoint Photovoltaic Co., 2015 Bankr. LEXIS 1636, at *7–17 (Bankr. D.N.J. May 12, 2015). While the bankruptcy court acknowledged that there was "limited case law on the issue of which parties are considered 'other interested entities' under § 1522(a)," it determined that other courts' "seemingly intentional usage of the word, 'persons,' rather than the word, 'creditors,' implies that § 1522(a) is to be construed broadly[.]" *Id.* at *9 (citing 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, 108 (Bankr. S.D.N.Y. 2012); *In re* Int'l Banking Corp. B.S.C., 439 B.R. 614, 627 (Bankr. S.D.N.Y. 2010)). The bankruptcy court also noted that when interpreting "other provisions of the Code in which similar language – particularly, 'party in interest' – is utilized with respect to the issue of standing," other courts have held that the "phrase 'party in interest' is to be 'construed broadly to permit parties affected by a Chapter 11 proceeding to appear and be heard,' and that 'courts must determine on a case by case basis whether the prospective party in interest has a sufficient stake in the proceeding so as to require representation.'" *Id.* at *9–11 (discussing "party in interest" in the context of section 1109(b)) (quoting *In re* Amatex Corp., 755 F.2d 1034, 1042 (3d Cir. 1985) (citing *In re* River Bend-Oxford Assocs., 114 B.R. 111, 114–15 (Bankr. D. Md. 1990) (considering whether a non-creditor was a party in interest for the purposes of section 1121(c))). Ultimately, the bankruptcy court concluded that because the interests of the party in question were "not otherwise being protected by the entities that maintain the direct right to protect said interests, this Court should mold its relief to meet the specific circumstances of this case by granting [the interested party] standing." *Id.* at *16 (internal citations omitted).

[267] *See* 11 U.S.C. § 1522(a).

[268] *See In re* SPhinX, Ltd., 351 B.R. 103, 113 (Bankr. S.D.N.Y. 2006).

[269] *In re* Sivec Srl, 476 B.R. 310, 323 (Bankr. E.D. Okla. 2012).

Provisional relief may be denied where it would interfere with the administration of the foreign main proceeding.[270] Moreover, section 1519 does not provide the court with the authority to enjoin a police or regulatory act of a governmental unit;[271] nor can the court or any administrative agency stay the exercise of any rights that would not be subject to the stay arising under section 362(a) pursuant to section 362(b)(6), (7), (17), or (27) or pursuant to section 362(o).[272] Section 1519(e) provides that the standards, procedures, and limitations applicable to an injunction apply to requests for provisional relief.[273] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[274] Courts have been inconsistent as to whether section 1519(e) applies only to requests for injunctive relief under section 1519[275] and whether an adversary proceeding is required to obtain provisional relief under section 1519.[276]

Courts may condition relief under section 1519 as appropriate, including requiring security or a bond.[277] "Section 1522(b) permits the court to impose

---

[270] *See* 11 U.S.C. § 1519(c); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 19(4).

[271] *See* 11 U.S.C. § 1519(d); *see also In re* Nortel Networks, Inc., 669 F.3d 128, 138–39 (3d Cir. 2011) (holding automatic stay applied to pension fund and trustee of pension plan because neither entity was a governmental unit and, therefore, did not fall within the police power exception of section 362(b)(4)). This provision is not found in the Model Law.

[272] *See* 11 U.S.C. § 1519(f). This provision is not found in the Model Law.

[273] *See id.* § 1519(e). This provision is not found in the Model Law.

[274] Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008); *see also In re* Qimonda AG, 2009 Bankr. LEXIS 2330, at *8–14 (Bankr. E.D. Va. July 16, 2009) (granting injunction to stay actions while petition for recognition was pending having found section 1519(e) was satisfied because an order of recognition was likely to be entered, which would otherwise operate to stay the actions).

[275] *Compare In re* Worldwide Educ. Servs., 494 B.R. 494, 499 (Bankr. C.D. Cal. 2013) (finding that the standard of proof for preliminary injunctive relief applies to all provisional relief requested pursuant to section 1519(e)) *with In re* Pro-Fit Holdings Ltd., 391 B.R. 850, 860 (Bankr. C.D. Cal. 2008) (concluding that section 1519(e) is limited to motions that request injunctive relief and is not applicable to requests for imposition of the automatic stay). The legislative history suggests a reading in line with the *Pro-Fit Holdings* court. *See* H.R. REP. NO. 109-31, pt. 1, at 114 (2005) ("Subsection (e) makes clear that this section contemplates injunctive relief and that such relief is subject to specific rules and a body of jurisprudence.").

[276] *Compare In re Pro-Fit Holdings Ltd*., 391 B.R. at 861 (noting that a request for a stay of execution under section 1519(a)(1) "would require an adversary proceeding[,]" although the imposition of the automatic stay would not) *with In re Worldwide Educ. Servs*., 494 B.R at 499 n.1 ("Since a petition for recognition is not defined as an adversary proceeding under Rule 7001, it and any related requests for provisional relief under Rule 1519 should be treated as contested matters under Rule 9014.") *and In re* Lee, 348 B.R. 799, 802 (Bankr. W.D. Wash. 2006) (noting that requiring an adversary proceeding to obtain an injunction under section 1519(e) would conflict with Rule 1018). Rule 1018 does not include Rule 7001(7) (which provides that a procedure to obtain an injunction must be through an adversary proceeding) as a rule applicable to a case ancillary to a foreign proceeding. *See* FED. R. BANKR. P. 1018 ("[T]he following rules in Part VII apply to all proceedings contesting . . . a chapter 15 petition for recognition . . . : Rules 7005, 7008–7010, 7015, 7016, 7024–7026, 7028–7037, 7052, 7054, 7056 and 7062. The court may direct that other rules in Part VII shall also apply.").

[277] *See* 11 U.S.C. § 1522(b); *see also In re* Millard, 501 B.R. 644, 654 (Bankr. S.D.N.Y. 2013) ("[T]here appears to be no case . . . where a foreign representative was required to post a bond to obtain recognition (or to enjoy the fruits of recognition), and I am not going to do that here either. . . . [I]f this case had been filed

conditions on any discretionary relief that it grants either pre- or post-recognition, which permits the court to achieve an appropriate balance between the interests of creditors and other interested entities, including the debtor."[278] The court may also modify or terminate relief granted under section 1519 at its own behest or at the request of the foreign representative or an entity affected by such relief only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.[279] All in all, section 1522 "gives the bankruptcy court broad latitude to mold relief to meet specific circumstances, including appropriate response if it is shown that the foreign proceeding is seriously and unjustifiably injuring United States creditors."[280]

C. Automatic Relief Upon Recognition of a Foreign Main Proceeding

Entry of an order recognizing a foreign proceeding constitutes "recognition."[281] It does not, however, create an estate for purposes of the Bankruptcy Code.[282] Pursuant to section 1520, upon recognition of a foreign main proceeding only, a number of provisions of the Bankruptcy Code become applicable to the debtor.[283]

---

in chapter 11, an automatic stay would stay judgment enforcement without requiring the debtor to post a bond. And using the bankruptcy system to avoid the need to post a bond is, as Texaco indicates, an appropriate resort to U.S. insolvency law.").

[278] Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (*In re* Vitro, S.A.B. de C.V.), 473 B.R. 117, 121 (Bankr. N.D. Tex. 2012), *aff'd*, 701 F.3d 1031(5th Cir. 2012).

[279] *See* 11 U.S.C. § 1522(a), (c); *see also In re* Nortel Networks Corp., 2013 U.S. Dist. LEXIS 162887, at *12–13 (D. Del. Nov. 15, 2013) (finding bankruptcy court examined the circumstances and concluded that a modification of the automatic stay in a chapter 15 case was not warranted given "a balanc[e] of the hardships [which] . . . clearly rests in favor of the debtors" and determining that even if the interests of "other interested entities" could be sufficiently protected, the bankruptcy court was within its discretion in not making the requested modifications).

[280] H.R. REP. NO. 109-31, pt. 1, at 116 (2005); *see also In re* Tri-Continental Exch. Ltd., 349 B.R. 627, 636–38 (Bankr. E.D. Cal. 2006) ("[T]he court has ample tools for dealing with the manner in which a chapter 15 case is administered.").

[281] *See* 11 U.S.C. § 1517(c).

[282] Section 541(a), which establishes the creation of an estate upon the commencement of a bankruptcy case, does not apply in chapter 15 cases. *See In re* ABC Learning Ctrs. Ltd., 728 F.3d 301, 312 (3d Cir. 2014) (holding that a chapter 15 proceeding does not create a separate bankruptcy estate but rather provides for ancillary proceedings so that a foreign representative need not initiate a new bankruptcy proceeding in the U.S.); *In re* British Am. Ins. Co. Ltd., 488 B.R. 205, 222–23 (Bankr. S.D. Fla. 2013); *In re* Qimonda AG, 482 B.R. 879, 887 (Bankr. E.D. Va. 2012) ("Upon recognition of a foreign main proceeding, an estate is not created, as Section 541 of the Bankruptcy Code is not among the enumerated Sections of the Bankruptcy Code that become operative upon recognition under Section 1520."). In *ABC Learning Centres*, the Third Circuit rejected an argument that all assets of the debtor that were subject to a security interest were not "property of the estate" pursuant to section 541(d) because the debtor allegedly held only legal title to such assets, and thus should not be protected by the automatic stay. *See In re ABC Learning Ctrs. Ltd*., 728 F.3d at 313. The *ABC Learning Centres* court found that the debtor retained an equitable interest in the encumbered assets because the debtor would receive any excess proceeds from a sale (even though none were expected) and retained the right of redemption under Australia's Corporations Act. *See id*. at 313–14.

[283] *See* 11 U.S.C. § 1520(a); *see, e.g.*, *In re* Rede Energia S.A., 515 B.R. 69, 89 (Bankr. S.D.N.Y. 2014) ("If a foreign case is recognized as a foreign main proceeding, . . . certain relief automatically goes into effect[.]").

First, sections 361 and 362 apply with respect to the debtor and the property of the debtor within the territorial jurisdiction of the United States.[284] "Within the territorial jurisdiction of the United States,"[285] when used with reference to property of a debtor, refers to tangible property located within the territory of the United States and intangible property deemed under applicable nonbankruptcy law to be located within that territory, including property subject to attachment or garnishment that may be seized or garnished by an action in a federal or state court in the United States.[286]

Section 361 provides the requirements for adequate protection under sections 362, 363, or 364. Section 362 describes the parameters of the automatic stay.[287] As the Fourth Circuit has noted:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from its creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.[288]

The purpose of the automatic stay is three-fold: (1) to prevent certain creditors from gaining a preference for their claims against the debtor; (2) to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and (3) in general, to avoid interference with the orderly liquidation or

---

[284] *See* 11 U.S.C. § 1520(a)(1). The Model Law includes similar provisions to section 1520(a) except that the Model Law does not limit relief to the territorial jurisdiction of the country considering the petition for recognition. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 20(1). This limitation was added to chapter 15 "because the United States, like some other countries, asserts insolvency jurisdiction over property outside its territorial limits under appropriate circumstances. Thus a limiting phrase is useful where the Model Law and this chapter intend to refer only to property within the territory of the enacting state." H.R. REP. NO. 109-31, pt. 1, at 107 (2005).

[285] H.R. REP. NO. 109-31, pt. 1, at 107 (2005).

[286] *See* 11 U.S.C. § 1502(8).

[287] *See id.* § 362; *In re* Britannia Bulk Holdings, Inc. Sec. Litig., 2009 U.S. Dist. LEXIS 96525, at *3–4 (S.D.N.Y. Oct. 19, 2009) (finding that recognition of foreign proceeding automatically stayed all pending litigation against debtor pursuant to section 362); Zeeco, Inc. v. Sivec Srl, 2012 U.S. Dist. LEXIS 2557, at *5–6 (E.D. Okla. Jan. 9, 2012) (stay imposed by recognition of Italian proceedings lifted to allow case to proceed, but court refused to hold claim resulting from case was entitled to priority in the absence of such a finding by the Italian court). In *Coinlab Inc. v. Mt Gox KK,* the District Court for the Western District of Washington found that extending the automatic stay to a solvent parent and codefendant was appropriate "to provide fairness to all Parties and promote efficiency." 513 B.R. 576, 578 (Bankr. W.D. Wash. 2014). In the Ninth Circuit, the district court has "the inherent power to control its own docket and calendar . . . [and] may stay an action 'pending resolution of independent proceedings which bear upon the case' if it finds it is efficient for its own docket and the fairest course for the parties." *Id*. (citations omitted). After weighing competing interests affected by the grant of a stay, the court held that refusing to do so "may result in inconsistent obligations for Defendants" and "will unnecessarily burden the docket." *Id*. at 579.

[288] Grady v. A.H. Robins Co., 839 F.2d 198, 200 (4th Cir. 1988) (quoting H.R. REP. NO. 95-595, pt. 1, at 340–41 (1977)).

rehabilitation of the debtor.[289] In a chapter 15 case, the stay is triggered automatically, not by the filing of a petition, but upon entry of a recognition order under section 1520.[290] Absent exigent circumstances, the stay is normally coterminous with the stay in the corresponding foreign proceeding.[291] However, the close of a foreign proceeding does not prevent a foreign representative from enforcing a chapter 15 automatic stay in all scenarios. For instance, a foreign representative would likely still be able to enjoin an entity that violated a stay order prior to the close of the foreign proceeding. Additionally, relief may be available after close of the foreign proceeding under section 1507, which allows a court to grant additional assistance to foreign representatives.[292]

Applications of section 1520(a)(1) generally reject an extraterritorial interpretation that would stay miscellaneous foreign litigation or arbitration proceedings having no meaningful nexus to property of the foreign debtor located in the United States.[293] According to the Bankruptcy Court for the Southern District of New York:

> The best reading of section 1520(a)(1), and one that is consistent with the plain meaning of the words as written, is that the stay arising in a chapter 15 case upon recognition of a foreign main proceeding applies to the debtor within the United States for all purposes and may extend to the debtor as to proceedings in other jurisdictions for purposes of protecting property of the debtor that is within the territorial jurisdiction of the United States. This more limited extraterritorial application of the automatic stay to the debtor entity fulfills the cross-border purposes of chapter 15 within the United States without broadly imposing a stay on all actions or proceedings against the debtor including those lacking any proper connection to the chapter 15 case.[294]

---

[289] *See* Borman v. Raymark Indus., Inc. 946 F.2d 1031, 1036 (3d Cir. 1991) (quoting Ass'n of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446, 448 (3d Cir. 1982)).

[290] *See* 11 U.S.C. § 1520(a); *see also In re* Singer, 205 B.R. 355, 357 (S.D.N.Y. 1997) ("Due process is satisfied because creditors have an opportunity to obtain relief from the automatic stay in the bankruptcy court."); *In re* Pro-Fit Holdings Ltd., 391 B.R. 850, 864 (Bankr. C.D. Cal. 2008).

[291] *See In re* Daewoo Logistics Corp., 461 B.R. 175, 178 (Bankr. S.D.N.Y. 2011).

[292] *See id.* at 180.

[293] *See In re* JSC BTA Bank, 434 B.R. 334, 337 (Bankr. S.D.N.Y. Aug. 23, 2010) (finding that the automatic stay does not operate as a bar to continuation of proceedings against the debtor in a foreign jurisdiction "based on the need to respect the international aspects of these Bankruptcy Code provisions, the limited and specialized definition of the term 'debtor' when used in chapter 15, and the fact that cases under chapter 15 are ancillary in nature and do not create an estate within the meaning of section 541 of the Bankruptcy Code").

[294] *Id*. at 343; *see also In re Pro-Fit Holdings Ltd*., 391 B.R. at 863 (distinguishing in dicta between the automatic stay in a plenary case, which applies worldwide, and the automatic stay arising from a recognition order in a chapter 15 case, which applies only within the territorial jurisdiction of the United States).

Second, upon recognition of a foreign main proceeding, "sections 363, 549 and 552 apply to a transfer of an interest of the debtor in property within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate[.]"[295] Section 363 deals with the use, sale or lease of the debtor's property.[296] Section 549 authorizes the avoidance of transfers that are (1)(a) authorized solely by section 303(f) or 542 and (b) occur after commencement of the case;[297] or (2) that are not authorized by the Bankruptcy Code or the court, and section 552 explains when property acquired by the debtor post-petition may be subject to a pre-petition security interest.[298] "[S]ection 363 and, by implication, its standards are applicable to the transfer of assets located in the United States by a foreign debtor in a foreign main proceeding of assets outside the ordinary course of business."[299] In addition, pursuant to section 363, cash collateral cannot be used by a debtor without the permission of any creditor holding a security interest in such cash.[300]

In *Krys v. Farnum Place, LLC*, the Second Circuit considered whether the sale of a chapter 15 debtor's claim involved "a transfer of an interest of the debtor in property within the territorial jurisdiction of the United States" and, thus, required the bankruptcy court to conduct a review of the sale under section 363.[301] In 2009, Fairfield Sentry Limited ("Sentry") entered liquidation proceedings in the British Virgin Islands.[302] Among Sentry's assets was a $230 million claim (the "SIPA Claim") against Bernard L. Madoff Investment Securities LLC ("BLMIS"), which had been placed into liquidation by the U.S. Bankruptcy Court under the Securities Investor Protection Act.[303] Three days after Kenneth Krys, the liquidator in Sentry's BVI proceeding, agreed to sell the SIPA Claim to Farnum Place, LLC ("Farnum") for 32.125% of the claim's allowed amount, the BLMIS trustee entered into a

---

[295] 11 U.S.C. § 1520(a)(2). "Subsection (a)(2), by its reference to sections 363 and 552 adds to the powers of a foreign representative of a foreign main proceeding an automatic right to operate the debtor's business and exercise the power of a trustee under sections 363 and 542, unless the court orders otherwise. A foreign representative of a foreign main proceeding may need to continue a business operation to maintain value and granting that authority automatically will eliminate the risk of delay. If the court is uncomfortable about this authority in a particular situation, it can 'order otherwise' as part of the order granting recognition." H.R. REP. NO. 109-31, pt. 1, at 115 (2005).

[296] *See, e.g.*, *In re* Elpida Memory, Inc., 2012 Bankr. LEXIS 5367, at *23 (Bankr. D. Del. Nov. 16, 2012) (holding that in a global transaction approved by the court in the foreign main proceeding involving the sale of assets located in the United States, the bankruptcy court will apply the same standard as it would to a 363 sale, requiring an evidentiary showing that the transaction is a sound exercise of the foreign representative's business judgment).

[297] The "commencement of the case" has been held to mean "the date of filing in the United States Bankruptcy Court of a petition for recognition of the foreign insolvency proceeding." *In re* Loy, 432 B.R. 551, 563 (E.D. Va. 2010) (finding that section 1504 provides that a chapter 15 case is commenced with the filing of the petition for recognition).

[298] *See* 11 U.S.C. §§ 363, 549, 552.

[299] *In re Elpida Memory, Inc*., 2012 Bankr. LEXIS 5367, at *18.

[300] *See In re* Tri-Continental Exch. Ltd., 349 B.R. 627, 639 (Bankr. E.D. Cal. 2006).

[301] Krys v. Farnum Place, LLC (*In re* Fairfield Sentry Ltd.), 768 F.3d 239, 241 (2d Cir. 2014) (citing 11 U.S.C. § 1520(a)(2)).

[302] *See id.*

[303] *See id.*

settlement agreement with an unrelated investor that called for a $5 billion payment to the BLMIS trustee.[304] This $5 billion influx increased the value of the SIPA Claim "from 32% to more than 50% of the $230 million allowed amount . . . (an increase of approximately $40 million)."[305] The BVI court ultimately approved the sale of the SIPA Claim to Farnum notwithstanding Krys's attempt to unwind the transaction.[306] The BVI court directed Krys "'to take the necessary steps to bring before the US Bankruptcy Court the question of approval (or non-approval) by that Court of the [sale of the SIPA Claim].' . . . [T]he BVI Court made 'clear that it must be done in such a way that the US Bankruptcy Court is presented with a choice whether or not to approve it.'"[307]

However, the Bankruptcy Court for the Southern District of New York denied Krys' application to review the sale under section 363.[308] The bankruptcy court found that "a plenary section 363 review . . . is not warranted . . . because the Sale does not involve the transfer of an interest in property within the United States[.]"[309] After the district court affirmed the bankruptcy court's decision,[310] Krys appealed to the Second Circuit, which reversed.[311]

The Second Circuit concluded that the SIPA Claim was located "within the territorial jurisdiction of the United States[,]"[312] as defined in section 1502(8), because:

> The SIPA Claim . . . is subject to attachment or garnishment and may be properly seized by an action in a Federal or State court in the United States. Under New York law, "any property which could

---

[304] *See id.* at 242.

[305] *Id.*

[306] *See id.* ("Krys asked the BVI Court not to approve the transfer . . . at the bid price because, given the sudden increase in the value of the SIPA Claim, it was not in the best interests of the Sentry estate. Krys also argued to the BVI Court that the Trade Confirmation required U.S. bankruptcy court approval pursuant to 11 U.S.C. §§ 1520(a)(2) and 363.").

[307] *Id.* at 242–43.

[308] *In re* Fairfield Sentry Ltd., 484 B.R. 615, 617–618 (Bankr. S.D.N.Y. 2013) (characterizing the application for section 363 review as "seller's remorse" and a "last-ditch effort" to undo the transaction).

[309] *Id.* at 618. The bankruptcy court also held that "comity dictates that [the] Court defer to the BVI Judgment. Failing to grant such comity to the BVI Judgment under these circumstances necessarily undermines the equitable and orderly distribution of a debtor's property by transforming a domestic court into a foreign appellate court where creditors are always afforded the proverbial second bite at the apple." *Id.* at 628 (internal quotations omitted).

[310] *See In re Fairfield Sentry, Ltd.*, 2013 U.S. Dist. LEXIS 188911, at *1–2 (S.D.N.Y. July 3, 2013) ("It is not clear that Section 363 . . . applies . . . because [i]t is questionable as to whether there has been 'a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States.' However, even if Section 363 applies, . . . [the bankruptcy court's] denial of the foreign representative's challenge was proper. Courts should be 'loath to interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence.'") (quoting *In re* Glob. Crossing Ltd., 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003)).

[311] *See* Krys v. Farnum Place, LLC (*In re* Fairfield Sentry Ltd.) 768 F.3d 239, 241 (2d Cir. 2014); *see also* Kenneth Krys v. Farnum Place, LLC (*In re* Fairfield Sentry Ltd.), No. 13-3000-bk (2d Cir. Jan. 13, 2015) [ECF No. 102] (denying petition for rehearing *en banc*).

[312] *Krys,* 768 F.3d at 241.

> be assigned or transferred" is subject to attachment and garnishment. For attachment purposes, with respect to intangible property that has as its subject a legal obligation to perform, the situs is the location of the party of whom that performance is required pursuant to that obligation. . . . [T]he SIPA Trustee is statutorily obligated to distribute to Sentry its pro rata share of the recovered assets. Therefore the situs of the SIPA Claim is the location of the SIPA Trustee, which is New York.[313]

The Second Circuit also found that the bankruptcy court erred when it "held that the role of comity, codified in Chapter 15, dictates deference to the BVI Court's judgment approving the sale."[314] While the Second Circuit acknowledged the important role that comity plays in chapter 15 cases,[315] it pointed out that chapter 15 "impose[s] certain requirements and considerations that act as a brake or limitation on comity. The express statutory command that, in a Chapter 15 ancillary proceeding, the requirements of section 363 'apply . . . *to the same extent*' as in Chapter 7 or 11 proceedings is one such limitation."[316] Because it found the language of section 1520(a)(2) to be "plain," the Second Circuit concluded that the bankruptcy court was "*required* to conduct a section 363 review when the debtor seeks a transfer of an interest in property within the territorial jurisdiction of the United States."[317] The court also noted that it was "not apparent at all that the BVI Court even expects or desires deference in this instance."[318] Because (i) the sale of the SIPA Claim constituted a "transfer of an interest of the debtor in property within the territorial jurisdiction of the United States"[319] and (ii) the plain language of section 1520(a)(2) required that the bankruptcy court conduct a section 363 review, the Second Circuit reversed the district court's order and remanded the case with instructions to the bankruptcy court to conduct such a review.[320]

Third, pursuant to subsection (a)(3) of section 1520, upon recognition of a foreign main proceeding, unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and

---

[313] *Id.* at 244–45.

[314] *Id.* at 245.

[315] *See id.* ("Congress specifically directed courts, '[i]n interpreting [Chapter 15], . . . [to] consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.'") (quoting 11 U.S.C. § 1508 (2012)).

[316] *Id.* at 245–46 (quoting 11 U.S.C. § 1520(a)(2)); Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB de C.V. (*In re* Vitro SAB de C.V.), 701 F.3d 1031, 1054 (5th Cir. 2012)).

[317] *In re Fairfield Sentry Ltd.,* 768 F.3d at 246 ("'[W]hen a statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'") (quoting Sebelius v. Cloer, 2013 U.S. LEXIS 3840, at *22 (2013)).

[318] *Id.* (noting that the BVI Court expressly declined to rule on whether sale required approval under section 363).

[319] *Id.* at 241 (quoting 11 U.S.C. § 1520(a)(2)).

[320] *See id.* at 246–47.

powers of a trustee under and to the extent provided in sections 363 and 552.[321] Finally, subsection (a)(4) provides that upon recognition of a foreign main proceeding, section 552 will apply to property of the debtor that is within the territorial jurisdiction of the United States.[322]

The drafters of the Model Law considered the stay of actions and enforcement proceedings "necessary to provide 'breathing space' until appropriate measures are taken for reorganization or fair liquidation of the assets of the debtor," and the suspension on transfers "necessary because in a modern, globalized economic system it is possible for multinational debtors to move money and property across boundaries quickly."[323] The UNCITRAL Guide explains that:

> The automatic consequences envisaged in article 20 are necessary to allow steps to be taken to organize an orderly and fair cross-border insolvency proceeding. In order to achieve those benefits, it is justified to impose on the insolvent debtor the consequences of article 20 in the enacting State (i.e., the country where it maintains a limited business presence), even if the State where the centre of the debtor's main interests is situated poses different (possibly less stringent) conditions for the commencement of insolvency proceedings or even if the automatic effects of the insolvency proceeding in the country of origin are different from the effects of article 20 in the enacting State.[324]

Section 1520(a) does not affect (1) the right to commence an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor or (2) the right of a foreign representative or an entity to file a petition commencing a case under the Bankruptcy Code or the right of any party to file claims or take other proper actions in such a case.[325]

D. Discretionary Relief Upon Recognition of a Foreign Main Proceeding or a Foreign Nonmain Proceeding

---

[321] *See* 11 U.S.C. § 1520(a)(3). This may be a typographical error as the legislative history indicates that section 542 was intended instead of section 552. *See In re* Tien Chiang, 437 B.R. 397, 402 n.13 (Bankr. C.D. Cal. 2010) (citing H.R. REP. NO. 109-31, pt. 1, at 115 (2005)). The court may subject the operation of the debtor's business under section 1520(a)(3) to conditions it considers appropriate, including requiring security or a bond. *See* 11 U.S.C. § 1522(b).

[322] *See* 11 U.S.C. § 1520(a)(4); 11 U.S.C. § 552(a) ("Except as provided in subsection (b) of [11 U.S.C. § 552], property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.").

[323] UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 37.

[324] *Id*. at Part Two, ¶ 178.

[325] *See* 11 U.S.C. §§ 1520(b)–(c); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 20(3)–(4).

Pursuant to section 1521, additional "appropriate" relief may be granted at the request of the foreign representative by the court upon recognition of a foreign proceeding (main or nonmain) where "necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors."[326] Relief under section 1521 will not be granted in the absence of a successful petition for recognition.[327] Such discretionary relief includes:[328]

> 1. staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations, or liabilities to the extent not already stayed by section 1520(a);[329]
> 2. staying execution against the debtor's assets to the extent not already stayed under section 1520(a);[330]

---

[326] 11 U.S.C. § 1521(a); *see also* Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB de C.V. (*In re* Vitro SAB de C.V.), 701 F.3d 1031, 1061–69 (5th Cir. 2012) (affirming denial of motion to enforce Mexican bankruptcy plan in the United States where enforcement would not sufficiently protect the interests of creditors in the United States or provide an appropriate balance between the interests of creditors and the debtor and its non-debtor subsidiaries where plan provided for releases of the debtor's non-debtor subsidiaries); *In re* Sivec Srl, 476 B.R. 310, 323 (Bankr. E.D. Okla. 2012) ("[A] bankruptcy court's authority to grant 'any appropriate relief' under § 1521 is 'exceedingly broad.'"); *In re* Atlas Shipping A/S, 404 B.R. 726, 739 (Bankr. S.D.N.Y. 2009) ("The discretion that is granted is 'exceedingly broad' since a court may grant 'any appropriate relief' that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors."). Article 21(1) of the Model Law is substantially the same as section 1521(a), except for the exceptions included in section 1521(a)(7). *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 21(1).

[327] *See* Orchard Enter. NY, Inc. v. Megabop Records Ltd., 2011 U.S. Dist. LEXIS 22896, at *9 (S.D.N.Y. March 4, 2011) (denying stay of pending U.S. case where petition for recognition did not comport with strict statutory requirements of chapter 15); Reserve Int'l Liquidity Fund, Ltd. v. Caxton Int'l Ltd., 2010 U.S. Dist. LEXIS 42216, at *18 (S.D.N.Y. Apr. 29, 2010) (refusing to acknowledge liquidator of fund in BVI liquidation proceeding as being in control of fund (and thereby able to intervene in U.S. case on behalf of fund) before a petition for recognition is granted because "such recognition would short-circuit any bankruptcy court determination as to whether the BVI liquidation proceeding should be recognized under Chapter 15"); Andrus v. Digital Fairway Corp., 2009 U.S. Dist. LEXIS 54800, at *8–9 (N.D. Tex. June 26, 2009) (denying motion to stay proceedings while a bankruptcy hearing in Canada proceeded because the fact that there "might be a Chapter 15" proceeding and "there then *might* be a request for this Court to suspend its proceedings" provided inadequate cause for a stay); United States v. J.A. Jones Constr. Grp., LLC, 333 B.R. 637, 639 (E.D.N.Y. 2005) (finding court had "no authority" to consider stay request made by an interim receiver appointed by a Canadian court "[i]n the absence of recognition under chapter 15").

[328] *See* 11 U.S.C. § 1521(a).

[329] *See id.* § 1521(a)(1); *see also* Capitaliza-T Sociedad De Responsabilidad Limitada De Capital Variable v. Wachovia Bank of Del. N.A., 2011 U.S. Dist. LEXIS 146599, at *35 (D. Del. Dec. 20, 2011) (granting motion for leave to file a second amended complaint but staying further litigation pending resolution of the debtor's Mexican bankruptcy proceeding following bankruptcy court's order recognizing the Mexican proceeding as a foreign main proceeding); *In re* Qimonda Ag, 482 B.R. 879, 890 (Bankr. E.D. Va. 2012) (applying section 1521(a)(1) to stay pre-petition claims).

[330] *See* 11 U.S.C. § 1521(a)(2); *see also In re Qimonda Ag*, 482 B.R. at 899 (finding, pursuant to section 1521(a)(2), that creditor could not collect any judgment as to assets of the debtor located within the territorial jurisdiction of the United States, absent further order of the court).

> 3. suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent not already suspended under section 1520(a);[331]
> 4. providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities;[332]
> 5. entrusting[333] the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;[334]

---

[331] *See* 11 U.S.C. § 1521(a)(3).

[332] *See id.* § 1521(a)(4); *see also* USCO S.P.A. v. ValuePart, Inc., 2015 U.S. Dist. LEXIS 99117, at *13 (W.D. Tenn. July 29, 2015) ("[D]iscovery pursuant to 11 U.S.C. § 1521(a)(4) can only be obtained in the bankruptcy proceedings by request of the debtor's foreign representative."). Requests for discovery in chapter 15 need not concern assets in the U.S. to be permissible under section 1521(a)(4). *See In re* Millenium Glob. Emerging Credit Master Fund Ltd., 471 B.R. 342, 347 (Bankr. S.D.N.Y. 2012). While section 1521(a)(4) expressly governs a foreign representative's discovery rights, Rule 2004 "complements those rights, and may provide a procedural mechanism to obtain a subpoena under Rule 9016 . . . , but cannot expand those rights beyond what the statute and the order issued pursuant to the statute permit." *In re* Glitnir banki hf, 2011 Bankr. LEXIS 3296, at *21–22 n.15 (Bankr. S.D.N.Y. Aug. 19, 2011) (granting motion to quash document requests directed at personal financial information of debtor's owners and finding that section 1521(a)(4) does not authorize the "fishing expedition" often associated with Rule 2004). However, while Rule 2004 relates to matters that may affect a debtor's estate, no estate is created in a chapter 15 case. Although Judge Gropper did not reach an affirmative decision on the issue of whether Rule 2004 is applicable in a chapter 15 case, he did note that "one of the main purposes of chapter 15 is to assist a foreign representative in the administration of the foreign estate, . . . which would militate in favor of granting a foreign representative broad discovery rights using the full scope of Rule 2004" and that there is no authority to suggest that chapter 15 was intended to limit the discovery available to foreign representatives. *In re Millenium Glob. Emerging Credit Master Fund Ltd.*, 471 B.R. at 347.

[333] "Entrustment" under section 1521(a)(5) does not authorize the foreign representative to distribute assets to the debtor's creditors. Instead, section 1521(b) provides that a foreign representative may be entrusted with "the distribution of all or part of the debtor's assets located in the United States" where the interests of U.S. creditors are sufficiently protected. 11 U.S.C. § 1521(b); *see also In re* Atlas Shipping A/S, 404 B.R. 726, 740–42 (Bankr. S.D.N.Y. 2009) (granting turnover of garnished funds to foreign representative because creditors were sufficiently protected where they could assert their rights to such funds in the bankruptcy court in Denmark).

[334] *See* 11 U.S.C. § 1521(a)(5); *see also In re* Fairfield Sentry Ltd., 458 B.R. 665, 678 n.2 (S.D.N.Y. 2011) ("The Plaintiffs' suggestion that the Chapter 15 cases themselves satisfy the requirements of section 1521(a)(5) is incorrect. For one thing, the actions are intangible assets, which are located where the plaintiff is domiciled. Here, Plaintiffs are domiciled in the BVI, so the intangible assets are located there. For another thing, this is not a case where Plaintiffs are seeking assets from a United States domiciliary or involving assets located within the United States. The only connection to the United States is the filing of the lawsuits here, and the bankruptcy court does not have summary jurisdiction to enforce a chose in action against the bankrupt's obligor, even when the bankrupt's rights seem clear. Thus, Plaintiffs may not manufacture jurisdiction by the expedient of filing a lawsuit in the United States.") (internal quotations and citations omitted); *In re Atlas Shipping A/S*, 404 B.R. at 740 ("Incident to the task of administering and realizing assets of the debtor within the U.S. is the need to obtain affirmative control over such assets. It may be necessary to obtain turnover of assets in the hands of third parties.").

Several courts have considered whether sections 542 and 543, both of which deal with the turnover of property, are applicable in a chapter 15 proceeding. *See, e.g.*, *In re* Lee, 472 B.R. 156, 178, 182 (Bankr. D. Mass. 2012) (finding that neither section 541(a) nor section 541(c) are applicable in determining property of the foreign debtor's estate, but finding burden of proof contained in section 542 was applicable in

6. extending relief granted under section 1519(a);[335] and
7. granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).[336]

---

determining whether the foreign representatives had satisfied their burden in establishing their entitlement to turnover under section 1521(a)(5) and (b)); *In re Atlas Shipping A/S*, 404 B.R. at 746 (holding that section 543 is inapplicable in chapter 15, as turnover is provided for under sections 1521(a) and (b)); *but see In re* AJW Offshore, Ltd., 488 B.R. 551, 559 (Bankr. E.D.N.Y. 2013) ("The Bankruptcy Code does not prohibit the court from authorizing the foreign representative to employ turnover powers available under §§ 542 and 543."); *In re* ABC Learning Ctrs. Ltd., 445 B.R. 318, 341 (Bankr. D. Del. 2010) (allowing without discussion the right to seek turnover under sections 542 and 543). In *AJW Offshore*, the court permitted the foreign representative to employ turnover powers under sections 542 and 543, but noted that access to turnover powers under section 1521(a)(7) "is conditioned upon sufficient protections being provided to creditors and other interested parties under § 1522, which requires a balancing of the respective parties' interests." *In re AJW Offshore, Ltd*., 488 B.R. at 559.

[335] *See* 11 U.S.C. § 1521(a)(6).

[336] *See id.* § 1521(a)(7); *see also* Hosking v. TPG Capital Mgmt., L.P. (*In re* Hellas Telecomms. (Lux.) II SCA), 535 B.R. 543, 587 (Bankr. S.D.N.Y. 2015) (holding that plaintiffs' unjust enrichment claim was not preempted by section 1521(a)(7) because such claim "is not identical to an avoidance action, particularly an avoidance action authorized by chapter 5 of the Bankruptcy Code, but rather is a 'standard common law' claim that 'exist[s] independently of the bankruptcy'") (quoting *In re Fairfield Sentry Ltd.*, 458 B.R. at 684); Awal Bank, BSC v. HSBC Bank USA (*In re* Awal Bank, BSC), 455 B.R. 73, 86–87 (Bankr. S.D.N.Y. 2011) (holding that avoidance power relief under section 553 relating to setoff is not prohibited as it is not explicitly included in section 1521(a)(7)'s exclusion and provides for recovery of property, not just the avoidance of a transfer); *In re* Fairfield Sentry Ltd., 452 B.R. 52, 62–63 (Bankr. S.D.N.Y. 2011) (finding that the tolling extension under section 108 was available under section 1521(a)(7) because it "will foster the objectives of chapter 15 by facilitating the duties of the Foreign Representatives, who are 'entrust[ed] [with] the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States,' to comply procedurally in pursuing and defending substantial litigation within the United States" and holding that the chapter 15 recognition date is the date of the "order for relief" for purposes of section 108); *In re* Qimonda AG, 2009 Bankr. LEXIS 4410, at *3 (Bankr. E.D. Va. July 22, 2009) (finding sections 305–307, 342, 345, 349, 350, 364–366, 503, 504, 546, 551, and 558 applicable in a chapter 15 proceeding pursuant to section 1521(a)).

The sections excluded in section 1521(a)(7) are often referred to as "'avoidance powers'—a trustee's powers to avoid the transfer of debtor property that would deplete the debtor's estate at the expense of creditors." Tacon v. Petroquest Res. Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 323 (5th Cir. 2010); *see also In re Hellas Telecomms. (Lux.) II SCA*, 535 B.R. at 586 ("[A] foreign representative may obtain relief available to a trustee under the Bankruptcy Code except for the relief available under chapter 5's avoidance provisions."); *In re Hellas Telcomms. (Lux.) II SCA*, 524 B.R. at 522–23 ("The parties agree that the Plaintiffs, as foreign representatives in the Debtor's chapter 15 proceeding, do not have standing to assert Count I if the Plaintiffs need to rely on section 544 to provide that standing because section 1521(a)(7) of the Bankruptcy Code does not permit a foreign representative to utilize section 544 to gain standing in a chapter 15 case."). Avoidance actions under U.S. law are excluded from chapter 15 ancillary proceedings, but may be brought in a chapter 7 or 11 proceeding pursuant to section 1523(a). *See In re Condor Ins. Ltd*., 601 F.3d at 323; *see also In re Hellas Telecomms. (Lux.) II SCA*, 535 B.R. at 586 ("[T]he U.S. prohibits foreign representatives of ancillary chapter 15 cases from bringing avoidance actions under U.S. law, but permits foreign representatives of chapter 15 cases who have filed a corresponding plenary chapter 7 or 11 case to bring such claims."); Barnet v. Drawbridge Special Opportunities Fund LP, 2014 U.S. Dist. LEXIS 124410, at *41 (S.D.N.Y. Sept. 5, 2014) ("[S]ection 1521(a)(7) of the Bankruptcy Code expressly precludes a court from granting for a foreign representative 'relief that may be available to a trustee . . . under section . . . 544 . . . .' In the context of a grant of recognition of a foreign proceeding under Chapter 15, a foreign representative has standing to initiate a fraudulent transfer action only 'in a case concerning the debtor pending under another chapter of [Title 11] . . . .' Thus, with this path statutorily foreclosed, the Liquidators brought their fraudulent transfer claim under the NYDCL, raising the question of whether the Liquidators

The list contained in section 1521 is not exhaustive and additional relief may also be granted.[337] However, some courts have held that such additional relief is limited to relief previously provided under section 304.[338] As discussed below, broader relief may also be available under section 1507.[339]

Upon recognition of any foreign proceeding, pursuant to section 1521, the court may also, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.[340] Relief under section 1521 will *only* be granted if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.[341]

---

have standing to bring such a claim under New York law.") (quoting 11 U.S.C. §§ 1521(a)(7), 1523); *In re Fairfield Sentry*, 458 B.R. at 679–80 ("A foreign representative is only permitted U.S.-law avoidance powers when he commences a plenary bankruptcy case within a Chapter 15 case. In such a case, the application of United States law, which ordinarily applies universally, is limited to assets 'within the territorial jurisdiction of the United States.'") (quoting 11 U.S.C. § 1528). However, the Fifth Circuit has held that section 1521(a)(7) does not preclude a foreign representative from bringing an avoidance action under applicable foreign law. *See In re Condor Ins. Ltd.*, 601 F.3d at 324 ("[S]ection 1521(a)(7) does not exclude avoidance actions under foreign law."); *but see In re Atlas Shipping A/S*, 404 B.R. at 744 ("[A]bsent a clear statutory directive, it is unclear whether chapter 15's replacement of § 304 precludes a foreign representative from bringing an avoidance action under foreign law."); *In re Fairfield Sentry*, 458 B.R. at 681 (distinguishing *In re Condor Ins. Ltd.* on the grounds that the foreign debtor in that case allegedly fraudulently transferred $313 million in assets to an affiliate with U.S. locations and, therefore, the assets claimed were located within the territorial jurisdiction of the United States).

[337] *See* UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 189 ("[T]he list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case."); *see, e.g.*, *In re* Rede Energia S.A., 515 B.R. 69, 93 (Bankr. S.D.N.Y. 2014) (granting the foreign representative's "requests for an order (i) enforcing a foreign confirmation order, including the request for an injunction of acts in contravention of such order, and (ii) directing the Indenture Trustee and [Depository Trustee Company] to take steps to assign [certain notes] and make payments to the Noteholders").

[338] *See, e.g.*, Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB de C.V. (*In re* Vitro SAB de C.V.), 701 F.3d 1031, 1056–57 (5th Cir. 2012).

[339] *Infra* section E.

[340] *See* 11 U.S.C. § 1521(b); *In re* Artimm, S.r.l., 335 B.R. 149, 160 (Bankr. C.D. Cal. 2005) (describing "sufficient protection" as embodying three basic principles: "the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law"). Article 21(2) of the Model Law is substantially the same except that it requires creditors be "adequately protected" instead of "sufficiently protected." *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 21(2). This change was made "to avoid confusion with a very specialized legal term in United States bankruptcy, 'adequate protection.'" H.R. REP. NO. 109-31, pt. 1, at 115 (2005).

[341] *See* 11 U.S.C. § 1522(a); *see also In re* Petroforte Brasileiro De Petroleo Ltda, 530 B.R. 503, 514 (Bankr. S.D. Fla. 2015) ("[W]here the primary purpose of the chapter 15 case is to conduct discovery, the Court finds that section 1522(a) requires this Court to balance the interests of the Trustee in obtaining this secret discovery against the due process rights of the Targets."); *In re* Grant Forest Prods., 440 B.R. 616, 621 (Bankr. D. Del. 2010) (finding section 1522 satisfied where order would assist in efficient administration of the cross-border proceeding and would not harm the interests of the debtors or their creditors); *In re Tri-Continental Exch.*, 349 B.R. at 637 ("Standards that inform the analysis of § 1522 protective measures in

In *Jaffe v. Samsung Electronics Co.*, the Fourth Circuit heard a chapter 15 case involving Qimonda AG, a semiconductor manufacturer that had filed for insolvency in Germany.[342] Qimonda owned about 4,000 U.S. patents that were subject to cross-license agreements with Qimonda's competitors.[343] The insolvency administrator appointed in the German proceeding filed an application under chapter 15 for recognition of the German insolvency proceeding as a foreign main proceeding.[344] Thereafter, the administrator indicated that he intended to re-license Qimonda's patents and replace paid for in-kind cross-licenses with licenses paid for with cash through royalties.[345] The bankruptcy court granted recognition and discretionary relief under section 1521(a)(5) but conditioned the latter, pursuant to section 1522(b), with the requirement that the administrator afford the licensees of Qimonda's U.S. patents the treatment they would have received in the U.S. under section 365(n), which limits a debtor's ability unilaterally to reject licenses to the debtor's intellectual property by permitting licensees the option to retain their license rights.[346] The bankruptcy court balanced the interests of the estate with the interests of the licensees of U.S. patents and determined that section 365(n) was necessary to ensure the licensees were "sufficiently protected" pursuant to section 1522(a), even where such protections were not found under German law, because the existing licensees had already made very substantial investments in research and manufacturing facilities in the U.S. in reliance upon the existing licenses.[347] The bankruptcy court also found that unilateral cancellation of the U.S. licenses "would be manifestly contrary to the public policy of the United States," under section 1506.[348]

The Fourth Circuit affirmed the bankruptcy court's ruling on direct appeal. Informed by the UNCITRAL Guide, the court rejected the administrator's argument that section 1506's public policy exception forecloses use of a balancing analysis under section 1522.[349] The Fourth Circuit held that the lower court correctly

---

connection with discretionary relief emphasize the need to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another."); UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 196 ("The idea underlying article 22 [which is substantially the same as section 1522] is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief. This balance is essential to achieve the objectives of cross-border insolvency legislation."). Article 22(1) of the Model Law is substantially the same except that it requires creditors be "adequately protected" instead of "sufficiently protected." *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 22(1).

[342] Jaffe v. Samsung Elecs. Co., 737 F.3d 14, 17–18 (4th Cir. 2013).

[343] *Id.*

[344] *Id.*

[345] *Id.*

[346] *Id.*

[347] *Id.* at 18.

[348] *Id*. (recognizing that "a fundamental U.S. public policy promoting technological innovation" would be undermined if section 365(n) was not applied).

[349] *Id*. at 29 ("Chapter 15 does not require a U.S. bankruptcy court, in considering a foreign representative's request for discretionary relief under § 1521, to blind itself to the costs that awarding such

interpreted section 1522(a)'s sufficient protection requirement "as requiring a particularized balancing analysis that considers the 'interests of the creditors and other interested entities, including the debtor,' . . . [and] a weighing of the interests of the foreign representative (the debtor) in receiving the requested relief against the competing interests of those who would be adversely affected by the grant of such relief."[350] The court also noted that section 1506 is "an additional, more general protection of U.S. interests that may be evaluated apart from the particularized analysis of § 1522(a)."[351] In October 2014, the Supreme Court issued an order denying the foreign representative's petition for a writ of certiorari.[352]

In granting any relief under section 1521 to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under U.S. law, should be administrated in the foreign nonmain proceeding or concerns information relating to such proceeding.[353] Section 1521 does not provide the court with the authority to enjoin a police or regulatory act of a governmental unit; nor can the court or any administrative agency stay the exercise of any rights that would not be subject to the stay arising under section 362(a) pursuant to section 362(b)(6), (7), (17), or (27) or pursuant to section 362(o).[354] The standards, procedures, and limitations applicable to an injunction apply to requests for the relief in sections 1521(a)(1), (2), (3) and (6).[355] The court may condition relief under section 1521 as appropriate, including requiring security or a bond.[356] The court may also modify or terminate relief granted under section 1521 at its own behest or at the request of the foreign representative or an entity affected by such relief only if the interests of the creditors and other interested entities, including the debtor, are "sufficiently protected" even though it would adversely affect the debtor's estate.[357]

In addition to the forgoing rights, upon recognition of a foreign proceeding, the foreign representative (1) has standing in a case concerning the debtor pending under another chapter of the Bankruptcy Code to initiate actions under sections 522,

---

relief would impose on others under the rule provided by the substantive law of the State where the foreign insolvency proceeding is pending.").

[350] *Id.* (citing Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB de C.V. (*In re* Vitro SAB de C.V.), 701 F.3d 1031, 1060, 1067 n.42 (5th Cir. 2012); *In re* Int'l Banking Corp. B.S.C., 439 B.R. 614, 626–27 (Bankr. S.D.N.Y. 2010); *In re* Tri-Continental Exch., 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006)). Section 6(e) of the Innovation Act (H.R. 9), if passed, would, among other things, amend section 1522 to make section 365(n) applicable in all chapter 15 cases. *See* H.R. REP. NO. 114-235, at 11 (2015).

[351] *Jaffe*, 737 F.3d at 29.

[352] Jaffe v. Samsung Elecs. Co., 135 S. Ct. 66 (2014).

[353] *See* 11 U.S.C. § 1521(c) (2012); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 21(3).

[354] *See* 11 U.S.C. § 1521(d), (f). These provisions are not found in the Model Law.

[355] *See id.* § 1521(e). This provision is not found in the Model Law. *See also supra* notes 273–276.

[356] *See* 11 U.S.C. § 1522(b). The Model Law is substantially the same except that section 1522(b) also applies to conditions relating to the operation of the debtor's business and includes, as an example, the giving of security or the filing of a bond. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 22(2).

[357] *See* 11 U.S.C. § 1522(a), (c). Section 1522(c) mirrors Article 22(3) of the Model Law. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 22(3).

544, 545, 547, 548, 550, 553 and 724(a)[358] and (2) may intervene in any proceedings in a state or federal U.S. court in which the debtor is a party under section 1524.[359]

E. Additional Assistance

Subject to the limitations stated elsewhere in chapter 15, if recognition is granted,[360] section 1507 authorizes the court to grant a foreign representative "additional assistance" that is available under the Bankruptcy Code or "other laws of the United States."[361] In determining whether to provide additional assistance, courts will consider "whether such additional assistance, consistent with the principles of comity, will reasonably assure – (1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by [the Bankruptcy Code]; and

---

[358] *See* 11 U.S.C. § 1523(a). Where the foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that any such action relates to assets that, under U.S. law, should be administered in the foreign nonmain proceeding. *See id*. § 1523(b); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 23(2). Section 1523(a) "confers standing on a recognized foreign representative to assert an avoidance action but only in a pending case under another chapter of this title. The Model Law is not clear about whether it would grant standing in a recognized foreign proceeding if no full case were pending. This limitation reflects concerns raised by the United States delegation during the UNCITRAL debates that a simple grant of standing to bring avoidance actions neglects to address very difficult choice of law and forum issues. This limited grant of standing in section 1523 does not create or establish any legal right of avoidance nor does it create or imply any legal rules with respect to the choice of applicable law as to the avoidance of any transfer of obligation. The courts will determine the nature and extent of any such action and what national law may be applicable to such action." H.R. REP. NO. 109-31, pt. 1, at 116 (2005).

[359] *See* 11 U.S.C. § 1524. The Model Law has a similar provision except that it explicitly requires that the requirements of the law of the relevant country are met prior to intervention. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 24. Section 1524 should not be read to limit a foreign representative's right to intervene solely to cases in which the debtor is a party. *See* CT Inv. Mgmt. Co., LLC, v. Carbonell, 2012 U.S. Dist. LEXIS 3356, at *6–7 (S.D.N.Y. Jan. 6, 2012) ("[N]o part of Section 1509(b) suggests that Congress intended the ability of a foreign representative to apply directly to a court . . . for appropriate relief, . . . following a U.S. bankruptcy court's recognition of a foreign bankruptcy proceeding to be limited to cases in which the Chapter 15 debtor is a party. . . . [T]he plain language of Sections 1509 and 1524 indicates that they are separate grants of authority[.]") (internal quotations and citations omitted).

[360] *See In re* Ran, 390 B.R. 257, 290 (Bankr. S.D. Tex. 2008) ("[T]he principles [of comity and deference] are incorporated into Chapter 15 in § 1507, available only if recognition is first granted.").

[361] 11 U.S.C. § 1507(a); *see also* Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB de C.V. (*In re* Vitro SAB de C.V.), 701 F.3d 1031, 1044 (5th Cir. 2012) ("§ 1507(a) gives a court authority to provide 'additional assistance,' subject to certain restrictions imposed by Chapter 15 and § 1507(b)."); Tacon v. Petroquest Res. Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 325 (5th Cir. 2010); *In re* Fairfield Sentry Ltd., 452 B.R. 52, 63 (Bankr. S.D.N.Y. 2011) (noting that section 1507 and 1521(a)(7) provide the bankruptcy court with "strong flexibility"); UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 105 ("The purpose of the Model Law is to increase and harmonize cross-border assistance available in the enacting State to foreign representatives.").

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns."[362] "Section 1507 was added to the Bankruptcy Code because Congress recognized that chapter 15 may not anticipate all relief . . . that a foreign representative may require."[363] Section 1507 is intended to be expansive.[364]

Comity, which has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protections of its laws[,]"[365] is a "principal objective" of chapter 15.[366] In the context of section 1507, the

---

[362] 11 U.S.C. § 1507(b); *see also In re* SLS Capital, S.A., 2015 Bankr. LEXIS 2468, at *25 (Bankr. S.D.N.Y. July 20, 2015) (holding that the additional assistance requested by the foreign representative, *i.e.*, granting comity to a Luxembourg court order interpreting a liquidation order, was "consistent with the principles of comity and reasonably assures each of the protections enumerated in section 1507(b)"); *In re* Rede Energia S.A., 515 B.R. 69, 88 (Bankr. S.D.N.Y. 2014) (finding that the foreign representative's request for an "order (i) granting full faith and credit to (a) the Brazilian Reorganization Plan and (b) the Confirmation Decision and enjoining acts in the U.S. in contravention of the Confirmation Decision; and (ii) authorizing and directing the Indenture Trustee and [Depository Trustee Company] to take actions to carry out the terms of the Brazilian Reorganization Plan, including assigning the Global Note . . . and making the associated payments to the beneficial Noteholders" met the requirements of section 1507(b)). The analogous Model Law provision does not reference the factors included in section 1507(b). *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 7 ("Nothing 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.").

[363] *See In re Vitro S.A.B. de C.V.*, 701 F.3d at 1055 (quoting 8 COLLIER ON BANKRUPTCY, ¶ 1507.01, at 1507-2 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014)).

[364] *See id.* at 1069.

[365] Hilton v. Guyot, 159 U.S. 113, 164 (1895).

[366] *In re Vitro S.A.B. de C.V.*, 701 F.3d at 1044 ("[Comity] is not a rule of law, but one of practice, convenience, and expediency. Within the context of Chapter 15, however, it is raised to a principal objective. Section 1501(a) begins by listing, as one of Chapter 15's goals, the furtherance of cooperation between domestic and foreign courts in cross-border insolvency cases. Section 1508 goes on to provide that Chapter 15's provisions shall be interpreted by considering its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions. Comity considerations are explicitly included in the introduction to § 1507, and § 1509(b)(3) further provides that our courts 'shall grant comity or cooperation to the foreign representative' of a foreign proceeding.") (internal quotations and citations omitted); *see also In re* Loy, 432 B.R. 551, 558 (E.D. Va. 2010) ("[T]here remains a strong emphasis on comity and cooperation with foreign bankruptcy courts.") (citing 11 U.S.C. §§ 1501(a)(1)(B), 1507(b)); *In re Rede Energia S.A.*, 515 B.R. at 89 ("A central tenet of chapter 15 is the importance of comity in cross-border insolvency proceedings."); *In re* AJW Offshore, Ltd., 488 B.R. 551, 563 (Bankr. E.D.N.Y. 2013) ("Comity has been defined as the 'recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protections of its laws.'") (quoting *In re Vitro S.A.B. de C.V.,* 701 F.3d at 1043–44); *In re* British Am. Ins. Co., 488 B.R. 205, 239 (Bankr. S.D. Fla. 2013) ("'Central to Chapter 15 is comity.'") (quoting *In re Vitro S.A.B. de C.V.*, 701 F.3d at 1043); *In re* Toft, 453 B.R. 186, 190 (Bankr. S.D.N.Y. 2011) ("[T]here is no doubt that the relief available under chapter 15, and particularly additional assistance granted pursuant to § 1507, should be consistent with the principle of comity.") (citing *In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010)). However, some courts have found that comity should not be the "end all be all" of chapter 15. *See, e.g.*, *In re* Elpida Memory, Inc., 2012 Bankr. LEXIS 5367, at *27 (Bankr. D. Del. Nov. 16, 2012) ("There can be no doubt that promoting comity is a general objective of Chapter 15.

principle of comity has been included in the introductory paragraph of subsection (b) in order to emphasize its importance.[367] Thus, while recognition of a foreign proceeding turns on "the strict application of objective criteria" under section 1517, post-recognition relief, including relief under sections 1507 and 1521, is "largely discretionary and turns on subjective factors that embody principles of comity."[368]

In *Ad Hoc Group of Vitro Noteholders v. Vitro SAB De CV*, the Fifth Circuit analyzed the relationship between section 1507, which grants the court authority to provide "additional assistance" to a foreign representative, and section 1521, which empowers the court to "grant any appropriate relief" in order to "effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors[.]"[369] The court began by acknowledging that "[t]he relationship between § 1507 and § 1521 is not entirely clear."[370] "[F]aced with two statutory provisions that

---

But it is not the end all be all of the statute. To require this Court to defer in all instances to foreign court decision would gut section 1520.").

[367] *See* 11 U.S.C. § 1507(b). *See also In re Vitro S.A.B. de C.V.*, 701 F.3d at 1056 n.26 ("These factors are identical to those formerly found under § 304(c), with the exception that comity has been elevated from a factor to the introductory text."); *In re* Atlas Shipping A/S, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009) ("These provisions embody the protections previously contained in § 304 with one critical exception: the principle of comity was removed as one of the factors and elevated to the introductory paragraph. The legislative history confirms that the principle of comity was placed in the introductory language to § 1507 to emphasize its importance."); *In re* Bd. of Dirs. of Telecom Arg. S.A., 2006 Bankr. LEXIS 483 (Bankr. S.D.N.Y. Feb. 24, 2006) ("The importance of comity is well noted in the newly enacted chapter 15 of the Bankruptcy Code that has incorporated concepts of section 304(c)(2) with the major difference that comity is elevated as the prime consideration for the grant of ancillary relief to a foreign representative."); H.R. REP. NO. 109-31, pt. 1, at 109 (2005) ("The additional assistance is made conditional upon the court's consideration of the factors set forth in the current subsection 304(c) in a context of a reasonable balancing of interests following current case law. . . . Although the case law construing section 304 makes it clear that comity is the central consideration, its physical placement as one of six factors in subsection (c) of section 304 is misleading, since those factors are essentially elements of the grounds for granting comity. Therefore, in subsection (2) of this section, comity is raised to the introductory language to make it clear that it is the central concept to be addressed.").

[368] *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (S.D.N.Y. 2008); *see also In re Rede Energia S.A.*, 515 B.R. at 91; *In re AJW Offshore, Ltd.*, 488 B.R. at 563; *In re* Cozumel Caribe, S.A., de C.V., 482 B.R. 96, 109 (Bankr. S.D.N.Y. 2012); *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. at 697; *In re Atlas Shipping A/S*, 404 B.R. at 738 ("Once a case is recognized as a foreign main proceeding, chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity."); *In re* Ran, 390 B.R. 257, 291 (Bankr. S.D. Tex. 2008).

[369] *In re Vitro S.A.B. de C.V.*, 701 F.3d at 1053–57; 11 U.S.C. §§ 1507, 1521(a).

[370] *In re Vitro S.A.B. de C.V.*, 701 F.3d at 1054 ("What is not clear is whether a foreign representative can pick and choose which section to proceed under in order to take advantage of different standards for affording relief or burdens of proof.") (quoting *In re Toft*, 453 B.R. at 190) (citing Ranney-Marinelli, *supra* note 58, at 317); *In re Atlas Shipping A/S*, 404 B.R. at 741 ("The interplay between the relief available under §§ 1507 and 1521 is far from clear."); George W. Shuster, Jr., *The Trust Indenture Act and International Debt Restructurings*, 14 AM. BANKR. INST. L. REV. 431, 455 ("Because it is unclear where section 1521 ends and where section 1507 begins, it is also unclear which of these paths the court will follow—whether it will consider entry of an order enforcing a foreign discharge as 'appropriate relief' under section 1521 or as 'additional assistance' under section 1507."); *In re Elpida Memory, Inc.*, 2012 Bankr. LEXIS 5367, at *11 ("The relationship between section 1507 and section 1521 is not entirely clear[.]"); Lesley Salafia, *Cross-Border Insolvency Law in the United States and Its Application to Multinational Corporate Groups*, 21 CONN. J. INT'L L. 297, 322 (2006) (noting that section 1507 "might not have been necessary," given expansive relief available under other parts of Chapter 15); 8 COLLIER ON BANKRUPTCY, ¶ 1507.01, at

each provide expansive relief, but under different standards[,]" the Fifth Circuit adopted a framework for analyzing requests for relief under chapter 15.[371]

The Fifth Circuit determined that, because section 1521 provides specific forms of relief, "a court should initially consider whether the relief requested falls under one of these explicit provisions."[372] If, however, none of sections 1521(a)(1)—(7) or (b) lists the requested relief, "a court should decide whether it can be considered 'appropriate relief' under § 1521(a). This, in turn, requires consideration of whether such relief has previously been provided under § 304 . . . . A court should also consider whether the requested relief would otherwise be available in the United States."[373] "[O]nly if the requested relief appears to go beyond the relief previously available under § 304 or currently provided for under United States law . . . should a court consider § 1507."[374] The Fifth Circuit concluded that:

> [T]his framework provides foreign representatives with the clearest path by which to seek Chapter 15 relief . . . [and] conforms to Congress's intent that courts should not deny Chapter 15 relief for failure to meet the requirements of § 1507, which, in any case, "is not to be the basis for denying or limiting relief otherwise available under this chapter." Under this framework, courts will also "not construe the range of relief under § 1507 to be bound by the same

---

1507-2 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) ("In light of this display of [section 1521's] weaponry, it is not clear what section 1507 adds to the arsenal.").

[371] *In re Vitro S.A.B. de C.V.*, 701 F.3d at 1056.

[372] *Id.* ("Other courts have held that, where the requested relief is explicitly provided for under § 1521, it is unnecessary to consider § 1507."); *In re* Int'l Banking Corp. B.S.C., 439 B.R. 614, 627 n.10 (Bankr. S.D.N.Y. 2010) ("Because the requested relief—'entrustment' or turnover of the Attached Funds—is explicitly treated in section 1521, this Court need not decide whether relief would be appropriate under section 1507."); *In re Atlas Shipping A/S*, 404 B.R. at 741 ("The relief sought by the foreign representative is expressly provided for in §§ 1521(a)(5) and 1521(b). The Court need not venture into the area of 'additional assistance,' 'consistent with principles of comity' under § 1507.").

[373] *In re Vitro S.A.B. de C.V.*, 701 F.3d at 1056–57 (citing Tacon v. Petroquest Res. Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 329 (5th Cir. 2010) (observing that avoidance actions under foreign law were permitted under section 304 and reading section 1521(a)(7) to permit such relief)).

[374] *Id.* at 1057 ("This approach recognizes that relief under § 1507 'is in nature more extraordinary' than that provided under § 1521, as a result of which 'the test for granting that relief is more rigorous.' It also acknowledges that, while § 1507's broad grant of assistance is intended to be a 'catch-all,' it cannot be used to circumvent restrictions present in other parts of Chapter 15, nor to provide relief otherwise available under other provisions."); *In re* Artimm, S.r.l., 335 B.R. 149, 160 n.11 (Bankr. C.D. Cal. 2005) ("§ 1507 of chapter 15 . . . authorizes a court, after issuing a recognition order, to provide assistance to a foreign representative beyond that authorized in the Bankruptcy Code or other United States law."); H.R. REP. NO. 109-31, pt. 1, at 116 (2005) ("[Section 1507] is intended to permit the further development of international cooperation begun under section 304[.]"); *id.* at 109 ("Subsection [(b) of section 1507] makes the authority for additional relief (beyond that permitted under sections 1519–1521, below) subject to the conditions for relief heretofore specified in United States law under section 304[.]"); 8 COLLIER ON BANKRUPTCY, ¶ 1507.01, at 1507-2 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) ("Even if it does not expand the available relief, section 1507 may provide an opening to look to jurisprudence under former section 304 not as binding precedent but for guidance or inspiration in fashioning relief under other sections of chapter 15.").

> limitations that apply in § 1521," with the exception of those limitations specifically provided for.[375]

Applying its three-step analysis to the question of whether to enforce the debtor's reorganization plan, which discharged obligations of third-party non-debtor guarantors, the Fifth Circuit held that:

> Sections 1521(a)(1)-(7) and (b) do not provide for discharging obligations held by non-debtor guarantors. Section 1521(a)'s general grant of "any appropriate relief" also does not provide the necessary relief because our precedent has interpreted the Bankruptcy Code to foreclose such a release, and because when such relief has been granted, it has been granted under § 1507, not § 1521. Even if the relief sought were theoretically available under § 1521, the facts of this case run afoul of the limitations in § 1522. Finally, although we believe the relief requested may theoretically be available under § 1507 generally, Vitro has not demonstrated circumstances comparable to those that would make possible such a release in the United States, as contemplated by § 1507(b)(4).[376]

Thus, the court concluded that "[w]hile the relief available under Chapter 15 may, in exceptional circumstances, include enforcing a foreign court's order extinguishing the obligations of non-debtor guarantors," the debtor failed to demonstrate that comparable circumstances were present in that case.[377]

In *In re Sino-Forest Corp.*, the Bankruptcy Court for the Southern District of New York considered, post-*Vitro*, whether to grant comity to a Canadian court order approving third-party non-debtor releases.[378] Relying on its holding in *In re Metcalfe & Mansfield Alternative Investments*, in which the bankruptcy court recognized and enforced a Canadian order granting a non-debtor release, the bankruptcy court granted comity to the Canadian court's order.[379]

---

[375] *In re Vitro S.A.B. de C.V.*, 701 F.3d at 1057 (quoting H.R. REP. NO. 109-31, pt. 1, at 116 (2005)); *see also* 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, 556 (2011) (whether a "court [would] ever dare to employ § 1507 as a substitute for (or worse, an end-around of) § 1521" is an open question); Ranney-Marinelli, *supra* note 58, at 316 n.267 ("At the same time, this approach means that, by first considering § 1521 relief—which [the court] deem[ed] co-extensive with that previously available under § 304—courts begin their analysis in familiar territory. This prevents all-encompassing applications of § 1507 and avoids prematurely expanding the reach of Chapter 15 beyond current international insolvency law."); *but see In re* Rede Energia S.A., 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014) ("It remains to be seen whether the three-part analysis crafted by the *Vitro* court is embraced by other courts[.]").

[376] *In re Vitro S.A.B. de C.V.*, 701 F.3d at 1057–58.

[377] *Id.* at 1043.

[378] *See In re* Sino-Forest Corp., 501 B.R. 655 (Bankr. S.D.N.Y. 2013).

[379] *See id.* at 661–66 (noting that *Sino-Forest* was "virtually on all fours with *Metcalfe*"); *see also In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010) ("[P]rinciples of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United

Quoting *Metcalfe*, the *Sino-Forest Corp*. court noted that "[t]he U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process."[380] Because the parties to the Canadian proceeding "had a full and fair opportunity to litigate the issues, and the trial court reached a reasoned decision . . . that such relief was appropriate[,]" the bankruptcy court concluded that it was appropriate to provide "additional assistance" under section 1507 and grant comity to the court order approving a third-party non-debtor release.[381]

While the bankruptcy court acknowledged that the Fifth Circuit's three-step approach in *Vitro* "may be appropriate in certain circumstances[,]" such analysis was unnecessary in *Sino-Forest* "because the Court already decided in *Metcalfe* that the relief sought is available under section 1507."[382] Therefore, the bankruptcy court declined to decide whether the "any appropriate relief" language of section 1521 would also provide a basis for the relief requested.[383]

F. Determining the Location of a Debtor's Center of Main Interests and a Debtor's Establishment(s)

As noted above, a "foreign main proceeding" is a foreign proceeding pending in the country where the debtor has the center of its main interests ("COMI"), while a "foreign nonmain proceeding" is a foreign proceeding pending in a country where the debtor maintains an establishment.[384] The distinction is an important one as recognition of a foreign main proceeding provides for certain rights that are not applicable to a foreign nonmain proceeding.[385] The cases addressing chapter 15's definitions of foreign main proceeding and foreign nonmain proceeding tend to focus on the factors required to establish a debtor's COMI or to determine where a debtor maintains an establishment.[386]

States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.").

[380] *In re Sino-Forest Corp.*, 501 B.R. at 663.

[381] *Id*. at 664 n.4 ("Congress has identified a series of factors to consider in determining whether to extend comity under section 1507; they may narrow circumstances when comity is appropriate. But as the Court concluded in *Cozumel*, '[i]t is unnecessary here to explore this issue further as the Court concludes that the relief ordered by the Court would be appropriate in any event.'") (quoting *In re* Cozumel Caribe, S.A., de C.V., 482 B.R. 96, 114 n.16 (Bankr. S.D.N.Y. 2012)).

[382] *Id.* at 664 n.3, 657 ("Metcalfe is almost on all fours with this case, and the Court concludes below that nothing in Vitro would require a different result here.").

[383] *See id.* at 663 n.3.

[384] *See* 11 U.S.C. § 1502(4), (5) (2012).

[385] *See, e.g., id.* § 1520; Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 129 (2d Cir. 2013) (noting that a determination regarding debtor's COMI determines whether the foreign proceeding is a foreign main proceeding "in which event U.S. proceedings against the debtor are stayed").

[386] Some foreign courts require a determination that the foreign proceeding is being filed in the debtor's center of main interests prior to initiation of such proceeding. For example, under the EU Regulation, the petitioned court opens main insolvency proceedings only if it determines it has jurisdiction under the EU

A few courts have also considered whether a foreign proceeding must necessarily be either a foreign main proceeding or a foreign nonmain proceeding and the consequences of such a finding.[387] For example, in *Lavie v. Ran*, the Fifth Circuit found that a foreign proceeding pending in Israel was neither a foreign main proceeding nor a foreign nonmain proceeding.[388] In such a case, the foreign representative may instead file an involuntary petition against the debtor under section 303(b)(4).[389]

1. Foreign Main Proceeding Criteria

To the extent no evidence is submitted to the contrary, the debtor's registered office[390] or habitual residence is presumed to be its COMI.[391] Habitual residence is not defined in the Bankruptcy Code but has been analyzed as virtually identical to the concept of domicile, which "is established by physical presence in a location coupled with an intent to remain their indefinitely."[392] The presumption that the location of the debtor's registered office is also its COMI is included for "speed and

---

Regulation as the location of the debtor's center of main interests. *See* Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, art. 3.1, 2000 O.J. (L 160) 1-18 (as amended) ("The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings."). Even so, "Chapter 15 does not provide for recognition of an insolvency proceeding based on a foreign court's determination that it has jurisdiction as the location of the debtor's center of main interests. . . . Instead, Chapter 15 requires the U.S. court to make an independent evaluation of the location of the debtor's center of main interests at the time a petition for recognition is presented." *In re* Ran, 390 B.R. 257, 267 (Bankr. S.D. Tex. 2008) (discussing objective factors considered by European courts, U.S. courts and Israeli courts when addressing a debtor's center of main interests); *In re* SPhinX, Ltd., 351 B.R. 103, 120 n.22 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007) ("[E]ven if the Cayman Court had made such a determination [that the insolvency proceeding was a main proceeding] it would not be binding on this Court[.]").

[387] *See, e.g.*, Lavie v. Ran (*In re* Ran), 607 F.3d 1017, 1028 (5th Cir. 2010); *see also In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 Bankr. LEXIS 4762, at *26–27 (Bankr. S.D.N.Y. Sept. 5, 2007).

[388] *In re Ran*, 607 F.3d 1017.

[389] *See In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 132 (Bankr. S.D.N.Y. 2007) ("Section 303(b)(4) of the Bankruptcy Code specifically provides that an involuntary case may be commenced under chapter 7 or 11 of the Bankruptcy Code by a foreign representative of the estate in a foreign proceeding so that a foreign representative is not left remediless upon nonrecognition. . . . Section 303(b)(4) does not require that the foreign proceeding be recognized.").

[390] "Registered office" is the term used in the Model Law to refer to the place of incorporation or the equivalent for an entity that is not a natural person. *See* H.R. REP. NO. 109-31, pt. 1, at 113 (2005). However, the location of a debtor's registered office is not the preferred determinative criterion of COMI where there is a "separation between a corporation's jurisdiction of incorporation and its real seat." *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 128. Instead, courts look to "where the debtor conducts its regular business." *In re Fairfield Sentry Ltd.*, 714 F.3d at 130.

[391] *See* 11 U.S.C. § 1516(c) (2012); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 16(3); *see also In re* Tri-Continental Exch., 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006) ("In effect, the registered office (or place of incorporation) is evidence that is probative of, and that may in the absence of other evidence be accepted as a proxy for, 'center of main interests.' The registered office, however, does not otherwise have special evidentiary value and does not shift the risk of nonpersuasion, i.e., the burden of proof, away from the foreign representative seeking recognition as a main proceeding.").

[392] *In re Ran*, 607 F.3d at 1022.

convenience of proof" where there is no serious controversy.[393] Section 1508 requires courts to promote an application of chapter 15 that is consistent with the application of similar statutes adopted by foreign jurisdictions.[394] According to the European Court of Justice, in determining the COMI of a debtor company, the presumption in favor of the registered office of that company can be rebutted only if "factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect."[395] For example, the COMI presumption may be overcome "in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated."[396] The foreign representative retains the burden of persuading the court, by a preponderance of the evidence, regarding the debtor's COMI where the presumption has been rebutted.[397] Courts retain the flexibility to rely on pragmatic considerations to deny recognition of a foreign main proceeding where supported by the facts of the case.[398] A debtor must have a COMI and may not have more than one COMI.[399]

The EU Report provides that the term "interests," as used in the phrase "centre of main interests," includes not only commercial, industrial, and professional activities but also the general economic activities of private individuals.[400] A debtor's COMI "must be identified by reference to criteria that are both objective and ascertainable by third parties."[401]

In *Morning Mist Holdings Ltd. v. Krys*, the Second Circuit addressed the debtor's COMI, including the relevant time period and the appropriate principles

---

[393] H.R. REP. NO. 109-31, pt. 1, at 113 (2005).

[394] *See* 11 U.S.C. § 1508.

[395] *In re* Eurofoods IFSC Ltd., 2006 ECJ CELEX LEXIS 777, ¶ 34 (E.C.J. May 2, 2006); *see also In re* Millennium Glob. Emerging Credit Master Fund Ltd., 474 B.R. 88, 92 (S.D.N.Y. 2012) ("Where evidence is presented to the contrary, the court cannot rely solely upon this presumption, but rather must consider all of the relevant evidence.").

[396] *In re Eurofoods IFSC Ltd*., 2006 ECJ CELEX LEXIS 777, at ¶ 35.

[397] *See In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 335 (S.D.N.Y. 2008) (finding that the section 1516(c) presumption can be rebutted notwithstanding a lack of party opposition because the presumption "imposes 'on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption' and only does so if the petitioner has established a prima facie case"); *In re* Betcorp Ltd., 400 B.R. 266, 285–86 (Bankr. D. Nev. 2009).

[398] *See In re* SPhinX, Ltd., 371 B.R. 10, 19 (S.D.N.Y. 2007) (concluding that because the chapter 15 filing was initiated in an effort to forum shop and frustrate an existing judgment and the statutory presumption in section 1516(c) was rebutted, recognition as a foreign main proceeding was denied); UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 137 ("Article 16 [which sets forth the presumption implemented in section 1516] establishes presumptions that permit and encourage fast action in cases where speed may be essential. These presumptions allow the court to expedite the evidentiary process. At the same time, they do not prevent the court, in accordance with the applicable procedural law, from calling for or assessing other evidence if the conclusion suggested by the presumption is called into question.").

[399] *See In re* Ran, 390 B.R. 257, 263 (Bankr. S.D. Tex. 2008) ("[A] debtor has only one center of main interests."); *In re* Tien Chiang, 437 B.R. 397, 403 (Bankr. C.D. Cal. 2010) ("[A] debtor must have a CoMI and it must be in a specific country.").

[400] *See* EU Report on the Convention of Insolvency Proceedings, ¶ 75 (Brussels, May 3, 1996).

[401] *In re Ran*, 390 B.R. at 266.

and factors to be considered in determining which jurisdiction predominated.[402] The Second Circuit concluded, based on the language of section 1517(b), that the relevant time period for determining a debtor's COMI is the time that the petition for recognition is filed, "subject to an inquiry into whether the process has been manipulated."[403]

The Second Circuit next considered the location of the debtor's COMI and, after consulting foreign law, determined that "the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties."[404] The court concluded that "any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis."[405] Among other

---

[402] *See* Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 130 (2d Cir. 2013).

[403] *Id.* at 137 ("[A] court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith."); *see also* Lavie v. Ran (*In re* Ran), 607 F.3d 1017, 1025 (5th Cir. 2010) ("Congress's choice to use the present tense requires courts to view the COMI determination in the present, i.e. at the time the petition for recognition was filed. If Congress had, in fact, intended bankruptcy courts to view the COMI determination through a lookback period or on a specific past date, it could have easily said so."); *In re* Betcorp Ltd., 400 B.R. 266, 290–92 (Bankr. D. Nev. 2009).

Courts that have held that a debtor's COMI should be determined on the date that the petition for recognition was filed are also likely to support a totality of circumstances approach where appropriate. "The jurisprudence emerging from these courts does not preclude looking into a broader temporal COMI assessment where there may have been an opportunistic shift to establish COMI (i.e., insider exploitation, untoward manipulation, overt thwarting of third party expectations)." *In re* Fairfield Sentry Ltd., 440 B.R. 60, 66 (Bankr. S.D.N.Y. 2010). Several courts, however, have focused on the date of the commencement of the foreign proceeding as the relevant timeframe for a COMI determination instead of the date of the filing of the petition for recognition. *See, e.g.*, *In re* Millennium Glob. Emerging Credit Master Fund Ltd., 474 B.R. 88, 92 (S.D.N.Y. 2012) (affirming bankruptcy court's conclusion that "COMI should be determined as of the date of the commencement of the foreign proceeding, rather than—as most of the courts that have looked at the issue have concluded—the date on which the Chapter 15 petition was filed"); *In re* Kemsley, 489 B.R. 346, 354–56 (Bankr. S.D.N.Y. 2013) ("Life is fluid, but COMI is a concept that is determined as of a fixed date (commencement of a foreign insolvency case) based on the circumstances that then existed."); *see also* Leif M. Clark, *Lief M. Clark on the Meaning of "Center of Main Interests,"* 2012 EMERGING ISSUES 6817 (Dec. 2012) ("[T]he purpose of the COMI determination is better served by looking to the residence of the debtor as of the opening of the foreign proceeding.").

[404] *In re Fairfield Sentry Ltd.*, 714 F.3d at 130*; see In re Ran*, 607 F.3d at 1025 ("[I]t is important that the debtor's COMI be ascertainable by third parties."); *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 474 B.R. at 93 ("In order to protect the expectation interests of creditors, investors and other interested third parties, courts ask whether the debtor's COMI would have been 'ascertainable' to interested third parties."); *In re* SPhinX, Ltd., 371 B.R. 10, 19 (S.D.N.Y. 2007) (noting that "the COMI must be identified based on criteria that are: (1) objective; and (2) ascertainable by third parties"); *In re Betcorp Ltd*., 400 B.R. at 291 ("[I]t is important that the debtor's COMI be ascertainable by third parties . . . The presumption is that creditors will look to the law of the jurisdiction in which they perceive the debtor to be operating to resolve any difficulties they have with that debtor, regardless of whether such resolution is informal, administrative or judicial.").

[405] *In re Fairfield Sentry Ltd.*, 714 F.3d at 137*; see In re* Suntech Power Holdings Co., 520 B.R. 399, 411–13 (Bankr. S.D.N.Y. 2014) ("[T]he commencement of a provisional liquidation may have a profound effect on the business of the debtor. It triggers a restructuring process on which the survival of the debtor's traditional business may depend, and it may shift the duties and responsibilities of running the business from the debtor's management to the provisional liquidators."); *id.* at 416, 419 (holding that although the debtor, prior to the commencement of the liquidation proceeding, maintained its principal executive offices in Wuxi, China and did not conduct any activities in the Cayman Islands, "the commencement of the provisional liquidation and the activities of the [foreign liquidators] had the effect of transferring the COMI from Wuxi,

factors that may be considered are "the location of headquarters, decision-makers, assets, creditors, and the law applicable to most disputes."[406] Although a helpful guide, the Second Circuit noted that "consideration of these specific factors is neither required nor dispositive."[407]

Other courts have found that the expectations of third parties with regard to the location of a debtor's COMI may also be considered.[408] For instance, "where a foreign representative remains in place for an extended period, and relocates all of the primary business activities of the debtor to his location (or brings business to a halt), thereby causing creditors and other parties to look to the judicial manager as the location of a debtor's business . . . the center of its main interest [may have] become lodged with the foreign representative."[409] Furthermore, while recognition of a foreign proceeding is not dependent on a cost-benefit analysis or approval by a

---

China to the Cayman Islands"); *In re* Fairfield Sentry Ltd., 2011 U.S. Dist. LEXIS 105770, at *11 (S.D.N.Y. Sept. 15, 2011) ("[C]ourt's have recognized that where a debtor's activities for an extended period of time have been conducted only in connection with winding up a debtor's business, the activities of a debtor's liquidators are both relevant and important to the COMI determination.").

[406] *In re Fairfield Sentry Ltd.,* 714 F.3d at 130*; see also In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 474 B.R. at 93–94 (affirming bankruptcy court's holding that a liquidation proceeding for an offshore investment fund in Bermuda was a foreign main proceeding based upon the residence of the company's directors, location of business records and accounts, location of fund headquarters, and location of the business ascertainable by third parties); *In re* Oilsands Quest Inc., 484 B.R. 593, 595 (S.D.N.Y. 2012); *In re Fairfield Sentry Ltd*., 2011 U.S. Dist. LEXIS 105770, at *20 (affirming decision that a liquidation in the BVI was a foreign main proceeding because it was a BVI company, employees and officers were in BVI, decision-making originated in BVI, significant books and records had been transferred to BVI, and the main liquid assets were in BVI); *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 336 (S.D.N.Y. 2008); *In re* Gerova Fin. Grp., Ltd., 482 B.R. 86, 91 (Bankr. S.D.N.Y. 2012) (noting that courts have considered a number of factors in determining the COMI of a foreign debtor, including: "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"); *In re* Think3 Inc., 2011 Bankr. LEXIS 5349, at *17 (Bankr. W.D. Tex. Sept. 12, 2011); *In re* ABC Learning Ctrs. Ltd., 445 B.R. 318, 333 (Bankr. D. Del. 2010); *In re British Am. Isle of Venice, Ltd*., 441 B.R. at 720 ("In determining COMI, courts typically consider the following: (1) The location of the debtor's headquarters; (2) The location of those who actually manage the debtor (which may be the headquarters of a holding company); (3) The location of the debtor's primary assets; (4) The location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; (5) The jurisdiction whose law would apply to most disputes; and (6) The expectations of third parties with regard to the location of a debtor's COMI."); *In re* Ernst & Young, Inc., 383 B.R. 773, 779 (Bankr. D. Colo. 2008); *In re* Tradex Swiss AG, 384 B.R. 34, 42–43 (Bankr. D. Mass. 2008); *In re* Basis Yield Alpha Fund (Master), 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008) ("While certainly not exhaustive or all necessarily applicable in this or any other case, these objective factors are indicative of the facts a court might find relevant in a COMI determination."); *In re* SPhinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006).

[407] *In re Fairfield Sentry Ltd.*, 714 F.3d at 137.

[408] *In re* Fairfield Sentry Ltd., 2011 U.S. Dist. LEXIS 105770, at *10 (S.D.N.Y. Sept. 15, 2011) ("[C]ourts also consider the expectations of third parties with regard to the location of a debtor's COMI.") (citing *In re* British Am. Isle of Venice, Ltd., 441 B.R. 713, 720 (Bankr. S.D. Fla. 2010)).

[409] *In re British Am. Isle of Venice, Ltd.*, 441 B.R. at 723 (citing *In re British Am. Ins. Co.*, 425 B.R. at 914).

majority of the debtor's creditors,[410] the debtor's motive in moving to a different country may be relevant to the COMI determination.[411]

Some U.S. courts have equated COMI with a debtor's principal place of business.[412] Cases from other countries have also supported a focus on the debtor's principal place of business.[413] The Supreme Court has held that a corporation's "principal place of business" is where the corporation's officers "direct, control, and coordinate the corporation's activities, *i.e.*, its nerve center, which will typically be found at its corporate headquarters."[414] Factors to be considered in determining a corporation's nerve center include: "(i) location of corporate and executive offices; (ii) the site where day-to-day control is exercised; (iii) the exclusivity of decision making at the executive office and the amount of managerial authority at that location; (iv) the location where corporate records and bank accounts are kept; (v) where the board of directors and stockholders meet; (vi) where executives live, have their offices, and spend their time; (vii) the location where corporate income tax is filed; (viii) the location designated in the corporate charter; and (ix) the location where major policy, advertising, distribution, accounts receivable departments and finance decisions originate."[415] Where the foreign representative fails to establish or

---

[410] *See In re Gerova Fin. Grp., Ltd.*, 482 B.R. at 93 ("Nothing in § 1507 of the Code conditions recognition of a foreign proceeding on a cost-benefit analysis or approval by a majority of a foreign debtor's creditors[.]").

[411] *See In re* SPhinX, Ltd., 371 B.R. 10, 18–19 (S.D.N.Y. 2007); *In re* Ran, 390 B.R. 257, 294–97 (Bankr. S.D. Tex. 2008) ("The motive of an individual in moving from one country to another may be relevant to a determination of the location of his center of main interests when a petition under Chapter 15 for recognition of a foreign proceeding is presented to the U.S. court on the heels of the individual's flight from the country in which the foreign proceeding is pending, but only to the extent that it might show the individual has not genuinely transferred his center of main interest to the U.S. and that his stay in the U.S. is only temporary."); *In re SPhinX, Ltd.*, 351 B.R. at 121–22 (declining to recognize foreign proceeding as a foreign main proceeding where foreign representatives were forum shopping and sought to obtain the automatic stay to defeat a settlement).

[412] *See, e.g.*, *In re Think3 Inc.*, 2011 Bankr. LEXIS 5349, at *17–18; *In re* Fairfield Sentry Ltd., 440 B.R. 60, 64 (Bankr. S.D.N.Y. 2010) (considering the debtor's administrative "nerve center" in COMI analysis); *In re* RHTC Liquidating Co., 424 B.R. 714, 723 (Bankr. W.D. Pa. 2010); *In re* Grand Prix Assocs., 2009 Bankr. LEXIS 1239, at *20 (Bankr. D.N.J. May 18, 2009); *In re* Basis Yield Alpha Fund (Master), 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008); *In re* Tri-Continental Exch., 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006); *see also* Westbrook, *supra* note 8, at 719–20 (2005) ("Chapter 15 was drafted to follow the Model Law as closely as possible, with the idea of encouraging other countries to do the same. One example is use of the phrase 'center of main interests,' which could have been replaced by 'principal place of business' as a phrase more familiar to American judges and lawyers. The drafters of Chapter 15 believed, however, that such a crucial jurisdictional test should be uniform around the world and hoped that its adoption by the United States would encourage other countries to use it as well.").

[413] *See In re* Betcorp Ltd., 400 B.R. 266, 289 n.32 (Bankr. D. Nev. 2009) ("Looking at these foreign cases is appropriate. Section 1508 states in interpreting phrases such as 'center of main interests,' 'the court shall consider' how those phrases have been construed in other jurisdictions which have adopted similar statutes. This means looking not only at domestic cases, but also at cases decided by the courts of other countries. As stated in the legislative history, '[n]ot only are these sources persuasive, but they advance the crucial goal of uniformity of interpretation.'") (citations omitted).

[414] Hertz Corp. v. Friend, 559 U.S. 77, 78 (2010).

[415] *In re Think3 Inc.*, 2011 Bankr. LEXIS 5349, at *17–18; *see also In re* OAS S.A., 533 B.R. 83, 101 (Bankr. S.D.N.Y. 2015) (noting that "the COMI analysis when applied to a special purpose financing vehicle proves less straightforward than the typical case"); *In re Betcorp Ltd.*, 400 B.R. at 290 ("[A] commonality of

plead facts supporting the existence of a main proceeding, a court may deny a petition even in the absence of objections from creditors.[416]

The factors to be considered in determining the COMI of an individual debtor are similar.[417] In *In re Loy*, the court noted that factors such as (1) the location of a debtor's primary assets; (2) the location of the majority of the debtor's creditors; and (3) the jurisdiction whose law would apply to most disputes, may be used to determine an individual debtor's COMI when there exists a serious dispute.[418] Factors considered in determining an individual's domicile are also helpful.[419] To establish a new domicile, an individual must demonstrate residence in a new state and an intention to remain in that state indefinitely.[420]

Congress has instructed that "[i]n interpreting [chapter 15], the court shall consider its international origin, and the need to promote an application . . . that is consistent with the application of similar statutes adopted by foreign jurisdictions."[421] In addition, the legislative history refers to the UNCITRAL Guide "for guidance as to the meaning and purpose of [chapter 15's] provisions."[422] Thus,

---

cases analyzing debtors' COMI demonstrates that courts do not apply any rigid formula or consistently find one factor dispositive; instead, courts analyze a variety of factors to discern, objectively, where a particular debtor has its principal place of business. This inquiry examines the debtor's administration, management, and operations along with whether reasonable and ordinary third parties can discern or perceive where the debtor is conducting these various functions.").

[416] *See In re Basis Yield Alpha Fund (Master)*, 381 B.R. at 50 ("[T]he Court has the power to satisfy itself that the requirements for recognition under section 1517 have been satisfied, and has a right like any other federal court to inquire under Fed. R. Evid. 614. . . . The court's power to ascertain the facts cannot be sidestepped by failures to object. Nor can it be sidestepped by elections not to plead or introduce inconvenient facts."); *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 129–30 (Bankr. S.D.N.Y. 2007).

[417] *See In re* Loy, 380 B.R. 154, 162 (Bankr. E.D. Va. 2007).

[418] *See id.* at 162–63 (finding that single factor of debtors' ownership of real property located outside the country of debtors' habitual residence, was insufficient to rebut the section 1516(c) presumption that debtors' habitual residence was the location of debtors' center of main interests); *see also* Lavie v. Ran, 406 B.R. 277, 286–87 (S.D. Tex. 2009) (existence of bankruptcy proceeding and debts in foreign country alone are not sufficient to find an establishment for an individual under chapter 15).

[419] *See In re* Ran, 390 B.R. 257, 281 (Bankr. S.D. Tex. 2008) ("Residence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile. . . . 'Domicile' is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there."); Deep Marine Tech., Inc. v. Conmaco/Rector, L.P., 515 F. Supp. 2d 760, 767 (S.D. Tex. 2007) ("An individual is domiciled in the place where he has 'his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom.") (citing Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir. 1974)). "Other factors pertinent to a finding of an individual's habitual residence include: (1) the length of time spent in the location; (2) the occupational or familial ties to the area; and (3) the location of the individual's regular activities, jobs, assets, investments, clubs, unions, and institutions of which he is a member." Lavie v. Ran (*In re* Ran), 607 F.3d 1017, 1022–23 (5th Cir. 2010); *see also In re* Kemsley, 489 B.R. 346, 353 (Bankr. S.D.N.Y. 2013) ("The term habitual residence includes an element of permanence and stability and is comparable to domicile; it connotes a meaningful connection to a jurisdiction, a home base where an individual lives, raises a family, works and has ties to the community.").

[420] *See In re Ran*, 607 F.3d at 1022 (citing Acridge v. Evangelical Lutheran Good Samaritan Soc'y, 334 F.3d 444, 448 (5th Cir. 2003)).

[421] 11 U.S.C. § 1508 (2012).

[422] H.R. REP. NO. 109-31, pt. 1, at 106 n.101 (2005).

although the statutory text controls, courts must consider international sources to the extent they help "carry out the congressional purpose of achieving international uniformity in cross-border insolvency proceedings."[423] Taking these international underpinnings into consideration, in *Morning Mist*, the Second Circuit noted:

> The UNCITRAL Guide, which does not define COMI, indicates that the concept was drawn from the European Union Convention on Insolvency Proceedings. In turn, the European Union Council Regulation enacting the Convention on Insolvency Proceedings provides some guidance.[424]

The Second Circuit ultimately determined that because the EU has no need for a petition for recognition as provided for in chapter 15 because a main insolvency proceeding in one EU member state is automatically recognized in all other EU member states, the EU Regulation is not helpful in ascertaining the appropriate timing for a COMI determination.[425] However, it did rely on the EU Regulation and other international interpretations, "which focus on regularity and ascertainability of a debtor's COMI," to find that courts "may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith."[426] In addition, the Second Circuit considered the EU Regulation providing that COMI "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"[427] in addressing the COMI factors because "it underscores the importance of factors that indicate regularity and ascertainability."[428]

In determining whether a proceeding is a foreign main proceeding, several courts have also considered the public policy provisions of chapter 15.[429] As noted above, section 1506 provides that the courts may refuse to take an action governed

---

[423] Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 136 (2d Cir. 2013).

[424] *Id.* (citing U.N. Comm'n on Int'l Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, ¶¶ 31, 72, U.N. Doc. A/CN.9/442 (1997)).

[425] *See id*.

[426] *Id*. at 137.

[427] Council Regulation (EC) No 1346/2000, 2000 O.J. (L160) 1-18 (as amended), Recital ¶ 13; *see also In re* Grand Prix Assocs., 2009 Bankr. LEXIS 1239, at *20 (Bankr. D.N.J. May 18, 2009); *In re* Basis Yield Alpha Fund (Master), 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008); *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007).

[428] *In re Fairfield Sentry Ltd.*, 714 F.3d at 138.

[429] *See, e.g.*, *id.* at 140 ("The confidentiality of BVI bankruptcy proceedings does not offend U.S. public policy. Although the BVI liquidation has proceeded under seal, Morning Mist's assertion that they are 'shrouded in secrecy' is overwrought. . . . Morning Mist cannot establish that unfettered public access to court records is so fundamental in the United States that recognition of the BVI liquidation constitutes one of those exceptional circumstances contemplated in Section 1506."); *In re* Gerova Fin. Grp., Ltd., 482 B.R. 86, 95 (Bankr. S.D.N.Y. 2012) (recognizing an involuntary foreign main proceeding of an investment company in Bermuda instituted by only one creditor over the objection of several of its creditors because the fact that the foreign insolvency proceedings did not provide the same protections as a U.S. bankruptcy case did not violate a fundamentally important U.S. policy).

by chapter 15 only if it is "manifestly contrary to the public policy of the United States."[430] The UNCITRAL Guide further provides that the exception should be read "restrictively" and invoked only "under exceptional circumstances concerning matters of fundamental importance for the enacting State."[431] Federal courts in the United States have also adopted this narrow view of section 1506.[432]

2. Foreign Nonmain Proceeding Criteria

As noted above, a foreign nonmain proceeding is a foreign proceeding, other than a foreign main proceeding, pending[433] in a country where the debtor has an establishment.[434] "Establishment" is defined in chapter 15 as "any place of operations where the debtor carries out a nontransitory economic activity."[435] The requirement that the foreign proceeding be pending in a country where the debtor has an establishment has led a few courts to analyze the term. The Fifth Circuit has held that the relevant time period to determine whether an establishment exists is the point in time when the petition for recognition is filed.[436] In determining whether the debtor had an establishment in Israel, the Fifth Circuit relied on the EU Convention's legislative history, which provides that a "place of operations" is "a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional."[437] This may include a secondary residence or a place of employment, but the mere presence of assets or debts in a given location or the existence of a bankruptcy proceeding in a foreign location is likely not sufficient.[438] However, the absence of any assets in a location supports the conclusion that recognition of a foreign nonmain proceeding would be inappropriate.[439] Courts have generally been more willing to find that a debtor has an establishment in a given location, which may stem from the fact that a finding that a foreign proceeding is neither a main proceeding nor a nonmain proceeding severely limits the ability of the debtor and its creditors to seek cooperation from the United States. For example, the Bankruptcy Court for the

---

[430] 11 U.S.C. § 1506 (2012).

[431] UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 104.

[432] *See supra* Section II.D.

[433] *See In re* Oversight and Control Comm'n of Avanzit, S.A., 385 B.R. 525, 537 (Bankr. S.D.N.Y. 2008) (finding that "pending" "refers to the location of the foreign case, not the stage of the proceeding").

[434] *See* 11 U.S.C. § 1502(5).

[435] *Id*. § 1502(2). The Model Law is substantially the same, except that it requires that the economic activity be carried out "with human means and goods or services." UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 2(f).

[436] *See* Lavie v. Ran (*In re* Ran), 607 F.3d 1017, 1027 (5th Cir. 2010) ("The use of the present tense [in section 1502(2)] implies that the court's establishment analysis should focus on whether the debtor has an establishment in the foreign country where the bankruptcy is pending at the time the foreign representative files the petition for recognition under Chapter 15.").

[437] *Id*.

[438] *See id.* at 1027–28.

[439] *See In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 339 (S.D.N.Y. 2008).

Southern District of New York granted a petition for recognition of a foreign nonmain proceeding where "no negative consequences would appear to result" therefrom because a consideration of the COMI factors supported a finding that the proceeding was not a foreign main proceeding.[440]

V. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

A. Cooperation and Direct Communication

Section 1525 requires courts to cooperate "to the maximum extent possible" with foreign courts and foreign representatives directly or through a trustee.[441] This is one of the most important changes introduced by chapter 15.[442] The U.S. court is permitted to communicate directly with, or request information or assistance directly from, the foreign court or foreign representative subject to the rights of all parties in interest to receive notice and to participate.[443] The Federal Rules of Bankruptcy Procedure require the U.S. court to provide notice by mail of the court's intention to communicate with a foreign court or foreign representative.[444] The ability of courts to communicate directly and for U.S. courts to request information and assistance directly from foreign courts and foreign representatives "is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. This ability is critical when the courts consider that they should act with urgency."[445] As noted by the United Nations, these provisions are intended to authorize "the courts or other relevant administrative authorities of the enacting State to extend cooperation to foreign courts in insolvency proceedings. It is intended to address what has been identified as one of the main obstacles of judicial cooperation in cross-border insolvencies, namely, the lack in many jurisdictions of legislative authority for judges to engage in cooperative activity."[446]

---

[440] *In re* SPhinX, Ltd., 351 B.R. 103, 122 (Bankr. S.D.N.Y. 2006) ("[W]here so many objective factors point to the Cayman Islands not being the Debtors COMI, and no negative consequences would appear to result from recognizing the Cayman Islands proceedings as nonmain proceedings, that is the better choice.").

[441] 11 U.S.C. § 1525(a) (2012); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 25(1).

[442] *See In re* Artimm, S.r.l., 335 B.R. 149, 159 (Bankr. C.D. Cal. 2005); H.R. REP. NO. 109-31, pt. 1, at 117 (2005) ("The right of courts to communicate with other courts in worldwide insolvency cases is of central importance.").

[443] *See* 11 U.S.C. § 1525(b). The Model Law is substantially the same except that it does not explicitly include notice and participation requirements. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 25(2).

[444] *See* FED. R. BANKR. P. 2002(q)(2).

[445] UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 218.

[446] UNCITRAL, Comm. On International Trade Law Working Group on Insolvency Law, Draft Legislative Provisions on Judicial Cooperation and Access and Recognition in Cases of Cross-border Insolvency, Rep. on its 19th Sess., April 1-12, 1996, U.N. Doc. A/CN.9/WG.V/WP.44 p. 21, at n.1, (Mar. 8, 1996), *available at* http://www.uncitral.org/pdf/english/travaux/insolvency/acn9-wg5-wp44-e.pdf.

Pursuant to section 1526, subject to the supervision of the court, the trustee[447] or other person, including an examiner, authorized by the court are also required to cooperate "to the maximum extent possible" with foreign courts and foreign representatives.[448] Such trustee or other person is entitled, subject to the supervision of the court, to communicate directly with the foreign court and foreign representatives.[449]

Section 1527 provides that the cooperation required by sections 1525 and 1526 may be implemented "by any appropriate means," including:

> 1. appointment of a person or body, including an examiner, to act at the direction of the court;
> 2. communication of information by any means considered appropriate by the court;
> 3. coordination of the administration and supervision of the debtor's assets and affairs;
> 4. approval or implementation of agreements concerning the coordination of proceedings; and
> 5. coordination of concurrent proceedings regarding the same debtor.[450]

The list contained in section 1527, however, is not intended to be exhaustive, and courts and other interested parties should endeavor to engage in any other forms of cooperation that would further the purpose and intent of chapter 15 to promote cross-border cooperation and comity.[451]

VI. CONCURRENT PROCEEDINGS

After recognition of a foreign main proceeding, a plenary case under another chapter of title 11 may be commenced only if the debtor has assets in the United States.[452] Upon recognition of a foreign proceeding, the foreign representative may

---

[447] "Trustee" includes a trustee, a debtor in possession in a case under any chapter of the Bankruptcy Code or a debtor under chapter 9. *See* 11 U.S.C. § 1502(6).

[448] *Id*. § 1526(a). The Model Law is substantially in accord. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 26(1).

[449] *See* 11 U.S.C. § 1526(b). The Model Law is substantially in accord. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 26(2).

[450] *See* 11 U.S.C. § 1527. The Model Law is substantially in accord except that it includes "approval or implementation *by courts* of agreements concerning the coordination of proceedings." *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 27 (emphasis added).

[451] *See* UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶¶ 220, 222.

[452] *See* 11 U.S.C. § 1528; *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 28; *see also In re* British Am. Ins. Co., 488 B.R. 205, 226 (Bankr. S.D. Fla. 2013) ("After recognition of a foreign main proceeding, and only if the debtor has assets in the United States, the foreign representative may file a plenary bankruptcy case for the debtor under another chapter of title 11."); *In re* Awal Bank, BSC, 455 B.R. 73, 88 (Bankr. S.D.N.Y. 2011) ("A foreign representative can open a plenary case after obtaining an order of recognition by filing 'a' petition, but it is not a new case. Rather, it is merely one in which the debtor takes on

commence an involuntary case under section 303.[453] In addition, if the recognized foreign proceeding is a foreign main proceeding, the foreign representative may commence a voluntary case under section 301 or 302.[454] This structure differs from

---

new duties and responsibilities as the debtor in a chapter 7 case or the debtor in possession in a chapter 11 case.") (internal citations omitted); *In re* Toft, 453 B.R. 186, 192 (Bankr. S.D.N.Y. 2011) ("Section 1528 specifically provides that the foreign debtor must have assets in the United States in order for a plenary case under another chapter to be initiated[.]"); UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 224 ("Article 28, in conjunction with article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of a local insolvency proceeding concerning the same debtor as long as the debtor has assets in the State."); *id*. at ¶ 225 ("While the solution leaves a broad ground for commencing a local proceeding after recognition of a foreign main proceeding, it serves the purpose of indicating that, if the debtor has no assets in the State, there is no jurisdiction for commencing an insolvency proceeding.").

While section 1528 generally limits the effects of the subsequently commenced title 11 case to the debtor's assets that are "within the territorial jurisdiction of the United States[,]" the effects of the title 11 case may be extended to foreign assets "to the extent necessary to implement cooperation and coordination under sections 1525, 1526, and 1527" if those foreign assets are subject to the jurisdiction of the court under section 541(a) and 28 U.S.C. § 1334(e) and not subject to the jurisdiction and control of a recognized foreign proceeding. 11 U.S.C. § 1528; *see also In re British Am. Ins. Co*., 488 B.R. at 225 ("In th[e] limited circumstance, where the Court has recognized a foreign main proceeding, the foreign representative has filed a plenary bankruptcy case for the debtor here, and the foreign representative does not have the benefit of another foreign proceeding for the debtor recognized by this Court having jurisdiction over the asset, then this Court may exercise its extra-territorial *in rem* jurisdiction under section 1334(e). This is consistent with the ancillary nature of the chapter 15 process, as the reach of this Court outside the United States is limited to the unlikely circumstance that no other recognized proceeding can assist with the asset."); *In re* JSC BTA Bank, 434 B.R. 334, 343–44 (Bankr. S.D.N.Y. 2010) ("[S]ection 1528 . . . extends bankruptcy court jurisdiction over certain foreign assets of a chapter 15 debtor upon the commencement of a subsequent plenary bankruptcy case but . . . does not expand jurisdiction as to the debtor itself."); *In re* SPhinX, Ltd., 351 B.R. 103, 116 (Bankr. S.D.N.Y. 2006) ("[A]fter recognition of a foreign main proceeding, the effects of a case under another chapter of the Bankruptcy Code are restricted to the assets of the debtor located within the territorial jurisdiction of the United States and, to the extent necessary to implement cooperation and coordination with the foreign court, to other assets of the debtor that are within the bankruptcy court's extraterritorial jurisdiction, to the extent not within the jurisdiction of a previously recognized foreign proceeding."). While Article 28 of the Model Law generally parallels section 1528, Article 28 limits the effects of the newly commenced proceeding to "assets of the debtor that are located in [the] State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of [the] State, should be administered in that proceeding." UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 28.

[453] *See* 11 U.S.C. § 1511(a)(1). However, section 303(b)(4) provides that an involuntary case against a person may be commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 by a foreign representative of the estate in a foreign proceeding concerning such person regardless of whether the foreign procedure has been recognized. *See id.* § 303(b)(4); *see also In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 132 (Bankr. S.D.N.Y. 2007) ("Section 303(b)(4) of the Bankruptcy Code specifically provides that an involuntary case may be commenced under chapter 7 or 11 of the Bankruptcy Code by a foreign representative of the estate in a foreign proceeding so that a foreign representative is not left remediless upon nonrecognition."). The Bankruptcy Court for the Southern District of New York noted that "the failure to repeal section 303(b)(4) along with section 304 may be a drafting error in view of the newly enacted section 1511(b) which likewise addresses the commencement of a case under sections 301 and 303. The inconsistencies of the two statutes have not been conformed." *Id.* at 132 n.15; *see also* H.R. REP. NO. 109-31, pt. 1, at 106 (2005) ("[A]n order granting recognition is required as a prerequisite to the use of sections 301 and 303 by a foreign representative.").

[454] *See* 11 U.S.C. § 1511(a)(2); *In re* Loy, 448 B.R. 420, 429 (Bankr. E.D. Va. 2011) ("Under § 1511(a)(2) of the Code, a foreign representative in a recognized foreign main proceeding may commence a voluntary Chapter 7 case.").

the Model Law, which does not differentiate between a voluntary and an involuntary case.[455]

In order to commence an involuntary or a voluntary case, the foreign representative must provide a certified copy of the order granting recognition with the bankruptcy petition.[456] In addition, the foreign representative must advise the court where the petition for recognition was filed that he or she intends to commence a case under section 1511(a) prior to the commencement thereof.[457] Pursuant to section 1529, if a case under section 301, 302, or 303 is commenced after recognition of the foreign proceeding, relief in effect in the chapter 15 case will be reviewed and modified or terminated to the extent it is inconsistent with the newly commenced case.[458]

In addition, pursuant to section 1512, upon recognition of a foreign proceeding, the foreign representative is permitted to participate as a party in interest in a case under title 11 regarding that same debtor.[459] Section 1512 provides the foreign representative with procedural standing in the title 11 case to file "petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding."[460] It does not, however, vest the foreign representative with any specific powers or rights, specify the types of motions that the foreign representative might file, or affect other title 11 provisions that govern the fate of the motions filed by the foreign representative.[461]

When a foreign proceeding and a case under another chapter of title 11 regarding the same debtor are pending concurrently, the court will seek cooperation

---

[455] *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 11 ("A foreign representative is entitled to apply to commence a proceeding under [*identify laws of the enacting State relating to insolvency*] if the conditions for commencing such a proceeding are otherwise met."); H.R. REP. NO. 109-31, pt. 1, at 111 (2005) ("Article 11 does not distinguish between voluntary and involuntary proceedings, but seems to have implicitly assumed an involuntary proceeding. Subsection 1(a)(2) goes farther and permits a voluntary filing, with its much simpler requirements, if the foreign proceeding that has been recognized is a main proceeding.").

[456] *See* 11 U.S.C. § 1511(b); *see also* FED. R. BANKR. P. 1010(a) (regarding service of an involuntary petition).

[457] *See* 11 U.S.C. § 1511(b); *see also* 8 COLLIER ON BANKRUPTCY, ¶ 1511.02, at 1511-3 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) ("The requirement for notice to the court that granted recognition is not explained but presumably is necessary to insure compliance with sections 1528 and 1529. Section 1528 limits the scope of a plenary case filed after recognition of a foreign main proceeding and section 1529 mandates cooperation and coordination of the two courts involved in the plenary and chapter 15 cases.").

[458] *See* 11 U.S.C. § 1529(2).

[459] *See id.* § 1512; *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 12; *see also In re* RHTC Liquidating Co., 424 B.R. 714 (Bankr. W.D. Pa. 2010) (foreign representative filed a motion to dismiss an involuntary chapter 7 case); *In re* SPhinX, Ltd., 351 B.R. 103, 113 (Bankr. S.D.N.Y. 2006) ("Chapter 15 . . . provides flexibility by acknowledging the possibility of a concurrent plenary case under other chapters of the Bankruptcy Code while a foreign proceeding is pending, permitting a foreign representative in a recognized foreign proceeding to commence . . . or participate in . . . such a case[.]").

[460] UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 115; *see* H.R. REP. NO. 109-31, pt. 1, at 111 (2005) ("The effect of this section is to make the recognized foreign representative a party in interest in any pending or later commenced United States bankruptcy case.").

[461] *See* UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 116.

and coordination under sections 1525, 1526, and 1527, subject to certain guidelines, based on the sequence in which the cases were filed.[462] If a case under another chapter of title 11 is pending when the petition for recognition of the foreign proceeding is filed, any relief granted under section 1519 or 1521 must be consistent with the relief granted in the pending title 11 case, and the relief provided for in section 1520 will not apply, even if the foreign proceeding is recognized as a foreign main proceeding.[463] If, on the other hand, the other title 11 case is commenced after recognition of the foreign proceeding, or after the filing of the petition for recognition, any relief in effect under section 1519 or 1521 will be reviewed and modified or terminated if it is inconsistent with the other title 11 case.[464] In addition, if the recognized foreign proceeding is a foreign main proceeding, the stay and suspension referred to in section 1520(a) will be modified or terminated if inconsistent with the relief granted in the other title 11 case.[465]

Moreover, in order to grant, extend, or modify the relief provided to a representative of a foreign nonmain proceeding, the court must conclude that such relief relates to assets that, under the laws of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.[466]

Finally, in order to achieve cooperation and coordination under sections 1528 and 1529, the court may dismiss or suspend a case pursuant to section 305.[467] This

---

[462] *See* 11 U.S.C. § 1529. While section 1529 of the Bankruptcy Code is substantially in accord with Article 29 of the Model Law, subsection 1529(4), which provides that, in achieving cooperation and coordination under sections 1528 and 1529, the court may grant any of the relief authorized under section 305 (which deals with abstention), is absent in Article 29. *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 29.

[463] *See* 11 U.S.C. § 1529(1)(A)–(B); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 29(a)(i)–(ii). While there is no explicit exception to the automatic stay in the other Title 11 case which permits the foreign representative to file a petition for recognition, the petition for recognition can be characterized as a determination of the status and standing of the foreign proceeding and foreign representative, as opposed to an action or proceeding against the debtor. *See* 8 COLLIER ON BANKRUPTCY, ¶1529.02, at 1529-4 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015).

[464] *See* 11 U.S.C. § 1529(2)(A); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 29(b)(i); *see also* H.R. REP. NO. 109-31, pt. 1, at 117 (2005) ("[A]lthough the jurisdictional limitation [in section 1528] applies only to United States bankruptcy cases commenced after recognition of a foreign proceeding, the court has ample authority under [section 1529] . . . and section 305 to exercise its discretion to dismiss, stay, or limit a United States case filed after a petition for recognition of a foreign main proceeding has been filed but before it has been approved, if recognition is ultimately granted.").

[465] *See* 11 U.S.C. § 1529(2)(B); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 29(b)(ii).

[466] *See* 11 U.S.C. § 1529(3); *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 29(c); *see also* 8 COLLIER ON BANKRUPTCY, ¶ 1529.04, at 1529-6 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013) ("In the context of coordinating concurrent cases, this provision continues the limited deference afforded by section 1521(c) to an essentially territorial, secondary proceeding.").

[467] *See* 11 U.S.C. §§ 305, 1529(4); *see In re* RHTC Liquidating Co., 424 B.R. 714, 720 (Bankr. W.D. Pa. 2010).

provision, which is absent from the Model Law, is "consistent with United States policy to act ancillary to a foreign main proceeding whenever possible."[468]

Section 1530 recognizes that representatives from multiple foreign proceedings involving the same debtor may seek recognition in the United States.[469] In such a situation, the court will seek cooperation and coordination under sections 1525, 1526, and 1527, subject to the following guidelines: (i) relief granted under section 1519 or 1521 to a representative of a foreign nonmain proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding, (ii) if a foreign main proceeding is recognized after recognition of a foreign nonmain proceeding, or after the filing of a petition for recognition, any relief in effect under section 1519 or 1521 will be reviewed and modified or terminated to the extent it is inconsistent with the foreign main proceeding, and (iii) if, after recognition of a foreign nonmain proceeding, another foreign nonmain proceeding is recognized, the court will grant, modify, or terminate relief for the purpose of facilitating coordination of the proceedings.[470] The first two guidelines emphasize the primacy of a foreign main proceeding over a foreign nonmain proceeding,[471] while the third "reflects the equal stature of two foreign nonmain proceedings and essentially instructs the court to make the best of it."[472]

If petitions commencing cases under title 11 or seeking recognition under chapter 15 are filed in different districts and involve the same or related debtors, the proper venue will be determined in the district in which a petition was first filed.[473] All proceedings on the other petitions are stayed until the court in the district in which a petition was first filed reaches a decision regarding venue.[474]

Section 1531 provides that the recognition of a foreign main proceeding creates a rebuttable presumption that the debtor is generally not paying debts as they

---

[468] H.R. REP. NO. 109-31, pt. 1, at 117 (2005) ("Cases brought under chapter 15 are intended to be ancillary to cases brought in a debtor's home country, unless a full United States bankruptcy case is brought under another chapter. Even if a full case is brought, the court may decide under section 305 to stay or dismiss the United States case under the other chapter and limit the United States' role to an ancillary case under this chapter.").

[469] *See generally* 11 U.S.C. § 1530; *see also In re* British Am. Ins. Co., 425 B.R. 884, 889 (Bankr. S.D. Fla. 2010) ("The petitions request coordination of foreign proceedings under 11 U.S.C. § 1530. Section 1530 contemplates coordination of multiple foreign proceedings recognized under chapter 15. The Court has recognized only a single foreign nonmain proceeding, so relief under 11 U.S.C. § 1530 is denied.").

[470] *See* 11 U.S.C. § 1530; *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 30.

[471] *See* 11 U.S.C. § 1530(1)–(2); H.R. REP. NO. 109-31, pt. 1, at 118 (2005) ("[Section 1530] ensures that a foreign main proceeding will be given primacy in the United States, consistent with the overall approach of the United States favoring assistance to foreign main proceedings.").

[472] 8 COLLIER ON BANKRUPTCY, ¶ 1530.01, at 1530-2 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013); *see also* 11 U.S.C. § 1530(3).

[473] *See* FED. R. BANKR. P. 1014; *see also In re* Vitro Asset Corp., *et al.*, Case No. 11-32600 (Bankr. N.D. Tex. May 13, 2011) (approving the motion to transfer the chapter 15 proceeding filed in the Southern District of New York to the Northern District of Texas and noting that the chapter 15 proceeding was filed after involuntary petitions were filed against certain related debtors in the Northern District of Texas).

[474] *See* FED. R. BANKR. P. 1014.

become due for the purpose of commencing an involuntary bankruptcy case under section 303.[475]

Finally, section 1532 prohibits an unsecured creditor that has received payment on account of its claim in a foreign proceeding from receiving payment for the same claim in the United States, if payment to other creditors of the same class in the United States proceeding is proportionately less than the payment the creditor received in the foreign proceeding.[476] If, however, creditors of the same class are to be paid a proportionately greater amount in the United States proceeding than the creditor received in the foreign proceeding, the creditor may participate in any such distribution to the extent necessary to receive a proportionately equal share of the proceeds.[477] Thus, if an unsecured creditor that received 5 percent of its claim in a foreign proceeding is also participating in an insolvency proceeding in the United States where the distribution to creditors in its class is 15 percent, the creditor will receive 10 percent of its claim in the United States proceeding.[478] Adding the 10 percent distribution to the 5 percent the creditor previously received in the foreign proceeding puts the creditor on equal footing with the others in its class that received 15 percent in the United States proceeding. If, however, creditors of the same class will receive 5 percent or less on account of their claims in the United States' proceeding, the creditor will not be permitted to participate in any distribution.

CONCLUSION

Ten years ago, through chapter 15, Congress introduced a statutory framework designed to foster comity and cooperation and to provide an effective means for harmonizing international bankruptcy proceedings. As American businesses continue to expand into global markets, they will increasingly rely on chapter 15 for clarity in cross-border insolvency matters. While courts have answered many vexing questions about the application of chapter 15 during the past decade, chapter 15 remains an evolving area of law that will continue to develop as its use intensifies.

---

[475] *See* 11 U.S.C. §§ 303, 1531. Article 31 of the Model Law provides that absent evidence to the contrary, "recognition of a foreign main proceeding is . . . proof that the debtor is *insolvent*." *See* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 31 (emphasis added). While section 1531 is generally in accord with Article 31, section 1531 substitutes "generally not paying such debts as those debts become due" for "insolvent". In addition, while proof of insolvency is required in some jurisdictions before any insolvency proceeding may be commenced, a determination of solvency is not necessary to commence a voluntary case under title 11. *See* 11 U.S.C. § 301; UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 235. Thus, the rebuttable presumption in section 1531 applies only to the commencement of an involuntary case under section 303. *See* 11 U.S.C. § 1531.

[476] *See* 11 U.S.C. § 1532; *accord* UNCITRAL Model Law and Guide, *supra* note 2, Part One, Art. 32; *see also* H.R. REP. NO. 109-31, pt. 1, at 118 (2005) ("This section . . . is very similar to prior section 508(a), which is repealed.").

[477] *See* UNCITRAL Model Law and Guide, *supra* note 2, Part Two, ¶ 239.

[478] *See id.*