



AMERICAN  
BANKRUPTCY  
INSTITUTE

# 2022 International Insolvency & Restructuring Symposium

## America Now!

### **Jay M. Goffman, Moderator**

Teneo | New York, N.Y., USA

### **Mark D. Bloom**

Baker McKenzie | Miami, Fla., USA

### **Hon. Martin Glenn**

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

### **Lynn P. Harrison III**

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### **Peter K. Newman**

Skadden, Arps, Slate, Meagher & Flom LLP | London, U.K.

# America Now!

## 2022 International Insolvency & Restructuring Symposium

October 14, 2022



### PANELISTS

- **Hon. Martin Glenn, Chief Bankruptcy Judge for the Southern District of New York**
- **Jay Goffman, Moderator, Teneo**
- **Mark D. Bloom, Baker McKenzie**
- **Lynn P. Harrison III, Dentons**
- **Peter Newman, Skadden**

## AGENDA

Skadden

1	<i>Circuit Split: Are Foreign Debtors Required to Satisfy Section 109(a) of the Bankruptcy Code?</i>
2	Establishing Foreign Main & Nonmain Proceedings in Ch. 15 Cases
3	Nonconsensual Third-Party Releases in Bankruptcy Cases
4	<i>Balance Between Equity and Federal Law v. Foreign Law and International Comity</i>
5	Establishing Personal Jurisdiction Over a Foreign Lender in Bankruptcy Cases

3 Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates

1

***Circuit Split:  
Are Foreign Debtors  
Required to Satisfy  
Section 109(a) of the  
Bankruptcy Code?***

4

## Topic 1: *Section 109(a) of the Bankruptcy Code*

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- *Issue: Do the eligibility requirements of section 109(a) of the Bankruptcy Code – specifically the requirement that a debtor have property in the United States – apply to a foreign debtor that is the subject of a case filed under Chapter 15 of the Bankruptcy Code?*
- *Case: Drawbridge Special Opportunities Fund LP v. Barnet*, (2d Cir. 2013)
  - The Second Circuit held that section 109(a) applies in chapter 15 cases.
- *Case: Zawawi v. Diss*, (M.D. Fla. 2022)
  - The Bankruptcy Court held that section 109(a) does not apply in chapter 15 cases.
  - Affirmed on appeal by the District Court for the Middle District of Florida.
  - On September 19, 2022, the American College of Bankruptcy joined in a Motion for Leave to File Amicus Curiae Brief.

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5

## 2 *Establishing Foreign Main & Nonmain Proceedings in Ch. 15 Cases*

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6

## Topic 2: *Foreign Main & Nonmain Proceedings*

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- Section 1502(4) of the Bankruptcy Code provides that a “foreign main proceeding” is a foreign proceeding pending in the country where the debtor has the center of its main interests, also known as “COMI.”
    - Rebuttable presumption that corporate debtor’s registered office is its COMI.
  - Section 1502(5) of the Bankruptcy Code defines a “foreign non-main proceeding” as a foreign proceeding “pending in a country where the debtor has an establishment.”
    - An “establishment” is defined in section 1502(2) of the Bankruptcy Code as “any place of operations where the debtor carries out a nontransitory economic activity.”
      - » No statutory presumption regarding foreign debtor’s establishment.
  - Recent Cases:
    - *In re PT Pan Brothers Tbk*, (Bankr. S.D.N.Y. 2022)
    - *In re Modern Land (China) Co.*, (Bankr. S.D.N.Y. 2022)
    - *In re E-House (China) Enterprise Holdings*, (Bankr. S.D.N.Y. 2022)
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7

# 3 *Nonconsensual Third-Party Releases in Bankruptcy Cases*

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### Topic 3: *Nonconsensual Third-Party Releases*

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- *Issue: Do Bankruptcy Courts have constitutional authority to approve nonconsensual third-party releases?*
  - *Recent Ch. 11 Cases:*
    - *In re Purdue Pharma, L.P.*, (D.N.Y. 2021)
      - » Bankruptcy Courts, as non-Article III courts, lack the constitutional authority to enter a final order approving nonconsensual third-party releases.
    - *Boy Scouts of America*, (Bankr. D. Del. Sept. 8, 2022)
      - » Judge Silverstein ruled that the inclusion of nonconsensual third-party releases in the debtor's reorganization plan was enforceable.
  - *Recent Ch. 15 Cases:*
    - *In re Vitro S.A.B. de C.V.*, (5th Cir. 2012)
    - *In re Avanti Commc'ns Grp.*, (Bankr. S.D.N.Y. 2018)
    - *In re PT Bakrie Telecom TBK*, (Bankr. S.D.N.Y. 2021)
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9

## 4 *Balance Between Equity and Federal Law v. Foreign Law and International Comity*

10

**Topic 4: Equity / Federal Law v. International Comity****Skadden**

- *Issue: Whether based on principles of “equity” and federal common law, a U.S. court presiding over a federal equity receivership can impose a scheme of distribution upon the foreign investors in a legal entity within that receivership that was organized under and regulated by the laws of a foreign jurisdiction, in disregard of a statutory distribution priority scheme created under the laws of that jurisdiction, over the objection of foreign liquidators appointed by the foreign court to oversee the liquidation of the subject entity.*
- *Case: SEC v. TCA Global Credit Fund, Ltd., (S.D. FL 2022)*
  - Addressing an issue of first impression, the Court ruled that a federal equity receiver can make a direct distribution to stakeholders of a foreign entity based on considerations of equity and federal common law.

11

**5*****Establishing  
Personal Jurisdiction  
Over a Foreign Lender  
in Bankruptcy Cases***

12

## Topic 5: *Establishing Personal Jurisdiction*

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- *Issue: Are Bankruptcy Courts required to have personal jurisdiction over foreign lenders in Bankruptcy Cases?*
- *Case: Sheehan v. Breccia Unlimited Co., (7th Cir. 2022)*
  - The Seventh Circuit held that the Bankruptcy Court must have personal jurisdiction over a foreign lender for the automatic stay to apply to foreclosure proceedings in a foreign country.
    - » Personal jurisdiction can be general or specific.
      - > Specific personal jurisdiction cannot be based “on the ‘unilateral activity’ of a plaintiff.”
      - > Foreign lenders must do something to “purposefully reach out beyond” the foreign country and affirmatively affiliate themselves with the United States in their dealings with the Chapter 11 debtor.



# Faculty

**Mark D. Bloom** is a partner with the Restructuring and Insolvency Practice of Baker & McKenzie LLP in its Miami office. He has more than 35 year of experience representing clients in a wide array of U.S. and cross-border financial restructuring, reorganization and bankruptcy matters. Mr. Bloom regularly represents debtors, trustees, secured and unsecured creditors, official committees, and purchasers of troubled companies and their assets, both in and out of bankruptcy court. He chairs the American College of Bankruptcy, having been inducted as a Fellow in 1998. For over 15 years, he has served the College in a variety of leadership roles, as president, director, vice president and regent. Mr. Bloom has been listed in *The Best Lawyers in America* since 1993, and he is listed in both the Florida and national listings of the *Chambers USA Guide* and in the *K&A Restructuring Register of America's Top 100 Restructuring Professionals*. He was inducted into the International Insolvency Institute in 2014, and also has been an active member of INSOL International for 20 years, co-chairing its Annual Conference on International Insolvency in 2012. Mr. Bloom has written and published extensively and lectured on five continents for INSOL, ALI-ABA, the International Section of the New York State Bar Association and other organizations, and at the Harvard Business School, on areas of interest to insolvency professionals, particularly cross-border recognition and international comity and cooperation. He has served on the editorial boards of both *INSOL World* and the *International Insolvency Law Review*. Mr. Bloom received his B.A. from Yale University in 1975 and his J.D. with honors from the University of Maryland in 1979.

**Hon. Martin Glenn** is Chief U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Nov. 30, 2006, and appointed Chief Judge on March 1, 2022. Previously, he was a law clerk for Hon. Henry J. Friendly, Chief Judge of the U.S. Court of Appeals for the Second Circuit, from 1971-72, and he practiced law with O'Melveny & Myers LLP in Los Angeles from 1972-85 and in New York from 1985-2006, where he focused on complex civil litigation including securities, RICO, financial and accounting fraud, and unfair competition. Judge Glenn is a member of the American Law Institute, International Insolvency Institute, New York Federal-State Judicial Council, New York City Bar, National Conference of Bankruptcy Judges and ABI. He is a past member of the Committee on International Judicial Relations of the U.S. Judicial Conference and the Bankruptcy Judge Advisory Group of the Administrative Office of the U.S. Courts. In addition, he is an adjunct professor at Columbia Law School, a contributing author to *Collier on Bankruptcy* and a frequent lecturer on bankruptcy-related issues. Judge Glenn received his B.S. from Cornell University in 1968 and his J.D. from Rutgers Law School in 1971, where he was an articles editor of the *Rutgers Law Review*.

**Jay M. Goffman** is client chairman of Teneo's Financial Advisory Business in New York. In this role, he leads client development and execution for Teneo's North American Financial Advisory business, while also working across the broader business globally. Prior to joining Teneo, Mr. Goffman was vice chair of Global Advisory at Rothschild & Co., a large international investment bank, where he advised clients across Rothschild's Restructuring, Debt Advisory and M&A practices. Before Rothschild, he spent 36 years as a lawyer focused on restructuring, debt advisory and distressed M&A. For the last 24 years of his legal career, he practiced at Skadden Arps, where he was the global head of its Corporate Restructuring Department. Over the course of his career, Mr. Goffman

has consistently been recognized as one of the leading and most innovative restructuring advisors in the world. He was named a “Dealmaker of the Year” by *The American Lawyer* and one of the “Most Influential Lawyers of the Decade” by *The National Law Journal*. He has also received several Lifetime Achievement and Hall of Fame honors, in addition to numerous philanthropic awards. Mr. Goffman is best known for having devised and pioneered the “prepackaged” restructuring, which revolutionized the field of restructuring and has been successfully used over the past 35 years to reorganize hundreds of companies in a quick, efficient and cost-effective manner. As a result of his efforts, prepacks are now the predominant method used in major restructurings. Mr. Goffman has successfully reorganized businesses out of court and in court across multiple industries and geographies, including some of the largest, most high-profile and most complex cases in history. Many of his deals and accomplishments have been profiled in various publications, including *The Wall Street Journal*. Mr. Goffman has chaired restructuring panels and legislative review committees, in addition to chairing and speaking at numerous restructuring and distressed M&A conferences. He also has published extensively on restructuring, fiduciary duties and distressed M&A. Mr. Goffman received his B.S. in 1980 in chemical psychobiology from the State University of New York at Binghamton and his J.D. in 1983 with honors from the University of North Carolina at Chapel Hill, where he was a member of the *University of North Carolina Law Review*. In 2018, the University of North Carolina School of Law presented him with its Distinguished Alumni Award.

**Lynn P. Harrison, III** is a partner in the Restructuring, Insolvency and Bankruptcy practice of Dentons in New York and has more than 30 years of experience in workouts, reorganizations and liquidations on behalf of debtors, creditors, liquidators and trustees. His clients have included foreign and domestic corporations (both public and private), financial institutions, underwriters and governmental creditors. He primarily advises them on chapter 11 reorganizations, chapter 15, and other ancillary proceedings, structured financings, distressed trades and acquisitions. Prior to joining Dentons, Mr. Harrison led the insolvency aspects of the representation as conflicts counsel of Lehman Brothers Holdings Inc. and its affiliates in one of the largest and most complex chapter 11 cases ever filed. He also played a key role in the international representation of the Italian Extraordinary Administrator of Parmalat S.p.A., a multinational dairy and food corporation, and its affiliates in restructuring some of the company’s subsidiaries in the United States and Latin America. He also counseled the foreign representatives of Gruppo Covarra S.A. de C.V., the first successful ancillary proceeding initiated by a “sindico” (a Mexican liquidator) in the U.S. since the enactment of Mexico’s insolvency law, the Ley de Concurso Mercantiles. In addition, he has international experience with such cases as China Fishery, SLS Capital, Abengoa and Arcapita. Mr. Harrison is a frequent lecturer and prolific writer on international and domestic insolvency issues. In 2019, he was invited to participate in the Second Circuit Judicial Conference, where he served on a panel among U.S. bankruptcy judges addressing “Failures Without Borders: Adjudicating Global Insolvencies.” Mr. Harrison was selected to attend the UNCITRAL Working Group V (Insolvency Law) at the United Nations as co-representative of the Inter-Pacific Bar Association (IPBA), an international association of business and commercial lawyers who live in, or otherwise have a strong interest in, the Asia-Pacific Region. He has spoken throughout the U.S., Europe, Latin America, the Far East and Africa. He has also been a featured commentator for *Forbes* magazine in the U.S. and Phoenix TV InfoNews Channel in China. Mr. Harrison received his B.A. in 1979 from Morehouse College and his J.D. in 1983 from New York University School of Law.

**Peter K. Newman** is a Corporate Restructuring partner with Skadden, Arps, Slate, Meagher & Flom LLP in London, where he advises companies, boards of directors, sponsors, creditors and creditor groups, acquirers and other stakeholders on large and complex restructurings, liability-management exercises, business or asset sales, bankruptcies, insolvencies and associated disputes in jurisdictions around the world. He also advises investors on structuring and restructuring private credit transactions. Mr. Newman is recommended as a leading restructuring practitioner in numerous legal guides, and he has been named an Emerging Leader by The M&A Advisor and an Outstanding Young Restructuring Lawyer by *Turnarounds & Workouts*. He also is an adjunct professor at New York University School of Law, where he teaches a course on cross-border restructuring. Mr. Newman has authored numerous publications, and is a regular speaker, on restructuring-related topics. He is a member of Chatham House: The Royal Institute for International Affairs and recently concluded a term membership with the Council on Foreign Relations. Mr. Newman received his B.A. in 2001 from the University of Maryland and his J.D. in 2004 from New York University School of Law.