AMERICAN BANKRUPTCY INSTITUTE

2019 Caribbean Insolvency Symposium

Chapter 15 Update: Discovery, Drawbridge, Venue, Parallel Cases and Other Hot Topics in Cross-Border Cases

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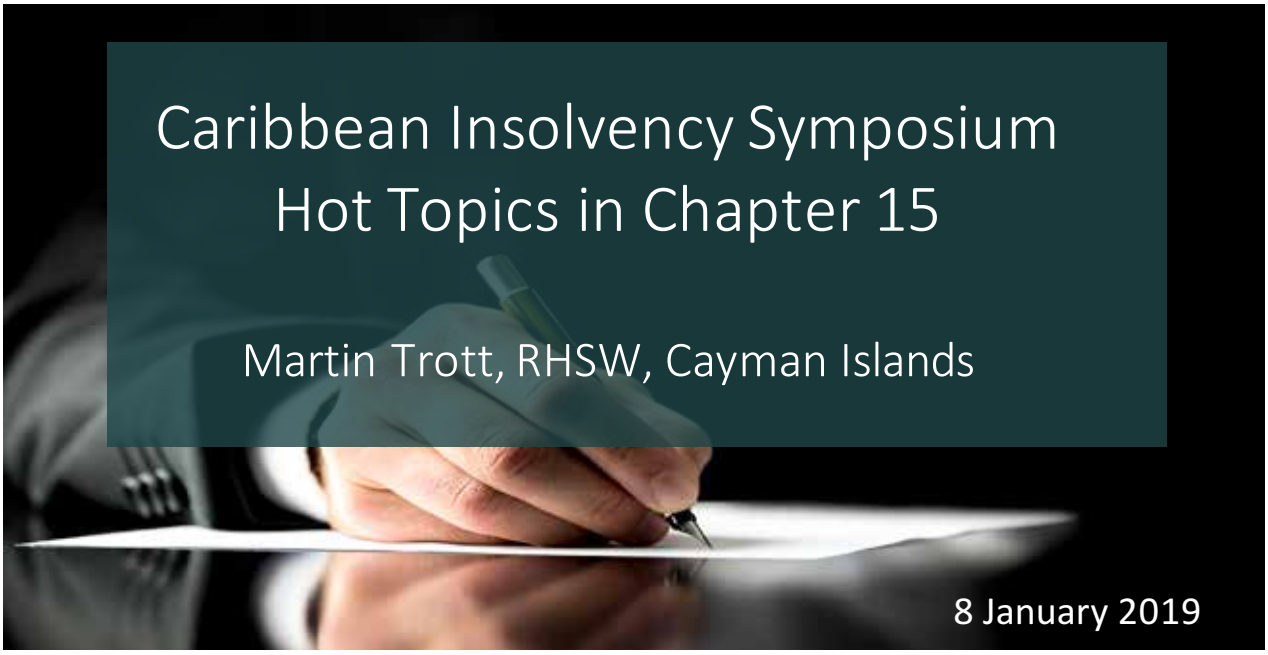

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COMI Shifting

- Consideration for all restructuring engagements
  - Offensive (recognition) or defensive (avoiding parallel proceeding)
- Proper examination of COMI
  - Incorporation vs substance
  - Changing registered office address
  - Opening bank accounts
  - Reporting to creditors, regulator, former principals
  - Holding meetings of creditors and contributories

COMI Shifting

- NBC 20 August letter
  - Seeks to align to UNCITRAL Model Law – revision to Guide to Enactment – date of foreign proceeding determinative

"With respect to the date at which the centre of main interests of the debtor should to be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date."

  - Proposes changes to 11 USC s1502(4) and (5) and 1517(b)

COMI Shifting

- Current status facilitates cross-border cooperation and seeks to maximize returns to creditors / investors.
- Proposal would limit US Bankruptcy courts ability to aid foreign restructuring
- Alternative of Chapter 11 filing would add unnecessary complexity, cost and burden to the estate
- Creditors' interests would not be protected – collective purpose of liquidation would be impaired
- Why change? Court still retains discretion to deny recognition if it deems COMI manipulation was in bad faith

COMI Shifting

- Who are you advising?
- Venue selection for litigation claims
  - Depends on jurisdiction clauses; arbitration
  - Adverse costs
  - Soundview and Richcourt Funds
    - Broad cooperative protocols bt Cayman, BVI and US officeholders
    - Offshore vs US venue for litigation

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COMI Shifting

- Chapter 15 pre-filing considerations
  - Examination of steps to shift COMI
  - 11 U.S.C. 1516(c): in the absence of evidence to the contrary the debtor's registered office is presumed to be the center of the debtor's main interests.
  - Creative Finance decision (Gerber J) – a cautionary tale

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COMI Shifting

- Case studies
  - Ocean Rig
    - Marshall Islands to Cayman; C15 filing
  - Platinum Partners Value Arbitrage Fund L.P.
    - C15 filing after several months of Cayman liquidation
    - First known express carve-out of offshore liquidation from broad-ranging SEC Receivership
  - Madison Funds and Delaware dispute

Parallel Proceedings

- US plenary (chapter 7 / 11) proceedings may be filed after foreign proceedings have been initiated.
  - Worldwide automatic stay may interfere with orderly management of foreign proceedings.
  - Section 305(b) permits foreign representatives to seek dismissal or stay of involuntary proceeding if a foreign proceeding has been recognized under chapter 15 and relief would best serve the purposes of chapter 15.

Parallel Proceedings

- Chapter 15 recognition of foreign proceedings:
  - Initiated by foreign representative
  - Low threshold to recognition
  - Access to most US bankruptcy code powers (e.g., 363 sales) on discretionary or mandatory basis
  - Established body of case law and reasonably predictable results
  - Can use as "home court" in the US to pursue claims to benefit the foreign estate, but only under applicable non-bankruptcy law and subject to potential forum non conveniens dismissal
  - Limited scope of stay

Parallel Proceedings

- Sections 303(b)(4) & 1528 permit a foreign representative to commence a plenary proceeding after chapter 15 recognition of a foreign *main* proceeding:
  - Proceeding's effect limited to US assets – no worldwide automatic stay
  - Grants access to avoidance powers unavailable in chapter 15,
  - Downsides?
  - How to terminate?

COMI Shifting

Thank You

Any Questions?

NATIONAL BANKRUPTCY CONFERENCE
A Voluntary Organization Composed of Persons Interested in the Improvement of the Bankruptcy Code and Its Administration

August 20, 2018

Honorable Tom Marino
Chairman
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
House of Representatives
Washington, DC 20515

Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable David Cicilline
Ranking Member,
Subcommittee on Regulatory Reform
Commercial and Antitrust Law
House of Representatives
Washington, DC 20515

Honorable Dianne Feinstein
Ranking Member,
Committee on the Judicial
United States Senate
Washington, DC 20510

Re: Revisions to Chapter 15 of the Bankruptcy Code

Dear Reps. Marino and Cicilline and Sens. Grassley and Feinstein:

The National Bankruptcy Conference ("NBC") is a voluntary, non-partisan, not-for-profit organization composed of about 60 of the nation's leading bankruptcy judges, professors and practitioners. It has provided advice to Congress on bankruptcy legislation for nearly 80 years. I enclose a Fact Sheet which provides further information about the NBC. This letter updates a January 27, 2016 letter by adding more current information and authorities.

Chapter 15, Ancillary and Other Cross-Border Cases, was added to the Bankruptcy Code by section 801 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[1] Chapter 15 is the United States embodiment and enactment of the Model Law on Cross-Border Insolvency ("Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL"). The United States and forty four countries (plus two overseas territories of the United Kingdom) have adopted the Model Law.[2] NBC Conferees were actively involved in the development and drafting of the Model Law as members (International Insolvency Institute) and heads (United States and the International Bar Association) of delegations to UNCITRAL and then assisted Congress in drafting chapter 15.[3] As experience has developed in cases under

[1]House Report No. 109-31, Pt. 1, 109th Cong., 1st Sess. 105, *et seq* (2005) ("H. R. Rep.").

[2]*See* http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.

[3]Conferee Professor Jay L. Westbrook was a head of the United States delegation to UNCITRAL Working Group V (Insolvency) while Conferee Daniel M. Glosband was the IBA's lead delegate. They also led a consulting group organized by the United States Department of State in drafting the legislation that was enacted by Congress as chapter 15.

chapter 15, the NBC has identified a number of revisions that are necessary or desirable for chapter 15 to fulfill its purposes, as set forth in section 1501(a), and to function and be interpreted in light of its international origin and consistently with the application of similar statutes adopted by foreign jurisdictions, as set forth in section 1508.

1. 11 U.S.C. § 103(a)

The rigid, ostensibly "plain meaning" interpretational approach taken by the Second Circuit in the *Barnet* decision discussed below raises the possibility that section 103 might be interpreted to prevent the application of several Bankruptcy Code sections that either apply by their terms in chapter 15 or are referenced in chapter 15 but are not specified in section 103(a). Section 103(a) provides:

11 U.S.C. § 103 Applicability of chapters

(a) 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. This chapter, sections 305, 306, 307, 362(o), 555, 556, 557, 559, 560, 561 and 562 of this title and any section of this title specifically made applicable by a section of chapter 15 apply in a case under chapter 15.

Sections 305 and 306, as they now exist and as they would be amended by changes recommended below, apply to chapter 15 by their terms. They should be added to section 103(a).

Additional sections of the Bankruptcy Code apply in cases under chapter 15 because they are specifically referenced in chapter 15. Section 1502(c) refers to sections 109(b) and (e) to exclude entities identified in those sections from the scope of chapter 15. Section 1520 applies (with limitations) sections 361, 362, 363, 549 and 552.[4] We recommend the following revisions to address this problem:

11 U.S.C. § 103. Applicability of chapters

(a) 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 ~~t~~itle, ~~and this~~**. This** chapter**,** sections **305, 306,** 307, 362(o), 555, **556,** ~~through~~ 557, ~~and~~ 559**, 560, 561, and** ~~through~~ 562 of this title, **and any section of this title specifically made applicable by a section of chapter 15** apply in a case under chapter 15.

2. 11 U.S.C. § 103(k)

Section 103(k) identifies sections of chapter 15 that apply (a) in all cases under title 11 and (b) in situations when no case under title 11 is pending. It was intended to identify

[4] While section 1523 gives a foreign representative the power to initiate avoidance actions in a case concerning the debtor under another chapter of the Bankruptcy Code and references sections 522, 544, 545, 547, 548, 550, 553 and 724(a), those sections only apply in cases under chapters other than chapter 15. Consequently, while mentioned in chapter 15, they do not need to be added to the list of sections that apply in a chapter 15 case.

sections of chapter 15 that would apply even if there were no chapter 15 case but, in retrospect, it was not sufficiently comprehensive. Section 103(k) currently states:

11 U.S.C. § 103 - Applicability of chapters

(k) Chapter 15 applies only in a case under such chapter, except that—
(1) sections 1505, 1513, and 1514 apply in all cases under this title; and
(2) section 1509 applies whether or not a case under this title is pending.

The sections currently specified in section 103(k)(1) deal with authorization of a trustee or other entity to act in a foreign country (§ 1505), the rights of foreign creditors to participate in a case under title 11 (§ 1513) and notifications to foreign creditors concerning a case under title 11 (§ 1514). The section currently specified in section 103(k)(2) deals with access to courts in the United States by foreign representatives (§ 1509).

In addition to sections 1505, 1513 and 1514, sections 1511, 1523, 1531 and 1532 should apply to all cases under title 11 while section 1510 should apply generally, regardless of whether there is a case pending under title 11. These sections would appear to apply beyond chapter 15 based on their language and function, but they are not referenced in 11 U.S.C. § 103(k).

Section 1510, Limited jurisdiction, provides: "The sole fact that a foreign representative files a petition under section 1515 does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose." The provision was intended to protect against an extension of jurisdiction "beyond the boundaries of the case and any related actions the foreign representative may take …."[5]

Section 1511, Commencement of case under section 301, 302 or 303, empowers a foreign representative, upon recognition, to commence a case under other chapters of title 11. It must necessarily apply to the case commencement procedures for those chapters. For example, section 301 refers to a voluntary case under a chapter being commenced by an entity that may be a debtor under that chapter and makes no reference to the foreign representative of a recognized foreign main proceeding who may file such a petition by virtue of section 1511.[6]

Section 1531, Presumption of insolvency based on recognition of a foreign main proceeding, literally creates this presumption for the purposes of an involuntary petition filed under section 303 and must apply in such a case.

Section 1532, Rule of payment in concurrent proceedings, replaced former section 508(a) and was intended to apply generally, regardless of whether there is a chapter 15 proceeding.[7] The language follows the Model Law and is designed "to avoid situations in which

[5] H.R. Rep. at 111.

[6] *Id.*

[7] 11 U.S.C. § 1532: "Without prejudice to secured claims or rights in rem, a creditor who has received payment with respect to its claim in a foreign proceeding pursuant to a law relating to insolvency may not receive a payment for the same claim in a case under any other chapter of this title regarding the debtor, so long as the payment to other creditors of the same class is proportionately less than the payment the creditor has already received."

a creditor might obtain more favorable treatment than the other creditors of the same class by obtaining payment of the same claim in different jurisdictions."[8]

While the applicability of these sections to other chapters of title 11 (or beyond, in the case of section 1510) may appear self-evident, in light of decisions in cases that apply the language of chapter 15 and related provisions more narrowly and literally than contemplated by section 1508, clarifying the statutory language to avoid potential misunderstanding would be prudent. The NBC recommends the following revisions:

> **(k)** Chapter 15 applies only in a case under such chapter, except that—
> (1) sections 1505, **1511,** 1513, ~~and~~ 1514**, 1523, 1531, and 1532** apply in all cases under this title; and
> (2) ~~section~~**sections** 1509 ~~applies~~**and 1510 apply** whether or not a case under this title is pending.

3. 11 U.S.C. § 109(a)

In an appeal certified directly from the bankruptcy court in *Drawbridge Special Opportunities Fund, LP v. Barnet (In re Barnet)*, 737 F. 3d 238 (2d Cir. 2013), the Second Circuit ruled that section 109(a) applied to a petition for recognition of a foreign proceeding and remanded the case to the bankruptcy court because the foreign representatives had not proved that the debtor satisfied the requirements of section 109(a). In the court's view:

> 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." 11 U.S.C. § 101(23). The debtor that is the subject of the foreign proceeding, therefore, must meet the requirements of Section 109(a) before a bankruptcy court may grant recognition of the foreign proceeding.[9]

Section 109(a) provides:

> **11 U.S.C. § 109 - Who may be a debtor**
>
> (a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

After the *Barnet* decision, the section 109(a) requirement has been regularly satisfied by the transfer of a small amount of the foreign debtor's property to the United States, usually the establishment of a funded retainer account, as an incidental step in the commencement of a chapter 15 case.[10] On a second petition for recognition of the Australian

[8] Guide to Enactment and Interpretation of the UNCITRAL Model Law, ¶ 239, available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

[9] See Section 1, above, for the text of § 103(a).

[10] *See*, e.g., *In re* The Cash Store Financial Services Inc., Case No. 15-12813, Docket No. 1-1, ¶ 4 (Bankr. S.D.N.Y. October 16, 2015). ("CSF is eligible to be a debtor under chapter 15 pursuant to sections 109(a) and 1501(b) of the Bankruptcy Code. CSF has a USD 50,000 retainer held in

liquidation of Octaviar Administration Pty Ltd., filed by Ms. Barnet after the remand, the bankruptcy court granted recognition to the foreign proceeding, finding that causes of action asserted by the foreign representatives and $50,000 held by their U.S. counsel in a retainer account each constituted "property in the United States" for purposes of section 109(a).[11] Bankruptcy Judges in Delaware and Florida rejected the Second Circuit's *Barnet* ruling and the Delaware judge predicted that the Third Circuit would also reject it.[12] A California bankruptcy judge applied section 109(a) to a recognition petition and then found that a retainer account was not sufficient to satisfy the section 109(a) property requirement. On appeal, the District Court, affirmed the applicability of section 109(a) but suggested that the retainer account should satisfy it.[13]Nevertheless, the contrived property transfer solely to satisfy section 109(a) exposes the recognition petition to a challenge that it was not filed in good faith or was "manifestly contrary to public policy". Conversely, by creating an artificial but permeable obstacle to recognition, the ruling inadvertently invites venue shopping based on the newly-minted "principal assets."[14]

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the United States by Conway Mackenzie, Inc. since 2014, and a retainer held in the United States by Rothschild Inc. since 2014, the balance of which is USD 21,532.09."); *see also In re* Berau Capital Resources Pte Ltd, 2015 WL 6507871 (Bankr. S.D.N.Y. 2015) (holding that each of funds in a retainer account and contract rights under a New York law-governed indenture constitute property sufficient to satisfy § 109(a)); In re B.C.I. Finance Pty Limited, 583 B.R. 288 (Bankr. S.D.N.Y. 2018) (finding that $1,250 in a retainer account suffices to satisfy § 109(a)).

[11] *In re* Octaviar Administration Pty Ltd (Debtor in a Foreign Proceeding), 511 B.R. 361 at 372-373 (Bankr. S.D.N.Y. June 19, 2014), citing *In re* Cenargo Int'l PLC, 294 B.R. 571, 603 (Bankr. S.D.N.Y. 2003); *In re* Yukos Oil Co., 321 B.R. 396, 401-403 (Bankr. S.D. Tex. 2005); *In re* Global Ocean Carriers Ltd., 251 B.R. 31, 39 (Bankr. D. Del 2000). *See also In re* Suntech Power Holdings Co., Ltd., 520 B.R. 399 (Bankr. S.D.N.Y. Nov. 17, 2014). A number of subsequent cases have found a retainer account to be sufficient to satisfy the §109(a) requirement including *In re* B.C.I. Finances Pty Limited, 583 B.R. 288 (Bankr. S.D.N.Y 2018) where the court ruled that each o $1,250 retainer account and causes of action (for breach of fiduciary duty) satisfied § 109(a).

[12] *In re* Bemarmara Consulting A.S., Case No. 13-13037 (Bankr. D. Del. Dec. 17, 2013); *In re* MMX Sudeste Mineracao S.A. (Bankr. D.D. Fla. Nov. 1, 2017 ("I reject the holding of the Second Circuit in drawbridge Special Opportunities Fund vs. Barnet…and agree with the majority view of commentators and courts that find that 109 does not apply to a Chapter." Transcript of 11/1/17 Hearing, p.5, Lines 21-24); appeal dismissed for lack of jurisdiction, U.S.D.C.S.D. Fla., No. 17-24308-Civ-Scola, Apr. 3, 2018).

[13] *In re* Forge Group Power Pty Ltd., Case No. 17-300008 (Bankr. N.D. Cal. Mar. 22, 2017); 2018 WL 827913 (N.D. Cal. Feb. 12, 2018).

[14] *See* 28 U.S.C. § 1410(a). The *Suntech* case, supra, is an exemplar of all that is bad about the *Barnet* ruling. ("Focusing on venue rather than eligibility, Solyndra nevertheless contends that the JPLs opened the BONY account to manipulate the placement of the case in this Court rather than in the Northern District of California where the Debtor allegedly had its principal place of business in the United States at the time the JPLs filed the chapter 15 petition …. Solyndra argues that the JPLs' conduct was somehow improper, but I disagree. 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,

Barnet is wrong; only the requirements specified in section 1517 (Order granting recognition) must be satisfied for recognition. Two Conferees who were actively involved in drafting both the Model Law and chapter 15 wrote a long article explaining in detail why *Barnet* is wrong.[15] In sum, section 1517 focuses on eligibility of the foreign proceeding and foreign representative, not the debtor, and contains no debtor-eligibility requirements.

The Second Circuit essentially invited Congress to revisit the drafting of section 109(a) in the last sentence of the *Barnet* opinion: "We direct the Clerk of Court to forward copies of this opinion to Congress following the specified protocol adopted by the Judicial Conference."[16] Amending the statute to reverse *Barnet* and preclude other courts from making the same mistake should be relatively easy.

We propose the following revision, which simply specifies the chapters to which section 109(a) applies and does not include chapter 15 in the list:

11 U.S.C. § 109. Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title. **This subsection does not apply in a case under chapter 15**.

4. 11 U.S.C. § 303

Prior to BAPCPA, section 303(b)(4) granted authority to a foreign representative to file an involuntary petition:

11 U.S.C. § 303 - Involuntary cases

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—…
(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

Section 303(b)(4) was not amended by BAPCPA despite the enactment of section 1511, which provides as follows:

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maximize value, protect creditors and other parties in interests and rescue financially troubled businesses. *See* 11 U.S.C. § 1501(a).") 520 B.R. at *412-*413.

[15] **Chapter 15 Recognition in the United States: Is a Debtor "Presence" Required**?, Int. Insolv. Rev., Vol. 24:28-56 (2015). Among other things, the *Barnet* opinion completely ignores section 1508, which dictates that courts shall take an international perspective in interpreting chapter 15 and look to the UNCITRAL Guide to Enactment for guidance. The Guide makes clear that there are no debtor-eligibility requirements for recognition ("In principle, the Model Law was formulated to apply to any proceeding that meets the requirements of article 2, subparagraph *(a)*, independently of the nature of the debtor or its particular status under national law."). UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment and Interpretation, 55.

[16] *Barnet*, supra, 737 F.3d at *251.

11 U.S.C. § 1511 - Commencement of case under section 301, 302, or 303

(a) Upon recognition, a foreign representative may commence—
(1) an involuntary case under section 303; or
(2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.

Consequently, the "upon recognition" pre-condition to the filing of an involuntary petition by a foreign representative was not interpolated into section 303, creating an internal inconsistency in the statute. This inconsistency was noted by the late Judge Lifland in his decision in the *Bear Stearns* case, where he denied recognition to foreign proceedings of hedge funds that had neither their COMI nor an establishment in the country of the foreign proceeding. *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007); *aff'd* 389 B.R. 325 (S.D.N.Y. 2008). Judge Lifland noted:

> Nonrecognition of the Foreign Proceedings, however, does not leave the Petitioners without the ability to obtain relief from U.S. courts…. While section 304 of the Bankruptcy Code was repealed upon the enactment of chapter 15, section 303 was not repealed. 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.
>
> FN15. 11 U.S.C. § 303(b)(4)…. Section 303(b)(4) does not require that the foreign proceeding be recognized. This flexibility leaves open the potential coordination of a case filed here under Title 11 with the Foreign Proceeding. *See* 11 U.S.C. § 1529 (implicating cooperation and coordination among proceedings under sections 1525, 1526 and 1527 of the Bankruptcy Code, i.e., section 1527(5), concurrent proceedings involving the same debtor).
>
> FN15. It would appear 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.

The NBC agrees that the failure to amend section 303 was a drafting error and should be corrected, as follows:

11 U.S.C. § 303. Involuntary cases

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(4) by ~~a~~ foreign representative ~~of the estate in a foreign proceeding concerning such person~~if the debtor is the subject of a foreign proceeding that has been recognized under section 1517.

5. 11 U.S.C. § 305

Section 305 of the Bankruptcy Code is entitled Abstention and deals with the dismissal of cases under title 11 and the suspension of proceedings in such cases. Recent cases suggest that there should be specific statutory language to give the bankruptcy court clear

statutory authority to abstain in international cases when abstention would better serve the interests of the system of cooperation represented by chapter 15 of the Code, as well as the flexibility to abstain in appropriate cases with respect to matters or issues that are not within the effective jurisdiction of the United States.[17]

There is some debate as to the extent to which the U.S. bankruptcy courts should exercise jurisdiction over full bankruptcy cases under the Code (chapters 7 or 11 primarily) where the debtor's "center of main interests" (its "COMI") is located outside the territorial jurisdiction of the United States. The general policy of chapter 15 is to recognize the foreign proceeding and proceed with an ancillary, cooperative case in the United States under that chapter, although a full United States bankruptcy case is permitted where the debtor satisfies one or more of the requirements to be a debtor in a case under title 11 of the United States Code.[18]

A question arises when a foreign debtor chooses to file its only bankruptcy proceeding in the United States, without filing in its "home" (COMI) country. United States jurisdictional rules have long permitted a filing here if there is any debtor property located in the United States, and no suggestion is made that this rule should change as a matter of jurisdiction.[19] Yet the result is that any debtor based in any country in the world can come to the United States to conduct its liquidation or reorganization, even if its assets, creditors, and business are mostly outside the United States. In those circumstances, we believe the court should have discretion under section 305(a) of the Code to abstain from or suspend all or any part of the full United States bankruptcy case.

Some courts have refused to dismiss a U.S. case where U.S. assets do not predominate and the debtor's COMI is elsewhere, as long as there is sufficient U.S. property to warrant a debt-adjustment proceeding in this country, at least in a case where the debtor has obtained the consent and cooperation of its principal foreign creditors and shareholders for the commencement of a proceeding only in the United States and not in the "home" country.[20]

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[17] Related changes to § 103(a) and 28 U.S.C. § 1334 are discussed in Part 6, below.

[18] 11 U.S.C. § 109 Who may be a debtor:

"(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title."

[19] See, for example, the *Yukos* case where jurisdiction was premised on the balance of the retainer that the debtor had paid to its U.S. bankruptcy counsel. *In re* Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005). Similarly, in *In re* Global Ocean Carriers, Ltd., 251 B.R. 31 (Bankr. D. Del. 2000), the Court sustained jurisdiction over a group of foreign shipping companies based on the presence in the United States of a small bank account and retainers that the companies had paid to counsel in the U.S. who filed their petitions. In *In re* Iglesias, 226 B.R. 721, 722-23 (Bankr. S.D. Fla. 1998), the Court held that an Argentine citizen who had a bank account of about $500 in Florida could file a bankruptcy case there because he had "property" in the United States. Of course, other courts have dismissed cases filed in this country by foreign debtors seeking to use U.S. law only to delay their creditors. *In re* Head, 223 B.R. 648 (Bankr. W.D.N.Y. 1998).

[20] See *In re* Avianca, 303 B.R. 1 (Bankr. S.D.N.Y. 2003).; *In re* Globo Communicacoes e Particpacoes S.A., (S.D.N.Y. 2004); *In re* Monitor Single Lift I, Ltd., 381 B.R. 455 (Bankr. S.D.N.Y. 2008). See generally, Oscar Couwenberg and Stephen J. Lubben, *Corporate Bankruptcy Tourists*, 70 The Business Lawyer 719 (2015).

Others believe that the U.S. courts should not attempt to exercise primary jurisdiction over assets the great bulk of which lie beyond the effective control of the U.S. courts or in circumstances in which the exercise of United States jurisdiction would violate the principles of modified universalism that underlie chapter 15.[21] For example, the U.S. case may merely be obstructing the administration of the foreign proceeding to gain negotiating leverage for a party.[22] It has been argued that the exercise of such jurisdiction is contrary to the purposes of chapter 15, as that term is used in section 305(a)(2)(B).[23] There may also be practical reasons for courts not to entertain cases when they lack the practical ability to exercise control over the debtor or its assets. For example, a debtor might file for the benefit of the automatic stay, but later refuse, with impunity, to abide by subsequent court orders.

Section 305 as it is now drafted does not offer a court the kind of specific statutory authority to efficiently deal with these sorts of situations. Section 305 currently provides as follows:

11 U.S.C. § 305. Abstention

> **(a)** The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
>
> **(1)** the interests of creditors and the debtor would be better served by such dismissal or suspension; or
>
> **(2) (A)** a petition under section 1515 for recognition of a foreign proceeding has been granted; and
>
> **(B)** the purposes of chapter 15 of this title would be best served by such dismissal or suspension.
>
> **(b)** A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.
>
> **(c)** An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

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[21] See, e.g., Georges Affaki, "A European View on the U.S. Courts' Approach to Cross-Border Insolvency – Lessons from Yukos," *reprinted in* Les Faillites Internationales, Colloque du 30 Novembre 2007, at 25 (Centre Francais de Droit Comparé, vol. 10, 2007). Both *Yukos* and *Global Ocean Carriers* are discussed and critiqued in Affaki's piece. See also Westbrook, "National Regulation of Multinational Default," *reprinted in* Economic Law and Justice in Times of Globalisation, at 777 (Festschrift für Carl Baudenbacher) (Nomos 2007). Professor Westbrook expresses concern over whether exercising control over such "solitary non-main proceedings" might undermine the development of cross-border principles. *Id.*

[22] *See In re* Northshore Mainland Servs., Inc., 537 B.R. 192 (Bankr. D. Del. 2015); *In re* Oi Brasil Holdings Cooperatief U.A. 578 B.R. 169 (Bankr. S.D.N.Y. 2017); *In re* Zhejiand Photovoltaic Co., Ltd., 2017 WL 6539481 (Bankr. D. New Jersey 2017).

[23] See Jay Lawrence Westbrook, "Multinational Insolvency: A First Analysis of Unilateral Jurisdiction," Norton Annual Review of International Insolvency 2009.

Thus section 305(a)(2) provides clear authorization for the court to dismiss a case when a petition for recognition of a foreign proceeding has been granted, while section 305(b) provides clear authorization for a recognized foreign representative under chapter 15 to seek dismissal or suspension of a case. However, it does not provide protection against an abusive or otherwise inappropriate filing of a full United States case made by the debtor in the situation where no chapter 15 recognition petition has been granted. That authority should be explicitly given to the courts. In addition, a specific authorization should include language that would allow a court to abstain from consideration of only part of the case or only some of the proceedings. That would make it clear that, if the court were inclined to sustain jurisdiction over a case involving a debtor located primarily abroad, it could still limit its exercise of jurisdiction to those assets within the court's effective control. Such a provision would also be consistent with section 1528. That section provides that, after recognition of a foreign main proceeding, a full bankruptcy case can only be commenced under another chapter of the Code if the debtor has assets in the U.S.[24] Once commenced, the case administration is limited to "assets that are within the territorial jurisdiction of the United States."[25] It makes sense that section 305 remain consistent with chapter 15.

The general authority under section 305(a)(1) to dismiss a case if dismissal would better serve the interests of the debtor and creditors may, in some instances, encompass dismissal of a case that is inconsistent with the purposes of chapter 15 or in which the court cannot exercise effective control over the debtor or its assets. However, the analysis required to conclude that dismissal is appropriate under the current statute is attenuated and does not focus on the primary reasons that dismissal is appropriate.[26] The NBC believes that there should be a clear statutory basis for dismissal of cases involving debtors whose COMI is outside of the United States when those cases either conflict with the purposes of chapter 15 or involve a debtor or assets over which the court does not have effective control.

Thus, modification to section 305 is appropriate. The statute, incorporating the foregoing proposals, would then read in relevant part as set forth below.

11 U.S.C. § 305. Abstention

> **(a)** The court, after notice and a hearing, may dismiss a case under this title, or may suspend ~~all proceedings~~**a proceeding** in a case under this title, at any time if~~—~~
>
> (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; ~~or~~

[24] *See* 11 U.S.C. § 109(a). Having assets in the U.S. is one basis for a person's eligibility for bankruptcy relief in the U.S. There are others as well (e.g., incorporation in the U.S., principal place of business in the U.S.). Section 1528 restricts the debtor that is the subject of a foreign main proceeding to the "assets in the U.S." qualification for eligibility.

[25] *See* 11 U.S.C. § 1528. The section actually permits a slightly greater reach – other assets that are "within the jurisdiction of the U.S. court by virtue of section 541(a) and 28 U.S.C. § 1334(e), but only "to the extent that such other assets are not subject to the jurisdiction and control of the foreign proceeding …"

[26] *See In re* Compania de Alimentos Fargo, S.A*,* 376 B.R. 427 (Bankr. S.D.N.Y. 2007); *In re* Yukos Oil Co., 321 B.R. 396 (Bankr. S.D.Tex. 2005).

(2)(A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and

(B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.; or

(C) the debtor's center of main interests is not the United States and the court cannot exercise effective control over either the debtor or the debtor's material assets.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending ~~all proceedings~~**a proceeding** in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158 (d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

6. 11 U.S.C. § 306

As discussed in Part 2, above, section 1511 provides that a foreign representative of a foreign main proceeding, upon recognition, may commence a voluntary case under section 301 or 302. Prior to the enactment of chapter 15, a foreign representative could appear under section 304, commence an involuntary case under section 303 or request abstention or dismissal of a case under section 305. Section 306 permitted those appearances without exposing the foreign representative to jurisdiction of any other court in the United States.[27] While section 1510 provides for such limited jurisdiction upon filing a petition for recognition under chapter 15, and the reference to section 304 was deleted from section 306, section 306 was not modified by BAPCPA to reflect the additional authority to file petitions under sections 301 and 302, and it should have been. As currently written, section 306 applies to petitions or requests under section 303 or 305:

11 U.S.C. § 306. Limited appearance

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.

Section 306 should be amended to add references to sections 301 and 302, as follows:

11 U.S.C. § 306. Limited appearance

An appearance in a bankruptcy court by a foreign representative in connection with a petition or **a** request under section **301, 302,** 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 **301, 302,** 303**,** or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court.

[27] H.R. Rep. at 325-326.

7. **11 U.S.C. § § 1502(4) and (5) and 1517(b): Clarification of the time at which the center of main interests ("COMI") of a debtor is determined by adopting the UNCITRAL formulation of the date of the commencement of the foreign proceeding**.

A growing number of decisions under chapter 15 have concluded that the COMI of a debtor in a foreign proceeding should be measured as of the date that the petition is filed for recognition under chapter 15. These decisions conflict with the original intention of the Model Law and the recent revision of the Guide to Enactment, which measure COMI as of the date of the commencement of the foreign proceeding.

Section 1502(4) defines a "foreign main proceeding" as a "foreign proceeding pending in the country where the debtor *has* the center of its main interests" 11 U.S.C. § 1502(4) (emphasis added). Section 1517(b)(2) states that a foreign proceeding shall be recognized "as a foreign main proceeding if it *is* pending in the country where the debtor *has* the center of its main interests." 11 U.S.C. § 1517(b)(2) (emphasis added).

The tense used is the same as that used in the Model Law:

"a foreign proceeding taking place in the State where the debtor *has* the centre of its main interests." Model Law, Art. 2(b).[27]

"if it *is* taking place in the State where the debtor *has* the centre of its main interests." Model Law, Art. 17(2)(a).

The verb tense was not deemed an issue by the drafters of the Model Law, who assumed that the center of main interests would not (and could not) change once the foreign proceeding was initiated, because "centre of main interests" referred to the business activity of the enterprise prior to the filing of the insolvency proceeding. The source of the COMI concept was the then nascent European Union Convention on Insolvency Proceedings, which used COMI as a jurisdictional test. That is, a country signatory to the convention could not open an insolvency proceeding for a given entity unless that entity's "centre of main interests" was located in that country. *See* M. Virgos and E. Schmit, *Report on the Convention on Insolvency Proceedings*, Brussels 3 May 1996 *available at* http://aei.pitt.edu/952.

The Guide to Enactment (as amended in 2013) explains:

> Under the [EC] Regulation, the decision on centre of main interests is made by the court receiving an application for commencement of insolvency proceedings at the time of consideration of that application. Under the Model Law, a request for recognition of a foreign proceeding may be made at any time after the commencement of that proceeding; in some cases it has been made several years later. Accordingly, the court considering an application for recognition under the Model Law must determine whether the foreign proceeding for which recognition is sought is taking place in a forum that was the debtor's centre of main interests when the proceeding commenced (the issue of timing with respect to the determination of centre of main interests is discussed at paras. 157-160 below).

Guide to Enactment, ¶ 141.

Regarding the timing issue, UNCITRAL Working Group V (Insolvency) revised the Guide to Enactment to address questions that had arisen with respect to the tense issue:

> The Model Law does not expressly indicate the relevant date for determining the center of main interests of the debtor.…
>
> The use of the present tense in article 17 does not address the question of the relevant date, but rather requires the foreign proceeding to be current or pending at the time of the recognition decision; if the proceeding for which recognition is sought is no longer current or pending in the originating State at that time (*i.e.* it is no longer "taking place" having been terminated or closed), there is no proceeding that would be eligible for recognition under the Model Law.…
>
> With respect to the date at which the centre of main interests of the debtor should be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, *the date of commencement of that proceeding is the appropriate date*. Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's centre of main interests is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, *determination of the centre of the debtor's main interests by reference to the date of the commencement of those proceedings would produce a clear result.* The same reasoning may also apply in the case of reorganization where, under some laws, it is not the debtor that continues to have a centre of main interests, but rather the reorganizing entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17, subparagraph 2 *(a)* is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, *taking the date of commencement to determine centre of main interests provides a test that can be applied with certainty to all insolvency proceedings*.

Model Law, ¶¶ 157-159 (emphasis supplied). A similar conclusion was expressed with regard to the determination of the debtor's establishment, for purposes of non-main proceedings.

In the U.S., however, there is a decades long jurisprudential tradition of applying the principle of "plain meaning" as the first (and often the only) rule of statutory interpretation when considering provisions of the Bankruptcy Code. The Second Circuit took just such an approach in *Morning Mist Holdings, Ltd. v. Krys (In re Fairfield Sentry)*, 714 F.3d 127 (2d Cir. 2013). Judge Lifland granted recognition to the BVI liquidation of Fairfield Sentry, resulting in the stay of a derivative action brought by Morning Mist Holdings Limited, a shareholder, in New York state court. Fairfield Sentry had been out of business since the Madoff fraud surfaced in December 2008. Its board of directors appointed a "Litigation Committee" which governed until April 2009, when ten shareholders asked the BVI court to appoint a liquidator; two were appointed on July 21, 2009. The chapter 15 petition was filed on June 14, 2010. The bankruptcy court framed the issue:

> At bottom, the main point of contention between the parties seems to be whether, as the Petitioners argue, [citing *Lavie v. Ran,* No. 09–20288, 2010 WL 2106638, at *7 (5th Cir. May 27, 2010)], the Debtors' center of main interests ("COMI") should be measured as of the date of the Petition and the Court should consider the liquidation proceeding as ongoing business activities, or, as the Objectors argue, COMI should include the period prior to and leading up to the filing of the Petition and the Court should focus only on the Debtors' business activities prior to the liquidation, [as those were the economic and business functions contemplated by their charters].

Judge Lifland cited several cases that focused on the time of the petition for recognition as the date to measure COMI: *Lavie v. Ran (In re Ran)*, 607 F.3d 1017 (5th Cir. 2010), *In re British Am. Ins. Co. Ltd.*, 425 B.R. 884 (Bankr. S.D. Fla. 2010); *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009). He also noted that those courts would allow "a broader temporal COMI assessment where there may have been an opportunistic shift to establish COMI." However, he never ruled that the chapter 15 petition date was the proper measurement date. Instead, he said: "The contentions of both parties are misplaced, as a review of the relevant factors places the COMI focus in the BVI for the pre- and post-liquidation periods." He then essentially followed the lead of the *British American* court to the effect that COMI "can become lodged with the foreign representative" in finding that "the facts now extant provide a sufficient basis for finding that the Debtors' COMI for the purpose of recognition as a main proceeding is in the BVI, and not elsewhere." In justifying recognition, Judge Lifland also quoted then Judge Markell: "'non- recognition where recognition is due may forestall needed inter-nation cooperation,' *In re Betcorp,* 400 B.R. at 291."[28]

Morning Mist appealed the grant of recognition, and the district court and Second Circuit affirmed. The Second Circuit, relying on a plain meaning standard for statutory interpretation, elected to focus on the COMI measurement date:

> The present tense suggests that a court should examine a debtor's COMI at the time the Chapter 15 petition is filed. "Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr v. United States,* 560 U.S. 438, 130 S.Ct. 2229, 2236, 176 L.Ed.2d 1152 (2010); *see also Dobrova v. Holder,* 607 F.3d 297, 301 (2d Cir.2010) (relying on Congress's use of present perfect tense in statutory construction). In *In re AroChem Corp.,* we were guided by the tense used in a provision of the Bankruptcy Code allowing bankruptcy trustees to hire professionals (*e.g.,* lawyers, accountants), as long as the professionals "`*do not hold or represent* an interest adverse to the estate.'" *In re AroChem Corp.,* 176 F.3d 610, 623 (2d Cir.1999) (quoting 11 U.S.C. § 327(a)) (emphasis added). The present tense signified that an estate's counsel would not be disqualified based on past or future representations. *Id.*
>
> It therefore matters that the inquiry under Section 1517 is whether a foreign proceeding "*is pending* in the country where the debtor *has* the center of its main interests." 11 U.S.C. § 1517(b)(1) (emphases added). In this light, we reject Morning Mist's invitation for us to consider the debtor's entire operational history. Likewise, a COMI determination based on the date of the *initiation* of the foreign proceeding is not compelled by the statute. A foreign proceeding "*is pending,*" 11 U.S.C. § 1517(b)(1) (emphasis added), only after it has been commenced. Under the text of the statute, therefore, the filing date of the Chapter 15 petition should serve to anchor the COMI analysis.

Id., at 133-34.

The court agreed with Judge Lifland that a recent change of domicile might warrant a different result. It found support for the chapter 15 petition date COMI measurement from the fact that "[m]ost courts in this Circuit and throughout the country appear to have examined a debtor's COMI as of the time of the Chapter 15 petition." The court rejected Judge Gropper's contrary view (supported by a quotation from a law review article by Professor Westbrook) that if COMI is recognized as the principal place of business, then "it is obvious that

[28]*In re* Fairfield Sentry Limited, 440 B.R. 60 (S.D.N.Y. 2010).

the date for determining an entity's place of business refers to the business of the entity before it was placed into liquidation."[29]

The Second Circuit also noted that the *then* UNCITRAL Guide to Enactment of the Model Law (*i.e.*, the pre-2013 version) also used the present tense, as did the EU Regulation; but otherwise the Regulation and other international sources were "of limited use." The Second Circuit decision focused on literal statutory interpretation and failed to reflect an understanding of the substantive concerns underlying the COMI issue. UNCITRAL, by adopting the requirement that a foreign proceeding be either a foreign main proceeding or a foreign non-main proceeding, mandated that the proceeding be in a country where the debtor had a tangible economic presence—either its principal place of business or at least a regular place of business. Chapter 15 adopted this anchoring requirement, and Judge Lifland and the district court endorsed it in *Bear Stearns*.[30] The Second Circuit result, perhaps unwittingly, is contrary to the decisions of UNCITRAL and Congress to require a substantial economic presence in the country of the foreign proceeding as a prerequisite to recognition.

Neither the Model Law nor chapter 15 contemplated that the locus of a liquidation proceeding could substitute for the place of business operations. As earlier discussed, UNCITRAL amended the Guide to Enactment in 2013 to clarify that the foreign proceeding commencement date is the proper date to measure COMI and rejected contrary inferences that relied on the verb tense of the Model Law. The Model Law was promulgated in the first instance to promote uniformity of application around the world, a principle to which Congress subscribed in enacting section 1508.

The Second Circuit's decision on timing is not consistent with how UNCITRAL itself deems timing to function under the Model Law, and it seems doubtful that Congress, in enacting the precise language of the Model Law, expressly intended to depart from the intent of the drafters of the Model Law on this point. It is therefore appropriate to align chapter 15 with the intentions of the Model Law itself and clearly signal to U.S. courts how the timing should apply.

We recommend the following amendatory language to accomplish the foregoing:

11 U.S.C. § 1502. Definitions

(4) "foreign main proceeding" means a foreign proceeding ~~pending~~**that was commenced** in the country where the debtor ~~has the~~**had its** center of ~~its~~ main interests; **when the foreign proceeding was commenced**;

(5) "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, ~~pending~~ **commenced** in a country where the debtor ~~has~~**had** an establishment **when the foreign proceeding was commenced**;

11 U.S.C. § 1517. Order granting recognition

[29] *In re* Millennium Global Emerging Credit Master Fund Limited, 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011).

[30] *In re* Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 128 (Bankr. S.D.N.Y. 2007), *aff'd,* 389 B.R. 325 (S.D.N.Y. 2008).

(b) Such foreign proceeding shall be recognized—

(1) as a foreign main proceeding if ~~it is pending in the country where~~**, when the foreign proceeding was commenced,** the debtor ~~has~~**had** the center of its main interests **in the foreign country where the proceeding was commenced**; or

(2) as a foreign nonmain proceeding if**, when the foreign proceeding was commenced,** the debtor ~~has~~**had** an establishment within the meaning of section 1502 in the foreign country where the proceeding ~~is pending~~**was commenced**.

8. 11 U.S.C. § 1511 and 28 U.S.C. § 1408

As discussed in Sections 2 and 4 above, section 1511(a) authorizes a foreign representative, upon recognition, to commence a case under section 301, 302 (if a foreign main proceeding) or 303 (if a foreign nonmain proceeding). Section 1511(b) provides:

> (b) The petition commencing a case under subsection (a) must be accompanied by a certified copy of an order granting recognition. The court where the petition for recognition has been filed must be advised of the foreign representative's intent to commence a case under subsection (a) prior to such commencement.

The Rules Committee considered two alternative approaches to address the notice requirement of section 1511(b) but failed to reach agreement on either of them, so there is currently no rule covering this notice. The NBC believes that it would be more logical and efficient to simply require that the proceeding to be commenced pursuant to section 1511 must be filed in the court that already granted recognition under chapter 15. The rules for changing venue would apply so that the 301–303 case could be transferred subsequent to filing, if appropriate.

This approach would require an addition to 28 U.S.C. § 1408 and deletion of section 1511(b). Existing 28 U.S.C. § 1408 would become subsection (a) and a new subsection (b) would be added to 28 U.S.C. § 1408, as set forth below:

> **28 U.S.C. § 1408. Venue of cases under title 11**
>
> **(a)** Except as provided in **subsection (b) of this section or in** section 1410 of this title, a case under title 11 may be commenced in the district court for the district**—**
>
> (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one- hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or
>
> (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.
>
> **(b) If an order granting recognition of a foreign proceeding under chapter 15 of title 11 has been entered, a case concerning the debtor in the foreign proceeding may be commenced under section 301, 302, or 303 of title 11 only in the district court for the district in which the order granting recognition has been entered.**

Section 1511(a) would be redesignated as section 1511:

11 U.S.C. § 1511. Commencement of case under section 301, 302, or 303

~~(a)~~ Upon recognition, a foreign representative may commence—
(1) an involuntary case under section 303; or
(2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.
~~(b) The petition commencing a case under subsection (a) must be accompanied by a certified copy of an order granting recognition. The court where the petition for recognition has been filed must be advised of the foreign representative's intent to commence a case under subsection (a) prior to such commencement.~~

9. 28 U.S.C. § 1334(c) and section 103(a)

A bankruptcy court decision involving the foreign nonmain proceedings of British American Insurance Company Limited ("BAICO"), a Bahamian insurance company in insolvency proceedings in St. Vincent and the Grenadines ("SVG"), held that section 305 is not applicable in a chapter 15 case and that 28 U.S.C. § 1334(c)(1) prohibits the bankruptcy court from abstaining from proceedings arising under title 11 or arising in or related to a case under title 11.[31] Subsequent circuit and bankruptcy court decisions agreed with the conclusion but discussed only 28 U.S.C. § 1334 and did not mention section 305.[32]

28 U.S.C. § 1334. Bankruptcy cases and proceedings provides as follows:

(c)(1) Except 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.

There is no discussion of the amendment to 28 U.S.C. § 1334(c) in the legislative history of chapter 15. The recollection of the Conferees who assisted with drafting chapter 15 (Jay Westbrook and Dan Glosband) was that the chapter 15 exception was added to section 1334 to assure that a chapter 15 petition would be considered on the new, objective standards for recognition adopted by the Model Law and chapter 15 and not on the subjective "interests of justice" standard of section 1334(c). The subjective standards of former section 304 were being replaced and no alternative, back-door approach to subjective evaluation of a chapter 15 petition for recognition was to be allowed.

In the *BAICO* case, branch operations of BAICO in SVG were placed under judicial management under the SVG insurance law, and a Judicial Manager was appointed with full authority to liquidate BAICO in SVG. The Judicial Manager sought (in November 2009) and obtained (in March 2010) recognition under chapter 15 of the SVG liquidation as a foreign nonmain proceeding. Through the Judicial Manager, BAICO sued its former directors for breach of fiduciary duty. Two of the directors moved to dismiss for lack of jurisdiction on various

[31] *In re* British American Insurance Company Limited, 488 B.R. 205 (S.D. Fla. 2013).

[32] Firefighters' Retirement Sys. v. Citco Group Ltd., 796 F. 3d 520 (5th Cir. 2015); *In re* Hellas Telecommunications (Luxembourg) II SCA, 535 B.R. 543 (Bankr. S.D.N.Y. 2015). Both of these decisions refer to dicta to the same effect in the case of *In re* Fairfield Sentry Ltd., 452 B.R. 64, 83 (Bankr. S.D.N.Y. 2011), rev'd on other grounds, 458 B.R. 665 (S.D.N.Y. 2011).

theories and, in the alternative, argued that the court should abstain from the litigation under the permissive abstention provisions of 28 U.S.C. § 1334(c)(1).

The court ruled that it had jurisdiction and that 28 U.S.C. § 1334(c)(1) does not permit the court to abstain from (a) either a full chapter 15 case or (b) a matter arising under chapter 15 or arising in a chapter 15 case. The first half of this ruling is consistent with the purpose of the chapter 15 exception to 28 U.S.C. § 1334(c)(1) but the second half goes beyond that purpose. The court discusses the issue as follows:

> Section 305 is the sole statutory authority for abstention from a title 11 case.
>
> However, section 305 is not applicable in a case under chapter 15. 11 U.S.C. § 103(a). There is no provision in federal law allowing a federal court to abstain from an entire chapter 15 case. Nor is there any provision in federal law permitting abstention from matters arising under chapter 15 or arising in a chapter 15 case. To the contrary, chapter 15 and section 1334 ensure that the decision whether to recognize a foreign proceeding, and control over further relief under chapter 15, rests with a single court. Congress reinforced this by eliminating the possibility of abstention from the entire chapter 15 case and from matters arising under chapter 15 or arising in a chapter 15 case. The Court's interpretation of section 1334(c)(1) is consistent with the intent of Congress. (footnotes omitted). [*British American*, supra, at 239-240.]

Reliance on 28 U.S.C. § 1334 for abstention from a full chapter 15 case is not necessary since an equivalent result is available under chapter 15 itself: (a) unlike the filing of a voluntary petition under other chapters of the Bankruptcy Code, which constitutes an order for relief, a chapter 15 petition is an application for recognition, and recognition can be denied if the criteria of section 1517 are not satisfied; (b) after recognition, recognition can be terminated or modified under §1517(d).[33]

The *British American* court reached its conclusion based on a plausible but unintended reading of 28 U.S.C. § 1334(c)(1):

> The opposing interpretation of the opening phrase of section 1334(c)(1) [that abstention from arising under/arising in cases is permitted] takes into consideration the remaining text of that subsection. In general, subsection (c)(1) permits abstention from proceedings arising under title 11 or arising in or related to a case under title 11. That is, it permits a court to abstain from matters other than the title 11 case itself. Because subsection (c)(1) is aimed at abstention from proceedings arising in, arising under and 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 chapter 15 case itself. Under this view, section 1334(c)(1) could not be used 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. Count I here is related to a chapter 15 case, and so section 1334(c)(1) could not be used to abstain from hearing Count I. Because this view of section 1334(c)(1) interprets the exclusionary provision in light of the entire text of the

[33] 11 U.S.C. § 1517(d): "The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under this chapter may be closed in the manner prescribed under section 350."

> subsection, the Court believes this view of section 1334(c)(1) to be correct. The Court may not abstain from Count I under section 1334(c)(1). (footnote omitted.)

The reference in 28 U.S.C. §1334(c)(1) to a "case" under chapter 15 was intended to echo the phrase "cases under title 11" in 28 U.S.C. § 1334(a) and 28 U.S.C. § 157(a) and was not intended to be expanded to prevent abstention from proceedings arising in/arising under cases.

Notwithstanding the intent of the drafters, the interpretation of the *British American* judge is a plausible one based on the current wording.

Two subsequent decisions followed the *British American* interpretation. In *Firefighters' Retirement System v. Citco Group Limited*, the Fifth Circuit reversed the district court's remand to Louisiana state court of an action by three pension funds against persons and entities related to a Cayman Islands leveraged feeder fund ("Leveraged Fund") and a larger fund (the "Arbitrage Fund" and together with the Leveraged Fund, the "Offshore Funds") through which it invested.[34] The Offshore Funds were part of a master fund entity which filed a chapter 11 case in the Southern District of New York. The litigation was originally filed in state court and then removed to federal district court based on the related chapter 11 case. The court read 28 U.S.C. § 1334(c)(1) to prevent abstention from a proceeding that was related to a chapter 15 case, as opposed to preventing abstention from considering the chapter 15 case itself.[35]

A decision of the Bankruptcy Court for the Southern District of New York agreed with the *British American* and *Firefighters'* analysis.[36]

The following revision will limit section 28 U.S.C. §1334(c)(1) to its original narrowly- intended purpose of assuring that chapter 15 petitions, as applications for recognition, must be heard and granted or denied:

> **28 U.S.C. § 1334. Bankruptcy cases and proceedings**
>
> (c)(1) Except with respect to a **determination of an application for recognition of a foreign proceeding in 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.

10. 11 U.S.C. § 1517(a)

Section 1517 is entitled **Order granting recognition**, and it contains the requirements for entry of an order recognizing a foreign proceeding. While "it closely tracks

[34] Firefighters' Retirement Sys. v. Citco Group Ltd., 796 F. 3d 520 (5th Cir. 2015).

[35] Id. at *527.

[36] *In re* Hellas Telecommunications (Luxembourg) II SCA, 535 B.R. 543 (Bankr. S.D.N.Y. 2015).

article 17 of the Model Law",[37] it inadvertently omitted a phrase. The pertinent part of Article 17 of the Model Law reads as follows:

> *Article 17. Decision to recognize a foreign proceeding*
>
> (1) Subject to article 6, a foreign proceeding shall be recognized if:
> (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
> (b) The foreign representative applying for recognition is a person or body **within the meaning of subparagraph *(d)* of article 2;** (emphasis added)

In contrast, the pertinent part of section 1517 reads:

> **11 U.S.C. § 1517 - Order granting recognition**
>
> (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
> (2) the foreign representative applying for recognition is a person or body;

The NBC recommends that section 1517 be conformed to Article 17 of the Model Law to avoid confusion over the unintended difference, as follows:

> **11 U.S.C. § 1517(a) - Order granting recognition**
>
> (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
> (2) the ~~foreign representative~~**person or body** applying for recognition is a ~~person or body~~**foreign representative**; and

11. Amendments related to avoidance of transfers and recovery of property

a. 11 U.S.C. §§ 1520, 1521 and 101(24)

Article 20 of the Model Law on Cross Border Insolvency provides as follows (with emphasis added in bold):

> 1. Upon recognition of a foreign proceeding that is a foreign main proceeding,
> (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
> (b) Execution against the debtor's assets is stayed; and
> **(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended**.
> 2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to [*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or*

[37] H.R. Rep. at p. 113.

termination in respect of the stay and suspension referred to in paragraph 1 of this article].

The U.S. enactment of Article 20, in section 1520, made modifications and adjustments, the intention of which was to integrate the Model Law into our existing bankruptcy scheme, while altering the original intention of Article 20 as little as possible. Thus, for example, section 1520, rather than imposing a generalized moratorium upon actions in the enacting state, as does the Model Law, instead takes our pre-existing generic moratorium, section 362, and *restricts* it to property within the territorial jurisdiction of the U.S., thereby approximating the scope of the Article 20 moratorium by pruning back the extraterritorial aspect of section 362 in the chapter 15 context.

The drafters of the U.S. enactment attempted to achieve a similar end with respect to the provision in Article 20 that imposes a moratorium on the debtor's ability to transfer property (a moratorium on *debtor's* actions, if you will). Again, they enacted this provision by reference to pre-existing provisions of the U.S. Bankruptcy Code. Section 1520 says that section 549, "Postpetition transactions," applies with respect to property of the debtor within the territorial jurisdiction of the U.S., paralleling the mechanism that was used for the moratorium on creditor actions.[38] Section 549 does not *automatically* proscribe postpetition transfers of the debtor's property in the way that the moratorium on such transfers was drafted in Article 20 of the Model Law; instead it empowers a trustee to avoid those transfers.[39] It thus falls short of achieving the intended purpose of Article 20.

The reference to section 549 creates two additional problems: first, there is no trustee in a chapter 15 ancillary proceeding, but only a trustee may "avoid a transfer of property …" (courts might interpret section 1520(a)(2) such that "trustee" means "foreign representative" in the context of 1520(a)(2) but it should not be left to doubt); second, section 549 is not self-executing, and the remedial mechanism to recover avoided transfers, section 550, is not available in chapter 15.[40] Section 1521(a)(7), which prohibits use of most Bankruptcy Code avoidance

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[38] Section 1520, Effects of recognition of a foreign main proceeding, provides in pertinent part:

(a) Upon recognition of a foreign proceeding that is a foreign main proceeding—
(1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;
(2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;
(3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and
(4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.

[39] Section 549 provides as follows:

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—
(1) that occurs after the commencement of the case; and
(2)(A) that is authorized only under section 303 (f) or 542 (c) of this title; or
(B) that is not authorized under this title or by the court.

[40] Section 550, Liability of transferee of avoided transfer, provides in pertinent part: "…to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property…"

powers in a chapter 15 case, includes a prohibition of section 550.[41] The omission of the section 550 remedy also affects one other avoidance provision that is not excluded from chapter 15 use, section 553 dealing with the reduction in insufficiency of a setoff within 90 days pre-petition.[42]

Repairing these problems requires amendments to sections 1520, 1521 and 101(24) (the definition of foreign representative) as follows:

11 U.S.C. § 1520. Effects of recognition of a foreign main proceeding

(a) Upon recognition of a foreign proceeding that is a foreign main proceeding—

(1) sections 361 ~~and~~**,** 362**, and 552** apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;

(2) the debtor may not transfer, encumber, or otherwise dispose of any assets within the territorial jurisdiction of the United States;

(~~2~~**3**) ~~sections~~**section** ~~3~~63, ~~549, and 552 apply~~ **applies** to a transfer **by a foreign representative** of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the ~~sections~~**section** would apply to property of an estate; **and**

(~~3~~**4**) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and ~~552~~**553.**

~~(4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.~~

11 U.S.C. § 1521. Relief that may be granted upon recognition

(a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

(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)**.; and**

(8) notwithstanding subsection (a)(7) of this section, granting relief under section 550 for the purpose of permitting the foreign representative to enforce the provisions of sections 549 and 553.

11 U.S.C. § 101. Definitions

In this title the following definitions shall apply:

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[41]Section 1521, Relief that may be granted upon recognition, provides in pertinent part: "(a) Upon recognition of a

foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including— (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). (emphasis added).

[42]The section 553/550 issue was discussed in Awal Bank, BSC v. HSBC Bank USA (*In re* Awal Bank, BSC), 455

B.R. 73, 82 (Bankr. S.D.N.Y. 2011).

(24) The term "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 the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding **and means trustee when the foreign representative acts under the sections of this title that are referred to in sections 1520(a) or 1521(a)(8)**.

b. 11 U.S.C. § 1523

Chapter 15 should also be amended to provide explicitly that the look-back period for avoidance proceedings brought under U.S. law by or on behalf of a foreign representative should be measured from the date of the filing of the foreign proceeding. Under section 1523(a) of chapter 15 a foreign representative can bring an avoidance proceeding based on U.S. substantive law only in a plenary U.S. case under chapter 7 or chapter 11.[43] Although section 1523(a) affords the foreign representative standing to bring such a proceeding, it does not explicitly provide that the look-back period should be measured from the date of the commencement of the foreign case rather than the date of commencement of case in the United States. If we measure the look-back period from the date of the opening of U.S. case, the delay inherent in the need for the foreign representative to file proceedings in the United States would make it unlikely that a foreign representative would ever be able to bring a proceeding under U.S. law to avoid a preference, as the look-back period under section 547 of the Bankruptcy Code is ordinarily only 90 days from the filing of the "petition," (i.e., the petition under chapter 15 or the petition under chapter 7 or 11). Proceedings to avoid a fraudulent conveyance under section 548 of the Bankruptcy Code have a longer look-back period of two years from the filing of the "petition," but some avoidable conveyances would doubtless fall outside this look-back period if the period is measured from the commencement of U.S. case rather than the commencement of the foreign proceeding.

There is authority under present law that the applicable look-back period can be measured from the date of the filing of the chapter 15 petition for recognition rather than the date of the opening of a plenary proceeding. *See In re Awal Bank, BSC*, 455 B.R. 73, 88-91(Bankr. S.D.N.Y. 2011). The same result might be obtainable by virtue of the tolling provisions of section 108 of the Bankruptcy Code, which apply in a chapter 15 case.

However, it is more consonant with the cooperation principles of chapter 15 for the look- back period to date from the opening of the foreign proceeding. There should be no unfairness in assisting the foreign representative in this manner because a court will be required to determine whether it is appropriate to apply avoidance law under the facts and circumstances of the case.

For example, if a German liquidator brought an avoidance proceeding in a U.S. plenary case after chapter 15 recognition, and it was determined that it was appropriate to apply U.S. avoidance law under the principles of *Maxwell Communication Corp. v. Societe Generale*

[43] Section 1523, Actions to avoid acts detrimental to creditors, provides:

"(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).

(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding."

(In re Maxwell Communication Corp., 93 F.3d 1036 (2d Cir. 1996)), or other applicable law, the German liquidator would be able to use the avoidance look-back period under U.S. law measured from the date of the filing of the original petition in Germany.[44]

The English version of the Model Law includes this type of provision at Article 23, sections 3 and 4 of the Cross-Border Insolvency Regulations 2006.

The statutory change can be accomplished by adding a new subsection (c) to section 1523[45]:

11 U.S.C. § 1523. Actions to avoid acts detrimental to creditors

(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).
(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.
(c) For purposes of any applicable section governing an action initiated by the foreign representative under subsection (a), the term "commencement of the case" and the term "order for relief" mean the opening of the foreign proceeding, and the phrase "date of the filing of the petition" means the date of the filing of an application or the taking of other action that resulted in the opening of the foreign proceeding. The date of the opening of the foreign proceeding shall be determined in accordance with the law of the country in which the foreign proceeding is pending.

We would welcome an opportunity to discuss these amendments with you or your staffs. We believe they would substantially improve the operation of chapter 15 by reducing litigation and more closely conforming it to the purposes of the Model Law.

[44] The same measurement date should apply to foreign avoidance law that may be applied in a chapter 15 case. *See* Fogerty v. Petroquest Res. (*In re* Condor Ins. Ltd., 601 F. 3d 319, 326 (5th Cir. 2010); *Hellas Telecommunications*, supra, 535 B.R. 543 at 586-587.

[45] Section 1523, Actions to avoid acts detrimental to creditors, currently provides:

(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).

(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.

Sincerely,

/s/ Jane Vris

Jane Vris, Chair
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National Bankruptcy Conference

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

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11/16/2017

Revised "Guide to Enactment" of the UNCITRAL Model Law

https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf

Date at which to determine centre of main interests and establishment

157. The Model Law does not expressly indicate the relevant date for determining the centre of main interests of the debtor.

158. Article 17, subparagraph 2 *(a)* provides that the foreign proceeding is to be recognized as a main proceeding "if it *is* taking place in the State where the debtor *has* the centre of its main interests" [*emphasis added*]. The use of the present tense in article 17 does not address the question of the relevant date, but rather requires the foreign proceeding to be current or pending at the time of the recognition decision; if the proceeding for which recognition is sought is no longer current or pending in the originating State at that time (i.e. it is no longer "taking place" having been terminated or closed), there is no proceeding that would be eligible for recognition under the Model Law.

159. With respect to the date at which the centre of main interests of the debtor should to be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date.[34] Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's centre of main interests is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the centre of the debtor's main interests by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganization where, under some laws, it is not the debtor that continues to have a centre of main interests, but rather the reorganizing entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17, subparagraph 2 *(a)* is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine centre of main interests provides a test that can be applied with certainty to all insolvency proceedings.

160. The same considerations apply to the date at which any determination with respect to the existence of an establishment of the debtor should be made. Accordingly, the date of commencement of the foreign proceeding is the relevant date to be considered in making that determination.

[34] *Under some insolvency laws, the effects of commencement are backdated to the date of the application for commencement or the date of application becomes the date of commencement by virtue of automatic commencement. In both cases, it is appropriate to refer to the date of commencement for the purposes of the centre of main interests determination, since the Model Law is concerned only with existing foreign proceedings and when they commenced.*

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US Bankruptcy Court Grants Rare Dismissal of Adversary Proceeding in Chapter 15 for Forum Non Conveniens

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On August 22, 2016, Judge Martin Glenn of the US Bankruptcy Court for the Southern District of New York (the "US Court") stayed an adversary proceeding brought by the liquidators of Hellas Telecommunications (Luxembourg) II SCA ("Hellas II") on the basis of inconvenient forum (*forum non conveniens*). The US Court held that the liquidators' claims had to proceed in the English court where the liquidation was pending and the same claims had been filed against related defendants. This is only the second case granting a *forum non conveniens* motion in a case commenced under Chapter 15 of the US Bankruptcy Code, which provides for recognition of foreign bankruptcy proceedings.[1] Other courts, including the Fifth Circuit Court of Appeals, have held that Section 1334 of the Bankruptcy Code bars *forum non conveniens* dismissal in Chapter 15 cases. Although not addressing the Section 1334 issue, Judge Glenn stayed, rather than dismissed, the adversary proceeding because his authority to enter a final order was uncertain in light of the US Supreme Court's decision in *Stern v. Marshall*. If Judge Glenn's analysis is accepted by other bankruptcy courts, it presents a new tool for creditors to remove litigation to more convenient, and potentially more favorable, venues.

Hellas II was part of a corporate family created by private equity firms Apax and TPG (the "Sponsors") to invest in Greek mobile telecommunications assets. Hellas II acquired TIM Hellas in June 2005 and Q-Telecom in January 2006 in leveraged buyouts in which the Sponsors received convertible preferred equity certificates ("CPECs") with a par value of approximately €77 million. The liquidators claim that the redemption of those CPECs for more than €1 billion in transactions in April and December 2006 violated their terms and left Hellas II deeply in debt. The redemptions were funded by Hellas II's issuance of subordinated notes and guarantee of senior secured notes issued by an affiliate. Deutsche Bank, which held CPECs that were redeemed in these transactions, served as an underwriter of certain of the bonds.

In February 2007, the Sponsors sold the Hellas companies to the Weather Group, who renamed the business WIND Telecom. In November 2009, Hellas II entered administration in England and sold its interest in WIND Telecom to the Weather Group for €10,000, the assumption of obligations on the senior secured notes, and a fund for costs of administration. Potential claims against third parties represented the only source of recovery for Hellas II's creditors, including the holders of €1.24 billion in subordinated notes. In December 2011, liquidators were appointed to pursue such claims.

In February 2012, the liquidators successfully petitioned the US Court for recognition of the liquidation proceeding under Chapter 15 of the US Bankruptcy Code, and in March 2014, they commenced an adversary proceeding for avoidance of the April and December 2006 transfers. The US Court dismissed certain claims under New York fraudulent transfer law and all claims against foreign-domiciled Apax and TPG entities for lack of personal jurisdiction, leaving only an unjust enrichment claim against the US-domiciled Apax and TPG entities, Deutsche Bank and a proposed class of subsequent transferees.

On March 19, 2015, the liquidators sought to add additional defendants and claims under UK and Luxembourg law. The defendants opposed the motion on the basis, *inter alia*, of *forum non conveniens* – that is, that the US Court was an inconvenient forum in which to litigate foreign law claims arising from foreign transactions. The US Court rejected the argument because the US-domiciled defendants had not consented to the jurisdiction of the English court, so there was no alternative forum available to the liquidators. The US Court recognized, however, that Deutsche Bank was subject to jurisdiction in England and suggested that *forum non conveniens* dismissal might be appropriate if the liquidators commenced proceedings in the English court against the previously-dismissed foreign defendants. The liquidators represented that they had no intention of filing such a proceeding.

On November 26, 2015, however, having been unable to convince the foreign defendants to execute a tolling agreement, the liquidators sued them in the English court

[1] The other is *Bancredit Cayman Ltd. v. Santana (In re Bancredit Cayman Ltd.)*, Adv. No. 08-1147, 2008 WL 5396618 (Bankr. S.D.N.Y. Nov. 25, 2008).

and sought a stay in favor of the US proceedings. On January 16, 2016, defendants in the US Court moved for dismissal on the basis of *forum non conveniens*, with the US-domiciled defendants for the first time agreeing to submit to the jurisdiction of the English court.

The US Court granted the motion, holding that the filing of the UK proceeding was a reason to re-evaluate its prior deference to the liquidators' choice of forum. A significant element of the US Court's analysis was the proper relationship between its role in a Chapter 15 case *vis-à-vis* the court overseeing the foreign main proceeding. It concluded that promoting the consolidation of litigation in that court was most consistent with the purpose of Chapter 15. Although the US Court had found it could hear the liquidators' claims under UK statutory law, it held the application of UK law to also weigh in favor of dismissal.

The US Court gave little weight to the proposed transferee class, even though the class members had not consented to the jurisdiction of the English court and class claims could not be pursued there, finding that the liquidators had failed to timely seek class certification. The liquidators filed their motion for class certification only after the *forum non conveniens* motion was filed, and the US Court denied the motion as moot in light of its grant of a stay.

At oral argument, the liquidators revealed what was likely the most significant reason for selecting the US forum – the American rule that parties to a litigation generally bear their own costs. The liquidators argued that they did not have the financial resources to proceed in the UK. In the UK, unlike the US, unsuccessful litigants typically are liable for some or all of the costs incurred by the successful party, and parties may be required to post security for that potential obligation at the outset of litigation.

This decision highlights the tactical issues plaintiffs face where they cannot obtain personal jurisdiction over all defendants in a single forum. The US courts are attractive to plaintiffs because of the wide discovery afforded, availability of contingency fees, rare fee-shifting, class actions and judgments entitled to full faith and credit in every state. The bankruptcy courts, moreover, often present a favorable venue for debtors pressing claims that will result in funds for distribution to creditors. Now, chapter 15 debtors considering whether to commence parallel actions in its main and ancillary proceedings must weigh the risk of having the US proceedings dismissed or stayed, thus losing the benefits US courts can offer.

ABI CARIBBEAN INSOLVENCY SYMPOSIUM

JANUARY 7 – 9, 2019

Chapter 15 Update: Discovery, Drawbridge, Venue, Parallel Cases and Other Hot Topics in Cross-Border Cases

Moderator: U.S. Bankruptcy Judge Robert A. Mark (S.D. Fla.) Miami, FL

Speaker: Gregory S. Grossman, Sequor Law, Miami, FL
Martin Trott, RHSW Caribbean, Grand Cayman
Laura R. Hall, Allen & Overy, LLP, New York, NY

Index of Materials:

9. *Australia and New Zealand Banking Group v. APR Energy Holding Limited*, 2017 WL 3841874 (S.D.N.Y. Sept. 1, 2017).

10. *In re Application of Antonio Del Valle Ruiz and Others for an Order to Take Discovery for Use in Foreign Proceedings Pursuant to 28 U.S.C. § 1782* – Opinion and Order, 18 Misc. (ER) (S.D.N.Y. Oct. 19, 2018).

tion of sections 362(a)(3) and 1520(a)(1) of the Bankruptcy Code. Any act by PPF to pursue the Poymanov-based SDNY Claims in the SDNY Action, or otherwise, is therefore stayed pursuant to section 362(a)(3).

Finally, PPF's argument that, pursuant to section 362(c)(1), which provides that the automatic stay continues until property is no longer property of the estate, the automatic stay no longer applies to the Poymanov-based SDNY Claims due to the purported transfer (Opp. ¶ 14) is circular and without merit. The Russian Court explicitly ruled that any purported transfer of the Poymanov-based SDNY Claims is invalid, has no legal consequences, and is void from the time of its execution. Thus, because the claims were never transferred out of the estate, section 362(c)(1) is inapplicable.

CONCLUSION

For the reasons set forth above, the Court concludes that SDNY Action is not subject to the automatic stay with respect to the SDNY Claims that are based on Podgornaya's ownership of shares in P–Granit and her purported transfer of claims to PPF. However, pursuant to sections 362(a)(3) and 1520(a)(1) of the Bankruptcy Code, that portion of the SDNY Action that is based on the Poymanov-based SDNY Claims is subject to the automatic stay.

It is so ordered.

IN RE: NATIONAL BANK OF ANGUILLA (PRIVATE BANKING TRUST) LTD., Debtor.

National Bank of Anguilla (Private Banking Trust) Ltd., Plaintiff,

v.

National Bank of Anguilla, National Commercial Bank of Anguilla and Eastern Caribbean Central Bank, Defendants.

In re: Caribbean Commercial Investment Bank Ltd., Debtor.

Caribbean Commercial Investment Bank Ltd., Plaintiff,

v.

Caribbean Commercial Bank (Anguilla) Ltd., National Commercial Bank of Anguilla Ltd., and Eastern Caribbean Central Bank, Defendants.

Case No. 16–11806 (MG)
Adv. Pro. Case No. 16–01279 (MG)
Case No. 16–13311 (SMB)
Adv. Pro. Case No. 17–01058 (SMB)

United States Bankruptcy Court, S.D. New York.

Signed January 29, 2018

Background: Foreign representative in two separate Chapter 15 cases, one for each of two Anguilla offshore banks that were the subject of receivership proceedings and litigation pending in Anguilla courts, filed Chapter 11 cases after recognition of the Anguilla receivership proceedings as foreign main proceedings. Foreign representative then brought avoidance claims under federal and New York law. Defendants in both proceedings filed motions to dismiss.

Holdings: In a joint opinion, the Bankruptcy Court, Stuart M. Bernstein, J., and Martin Glenn, J., held that:

(1) adversary proceedings would be stayed based on forum non conveniens, and

(2) adversary proceedings would be stayed based on international comity.

Motions granted.

1. Federal Courts ⚿2971

Doctrine of forum non conveniens is a discretionary device permitting a court in rare instances to dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim.

2. Federal Courts ⚿2972, 3583

Whether to dismiss an action on forum non conveniens grounds is a decision that lies wholly within the broad discretion of the court and should be reversed only if that discretion has been clearly abused.

3. Federal Courts ⚿2976, 2979

Court may dismiss an action under forum non conveniens when considerations of convenience, fairness, and judicial economy so warrant.

4. Federal Courts ⚿2973, 2979, 2982

Courts apply a three-step process to determine whether to dismiss an action for forum non conveniens: first, the court must determine the degree of deference properly accorded to the plaintiff's choice of forum, second, after determining whether the plaintiff's choice is entitled to more or less deference, the court must determine whether an adequate alternative forum exists, and third, the court must then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake.

5. Federal Courts ⚿2979

In considering factors bearing on forum non conveniens dismissal motion, the court is necessarily engaged in a comparison between the hardships defendant would suffer through the retention of jurisdiction and the hardships the plaintiff would suffer as the result of dismissal and the obligation to bring suit in another country.

6. Federal Courts ⚿2992(2)

The law presumes that the plaintiff's choice of forum is adequate, and the defense must overcome a heavy burden to have the case dismissed on forum non conveniens grounds.

7. Federal Courts ⚿2973

In determining whether to dismiss an action for forum non conveniens, courts measure the degree of deference owed to a plaintiff's choice of forum on a sliding scale; the more it appears that the plaintiff's choice of a United States forum was motivated by forum shopping reasons, the less deference the plaintiff's choice commands.

8. Federal Courts ⚿2973, 2976

In determining the degree of deference to be afforded to a foreign plaintiff's choice of a United States forum, upon forum non conveniens dismissal motion, courts consider various factors to ascertain whether the plaintiff's forum choice was motivated by convenience or instead by the desire to forum shop, including: (1) the convenience of the plaintiff's residence in relation to the chosen forum, (2) the availability of witnesses or evidence to the forum district, (3) the defendant's amenability to suit in the forum district, (4) the availability of appropriate legal assistance, and (5) other reasons relating to convenience or expense.

9. Federal Courts ⚿2973

In determining whether to dismiss an action for forum non conveniens, circumstances indicative of forum shopping include: (1) attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, (2) the habitual generosity of juries in the United States or in the forum district, (3) the plaintiff's popularity or the defendant's unpopularity in the region, or (4) the inconvenience and expense to the defendant resulting from litigation in that forum.

10. Bankruptcy ⚿2341

Adversary proceedings asserting avoidance claims brought by foreign representative of two Anguilla offshore banks that were the subject of receivership proceedings in Anguilla courts would be stayed based on forum non conveniens; choice of a New York venue was an exercise in forum shopping, as foreign representative initially sued the same defendants in Anguilla, seeking the same relief for the same wrongs in the foreign forum, although Anguillan law did not recognize certain claims for which recovery was sought, and relevant evidence was primarily located in Anguilla, not New York.

11. Federal Courts ⚿2982

In determining whether to dismiss an action for forum non conveniens, an alternative forum is ordinarily adequate if (1) the defendants are amenable to service of process there and (2) the forum permits litigation of the subject matter of the dispute.

12. Federal Courts ⚿2982

Availability of an adequate alternative forum, for purposes of forum non conveniens dismissal motion, does not depend on the existence of the identical cause of action in the other forum.

13. Federal Courts ⚿2982

Fact that the law of the alternative forum is less favorable does not weigh against dismissal of an action for forum non conveniens.

14. Federal Courts ⚿2982

To be inadequate under doctrine of forum non conveniens, the remedy offered by alternative forum must be clearly unsatisfactory, such as where the alternative forum does not permit litigation of the subject matter of the dispute.

15. Federal Courts ⚿2979

In determining whether the doctrine of forum non conveniens should be applied, court should consider factors of public interest and private interests of the litigant, and balancing of the private and public interest factors must tilt heavily in favor of the alternative forum.

16. Federal Courts ⚿2979

In weighing the litigants' private interests, upon forum non conveniens dismissal motion, a court should consider: (1) the relative ease of access to sources of proof, (2) availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses, (3) possibility of view of the premises, if view would be appropriate to the action, and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.

17. Federal Courts ⚿2979

Under doctrine of forum non conveniens, deferring to litigation in another jurisdiction is appropriate where the litigation is intimately involved with sovereign prerogative and it is important to ascertain the meaning of another jurisdiction's statute from the only tribunal empowered to speak definitively.

18. Courts ⚿512

International Law ⚿10.1

Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor a mere courtesy and good will, upon the other, but it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

19. Courts ⚿512

International Law ⚿10.1

International comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.

20. Bankruptcy ⚿2341

While a defendant's international comity defense should be assessed from the legal sense, a court must not lose sight of the broader principles underlying the doctrine.

21. International Law ⚿10.1

Even where the international comity doctrine clearly applies, it is not an imperative obligation of courts, but rather, is a discretionary rule of practice, convenience, and expediency.

22. International Law ⚿10.1

Under international comity, states normally refrain from prescribing laws that govern activities connected with another state when the exercise of such jurisdiction is unreasonable.

23. Bankruptcy ⚿2341

Applying international comity, courts have the inherent power to dismiss or stay an action based on the pendency of a related proceeding in a foreign jurisdiction.

24. Bankruptcy ⚿2341

Concerns of international comity must be balanced against the virtually unflagging obligation of the federal courts to exercise the jurisdiction given to them.

25. Bankruptcy ⚿2341

In evaluating whether to defer to a foreign proceeding under international comity, the court's task is not to articulate a justification for the exercise of jurisdiction, but rather, to determine whether exceptional circumstances exist that justify the surrender of that jurisdiction.

26. Bankruptcy ⚿2341

Adversary proceedings asserting avoidance claims brought by foreign representative of two Anguilla offshore banks that were the subject of receivership proceedings in Anguilla courts would be stayed based on international comity, pending outcome of initial Anguilla litigation brought by foreign representative against the same defendants and seeking the same relief for the same wrongs; Anguilla litigation was filed months before the adversary proceedings, the Anguilla courts had personal and subject matter jurisdiction over all of the parties, and Anguilla courts had an interest in the equitable and orderly distribution of the debtor banks' property.

27. Courts ⚿512

Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of the United States citizens or violate domestic public policy.

28. Courts ⚿512

In applying international comity, deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and do not contravene

the laws or public policy of the United States.

29. Courts ⚿512

For two actions to be considered parallel, for purposes of international comity, the parties in the actions need not be the same, but they must be substantially the same, litigating substantially the same issues in both actions.

30. Courts ⚿512

Under doctrine of international comity, the inconvenience and expense associated with parallel proceedings do not constitute prejudice justifying deference to a parallel foreign litigation.

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MEMORANDUM OPINION AND ORDER GRANTING MOTIONS TO STAY THESE ADVERSARY PROCEEDINGS BASED ON FORUM NON CONVENIENS AND INTERNATIONAL COMITY

STUART M. BERNSTEIN and MARTIN GLENN, UNITED STATES BANKRUPTCY JUDGES

I. INTRODUCTION [1]

This joint opinion addresses common issues raised by the *Motions to Dismiss* in two separate Adversary Proceedings—one pending before Judge Bernstein and the other pending before Judge Glenn. The two Adversary Proceedings were filed in connection with two separate chapter 11 cases, one for each of two Anguilla "offshore banks" (as explained below). The two Anguilla offshore banks failed between 2013 and 2016, and each Debtor Bank is the subject of a receivership proceeding and litigations pending in the Anguilla courts. The same Foreign Representative in two separate chapter 15 cases (one for each Anguilla offshore bank) filed these chapter 11 cases after recognition of Anguilla receivership proceedings as foreign main proceedings.

The two chapter 11 cases were filed to enable the Foreign Representative to bring avoidance claims under federal and

1. Capitalized terms in the Introduction are defined below.

New York law, as 11 U.S.C. § 1521(a)(7) does not permit federal and state law avoidance claims to be brought in a chapter 15 case, and, as freely admitted by the Debtor Banks, Anguilla law does not recognize constructive fraudulent transfer claims. The Defendants in these Adversary Proceedings, for the most part, are the same, counsel to the Plaintiffs and the Defendants are the same, and the briefs and arguments relating to the Defendants' *Motions to Dismiss* the two Adversary Proceedings are substantially the same.

Because of the common issues, arguments and counsel, we heard argument on the *Motions to Dismiss* together, and we decide the common issues together. To be clear, however, while we reach the same resolution of the Motions, this joint Opinion reflects the separate opinion of each of us in our respective Adversary Proceeding.

The *Motions to Dismiss* raise difficult issues of personal jurisdiction, subject matter jurisdiction, *forum non conveniens*, international comity, Foreign Sovereign Immunities Act defenses, extraterritorial application of federal and New York law, and the act of state doctrine. We discuss the issues below, although we find it unnecessary, at this stage of these cases, to resolve all of them.

We agree that the proper disposition of each case is a stay based on *forum non conveniens* and international comity, pending decisions of issues raised or that can be raised, and more appropriately should be raised and decided by the courts in Anguilla.

II. BACKGROUND

A. The Pleadings and Motions

National Bank of Anguilla (Private Banking & Trust) Ltd. ("PBT") filed an adversary proceeding in this Court (the "PBT Adversary Proceeding," ECF Adv. Proc. No. 16–01279 (MG)) [2] on December 16, 2016 (ECF PBT Doc. # 1), and filed an amended complaint (the "*PBT Complaint*," ECF PBT Doc. # 32) on March 20, 2017 against the Eastern Caribbean Central Bank ("ECCB," or the "Central Bank"), the National Bank of Anguilla Ltd. ("NBA"), and the National Commercial Bank of Anguilla Ltd. ("NCBA," and together with ECCB and NBA, the "PBT Defendants"). On April 27 and 28, 2017, the PBT Defendants filed the pending motions to dismiss the *PBT Complaint* (the "*ECCB Motion to Dismiss the PBT Complaint*," ECF PBT Doc. # 38; the "*NBA Motion to Dismiss the PBT Complaint*," ECF PBT Doc. # 41; and the "*NCBA Motion to Dismiss the PBT Complaint*," ECF PBT Doc. # 44, and collectively, the "*PBT Motions to Dismiss*"). The *PBT Motions to Dismiss* are supported by memoranda of law (the "*ECCB (PBT) Memo*," ECF PBT Doc. # 39; the "*NBA Memo*," ECF PBT Doc. # 42; and the "*NCBA (PBT) Memo*," ECF PBT Doc. # 45) and the declarations of William Richard Hare (the "*Hare PBT Decl.*," ECF PBT Doc. # 47) [3] and Trevor Brathwaite (the "*Brathwaite PBT Decl.*," ECF PBT Doc. # 40). PBT filed memoranda of law in opposition

2. For purposes of clarity, "ECF Doc. # __" refers to the electronic docket in Adv. Proc. No. 17–01058 (SMB) (as defined below), and "ECF PBT Doc. # __" refers to the electronic docket in Adv. Proc. No. 16–01279 (MG).

3. Hare submitted the *Hare PBT Declaration* on May 3, 2017, as an amended declaration of one submitted on April 28, 2017 (ECF PBT Doc. # 43), without exhibits. The only difference between the two appears to be that the original declaration was unsigned and the amended declaration was executed by Hare. As all of the exhibits were attached to the initial original, the Court will continue to refer to that version with the understanding that the failure to sign it was an oversight.

to the *PBT Motions to Dismiss* on May 26, 2017 (the "*PBT Response to ECCB*," ECF PBT Doc. # 51; the "*PBT Response to NBA*," ECF PBT Doc. # 49; and the "*PBT Response to NCBA*," ECF PBT Doc. # 50, and collectively, the "*PBT Opposition*"). The *PBT Opposition* is supported by the declaration of Eustella Fontaine (the "*Fontaine PBT Decl.*," ECF PBT Doc. # 52). The PBT Defendants filed reply briefs to the *PBT Opposition* (the "*ECCB (PBT) Reply*," ECF PBT Doc. # 57; the "*NBA Reply*," ECF PBT Doc. # 54; and the "*NCBA (PBT) Reply*," ECF PBT Doc. # 55).

Caribbean Commercial Investment Bank Ltd. ("CCIB," and together with PBT, the "Plaintiffs," or the "Debtor Banks") filed an adversary proceeding (the "CCIB Adversary Proceeding," ECF Adv. Proc. No. 17–01058 (SMB), and together with the PBT Adversary Proceeding, the "Adversary Proceedings") by filing a complaint (the "*CCIB Complaint*," ECF Doc. # 1, and together with the *PBT Complaint*, the "*Complaints*") on May 1, 2017 against NCBA, ECCB, and the Caribbean Commercial Bank (Anguilla) Ltd ("CCB," and together with NCBA and ECCB, the "CCIB Defendants," and together with the PBT Defendants, the "Defendants," each a "Defendant"). On July 24, 2017, the CCIB Defendants filed the pending motions to dismiss the *CCIB Complaint* (the "*CCB Motion to Dismiss the CCIB Complaint*," ECF Doc. # 12; the "*ECCB Motion to Dismiss the CCIB Complaint*," ECF Doc. # 18; and the "*NCBA Motion to Dismiss the CCIB Complaint*," ECF Doc. # 15, and collectively, the "*CCIB Motions to Dismiss*," and together with the *PBT Motions to Dismiss*, the "*Motions to Dismiss*," or the "*Motions*"). The *CCIB Motions to Dismiss* are supported by memoranda of law (the "*CCB Memo*," ECF Doc. # 13; the "*ECCB (CCIB) Memo*," ECF Doc. # 19; and the "*NCBA (CCIB) Memo*," ECF Doc. # 16) and the declarations of William Richard Hare (the "*Hare CCIB Decl.*," ECF Doc. # 14) and Trevor Brathwaite (the "*Brathwaite CCIB Decl.*," ECF Doc. # 20). CCIB filed memoranda of law in opposition to the *CCIB Motions to Dismiss* (the "*CCIB Response to CCB*," ECF Doc. # 24; the "*CCIB Response to NCBA*," ECF Doc. # 25; and the "*CCIB Response to ECCB*," ECF Doc. # 26, and collectively, the "*CCIB Opposition*"). The *CCIB Opposition* is supported by the declaration of Eustella Fontaine (the "*Fontaine CCIB Decl.*," ECF Doc. # 27). The CCIB Defendants filed reply briefs to the *CCIB Opposition* (the "*CCB Reply*," ECF Doc. # 29; the "*NCBA (CCIB) Reply*," ECF Doc. # 30; and the "*ECCB (CCIB) Reply*," ECF Doc. # 33).

On October 19, 2017, the Court entered an order (the "October 19, 2017 Order) in both Adversary Proceedings authorizing the parties to file additional memoranda of law addressing (1) whether the Bankruptcy Code abrogates sovereign immunity for ECCB over bankruptcy law avoidance claims under 548 and state law avoidance claims that can be asserted under section 544, and (2) whether any authority exists under Anguillan law in support of the contention that the Debtor Banks retained an interest in funds transferred from the Debtor Banks to the Defendants (ECF Doc. # 37; ECF PBT Doc. # 76). The Debtor Banks filed a joint supplemental memorandum in response to the order (the "*Debtor Banks Joint Supplemental Memo*," ECF Doc. # 42, ECF PBT Doc. # 81). The Defendants also filed a joint memoranda of law (the "*Defendants Joint Supplemental Memo*," ECF Doc. # 39, ECF PBT Doc. # 78), and ECCB filed another supplemental brief in response to the order (the "*ECCB Supplemental Memo*," ECF Doc. # 40, ECF PBT Doc. # 79).

B. Factual Background

The facts surrounding these related Adversary Proceedings are taken primarily from the well-pleaded allegations in the *Complaints*.[4] The Court assumes the veracity of well-pleaded facts when determining whether they plausibly give rise to a claim, *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717–18 (2d Cir. 2013) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)), and may also consider "documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (citations omitted). Additionally, where, as here, defendants move to dismiss under the doctrine of *forum non conveniens*, the Court may consider affidavits and exhibits in addition to the pleadings. *Kitaru Innovations Inc. v. Chandaria*, 698 F.Supp.2d 386, 389–90 (S.D.N.Y. 2010); *accord Picard v. Estate (Succession) of Igoin*, 525 B.R. 871, 890 (Bankr. S.D.N.Y. 2015).

1. The Parties

CCIB and PBT were incorporated and licensed in Anguilla under the Trust Companies and Offshore Banking Act of Anguilla, (¶ 26; *PBT Compl.* ¶ 22), and operated as commercial offshore banks (*i.e.* banks that operated within Anguilla, but served only non-Anguillan customers). As offshore banks, CCIB and PBT were authorized only to accept deposits and remit withdrawals in non-Eastern Caribbean currencies to individuals who were not residents of Anguilla. (*Brathwaite CCIB Decl.* ¶ 12; *Braithwaite PBT Decl.* ¶ 12.) Approximately 120 of PBT's depositors were located in the United States, accounting for 16% of deposits made with PBT (*PBT Compl.* ¶ 22), and approximately 144 of CCIB's depositors were located in the United Stated, representing 43% of CCIB's deposits. (¶ 26.)

CCIB and PBT are wholly-owned subsidiaries, respectively, of CCB and NBA (collectively, the "Parent Banks"). (¶ 27; *PBT Compl.* ¶ 23.) NBA, which was the largest financial institution in Anguilla (*Brathwaite PBT Decl.* ¶ 11) and CCB are incorporated pursuant to the laws of Anguilla as private limited liability companies (¶ 27; *PBT Compl.* ¶ 23). NBA, as PBT's onshore parent company, managed the administrative and banking operations of PBT pursuant to an agreement dated April 1, 2005 (the "PBT Service Agreement," *Braithwaite PBT Decl.*, Ex. D.). (*Brathwaite PBT Decl.* ¶ 21.) Likewise, CCB managed the day-to-day affairs of CCIB pursuant an agreement for service dated May 2010 (the "CCIB Agreement for Service," *Braithwaite CCIB Decl.*, Ex. D.).

NCBA is a newly-formed bank created in 2016, incorporated under the laws of Anguilla, and wholly owned by the government of Anguilla. (¶¶ 28, 34; *Fontaine PBT Decl.* ¶ 12.) On April 22, 2016, NCBA inherited NBA's and CCB's "valuable assets" as part of a "Resolution Plan" (defined below). (*PBT Compl.* ¶¶ 13, 52–53.) According to William Hare, NCBA is "now the only bank providing retail and commercial banking services in Anguilla." (*Hare PBT Decl.* ¶ 19.)

CCB, NBA, and NCBA are regulated by ECCB. ECCB was established on October 1, 1983 under the Eastern Caribbean Central Bank Agreement Act R.S.A c. E5

4. Because the allegations in the *CCIB Complaint* and the *PBT Complaint* substantially overlap, the Court relies primarily on the *CCIB Complaint,* and references to paragraphs therein are denoted with "(¶ _.)" Where necessary, the Court cites to each complaint individually.

(Anguilla) (the "ECCB Act") as the monetary authority and regulator of the domestic banking system of the territories of participating governments—Anguilla, Antigua and Barbuda, Commonwealth of Dominica, Grenada, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent, and the Grenadines. (¶¶ 29, 40, 48, 66, 72.) ECCB is headquartered in St. Kitts and Nevis and was established to "maintain the stability of the Eastern Caribbean Currency and the integrity of the banking system in order to facilitate the balanced growth and development of member states." (*Hare PBT Decl.* ¶¶ 16–18.) ECCB's regulatory authority over the participating governments is found in Part IIA, Article 5B of the ECCB Act, which states if any of the participating territory's financial system is in danger of disruption, substantial change, injury or impairment, then [ECCB] has the express right to intervene into a financial institution of any of the participating territories by assumption and control of that institution's property provided that:

a. the interests of depositors or creditors of a financial institution are threatened;

b. a financial institution is likely to become unable to meet its obligations or is about to suspend or has suspended payment to its creditors or depositors; or

c. a financial institution is not maintaining high standards or financial probity or sound business practices.

(*Brathwaite PBT Decl.* ¶ 9 (citing ECCB Act at Art. 5B, Part IIA).) ECCB has no regulatory authority over the Debtor Banks. (¶ 40; *PBT Compl.* ¶ 7.) Instead, the Debtor Banks are regulated by the Anguillan Financial Services Commission (the "FSC"). (¶ 59; *PBT Compl.* ¶ 7.)

2. The Conservatorships

The 2008 global financial crisis severely stressed the Eastern Caribbean banking sector. (*Brathwaite PBT Decl.* ¶ 10.) The effects of the crisis were especially pronounced in Anguilla, where economic activity contracted and the country continued to experience negative growth through 2012. (*Id.*) Anguillan commercial banks uniformly realized significant declines in earnings and deterioration of capital levels. (*Id.*)

In October 2011, ECCB and others began monitoring the affairs of the Parent Banks in response to questions relating to the Parent Banks' viability. (¶ 47; *PBT Compl.* ¶ 43.) On August 12, 2013, concerned by escalating non-performing loans, the Parent Banks' failure to meet ECCB's capital requirements, and the likely inability of the Parent Banks to meet their obligations, ECCB placed each Parent Bank into conservatorship (the "Conservatorships") pursuant to powers conferred on ECCB under the ECCB Act. (¶ 48; *PBT Compl.* ¶ 43.) The stated aim of the Conservatorships was to stabilize and restructure the Debtor Banks. (¶ 50; *PBT Compl.* ¶ 46.) To accomplish that aim, ECCB appointed Conservator Directors (as defined below) to both CCB and NBA to prepare a rescue plan, and through the Conservator Directors, restricted access to CCB and NBA deposits. (¶¶ 51, 53; *PBT Compl.* ¶¶ 47, 49.)

Following the implementation of the Conservatorships, ECCB removed the Parent Banks' directors and appointed Martin Dinning, Hudson Carr, Shawn Williams, and, for a short period of time, Robert Miller (each a "Conservator Director," and collectively, the "Conservator Directors") as conservators of the Parent Banks. (¶ 52; *PBT Compl.* ¶ 7.) Between August 12, 2013 and March 24, 2016 (the "Relevant Period"), the Parent Banks' affairs were conducted in accordance with instructions provided by the Conservator Directors (¶ 55; *PBT Compl.* ¶ 7), several

of whom were or had been employees of ECCB (¶ 55), and who operated under the control and supervision of ECCB. (¶ 52.)

On or about August 15, 2013, ECCB or Dinning, as Conservator Director acting on behalf of NBA and CCB, or Miller, Conservator Director acting on behalf of CCB, dismissed the appointed directors of PBT and CCIB. (¶ 66; *PBT Compl.* ¶ 62.) From August 15, 2013 until February 22, 2016, the Debtor Banks had no *de jure* directors and allegedly acted solely under the management control of the Conservator Directors. (¶ 69; *PBT Compl.* ¶ 65.) According to the Plaintiffs, the Conservator Directors presumed to act as directors of the Debtor Banks and were the sole persons causing the Debtor Banks to continue conducting regular banking business. (¶ 71; *PBT Compl* ¶ 67.) For example, on September 10, 2013 and October 17, 2017, some of the Debtor Banks' customers received correspondence from certain Conservator Directors advising them of operational changes at the Debtor Banks due to the takeover by ECCB, but stating that the Debtor Banks' operations would remain normal. (¶ 70; *PBT Complaint* ¶ 66.) The Conservator Directors also determined that funds were commingled between NBA and PBT and between CCIB and CCB, and specifically determined that some funds deposited in PBT and CCIB were transferred respectively to NBA and CCB. (*Brathwaite CCIB Decl.* ¶ 18; *Brathwaite PBT Decl.* ¶ 20.)

The Conservatorships, and ECCB and the Conservator Directors' alleged control over the Debtor Banks, continued from the Conservatorships' implementation until April 22, 2016, when the Debtor Banks were placed into receivership. (¶¶ 56–57; *PBT Compl.* ¶¶ 50–51; *see also Fontaine PBT Decl.* ¶ 9.)

3. The Transfer of Funds

The *Complaints*, in the main, allege that during the Relevant Period, the Conservator Directors assumed control of the Debtor Banks and, as *de facto* director, breached their fiduciary duties to the Debtor Banks by, among other things, "procur[ing] or permit[ing]" the payment (*i.e.*, "upstream") of each Debtor Bank's customer deposits to the respective Parent Bank's Bank of America ("BofA") accounts (collectively, the "Accounts) in New York.[5] More specifically, CCIB alleges that between August 12, 2013 and April 22, 2016, the Conservator Directors caused CCIB to transfer the net amount of US$4,481,394.62 in CCIB customer deposits to CCB's BofA Account. (¶ 95.) In addition, on November 8, 2013, the Conservator Directors liquidated US$8,942,000 in CCIB's Morgan Stanley investment account and transferred those funds to CCB. (¶ 96.) Likewise, PBT alleges that a net amount of US$9,150,168.84 in PBT customer deposits was upstreamed to NBA in the period between August 13, 2013 and March 23, 2016. (*PBT Compl.* ¶¶ 94–97.)[6] The trans-

5. The *Complaints* imply that the customers' deposits were initially held in accounts in the name of the Debtor Banks and subsequently transferred to accounts held in the names of the Parent Banks, giving rise to the Debtor Banks' alleged claims. However, neither PBT nor CCIB actually maintained accounts in the United States in their own names into which money could be deposited. (*See* ¶ 11; *PBT Compl.* ¶ 12.) Instead, anyone seeking to deposit U.S. dollars, directed those deposits in the first instance into accounts in the names of the Parent Banks at BofA. (Transcript of 10/26/17 H'rg ("Tr.") at 79:5–8; 85:14–21; 86:19–21.) The *CCIB Complaint* also alleges that CCIB had US$8,942,000 in a Morgan Stanley Smith Barney LLC ("Morgan Stanley") investment account in its own name, and that ECCB and the Conservator Directors liquidated that account and transferred the proceeds to CCB's BofA Account. (¶ 15.)

6. At oral argument, counsel for the Parent Banks indicated that the transfers at issue in this case from the Debtor Banks to the Parent Banks were made in accordance with the

ferred assets are referred to collectively as the "Funds."

Further, while the Debtor Banks allege that legal title to the Funds transferred to the Parent Banks when such Funds were deposited into the Accounts (¶ 76; *PBT Compl.* ¶ 72), the Debtor Banks contend that they maintained an equitable interest in the Funds in the Accounts because the Debtor Banks had no accounts in their own names and the Accounts, although in the Parent Banks' names, were also used as the Debtor Banks' operating accounts. (¶ 76; *PBT Compl.* ¶ 72.) According to the Debtor Banks, the Parent Banks "knowingly made no provision for repaying" the Debtor Banks and "did not provide any reasonably equivalent value or fair consideration for the Funds." (¶ 76; *PBT Compl.* ¶ 72.) The Debtor Banks contend that the Funds along with millions of other dollars were subsequently transferred to ECCB. (*See* ¶¶ 97–100; *PBT Complaint* ¶¶ 98–100.)

In addition, the Debtor Banks contend that the Parent Banks, prior to and while under the management of the Conservator Directors, upstreamed millions of dollars to ECCB. CCB allegedly transferred to ECCB (a) US$28,673,612.01 in the two years prior to CCIB's chapter 15 petition, (b) US$67,198,261.96 in the three years prior to CCIB's chapter 15 petition, (c) US$70,023,261.96 during the Conservatorship of CCB, and (d) US$87,933,896.76 during the period between January 3, 2013 and April 18, 2016. (¶¶ 97–100.) Likewise, PBT alleges that NBA transferred to ECCB the net amount of (a) US$12,120,348.30 in the two years prior to PBT's chapter 15 petition, (b) US$11,872,446.40 during the Conservatorship of NBA, and (c) US$27,572,446.40 in the period between January 2, 2013 and April 11, 2016, without receiving reasonably equivalent value or fair consideration in exchange. (*PBT Compl.* ¶¶ 98–100.)

The Plaintiffs argue that the upstreaming of the Debtor Banks' customers' deposits provided liquidity to the Parent Banks during times when the Parent Banks were insolvent on a balance sheet basis. (¶¶ 77, 80; *PBT Compl.* ¶¶ 74, 77.) However, the upstreaming rendered the Debtor Banks insolvent and unable to pay their depositors during the Relevant Period. (¶¶ 81–89; *PBT Compl.* ¶¶ 79–86.) The Debtor Banks' contemporaneous audited and unaudited financial statements showed that they were insolvent during the Relevant Period. (¶¶ 85–88; *PBT Compl.* ¶¶ 83–85.)

In addition, the Debtor Banks' customers were assured that any new funds deposited with the Debtor Banks after August 12, 2013 would be available for withdrawal. (¶ 91; *PBT Compl* ¶ 88.) But despite those assurances, on or around September 2, 2013, the Conservator Directors placed restrictions on the Debtor Banks' customers' ability to make withdrawals. (¶ 83; *PBT Compl.* ¶ 81.) [7]

4. The Resolution Plan of 2016

ECCB ultimately developed a plan in 2016 to resolve the Parent Banks' financial problems (the "Resolution Plan"). The fairness of the Resolution Plan is currently the subject of a judicial proceeding pending in Anguilla, and that proceeding is discussed in greater detail below. On April 22, 2016, ECCB appointed a receiver of

existing service agreements. (Tr. at 41:24–42:2.)

7. After his appointment, the Administrator (as defined below) sought written confirmation from ECCB and the Conservator Directors that this assurance would be honored, (¶ 92; *PBT Compl.* ¶ 90), but did not receive it despite numerous correspondence and calls among the parties. (¶ 92(a)–(y); *PBT Compl.* ¶ 90(a)–(y).)

both Parent Banks (the "Receiver"), and the Parent Banks ceased banking operations in Anguilla. (¶ 56; *PBT Compl.* ¶ 52.) On that same day, the Parent Banks transferred to NCBA their banking operations, including the Funds in accounts held by the Parent Banks at BofA and which are the subject of this litigation. (¶¶ 56–57; *PBT Compl.* ¶¶ 52–53.) NCBA then transferred the Funds from the Accounts, in the name of the Parent Banks at BofA in New York, to another account under NCBA's control in June and July of 2016, without making any provision to repay the Debtor Banks. (¶¶ 33, 57–58; *PBT Compl.* ¶¶ 29, 53–54.) On July 8, 2016, the Funds held in the Account inherited by NCBA from NBA were frozen by BofA at the written request of PBT. (*Hare PBT Decl.* ¶ 28–29.)

As shall be seen, the Debtor Banks contend that the Funds transferred out of the Accounts to the Parent Banks and ECCB "were held in constructive trust for the Debtor" (¶ 76; *PBT Compl.* ¶ 73), and that the Resolution Plan unfairly discriminated against them by failing to transfer their liabilities to NCBA because, among other reasons, the Debtor Banks' depositors were non-Anguillan residents.

5. The Appointment of an Administrator of the Debtor Banks

Upon the FSC's application, the Supreme Court in the High Court of Anguilla (the "High Court") entered an order placing the operations of the Debtor Banks under administration pursuant to section 31(2)(b) of the FSC Act, R.S.A. c.F28 (the "Anguilla Administrations"). (¶ 60; *PBT Compl.* ¶ 56.) On February 22, 2016, the High Court appointed William Tacon of FTI Consulting as the administrator of the Debtor Banks (the "Administrator," or the "Foreign Representative"), granting the Administrator complete control of the management of the Debtor Banks. (¶ 61; *PBT Compl.* ¶ 57.) The High Court specifically authorized the Administrator, as an officer of the High Court, "to act in Anguilla or any foreign jurisdiction where he believes assets and property of the Offshore Banks may be Situate[d] . . . [to] commence [or] continue . . . without further order of this Honorable Court any proceeding or action . . . in a foreign jurisdiction for the purpose of fulfilling his duties and obligations" under the February 22, 2016 order. (¶ 62; *PBT Compl.* ¶ 58.) At the close of business on April 25, 2016, the Debtor Banks ceased accepting new deposits at the Administrator's direction. (¶ 79; *PBT Compl.* ¶ 22.)

C. Procedural Background

Several pending proceedings in the United Stated and in Anguilla are relevant to the Defendants' *Motions to Dismiss*. In addition to the Anguilla Administrations of the Debtor Banks pursuant to section 31(2)(b) of the FSC Act, R.S.A. c.F28, these pending proceedings include: (i) the chapter 15 and chapter 11 proceedings of the Debtor Banks before this Court (the "U.S. Proceedings"); (ii) the proceedings initiated by the Debtor Banks in Anguilla against the Parent Banks and NCBA (the "Anguilla Initial Proceedings"); (iii) the proceedings commenced by some of the Debtor Banks' depositors in Anguilla against the Conservator Directors and ECCB (the "Satay Action"); and (iv) the proceedings initiated by the Debtor Banks against ECCB and others seeking judicial review of the Defendants' conduct (the "Judicial Review," together with the Anguilla Initial Proceedings and the Satay Action, the "Anguilla Litigation").

1. The U.S. Bankruptcy Proceedings

On May 26, 2016 and October 11, 2016, pursuant to the authority granted by the Anguillan High Court, the Administrator filed chapter 15 petitions in this Court on

behalf of PBT (Case No. 16–11529–MG) and CCIB (Case No. 16–12844–SMB), respectively, seeking recognition of the Anguilla Administrations. By orders dated June 17, 2016 and November 15, 2016, this Court granted the petitions as to PBT (ECF Case No. 16–11529–MG) and CCIB (ECF Case No. 16–12844–SMB), respectively, thereby recognizing the Anguilla Administrations as foreign main proceedings and the Administrator as the Debtor Banks' foreign representative. At the time of the filing, the Administrator "anticipate[d] that calling for claims and subsequently admitting them to rank for dividend will take place in Anguilla as part of the Anguillan Proceeding[s] and my liquidation of [the Debtor Banks'] assets." (*Declaration of William Tacon in Support of (I) the Verified Petition for Recognition of Foreign Proceeding and (II) Motion in Support of Verified Petition for Recognition of Foreign Proceeding and for Related Relief*, dated May 26, 2016 (the "*Tacon PBT Decl.*," ECF Case No. 16–11529–MG Doc. # 2) ¶ 36; *Declaration of William Tacon in Support of (I) the Verified Petition for Recognition of Foreign Proceeding and (II) Motion in Support of Verified Petition for Recognition of Foreign Proceeding and for Related Relief*, dated Oct. 6, 2016 (ECF Case No. 16–12844–SMB Doc. # 2) ¶ 35).

PBT and CCIB subsequently filed chapter 11 petitions, respectively, on June 22, 2016 (Case No. 16–11806–MG) and October 11, 2016 (Case No. 16–13311–SMB) for the ostensible purpose of filing federal avoidance actions against the Defendants. On December 16, 2016 and May 1, 2017, PBT and CCIB filed these Adversary Proceedings. With one exception, the *Complaints* are identical and seek identical relief. They assert claims to (a) avoid and recover intentional or constructive fraudulent transfers under applicable provisions of the Bankruptcy Code, New York law and Anguillan law; (b) recover the avoidable transfers from NCBA and ECCB as subsequent transferees; (c) disallow claims of the Parent Banks, NCBA, and ECCB under section 502(d) of the Bankruptcy Code; and (d) impose liability against ECCB for breach of fiduciary duty, gross negligence, and aiding and abetting breach of fiduciary duty.

In addition to challenging the upstreaming of funds from the Debtor Banks to the Parent Banks and NCBA, the *CCIB Complaint* also alleges that CCIB transferred approximately US$9 million to CCB from its Morgan Stanley account. It does not appear, however, to include this transfer in its avoidance claims which are limited to US$4,481,394.62, the net amount upstreamed transfers effectuated through the BofA accounts. (*See CCIB Complaint*, Counts V, VIII, XI, XIV.)

2. The Anguilla Initial Proceedings

On May 6, 2016, the Debtor Banks brought suit in the High Court of Anguilla against the Parent Banks and NCBA. (*See Debtor Banks' Statement of Claim, Hare CCIB Decl.*, Ex. B.) The Debtor Banks made the same essential allegations as in the *Complaints*, namely, that the Conservator Directors and ECCB breached their fiduciary duties in their capacity as *de facto* directors of the Debtor Banks by transferring the Funds to the Parent Banks. More specifically, the Debtor Banks alleged that during their control, and while the Parent Banks were insolvent, the Conservator Directors "procured or permitted the payment to, respectively, NBA and CCB of all monies received by PBT and [CCIB] from depositors, and the proceeds of all assets of PBT and [CCIB] realized or collected during the Relevant Period" (*id.* ¶ 11), in the amounts of US $174,959,675.75 and US $26,983,662.05, respectively. (*Id.* ¶ 13.) PBT and CCIB con-

tended that the upstreamed funds "were received and held by NBA and CCB on trust for PBT and [CCIB]," remained the Debtor Banks' assets, and the Debtor Banks were entitled to the return of the funds and/or their traceable proceeds. (*Id.* ¶¶ 15, 17.) The Debtor Banks therefore sought declaratory, equitable and monetary relief aimed at restoring the wrongfully upstreamed funds and other transferred assets. (*Id.* at 10–11.) However, the Debtor Banks did not assert claims under the Fraudulent Dispositions Act of Anguilla (the "Fraudulent Dispositions Act") against any of the Defendants, and neither ECCB nor the Conservator Directors are parties to the Anguilla Initial Proceedings.

Because the Parent Banks were in receivership at the commencement of the Anguilla Initial Proceedings, a stay was in effect as to all legal proceedings against them under section 143(c) of the Banking Act 2015 (the "Banking Act").[8] (*Hare PBT Decl.* ¶ 23.) The Debtor Banks therefore required leave of the High Court to sue the Parent Banks. They did not seek leave before initiating the action, and sought leave retrospectively. Although it was in all parties' mutual interest to determine the Debtor Banks' claims, (*Leave Order, Hare CCIB Decl.*, Ex. C ¶¶ 84, 107(2)), and the refusal to lift the stay would leave the Debtor Banks unable to pursue their proprietary claims against the defendants (*id.* at ¶ 85), the High Court nevertheless refused to lift the stay, and the Debtor Banks' application was dismissed on August 24, 2016. (*Id.* ¶ 108.)

The principal reason for the dismissal was the Debtor Banks' failure to join the Conservator Directors as parties. According to the High Court, the Debtor Banks' claims "raise[d] serious questions about the source of the powers under which the conservators of the defendants (appointed by ECCB) sought to exercise the powers they are alleged to have exercised over the claimants who are offshore banks regulated by the Anguilla Financial Services Commission ["FSC"] rather than the ECCB." (*Id.* ¶ 93.) Although the Debtor Banks alleged that the Conservator Directors breached their fiduciary duties to them and sought a remedy against them in the form of a declaration that they had breached their fiduciary duties, the High Court noted that the Debtor Banks did not name the Conservator Directors as parties. (*Id.* ¶ 95.) The High Court found that "it [did] not appear . . . that the claimants [could] rightfully seek or obtain a declaration against them that they acted in breach of the fiduciary duty" (*id.* ¶ 99(5)), and without their presence, "the claim has very poor prospects of success." (*Id.* ¶ 99(6); ¶¶ 107(5)–(6).) The High Court concluded that the Conservator Directors were necessary parties. (*Id.* ¶ 99.)

The High Court explained that the dismissal of the Debtor Banks' application was also justified by the Conservator Directors' possible immunity. The defendants argued that the Conservator Directors were immune from suit under Article 5F of the ECCB Act.[9] (*See id.* ¶ 100.) The

8. Banking Act § 143(c) provides that upon the appointment of a receiver:

> All legal proceeding against the licensed financial institution or licensed financial holding company are stayed and a third party shall not exercise any right against the licensed financial institution's or licensed financial holding company's assets without the prior leave of the court unless the court directs otherwise.

9. Article 5F of the ECCB Act provides:

> The Council, or the Minister or the Bank, its directors and officers and any person appointed by the Bank under Article 5B are not subject to any action.... in respect of anything done or omitted to be done in good faith and without negligence in the performance or in connection with the per-

High Court stated that Article 5F only provided immunity for acts done by the Conservator Directors in good faith and without negligence (*id.* ¶ 101), and explained that the *Debtor Banks' Statement of Claim* failed to specifically plead bad faith or negligence necessary to remove their claim from the immunity under Article 5F. (*Id.* ¶ 106(1).)

The defendants also argued that the Conservator Directors were employees of ECCB, and therefore immune from suit under Article 50(7)(i).[10] The High Court questioned whether Article 50(7) even covered the Conservator Directors. The immunity was not absolute, and in light of the "constitutional concept of proportionality," the High Court had to decide whether the immunity was inapplicable because the "the reliefs being sought fall outside that section on the basis that it constitutes a civil right." (*Id.* ¶¶ 104–05.) Based on these considerations, the High Court found that these issues "do not lend themselves to the court exercising its power without giving the parties an opportunity to be heard and further detailed analysis." (*Id.* ¶ 106(2).) The Debtor Banks have appealed from the *Leave Order*. (*See Hare CCIB Decl.* ¶ 24; *Hare PBT Decl.* ¶ 24.)

3. The Satay Action

On June 28, 2016, fifty-one PBT depositors and seventeen CCIB depositors (the "Satay Claimants") brought an action in the High Court against Conservator Directors Martin Dinning, Hudson Carr, Shawn Williams, Robert Miller and ECCB (the "Satay Defendants"). (*Hare PBT Decl.* ¶ 32.) Their statement of claim (the "*Satay Statement of Claim*," *Hare CCIB Decl.*, Ex. D) alleged the same set of facts as the *Complaints* and the *Debtors Banks' Statement of Claim*, but asserted claims belonging to the Debtor Banks' depositors rather than the Debtor Banks. In the *Satay Statement of Claim*, the Satay Claimants asserted that they opened bank accounts with the Debtor Banks (*Satay Statement of Claim* ¶ 4), and that ECCB placed the Parent Banks in conservatorship on August 12, 2013 pursuant to its emergency powers under the ECCB Act, and appointed the four individual defendants as Conservator Directors of the Parent Banks. (*See id.* ¶ 6.) The Satay Claimants alleged that as a result of the assumption of control over Parent Banks by the Conservator Directors, the Conservator Directors became *de facto* directors of the Debtor Banks and breached their duties to the Satay Claimants by, *inter alia*, failing to ensure the safety and security of their deposits and the Debtor Banks' property. (*Id.* ¶¶ 24–27.). The Satay Claimants further contended that Conservator Martin Dinning misrepresented that their deposits were safe and that they could continue to trade with their accounts. (*Id.* ¶ 27(h).) As a result, the Satay Claimants claimed that they could not access their funds deposited with the Debtor Banks (*id.* ¶ 28), and under the Resolution Plan of 2016, the assets of the Debtor Banks, including the Satay Claimants' deposits, were transferred to the newly constituted NCBA in breach of the Anguillan Constitution and the European Convention on Human Rights. (*Id.* ¶ 29.) The Satay Claimants further alleged that the Satay Defendants knowingly assisted the Government of Anguilla in depriving the

formance of functions conferred on the Bank under this Part.

10. Article 50(7)(i) of the ECCB Act states:

The Governor, the Deputy Governor, the appointed Directors, officers and employees of the Bank shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity.

Satay Claimants of their money. (*Id.* ¶ 30.) The Satay Claimants sought a money judgment in the sum of US$13,028,846.17 together with interest from August 2013 in accordance with the terms of their accounts. (*Id.* at 8.)

The Satay Defendants filed an application on August 12, 2016 seeking a declaration that the High Court lacked jurisdiction based on the Satay Defendants' statutory immunity. (*See Judgment*, dated Feb. 22, 2017 (the "*Satay Judgment*"), *CCIB Compl.*, Ex. A ¶¶ 9–10.) The Satay Defendants contended that ECCB was immune from suit under Article 50(2) of the ECCB Act [11] (*id.* ¶ 10), and that the individual defendants were immune from suit pursuant to one or more of ECCB Act Articles 50(7), and/or 5B(1)(vii).[12] The thrust of the individual defendants' position was that they acted under the mandate of ECCB to stabilize the Anguillan banking system, and that their actions included the management and control of the Debtor Banks. (*See id.* ¶¶ 11–13.) On the other hand, the Satay Claimants claimed that the defendants acted without authority in managing and controlling the Debtor Banks (*see id.* ¶ 14), and that they were therefore not entitled to immunity. (*Id.* ¶¶ 30–31.)

On February 22, 2017, the High Court issued the Satay Judgment and held that the Satay Defendants had acted *ultra vires*. Although ECCB could, under appropriate circumstances, exercise control over the financial institutions it regulated (*e.g.*, the Parent Banks), the High Court found that it could only "investigate the affairs" of the affiliated financial institutions, here, the Debtor Banks. (*Id.* ¶¶ 33, 64, 66). The High Court found that ECCB and the individual defendants had exceeded their powers with respect to the Debtor Banks, including by hiring and laying off the Debtor Banks' officers and employees and replacing them with the Conservator Directors, and by sending letters to the Debtor Banks' depositors regarding the restrictions on their withdrawals and the revisions of the interest rates on their deposits. (*Id.* ¶¶ 61–62.).

Since the Satay Defendants did not possess the authority to act as they did with respect to the Debtor Banks, the High Court concluded that immunity under Article 50 did not apply. (*Id.* ¶ 67) The High Court further found that the applicability of Article 5F, which immunizes acts taken in good faith and without negligence, could only be determined "after a full ventilation of the facts of the case." (*Id.* ¶ 69.) The Satay Defendants' jurisdictional objection was therefore "refused," and they were directed to serve their defense. (*Id.* ¶ 70.) The *Satay Judgment* did not address whether the Parent Banks could have lawfully taken the challenged actions in their capacities as sole shareholders of the Debtor Banks. (*Hare CCIB Decl.* ¶ 31; *Hare PBT Decl.* ¶ 35.) ECCB and the Conservator Directors applied for leave to appeal from the *Satay Judgment*, and their

11. Article 50(2) of the ECCB Act provides:

> The Bank, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.

12. Article 5B(1)(vii) is part of the 1993 amendments to the ECCB Act, and is annexed to the *Braithwaite CCIB Declaration* as Exhibit B. It grants ECCB authority "to appoint such persons and to establish such companies or corporations as it considers necessary to assist in the performance of the functions conferred [under Article 5B]; and the provisions of Article 50 [*e.g.*, immunity from suit] shall apply to such persons, companies or corporations[.]"

application was granted on April 11, 2017. (*Hare CCIB Decl.* ¶ 29; *Hare PBT Decl.* ¶ 33.) The appeal is pending.

4. Application for Judicial Review

On March 10, 2017, the Debtor Banks filed an application for leave to apply for judicial review (the "*Judicial Review Application*," *Brathwaite CCIB Decl.*, Ex. F) against the Chief Minister of Anguilla, the Attorney General of Anguilla in his official capacity as a legal representative of the Government of Anguilla, Gary Moving, the receiver of the Parent Banks and ECCB. The *Judicial Review Application* alleged that as part of the Resolution Plan, in or around April 2016, ECCB and the Receiver agreed to transfer certain of the Parent Banks' liabilities (including their liabilities for deposits up to EC$2.8 million) and an equal amount of assets to NCBA. (*Id.* ¶¶ 10(2)(i)–(ii).) At around the same time, the House of Assembly in Anguilla granted the Government of Anguilla money to fund two trusts (the "Trusts") to protect the Parent Banks' large depositors, defined as those depositors whose deposits exceeded EC$4 million. (*Id.* ¶ 10(2)(iii).) The intention was to fulfill the policy under which NCBA would assume the Parent Banks' liability to their depositors up to EC$2.8 million while the balance of the deposits would be protected by the Trusts, thereby fully protecting the Parent Banks' depositors. (*Id.* ¶¶ 11–12.)

The *Judicial Review Application* claimed, in substance, that the respondents unfairly discriminated against the Debtor Banks by guarantying repayment of deposits of all onshore depositors but not of offshore depositors, who are non-residents of Anguilla. More specifically, the *Judicial Review Application* alleged that based on the upstreaming of the funds, the Debtor Banks were depositors of the Parent Banks (*id.* ¶ 14), and that, accordingly, the Debtor Banks should have received similar protection for their deposits. Nevertheless, the liability for the Debtor Banks' deposits was not transferred to NCBA, and the Debtor Banks were excluded from eligibility for payments from the Trust. (*Id.* ¶¶ 15–24.) As a result, and through the *Judicial Review Application*, the Debtor Banks sought judicial review of various actions and decisions (collectively, the "Decisions") that resulted in this alleged discriminatory treatment (*see id.* 32–34), the cumulative effect of which excluded the Debtor Banks' deposits from the protection up to EC$2.8 million per deposit and eligibility for protection under the Trusts. (*Id.* ¶ 35.) Among other things, the Debtor Banks argued that the respondents had discriminated against similarly situated creditors of the Parent Banks notwithstanding contrary expectations based on ECCB's promises and assurances to the Debtor Banks that it would protect their deposits. The Debtor Banks also claimed that the defendants mistakenly considered the legally irrelevant fact that the Debtor Banks' depositors were non-Anguillan residents, and that they ignored the fact that the Debtor Banks, as depositors of the Parent Banks, were domestic depositors." (*Id.* ¶¶ 37–74.) The Debtor Banks therefore sought (1) a declaration that the Decisions were unlawful, and orders quashing the Decisions; (2) a declaration that ECCB and the Chief Minister must effect the transfer of the liability for the Debtor Banks' deposits in the sum of EC$2.8 million per deposit to NCBA; and (3) a declaration that the Debtor Banks' deposits with the Parent Banks must receive the same treatment and protections under the Trusts from the Chief Minister and the Receiver as the Parent Banks' other, similarly situated, depositors. (*Id.* ¶¶ 87–91.)

The Debtor Banks expressly requested ECCB's consent for a stay of the *Judicial Review Application* until the final determi-

nation of these Adversary Proceedings and the U.S. Proceedings, but consent was not granted. (*Fontaine PBT Decl.* ¶ 35; *Fontaine CCIB Decl.* ¶ 34.) On May 25, 2017, the High Court dismissed ECCB's and the Receiver's application for an adjournment and ordered that they provide reasons for their opposition to a stay of the *Judicial Review Application*. (*Fontaine PBT Decl.* ¶ 35; *Fontaine CCIB Decl.* ¶ 34.) The Attorney General, representing himself and the Government of Anguilla, did not oppose the stay of the Judicial Review. (*Fontaine PBT Decl.* ¶ 35; *Fontaine CCIB Decl.* ¶ 34.) On June 14, 2017, the High Court stayed the Judicial Review (*Hare CCIB Decl.*, Ex. E), until the earlier of either a "final determination" in these Adversary Proceedings or a final settlement agreement between the parties to these Adversary Proceedings.

D. The Motions to Dismiss

The Defendants seek to dismiss the Adversary Proceedings on several grounds. Some of the grounds for dismissal are asserted by all Defendants, while others are asserted independently by some Defendants only.

1. *Dismissal Sought by All Defendants Under Forum Non Conveniens* [13]

Each of the Defendants asserts that these Adversary Proceedings should be dismissed on grounds of *forum non conveniens* because, *inter alia*, the parties are Anguillan entities and Anguilla is the most convenient forum for the Plaintiffs' claims. The Defendants argue that the Debtor Banks are merely forum shopping by filing their claims in this Court in order to avoid constructive fraudulent transfers under the Bankruptcy Code, a claim not recognized under Anguillan law. In response, the Plaintiffs argue that dismissal is not warranted given, among other things, that many of the transfers at issue occurred in New York and the Anguillan High Court authorized the Plaintiffs to commence actions in foreign jurisdictions and recently issued a stay on the *Judicial Review Application* pending the outcome of the Adversary Proceedings. In addition, the Plaintiffs urge denial of the motion to dismiss precisely because Anguillan law does not recognize a claim based on a constructive fraudulent transfer.

2. *Dismissal Sought by ECCB Under the Foreign Sovereign Immunities Act and for Lack of Personal Jurisdiction* [14]

ECCB contends that it is immune from suit in the United States under the Foreign Sovereign Immunities Act (the "FSIA") because it is a foreign agency or instrumentality and the commercial activity exception to the FSIA does not apply. In response, the Plaintiffs allege that ECCB's activities with respect to the Debtor Banks were nothing more than ordinary banking commercial activities under the FSIA, which occurred or had a direct effect in the United States given, among other things, the transfers to and from a United States bank account and the presence of numerous injured depositors in the United States.

13. For the Defendants' *Motions to Dismiss, see ECCB (PBT) Memo* at 25–31; *NBA Memo* at 11–19; *NCBA (PBT) Memo* at 9–10; *CCB Memo* at 13–22; *ECCB (CCIB) Memo* at 25–31; *NCBA (CCIB) Memo* at 8. For the Plaintiffs' responses, *see PBT Resp. to ECCB* at 21–32; *PBT Resp. to NBA* at 31; *PBT Resp. to NCBA* at 10; *CCIB Resp. to ECCB* at 24–35; *CCIB Resp. to CCB* at 31; *CCIB Resp. to NCBA* at 9.

14. For ECCB's *Motions to Dismiss, see ECCB (PBT) Memo* at 19–25; *ECCB (CCIB) Memo* at 13–19. For the Plaintiffs' responses, *see PBT Resp. to ECCB* at 9–17; *CCIB Resp. to ECCB* at 10–20.

ECCB further asserts that the Court lacks personal jurisdiction over it because the Debtor Banks have not satisfied their burden to show that ECCB has "minimum contacts" with New York. ECCB argues that the Plaintiffs have shown neither general nor specific jurisdiction because its limited involvement in the transfers to New York do not satisfy the required burden. In response, the Debtor Banks contend that minimum contacts need not be established once jurisdiction under the FSIA and proper service have been established, but that, in any event, ECCB has numerous specific contacts with New York and with the United States generally.

3. Dismissal Sought by NCBA, NBA and CCB Under International Comity, Non–Extraterritoriality of the Provisions of Bankruptcy Code, the Act of State Doctrine, and for Failure to State a Claim under Sections 550 and 502(d) of the Bankruptcy Code [15]

NCBA, NBA and CCB alternatively contend that concerns of international comity warrant staying the Adversary Proceedings pending the outcome of the proceedings in Anguilla. The Debtor Banks assert that a stay should not be granted because, among other things, the High Court has stayed the *Judicial Review Application* pending the outcome of these Adversary Proceedings.

NCBA, NBA and CCB further argue that the transfers that the Debtor Banks seek to avoid and recover under provisions of the Bankruptcy Code and the New York Debtor Creditor Law (the "NYDCL") are foreign, rather than domestic transfers. Because the avoidance provisions of the Bankruptcy Code and the NYDCL allegedly do not apply extraterritorially, the Plaintiffs cannot seek to avoid the foreign transfers under these provisions.

In response, the Plaintiffs assert that the focus of the Congressional concern, to which a court must look in determining whether application of a statute is extraterritorial, with regards to the avoidance and recovery provisions of the Bankruptcy Code, is on the initial transfers that deplete the bankruptcy estate, and not on the recipient of the transfers. The Plaintiffs thus assert that the focus should be on where the transfers occurred and whether, as here, title transferred in the United States. Since, as the Plaintiffs argue, the transfers are domestic, the Adversary Proceedings should not be dismissed. But the Plaintiffs further contend that should the Court find that the transfers were foreign, Congress has shown a clear intent that the Bankruptcy Code's avoidance powers apply extraterritorially, and that similar public policy reasons favor applying the provisions of the NYDCL extraterritorially. Accordingly, the Plaintiffs contend that the provisions should apply to the contested transfers.

NCBA, NBA and CCB also assert that this Court cannot reach the merits of this case because the act of state doctrine precludes the Court from adjudicating a case based on allegations that a foreign banking regulator (*i.e.*, ECCB) violated its own laws in its own territory. The Plaintiffs, on the other hand, contend that the challenged actions occurred in the United States and are commercial in nature, and are not subject to the act of state defense.

NBA, CCB and NCBA further contend that the Plaintiffs' claims under section 550 of the Bankruptcy Code fail because there is no viable avoidance claim in these cases

15. For NCBA, NBA and CCB's *Motions to Dismiss, see NBA Memo* at 19–27; *NCBA (PBT) Memo* at 9–10, 14, 18–20, 23–24; *CCB Memo* at 22–29; *NCBA (CCIB) Memo* at 8, 11–13, 16–17. For the Plaintiffs' responses, *see PBT Resp. to NBA* at 13–32; *PBT Resp. to NCBA* at 5–6, 9–11; *CCIB Resp. to CCB* at 13–22, 27–32; *CCIB Resp. to NCBA* at 5–10.

as a basis for recovery under that section, and the disallowance claim under section 502(d) is premature because they have not filed claims that could be disallowed.

In response, the Debtor Banks argue that their section 550 claims are proper because they have stated legally sufficient avoidance claims, and the section 502(d) claim is not premature because the bar date for filing claims has not passed. Indeed, it has not even been set.

4. Dismissal Sought by NCBA for Failure to State Claims for Relief Under Sections 548 and 544 of the Bankruptcy Code [16]

NCBA contends that the Plaintiffs fail to state claims for relief under sections 548 and 544 of the Bankruptcy Code and the NYDCL because (i) the Plaintiffs fail to allege with sufficient detail pre-petition transfers from the parent defendant (*i.e.*, NBA and CCB, respectively) to NCBA on April 22, 2016, including their amount, and the specific funds and assets at issue; and (ii) the Plaintiffs' allege that they retained their equitable interests in the Funds both before and after the alleged transfers, and hence, fail to allege a transfer of an interest in their property. The Plaintiffs counter that they have pled the requisite details for the fraudulent transfer claims, and given the broad definition of "transfer," a transfer of the Debtor Banks' legal title in the Funds occurred when the funds were deposited into the Parent Banks' BofA accounts.

Because we conclude that these Adversary Proceedings should be stayed based on *forum non conveniens* and international comity, we decline to decide any other issues raised by the *Motions to Dismiss*. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007) (concluding that a court may dismiss an action based on *forum non conveniens* without first deciding other threshold objections such as subject matter jurisdiction or personal jurisdiction). If these cases return here after decisions by the courts in Anguilla, those remaining arguments can be dealt with then.

III. DISCUSSION

A. These Cases Should Be Stayed Based on *Forum Non Conveniens*

All of the Defendants in these Adversary Proceedings move to dismiss or stay these cases based on *forum non conveniens*. The Plaintiffs and all of the Defendants are citizens of or domiciled in Anguilla. There is litigation pending in the courts of Anguilla between all of these parties, and, indeed, the Anguilla Initial Proceedings and the Satay Action were pending before these Adversary Proceedings were filed in New York. No one disputes that the Anguilla High Court has personal and subject matter jurisdiction over the parties. One might be inclined to ask the obvious question—why did the Plaintiffs file these cases here if all of the foregoing is true? The obvious answer is that the Plaintiffs believe that certain causes of action can be asserted here that cannot be asserted in Anguilla—specifically, the constructive fraudulent transfer claims under federal and New York law that, according to the Plaintiffs, have no counterpart and cannot be asserted under Anguilla law. The Plaintiffs' counsel nevertheless acknowledged that the *remedy* that the Plaintiffs seek in these cases is available through their breach of fiduciary duty and actual fraudulent transfer causes of

16. For NCBA's *Motions to Dismiss, see NCBA (PBT) Memo* at 10–18; *NCBA (CCIB) Memo* at 8–13. For the Plaintiffs' responses, *see, PBT Resp. to NCBA* at 6–8; *CCIB Resp. to NCBA* at 6–8.

action, already pending in Anguilla. (Tr. at 107:14–24.) Assuming that the Plaintiffs' *Complaints* have properly stated causes of action for constructive fraudulent transfers (or, could be amended to do so), does that require that the *forum non conveniens* motions should be denied? The Court concludes below that the availability here of causes of action that are not available in Anguilla does not require denial of the *Motions to Dismiss*, but that a stay of these Adversary Proceedings rather than dismissal is appropriate. Depending on the disposition of the cases in Anguilla, it may be appropriate for the Plaintiffs to return to this Court to seek resolution of any of the claims in the *Complaints* that are not resolved by the Anguilla courts, are not precluded by recognition and enforcement of judgments in Anguilla, and are not subject to dismissal for the additional reasons urged by the Defendants in the *Motions to Dismiss* before the Court.

1. Legal Principles of Forum Non Conveniens

[1–3] The doctrine of *forum non conveniens* "is a discretionary device permitting a court in rare instances to dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000) (internal citation and quotation marks omitted). Whether to dismiss an action on *forum non conveniens* grounds is a decision that " 'lies wholly within the broad discretion of the [ ] court' and should be reversed only if 'that discretion has been clearly abused.' " *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir. 1996) (quoting *Scottish Air Int'l, Inc. v. British Caledonian Grp., PLC*, 81 F.3d 1224, 1232 (2d Cir. 1996)). A court may dismiss an action under *forum non conveniens* "when considerations of convenience, fairness, and judicial economy so warrant." *Magi XXI, Inc. v. Sato della Citta del Vaticano*, 714 F.3d 714, 720 n.6 (2d Cir. 2013) (citation omitted).

[4–6] In the Second Circuit, courts apply a three-step process to determine whether to dismiss an action for *forum non conveniens*. *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73–74 (2d Cir. 2001). First, the court must "determine[ ] the degree of deference properly accorded [to] the plaintiff's choice of forum." *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 153 (2d Cir. 2005) (citing *Iragorri*, 274 F.3d at 73). Second, "after determining whether the plaintiff's choice is entitled to more or less deference," the court must determine "whether an adequate alternative forum exists." *Iragorri*, 274 F.3d at 73. Third, the court must "then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake." *Wiwa*, 226 F.3d at 100 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)). "In considering these factors, the court is necessarily engaged in a comparison between the hardships defendant would suffer through the retention of jurisdiction and the hardships the plaintiff would suffer as the result of dismissal and the obligation to bring suit in another country." *Iragorri*, 274 F.3d at 74. The law presumes that the plaintiff's choice of forum is adequate, and the defense must overcome a "heavy burden" to have the case dismissed on *forum non conveniens* grounds. *Sinochem*, 549 U.S. at 430, 127 S.Ct. 1184; *Wiwa*, 226 F.3d at 100; *see also Gilbert*, 330 U.S. at 508, 67 S.Ct. 839 (stating that "unless the balance [of the factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed"); *Iragorri*, 274 F.3d at 74–75 (explaining that "[a] defendant does not carry the day simply by showing the existence of an adequate alternative forum.

The action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable"). For the reasons discussed below, the Court concludes that the factors cited by the *Iragorri* court strongly favor staying these Adversary Proceedings on grounds of *forum non conveniens*.

2. Degree of Deference to the Plaintiff's Choice of Forum

[7] Courts measure the degree of deference owed to a plaintiff's choice of forum on a sliding scale; the more it appears that the plaintiff's choice of a United States forum was motivated by forum shopping reasons, the less deference the plaintiff's choice commands, *see In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 498 (2d Cir. 2002); *Iragorri*, 274 F.3d at 71, because "it 'is much less reasonable' to presume that the choice was made for convenience." *Iragorri*, 274 F.3d at 71 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)); *see also Monegasque De Reassurances*, 311 F.3d at 498 (holding that "[a] domestic petitioner's choice of its home forum receives great deference, while a foreign petitioner's choice of a United States forum receives less deference"). "In such circumstances, a plausible likelihood exists that the selection was made for forum-shopping reasons . . . ." *Iragorri*, 274 F.3d at 71. Even if forum shopping reasons did not inform the foreign plaintiff's decision to file an action in a U.S. court, "there is nonetheless little reason to assume that it is convenient for a foreign plaintiff." *Id.*

[8, 9] In determining the degree of deference to be afforded to a foreign plaintiff's choice of a United States forum, courts consider various factors to ascertain whether the plaintiff's forum choice was motivated by convenience or instead by the desire to forum shop. *See Norex*, 416 F.3d at 155 (citing *Iragorri*, 274 F.3d at 72). These include "[1] the convenience of the plaintiff's residence in relation to the chosen forum, [2] the availability of witnesses or evidence to the forum district, [3] the defendant's amenability to suit in the forum district, [4] the availability of appropriate legal assistance, and [5] other reasons relating to convenience or expense." *Iragorri*, 274 F.3d at 72. Circumstances indicative of forum shopping include "[1] attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, [2] the habitual generosity of juries in the United States or in the forum district, [3] the plaintiff's popularity or the defendant's unpopularity in the region, or [4] the inconvenience and expense to the defendant resulting from litigation in that forum. . . ." *Id.*

[10] Here, the Plaintiffs' choice of forum was not motivated by convenience. The Debtor Banks were incorporated in Anguilla, do not operate in the United States (other than having accepted U.S. dollar deposits that were deposited in the Parent Banks' New York bank accounts), and their Administrator, Mr. Tacon resides in England. (*Tacon PBT Decl.* ¶ 4.) The Conservator Directors, the key witnesses in these cases, reside in Anguilla, the Eastern Caribbean or London, (Tr. at 56:12–20), and aside from banking documents in New York, access to which does not appear to present any difficulties even if the suits were pursued in Anguilla, all of the evidence and witnesses for these cases are located in the Eastern Caribbean or elsewhere, but not in the United States. Finally, the Defendants are amenable to suit in Anguilla—the Plaintiffs had already sued the Defendants in Anguilla as part of the Anguilla Initial Proceedings before they commenced these Adversary Proceedings,

and the all parties are represented by legal counsel there.

Instead, the choice of a New York venue was an exercise in forum shopping. Despite the Plaintiffs' arguments that this forum is convenient and their lawsuits have New York connections, they initially sued these same defendants in Anguilla to impress a trust, and ultimately, recover the same Funds. The Plaintiffs commenced the Adversary Proceedings only after the Anguillan High Court issued the *Leave Order*, stymying their efforts to recover on substantially similar claims. The High Court refused to lift the stay to allow the Plaintiffs to proceed against the Parent Banks based on the Plaintiffs' failure to join the Conservator Directors, and the Plaintiffs then commenced these Adversary Proceedings in this venue rather than join the Conservator Directors in the Anguilla Initial Proceedings. Even giving the Plaintiffs the benefit of the doubt, they freely admit that they are pursuing these Adversary Proceedings because "Anguillan law does not recognize certain claims for which recovery is sought." (*PBT Resp. to ECCB* at 26.) Accordingly, the Plaintiffs' selection of New York as a forum is not entitled to any deference.

The Plaintiffs' *Opposition* authority is distinguishable. In *Skanga Energy & Marine Ltd. v. Arevenca S.A.*, 875 F.Supp.2d 264, 267 (S.D.N.Y. 2012), *aff'd*, 522 Fed. Appx. 88 (2d Cir. 2013) (summary order), the plaintiff, a Nigerian company, agreed to buy oil from the defendants, state-owned Venezuelan entities. Their agreement provided that all payments would be made in U.S. dollars to the seller's agent's bank account in New York. *Id.* After the plaintiff made the payments but did not receive the oil, it sued in New York federal court for a refund. *Id.* at 267–68. The defendants moved to dismiss, *inter alia*, based on *forum non conveniens*. The district court concluded that the plaintiff's choice of forum was entitled to considerable (but not maximum) deference. *Id.* at 273. The transaction had a *bona fide* connection to New York based on the transfer of millions of dollars to a New York bank account where it "disappeared down the rabbit hole in New York, and Skanga wishes to follow it." In addition, the plaintiff would likely have to seek discovery from the seller's New York banks and its United States operations. *Id.*

In these Adversary Proceedings, while the *Complaints* refer to transactions between the Debtor Banks and the Defendants that have connections to New York and the United States, these connections do not overcome the Court's conclusion that the Plaintiffs' choice of a New York forum is not entitled to deference. At bottom, the New York venue was the Plaintiffs' second choice, not their first, and unlike in *Skanga*, the Plaintiffs were already seeking the same relief for the same wrongs in the foreign forum. In addition, and as discussed below, the Plaintiffs' detailed pleadings indicate that they know the path taken by the Funds, and the relevant evidence is primarily located in Anguilla, not New York.

3. Existence of an Adequate Alternative Forum

[11–14] "An alternative forum is ordinarily adequate if (1) the defendants are amenable to service of process there and (2) the forum permits litigation of the subject matter of the dispute." *Monegasque De Reassurances*, 311 F.3d at 499 (citation omitted). "[T]he availability of an adequate alternative forum does not depend on the existence of the identical cause of action in the other forum." *Capital Currency Exchange, N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 610 (2d Cir. 1998). Furthermore, the fact that the law of the alternative forum is less favorable does not

weigh against dismissal. *Piper*, 454 U.S. at 255 n.22, 102 S.Ct. 252; *Cortec Corp. v. Erste Bank Ber Oesterreichischen Sparkassen AG (In re Erste Bank)*, 535 F.Supp.2d 403, 411–12 (S.D.N.Y. 2008) (holding that Croatian commercial law controlled and that plaintiffs' concerns that Croatia did not recognize tortious interference with business claims did not render Croatia an inadequate alternative forum); *LaSala v. Bank of Cyprus Pub. Co.*, 510 F.Supp.2d 246, 255–56 (S.D.N.Y. 2007) (finding Cyprus to be an adequate alternate forum although claims for aiding and abetting a breach of fiduciary duty and breach of implied duty of good faith and fair dealing are not recognized by Cypriot courts); *Fustok v. Banque Populaire Suisse*, 546 F.Supp. 506, 514 (S.D.N.Y. 1982) ("Apart from precedent, there is a strong policy reason for rejecting plaintiff's argument that *forum non conveniens* does not apply whenever a plaintiff alleges a federal cause of action. If such were the rule, a plaintiff, by the simple device of alleging even a colorable federal claim, could effectively prevent consideration by the court of a *forum non conveniens* dismissal no matter how inconvenient plaintiff's chosen forum and regardless of how burdensome such litigation would be upon our courts and citizens. Such a *per se* rule would conflict with the hallmarks of the *forum non conveniens* doctrine—namely, its flexibility and the wide discretion which it invests in the trial judge"). To be inadequate, the *remedy* offered must be clearly unsatisfactory, such as where the alternative forum does not permit litigation of the subject matter of the dispute. *Piper*, 454 U.S. at 255 n.22, 102 S.Ct. 252.

Here, Anguilla is an adequate alternate forum. First, the parties do not contest, and this Court has previously found, that the Anguillan courts are competent to adjudicate disputes. *See In re HBLS, L.P.*, 468 B.R. 634, 640 (Bankr. S.D.N.Y. 2012) (explaining that "the courts of Anguilla are available and competent to adjudicate these issues. There is no need for this Court to inject itself into proceedings that have already been or can be handled in Anguilla"). Further, the Plaintiffs initially sued the Parent Banks and NCBA in Anguilla in connection with the subject matter of this dispute, and cannot, therefore, contend that the Anguillan forum is inadequate. *Saud v. PIA Invs. Ltd.*, No. 07 Civ. 5603(NRB), 2007 WL 4457441, at *3 (S.D.N.Y. Dec. 14, 2007) ("Having already commenced a lawsuit against PIA regarding the same subject matter in the High Court of Justice of the British Virgin Islands . . . plaintiff cannot suggest that the British Virgin Islands courts lack general competency") While it is true that ECCB had not been sued by the Plaintiffs in Anguilla before the filing of the PBT Adversary Proceeding on December 16, 2016, the Plaintiffs sought leave to do so on March 10, 2017 by filing the *Judicial Review Application* in Anguilla. By the time the CCIB Adversary Proceeding was filed on May 1, 2017, the Plaintiffs had brought suit against all of the Defendants in Anguilla, and thus, can hardly contend that the Anguillan forum is inadequate.

Second, although Anguillan law does not recognize a claim to avoid and recover a *constructive* fraudulent transfer, this does not render the Anguillan forum inadequate. *Piper*, 454 U.S. at 247, 102 S.Ct. 252 (explaining that "[t]he Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.")

Moreover, the Anguillan Fraudulent Dispositions Act does provide a remedy to avoid and recover intentional fraudulent transfers,[17] and the Plaintiffs can prove their cases, they will be able to recover the same *remedy* as if they proceeded under the Bankruptcy Code.

Third, other causes of action asserted by the Plaintiffs in the Anguillan Initial Proceedings also provide the same remedy that the Plaintiffs are seeking in this Court—the recovery of the upstreamed funds and transferred property. While the Plaintiffs have not asserted in Anguilla, as they have in these Adversary Proceedings, that ECCB breached its fiduciary duties to the Debtor Banks, was grossly negligent and aided and abetted the Conservator Directors' breach of fiduciary duties, these claims will presumably be governed by Anguillan law and can be asserted in Anguilla.[18] Therefore, Anguilla is an adequate alternate forum for the litigation of the subject matter of the dispute.

4. The Balancing of Public and Private Factors

[15] In determining whether the doctrine of *forum non conveniens* should be applied, a court should also consider "factors of public interest" and the "private interest[s] of the litigant." *Gilbert*, 330 U.S. at 508, 67 S.Ct. 839. A balancing of the "private and public interest factors [must] tilt[ ] heavily in favor of the alternative forum." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009); *see also Alfadda v. Fenn*, 159 F.3d 41, 45–46 (2d Cir. 1998). Here, they do.

a. The Private Factors

[16] In weighing the litigants' private interests, a court should consider

> [1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; [3] possibility of view of the premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gilbert, 330 U.S. at 508, 67 S.Ct. 839; *accord Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 980 (2d Cir. 1993); *Hosking v. TPG Capital Mgmt., L.P. (In re Hellas Telecommunications (Luxembourg) II SCA)*, 555 B.R. 323, 348 (Bankr. S.D.N.Y. 2016) ("Hellas II") (citations omitted).

As previously noted, the majority of the relevant evidence is located or accessible in Anguilla but not in New York. Difficulties in obtaining documents and witness testimony support dismissal or a stay of litigation in favor of the more convenient foreign forum. *See FUNB v. Arab African Int'l Bank*, 48 Fed.Appx. 801, 805 (2d Cir.

17. A copy of the Fraudulent Dispositions Act is annexed as part of Exhibit A to the *Hare CCIB Declaration*. By its terms, it applies extraterritorially to "every disposition of property . . . whether or not the property, the subject of the disposition, is situated in Anguilla or elsewhere." (Fraudulent Dispositions Act § 2.) Thus, it would reach transfers of property within New York.

18. The Plaintiffs' splitting of their causes of action between the Anguillan High Court and this Court is perplexing. They did not assert fraudulent transfer claims in Anguilla, but asserted fraudulent transfer claims based on Anguilla's Fraudulent Dispositions Act in this Court. (*See* ¶¶ 173–99; *PBT Compl.* ¶¶ 189–216.) In addition, the Plaintiffs did not assert a claim that ECCB had breached its fiduciary duties to the Debtor Banks in any of the Anguillan proceedings, but asserted those claims as well as gross negligence and aiding and abetting breach of fiduciary duty claims in this Court, (*see* ¶¶ 244–70; *PBT Compl.* ¶¶ 262–85), despite the fact that these claims will likely be determined under Anguillan law, including under the ECCB Act.

2002) (summary order) (dismissing a suit by an American bank against Middle Eastern banks because most of the documents were in London, many witnesses could not be compelled to testify in New York, and the general cost of litigation was lower in London); *see also Florian v. Danaher Corp.*, 69 Fed.Appx. 473, 475 (2d Cir. 2003) (summary order) (finding that the district court did not abuse its discretion by dismissing a products liability action on *forum non conveniens* grounds when virtually every fact witness was located in Canada, where the accident occurred). Here, none of the witnesses, in particular, the Conservator Directors, are located in the United States or within this Court's subpoena power. Moreover, the records of the Debtor Banks, the Parent Banks, NCBA and ECCB are presumably located in Anguilla, but are certainly not located here. The only relevant records within this jurisdiction are the various bank records that are necessary to establish the transfers and depict the flow of funds. However, the Plaintiffs already have this information, judging from the schedules attached to the *Complaints*, and access to this proof for use in Anguilla does not appear to present a problem.[19] *See Seidel v. Ritter* (*In re Kinbrace Corp.*), Adv. Pro. No. 15-01432 (SMB), 2017 WL 1380524, at *6 (Bankr. S.D.N.Y. Apr. 17, 2017).

Conversely, while the testimony of the Conservator Directors and of ECCB is crucial to these Adversary Proceedings it would be difficult, if not impossible, to procure their attendance in this Court. This litigation is not simply a "document" case where the Plaintiffs will establish their *prima facie* case through the introduction of business records. The Plaintiffs assert that ECCB breached its fiduciary duties to the Debtor Banks, was grossly negligent and aided and abetted the Conservator Directors' breach of their own fiduciary duties to the Debtor Banks. (¶¶ 244–270; *PBT Compl.* ¶¶ 262–85.) In addition, the Anguillan High Court has ruled that the Defendants may be entitled to immunity if the Conservator Directors acted in good faith and without negligence. Furthermore, the Conservator Directors' business judgment may be an issue in connection with the actions they took on behalf of the Parent Banks as the sole shareholders of the Debtor Banks and as their servicers under the PBT Service Agreement and the CCIB Agreement for Service. All of the Conservator Directors and ECCB's actions took place in Anguilla or the Eastern Caribbean, and their availability, the ability to compel their attendance and the relative ease and access to proof weigh heavily in favor of the Anguillan forum.

b. The Public Factors

[17] In *Gilbert*, the court identified several public interest factors that a court should consider when faced with a motion to dismiss based on *forum non conveniens.* These include (1) administrative difficulties relating to court congestion; (2) imposing jury duty on citizens of the forum; (3) having local disputes settled locally; and (4) avoiding problems associated with the application of foreign law. 330 U.S. at 508–

19. At oral argument, the Court questioned the Plaintiffs' counsel regarding the failure to allege the intentional fraudulent transfers with the specificity (*e.g.,* date, amount, identity of the transferee) required by Rule 9(b) of the Federal Rules of Civil Procedure. Counsel for the Plaintiffs responded that the Defendants have the records and "should be able to figure it out," but if need be, the Plaintiffs "would be, of course, more than happy to [amend the pleadings] and set forth all of the transfers that comprised those amounts." (Tr. at 119:6–17.) It therefore appears that all parties already have the records relating to the transfers.

09, 67 S.Ct. 839; *accord Hellas II*, 555 B.R. at 348 ("The public interest factors include: (1) settling local disputes in a local forum; (2) avoiding the difficulties of applying foreign law; and (3) avoiding the burden on jurors by having them decide cases that have no impact on their community") (citation omitted). "Numerous courts have found that the public interest factors often favor dismissal where there is a parallel litigation arising out of the same or similar facts already pending in the foreign jurisdiction." *Argus Media Ltd. v. Tradition Fin. Servs. Inc.*, No. 09 Civ. 7966 (HB), 2009 WL 5125113, at *6 (S.D.N.Y. Dec. 29, 2009) (citing cases). In addition, "deferring to litigation in another jurisdiction is appropriate where the litigation is 'intimately involved with sovereign prerogative' and it is important to ascertain the meaning of another jurisdiction's statute 'from the only tribunal empowered to speak definitively.' " *Figueiredo Ferraz Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 392 (2d Cir. 2011) (quoting *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28–29, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959)).

Here, the private factors weigh in favor of dismissal. Parallel litigations are already pending in Anguilla, although the Anguilla Initial Proceedings is currently stayed against the Parent Banks. The Plaintiffs have appealed from the *Leave Order*, but it seems that they can avoid the stay simply by joining the Conservator Directors. In addition, these Adversary Proceedings arise from the bailout of two Anguillan banks authorized, and according to the *Complaints*, directed and controlled by ECCB, an arm of the Anguillan State. The legality of the actions taken by the Conservator Directors, including the upstreaming of customer deposits and the transfer of other property owned by the Debtor Banks to the Parent Banks, and ultimately, to NCBA and possibly ECCB, must be determined in accordance with the ECCB Act and applicable Anguillan law. Although "the need to apply foreign law . . . alone is not sufficient to warrant dismissal," *Piper*, 454 U.S. at 260 n.29, 102 S.Ct. 252; *see also Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 492 (2d Cir.1998) ("While reluctance to apply foreign law is a valid factor favoring dismissal under *Gilbert*, standing alone it does not justify dismissal."), it may nevertheless be considered as part of the balancing equation. *See Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine and State of Ukraine*, 158 F.Supp.2d 377, 387 (S.D.N.Y. 2001) ("Courts have a legitimate interest in avoiding the difficulty with questions of conflicts of law and the application of foreign law."), *aff'd*, 311 F.3d 488 (2d Cir. 2002).

In fact, the High Court has already addressed the Defendants' claims of immunity under Anguillan law. The *Satay* court held that the Conservator Directors had acted *ultra vires*, and were not entitled to statutory immunity under Article 50 of the ECCB Act. In addition, the applicability of Article 5F immunity presented a question of fact. The *Satay Judgment* is on appeal. Furthermore, the *Satay* court did not address the Conservator Directors' right to take the challenged actions in their capacities as directors of the Parent Banks, sole shareholders of the Debtor Banks, an issue that must also be decided under Anguillan law, as is the Conservator Directors' authority under the service agreements between the Debtor Banks and the Parent Banks.

The Anguillan High Court also addressed Article 5F in the *Leave Order*. It ruled that the *Debtor Banks' Statement of Claim* failed to allege lack of immunity under that provision because the pleading did not assert that the Conservator Directors had acted negligently and in bad

faith. The *Leave Order* also concluded that it could not determine whether immunity under Article 50(7)(i) applied without further briefing from the parties because it could not determine that "the reliefs being sought fall outside that section on the basis that it constitutes a civil right." In contrast, the *Satay* Court had ruled that the Article 50 immunities raised in that case did not apply because the Conservators had acted *ultra vires*. The Debtor Banks have appealed from the *Leave Order*.

The issue of the Conservator Directors' and the Defendants' immunity from suit has been a focal point of litigation in the Anguillan proceedings, the Anguillan decisions appear to be somewhat inconsistent, and the immunity issues are on appeal in Anguilla. Moreover, substantial resources have already been expended in Anguilla to litigate these issues, and the outcome of these Adversary Proceedings will depend on the overriding question of whether ECCB, Anguilla's central bank and a sovereign entity, appropriately executed a bank rescue plan (*i.e.*, the Resolution Plan) under Anguillan law for the purpose of preserving the Anguillan banking system. Only the Anguillan courts are authorized to speak definitively on these issues, and deference to those proceedings is appropriate.

It is true that the United States has certain connections to the Anguillan rescue plan. As alleged in the *Complaints*, the Conservator Directors "upstreamed" the Debtor Banks' funds to the Parent Banks in New York, although the Debtor Banks' counsel indicated during oral argument that the "upstreamed" funds were never in accounts maintained by the Debtor Banks.[20] But even if all of the transfers were domestic, the legality of the transfers and the extent of the Defendants' liability in the face of their assertions of immunity turn on interpretations of Anguillan law. Anguilla, therefore, has an overwhelming and stronger interest in determining the legality of those actions and the extent of the Defendants' liability.

Finally, the Plaintiffs have demanded a jury trial. When a court has very little interest in adjudicating the claims primarily due to the removed location of events and the applicability of foreign law, this could create an unnecessary burden on jurors. *Stewart v. Adidas A.G.*, 1997 WL 218431, at *7 (S.D.N.Y. Apr. 30, 1997).

While the most common disposition where a *forum non conveniens* motion is granted is dismissal of the case, a stay rather than dismissal may be more appropriate when the case may return to this Court following decisions of the foreign courts. *See Hellas II*, 555 B.R. at 330. The international comity analysis in the next section also clearly supports a stay rather than dismissal under the circumstances of this case.

B. These Cases Should Be Stayed Based on International Comity Pending the Outcome of the Anguilla Litigation

The doctrines of *forum non conveniens* and international comity are animated by many of the same concerns, and are often raised together in motions to stay or dismiss. As already explained above, the Court concludes that *forum non conveniens* supports staying both of these Adversary Proceedings in favor of the courts in Anguilla. And as explained in this section, application of international comity leads to the same result.

20. As noted, the *CCIB Complaint* also alleges that the Morgan Stanley transfer from CCIB to CCB was domestic, but CCIB does not appear to seek to avoid and recover that transfer through its avoidance claims.

Even if the Court has jurisdiction over all the parties in these cases—an issue not fully resolved at this point—the Court may choose not to exercise that jurisdiction based on international comity principles. NBA and CCB are the only defendants in these Adversary Proceedings that moved to stay based on international comity in favor of the Anguilla Initial Proceedings, the Satay Action, and the Judicial Review. But international comity principles are well established and may be applied here to all of the parties before the Court. Deference to pending foreign proceedings and this Court's customary obligation to exercise jurisdiction in cases otherwise properly within its jurisdiction must be balanced. Therefore, the Court must decide whether international comity favors deferring, at least in the first instance, to the PBT and CCIB foreign main proceedings and to the Anguilla Litigation.

The question is particularly acute here because of the circumstances revolving around these Adversary Proceedings. CCIB and PBT were placed into administration in Anguilla, the same Foreign Representative was appointed in each of the Anguilla Administrations, and after the Foreign Representative filed the chapter 15 cases in this Court, the two Anguilla Administrations were recognized as foreign main proceedings. The Foreign Representative then filed chapter 11 cases for both CCIB and PBT, followed by the filing of the two Adversary Proceedings that are the subject of the pending Motions. The Anguilla Litigation involves the same parties as these Adversary Proceedings, and the causes of action in the Adversary Proceedings and the Anguilla Initial Proceedings and the Satay Action arise from the same facts. The Anguilla Initial Proceedings and the Satay Action were filed months before the Adversary Proceedings in this Court, and the Anguilla courts have personal and subject matter jurisdiction over all of the parties. For the reasons explained below, the Court concludes that international comity principles warrant a stay of these Adversary Proceedings pending the outcome of the Anguilla Litigation. Under the present circumstances, staying these cases—rather than dismissing them—is appropriate to preserve the Plaintiffs' domestic causes of action while granting proper deference to proceedings in the Anguilla courts. Depending on the disposition of the Anguilla Litigation, it may be appropriate for the Plaintiffs to return to this Court to seek resolution of any claims in the Adversary Proceedings that are not resolved by the Anguilla courts and are not precluded by recognition and enforcement of judgments entered in Anguilla.

1. International Comity Considerations

[18] "Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163–64, 16 S.Ct. 139, 40 L.Ed. 95 (1895). The boundaries of the international comity doctrine have been described as "amorphous" and "fuzzy." *See JP Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 423 (2d Cir. 2005) (citation omitted); *see also Official Comm. of Unsecured Creditors v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(c))*, 575 B.R. 229, 237 (Bankr. S.D.N.Y. 2017).

[19] Second Circuit courts as well as the Supreme Court have taken great care to analyze and clarify the international comity doctrine, as well as its underlying

rationale. As the Supreme Court has noted, the international comity doctrine "is not just a vague political concern favoring international cooperation when it is in our interest to do so [but r]ather it is a principle under which judicial decisions reflect the systematic value of reciprocal tolerance and goodwill." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 555, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987). Comity "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122, 139 (2d Cir. 2014) (quoting *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 543 n.27, 107 S.Ct. 2542).

[20, 21] While a defendant's international comity defense should be assessed from the "legal sense," a court must not lose sight of the broader principles underlying the doctrine. *See Altos Hornos*, 412 F.3d at 423 ("Whatever its precise contours, international comity is clearly concerned with maintaining amicable working relationships between nations, a 'shorthand for good neighborliness, a common courtesy and mutual respect between those who labour in adjoining judicial vineyards.' ") (citation omitted)). On the other hand, even where the comity doctrine clearly applies, it "is not an imperative obligation of courts, but rather is a discretionary rule of 'practice, convenience, and expediency.' " *Royal and Sun Alliance Ins. Co. of Canada v. Century Int'l Arms*, 466 F.3d 88, 92 (2d Cir. 2006) (citation and quotation marks omitted); *see also Duff & Phelps, LLC v. Vitro S.A.B. de C.V.*, 18 F.Supp.3d 375, 382 (S.D.N.Y. 2014) (explaining that "[t]he decision to grant comity is a matter within a court's discretion and the burden of proof to establish its appropriateness is on the moving party") (citations omitted).

[22] The Second Circuit has explained that international comity "may describe two distinct doctrines . . . ." *Maxwell Comm'n Corp. v. Societe Generale (In re Maxwell Comm'n Corp.)*, 93 F.3d 1036, 1047 (2d Cir. 1996) ("Maxwell II"). The first doctrine—often referred to as legislative or prescriptive comity, or comity among nations—is "a canon of construction" which serves to "shorten the reach of a statute." *Arcapita Bank*, 575 B.R. at 238 (citing *Maxwell II*, 93 F.3d at 1047; *Mujica v. AirScan Inc.*, 771 F.3d 580, 598 (9th Cir. 2014) (explaining that "legislative or 'prescriptive comity' . . . guides domestic courts as they decide the extraterritorial reach of federal statutes.")). "Under international comity, states normally refrain from prescribing laws that govern activities connected with another state when the exercise of such jurisdiction is unreasonable." *Arcapita Bank*, 575 B.R. at 237 (citations and quotation marks omitted); *see also Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff)*, 2016 WL 6900689, at *12 (Bankr. S.D.N.Y. Nov. 21, 2016) (clarifying that "comity among nations [is] a canon of construction that limits the reach of the Bankruptcy Code's avoidance and recovery provisions") (citation omitted). It is unclear in these cases whether prescriptive comity should apply. On the one hand, to the extent that wholly domestic transfers are involved, federal and New York avoidance statutes express strong public policies protecting creditors from actual or constructive avoidable transfers. On the other hand, the alleged transfers were made exclusively between Anguillan financial institutions that were regulated by Anguillan authorities in Anguilla, which has a strong interest in regulating those institutions. If these two regulatory regimes clash, which one should give way? As explained below, this

Court need not resolve that conflict at this time.

The second doctrine—referred to as adjudicative comity, or comity among courts—is "a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *Arcapita Bank*, 575 B.R. at 238 (citing *Maxwell II*, 93 F.3d at 1047; *Mujica*, 771 F.3d at 599 (stating that "adjudicatory comity involves . . . the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction.") (citation and quotation marks omitted)); *see also Altos Hornos*, 412 F.3d at 424 (finding, where the dispute involved the ownership of property a debtor claimed as part of its estate in a foreign bankruptcy proceeding, that "[i]nternational comity, as it relates to this case, involves not the choice of law but rather the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction") (citation omitted).

Because the Court concludes that comity among courts supports a stay of these Adversary Proceedings, it is unnecessary to reach the issue whether prescriptive comity supports narrowing the reach of federal and New York State avoidance statutes.[21] NBA and CCB argue that comity principles favor the recognition of the pending Anguilla Litigation that have yet to reach final judgment, and that proper deference to these proceedings requires abstention by United States courts. The claims in the Adversary Proceedings fall squarely within considerations of comity among courts. *See Royal and Sun Alliance*, 466 F.3d at 92.

[23–25] Applying international comity among courts, courts "ha[ve] the inherent power to dismiss or stay an action based on the pendency of a related proceeding in a foreign jurisdiction." *Ole Media Mgmt., L.P. v. EMI April Music, Inc.*, 2013 WL 2531277, at *2 (S.D.N.Y. June 10, 2013) (collecting cases). This reflects "the proper respect for litigation in and the court of a sovereign nation, fairness to litigants, and judicial efficiency." *Royal and Sun Alliance*, 466 F.3d at 94 (collecting cases). Nonetheless, concerns of comity must be balanced against the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given to them." *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). In evaluating whether to defer to a foreign proceeding, "[t]he task of a [bankruptcy] court . . . is not to articulate a justification *for* the exercise of jurisdiction, but rather to determine whether exceptional circumstances exist that justify the surrender of that jurisdiction." *Royal and Sun Alliance*, 466 F.3d at 93 (emphasis in original) (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25–26, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *Colorado River*, 424 U.S. at 813, 96 S.Ct. 1236).

2. Comity Among Courts Warrants Staying These Adversary Proceedings

a. The Court Should Defer to the Main Insolvency Proceedings in Anguilla

[26, 27] The Court concludes that these Adversary Proceedings should be stayed in

21. Although it is unclear from the current version of the *Complaints,* it appears that some or all of the challenged transfers may have occurred entirely between accounts in the United States. If these cases return to this Court after decisions of the courts in Anguilla, the Plaintiffs will need to amend the *Complaints* to more clearly allege the facts showing the transfers at issue—the who, what, where and when for each transfer.

deference to the main insolvency proceedings in Anguilla. "Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of the United States citizens or violate domestic public policy." *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, 114 (Bankr. S.D.N.Y. 2012) (citing *In re Atlas Shipping*, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009)). The Second Circuit has "recognized one discrete category of foreign litigation that generally requires the dismissal of parallel district court actions—foreign bankruptcy proceedings." *Royal and Sun Alliance*, 466 F.3d at 92–93. A foreign nation's interest in the "equitable and orderly distribution of a debtor's property" is an interest deserving of particular respect and deference, and accordingly, the Second Circuit has followed the general practice of United States courts and regularly defers to such actions. *Id.* at 93 (citing cases); *see also Duff & Phelps, LLC*, 18 F.Supp.3d at 383 (holding that deference is warranted "[b]ecause the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding") (quotation marks and citations omitted).

[28] "[D]eference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and . . . do not contravene the laws or public policy of the United States." *Cozumel Caribe,* 482 B.R. at 114 (citing *Altos Hornos*, 412 F.3d at 424). In analyzing procedural fairness, courts have looked to the following nonexclusive factors:

> (1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to the debtors potential claimants; (5) whether there are provisions for creditors meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.

Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 249 (2d Cir. 1999).

Deference to the Anguilla Administrations is warranted here. On February 22, 2016, CCIB and PBT were placed under administration pursuant to section 31(b)(2) of the Financial Services Commission Act, R.S.A. c. F28, and the High Court appointed the Foreign Representative as administrator for PBT and CCIB. (¶¶ 60–61; *PBT Compl.* ¶¶ 56–57.) The Administrator subsequently filed the PBT and CCIB chapter 15 petitions in this Court on May 26, 2016 and on October 11, 2016, respectively, seeking recognition of the PBT administration and the CCIB administration in Anguilla. (¶ 64; *PBT Compl.* ¶ 60.) On June 17, 2016 and November 15, 2016, the orders were entered in this Court, recognizing the PBT administration (Case # 16–11529 (MG), ECF Doc. # 17 ("*PBT Recognition Order*")) and the CCIB administration as foreign main proceedings. (Case # 16–12844 (SMB), ECF Doc. # 16 ("*CCIB Recognition Order*").). Given the administration of PBT and CCIB in the Anguilla foreign main insolvency proceedings, the Anguilla courts clearly have an interest in the "equitable and orderly distribution" of the Debtors Banks' property; and deference to those proceedings is appropriate. *See Royal and Sun Alliance*, 466 F.3d at

92–93. Neither PBT nor CCIB dispute the procedural fairness of the Anguilla main proceedings, nor does the record support any such contention. *See Altos Hornos*, 412 F.3d 418 (noting that, in assessing the fairness of Mexican proceedings, "[n]othing in the record before us suggests that the actions taken by the Mexican bankruptcy court are not approved or allowed by American law"). This Court has already found Anguillan courts to be competent to adjudicate matters pending before them. *See In re HBLS, L.P.*, 468 B.R. at 640 ("[T]he courts of Anguilla are available and competent to adjudicate these issues. There is thus no need for this Court to inject itself into proceedings that have already been or can be handled in Anguilla.").

NBA and CCB argue that a district court decision in *Madoff* supports staying these actions based on comity. *See Sec. Inv'r Prot. Co. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, 513 B.R. 222 (S.D.N.Y. 2014). In *Madoff*, the district court denied the SIPA trustee's claim over foreign transfers based on the presumption against extraterritoriality of section 550(a) of the Bankruptcy Code, but added that even if the presumption was rebutted, the SIPA trustee's claim would be precluded by concerns of international comity. *Id.* at 231. The district court noted that the British Virgin Islands courts had already determined that debtor could not reclaim transfers made to its customers under certain common-law theories, a determination that was in conflict with the trustee's claim. *Id.* at 232. As such, the district court ruled that by filing the action to avoid the transfers before United States courts, the SIPA trustee was "seeking to use SIPA to reach around such foreign liquidations." *Id.* at 231–32; *see also Altos Hornos*, 412 F.3d at 427 (explaining that "creditors may not use U.S. courts to circumvent foreign bankruptcy proceedings").

The Plaintiffs attempt to distinguish these cases from *Madoff*, arguing that a stay based on comity is inappropriate. The Plaintiffs contend that comity may be appropriate to stay the exercise of bankruptcy court jurisdiction in circumstances such as in *Madoff*, where a creditor seeks to "reach around" foreign insolvency proceedings, but further contend that is it not the case here: the "Administrator does not seek to compete with the Debtor's Anguillan estate," but "is asserting the Debtor's own claims—not 'reaching around'—the Anguillan insolvency proceeding." (*CCIB Opp'n to CCB's Mot. to Dismiss* at 27–28; *PBT's Opp'n to NBA's Mot. to Dismiss* at 28.)

"Reaching around" can take multiple shapes and forms. That the claims in these Adversary Proceedings are not brought by or in the interest of a creditor of PBT or CCIB, but by debtors in possession, does not change the analysis. Indeed, the Plaintiffs do seek to reach around the litigation in Anguilla. Because NBA and CCB are in receivership in Anguilla, the Anguilla court has stayed the actions against those two entities in Anguilla. The Plaintiffs seek to proceed against those two entities in the Adversary Proceedings—in effect, the Plaintiffs ask this Court to disregard the stay entered by a court in Anguilla. The Plaintiffs have appealed the stay order in Anguilla, but even if the stay is lifted, it is more appropriate that the Anguilla Litigation proceed to judgment before this Court needs to address whether any issues remain to be decided under federal or New York law. *See also Altos Hornos*, 412 F.3d at 427 (noting that the recognition sought in the United States that lender owned the disputed funds would determine how those funds were distributed to creditors and, therefore, such determination was "precisely the sort of end-run around a parallel

foreign bankruptcy proceeding of which we have repeatedly disapproved").[22]

The Foreign Representative freely admits that he filed the Plaintiffs' chapter 11 cases to allow him to bring the Adversary Proceedings and to assert constructive fraudulent transfer claims under federal and New York law that, according to the Plaintiffs, have no counterpart and cannot be asserted under Anguilla law. There is little doubt that by filing these Adversary Proceeding in the United States, the Plaintiffs sought to litigate these cases despite the stay imposed and the appeal pending in Anguilla. Accordingly, the Court concludes, in the exercise of its discretion, that international comity warrants staying these Adversary Proceedings in deference to the Anguilla Administrations.[23]

b. The Adversary Proceedings Should Be Stayed Pending the Resolution of the Anguilla Litigation

While deference to the main insolvency proceedings in Anguilla warrants a stay of these Adversary Proceedings, the Court also finds, in the exercise of its discretion, that deference to the related Anguilla Litigation justifies a stay of these cases pending resolution of the Anguilla Litigation.

The Second Circuit has articulated non-exclusive factors that courts should consider in evaluating a request for dismissal based on a parallel proceeding in a foreign nation. These factors include:

22. Our bankruptcy courts take a dim view when parties outside the United States seek to avoid the effect of the automatic stay in our cases; so too, our courts should be reluctant to ignore the effect of a stay issued by a foreign court.

23. The Court notes that the Second Circuit in *Altos Hornos* addressed the circumstances where it is appropriate for a United States court to defer to a foreign insolvency court to decide issues concerning the treatment of a foreign debtor's property in the United States. *See Altos Hornos*, 412 F.3d 418. In these Adversary Proceedings, as in *Altos Hornos*, the alleged transfers of funds supposedly took place in the United States between bank accounts located in New York. The Second Circuit held that "the ownership of property a debtor claims as part of its estate in a foreign bankruptcy proceeding is a question 'antecedent to the distributive rules of bankruptcy.' Local courts may resolve the question because international comity does not require deference to the parallel foreign bankruptcy proceeding in such circumstances." *Altos Hornos*, 412 F.3d at 420 (quoting *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag)*, 961 F.2d 341, 349 (2d Cir. 1992)). The *Altos Hornos* court explained that this rule only applies to disputes that present a *bona fide* question of property ownership. *Id.* However, the Second Circuit's holding on federal courts' power to adjudicate a *bona fide* dispute of property of a foreign debtor was decided and is only applicable in the context of an ancillary bankruptcy proceeding filed in the United States, either under former Bankruptcy Code section 304 or current chapter 15 of the Bankruptcy Code, which replaced section 304. *See, e.g., In re Petition of Wuthrich*, 337 B.R. 262, 267 (Bankr. S.D.N.Y. 2006) (explaining that "comity is not implicated by every question presented in a § 304 proceeding," but that "U.S. courts may resolve *bona fide* questions of property ownership arising under local law while a foreign bankruptcy proceeding is ongoing without deferring to the parallel foreign proceeding on grounds of international comity") (citing *Altos Hornos*, 412 F.3d at 426). Despite recognition by this Court of the Anguilla Administrations, these Adversary Proceedings were filed in plenary chapter 11 cases, not chapter 15 cases. Further, even assuming that *Altos Hornos* controls in these chapter 11 cases, the Court is uncertain, and does not decide, whether the fraudulent conveyance claims brought by the Plaintiffs are *bona fide* claims of property which warrant adjudication by a national court. As explained elsewhere in this Opinion, it is unclear whether the Debtors have a property interest in the deposits in their parent companies' New York bank accounts sufficient to trigger application of federal or state avoidance statutes. The *Complaints* are unclear when and how the Debtors' customer funds were deposited in the New York bank accounts.

> the similarity of the parties, the similarity of the issues, the order in which the actions were filed, the adequacy of the alternate forum, the potential prejudice to either party, the convenience of the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction.

Royal and Sun Alliance, 466 F.3d at 94 (citations omitted). "This list is not exhaustive, and a [bankruptcy] court should examine the 'totality of the circumstances' to determine whether the specific facts before it are sufficiently exceptional to justify abstention." *Id.* (quoting *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 900 (7th Cir. 1999)). The Supreme Court has similarly recognized that a decision to abstain from exercising jurisdiction based on the existence of parallel litigation "does not rest on a mechanical checklist, but on a careful balancing of the important factors ... as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Id.* (quoting *Moses H. Cone*, 460 U.S. at 16, 103 S.Ct. 927); *see also Colorado River*, 424 U.S. at 818–19, 96 S.Ct. 1236 ("No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required.") (citation omitted).

While *Royal and Sun Alliance* outlined the factors in the context of a motion to dismiss, rather than to stay the action, the analysis still applies. *Tarazi v. Truehope Inc.*, 958 F.Supp.2d 428, 433–34 (S.D.N.Y. 2013) (collecting cases) (staying domestic actions in favor of Canadian courts). However, the factors may be weighted differently when a stay, rather than dismissal, is considered. *Id.* at 434 (citing *Royal and Sun Alliance*, 466 F.3d at 96–97 (suggesting that stay rather than dismissal might be merited); *Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. Kozeny*, 115 F.Supp.2d 1243, 1248 (D. Colo. 2000) (weighting adequacy of foreign forum in light of fact that court was staying, rather than dismissing, domestic action); *Goldhammer v. Dunkin' Donuts, Inc.*, 59 F.Supp.2d 248, 254 (D. Mass. 1999) (same)). The Court finds that the balancing of the *Royal and Sun Alliance* factors in these Adversary Proceedings favors a stay of the Adversary Proceedings in New York pending the outcome of the Anguilla Litigation.

i. Similarities of Parties

The similarity between the parties involved in the foreign and domestic actions favors a stay of the Adversary Proceedings. The parties to the Anguilla Initial Proceedings are PBT and CCIB as plaintiffs, and NBA, CCB and NCBA as defendants. The parties to the Judicial Review are plaintiffs PBT and CCIB, and defendant ECCB, among others. In the Satay Action, ECCB is named as defendant and is the only party in those proceedings that is also a party to the Adversary Proceedings. The Adversary Proceedings include each of those parties.

[29] "For two actions to be considered parallel, the parties in the actions need not be the same, but they must be *substantially* the same, litigating substantially the same issues in both actions." *Royal and Sun Alliance*, 466 F.3d at 94 (emphasis added); *see also Advantage Intern. Mgmt. Inc. v. Martinez*, 1994 WL 482114, at *4 (S.D.N.Y. Sept. 7, 1994) ("All that is required in this Circuit is that the parties and issues be sufficiently similar so that when a judgment issues from the foreign court, res judicata will apply."); *Herbstein v. Bruetman*, 743 F.Supp. 184, 188 (S.D.N.Y. 1990) ("[C]omity requires that the parties and issues in both litigations

are the same or sufficiently similar, such that the doctrine of *res judicata* can be asserted.") (citation omitted).[24]

All parties in these Adversary Proceedings, other than ECCB, are parties in the Anguilla Initial Proceedings. While ECCB is a defendant in the Satay Action, neither the Debtors nor any other Defendants in these actions are parties in that proceeding. However, PBT and CCIB have sued ECCB in Anguilla as part of the *Judicial Review Application*. In any event, the actions pending in Anguilla revolve around the disputed issues in the present Adversary Proceedings, and even if there are minor differences in the parties in those proceedings, the judgments of the Anguilla High Court would nevertheless be instructive to this Court (or even dispositive) in resolving the issues before it, including those involving ECCB. Moreover, while ECCB's argument that it is not subject to personal jurisdiction in this Court cannot be fully resolved now, there may be no basis to keep ECCB in these Adversary Proceedings. The Foreign Representative argues that there are currently no claims pending against CCB and NBA by the Debtors in Anguilla in light of the High Court's decision to deny the application for leave to assert claims against CCB and NBA. (*CCIB's Opp'n to CCB's Mot. to Dismiss* at 30 n.16; *PBT's Opp'n to NBA's Mot. to Dismiss* at 30 n.13.) But the Plaintiffs have appealed the High Court's decision. If the Court of Appeal in Anguilla grants relief to PBT and CCIB, and the parties are allowed to litigate before the High Court, the Defendants would be faced with having to defend actions in two fora. The Court thus finds that the parties in these Adversary Proceedings and Anguilla Litigation are clearly sufficiently similar. This factor weights in favor of staying the Adversary Proceedings.

ii. Similarities of Issues

Likewise, the similarity between the issues litigated in the foreign and domestic actions favors a stay of the Adversary Proceedings. As explained in *Royal and Sun Alliance*, "[f]or two actions to be considered parallel, the parties in the actions need not be the same, but they must be substantially the same, litigating *substantially* the same issues in both actions." 466 F.3d at 94 (emphasis added) (citations omitted). In *Ole Media*, the court found that there was substantial similarity between the cases because the determination of the issue presented by the Canada action would have a significant bearing and *res judicata* effect, on the dispute in the New York action. 2013 WL 2531277, at *4 (holding that although the New York action included an issue not present in the Canadian action, the imposition of a stay would "not prevent the additional issue from being litigated before th[e] [New York] [c]ourt. Instead, it w[ould] permit an underlying dispute to be resolved first, one which is likely . . . to prove either 'instructive on the ultimate resolution' of th[e] [New York] action or largely dispositive.") (citation and footnote omitted). When the issues litigated in the foreign and domestic proceedings are not completely similar, dismissal of the action is inappropriate, but a stay may be warranted. *See id.* at *4 (citing *Palm Bay Int'l v. Marchesi Di Barolo S.P.A.*, 659 F.Supp.2d 407, 414 (E.D.N.Y. 2009) (concluding that where domestic action included an issue not pre-

24. Issues of ''substantial similarity'' between parties for purposes of comity analysis usually arise when parties in foreign and national actions are ''affiliates or have a similarly close relationship''; in those circumstances, courts deem parties similar for comity purposes. *See Tarazi,* 958 F.Supp.2d at 434 (collecting cases). This is, however, not an issue in these Adversary Proceedings.

sented by foreign dispute, dismissal of domestic action was not appropriate)).

The litigation of these Adversary Proceedings involves the same subject matter and revolves around the same issues as the actions currently being litigated before the courts in Anguilla: whether the Plaintiffs have a proprietary interest in the deposits that were allegedly upstreamed to the parent banks, NCBA and ECCB, and whether the Conservator Directors violated their fiduciary duties and Anguillan law by transferring the Debtor Banks' Funds to the Parent Banks. The resolution of the Anguilla Litigation will prove highly instructive, if not completely dispositive, on the ultimate resolution of these Adversary Proceedings. The Plaintiffs argue that the relief requested is not warranted because "[a]ll of the claims in this Adversary Proceeding could not be litigated in Anguilla because it does not recognize constructive fraudulent conveyance claims." (*CCIB's Opp'n to CCB's Mot. to Dismiss* at 30 n.16; *PBT's Opp'n to NBA's Mot. to Dismiss* at 30 n. 13.) Yet, both United States courts and Anguilla courts provide essentially the same remedy that the Plaintiffs seek, regardless of the underlying causes of action. If intentional fraud is proven in Anguilla, the Debtor Banks' remedy would be the same as if it proceeded under either intentional or constructive fraud provisions of the Bankruptcy Code and New York law—the money the Plaintiffs allege belonged to them would be transferred back to the bankruptcy estates. It is irrelevant that Anguilla law does not recognize constructive fraudulent transfer claims, as adequate relief is available in Anguilla. The Court accordingly finds that the issues in the Adversary Proceedings and Anguilla Litigation are similar. This factor thus weights in favor of staying the Adversary Proceedings.

iii. Order of Filing

Courts "have traditionally accorded great weight to the first suit filed." *Tarazi*, 958 F.Supp.2d at 436 (citation omitted). However, the importance of this factor is reduced when the relevant actions were filed in close temporal proximity to one another and where the first-filed action has not "reached a more advanced stage" than the later action. *Id.* (citation omitted). Additionally, "[t]he first-filed doctrine is considered, perhaps with less force, in the international cross-border context." *MF Glob. Holdings Ltd. v. Allied World Assurance Co. (In re MF Glob. Holdings Ltd.)*, 561 B.R. 608, 628 (Bankr. S.D.N.Y. 2016), *leave to appeal denied*, No. 17 CIV. 106, 2017 WL 548219 (S.D.N.Y. Feb. 10, 2017); *see also Taub v. Marchesi Di Barolo S.p.A.*, No. 09-CV-599, 2009 WL 4910590, at *6 (E.D.N.Y. Dec. 10, 2009) (analyzing principles and factors relating to international comity and parallel proceedings, and affording "minimal weight" to the temporal sequence of filings).

Here, the Anguilla Initial Proceedings was filed on May 6, 2016, and the Satay Action was filed on June 28, 2016, approximately seven to eight months and five months, respectively, before these Adversary Proceedings were filed on December 16, 2016 (before Judge Glenn) and on January 5, 2017 (before Judge Bernstein). The *Judicial Review Application* was filed on March 10, 2017, three to four months *after* these Adversary Proceedings. The fact that two of the proceedings in Anguilla were filed several months before these Adversary Proceedings, and that one was filed some months after, slightly supports staying the Adversary Proceedings in favor of the proceedings in Anguilla. Further, while the High Court of Anguilla already has addressed some of the parties'

arguments and objections,[25] there is no suggestion that substantial activity has taken place in the Anguilla proceedings. *See Thornton Tomasetti, Inc. v. Anguillan Dev. Corp.*, 2015 WL 7078656, at *4 (S.D.N.Y. Nov. 13, 2015) (observing, where the Anguillan proceeding was filed three months before the domestic one, that "[a]n appeal of the motion to dismiss in the Anguillan case has been pending ... though there is no suggestion that discovery has yet taken place. Accordingly, the Anguilla action was filed and some progress has been made in that case[ ]" and concluding that "[t]his factor weighs slightly in favor of a stay") (citing *Vill. of Westfield v. Welch's*, 170 F.3d 116, 122 (2d Cir. 1999) ("This factor does not turn exclusively on the sequence in which the cases were filed, but rather in terms of how much progress has been made in the two actions.")). On the other hand, this Court has already heard the parties' arguments on the *Motion to Dismiss*. On balance, the Court thus considers this factor to be neutral.

iv. Adequacy of Anguilla Forum

The Court has already examined the adequacy of the Anguilla forum in the context of the *forum non conveniens* analysis above. For the reasons set forth in the *forum non conveniens* analysis, the Court holds that Anguilla is an adequate forum for the litigation of the subject matter of the dispute. This factor thus favors staying the Adversary Proceedings.

v. Convenience of, and Potential Prejudice to, Either Party

The inconvenience of New York courts to Anguillan parties and the relative prejudice to litigate the subject matter of the litigation in a foreign country also favor a stay of these Adversary Proceedings. The Plaintiffs, discussing *forum non conveniens*, contend that "the documentary evidence and witnesses necessary to follow the Debtors' money will be located in the United States, and especially in New York[,]" and that "[i]n any event, Defendants are sophisticated global institutions for whom producing documents or witnesses in any forum poses no special inconvenience." (*CCIB's Mem. of Law in Opp'n to ECCB's Mot. to Dismiss* at 31; *PBT's Mem. of Law in Opp'n to the ECCB's Mot. to Dismiss* at 27–28.) However, for the reasons set forth in the *forum non conveniens* analysis, the Court finds that there is little reason to find that New York is a convenient forum for the Plaintiffs.

[30] Turning to the potential prejudice to the parties, NBA and CCB argue, in the context of the *forum non convenience* analysis, that "[i]t makes no sense for the parties to fly back and forth from Anguilla to New York and pay New York lawyers to litigate over Anguilla law when [the Plaintiffs'] claims can and should be resolved in Anguilla." (*Mem. of Law in Supp. of CCB's Mot. to Dismiss* at 21; *Mem. of Law in Supp. of NBA's Mot. to Dismiss* at 18.) However, the inconven-

25. On August 24, 2016, the High Court entered the *Leave Order,* staying the case under section 143(c) of the Banking Act of 2015 because the parent banks were in receivership. It is currently subject to an appeal before the Court of Appeal in Anguilla. In the Satay Action, the High Court heard and addressed the defendants' application dated August 12, 2016 seeking a declaration that the High Court lacked jurisdiction based on the defendants' statutory immunity. The High Court refused the defendants' objection, and although the defendants in these cases were directed to serve their defense, the defendants filed and were granted leave to appeal that decision. On June 14, 2017, the High Court stayed the Judicial Review until the earlier of either a ''final determination'' in these adversary proceedings or a final settlement agreement between the parties to these cases. (*Judicial Review Appl.* at 5.)

ience and expense associated with parallel proceedings do not constitute prejudice justifying deference to a parallel foreign litigation. *See Tarazi*, 958 F.Supp.2d at 438 (citing *Kitaru Innovations Inc. v. Chandaria*, 698 F.Supp.2d 386, 391 (S.D.N.Y. 2010) (noting that the burden of litigating simultaneously in two forums is not sufficient prejudice to weigh in favor of stay)); *compare National Union Fire Insurance Co.*, 115 F.Supp.2d at 1249 (concluding that less access to discovery and unavailability of jury trial in foreign court weighs against stay), *and Goldhammer*, 59 F.Supp.2d at 255 (concluding that less access to discovery in foreign forum weighs against stay). Given that no party has identified any prejudice it will suffer if it does not prevail on these *Motions to Dismiss*, and because New York is not a convenient forum for the Plaintiffs or the Defendants, this factor weighs in favor of a stay of the Adversary Proceedings.

vi. Connection Between the Litigation and the United States and Anguilla

The facts alleged in the *Complaints* implicate conduct in both Anguilla and the United States. The Plaintiffs and all Defendants are based in Anguilla, and the solvency, integrity, and regulation of the Anguilla banks in a period of dire economic circumstances are of paramount interest to Anguilla. The allegations in the *Complaints* about the ownership and flow of funds of the alleged transfers is unclear, and will require amendments of the *Complaints* if these cases are reactivated here after the decisions of the Anguilla courts. It is certainly true that New York and the United States have a strong interest in the integrity of the banking system in New York and the United States. Some or most of the transfers for which recovery is sought were allegedly made between bank accounts in New York, so it appears that the alleged damages occurred in the United States.[26] However, even if the transfers at issue are "domestic," it does not change the fact that Anguilla has an exceedingly strong interest in this case—the parties are from Anguilla, the conduct at issue was directed from Anguilla, Anguilla has a paramount interest in regulating the conduct of its banks, and Anguilla has a strong interest in having disputes involving its banking system resolved in its courts. *See Gilbert*, 330 U.S. at 509, 67 S.Ct. 839 (stating that under the *forum non conveniens* doctrine, "[t]here is a local interest in having localized controversies decided at home"); *see also Thornton Tomasetti*, 2015 WL 7078656, at *5 (staying the domestic action where "[t]he Anguillan case resolves virtually identical issues between identical parties, and this dispute has only a tenuous connection to the United States") (citation omitted). This factor thus favors a stay of these Adversary Proceedings.

vii. Balance of Factors

Evaluating the *Royal and Sun Alliance* factors as a whole, the Court concludes

26. *Cf. Bascuñán v. Elsaca*, 874 F.3d 806, 820–21 (2d Cir. 2017) (concluding that for purposes of RICO injury, injury was domestic where money was taken from bank accounts in New York even though plaintiffs and defendants were in Chile; applying Restatement (Second) of Conflicts of Laws § 147 *cmt. e*, "[w]here the injury is to tangible property, we conclude that, absent some extraordinary circumstance, the injury is domestic if the plaintiff's property was located in the United States when it was stolen or harmed, even if the plaintiff himself resides abroad"); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS (1971) § 147 *cmt. e* ("*When conduct and injury occur in different states*. For reasons stated in § 146, Comment *e*, the local law of the state where the injury occurred to the tangible thing will usually be applied to determine most issues involving the tort (see § 145, Comments *d–e* and §§ 156–66, 172) on the rare occasions when conduct and the resulting injury to the thing occur in different states.").

that they strongly favor staying the action in deference to the pending proceedings and litigation in Anguilla courts. Even where courts have declined to dismiss an action because of a prior parallel action in a foreign court, a stay has often been viewed as the appropriate intermediate measure. *Ole Media*, 2013 WL 2531277, at *6 (citing cases including *Royal and Sun Alliance*, 466 F.3d at 96 ("[A] measured temporary stay need not result in a complete forfeiture of jurisdiction. As a lesser intrusion on the principle of obligatory jurisdiction, which might permit the district court a window to determine whether the foreign action will in fact offer an efficient vehicle for fairly resolving all the rights of the parties, such a stay is an alternative that normally should be considered before a comity-based dismissal is entertained.")). Based on these facts, the Court concludes, in the exercise of its discretion, that these Adversary Proceedings should be stayed based on international comity pending the outcome of the Anguilla Litigation. Not only do the Anguilla courts have a superior interest in the equitable and orderly distribution of the Debtors' assets as part of the Anguilla Administrations, but deference should also be granted to the pending Anguilla Litigation.

IV. CONCLUSION

For the reasons explained above, the Court concludes, based on *forum non conveniens* and international comity, that the disputes between the parties should be adjudicated in the first instance in the courts of Anguilla. Therefore, both Adversary Proceedings are stayed.

Counsel for the parties shall file joint status reports with this Court in each of these Adversary Proceedings every ninety (90) days from the date of this Opinion reporting on the status of proceedings in the Anguilla courts.

IT IS SO ORDERED.

IN RE: FRESH–G RESTAURANT INTERMEDIATE HOLDING, LLC et al., Debtors.

Case No.: 16–12174 (CSS) (Jointly Administered)

United States Bankruptcy Court, D. Delaware.

Signed December 20, 2017

Background: Chapter 11 debtor-tenant moved to assume and assign shopping center lease as part of motion to sell certain assets to proposed buyer. Landlord filed limited objection to proposed sale, arguing that debtor failed to properly exercise its option to extend lease for five-year period due to then-existing pre-and postpetition defaults.

Holdings: The Bankruptcy Court, Christopher S. Sontchi, J., held that:

(1) pursuant to California's anti-forfeiture statute, the option was revived based upon the total cure of any postpetition defaults that existed at the time the option was exercised, and

(2) the California anti-forfeiture statute was not preempted by the section of the Bankruptcy Code governing executory contracts and unexpired leases.

Objection denied.

1. Bankruptcy ⇨2002

In matters of contract interpretation, bankruptcy court will rely on applicable state law in construing a contract's terms.

2018 WL 3207119
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

IN RE: PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (In Official Liquidation), et al. Debtors in Foreign Proceedings.
Cohnreznick LLP, Appellant,
v.
Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (In Official Liquidiation) and Foreign Representatives of Platinum Partners Value Arbitrage Fund (International) Limited (In Official Liquidation), Appellees.

18cv5176 (DLC)
|
Signed 06/29/2018

Attorneys and Law Firms

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OPINION AND ORDER

DENISE COTE, United States District Judge

***1** This appeal arises out of the liquidations of a hedge fund incorporated in the Cayman Islands, Platinum Partners Value Arbitrage Fund L.P. (the "Master Fund") and its feeder funds, Platinum Partners Value Arbitrage Fund (International) Limited (the "International Fund"), and Platinum Partners Value Arbitrage Fund Ltd. ("Intermediate Fund," and, collectively, the "Funds"). A former auditor of the Funds, CohnReznick LLP ("CohnReznick"), has made a motion under Rule 8007(b), Fed. R. Bankr. P., for a stay pending appeal of an order of the bankruptcy court requiring its compliance with a subpoena in a Chapter 15 bankruptcy proceeding. For the following reasons, the motion for a stay pending appeal is denied.

The facts of this appeal are exhaustively discussed in the bankruptcy court's thorough and well-reasoned opinion, In re Platinum Partners Value Arbitrage Fund L.P. (In Official Liquidation), 583 B.R. 803 (Bankr. S.D.N.Y. 2018) ("April Order"), and therefore this decision describes only those facts particularly relevant here. Each of the three Funds is organized under the laws of the Cayman Islands and was managed by Platinum Management (NY) LLC ("Platinum Management"), which is headquartered in New York. In August 2016, following their failure to honor redemption requests from investors in a timely manner, the Master Fund and International Fund were placed into liquidation by order of the Grand Court of the Cayman Islands.

On October 18, 2016, two months after the liquidations began, the court-appointed liquidators of the Master Fund and International Fund ("Liquidators") sought recognition of the Cayman Islands liquidation proceedings for the two Funds in this district's bankruptcy court as foreign main proceedings under Chapter 15 of the Bankruptcy Code. The bankruptcy court consolidated the two cases on October 25, 2016, and on November 22, 2016, without objection, granted recognition of the two liquidations as foreign main proceedings. [1]

1 The Intermediate Fund was placed into liquidation in the Cayman Islands in 2017. Its Chapter 15 proceeding was consolidated with the other Platinum Partners proceedings on September 7, 2017, and its Cayman Islands liquidation was recognized as a foreign main proceeding on October 12, 2017.

On December 14, 2016, a federal grand jury in the Eastern District of New York indicted certain senior executives of Platinum Management on charges of conspiracy, securities fraud, investment advisor fraud, and wire fraud in connection with their management of the Funds. On December 19, 2016, the Securities and Exchange Commission ("SEC") filed a complaint against Platinum Management and the indicted individuals

seeking relief for their allegedly fraudulent activities. The indicted individuals have apparently asserted their Fifth Amendment rights when questioned in proceedings concerning Funds-related matters.

Under Cayman Islands law, the Liquidators are obligated to collect, realize, and distribute the assets of the Funds, and are empowered to investigate the promotion, business, dealings, and affairs of the Funds, including the causes of their failure. Pursuant to the bankruptcy court's November 22, 2016 recognition order, the Liquidators were authorized to "examine witnesses, take evidence, and seek the production of documents within the territorial jurisdiction of the United States concerning the assets, affairs, rights, obligations or liabilities of the [f]unds, the [f]unds affiliates and the [f]unds subsidiaries."

***2** Appellant CohnReznick is a New York City firm that provides accounting, assurance, tax, and business advisory services. CohnReznick was engaged to provide audit services to the Funds for their last two full years of activity: 2014 and 2015. CohnReznick provided an audit letter for the 2014 year, but its services were terminated prior to the completion of the 2015 audit. CohnReznick was responsible for auditing roughly $1.2 billion in assets managed by the Funds.

The engagement letters between each Fund and CohnReznick contain an arbitration clause ("Arbitration Clause"), which reads in relevant part:

> Any dispute, controversy, or claim arising out of or relating to the services or the performance or breach of the Agreements (including disputes regarding the validity or enforceability of this Agreement) or in any prior services or agreements between the parties shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("IICPR") Rules for Non-Administered Arbitrations .... Such arbitration shall be binding and final. In agreeing to arbitration, the parties acknowledge that in the event of any dispute (including a dispute over fees) the parties are giving up the right to have the dispute decided in a court of law before a judge or jury and instead the parties are accepting the use of arbitration for resolution.

(Emphasis supplied.) The engagement letters also provide that they are to be governed by New York law.

As part of the investigation into the affairs of the Funds, the Liquidators sought documents from CohnReznick regarding its work for the Funds. Although CohnReznick produced some documents (described as the property of the Funds), it did not provide others, including its workpapers for the engagement. On August 31, 2017, the International Fund liquidators served a subpoena upon CohnReznick.[2] The subpoena sought, among other things, engagement documents, communications, representations, invoices, and workpapers (collectively, "Workpapers"). After negotiations over the scope of the subpoena failed, on January 25, 2018, the International Fund Liquidators filed a motion to compel, in which the Master Fund Liquidators joined. The bankruptcy court, after full briefing and oral argument, issued the April Order granting the motion to compel on April 17, 2018. 583 B.R. 803.

2 The Master Fund Liquidators consented to the issuance of the subpoena by the International Fund Liquidators.

On May 1, CohnReznick timely filed a notice of appeal. In its May 15 Statement of Issues on Appeal, CohnReznick asserts that the "central" issue is:

> Whether a foreign debtor's representatives can use chapter 15 for wide-ranging discovery to investigate potential claims against a U.S. entity where the foreign representatives
>
> (i) are bound by the debtor's agreements with the U.S. entity to arbitrate any such claims under rules providing for only limited discovery and
>
> (ii) lack the power under the laws of their home jurisdiction to take the requested discovery.

At a conference on May 23, which followed another round of briefing and oral argument, the bankruptcy court denied motions by CohnReznick to stay the April Order and to certify the order for direct appeal to the Second Circuit. In re Platinum Partners Value Arbitrage

Fund L.P., No. 16-12925-SCC, Dkt. 88 (Bankr. S.D.N.Y. May 23, 2018) ("Stay Opinion"). Those rulings were memorialized in two orders dated May 31.

In the Stay Opinion, the bankruptcy court addressed the four factors relevant to whether a stay should be granted pending appeal. On irreparable harm, the bankruptcy court found "that any potential harm to CohnReznick in proceeding with discovery while its appeal is pending fails to overcome the weight of the other three factors," and that, "as a practical matter, this circumstance is no different from many other situations in which a stay is requested to free a party from doing something it maintains it should not be required to do or to be affected by." Id. at 96-97. On potential harm to other parties, the bankruptcy court said that "[w]ere a stay to be imposed, the Liquidators' ability to timely administer the liquidation of the Funds would be affected," and that CohnReznick's arguments for lack of harm to the Liquidators were either "patently untrue" or "without any basis of fact." Id. at 97-98. It further found that "the Master Fund Liquidators have a need for CohnReznick's audit workpapers in pursuing their wide-ranging investigation into the alleged one-billion-dollar fraud involving approximately one billion dollars in assets that were audited by CohnReznick directly before the commencement of the Funds' liquidation proceedings." Id. at 99. On substantial probability of success on appeal, the bankruptcy court concluded that CohnReznick "has failed to demonstrate a substantial possibility of success on appeal." Id. at 102. Finally, with respect to the public interest, the bankruptcy court decided that "[t]he public interest here is best served by requiring compliance with the discovery order and permitting the Liquidators to continue their investigation unfettered so that they may pursue timely claims on behalf of creditors of the funds prior to the running of applicable statutes of limitations." Id. at 103-04. The bankruptcy court declined to set a schedule for production, however, "because CohnReznick was not given notice" of the Liquidators request, and because the bankruptcy court did not "want to be perceived as in any way pressuring the decision of whatever court you go to next."

***3** The appeal from the April Order was assigned to this Court on June 8. A June 11 Order set a briefing schedule, requiring all briefing on the merits appeal to be completed by July 16. On June 12, the parties each filed letters addressing a contemplated motion to stay the effect of the April Order pending appeal. A June 13 Order directed the filing of simultaneous briefs on June 18 and set oral argument on the motion to stay for June 20. [3]

3 No motion has been made in this Court for certification of a direct appeal to the Second Circuit Court of Appeals.

At the June 20 conference, the parties agreed to further expedite briefing on the appeal on the merits from the April Order. The briefing on the merits is fully submitted today and an Order of today denies the appeal.

At the June 20 conference, the Court ordered CohnReznick immediately to begin to prepare for production of the Workpapers so that there would be no delay should the bankruptcy court set a deadline for that production. CohnReznick represented that a partial production could begin immediately and the production could be substantially complete within two weeks of the June 20 conference. Pursuant to the parties' submissions to the bankruptcy court on June 21 and June 22, 2018, the bankruptcy court recently set a deadline of July 16, 2018 for the production of the Workpapers.

DISCUSSION

The legal standard for granting a stay pending appeal of a bankruptcy court order requires application of the familiar four-factor test:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay;
>
> (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
>
> (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009); see also In re World Trade Center Disaster Site Litig., 503 F.3d 167, 170 (2d Cir. 2007). The Second Circuit has held that these criteria should be applied "somewhat like a sliding scale ... more of one excuses less of the other." Thapa v. Gonzales, 460 F.3d 323, 334 (2d Cir. 2006) (citation omitted). [4] The burden of establishing entitlement to a stay rests with the

appellant. Nken, 556 U.S. at 433-34. Each of the Nken factors will be addressed in turn.

4 Although there might be some doubt as to whether the Second Circuit's sliding-scale approach survives decisions such as Nken and Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008), in the related context of motions for a preliminary injunction, the Second Circuit has reaffirmed the validity of the sliding-scale approach. See Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 37-38 (2d Cir. 2010). Because the appellants' request fails regardless of the standard to be applied, it is unnecessary to address this issue further.

I. Likelihood of Success on the Merits

CohnReznick has not shown that it is likely to succeed on its appeal from the April Order, much less made a strong showing of a likelihood of success.[5] The Bankruptcy Court acted well within its authority in granting the Liquidators' motion to compel production of the CohnReznick Workpapers.

5 CohnReznick argues that it need only show a "possibility" of success on appeal. That standard purports to derive from ACC Bondholder Gp. v. Adelphia Comm's Corp., 361 B.R. 337, 346 (S.D.N.Y. 2007), which in turn cites Hirschfeld v. Bd. of Elec. in City of New York, 984 F.2d 35, 39 (2d Cir. 1993). Hirschfeld required that a possibility of success on the merits be "substantial," and Nken specifically rejects the mere "possibility" standard. Nken, 556 U.S. at 434-35.

***4** The relevant provisions of the bankruptcy laws give the bankruptcy court broad authority to compel discovery in aid of foreign bankruptcy proceedings. In 2005, Congress added Chapter 15 to the Bankruptcy Code through the Bankruptcy Abuse Prevention and Consumer Protection Act. Pub. L. No. 109-8, § 801, 119 Stat. 23 (codified at 11 U.S.C. §§ 1501-1532). In doing so, Congress included an explicit statement of its purposes:

> [t]he purpose of [Chapter 15 of the Bankruptcy Code] is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of:
>
> (1) cooperation between—
>
> (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
>
> (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
>
> (2) greater legal certainty for trade an investment;
>
> (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
>
> (4) protection and maximization of the value of the debtor's assets; and
>
> (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

11 U.S.C. § 1501.

In aid of these purposes, Chapter 15 provides for the recognition of foreign bankruptcy proceedings in United States courts. See 11 U.S.C. §§ 1515-1524; see generally In re Fairfield Sentry Ltd., 714 F.3d 127, 132-33 (2d Cir. 2013). Upon recognition of a foreign proceeding, and at the request of the foreign representative, the bankruptcy court is empowered to allow discovery to be taken. It can "provid[e] for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's affairs, rights, obligations, or liabilities." 11 U.S.C. § 1521(a)(4). Under § 1521(a)(7), the bankruptcy court may also "grant[ ] any additional relief that may be available to a trustee," subject to exceptions not applicable here. 11 U.S.C. § 1521(a)(7). Accordingly, it may also authorize foreign representatives to take discovery pursuant to § 542(e) of the Bankruptcy Code, and Federal Rule of Bankruptcy Procedure 2004, each of which provides for discovery of the affairs of a debtor.

The bankruptcy court's April Order authorizing discovery of the Workpapers fits comfortably within this broad grant of powers. After all, discovery of an auditor's workpapers and related documents and communications for the two-year period immediately preceding a massive business failure of any entity would be highly relevant. Moreover, the decision by a court to allow discovery is a

discretionary one. See In re Barnet, 737 F.3d 238, 248 (2d Cir. 2013). Review of a discovery order is for abuse of that discretion. See In re Lyondell Chem. Co., 585 B.R. 41, 52 (S.D.N.Y. 2018).

Finally, Chapter 15 expresses a strong preference for providing assistance to foreign representatives in appropriate circumstances. That congressional preference is not to be lightly disturbed. [6]

6 As the bankruptcy court found, there were other compelling reasons to grant the Liquidators' motion to compel, including that the Funds' assets were largely U.S.-based and held by U.S. subsidiaries, the anticipated lack of cooperation by the Funds' executives in the Liquidators' investigation, and the alleged criminal fraud with respect to the Funds. April Order, 583 B.R. at 821. While each of these factors underscores the soundness of the bankruptcy court's exercise of its discretion, even in their absence CohnReznick has failed to show that the bankruptcy court abused its discretion.

***5** CohnReznick makes two arguments regarding the merits of the April Order and its likelihood of succeeding with its appeal from that order. [7] First, it argues that the Arbitration Clause precludes the discovery the Liquidators seek. Not so. The Arbitration Clause applies to a "dispute, controversy or claim" between the Funds and CohnReznick. There is no such pending proceeding brought by the Liquidators against CohnReznick. [8] The bankruptcy court was clear that she was doing "nothing" to take away CohnReznick's right to have a dispute heard in an arbitral forum. [9] Stay Opinion at 25. In its submission of June 25, CohnReznick admits as much. [10]

7 While CohnReznick originally resisted production of its Workpapers by arguing principally that a Cayman Islands court would not order them to be produced, and secondarily referred to the Arbitration Agreement, in support of a stay and on appeal it relies principally on the existence of the Arbitration Agreement.

8 It is telling that CohnReznick did not show below that in the event there were an arbitration between the Liquidators and CohnReznick, any specific category of documents covered by the April Order would not be required to be produced. It is difficult to imagine how the Workpapers would not be discoverable in any arbitrated dispute between CohnReznick and the Funds.

9 If a claim were filed by the Liquidators against CohnReznick, then a bankruptcy court would likely apply the pending proceeding rule. See In re Enron Corp., 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002) ("the well-recognized rule [is] that once an adversary proceeding or contested matter is commenced, discovery should be pursued under the Federal Rules of Civil Procedure and not by Rule 2004."). Through that mechanism, the bankruptcy and arbitration regimes are, in the words of the Liquidators, "harmonized." Stay Opinion at 54.

10 As CohnReznick's June 25 brief acknowledges, "To be sure, the [April] Order does not prevent CohnReznick from having any claims by the Liquidators heard in an arbitral forum."

The subpoena was a request for production of documents from a witness. The Liquidators seek the Workpapers to investigate the affairs of the Funds and in connection with any and all claims that the Funds' estates may have against any and all third parties. As the bankruptcy court observed, "CohnReznick and its employees are among the most significant witnesses" in connection with the bankruptcy proceeding and its Workpapers "are directly material" to that work. Stay Opinion at 99. Taken to its logical conclusion, if CohnReznick's argument prevailed, an accountant's workpapers would never be discoverable when the accountant's engagement letter contained an arbitration clause. Unsurprisingly, CohnReznick cites no support for that sweeping proposition. As the Liquidators observe, an arbitration clause does not immunize a witness from civil discovery. Again, the bankruptcy court was entirely correct when it observed that its discovery order did not violate the Arbitration Clause. Stay Opinion at 23.

CohnReznick's primary response is to urge this Court to follow In re Daisytek, Inc., 323 B.R. 180 (N.D. Tex. 2005). Daisytek does not alter the preceding analysis.

In Daisytek, a bankruptcy trustee sought an examination of Ernst & Young ("E&Y"), the debtor's auditor, explaining that the examination might support future claims against E&Y for accounting malpractice. Id. at 183. E&Y resisted, arguing that such discovery would circumvent the arbitration provisions in its engagement agreement with the debtor. The district court remanded the case with instructions to the bankruptcy court to determine whether the trustee was seeking to bring state-

law accounting malpractice claims based on pre-petition conduct or an action to avoid preferential and fraudulent transfers. It reasoned that the former could be brought in a forum other than a bankruptcy court, and the latter derived exclusively from the Bankruptcy Code. If the proceeding derived exclusively from the Bankruptcy Code, the bankruptcy court would have discretion to refuse to enforce an arbitration agreement and order discovery. By contrast, if the claim was a state law claim, the arbitration clause would govern, and discovery related to those claims would have to proceed in accordance with an arbitration. Id. at 187-88. The approach taken in Daisytek is not persuasive and has been criticized, [11] but it is in any event inapposite. The Liquidators' request here is not analogous to the trustee's request in Daisytek. It seeks the documents pursuant to Chapter 15 and to investigate the affairs of the Funds and any claims the Liquidators might bring against any third parties.

11 See In re Millennium Lab Holdings II, LLC, 562 B.R. 614, 631 (Bankr. D. Del. 2016); In re Friedman's, Inc., 356 B.R. 779, 783-84 (Bankr. S.D. Ga. 2005).

***6** CohnReznick makes one more attempt to show that it may succeed in overturning the April Order. It contends that the Liquidators would be unable to obtain the Workpapers under Cayman Islands law. Even if CohnReznick were correct (the bankruptcy court did not find it necessary to resolve that issue), [12] neither principles of comity nor any foreign discoverability requirement weigh against granting the Liquidators' motion to compel. In the analogous context of 28 U.S.C. § 1782 proceedings, the foreign discoverability rule has been roundly rejected, and this Court declines to impose such a rule for Chapter 15 proceedings. See Mees v. Buiter, 793 F.3d 291, 303 (2d Cir. 2015). The bankruptcy court's April Order was issued pursuant to the statutory authorization for discovery provided in Chapter 15 and the ancillary provisions of the Bankruptcy Code and Rules. It did not issue its order pursuant to Cayman Islands law.

12 The bankruptcy court examined with care the parties' submissions regarding Cayman Islands law and found that it had "not been provided with evidence sufficient to enable it to conclude that Cayman law prohibits the discovery sought in the Subpoena." April Order, 583 B.R. at 815.

CohnReznick argues that a bankruptcy decision, In re Hopewell, 258 B.R. 580 (Bankr. S.D.N.Y. 2001), requires bankruptcy courts to determine whether documents would be discoverable under foreign law. Not so. Hopewell was issued before the passage of the law creating Chapter 15, which provided new statutory authority for bankruptcy courts to authorize discovery in cross-border insolvency cases. Hopewell involved a pending arbitration proceeding, and thus implicated the pending proceeding rule. Id. at 582. One of the key factors undergirding the decision in Hopewell was the distinction between locating and remitting assets, which is what the Liquidators seek to do here, and the administration thereof, which was what the debtor sought to do in Hopewell. Id. at 584-85. As Hopewell notes, even the predecessor to Chapter 15, 11 U.S.C. § 304, "would likely allow the court in an appropriate case to provide discovery in aid of the claim liquidation efforts of a foreign representative." Id. at 585. And, Hopewell notes that the law that eventually became Chapter 15 would "specifically permit a recognized foreign representative to examine witnesses and take evidence regarding the debtor's assets, affairs, obligations, or liabilities." Id. (citation omitted). [13]

13 CohnReznick also relies upon In re Condor Ins. Ltd., 601 F.3d 319, 326-27 (5th Cir. 2010), In re ABC Learning Centers Ltd., 728 F.3d 301, 306 (3d Cir. 2013), and an article, Allan L. Gropper, The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases, 9 Brook. J. Corp. Fin. & Com. L. 152 (2014). Neither case is contrary to the result here, but in any event both involve entirely different contexts. As for the Gropper article, although CohnReznick cites it for the proposition that a bankruptcy court in Chapter 15 must apply lex fori concursus—the law of the jurisdiction where the main insolvency proceeding is pending—the article in fact concludes that "[n]o U.S. case has so held" that lex fori concursus governs. Id. at 178.

Even if a Cayman Islands court would not itself order production of the documents, Cayman Islands courts are receptive to evidence obtained through U.S. discovery proceedings. April Order, 583 B.R. at 816. Accordingly, CohnReznick has not shown that it is likely to succeed on the merits of its appeal.

II. Irreparable Injury

CohnReznick has also failed to show irreparable injury in the event its request for a stay is denied. For example, CohnReznick has made no assertion that the documents sought by the Liquidators are privileged or

otherwise protected by the trade secret or similar doctrine. As the bankruptcy court cogently explained below, a requirement to produce documents, at least absent a claim of privilege or sensitivity, is not generally the type of injury that is irreparable. See Stay Opinion at 96-97.

***7** Moreover, as discussed above, CohnReznick did not provide any analysis or evidence to the bankruptcy court demonstrating that the Workpapers would not be discoverable in an arbitration, should one ever be conducted, between these parties. It relies solely on the uncontroversial observation that discovery in arbitration is generally more limited than that allowed in bankruptcy proceedings and is subject to its own set of procedures. That unremarkable proposition does not suggest irreparable injury. CohnReznick had to demonstrate that specific categories of documents would not be producible, and that production of those documents would cause irreparable harm. It has not.

CohnReznick asserts that it would suffer irreparable injury because the issuance of a stay would moot its appeal of the April Order. This does not constitute irreparable injury. While the Court of Appeals allows appeals from discovery orders in Chapter 15 proceedings as an exception of the final order rule for the reasons explained in In re Barnet, 737 F.3d at 244, the right to appeal does not require a stay to be issued. A showing of irreparable harm requires more than the possibility of mootness, particularly because courts have the ability to fashion at least some form of relief if a discovery production order is reversed on appeal. See United States v. Jicarilla Apache Nation, 564 U.S. 162, 169 n.2 (2011).

The reversal of discovery orders by the Court of Appeals is understandably rare, given the broad discretion granted lower courts in management of discovery. The issuance of a stay of discovery pending a decision on appeal is even rarer.

The sole case cited by CohnReznick, In re Barnet, does not suggest a stay is appropriate here. In Barnet, the bankruptcy court certified an appeal and the Court of Appeals stayed the entirety of the Chapter 15 proceeding while it addressed whether the debtor was statutorily authorized to proceed under that chapter. Barnet, 737 F.3d at 241. No comparable issue is implicated by this appeal.

III. Injury to Other Parties

The bankruptcy court correctly found that the Liquidators would "suffer substantial injury if a stay were granted." Stay Opinion at 97. The Liquidators are facing the expiration of certain statutes of limitations in November 2018, id. at 98, and further delay of the production of the documents will impair their ability to investigate and bring claims prior to the expiration of the limitations periods. Id. at 98-99. And, because of the criminal investigations and related proceedings against the former managers of the Funds, the Liquidators have few alternatives to obtain documents regarding the financial condition and affairs of the Funds but to seek documents from CohnReznick. Id. at 99. Among other things, the Workpapers will assist the Liquidators in linking transactions that appear in the financial statements with assets in the management accounts, and reveal witness statements to the auditors. Stay Opinion at 21. Accordingly, this factor weighs strongly against granting a stay of the bankruptcy court's order pending appeal.

CohnReznick has no persuasive response to this analysis. It observed that the bankruptcy court did not set a final date for production even though it denied the motion for a stay. It nakedly asserts that the Liquidators' investigation of others will not be impeded because the CohnReznick papers reflect its own work and the Liquidators already have millions of other documents. These arguments may be swiftly rejected. The bankruptcy court repeatedly expressed its belief that a prompt production of the subpoenaed records was critical. See Stay Opinion at 98-99. The bankruptcy court has now set a July 16 date for production of the Workpapers.

IV. The Public Interest

***8** Finally, this Court agrees with the bankruptcy court that the purposes underlying Chapter 15 and the sound administration of bankruptcy proceedings weigh firmly against a stay of the bankruptcy court's order pending appeal. The sound administration of justice in federal courts counsels against interference with a court's discovery orders. A stay on appeal of discovery orders delays litigation, adds uncertainty to the proceedings, and increases the costs of litigation. Stays are rarely issued, even in appeals of § 1782 proceedings. Staying discovery ordered by the bankruptcy court in a Chapter 15 proceeding should also be a rare outcome.

In the circumstances here, a stay would be particularly inappropriate. The U.S. Government investigations accuse the Funds and their managers of engaging in a massive fraud. Liquidators appointed by a foreign bankruptcy court are seeking assistance from this nation's courts. The Liquidators face imminent expiration of applicable statutes of limitations. The bankruptcy court is vested with broad discretion to grant access to discovery in order to fulfill the purposes of Chapter 15, and has exercised that discretion with great care.

CONCLUSION

The June 12, 2018 motion for a stay pending appeal of the bankruptcy court's April 17, 2018 Order is denied.

SO ORDERED.

All Citations

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Case No: 2011013638

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Building, Fetter Lane, London
EC4A 1NL

Date: 18/10/2018

Before:

MR JUSTICE HILDYARD

- -

Between:

(1) Andrew Lawrence Hosking **Applicants**
(2) Bruce Mackay
(as Joint Liquidators of Hellas Telecommunications (Luxembourg) II SCA) (In Compulsory Liquidation)

- and –

Apax Partners LLP **Respondents**
& others

- -
- -

Joe Smouha QC, Stephen Davies QC, Ciaran Keller, Tom Ford, Stephen Donnelly (instructed by Norton Rose Fulbright LLP) for the **Applicants**
Robert Miles QC, Andrew de Mestre (instructed by Clifford Chance LLP) **for the APAX Respondents**
Richard Jacobs QC, David Peters (instructed by PCB Litigation LLP) for **the TPG Respondents**

Hearing date: 5th March 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr Justice Hildyard :

The issue for adjudication: costs

1. This judgment concerns the denouement of litigation on a grand scale which was suddenly concluded, not by settlement or adjudication, but by discontinuance after four days of what had been envisaged to be six weeks of evidence and submission.

2. The central issue for adjudication is whether the Claimants should be liable for costs, not on the standard basis provided for in the event of discontinuance by *CPR 38.6(1)* (and which the Claimants cannot avoid), but on the indemnity basis. The Respondents contend that an order for standard costs would not properly reflect the conduct of the joint Liquidators ("the Liquidators") in pursuing and then suddenly abandoning these proceedings. They say that the circumstances of the case take it well outside the norm so as to justify the indemnity basis.

3. The adjudication of that issue will also inform the appropriate approach to the ancillary issue as to the quantum of any payment on account.

4. The importance of these issues in monetary terms is illustrated by the fact that the payments on account sought in aggregate exceed £8 million, representing an estimated 70% of the costs in issue.

Factual background

5. The proceedings concerned a Luxembourg entity called Hellas Telecommunications (Luxembourg) II SCA ("Hellas II").

6. Hellas II was the immediate parent company of TIM Hellas, which was at all material times the 3rd largest mobile telecommunications company in Greece. Hellas II also had an indirect shareholding, acquired through TIM Hellas in 2006, in Q-Telecom, the fourth largest Greek mobile phone operator.

7. Hellas II is in compulsory liquidation, following on from its administration, in each case in this jurisdiction. Until August 2009, Hellas II had no material connection with this jurisdiction. However, in August 2009 Hellas II moved its centre of main interest from Luxembourg to England partly or primarily in order to take advantage of the administration regime under the Insolvency Act 1986.

8. Hellas II went into administration on 26 November 2009, having formally defaulted on its debts on 15 October 2009. At the commencement of that process, Hellas II had external debts in excess of €1.2 billion. The administration process failed.

9. Hellas II has been in compulsory liquidation since an order of Sales J (as he then was) made on 1 December 2011. Thus, these proceedings are brought by the Liquidators.

10. The Respondents are corporate entities and individuals connected with two global private equity houses which I shall call Apax and TPG respectively. The first eight Respondents are or were at material times connected with Apax ("the Apax Respondents"); the 9th to 42nd Respondents are or were connected with TPG ("the TPG Respondents"). For present purposes I shall simply refer to them as "Apax and TPG".

Claims in other jurisdictions before these

11. In these proceedings, commenced in November 2015, the Liquidators have claimed approximately €1 billion from the Respondents as being the entities and individuals responsible for a transaction allegedly at an undervalue which they contended placed intolerable financial strain on Hellas II and caused its commercial demise.

12. This jurisdiction is the natural 'home' for such proceedings. But the Liquidators did not originally choose to sue here, and fought repeatedly to have their alleged rights adjudicated elsewhere.

13. They started with Luxembourg, where proceedings were brought against Hellas I, Hellas and the six individuals who formed the Board of Managers of Hellas. These included Messrs Aliberti and Bottinelli from the Apax side. These proceedings were unsuccessful, resulting in the Commercial Court in Luxembourg giving judgment against the Liquidators in December 2015. All of the allegations (including of fraud) were rejected: the Court in particular finding that the December 2006 recapitalisation had taken place in "*utter transparency*". That decision is under appeal.

14. Then, but in effect in parallel with their proceedings in Luxembourg, the Liquidators pursued proceedings in the Bankruptcy Court in New York against a wide range of defendants, including initially the Apax Respondents, alleging fraudulent conveyance under New York law. However, these claims were dismissed as against all parties on choice of law (and other) grounds and as against the Apax Respondents for lack of personal jurisdiction.

15. Amended claims under sections 423 and 213 of the Insolvency Act 1986 were then brought against the remaining defendants in New York, alongside an existing claim for unjust enrichment. Thereafter the New York Court also summarily dismissed the claims against a number of parties (being the First to Ninth Respondents- which include the persons which the Liquidators' written opening identifies as "the Prime Movers") over whom it concluded it did not have personal jurisdiction.

16. Only then, and with the imminent expiry of a limitation period in this jurisdiction, did the Liquidators issue proceedings in England against the First to Ninth Respondents. Even then, however, the Liquidators showed no appetite for prosecuting those proceedings. On the contrary, and remarkably, they fought hard to obtain a stay of the English proceedings (to which the alleged Prime Movers were parties), so that the New York Proceedings (against parties who were indirect recipients of proceeds of the December Recap) could be concluded first. The Chancellor of the High Court rejected the Liquidators' application for such a stay.

17. Following the Chancellor's decision, the New York Court stayed the proceedings before it on *forum conveniens* grounds. The essential logic of that decision was that England is both the proper (and an available) forum for the resolution of the Liquidators' claims under the English Insolvency Act. It is and always has been their natural home.

The transaction the Liquidators sought to impugn

18. The transaction in question in these proceedings, as in the previous foreign proceedings, was an element in a recapitalisation ("the Recap") by which the Hellas group of companies raised monies through a debt issuance, and paid approximately €978m of those monies up to its investors (and therefore out of the group).

19. There was no substantial factual dispute about the structure or execution of the Recap. There was also no dispute that it resulted in the relevant creditors' money being used in precisely the manner which they were told it would be: that is, to provide a return to the then investors.

20. The particular element of the Recap which the Liquidators have nevertheless sought to impugn is the redemption of some Luxembourg-law debt instruments known as CPECs[1] ("the Redemption").

21. They contended that the Redemption took place at an undervalue, alleging that the enterprise value ("EV")[2] of Hellas II was only some €2.4 billon (as opposed to the figure of €3.2 billion used for the purposes of the transaction). They contended that this beggared Hellas II, leaving it with unsustainable debts whilst the recipients of the Recap proceeds received very considerable profits.

22. The Liquidators' claim here was brought pursuant to section 423 of the Insolvency Act 1986 ("section 423"). That was the only claim before me for trial. The Liquidators had originally also included allegations of fraudulent trading contrary to section 213 of that Act ("IA 1986"); but although they maintained the latter until October 2016, it was dropped in December 2016 after new Consolidated Particulars of Claim were provided, signed by new Counsel.

23. No other cause of action was asserted and no other claim was made in this jurisdiction, whether in negligence or for breach of duty or for recovery of any payment under Luxembourg law. Whether projections developed by the Deal Team[3] were objectively reasonable or not, or whether Luxembourg company law was breached in fact, were not matters necessary or required to be determined. There was never, in this jurisdiction at least, a question as to the existence and breach of a duty of care.

24. Accordingly, to succeed in their claim the Liquidators had to show

    (A) That the December 2006 Recap was a transaction at an undervalue within the meaning of section 423(1);

    (B) That, in participating in the CPEC Redemption, and in the December 2006 Recap generally, Hellas II was acting for the substantial purpose of placing assets beyond the reach of its creditors and/or of otherwise prejudicing the interests of such creditors within the meaning of section 423(3) ("the Statutory Purpose");

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[1] CPEC stands for convertible preferred equity certificate.
[2] EV is the total value of the equity and net debt of a company.
[3] That is, the group of individuals at Apax Partners and its subsidiaries and affiliates which dealt with the AEVI Fund's investment in the Hellas Group on a day to day basis and which made recommendations to various committees at Apax Partners as to how that investment should be dealt with. The TPG Respondents also had a deal team.

(C) That it was appropriate in all the circumstances for the court to grant the Liquidators the relief they sought in relation to the Recap.

The Liquidators' claims and the Respondents' defences in more detail

25. I turn to outline the parties' respective positions, with particular reference to the three points identified in the preceding paragraph.

26. In summary as to these three issues the Liquidators contended that:

(A) The test of undervalue was met because

(1) the CPECs were not redeemed in accordance with their terms and conditions and the Hellas II CPEC Redemption was for that reason a misapplication and gratuitous disposition of Hellas II's assets;

(2) the Hellas II CPEC Redemption was voluntary and discretionary at the option of Hellas II, with no consideration flowing to it;

(3) the Hellas II CPEC redemption was contrary to provisions of Luxembourg substantive law, namely Article 72 of the Luxembourg law on Companies, (which gives effect to EC Directive 77/91/EEC ("the Second Directive")) and was for that reason a misapplication and gratuitous disposition of Hellas II's assets;

(4) the Optional Redemption Price was not calculated in accordance with the terms of the CPECs and/or was wrongly overstated; and

(5) the nature and pricing of the Hellas II CPEC Redemption made it an obvious transaction at an undervalue where the inequality of exchange from the point of view of Hellas II was represented by: (1) a payment away of almost all its assets—€978m in cash—which had been borrowed for the purpose; in return for (2) the redemption of CPECs which would not mature for 30 years, were non-interest bearing, non-tradeable, subordinated to the rights of all other creditors and, even then, had an aggregate par value of less than €28m.

(B) The Statutory Purpose could and should be inferred because

(1) The Redemption was a voluntary disposition by Hellas II in favour of its shareholder. Even if, contrary to the Liquidators' case, it was effected in accordance with the Hellas II CPEC Terms and Conditions and did not constitute an unlawful distribution, Hellas II was under no obligation at all to effect an Optional Redemption of the CPECs;

(2) The objective of the Recap was certainly to extract money from the company to give to investors, including each of the Respondents, and it was done at the risk and to the prejudice of creditors. The Optional Redemption of the CPECs using borrowed funds was a transaction which inherently was capable of benefitting only Hellas I and, through it, the private equity firms and their investors. It could not in any real sense benefit either Hellas II or its creditors;

(3) Hellas II was not a trading business. It was a holding company. Unlike an ordinary trading transaction, where increasing the risk to creditors may be merely an undesirable collateral consequence, here there was no wider legitimate commercial purpose from the perspective of Hellas II in voluntarily redeeming the CPECs early, still less at a price so vastly in excess of par;

(4) Further, Hellas II would be dependent on the operating company (TIM Hellas) to pay up dividends to enable it to service the debt, which debt had been raised not for the benefit of TIM Hellas but to enable money to be paid up to the parent and out of the Hellas Group;

(5) If, after the Hellas II CPEC Redemption, Hellas II was clearly able to satisfy its future obligations to creditors (i.e. to pay interest and repay principal, each when due) then it caused those creditors no prejudice. However, if the Hellas II CPEC Redemption materially impaired the ability of Hellas II to meet its financial obligations, a fortiori if it created a risk of insolvency, the enrichment of Hellas I and its ultimate owners, and the removal of the risk to their investment in relation to the CPECs being redeemed, had as its inevitable corollary prejudice to creditors;

(6) By the Hellas II CPEC Redemption, Hellas II borrowed in excess of €1 billion to pass up voluntarily to its shareholder. The debt burden assumed was the 2nd highest of 147 telecoms companies across Europe. This inevitably involved the Statutory Purpose unless Hellas II, after proper investigation, was entirely confident that it thereby created no real risk of inability to service the interest on and/or repay the principal of the new debt or its other substantial debts. The mere fact that it was not known that Hellas II would definitely be unable to pay its debts as they matured and fell due is irrelevant;

(7) From the inherent risk and the personal enrichment should be inferred the purpose. Thus, if the Hellas II CPEC Redemption and/or the December 2006 Re-Cap was carried out in circumstances where Hellas II knew there was a risk that it would be overleveraged or unable to pay its debts (both interest and principal) as they matured and fell due as a result of or following the transactions, it had as its purpose both the enrichment of Hellas I and its ultimate owners and causing prejudice to the creditors. The two purposes are inseparable. They are opposite sides of the same coin;

(8) No compensating benefits to Hellas II were identified or even suggested to exist (actually or potentially) from the December 2006 Recap—the only reason to do it being to extract money for the benefit of the Sponsors and their investors and the key consideration being the amount that could be borrowed.

(C) The Court should grant relief under section 425 to restore so far as possible the position of Hellas II to what it would have been if the Hellas II CPEC Redemption and/or the December 2006 Re-Cap had not taken place and to protect the interests of the creditors of Hellas II.

27. Apax and TPG, on the other hand, have always rejected any suggestion that the Recap or any element within it constituted a transaction at an undervalue. They have contended throughout that the Liquidators' claims pursuant to section 423 failed to satisfy the statutory ingredients and were plainly unsustainable.

28. The background story has been presented by Apax and TPG as a prosaic and conventional one. Put very summarily:

    (1) Apax and TPG identified an undervalued and undermanaged company (TIM Hellas) as an investment opportunity for funds they advised, arranged for its purchase by those funds, and helped to turn it round, with the result that the funds benefited from its improved value.

    (2) They then oversaw the return of some of that enhanced value to the funds by means of the Recap and shortly afterwards returned further value following the sale of the business to another provider called Weather Investments S.p.A ("Weather") in February 2007, just after the Recap.

29. As regards each element of the Liquidators' case the Respondents contended that the Liquidators' case was plainly and obviously flawed.

30. As to (A), no undervalue had been established:

    (1) In seeking to demonstrate undervalue, the Liquidators had sought to rely on a retrospective, theoretical valuation carried out by their expert witness, who put the value of the business at €2.4 billion as compared to the value of €3.2 billion used for the Recap. This valuation was inherently and inevitably difficult to sustain: it was theoretical, and around €1 billion lower than the price, €3.4 billion, for which the asset was actually sold to Weather in February 2007, just after the Recap;

    (2) Secondly, other market evidence was provided by the Respondents which tended further to undermine the Liquidators' case on the valuation issues. This evidence included that from about July 2006, a wide range of investment banks well experienced in the valuation of businesses such as the Hellas Group produced valuations of that business which ranged on average from €3.3 billion (on the low case) to €3.9 billion (on the high case). Further, when the Hellas Group was offered for sale in the autumn of 2006, potential bidders were provided with a wide range of information about the Hellas Group, including a detailed Information Memorandum ("the IM") and an independent review by McKinsey & Company which concluded that the business plan of the management of TIM Hellas was "*robust and credible*" ("the McKinsey Report"). A number of bids were received in the first round of bidding. In the second round of bidding, Providence Equity Partners ("Providence"), a leading private equity firm with a particular focus on telecoms and which had been interested in purchasing the business in 2005, made a fully-financed cash bid of €3.2 billion on 30 November 2006 which was subject only to legal and technical due diligence and the terms of a share purchase agreement. This bid was below the price at which Apax Partners was prepared to recommend that the AEVI Fund should sell its investment and so the Recap ultimately went ahead.

    (3) Although the bid from Providence was not accepted, their bid documents showed that it was based on a structure with essentially the same level of debt as the Recap

(therefore showing that a sophisticated third party and its lenders also considered such debt to be sustainable by the Hellas Group) and was at a value for the assets which was the same €3.2 billion EV used for the redemption of the CPECs in December 2006.

(4) An additional offer of €3.4 billion was received on or around 18 December 2006 from BC Partners, another well-known private equity house which had previously shown interest in the business.

31. As to (B), the Respondents rejected the allegation that the Recap was entered into for the purpose of prejudicing the holders of the subordinated debt issued by Hellas II as part of that Recap. They pointed to the following difficulties as being unsurmountable:

(1) First, there was no dispute that those bondholders knew that the money they were lending would be paid straight out to the funds and would not become working capital or otherwise be available to repay their bonds. They consented to becoming creditors on that basis.

(2) Secondly, and in consequence, there was no depletion of assets that would otherwise have been available to them and none of those concerned in the transaction had the purpose of removing assets of Hellas II from the creditors' reach or otherwise prejudicing them.

(3) Thirdly, the bondholders also consented to leave their debt in the business under new owners, rather than being fully repaid with a premium, when that business was sold a few months later.

32. Further, the Respondents stressed that the claim had to overcome the following counter-indications:

(1) There was nothing in the documentary record hinting that the Recap was motivated by the required unlawful purpose;

(2) The transaction, including the payment of the Recap monies to the funds, took place openly: the level of debt of the Hellas Group both before and after the Recap and the use to which the proceeds would be put, including the redemption of the CPECs, and the risks associated with the level of debt, were clearly disclosed to potential purchasers of Hellas II's debt in a detailed Offering Memorandum ("the OM") produced for the purposes of the Recap and in a presentation prepared for use at meetings with potential purchasers of that debt. There were also credit ratings for the debt published by the credit ratings agencies, which explained the purposes to which the monies raised would be put;

(3) The Apax and TPG funds retained an interest in the business and their expected future returns depended on the business being able to continue to pay its debts. The funds' interests were therefore aligned with those of the creditors – both wanted the business to continue to flourish;

(4) There was an offer of €3.2 billion from a credible third party (Providence) on the table. The Apax and TPG funds would have made a significantly larger

immediate return (at least €100 million) from a sale to that third party. If there had been any concern about the viability of the business, the question is why that offer was not accepted, and the proffered reason that it was not because, contrary to the claim, the business prospects were considered good was always going to be difficult to gainsay;

(5) the Hellas Group in fact made all required payments on its debt, including that issued as part of the Recap in December 2006, for nearly three years after that refinancing. Hellas II only defaulted on 15 October 2009 after the Hellas Group had been seriously adversely affected by the unforeseen, and unforeseeable, global financial crisis which hit Greece (and the mobile phone market there) particularly severely – mobile phone revenues in Greece collapsed by more than 50% between 2008 and 2014 (from over €4 billion to €2 billion). Before that crisis fully hit home, Hellas had continued its strong financial performance;

(6) The evidential record revealed considerable and transparent analysis and projections by the 'Deal Teams' for Apax and TPG (comprising individuals nominated to review the matter on a day to day basis) supportive of the Respondents' case that they considered that the business was worth more than €3.2 billion; that the debt which was being proposed for the Recap was sustainable; and that the business was likely to generate growing returns;

(7) it would have been counterintuitive for the Deal Team to have recommended that the AEVI Fund should retain its investment in the Hellas Group if they had believed that the Hellas Group would be rendered insolvent by the Recap.

Summary of the rival submissions as to the merits

33. In such circumstances, the Respondents contend now that

(1) the Liquidators' claim was always, if not hopeless, speculative, weak, opportunistic and thin; and that

(2) a claim pursued in such circumstances and with such limited prospects, particularly one based on allegations of commercial impropriety, which was discontinued without explanation after four days of trial when attempts to settle had failed, should attract upon such discontinuance an order for indemnity costs.

34. The Liquidators, on the other hand, dispute this and contend that the Court is not in a position, and should not attempt, to decide what it would have determined at the end of the remaining 6 weeks of trial without having heard the relevant factual and expert evidence and legal argument. That, they submit, would not be fair or proportionate; and it would undermine the simplicity and purpose of the specific rules in the CPR on discontinuance which they maintain are exhaustively there set out.

35. The Liquidators emphasise especially that the Court has:

(1) heard "*brief oral opening submissions*", but no detailed argument on the law or the law as applied to the facts, which were matters for closing submissions;

(2) heard the complete evidence of only one of 12 live factual witnesses, Mr Halusa, lasting less than half a day;

(3) heard part, but not all, of the oral evidence of one member of the Apax Deal Team;

(4) not heard any evidence from the Apax Deal Team members with responsibility for the financing (Mr Ehmer) or operational modelling (Mr Singh);

(5) not heard any evidence from any of the senior members of the Board of Managers, whom the Respondents contended were required to have the Statutory Purpose;

(6) not heard any evidence at all from any TPG witness;

(7) not heard any of the expert evidence on (1) Luxembourg law, (2) accountancy, (3) insolvency and valuation, or (iv) the wireless telecommunications industry;

(8) not received the detailed written closing submissions which the Court indicated that it would find helpful; and

(9) not heard the 4 days of closing argument the parties agreed were appropriate.

36. Especially in these circumstances, the Liquidators pray in aid what Chadwick LJ stated in *In re Walker Wingsail Systems plc* [2006] 1 WLR 2194 at para 12:

> "[I]t is no part of the function of a court on an application to discontinue to attempt to reach a decision whether or not the claim would succeed".

The approach in determining the basis of costs

37. The standard basis of costs is, as its description denotes, the norm. Only if the case is 'out of the norm' may the indemnity basis be justified.

38. An award of indemnity costs is valuable to a receiving party for two separate reasons: (1) the burden of persuasion as to reasonableness is shifted to the paying party, and (2) the paying party does not have the benefit of the limitation that only costs which were proportionate to the matters in issue are recoverable: see *Digicel (St. Lucia) Ltd and others v Cable and Wireless PLC and others* [2010] EWHC 888 (Ch), para [9] (Morgan J).

39. The decision of Morgan J. in *Digicel* contains a useful review of prior authority at paras [14] – [19]: see in particular paragraph [19] where Morgan J. asked whether the

> "conduct of the paying party was at a sufficiently high level of unreasonableness or inappropriateness to make it appropriate to order indemnity costs".

40. More recently, the Court of Appeal said the following on the subject in *Excalibur Ventures v Texas Keystone & Others (No.2)* [2017] 1 WLR 2221 at [21]:

> "The principles which should guide the court in exercising its discretion as to the basis upon which a costs order should be made are too well known to require restatement. They are accurately summarised in the judge's costs judgment, to which

> the judge referred at para 60 of the judgment which is the subject of this appeal. CPR Pt 44 makes clear, as the judge noted at para 62, that the conduct of the parties is one, but only one, of the circumstances to be taken into account. The discretion is to be exercised in the light of all the circumstances of the case. To award costs on an indemnity scale is a departure from the norm and one therefore looks for something, whether it be the conduct of the relevant party or parties, or the circumstances of the case, which takes the case outside the norm. The judge cited in his costs judgment some of the many cases which attempt to collect examples of circumstances which may take a case out of the norm—such as his own judgment in Balmoral Group Ltd v Borealis (UK) Ltd [2006] EWHC 2531 (Comm), my judgment in Three Rivers District Council v Governor and Company of the Bank of England [2006] 5 Costs LR 714 and the judgment of Gloster J in Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB [2012] EWHC 749 (Comm) ."

41. In the passage from her Judgment in the *Euroption* case which is referred to above, Gloster J (as she then was) said the following:

> "There was virtually common ground between the parties as to the principles to be applied by the court in making its choice between the two bases of assessment. The principles are well-known and have been exhaustively rehearsed in the relevant authorities. The following is no more than a headline summary.
>
> First, on either basis, the receiving party is only entitled to recover costs which it has actually incurred, and, further, is only entitled to receive costs which were reasonably incurred and were reasonable in amount. Second, the standard basis is the normal basis of assessment: see Reed Minty v Taylor [2002] 1 WLR 2800 at [28]; Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson [2002] EWCA (Civ) 879 at [19]. This means that there has to be something in the conduct of the action, or about the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs: see Excelsior (supra) and Noorani v Calver [2009] EWHC 592 (QB) at [9], per Coulson J. Third, cases vary very considerably, and the Court of Appeal has declined to lay down guidelines on the subject: see Excelsior (supra) at [32]. It is obvious from a reading of the authorities that each case is highly fact-dependent. Fourth, to demonstrate that a case has gone outside the norm of behaviour, it is not necessary to show that the paying party's conduct lacked moral probity or deserved moral condemnation in order to attract recovery of costs on an

indemnity basis: see Balmoral Group Ltd v Borealis (UK) Ltd [2006] EWHC 2531 (Comm) at [1], where Christopher Clarke J said:

> "… The basic rule is that a successful party is entitled to his costs on the standard basis. The factors to be taken into account in deciding whether to order costs on the latter basis have been helpfully summarised by Tomlinson, J., in Three Rivers District Council v The Governor and Company of the Bank of England [2006] EWGC 816 (Comm). The discretion is a wide one to be determined in the light of all the circumstances of the case. To award costs against an unsuccessful party on an indemnity scale is a departure from the norm. There must, therefore, be something — whether it be the conduct of the claimant or the circumstances of the case — which takes the case outside the norm. It is not necessary that the claimant should be guilty of dishonesty or moral blame. Unreasonableness in the conduct of the proceedings and the raising of particular allegations, or in the manner of raising them may suffice. So, may the pursuit of a speculative claim involving a high risk of failure or the making of allegations of dishonesty that turn out to be misconceived, or the conduct of an extensive publicity campaign designed to drive the other party to settlement. The making of a grossly exaggerated claim may also be a ground for indemnity costs."

However, as Mr. Shivji emphasised, by reference to paragraph 8 of the decision in Noorani (supra), conduct must be unreasonable "to a high degree" to attract indemnity costs. "Unreasonable" in this context does not mean merely wrong or misguided in hindsight: see per Simon Brown LJ (as he then was) in Kiam v MGN Limited (No 2) [2002] 1 WLR 2810 . In each case, it is a fact dependent question as to whether or not the paying party's conduct has been unreasonable to a high degree."

42. The emphasis is thus on whether the behaviour of the paying party or the circumstances of the case take it out of the norm. The merits of the case are relevant in determining the incidence of costs: but, outside the context of an entirely hopeless case, they are of much less, if any, relevance in determining the basis of assessment.

43. The cases cited show that amongst the factors which might lead to an indemnity basis of costs are (1) the making of serious allegations which are unwarranted and calculated to tarnish the commercial reputation of the defendant; (2) the making of grossly exaggerated claims; (3) the speculative pursuit of large-scale and expensive litigation with a high risk of failure, particularly without documentary support, in

circumstances calculated to exert commercial pressure on a defendant; (4) the courting of publicity designed to drive a party to settlement notwithstanding perceived or unaddressed weaknesses in the claims.

Application of the approach in the particular context of discontinuance

44. In my view, the like considerations apply in the context of discontinuance; but their application is made the more difficult because at that stage the Court will not itself have assessed all the evidence and reached an adjudication, and the reasonableness (or not) of the way the case has been conducted may be more difficult to assess. For example, it may well be difficult to dismiss a claim which has not proceeded to adjudication as "unwarranted".

45. Discontinuance connotes (in the absence of agreed terms or particular different explanation) that the discontinuing party no longer considers its claim to be worth pursuing, or that it can no longer afford to pursue it. However, whether that is on a cost/benefit analysis, or because of funding difficulties, or changed strategic priorities, the Court is unlikely to be in a position to know or determine. Discontinuance does not necessarily connote an acceptance that the case was, is or has become hopeless; and a fair assessment of the merits will be difficult, if not impossible, at least if there remains any real issue by the date of discontinuance.

46. I accept also, in light of Chadwick LJ's statement quoted at paragraph [36] above, that in the ordinary course, and given these uncertainties, any adjudication of the merits will ordinarily not be the court's function at the discontinuance stage.

47. However, I do not read that statement as precluding the Court from considering whether in the particular circumstances the sudden discontinuance confirms that a claim, though perhaps not susceptible to summary determination at an earlier stage, lacks or has come to lack any real vitality; nor is it precluded from examining the particular circumstances, including the documentary record, to assess whether it appears that it has been continued, not with a view to its adjudication on its merits, but with a view to extracting a settlement on account of its nuisance, expense, and any uncertainty as to the result inherent in almost all litigation.

48. Further, I do not accept that the Court cannot assess whether the fact of discontinuance, where no other explanation is offered and no change in the forensic landscape which might excuse a change of perception or tack is apparent, raises an inference in all the circumstances that the discontinuing party has not only recognised weaknesses such as no longer in its perception justify pursuit of the claim but that such weaknesses were always an incident of that claim.

49. By the same token, there is, in my view, no reason for particular reluctance, at the stage of discontinuance, to award an indemnity basis of costs if the conduct of the parties or the circumstances of the case are by then revealed as being 'out of the norm'. In that context, I do not accept the suggestion put forward on behalf of the Liquidators at the hearing of consequential matters that the fact that the express provision in the CPR for discontinuance provides for the payment of standard costs places some higher hurdle, or tips the balance, against an award on the indemnity basis. The CPR simply caters in this context for the norm: it does not fetter the Court in determining the appropriate response to cases which it is persuaded are 'out of the

norm'. If anything, the sudden, unexplained discontinuance of a large claim, carried on for days at trial after enormous expense, invites the question whether it was reasonable to pursue it at all, or at least, so far.

Hallmarks of cases falling 'outside the norm'

50. As is apparent from paragraph [41] above, a recurring theme of these considerations, and a hallmark of cases falling 'out of the norm' in the relevant sense, is that the proceedings in question have been high risk, and apparently pursued, and usually publicised, to exert pressure in the hope of extracting a settlement, with frail evidential support and little regard to their prospects of success at trial or any real and realistic objective of securing vindication by adjudication.

51. Whilst that may not technically amount to abuse, it is close to it, since the Court is intentionally, though in the event, unsuccessfully, being used as an anvil for settlement rather than as an adjudicator; and it may cause the Court to set aside, in assessing costs of the victim, the ordinary constraints of proportionality and reasonableness, precisely because the court is persuaded that the victim has been pursued and subjected to legal process in a way and for a reason which is neither proportionate nor reasonable.

52. If the Court reaches the conclusion that this was, or at some point became, a fair depiction of the proceedings, discontinuance should not deter the Court in a case 'out of the norm' from an order of costs which better fits such circumstances. On the contrary, especially where by discontinuance of the proceedings without explanation the victim in such a case is deprived of any prospect of vindication in which very serious allegations of impropriety or worse have been advanced, pursued, intentionally widely publicised and suddenly abandoned, it is right in my judgment for the Court to be inclined towards an indemnity basis of costs.

53. Whilst I would accept that neither *Three Rivers DC v The Governor & Company of the Bank of England* [2006] 5 Costs LR 714 *per* Tomlinson J (as he then was) at [24], nor *Jordan Grand Prix v Vodafone Group* [2003] 2 Lloyds Rep 874 (which he cited) is directly in point, since the one went to the question of whether there was a sufficient issue remaining, after the claimants had already abandoned their claims and agreed to pay costs on an indemnity basis, to warrant the Court making observations as to the substance of the case, and the other went to the question whether the Court should give judgment after discontinuance, both illustrate the Court's reluctance to permit parties which have invoked its jurisdiction and pursued proceedings for purposes or in a manner of which the Court disapproves to withdraw silently and deprive the other party of some proper recompense or vindication.

54. That sharpens focus on why this claim, which was pursued all the way and yet suddenly dropped after four days of trial without apparent reason beyond the fact of failed negotiations, was pursued until then, and whether there are factors relating to the way it was so pursued which take it 'out of the norm'.

The Respondents' principal factual points

55. I turn, therefore, to consider the particular points made by the Respondents in support of their application for an indemnity basis of assessment.

56. Citing in particular the *Excalibur* case, both Apax and TPG identified the following "striking features" or egregious factors as justifying that characterisation of this claim:

    (1) there were wide ranging allegations of fraud (which were abandoned before trial) and of serious commercial impropriety (abandoned at trial);

    (2) the claims were forced Procrustes-like into an incongruous cause of action;

    (3) the case shifted about as the Liquidators attempted to force the facts into some kind of coherent shape;

    (4) the Liquidators and bondholders standing behind them courted publicity for their claims and used the press to seek to apply pressure on the Respondents;

    (5) the factual averments made in the claims were not consistent with the documentary record, and their proof appeared to rely on demonstrating that record to be false by cross-examination;

    (6) the Liquidators did not even put their pleaded case to the first two witnesses who were called by the Respondents;

    (7) the Liquidators sought to bolster a weak case with improbable and unwarranted expert evidence which was difficult to square with the factual evidence; and

    (8) after aborted settlement talks which were presented to the Court as justifying an adjournment of the continuation of the trial, the Liquidators then peremptorily gave up the case, without explanation, and without withdrawing any of the allegations they were making, at around 1am on Friday 23 February 2018.

Allegations of serious commercial impropriety

57. As to point (1), although the Liquidators disclaimed any allegation of dishonesty, and emphasised (citing, for example, *Pena v Coyne (No 1)* [2004] BCLC 703) that unlike the provisions that section 423 replaced, that section does not require proof of dishonesty, the fact is that their claims initially pleaded actual fraud, and at all times were founded on serious commercial impropriety.

58. Further, the Liquidators only confined their case to impropriety some time after having to abandon their claims of dishonesty and fraud in New York. The Liquidators' Amended Complaint in the New York proceedings contains a litany of the most serious allegations concerning the Respondents' conduct. Set out below is a mere sample of the types of allegations contained in that document and their highly-coloured presentation:

> **At paragraph 1**
> *The Joint Compulsory Liquidators bring this action... to obtain redress for one of the very worst abuses of the private equity industry.*
> ...
> *Less than two months after that fraudulent transfer [a reference to the Hellas II CPEC Redemption] TPG and Apax disposed of the Company and its subsidiaries, pocketing a*

> *windfall and leaving behind an insolvent company staggering toward bankruptcy. Consistent with their code names for the initial transactions through which they later secured their windfall, TPG's and Apax's duplicitous and catastrophic plunder of the Company is evocative of the sack of Troy.*
>
> **At paragraph 5**
> *In the light of day, however, "Project Troy" and "Project Helen" can be seen for what they were- a state-of-the-art Trojan Horse designed to financially infiltrate TIM Hellas and Q-Telecom and then systematically pillage their assets from within by piling on debt in order to make large distributions to the equity owners*
>
> **At paragraph 14**
> *Based on these and other facts, it is apparent that the Company's December 2006 CPEC Redemption was carried out with the fraudulent intent to put assets beyond the reach of actual or potential creditors of the Company, and in particular the holders of the Sub-Notes, and with the knowledge that the December 2006 CPEC Redemption would harm such creditors".*

59. Of course, this Court must adjudicate on issues relating to the proceedings here by reference to the case as pursued here. However, the antecedent proceedings in New York, as well as the reluctance of the Liquidators to bring their proceedings in a more natural jurisdiction where their accusations would have to be more confined and prosaically expressed, serve to illustrate that the Liquidators consistently sought to depict the Respondents as being guilty of conduct falling far short of the commercially acceptable.

60. There seems to me to be no real doubt that the Liquidators selected a forum where trial is by jury (whose members may be more susceptible than a judge to highly coloured presentation) and abandoned that forum, and the most lurid presentation of their claims, reluctantly, and only when the forum became unavailable and their more extravagant claims faced revelation as unsustainable. Even when effectively forced to litigate in the natural 'home' for the claims, the first version of the Liquidators' Particulars of Claim in these proceedings included a claim for fraudulent trading under section 213 of the Act. It also included certain very serious allegations, including an allegation that the OM was deliberately doctored so as to remove certain facts which would have caused creditors not to purchase the FRSNs, with the result that they were induced to do so "on a false basis". These allegations were subsequently, and without explanation, dropped; but not before the Liquidators had strived to achieve publicity for them (see below).

61. The surviving claims were less luridly expressed; but they still asserted commercial impropriety of a serious nature, and the Liquidators never abandoned the sub-text that the impugned transaction was allegedly a particularly noxious example of abuse in the private equity industry.

Procrustean or incongruous nature of the claims: the cap did not fit

62. As to point (2) (see paragraph [56] above), section 423 was always a difficult vehicle for the Liquidators' claims. The difficulties have already been foreshadowed. Most importantly:

(1) The claims being made simply did not fit within the section. In particular, they did not involve anything being done to an asset of Hellas II which would otherwise have been available for use in the business of the Hellas Group and the payment of its creditors. Rather, the monies lent by purchasers of the subordinated notes issued as part of the Recap were always intended to be used to make payments to Hellas I and then on to the investors in the Hellas Group.

(2) Further, the nature of the Recap and the use to which the monies would be put were disclosed to the very people who would become creditors of Hellas II by purchasing the subordinated notes.

(3) The recapitalisation was carried out at a value of €3.2 billion which was consistent with the offer on the table from Providence in early December 2006 and lower than the offers from BC Partners and Weather received as the recapitalisation was taking place. The latter resulted in the sale of the Hellas Group at an enterprise value of €3.4 billion.

(4) After the recapitalisation, the Apax and TPG funds retained an interest in the business and their expected future returns depended on the business being able to continue to pay its debts. The funds' interests were therefore aligned with those of the creditors: both wanted the business to continue to flourish.

Shifting case

63. The difficulty the Liquidators faced in shoe-horning their complaints into section 423 led to undisguised inconsistencies and tensions in various reiterations of the case. Thus, for example, the original Particulars of Claim asserted that the redemption of the CPECs in December 2006 "*subtracted from the property which was the proper fund for the payments of the debts and future debts of Hellas II, an amount...*". The CPoC continued to allege that the purpose of the recapitalisation was to put assets beyond the reach of Hellas II's creditors. However, by the time that the Liquidators' case was opened, it was accepted that:

> "the transaction was not about moving away an existing asset to frustrate enforcement or feared enforcement by present or future creditors"

and the case was reduced to a much more nebulous idea that the purpose behind it was to prejudice the creditors, but without apparently affecting any asset which would have otherwise been available to them.

64. Another example already referred to above is the inconsistency in the Liquidators' case in relation to the projections produced by the Apax Deal Team.

65. There was likewise apparent inconsistency in the Liquidators' approach to the question of who within the Deal Teams had the Statutory Purpose. The TPG Respondents provided a telling example of this by reference to the Liquidators' case, such as it was, against the two most senior individuals within TPG, namely Mr. Coulter and Mr. Bonderman. In that regard:

(1) The contemporary documents (which were shown to the court during TPG's opening) indicate that the Recap was decided upon by the Deal Team. There is only one relevant document to and from Mr. Bonderman in the critical period of October to December 2006. This shows that he had no involvement in the December Recap. There are a very small number of documents to or from Mr. Coulter. These show that he did not decide upon the Recap, but rather raised questions as to one aspect of it (the PIK notes). These questions were on the basis that he thought that the Recap was too beneficial to creditors.

(2) Mr. Coulter was deposed in the New York proceedings. The substance of his evidence was that he was not involved in the Recap. The Liquidators asked to depose Mr. Bonderman. But they subsequently decided that this was not necessary: the obvious explanation being that there was nothing to suggest his involvement.

(3) When the Liquidators' case was pleaded here, there were no allegations of "statutory purpose" against Mr. Coulter or Mr. Bonderman.

(4) The first time that allegations were made against them was in the Reply. The allegations were that they knew or ought to have known that the CPEC redemption was made in the absence of distributable reserves, and "knew or were on notice of" the existence of the Statutory Purpose. It is difficult to see how, in view of the contemporary documents showing their lack of involvement, these allegations could properly have been made.

(5) When the timetable for the hearing was being considered prior to and at the PTR, the Liquidators (again without any basis) described Mr. Bonderman and Mr. Coulter as the "decision-makers". They submitted that their evidence should be taken together with Mr. Halusa, on the basis that he was the decision-maker for Apax.

(6) None of these allegations was pursued in the Liquidators' written opening. No case of Statutory Purpose was advanced against either individual. In oral opening, the Liquidators' case was that the relevant individuals, whose knowledge was to be attributed to TPG, were those in the Deal Teams, and not either of those individuals. Yet in the meantime, the Liquidators had obtained an order from Snowden J. that both these persons attend for cross-examination.

The claim was calculated to maximise publicity

66. The tensions and difficulties beg the question as to why the Liquidators sought to deploy the section in unpromising circumstances. It is difficult to avoid the conclusion that the Liquidators' imperative was to seek to continue here what they had instigated first in New York; to benefit from the publicity generated there; and to develop commercial pressure by casting the claims in the dark clothes of defeating creditors, rather than the more anodyne trappings of a negligence claim.

67. It is important to emphasise at the outset that the Liquidators have strenuously denied that they have "courted publicity" and have derided the evidence said to support the suggestion as consisting of "a few press cuttings".

68. The Liquidators accepted that the "press had been very inquisitive"; but they contended before me that "It might be thought unsurprising that the press is interested in disputes relating to the collapse of a major telecoms player leaving it €1 billion in debt, or that creditors might feel strongly about it, or indeed might contact the press. But that is not something that can be laid at the Liquidators' door, and it is certainly not a justification for an order that they pay costs on the indemnity basis."

69. The fact remains, however, as is evident from the quotations from it at paragraph [58] above, that the Liquidators' Amended Complaint in the New York Proceedings was, to put it lightly, highly coloured. Certainly the claims achieved publicity.

70. When the claims in New York were first filed in March 2014, the Financial Times reported that the complaint had been filed after consultation with Hellas II's creditors' committee (an early indication of the role of the bondholders) and quoted one of the Liquidators, Mr Hosking, as saying that the lawsuit was intended to seek redress for "*one of the very worst abuses in the private equity industry.*" The proceedings in this jurisdiction were, of course, a continuation of those originally commenced in New York.

71. Subsequently, this was repeated in an article in The Economist in June 2015 which also quoted the Liquidators describing the events as a "*duplicitous and catastrophic plunder*" and as having said that Hellas II was "*systematically pillage*[d]".

72. These themes were picked up in subsequent press articles including, on the day of the Luxembourg trial, 28 October 2015, in the Independent newspaper. That article, under the subheading "*Luxembourg court to hear allegations that Apax and TPG 'plundered' for profit*", repeated the phase quoted in The Economist that the December 2006 recapitalisation represented "*duplicitous and catastrophic plunder*". Presumably quoting the claim in the US (see paragraph [58] above), it went on to refer to the Liquidators' claim as being that the entire investment by the Apax and TPG Funds in the Hellas Group was:

> "*a state of the art Trojan horse designed to financially infiltrate TIM Hellas and Q-Telecom and then to systematically pillage their assets from within by piling on debt to make large distributions to equity owners.*"

73. Now I accept of course that I have no reason not to accept the Liquidators' denial that they actively promoted such publicity; and the Liquidators in such circumstances cannot be answerable for the unilateral activities of the press. However, the fact of such highly coloured press commentary cannot be causally divorced from the way that the Liquidators chose to proceed, or from their statements, or from their repeated tendency to plead and depict the claim in highly coloured terms. The way the claims were presented courted publicity. Further, having (in effect) depicted the claim as out of the norm, it is difficult for them to gainsay that characterisation now.

No supporting documentary record

74. The Respondents' fifth point focuses on an arresting feature of the way the case was pleaded and advanced, which is that the Liquidators found so little, if anything at all,

which they felt able to rely on in their presentation to me by way of even slight corroboration for their claims in the documentary evidence.

75. Thus, none of the documents shown to the Court during the course of the trial suggested that any members of the Deal Teams held the Statutory Purpose. On the contrary, the case was pursued by the Liquidators notwithstanding contemporaneous documentation which showed that the Deal Teams (a) carefully considered the risks presented by the December 2006 Recap (including issues of debt serviceability); and (b) determined that the Hellas Group would be able to service the New Debt with considerable headroom, and would, despite having taken on that debt, be capable of being sold for more than the €3.2bn offered by Providence in November 2006.

76. An example of a fundamental difficulty arising in consequence was provided in the second day of trial. The documentary record included projections produced by the Apax Deal Team. These appeared to corroborate Apax's case. If the documents were genuine documents, and did genuinely record the views of the Deal Teams (as the Liquidators ultimately conceded), they would compel the conclusion that the Deal Teams did not believe that creditors would be prejudiced, even on a downside case.

77. The Liquidators, in their Skeleton Argument for Trial, had suggested that nevertheless the Deal Team had not themselves believed or given credence to the projections. However, when pressed by the Court, the Liquidators were compelled to confirm at trial that no case was being made that the documentary record did not reflect a genuine record of the Deal Team's thoughts and actions. The inevitable impression left was that the Liquidators simply hoped that something would turn up on cross-examination.

78. It is relevant to note also that as the Respondents inevitably emphasised as point (5) in paragraph [56] above, this was a claim for which the Liquidators had all of the relevant material before they commenced the proceedings in this jurisdiction. I was informed that the Liquidators had obtained disclosure of some 1.5 million pages of documentation, had exchanged expert evidence and had taken more than 10 depositions in the New York proceedings before they commenced the proceedings. There was an extensive documentary record which set out what the Apax Deal Team had been thinking and intending throughout the recapitalisation.

The Liquidators did not put the case they had pleaded to the two first witnesses

79. The Respondents elaborated their sixth point (see paragraph [56(6)] above) as follows. The only witnesses cross-examined before discontinuance were Mr Halusa and Mr Nathoo (whose cross-examination was not completed). The Respondents drew attention in this context to what Mr Miles described as the extraordinary gap between the way the case was pleaded and the way that these cross-examinations took place.

80. Thus, in the case of Mr Halusa, it was alleged in the Claimants' pleadings that he knew or must be taken to have known that Hellas II was over-leveraged, over-stretched and would not be able to repay its debts. Yet none of this was put to Mr Halusa; and indeed Mr Davies, when cross-examining on behalf of the Liquidators, appeared to accept that Mr Halusa himself believed that the company would be able to repay. His witness statement as to the actual purpose of the recapitalisation, and indeed, most of his statement, was left entirely unchallenged.

81. Similarly, the pleaded case was that Mr Nathoo (who was primarily responsible for modelling) had adopted unreasonable assumptions, including unrealistic multiples; but he was not taken through or challenged on any of them in cross-examination. Whilst Mr Davies sought in his submissions on costs to explain that this was because he and his team regarded the main modeller as having been revealed to be Mr Singh and not Mr Nathoo, so they had determined to keep their powder dry until cross-examining Mr Singh. But that was not the way of the pleading; and it was the fact that Mr Singh was fairly junior and Mr Nathoo was his boss. Mr Miles dismissed the suggestion that it was proper to say no more to Mr Nathoo and put the entire matter to Mr Singh as "frankly absurd". Likewise, Mr Miles dismissed as "a travesty" the suggestion to which Mr Davies resorted that in the last available half-hour of the slot for Mr Nathoo's cross-examination he could have put these points.

82. I do not think it fair to reach a concluded view of this aspect beyond this: the impression I was left with was that the Claimants had no documentation with which to confront either witness, made little or no progress with either of them, and at least whilst there was any prospect of settlement, preferred not to expose their case further to compelling rebuttal by two moderate and impressive witnesses. Of course, subsequent cross-examination might have rescued the position: but the decision to discontinue once settlement prospects had failed speaks for itself in that regard.

Expert evidence of doubtful utility and consistency

83. As to point (7) in paragraph [56] above, the two days of cross-examination before me also suggested notable inconsistencies with the Claimants' voluminous expert evidence, the relevance of which was itself not easy to follow.

84. As to inconsistency, the TPG Respondents pointed out that Mr Nathoo was cross-examined on the basis that (a) the best source of information for any projection of the future performance of the TIM Hellas Business was the management of that business; and (b) an appropriate downside case would therefore have been flat EBITDA of around €430m per annum. This line of cross-examination was not consistent with the Liquidators' expert case to the effect that (a) information emanating from management was unreliable, and ought to be disregarded; and (b) a reasonable downside case ought to have assumed performance which was worse than the 2006 EBITDA of €380m. Mr. Nathoo was also cross-examined on the basis that it was right to acknowledge that "the way things were in February 2005 doesn't tell us very much about the way things were in mid-2006 and going forward." Yet the expert evidence of Mr. Furchtgott-Roth was replete with analysis based on Apax's original 2005 DQM.

85. As to relevance, although Mr. Furchtgott-Roth's report (for the Liquidators) spent many hundreds of pages attacking the assumptions which were used in the model, none of these criticisms were put to Mr. Nathoo during the course of cross-examination. That seems surprising, even allowing for the rationale suggested by Mr Davies that they had determined that Mr Singh, his subordinate, was the man to ask.

86. Further as to relevance, and more generally, my pre-trial reading broadly confirmed the Respondents' submission that the Claimants' expert evidence was really directed to a case of negligent modelling rather than such a departure as might suggest the Statutory Purpose. The Claimants' two experts sought to advance a case that the

projections produced by the Apax Deal Team were objectively unreasonable: but it was not explained or apparent to me how such evidence would assist the Court to determine whether or not the Deal Team acted with the Statutory Purpose.

87. Again, I accept that I cannot foreclose the possibility that all might have been revealed in the end; but the impression with which I was left was that there was a confusion between negligent projection and proof of the Statutory Purpose unlikely to be bridged by judicial inferences, even if perhaps a jury might perhaps have been expected to be less particular had the case proceeded in the United States, as the Liquidators had planned.

Whether inferences may be drawn from the fact of discontinuance

88. As to point (8) in paragraph [56] above, I accept that the Liquidators were under no obligation under the CPR to explain their sudden decision to seek the permission they required to discontinue (since undertakings had been given earlier in the proceedings), and, the application being unopposed, they have not sought to do so.

89. However, in circumstances where there had been, to use the phrases deployed in oral argument by Mr Miles, "no change in the forensic landscape", and no "explanation for the abandonment of the case", there is little to contradict the suggestion that "the reason they gave up is that it was obvious they were going to lose" and "more than that, it would, if they carried on, apart from the additional costs that would be incurred,…potentially damage their campaign of litigation elsewhere" (and, in particular, on appeal in Luxembourg).

90. For the Liquidators, Mr Smouha rejected this process of reasoning as simplistic and misplaced, and submitted that it would be wrong for the Court to draw any inferences such as had been suggested, or seek to ascertain from the Liquidators their reasons for seeking to discontinue.

91. Mr Smouha submitted that if it had been the intention of the CPR that an unexplained discontinuance should bring the inference sought by Mr Miles and result accordingly in an indemnity basis of costs, the rules would (adopting now Mr Smouha's phrases) "have been set up in a different way"; and that, as to the apparently unchanged forensic landscape, that could only mean no change "that your Lordship sees or can be told". He continued "…the court should not be requiring the discontinuing party to explain to the court and justify, by reference to matters which are very likely to put it in a difficult position in which it would be unable to provide that information because it would obviously go into privilege[d] areas…".

92. Mr Smouha submitted that in the context of a discontinuance, and having regard to the public interest in facilitating the cessation of claims which a claimant no longer feels able or wishes to pursue, no order for indemnity costs should be made "save in extreme circumstances where the court is in a position to see that the case should never have been brought, something extreme in that way…".

93. As acknowledged previously, I accept that there may well often be reasons against drawing an inference from the fact of discontinuance that the case has been recognised belatedly to be hopeless. There may be other reasons or drivers to which reference cannot safely or properly be made. However, in this case, the fact of

discontinuance after the collapse of settlement negotiations directed to the compromise of the Liquidators' proceedings abroad as well as here, taken together with all the circumstances to which I have previously referred, seems to me to support the thesis that the case was belatedly pursued in this jurisdiction with the aid of earlier-engineered publicity, not by reference to its perceived intrinsic merit, but as a last available means (apart from the appeal in Luxembourg) of forcing a world-wide settlement despite the failures in Luxembourg and New York, and the refusal of a stay here. This seems to me clearly to add weight to the conclusion that this is a case 'out of the norm'.

94. Further, the lack of any explanation for discontinuance must be weighted in all the apparent circumstances. These seem to me to include in particular

(1) the monetary forfeit of discontinuance (in that an order for adverse costs is a corollary) in any event; in this case the size of the forfeit suggests, no other explanation having been offered and in light of (2) below, that the applicants held a very dismal view of the prospects;

(2) the signs that it is not some funding restraint that has caused the discontinuance: for the Liquidators intend to proceed in Luxembourg, and it is no secret that they have enjoyed bondholder support;

(3) the nature of the claims and their reputational significance, which means that their sudden abandonment entails that the Respondents have not had the opportunity for vindication and yet would pay for the insult to the extent that their costs are irrecoverable;

(4) the abandon with which the Liquidators have sued in three jurisdictions, including an unsuitable one (New York) for a claim under the Insolvency Act against a company with its COMI here, and marshalled quantities of expert evidence, ramping up the costs of and pressures on the other parties;

(5) the overall fairness in the apparent circumstances of restricting the Respondents to recovery of costs on a standard basis, and of thereby reserving to the claimants the twin benefits of (a) any doubt as to reasonableness having to be resolved in their favour and of (b) the proportionality test, whilst denying the Respondents any prospect of vindication.

Conclusions

95. The Liquidators submitted, and I agree, that neither of the following matters can be said of themselves to take a case 'out of the norm':

(1) Pursuit of a case to judgment which fails (even resoundingly);

(2) Pursuit of an arguable case raising issues of law and fact which could not be resolved without a trial, even if the court considers with hindsight that the case was unlikely to succeed.

96. They further submitted that their claim was plainly arguable and had a real prospect of success; that in any event the Court could and should not make a fair assessment of

the merits; and that "once their attack on the merits is stripped away, the Respondents' grounds for seeking an order for indemnity costs are thin at best."

97. I accept that I should not seek at this stage summarily to determine the merits of the abandoned claims. But I do not accept that I should not make an assessment as to the purposes of pursuing the proceedings, or discount an overall view, after exchange of skeleton arguments, introduction of the primary documentation, four days of trial, and the sudden unexplained discontinuance, as to the weight of the difficulties in the way of establishing liability and more generally the egregious features of the case. Further, I consider that I am in a position to assess in broad terms the reasonableness of the pursuit and the manner of presentation of these proceedings having regard to the earlier proceedings abroad and the frailties and difficulties they had to overcome, and the sustained efforts to avoid the natural or 'home' jurisdiction. Put shortly, and in any event, I consider that I am in a position to determine in all the circumstances already apparent to the Court whether the case is such as fairly and properly to be characterised as 'out of the norm'.

98. My assessment is that this was high-risk litigation aggressively and very expensively pursued after failure of one sort or another in multiple jurisdictions, without demonstrable support in the contemporaneous documentary evidence; that the shape of the proceedings abroad, and the publicity the claims seem to have been calculated to attract, committed the Liquidators to an inappropriate form of action, it being difficult, perhaps impossible, to force the complaints into the structure of section 423; that the case always depended on extracting in cross-examination support for a thesis which had no or no material support in the contemporaneous documentation and which it clearly contradicted; and that whilst the ultimate consequences of the Recap and its fall-out might elicit the support of a jury, the claims had a much lesser chance of success before a judge in this jurisdiction.

99. In my assessment, the attempts to litigate anywhere but in the natural home for the relevant claims seem to me to indicate an appreciation of the severe difficulties of establishing the case here. Further, the case appears to me to have been launched and pursued with a view to a settlement which the very hostile publicity against the Respondents which the way the proceedings were formulated had engendered in the USA, and the continuing echoes of that publicity in this jurisdiction, might have led the Claimants to suppose might be on the cards, whatever might be the merits of the claims in law. The desire for a jury trial in New York, which remained even after the issue of proceedings here (as demonstrated by the extraordinary and unsuccessful application for a stay of these proceedings), reinforces my perception that the Liquidators and their funders were wary of strict legal adjudication of their claims.

100. Moreover, and in any event, I consider the following factors (all elaborated above) take this case well 'out of the norm':

(1) The pursuit to the doors of the Court, and four days beyond, of serious allegations of commercial impropriety, which were suddenly abandoned only when settlement talks failed, and then without explanation and without visible change in the forensic landscape;

(2) The changing nature of and inconsistencies in the case, both internally and with the expert evidence put forward;

(3) The publicity attending the case, stoked up by the prior proceedings in the USA and the highly-coloured way in which the case was presented both there and in this jurisdiction;

(4) The overall unfairness of preserving for the Claimants the twin benefits of the ordinary basis of assessment whilst exposing the Respondents, having had to respond to an expensively presented case, to the twin detriments of facing a shortfall in costs recovery and being denied the chance of vindication without explanation.

101. In such circumstances, I do not consider the standard basis of costs would reflect the extraordinary nature of the case and its sudden discontinuance or provide a fair balance in the circumstances. I direct the costs payable by the Claimants to be assessed on the indemnity basis accordingly.

102. I do not, however, feel able to accede to the submission that I should state that the allegations of commercial impropriety made against the 6 TPG individuals were unwarranted. That should not be taken as an indication that I had been persuaded they had a real prospect of success: on the contrary, they appeared to me to be thin. But what is sought is in the nature of an adjudication of the merits summarily: and I do not consider that would be proper. Further, as previously indicated, the ultimate commercial consequences of the Recap are such as to give rise, and indeed have given rise, to real disquiet; and that is so even though the claims made in respect of the circumstances were inappropriately framed.

Payment on Account

103. *CPR 44.2(8)* now provides that

> "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

104. The Liquidators accept there should be a payment on account of costs. The only issues are (a) the quantum of the "*reasonable sum*" and (b) timing.

105. In the present case the costs incurred by the Respondents are, inevitably, substantial. Although costs management was not ordered by Snowden J, costs budgets were produced pursuant to an order made at the CMC in July 2017. These showed that the estimated costs were, at that stage:

(1) £9,329,857.27 for the Liquidators;

(2) £7,012,899.70 for the Apax Respondents; and

(3) £4,819,023.11 for the TPG Respondents.

106. The Apax Respondents have estimated that the actual costs which have been incurred are £6,990,000. On the indemnity basis of assessment, they seek a payment on account of £5 million.

107. The TPG Respondents have estimated that their total costs of these proceedings are about £4.3 million. On the indemnity basis of assessment, they have sought an order for a payment account in the sum of £3 million (equating to approximately 70% of the total bill).

108. The Liquidators contest these figures. They contend that this is a case in which there is, to say the least, a large degree of uncertainty as to what will be allowed on detailed assessment. They suggest that, in the round and on the indemnity basis of assessment, a 50% discount should be applied at this stage.

109. As regards the Apax Respondents, the Liquidators contend that the costs estimate is too high, that this is illustrated by a comparison with the TPG Respondents' costs claims and more particularly that it would appear from admittedly only outline information available that:

(1) The costs budget assumed a total of £3.1 million for the 6-week trial, including weekends, and post-trial matters including hand-down of judgment, costs and consequentials. The estimated costs of refreshers, weekend work during trial and judgment and costs submission alone was over £575,000;

(2) The costs claimed for trial preparation have nearly doubled, from c.£608,000 to £1.15 million;

(3) The costs for the experts have nearly tripled, from c.£414,000 to £1.16 million, despite the fact they were not required to attend trial.

110. Further, the Liquidators drew to my attention that on the face of Mr Kosky's Witness Statement in support of the Apax Respondents' application he states that "*payments on account of costs which have already been ordered in respect of interim applications in these proceedings have been excluded*". It is of course not merely the payments on account of costs that should have been excluded, but the total costs claimed to which those payments on account relate, which are the subject of existing orders of the Court.

111. The Liquidators submitted that (a) in arriving at a reasonable sum the appropriate starting point is substantially below the costs budget filed by the Apax Respondents pursuant to Snowden J's order for the entirety of the trial, given that the claim was discontinued with over 5 weeks still to run; and (b) since the Liquidators have ATE insurance in place in the sum of £10 million there is no real prospect of the Respondents failing to recover their assessed costs, and they will have interest on the costs paid to their solicitors in the meantime.

112. The information provided to me does not enable precision; and in any event, the assessment of an appropriate interim payment on account inevitably is approximate, with an element of rough reckoning. I accept that there is a real prospect of some deduction in the fees claimed though I am not persuaded, in point of detail, that Mr Kosky was referring only to a deduction in respect of payments made on account. I consider that the payment on account to be made to the Apax Respondents should be £4.75 million.

113. Turning to the TPG Respondents, the Liquidators took what they described as "an important preliminary point". This was to the effect that none of the costs claimed in respect of the fees of a US law firm called Kasowitz, Benson, Torres and Friedman ("Kasowitz") should be recoverable, since Kasowitz are not on the record and as foreign lawyers could not have been providing *"legal services"* for the purposes of CPR 46.5(3)(b). The Liquidators cited in this context [2016] 4 Costs LR 687, at [17] (David Foxton QC), where the judge said this:

> "In my view, services provided by a lawyer qualified in another jurisdiction do not constitute "legal services" for the purposes of CPR 46.5(3)(b):
>
> (1) I do not see any material difference between the position of a lawyer qualified in another jurisdiction, and the specialist tax advisers considered in Agassi. In each case, the provider of those services no doubt has valuable knowledge and expertise to provide, but in neither case are they authorised to conduct litigation, nor are they subject to the wasted costs jurisdiction of the court.
>
> (2) While Dickinson Gleeson are qualified by reference to the law and procedure of their own jurisdiction, their position so far as English proceedings are concerned is that of lay persons. It seems clear that where a lay person such as a McKenzie Friend provides services of a kind which a lawyer would provide, their fees for doing so are not ordinarily recoverable in litigation from the opposing party (see for example Practice Note (McKenzie Friends: Civil and Family Courts [2010] 1 WLR 1881 at [27] to [29]).
>
> (3) The use of lawyers qualified in another jurisdiction to provide "legal services" in relation to the conduct [of] English litigation seems to me to be very far from the "unbundling" of legal services which Lord Woolf had in mind in Access to Justice – Final Report (1999) Section II Chapter 7 para 45 (which contemplated a solicitor or barrister providing legal services in relation to aspects of litigation, without being instructed for the conduct of the litigation as a whole)."

114. They also cited *Bühler AG v FP Spomax SA [*2008] EWHC 1109 (Pat). There, at [10], Mann J considered the recoverability of the fees of Polish lawyers retained by Polish clients in addition to English solicitors in English litigation, in the context of an application for a payment on account of costs. Mann J noted that it was not the occasion on which to decide whether any of the costs of the Polish lawyers were recoverable as a matter of principle, but that there was "*a serious question mark*" as to whether they were. At [11] and [12] he disregarded those fees entirely for the purposes of the payment on account in so far as they related to legal costs, but allowed a small sum for interpretation and translation.

115. They submitted that therefore all of the actual and estimated Kasowitz fees should be stripped out of the costs estimate as a starting point, reducing the total sum to £3,121,000.

116. The Liquidators submitted in this context also that this is a case in which there is, to say the least, a large degree of uncertainty as to what will be allowed on detailed assessment; but as against the TPG Respondents the focus of their attention was (apart from the points above) that there had not been provided a sufficient breakdown to enable any more detailed comparison of the costs now claimed and the cost budget filed; but that to take just one example, trial costs were estimated at £2,395,055, including refreshers, weekend work, post-judgment matters and 40% of expert fees. Yet the grand total now claimed is less than £300,000 under the costs budget filed for the whole of the 6-week trial.

117. In the round, the Liquidators submitted that an interim payment on account to the TPG Respondents should not exceed about £1.6 million, even on the indemnity basis of assessment.

118. In my judgment, that is too low, even accepting for present purposes, but without deciding, the irrecoverability of the bulk of the Kasowitz costs. I consider that the payment on account to be made to the TPG Respondents should be £2.65 million. If a definitive ruling is sought from this Court as to the Kasowitz issue, application can be made under the liberty to apply.

119. As to timing, the Liquidators asked for 21 days (rather than the default 14 days) to pay any amounts ordered by way of interim payment, because (1) the amount to be ordered is on any view a very substantial sum and (2) the Liquidators have ATE insurance in place. I am content with that.

Interest on Costs

120. Both sets of Respondents have sought orders for interest on costs from the date of payment of those costs to their English solicitors on the record to the date when those costs become subject to Judgments Act interest, pursuant to CPR 44.2(6)(g), which also provides that the Court can order that interest is payable on costs from or until a certain date, including a date before Judgment.

121. The Liquidators did not oppose an order for interest on costs but submitted that the rates sought were too high.

122. In the case of the Apax Respondents, the rate sought is 2% above base rate. The Liquidators argued that this is too high and unjustified; and that a rate of 1.5% would be more appropriate. I consider that the rate sought is appropriate, as was awarded in *Marathon Asset Management LLP v Seddon & Ors* [2017] EWHC 479, at least for the period up to the time of the hearing on costs. In light of my delay in providing this judgment I shall consider submissions, if sought to be made, in respect of any contention for there to be a higher rate after that date until the rate under the Judgments Act becomes payable.

123. The TPG Respondents have sought interest (1) by reference to US Libor, notwithstanding that their costs are claimed in sterling and (2) at 3% above that rate.

Both limbs are opposed by the Liquidators. I consider that, as in the case of the Apax Respondents, the appropriate rate is 2% above Base Rate at least for the period up to the time of the hearing on costs. I shall consider submissions as indicated in the last sentence of paragraph [122] in the case of the TPG Respondents, if sought to be made.

Disclosure of Funder Contributions

124. TPG applied for an order that the Liquidators provide the identities and details of each and every third-party funder who has provided funding which has in fact been used for the purposes of pursuing these proceedings and the amount of funding provided by each such funder.

125. The application affects the third-party funders and was not opposed by the Liquidators. The funders' solicitors were notified of the application and of the hearing. I did not understand either of the two funders to oppose, though one firm, Rosenblatt, made in correspondence the point that the amounts of funding by their clients have already been disclosed to the Respondents in the context of an application against the funders for security for costs in December 2017.

126. If, contrary to my understanding, the other funder opposes this, an application can be made on paper in the first instance setting out why they do so.

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The International Scene

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*18 SEEING DOUBLE?

Two Judges, Two Lawsuits, Two Types of Bankruptcy--But a Single Vision for Comity in Cross-Border Insolvencies

The recent decision in *In re National Bank of Anguilla (Private Banking Trust) Ltd.* [1] may cause readers to do a double-take. First, it is co-authored by two bankruptcy judges: Hon. **Stuart M. Bernstein** and Hon. **Martin Glenn**. Second, it arises from two separate lawsuits filed by a foreign representative for two separate foreign debtor entities, each of which is subject to its own administration proceeding in Anguilla. Third, each of the Anguilla foreign debtors is subject not only to one U.S. chapter 15 case, but also a second U.S. chapter 11 case. These tandem facts are tough to wrangle, but they also provided an opportunity for the New York bankruptcy court to explain a coordinated vision for the application of international comity principles in cross-border insolvencies.

Background

The U.S. proceedings began unremarkably enough. The administrator for two Anguilla banks subject to administration proceedings in Anguilla filed chapter 15 cases for those entities in the U.S. The bankruptcy court recognized the administrator as the banks' "foreign representative" and the Anguilla administration proceedings as "foreign main proceedings." However, the normalcy of the background facts ends there--and an unusual litigation history begins.

Before filing the U.S. chapter 15 cases, the foreign representative commenced actions in Anguilla against a number of entities, challenging certain transactions relating to the failure of the banks. In those actions, the foreign representative alleged that the banks' parent entities, their directors and their regulator breached their duties by upstreaming depositors' funds to the parent entities when the banks were insolvent.

The foreign representative sought declaratory, equitable and monetary relief in order to restore the alleged wrongfully upstreamed funds to the banks for the benefit of the banks' depositors. However, the foreign representative did not assert claims under Anguilla's fraudulent-transfer statutes, likely in part because those statutes did not recognize the constructive fraudulent-transfer theories that were most likely to be applicable to the transactions.

At the time that the foreign representative filed the chapter 15 cases for the Anguilla banks, he was looking for a way to enhance his claims relating to the upstreaming transactions, but chapter 15 alone could not accomplish that goal. While the filing of the chapter 15 cases for the banks allowed the foreign representative to seek and receive certain

protections in the U.S., one thing the chapter 15 filings did not allow was for the foreign representative to commence U.S. avoidance actions under chapter 5 of the U.S. Bankruptcy Code. Section 1521 (a) (7) of the U.S. Bankruptcy Code expressly prohibits a foreign representative from commencing such actions in the context of a chapter 15 case. [2]

Therefore, the foreign representative, wanting to commence those U.S. avoidance actions in order to recover the same funds that were the subject of the Anguilla actions, filed chapter 11 cases for the Anguilla banks after (and in addition to) filing the chapter 15 cases. While this layering of chapter 15 and 11 cases is uncommon, it is expressly authorized by statute.

Section 1511 permits a foreign representative to commence a plenary chapter 11 case for a foreign debtor whose foreign proceeding has been recognized as a foreign main proceeding, and § 1523 (a) provides that a foreign representative has standing in such a case to initiate chapter 5 avoidance actions. In addition, although the debtors were banks, they were permitted to file chapter 11 cases in the U.S. for the same reason they were permitted to file chapter 15 cases: They were not domestic U.S. banks and did not have a U.S. branch or agency that would disqualify them from chapter 11 under § 109 of the U.S. Bankruptcy Code. [3]

The debtors also satisfied the requirement that they have property in the U.S., apparently based on the unearned portion of the retainer paid to their legal counsel and the avoidance claims that they sought to assert to recover funds held at U.S. banks. [4] These facts combine to create an unusual ***19** situation: Banks (which are not usually U.S. debtors) being subject to multiple U.S. bankruptcy cases, including "plenary" chapter 11 cases, even though they have few U.S. assets.

Having commenced chapter 11 cases for the debtors, the foreign representative subsequently commenced actions in the U.S., including U.S. avoidance claims and other causes of action, covering some of the ground that was already the subject of the litigation commenced against the same defendants in the Anguilla courts several months before. Specifically, the foreign representative asserted claims for intentional and constructive fraudulent transfer and breach of fiduciary duty with respect to the upstreamed funds. The defendants in the U.S. avoidance actions moved to dismiss them on various grounds, including personal jurisdiction, subject-matter jurisdiction, *forum non conveniens*, international comity, Foreign Sovereign Immunity Act defenses, extraterritoriality and the act-of-state doctrine.

Since the chapter 15 and 11 cases of the two Anguilla banks were assigned to different New York bankruptcy judges, both Judges Bernstein and Glenn were called upon to decide whether the U.S. avoidance actions should be allowed to proceed or, in the alternative, whether the complementary principles of international comity and *forum non conveniens* should cause the New York court to defer to the courts in Anguilla. The tandem origins of the two disputes led to the resolution of those disputes by Judges Bernstein and Glenn in an uncommon single decision authored by both judges jointly.

The U.S. Bankruptcy Court Stays--but Does Not Dismiss--the U.S. Actions

Due to the pending insolvency proceedings and litigation in Anguilla, the U.S. bankruptcy court elected to stay the foreign representative's U.S. avoidance actions based on principles of international comity and the related doctrine of *forum non conveniens*. In determining to stay the proceedings based on international comity, the U.S. court applied the doctrine of comity among courts, pursuant to which a court can decline to exercise jurisdiction over a matter when a related case is pending in a foreign court. [5] The doctrine is motivated by "the proper respect for litigation in and the court of a sovereign nation, fairness to litigants, and judicial efficiency." [6]

Applying these considerations, the U.S. court determined that deference to the main insolvency proceedings in Anguilla warranted staying the U.S. actions. First, no party had questioned that the Anguilla insolvency proceedings were procedurally fair, and that the Anguilla court had an interest in the "equitable and orderly distribution" of the banks'

property.[7] Second, the U.S. court concluded that the foreign representative, in commencing the U.S. actions, was effectively trying ***68** to "reach around" the Anguilla insolvency proceedings in order to avoid the stay that had been imposed by the Anguilla court.[8] The U.S. court further noted that the foreign representative admitted that he filed the U.S. actions in order to assert constructive fraudulent-transfer claims that had no counterpart and could not be asserted under Anguilla law.[9]

The U.S. court separately concluded that deference to the related Anguilla litigation justified a stay of the U.S. actions. The U.S. court found that the Anguilla litigation involved the same subject matter and parties as the U.S. actions; therefore, resolution of that litigation would prove highly instructive to-- if not dispositive of--the foreign representative's U.S.-law claims.[10] While Anguilla law might not recognize constructive fraudulent-transfer claims and might be less favorable to the foreign representative than U.S. law in some respects, the court found that fact to be irrelevant to its determination that Anguilla was an adequate forum for the litigation.

According to the U.S. court, both forums allowed the foreign representative to essentially seek the same remedy: return of the upstreamed funds to the debtor banks, even if not through precisely the same causes of action.[11] Finally, the U.S. court concluded that while the facts alleged by the foreign representative implicated conduct in both Anguilla and the U.S., Anguilla had a stronger interest in the subject matter of the case based on its interest in having disputes involving its banking system resolved in its courts.[12]

For many of the same reasons that it stayed the U.S. actions based on comity principles, the U.S. court concluded that the doctrine of *forum non conveniens* also warranted the stay. *Forum non conveniens* is "a discretionary device permitting a court in rare instances to dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim" and is animated by many of the same concerns as comity.[13] Principal among the U.S. court's considerations in determining to stay the U.S. actions on this basis was its conclusion that the foreign representative's choice of the U.S. as a forum was not entitled to deference because it was, according to the court, "an exercise in forum-shopping" in an attempt to circumvent the obstacles that he faced to the pursuit of his claims in Anguilla.[14]

Despite its findings regarding comity and *forum non conveniens*, the U.S. court reasoned that on balance, a stay pending the outcome of the Anguilla litigation was more appropriate than dismissing the U.S. actions outright. The U.S. court also noted that depending on the outcome of the Anguilla proceedings, it might be appropriate for the foreign representative to return to the court to seek resolution of any claims in the U.S. actions that "are not resolved by the Anguilla courts and are not precluded by recognition and enforcement of judgments in Anguilla."[15]

Presumably, those "unresolved" claims might include the constructive fraudulent-transfer claims that appear to have been a motivating factor behind the foreign representative's U.S. litigation strategy from the outset. Upon such a return, the U.S. court cautioned that the foreign representative would still have to address the defendants' other arguments for dismissal, including questions of jurisdiction.

Conclusion

Faced with potentially competing litigation in the U.S. and Anguilla, Judges Bernstein and Glenn employed international comity and related doctrines to put the U.S. avoidance actions on hold, but did not dismiss them outright. They entered this decision effectively to let the separate, and earlier-filed, Anguilla litigation run its course, while at the same time preserving the potential causes of action filed in the U.S. litigation. This decision is as deferential as it is pragmatic: It both looks to the Anguilla courts to resolve issues that are, in the first instance, Anguilla issues, and maintains the possibility that U.S. litigation could be necessary to round out the legal rights of the litigation parties if the Anguilla courts are unable to tie up all loose ends.

This result seems balanced on its surface, neither allowing the U.S. litigation to proceed nor dismissing it outright. However, it also seems to allow the foreign representative the potential for "multiple bites at the apple" by litigating in Anguilla first and preserving any incremental claims in the U.S. for a second round. In that respect, the result also seems to increase the uncertainty for both parties.

For the defendants, it is unclear not only what claims might be asserted against them, but also in what courts they might have to defend themselves. For the foreign representative, it is unclear whether a true "second chance" will exist in the U.S. due to potential preclusion and jurisdiction issues. For both parties, the decision could require difficult strategic judgments regarding the assertion of claims and defenses in Anguilla, because those judgments may or may not have later effects in subsequent U.S. litigation.

Accordingly, cases that arose from a background of prismatic complexity appear to have resulted, perhaps unavoidably, in a decision that, while focused in its single vision for international comity, does not truly resolve basic questions of what types of claims should proceed in what courts in cross-border insolvencies. In the end, the decision seems to leave both plaintiffs and defendants unclear on what to expect--other than knowing where they will be litigating first.

Footnotes

a1 *George Shuster is a partner and Benjamin Loveland is counsel with WilmerHale in the firm's Boston and New York offices.*

1 580 B.R. 64 (Bankr. S.D.N.Y. 2018).

2 11 U.S.C. § 1521(a)(7) ("Upon recognition of a foreign proceeding ... the court may ... grant any appropriate relief, including ... 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).").

3 Section 109(b)(3)(B), made applicable to chapter 15 debtors by § 1501 (c), provides that a foreign bank cannot be a debtor if it has a branch or agency in the U.S. *See Flynn v. Wallace (In re Irish Bank Resolution Corp. Ltd. (In Special Liquidation))*, 538 B.R. 692, 696 (D. Del. 2015).

4 11 U.S.C. § 1528 ("After recognition of a foreign main proceeding, a case under another chapter of [title 11] may be commenced only if the debtor has assets in the United States."); *see also Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 247 (2d Cir. 2013); *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603, 612 (Bankr. S.D.N.Y. 2018) ("In a controversial ruling, the Second Circuit applied the requirements of section 109 (a) to eligibility to file a chapter 15 case.").

5 This doctrine is distinct from the doctrine of comity among nations, which can apply to limit the reach of the Bankruptcy Code's avoidance provisions to transactions that are connected with a foreign state. *Nat'l Bank of Anguilla*, 580 B.R. at 93.

6 *Nat'l Bank of Anguilla*, 580 B.R. at 94 (quoting *Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms Inc.*, 466 F.3d 88, 94 (2d Cir. 2006).

7 580 B.R. at 95-96.

8 *Id.* at 96.

9 *Id.* at 97.

10 *Id.* at 99.

11 *Id.* at 100.

12 *Id.* at 102.

13 *Id.* at 84.

14 *Id.* at 86.

15 *Id.* at 92.

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AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED, Plaintiff,
v.
APR ENERGY HOLDING LIMITED, Defendant.

17-MC-00216 (VEC)
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Signed 09/01/2017

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MEMORANDUM OPINION & ORDER

VALERIE CAPRONI, United States District Judge

***1** Australia and New Zealand Banking Group Limited ("ANZ Bank" or "Bank") has commenced this action in order to quash a subpoena served on it pursuant to 28 U.S.C. § 1782 by APR Energy Holding Limited ("APR"). APR seeks documents from ANZ Bank as a nonparty for use in a foreign arbitration proceeding against the country of Australia. Because the Court lacks personal jurisdiction over ANZ Bank, the Bank's motion to quash is granted.

BACKGROUND

ANZ Bank is incorporated and headquartered in Australia. Kucharski Decl. ¶ 99(a) (Dkt. 4). It has a significant global presence, but the majority of its operations are based in the Oceania and Asia-Pacific regions; a small fraction of ANZ Bank's activities take place in New York. Maddigan Decl. ¶¶ 3-7 (Dkt. 3). For example, ANZ Bank has 1,127 branches and representative offices; five are in the United States, including one in New York and four in Guam and American Samoa. *Id.* ¶ 3. Only 140 out of ANZ Bank's 46,554 full-time employees are based in the New York office. *Id.* ¶ 6. In addition, only 2% of the Bank's $697 billion in assets, 2% of its operating income, and 2% of its profits are attributable to the New York office. *Id.* ¶ 7.

This dispute is preceded by extensive multi-national litigation, which the Court will address briefly. In July 2013, ANZ Bank recorded a general security interest over all present and after-acquired property of Forge Group Power Pty. Ltd. ("Forge"), an Australian company, as security for a loan to Forge. Patrikoff Decl. ¶ 13 (Dkt. 12-2); Memorandum of Law in Support of Application for Judicial Assistance at 3 (Dkt. 12-1). In October 2013, APR, a supplier of "turnkey power generation solutions," through its subsidiaries, was assigned ownership of four mobile gas turbines that were being leased by Forge, plus the lease itself. Kucharski Decl. ¶ 8.

On February 11, 2014, Forge initiated a bankruptcy proceeding. *Id.* ¶ 9. Pursuant to the Australian Personal Property Securities Act ("PPSA"), if a holder of a non-possessory interest in personal property fails to register its interest prior to the time the party in possession of the property becomes insolvent, title to the property vests with the estate of the party in possession, and the non-possessory interest holder becomes an unsecured creditor. *See id.* ¶¶ 42-47. Because APR did not register the required financing statement relating to the four turbines, APR became an unsecured creditor, and title to the turbines vested with the estate of the entity in possession—Forge. *Id.* ¶ 10. Forge's receivers, who were appointed by ANZ Bank (Forge's primary secured creditor), refused APR's demand for the turbines, despite APR's claim that it was entitled to them under the terms of the lease. Patricoff Decl. ¶¶ 15-18.

APR and others initially brought suit in federal court in Florida to claim title to the turbines. *See Power Rental OP Co. Austl. LLC v. Forge Grp. Power Pty. LTD*, No. 3:14-CV-00445 (M.D. Fla filed Apr. 17, 2014). Subsequently, APR agreed to litigate its dispute with Forge in an Australian court. Kucharski Decl. ¶¶ 13, 15. The parties litigated the case to Australia's highest court, and Forge prevailed. *Id.* ¶¶ 16-18. After the Australian litigation had run its course, in July 2016, APR sued Forge in Texas state court. *See APR Energy Holdings Ltd. V. Forge Grp. Power*

Ltd., No. 201646548 (Tex. Dist. Ct. Harris Cty. filed July 12, 2016). The Texas court dismissed the case for lack of personal jurisdiction; APR's appeal is pending. Kucharski Decl. ¶¶ 20-22.

***2** On April 14, 2017, APR initiated arbitration against Australia pursuant to Article 3 of the UNCITRAL Arbitration rules and the Australia-United States Free Trade Agreement ("AUSFTA"). Rooney Decl. ¶¶ 14-15 (Dkt. 11-2). APR claims that the divestment of its ownership interest in the turbines, through the application of the PPSA, is an expropriation of private property that violates the AUSFTA. *See* APR Energy Holdings Limited's Memorandum of Law in Opposition ("Def. Opp.") 4, 7 (Dkt. 11). On May 15, 2017, Australia responded to APR's notice of arbitration, arguing that the tribunal lacks jurisdiction and that APR's claims are without merit. Rooney Decl. ¶ 16. APR and Australia are in the process of appointing three arbitrators. *Id.* ¶ 21.

On April 28, 2017, in a separate proceeding in this court, Judge Oetken granted APR's *ex parte* application to subpoena ANZ Bank's New York branch office pursuant to 28 U.S.C. § 1782. Order, No. 1:17-MC-00143-P1 (S.D.N.Y. filed Apr. 28, 2017), ECF No. 4. Pursuant to its subpoena, APR seeks documents from ANZ Bank regarding ANZ Bank's financial transactions with Forge, Forge's financial condition and insolvency during the relevant period, the recording of ANZ Bank's lien, and the actions taken by Forge's receivers. *See* Lurie Decl. Ex. A; Patricoff Decl. ¶¶ 26-32. APR claims that it needs the documents to show that the PPSA enabled ANZ Bank, acting through Forge's receivers, to take APR's investment in Australia in a way that violated the AUSFTA. *See* Def. Opp. 9. All responsive documents are located in Australia. Kucharski Decl. ¶ 99(c); Oral Argument Tr. 14:7-17. On June 22, 2017, ANZ Bank moved to quash the subpoena. Dkt. 1.

DISCUSSION

Pursuant to 28 U.S.C. § 1782, "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal...." 28 U.S.C. § 1782. An applicant must satisfy three requirements in order for a court to enforce a section 1782 subpoena: (1) the person from whom discovery is sought must "reside" or "be found" in the district; (2) the discovery must be for use in a proceeding in a foreign tribunal; and (3) the applicant must be an "interested person." [1] *In re Edelman*, 295 F.3d 171, 175-76 (2d Cir. 2002). If the three requirements are met, the court has discretion whether to enforce the subpoena, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 260 (2004), and there are a series of factors the court must consider when exercising its discretion, *see In re Godfrey*, 526 F. Supp. 2d 417, 419 (S.D.N.Y. 2007).

1 In addition, section 1782 provides, "To the extent that the [court's] order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure." 28 U.S.C. § 1782.

The parties dispute whether these criteria are satisfied. In particular, the parties dispute whether ANZ Bank resides or is found in New York on account of its New York branch office. ANZ Bank argues that section 1782's requirement that the person be found or reside in the district refers to personal jurisdiction. *See* Memorandum of Law in Support of Australia And New Zealand Banking Group Limited's Motion to Quash ("Pl. Mem.") 9-10 (Dkt. 2). ANZ Bank points to *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), in which the Supreme Court held that in order for there to be general personal jurisdiction in a state, a company's contact with that state must be so constant and pervasive when judged against its national and global activities that it is essentially at home in that state. *Id.* (citing 134 S. Ct. at 761-62). ANZ Bank argues that its contacts with New York do not rise to that level and that therefore there is no personal jurisdiction over it. *See id.* at 10. APR, on the other hand, contends that section 1782's requirement that the person be found or reside in the district does not refer to personal jurisdiction and that ANZ Bank is found in New York as that term is used in section 1782 because it has continuous and systematic contacts through its New York office. *See* Def. Opp. 9, 12-13; Oral Argument Tr. 2:21-3:11, 6:18-21, 14:23-15:7.

***3** Whether section 1782's requirement that the person be found or reside in the district equates to a requirement that the court have personal jurisdiction over the person in order to enforce a section 1782 subpoena is unclear. The District Court for the District of Columbia explicitly highlighted this ambiguity:

> Courts considering whether to grant a petition for assistance pursuant to 28 U.S.C. § 1782 have analyzed their authority by referencing the language in section 1782—whether it is a district "in which a person resides or is found"—rather than discussing whether the Court has subject matter and personal jurisdiction over the entity or person from whom discovery is sought. To some extent, courts have considered these inquiries to be the same.... At minimum, they overlap considerably. ...

In re Application of Thai-Lao Lignite (Thailand) Co., Ltd., 821 F. Supp. 2d 289, 295 n.4 (D.D.C. 2011) (internal citations omitted).

Regardless of what section 1782 requires, the Constitution's due process protections apply. To lawfully exercise personal jurisdiction, a federal court must satisfy three primary requirements: (1) there must be proper service, (2) there must be a statutory basis to exercise personal jurisdiction, *and* (3) the exercise of personal jurisdiction must comport with constitutional due process. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59-60 (2d Cir. 2012). The Court need not reach the issue of whether section 1782 provides a basis to exercise personal jurisdiction—essentially the issue disputed by the parties as described above—because the constitutional requirements are not satisfied here.

APR argues that courts have not applied the Constitution's due process protections to section 1782 subpoenas. *See* Def. Opp. 13-14; Oral Argument Tr. 2:18-3:11. The Second Circuit, however, has held unequivocally that a federal court "must have personal jurisdiction over a nonparty in order to compel it to comply with a valid discovery request under Federal Rule of Civil Procedure 45." *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 141 (2d Cir. 2014); *see also Matter of Marc Rich & Co., A.G.,* 707 F.2d 663, 669 (2d Cir. 1983) ("A federal court's jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction."). There is no meaningful distinction from a constitutional standpoint between a subpoena issued to a nonparty pursuant to Rule 45 and a subpoena issued to a nonparty pursuant to section 1782, and APR has failed to articulate any such distinction. Accordingly, the Court must have personal jurisdiction over ANZ Bank in order to enforce APR's subpoena.

The Court does not have general personal jurisdiction over ANZ Bank. In *Daimler*, the Supreme Court held that a corporation may be subject to general jurisdiction in a state only when its contacts with the state are so "continuous and systematic as to render [it] essentially at home in the forum [s]tate," taking into account the corporation's national and global activities. 134 S. Ct. at 761-62 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). The Supreme Court explained that, absent exceptional circumstances, a corporation is "at home" for the purpose of constitutional due process only in a state that is the corporation's place of incorporation or its principal place of business. *See id.* at 761 & n.19. In *Gucci*, the Second Circuit applied *Daimler* to hold that the court did not have general jurisdiction over a nonparty foreign bank in order to enforce a subpoena served on the bank because the mere fact that the bank had branch offices in New York did not satisfy the Constitution's due process requirements. 768 F.3d at 135, 141. The foreign bank was incorporated and headquartered elsewhere, it had four branch offices in the United States, and only a small portion of its worldwide business was conducted in New York. *Id.* at 135.

***4** This case fits squarely within the precedent set by *Gucci*.[2] As described above, ANZ Bank is incorporated and headquartered in Australia. Kucharski Decl. ¶ 99(a). The Bank has one branch office in New York, only 2% of its assets, operating income, and profit are attributable to the New York Office, and only 0.3% of its employees are based in New York. Maddigan Decl. ¶¶ 3, 6-7. This degree of contact does not render ANZ Bank essentially at home in New York, nor do exceptional circumstance exist that would otherwise support general jurisdiction. *See Motorola Credit Corp. v. Uzan*, 132 F. Supp. 3d 518, 521 (S.D.N.Y. 2015) (applying *Gucci* to hold that the court did not have general jurisdiction over the branch offices of foreign banks in order to enforce a nonparty subpoena); *see also Leibovitch v. Islamic Republic of Iran*, 852 F.3d 687, 689-90 (7th Cir. 2017) (applying *Daimler* to hold that the court did not have general jurisdiction over branch offices of foreign banks in order to enforce a nonparty Rule 45 subpoena).

2 APR conceded at oral argument that if *Daimler* applies to a subpoena issued pursuant to section 1782, the subpoena in this case would be quashed. Oral Argument Tr. 7:14-8:1.

APR argues that ANZ Bank has nevertheless consented to jurisdiction in New York because its New York branch is regulated by the International Banking Act of 1978 ("IBA"), 12 U.S.C. §§ 3101-3108, which applies federal banking law to U.S. branches of foreign banks. Def. Opp. 10-11; Oral Argument Tr. 4:1-7. The Second Circuit has rejected this species of argument. The Second Circuit concluded that a foreign corporation did not consent to the exercise of general jurisdiction simply by registering to do business and appointing an agent under the Connecticut business-registration statutes: in light of the "more demanding 'essentially at home' test enunciated in *Goodyear* and *Daimler* ... federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate 'consent'—perhaps unwitting—to the exercise of general jurisdiction by state courts, particularly in circumstances where the state's interests seem limited." *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 637 (2d Cir. 2016) (footnote omitted). The Second Circuit also warned that interpreting a foreign corporation's compliance with the Connecticut business registration statute as consent to jurisdiction "would risk unravelling the jurisdictional structure envisioned in *Daimler* and *Goodyear* based only on a slender inference of consent pulled from routine bureaucratic measures that were largely designed for another purpose entirely." *Id.* at 639.

Similarly, "[n]othing in the IBA causes [a foreign bank's] branches to be 'at home' in the U.S." *AM Tr. v. UBS AG*, 78 F. Supp. 3d 977, 985 (N.D. Cal. 2015), *aff'd*, 681 Fed.Appx. 587 (9th Cir. 2017). APR points to language in the IBA subjecting a foreign bank's "Federal branch or agency" to the "rules, regulations, and orders" considered appropriate by the Comptroller of the Currency, including provisions for service of process, and to language requiring that "operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank ... and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations...." Def. Mem. 10 (citing 12 U.S.C. § 3102(b)).[3] These provisions do not indicate that a foreign bank consents to general personal jurisdiction by subjecting itself to the IBA; they merely provide that a foreign bank shall conduct its operations in accordance with U.S. law. APR also cites to the provision in the Code of Federal Regulations that defines the "home state" of a foreign bank operating pursuant to the IBA as "the state in which the foreign bank has a branch, agency, subsidiary commercial lending company, or subsidiary bank." *Id.* at 10-11 (citing 12 C.F.R. § 28.11(n)). Nothing in the relevant regulations or the IBA provides that "home state" as defined in those regulations is a foreign bank's "home state" for the purpose of general jurisdiction; indeed, the regulations also define a foreign bank's "home country" as "the country in which the foreign bank is chartered or incorporated." 12 C.F.R. § 28.11(l).

3 APR also cites the comparable provisions in the Code of Federal Regulations. Def. Mem. 10-11 (citing 12 C.F.R. §§ 28.13(a)(1), 28.21).

***5** The lack of express language in the IBA and related regulations providing that a foreign bank consents to general jurisdiction precludes a finding that ABZ Bank consented to general jurisdiction when it subjected itself to the IBA. *See Brown*, 814 F.3d at 636 (no consent to general jurisdiction pursuant to the Connecticut registration statute in part because the statute does not "contain express language alerting the potential registrant that by complying with the statute and appointing an agent it would be agreeing to submit to the general jurisdiction of the state courts."); *but cf. Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (holding foreign corporation consented to jurisdiction because a Pennsylvania statute explicitly provided that registration by a foreign corporation "shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person." (quoting 42 Pa. Cons. Stat. § 5301)). The IBA cannot be fairly construed as requiring foreign banks to consent to general jurisdiction, and "[a] more sweeping interpretation would raise constitutional concerns prudently avoided absent a clearer statement by [Congress]." *Brown*, 814 F.3d at 623.[4]

4 Registration under New York banking law is also not consent to general jurisdiction. *See Sullivan v. Barclays PLC*, No. 13-CV-2811 (PKC), 2017 WL 685570, at *40 (S.D.N.Y. Feb. 21, 2017) ("New York does not have personal jurisdiction over any Foreign Defendant by reason of its registration of a branch office pursuant to New York Banking Law § 200."); *In re: LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 (NRB), 2016 WL 1558504, at *7 (S.D.N.Y. Apr. 15, 2016) (same).

The case law regarding specific personal jurisdiction in the context of nonparty discovery requests is sparse and unsettled. As the Second Circuit noted, "the Supreme

Court has not ... addressed specific jurisdiction over nonparties." *Gucci Am., Inc.*, 768 F.3d at 136. "At least one circuit has translated [the specific personal jurisdiction] test to nonparty discovery requests by focusing on the connection between the nonparty's contacts with the forum and the discovery order at issue." *Id.* at 141 (citing *Application to Enforce Admin. Subpoenas Duces Tecum of the S.E.C. v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996)); *see also Leibovitch*, 852 F.3d at 690 ("[A] district court can have ... 'specific' jurisdiction over a corporation if the corporation's activities within the jurisdiction of the court are closely related to the lawsuit or, as in this case, to subpoenas ... issued within that jurisdiction."). And, at least one district court in the Second Circuit has applied that specific personal jurisdiction test to a nonparty. *See Gucci Am., Inc. v. Weixing Li*, 135 F. Supp. 3d 87, 98-99 (S.D.N.Y. 2015), *appeal withdrawn* (Feb. 16, 2016).

There is no nexus between ANZ Bank's New York contacts and the subject matter of the discovery sought by APR pursuant to the section 1782 subpoena. The subject matter of the requested discovery concerns turbines in Australia that were leased to an Australian company that received loans from an Australian bank and went into bankruptcy in Australia. None of the requested discovery is located in the United States. Kucharski Decl. ¶ 99(c); Oral Argument Tr. 14:7-17. APR is not aware of any facts connecting ANZ Bank's New York branch office with the underlying facts of the case beyond the possibility that funds transferred pursuant to a letter of credit in favor of Forge's receivers issued by Bank of America's San Francisco branch and sponsored by APR *might* have passed through New York. Oral Argument Tr. 4:11-5:22; *see Leibovitch*, 852 F.3d at 690 (holding there was no specific jurisdiction to enforce a nonparty subpoena served on foreign banks' U.S. branches because the subpoenas were "not tailored to the banks' presence or activities in the United States").

During oral argument, APR requested limited jurisdictional discovery to develop facts in support of specific jurisdiction in the event this Court were to hold that personal jurisdiction is required for 1782 subpoenas. Oral Argument Tr. 7:14-21. In order to be entitled to jurisdictional discovery, APR must make a "sufficient start" toward establishing personal jurisdiction, *Tarsavage v. Citic Tr. Co.*, 3 F. Supp. 3d 137, 148 (S.D.N.Y. 2014), and must rely on more than "conclusory allegations" or "mere speculations or hopes that jurisdiction exists" so that jurisdictional discovery does not "lead to an unwarranted fishing expedition," *Reich v. Lopez*, 38 F. Supp. 3d 436, 459 (S.D.N.Y. 2014) (internal quotation marks and citations omitted), *aff'd*, 858 F.3d 55 (2d Cir. 2017). Because APR has not done so, the Court will not permit it to pursue jurisdictional discovery.

CONCLUSION

***6** For the foregoing reasons, ANZ Bank's motion to quash APR's section 1782 subpoena is GRANTED. The Clerk of Court is respectfully directed to terminate the open motion at docket entry 1 and to close the case.

SO ORDERED.

All Citations

Slip Copy, 2017 WL 3841874

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE APPLICATION OF ANTONIO DEL VALLE RUIZ AND OTHERS FOR AN ORDER TO TAKE DISCOVERY FOR USE IN FOREIGN PROCEEDINGS PURSUANT TO 28 U.S.C. § 1782	**OPINION AND ORDER** 18 Misc. 85 (ER)
IN RE APPLICATION OF PACIFIC INVESTMENT MANAGEMENT COMPANY LLC AND ANCHORAGE CAPITAL GROUP, L.L.C. FOR AN ORDER TO TAKE DISCOVERY FOR USE IN FOREIGN PROCEEDINGS PURSUANT TO 28 U.S.C. § 1782	18 Misc. 127 (ER)

Ramos, D.J.:

Petitioners in the above-captioned actions have applied for court orders to conduct discovery for use in foreign proceedings, pursuant to Title 28, United States Code, Section 1782. Petitioners in both actions seek discovery against Banco Santander, S.A., Santander Holdings U.S.A., Inc., and Santander Bank N.A (collectively, "Santander"). Petitioners in one of the actions also seek an order to conduct discovery against Santander Investment Securities Inc. For the reasons set forth below, Petitioners' applications are GRANTED in part and DENIED in part.

I. BACKGROUND

Banco Popular Español, S.A. was at one point Spain's sixth largest bank, with € 147 billion in assets. *See* Decl. of Javier H. Rubinstein in Support of Petition for 28 U.S.C. § 1782 Discovery ¶ 21 ("Rubinstein Decl."), Case No. 18 Misc. 85, Doc. 16.[1] On June 6, 2017, the European Central Bank, which comprises one part of Europe's system of banking supervision, informed the European Single Resolution Board, another part of Europe's system of banking

[1] Both sets of Petitioners allege similar (if not identical) facts, most of which are undisputed by Santander. Accordingly, the Court draws from the undisputed facts contained in the Rubenstein Declaration, which is offered in support of the application for discovery in Case No. 18 Misc. 85. All references to the Rubenstein Declaration incorporate the documents cited therein.

supervision, that Banco Popular was failing or likely to fail. *See id.* ¶ 54. On that same day, and at the direction of the Single Resolution Board, Spain's national banking supervisory authority, the Fondo de Reestructuración Ordenada Bancaria ("FROB"), invited several banks to submit offers to acquire Banco Popular. *Id.* Of the banks invited to submit a bid, Banco Santander, S.A. was the only bank to submit one. *Id.* ¶ 56. The next day, June 7, 2017, the Single Resolution Board and FROB accepted Santander's €1 offer and declared Santander the purchaser of Banco Popular. *Id.* ¶ 59. The government-ordered sale of Banco Popular was ostensibly done pursuant to a "resolution," a process in which the aforementioned authorities can force the total or partial disposal of a financial institution's assets when certain requirements are met. *See id.* ¶¶ 46–50. Banco Popular was the first European Union financial institution ever to undergo a "resolution." *Id.* ¶ 5.

Petitioners in the instant actions are former investors in Banco Popular. Petitioners allege that they lost virtually all of their investments when Santander purchased Banco Popular for €1. Petitioners in Case No. 18 Misc. 127—the "PIMCO Petitioners"—manage funds that held Banco Popular bonds. Petitioners in Case No. 18 Misc. 85—the "Del Valle Ruiz Petitioners"—comprise a group of 55 former investors in Banco Popular. Collectively, Petitioners claim to have lost over one billion euros because of the forced sale.

Following Santander's acquisition of Banco Popular, Petitioners initiated actions before the General Court of the Court of Justice of the European Union against the agencies responsible for Banco Popular's resolution. In those actions, Petitioners seek to annul the resolution of Banco Popular, asserting that the resolution was illegal. In addition, Del Valle Ruiz Petitioners initiated investor-state arbitration proceedings against Spain, pursuant to the Mexico-Spain Bilateral Investment Treaty. Del Valle Ruiz Petitioners contend that the Spanish government

"actively participated in the design and decision-making process that ultimately led to the European Commission's and the Single Resolution Board's decision to resolve [Banco Popular]." *Id.* ¶ 2. And PIMCO Petitioners, for their part, filed writs with the Spanish Central Criminal Court to join Spanish criminal proceedings against Banco Popular and its former management personnel. Declaration of Peter Calamari ("Calamari Decl.") ¶¶ 47–48, Case No. 18 Misc. 127, Doc. 8. Neither group of Petitioners have initiated foreign actions against Santander, however.

Pursuant to 28 U.S.C. § 1782, both groups of Petitioners apply for orders from this Court to conduct discovery against Santander for use in the foreign proceedings. PIMCO Petitioners also seek discovery from Santander Investment Securities Inc. Below, the Court analyzes Petitioners' applications.

II. ANALYSIS

Pursuant to Section 1782, "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." 28 U.S.C. § 1782(a). To obtain a court order for discovery under Section 1782, an applicant must establish the following: "(1) that the person from whom discovery is sought reside[s] (or [can] be found) in the district of the district court to which the application is made, (2) that the discovery [is] for use in a proceeding before a foreign tribunal, and (3) that the application [is] made by a foreign or international tribunal or 'any interested person.'" *In re Edelman*, 295 F.3d 171, 175–76 (2d Cir. 2002) (citation omitted).

"Once a district court is assured that it has jurisdiction over the petition, it *may* grant discovery under § 1782 *in its discretion*." *Kiobel v. Cravath, Swaine & Moore LLP*, 895 F.3d

238, 244 (2d Cir. 2018) (emphases added). "To guide district courts in the decision to grant a Section 1782 petition, the Supreme Court in *Intel* [*Corp. v. Advanced Micro Devices, Inc.*], 542 U.S. 241 [(2004)], discussed non-exclusive factors . . . to be considered in light of the 'twin aims' of Section 1782: 'providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.'" *Id.* (citation omitted). The four *Intel* factors are as follows:

> (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding," in which case "the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought form a nonparticipant in the matter arising abroad," given that "[a] foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence;"
>
> (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance;"
>
> (3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States;" and
>
> (4) whether the discovery request is "unduly intrusive or burdensome."

Intel, 542 U.S. at 264–65; *see also Kiobel*, 895 F.3d at 244 (quoting same).

In this case, Santander purports to challenge the propriety of court-ordered discovery pursuant to Section 1782 on both statutory and discretionary grounds. At oral argument, however, Santander effectively conceded that Petitioners, at minimum, have satisfied the second and third statutory elements of Section 1782. Accordingly, in the analysis below, the Court addresses the first statutory element only, ultimately finding a lack of authority to grant Petitioners' applications.

A. Applicable Legal Standard

To obtain a court order for discovery under Section 1782, an applicant must initially establish that the person from whom discovery is sought resides (or can be found) in the district where the application is made. *In re Edelman*, 295 F.3d at 175–76. Section 1782 does not define what it means to "reside" or be "found" in a particular district, and "[i]t is unclear whether [Section] 1782's statutory prerequisite that a person or entity reside or be found in a district is coextensive with whether a court has personal jurisdiction over that person or entity." *In re Sargeant*, 278 F. Supp. 3d 814, 820 (S.D.N.Y. 2017).[2] However, several courts within this District have recognized that, "[a]t minimum . . . compelling an entity to provide discovery under § 1782 must comport with constitutional due process." *Id.*; *accord, e.g.*, *In re Fornaciari*, No. 17 Misc. 521, 2018 WL 679884, at *2 (S.D.N.Y. Jan. 29, 2018); *Austl. & N.Z. Banking Grp. Ltd. v. APR Energy Holding Ltd.*, No. 17 Misc. 216 (VEC), 2017 WL 3841874, at *3 (S.D.N.Y. Sept. 1, 2017) ("Whether section 1782's requirement that the person be found or reside in the district equates to a requirement that the court have personal jurisdiction over the person in order to enforce a section 1782 subpoena is unclear. . . . Regardless of what section 1782 requires, the Constitution's due process protections apply."); *cf. Gucci Am., Inc. v. Li*, 768 F.3d 122, 141 (2d Cir. 2014) ("A district court . . . must have personal jurisdiction over a nonparty in order to compel it to comply with a valid discovery request under Federal Rule of Civil Procedure 45." (footnote omitted)).

[2] Three requirements must be satisfied before a federal court may lawfully exercise personal jurisdiction: (1) "the plaintiff's service of process upon the defendant must have been procedurally proper," (2) "there must be a statutory basis for personal jurisdiction that renders such service of process effective," and (3) "the exercise of personal jurisdiction must comport with constitutional due process principles." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59–60 (2d Cir. 2012).

Given that constitutional due process principles apply to an applicant's request for discovery, it follows that district courts should employ the same analysis as when determining whether personal jurisdiction is present over a person. Indeed, "Hans Smit, a leading academic commentator and drafter of [Section] 1782, has commented that the language defining [Section 1782's] in personam reach must be given a liberal construction commensurate with the purpose to liberalize the assistance given to foreign and international tribunals," and therefore, "[i]nsofar as the term 'found' applies to legal rather than natural persons, it may safely be regarded as referring to judicial precedents that equate systematic and continuous local activities with presence." *In re Sargeant*, 278 F. Supp. 3d at 819–20 (some internal quotation marks and alterations omitted) (quoting Hans Smit*, American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Com. 1, 9–10 (1998)); *accord In re Godfrey*, 526 F. Supp. 2d 417, 422 (S.D.N.Y. 2007) (quoting same). Put differently, a court may issue a discovery order against a person pursuant to Section 1782 only if "the relationship of the person addressed to the district is such as to warrant the exercise of in personam authority under the due process clause." *In re Sargeant*, 278 F. Supp. 3d at 820 (citation omitted); *see also In re Thai-Lao Lignite (Thai.) Co.,* 21 F. Supp. 2d 289, 294 n.4 (D.D.C. 2011) (concluding that the question whether a particular district is one "in which a person resides or is found" and the question whether the district court has personal jurisdiction over the person from whom discovery is sought are two questions that, "[a]t minimum, . . . overlap considerably").

1. *General Jurisdiction over Santander*

In analyzing personal jurisdiction, the Supreme Court has long distinguished between "specific or case-linked jurisdiction and general or all-purpose jurisdiction."[3] *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549, 1558 (2017). In *Daimler AG v. Bauman*, however, the Supreme Court cast doubt upon prior decisions in which it upheld the exercise of general personal jurisdiction based merely upon a corporation "doing business" or having a local office within a particular forum, 571 U.S. 117, 138 n.18 (2014), and instead clarified that, with respect to foreign corporations (i.e., "legal" persons), the touchstone of general personal jurisdiction is "whether that corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum,'" *id.* at 138–39 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). The Supreme Court explained that a corporation's place of incorporation and principal place of business are "paradig[m] . . . bases for general jurisdiction." *Id.* at 137 (alterations in original). Moreover, while the Court cautioned that it was not "foreclos[ing] the possibility that in an *exceptional case* . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in the State," *id.* at 139 n.19 (emphasis added), notably, the only example of an "exceptional case" cited by the Court was *Perkins v. Benguet Consolidation Mining Co.*, 342 U.S. 437, 448 (1952). In that case, the Supreme Court found that an Ohio state court could exercise general personal jurisdiction over a Filipino corporation on a claim that neither arose in Ohio nor related to the corporation's activities in Ohio because the corporation was forced to move its operations to Ohio during

[3] In general, "all-purpose jurisdiction permits a court to hear 'any and all claims' against an entity. Specific jurisdiction, on the other hand, permits adjudicatory authority only over issues that 'aris[e] out of or relat[e] to the [entity's] contacts with the forum.'" *Gucci Am., Inc. v. Li*, 768 F.3d 134 (2d Cir. 2014) (alterations in original) (citations omitted).

World War II and, consequently, "Ohio was the corporation's *principal*, if temporary, place of business," *Daimler AG*, 571 U.S. at 130 (emphasis added) (citation omitted).

Examples of the strict limits of general personal jurisdiction following *Daimler* abound. In *BNSF Railway*, for instance, the Supreme Court concluded that a railway company's extensive business activities in Montana were insufficient to subject that company to claims in Montana state courts unrelated to the company's business activities in the state. 137 S. Ct. at 1559. Notably, at the time of suit the company "ha[d] over 2,000 miles of railroad track and more than 2,000 employees in Montana." *Id.* Nevertheless, the Supreme Court held that these contacts were insufficient to support general personal jurisdiction, reiterating its remark in *Daimler* that "the general jurisdiction inquiry does not focus solely on the *magnitude* of the defendant's in-state contacts." *Id.* (emphasis added) (quoting *Daimler*, 571 U.S. at 140 n. 20). "Rather, the inquiry calls for an appraisal of a corporation's activities *in their entirety*; a corporation that operates in many places can scarcely be deemed *at home* in all of them." *Id.* (emphasis added) (internal quotation marks and alterations omitted) (quoting *Daimler*, 571 U.S. at 140 n. 20).

Moreover, the Second Circuit held recently that a court within this District erred when it exercised general personal jurisdiction over the Bank of China. *See Gucci Am.*, 768 F.3d at 122. In so holding, the Second Circuit noted that the bank's contacts with the United States—including two bank branches in New York—were insufficient to establish general personal jurisdiction:

> Just like the defendant in *Daimler*, the nonparty Bank here has branch offices in the forum, but is incorporated and headquartered elsewhere. Further, this is clearly not "an exceptional case" where the Bank's contacts are "so continuous and systematic as to render [it] essentially at home in the forum."

Id. at 135 (quoting *Daimler*, 571 U.S. at 138 & n.19). The Second Circuit in *Gucci America* acknowledged that its holding stood in sharp contrast with prior Circuit precedent, stating that

"[p]rior to *Daimler*, controlling precedent in this Circuit made it clear that a foreign bank with a branch in New York was properly subject to general personal jurisdiction here." *Id.* at 136.

Courts within this District mostly have followed *Daimler* and *Gucci America*'s reasoning in subsequent Section 1782 cases. For example, in *Fornaciari*, the court concluded it lacked authority to grant a Section 1782 application against Royal Bank of Canada, noting, "[T]o the extent that [the applicant] premises general jurisdiction on the mere existence of Royal Bank's offices in this District, such argument is foreclosed by *Daimler AG v. Bauman.*" 2018 WL 679884, at *2. In *Sargeant*, the court concluded it lacked authority to enforce a Section 1782 order against a foreign company with one of its so-called "primary business offices" in New York City. 278 F. Supp. 3d at 821. In so doing, the court noted that "the mere fact that [the company] maintains an office in New York City . . . from which it conducts business does not establish that its principal place of business is its midtown Manhattan location. Nor is the bare allegation that [the company] conducts business in New York sufficient to establish that its operations in that offices are 'so substantial and of such a nature' as to render [the company] at home in New York." *Id.* (quoting *Gucci Am.*, 768 F.3d at 135–36).

Moreover, another court in this District concluded recently that it lacked authority over a foreign bank because New York was neither the bank's state of incorporation nor the bank's principal place of business, and there were no "exceptional circumstances" that would otherwise support general jurisdiction. *Austl. & N.Z. Banking Grp.*, 2017 WL 3841874, at *3–4 (citing *Gucci Am.*, 768 F.3d at 135, 141); *see also In re Masters*, 315 F. Supp. 3d 269, 277 (D.D.C. 2018) (concluding that neither Bank of America, N.A., nor Citibank, N.A., was "found" in the District of Columbia—notwithstanding that the banks collectively maintained at least eighteen retail branches in the district and offered private banking and brokerage services—because the

banks were not incorporated therein and their respective principal places of business were elsewhere); *cf. Motorola Credit Corp. v. Uzan*, 132 F. Supp. 3d 518 (S.D.N.Y. 2015) (finding general personal jurisdiction improper in discovery dispute against three banks incorporated and principally based elsewhere, and noting that "*Gucci* stands for the proposition that mere operation of a branch office in a forum—and satisfaction of any attendant licensing requirements—is not constitutionally sufficient to establish general jurisdiction").

Given the aforementioned authorities, the Court must rely on *Daimler* and *Gucci* in evaluating the instant case.[4] Here, Petitioners contend that Santander is "found" in the District because it has a "longstanding and significant presence in this District" and has "made New York a focal point for [their] investors." Del Valle Ruiz Pet'rs' Mem. at 13–14; *accord* PIMCO Pet'rs' Mem. at 18 ("Santander has a longstanding and significant presence in this district."). However, even assuming *arguendo* that Santander's business activities in the District are as extensive as Petitioners claim, Santander's activities remain insufficient to satisfy Section 1782.

Petitioners concede that Santander is incorporated and has its principal place of business outside of New York. Nevertheless, Petitioners argue that Santander is "found" in the District based on the Defendants' level of activities within the District and the State of New York generally. In total, Petitioners allege the following facts in support of their argument:

- Santander maintains branches in New York City, is supervised by the New York State Department of Financial Services, and manages $14.8 billion in assets here as of 2013;

[4] The Court notes one distinguishing fact between the instant case and *Daimler*: In the latter case, the entity resisting personal jurisdiction was faced with the threat of liability, not just the burden of having to comply with a discovery request, as is the case here. Prior to *Daimler*, the Second Circuit, in passing, has observed that "a person who is subjected to *liability* by service of process far from home may have better cause to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents or testimony." *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d Cir. 1998). However, in the subsequent decades since that observation, neither the Supreme Court nor the Second Circuit (nor any other Circuit that the Court is aware of) has held that fewer contacts with a forum may be sufficient to exercise personal jurisdiction over an entity who faces the threat of discovery as a nonparty rather than liability as a party-defendant. Accordingly, the Court will not so find here.

- Santander manages its wholly owned U.S. subsidiaries from New York City;
- Santander constitutes the ninth largest "banking group" by deposit market share in the New York area;
- Santander is listed on the New York Stock Exchange;
- The C.E.O. of Santander recently rang the bell of the New York Stock Exchange to celebrate the 30-year anniversary of Santander's listing on the Exchange;
- Santander executives holds some of their meetings in New York;
- Santander has certified and listed its New York City branch as "Process Agent" in certain filings;
- In previous S.D.N.Y. actions, Santander has admitted that it "maintain[s] offices and conduct[s] business in this district"; and
- One of Santander's chief executives, Scott Powell, lists his location on LinkedIn as New York City and is a board member for at last two New York-based non-profits.

See PIMCO Pet'rs' Mem. at 17–23; Del Valle Ruiz Pet'rs' Mem. at 13–16. Nevertheless, in light of the aforementioned authorities, such contacts with this District are not enough. Surely, if 2,061 miles of railroad track and 2,100 employees in Montana were not contacts that were "systematic and continuous" enough to make a railway company essentially "at home" in Montana, *see BNSF Ry.*, 137 S. Ct. at 1554, and the Bank of China's multiple branches in Manhattan were not enough to render it essentially "at home" in this District, *Gucci Am.,* 768 F.3d at 135, then Santander's New York offices, activities, and chief executive's LinkedIn profile are not enough contacts to render Santander essentially "at home" in this District. Nor can it be said that the Santander's contacts with the District are so systematic and continuous that this case is "exceptional" like *Perkins*. Unlike *Perkins*, a case in which the state of Ohio was a Filipino corporation's "*principal*, if temporary, *place of business*," *Daimler AG*, 571 U.S. at 130 (emphasis added) (citation omitted), Petitioners in this case have never suggested that Santander's principal place of business is within the District. At bottom, Santander's contacts with this District are far less systematic and continuous than corporations that have been spared from general personal jurisdiction in other binding authorities.

However, notwithstanding the voluminous case law against their position, Petitioners rely on a few cases that ostensibly support their conclusion that Santander is "found" in this District. None is persuasive. First, Petitioners point to *In re Kleimar N.V.*, 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016), a case in which the court concluded that a Brazilian multinational mining corporation was "found" in the District because the corporation trades on the New York Stock Exchange, regularly files forms with the Securities and Exchange Commission, and its subsidiary corporation "appears to conduct systematic and regular business in the United States and New York." *Id.* The *Kleimar* court, however, was never asked to grapple with the Supreme Court's view of general personal jurisdiction in light of *Daimler* or *BNSF Railway* or the Second Circuit's opinion in *Gucci America*, and thus never attempted to distinguish the myriad Second Circuit and district court opinions that reached opposite conclusions with similar levels of business activity. *See, e.g.*, *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 641 (2d Cir. 2016) (declining to read Connecticut's business registration and agent-appointment statute as "embodying actual consent by every registered corporation to the state's exercise of general jurisdiction over it" in light of due process and other constitutional concerns); *Motorola Credit Corp.*, 132 F. Supp. 3d at 518 (concluding that foreign banks were not subject to discovery under Section 1782 in this District notwithstanding that the banks maintain branches in New York City and are registered and licensed under New York banking laws and federal laws).

The Court is similarly unpersuaded by Petitioners' reliance on *In re Alghanim*, No. 17 Misc. 406 (PKC), Doc. 7 (S.D.N.Y. Nov. 16, 2017), which Petitioners cite as an example of a court "authoriz[ing] discovery of Santander in another section 1782 proceeding." Del Valle Ruiz Pet'rs' Mem. at 13. However, the record in *Alghanim* makes clear that the court issued the discovery order *ex parte*. Moreover, the record further reveals that Santander *voluntarily* turned

over discovery instead of moving to quash the applicant's subpoena. *See In re Alghanim*, No. 17 Misc. 406 (PKC), 2018 WL 2356660, at *2 (S.D.N.Y. May 9, 2018). Accordingly, given that Santander neither intervened in that proceeding nor moved to quash the subpoena, the *Alghanim* court had no occasion to determine whether Santander was "found" in the District for purposes of Section 1782. *Cf. Masters*, 315 F. Supp. 3d at 272 ("[D]istrict courts are generally authorized to review a § 1782 application on an *ex parte* basis, and . . . as a general matter, *ex parte* review is justified by the fact that the parties from whom discovery is sought will be given adequate notice of any discovery taken pursuant to the request and will then have the opportunity to move to quash the discovery or to participate in it.").

Petitioners also cite to *Ayyash v. Crowe Horwath LLP*, in which the court concluded that two foreign accounting firms were "found" in the District because it maintained offices here. No. 17 Misc. 482, 2018 WL 1871087, at *2 (S.D.N.Y. Apr. 17, 2018). However, like *Kleimar*, the court in *Ayyash* was not asked to analyze jurisdiction in light of *Daimler* and *Gucci America*, and thus concluded that two foreign companies were "found" in the District merely because they have offices here. *Id.* And, like the respondents in *Alghanim*, the *Ayyash* respondents never contested that they were "found" here. *Id.* Consequently, the Court finds Petitioners' reliance on this case unavailing.[5]

[5] Petitioners also cite to several out-of-district cases in which courts have found personal jurisdiction over corporate entities proper based solely on the presence of a company's office or business activities in the district. *See, e.g.*, *In re Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1036 (N.D. Cal. 2016). But all of those cases either predate *Daimler*, *see, e.g.*, *In re Inversiones y Gasolinera Petroleos Vanezuela, S. de R.L.*, 2011 WL 181311, at *7–8 (S.D. Fla. Jan. 19, 2011), or the courts did not consider whether constitutional due process was satisfied before exercising jurisdiction, *see, e.g.*, *Qualcomm Inc.*, 162 F. Supp. 3d at 1036.

2. *Specific Jurisdiction over Santander*

Petitioners, in a final effort, make what can only be described as an argument for the exercise of *specific* personal jurisdiction. Even without general personal jurisdiction, the Court may obtain specific personal jurisdiction over Santander. *See Gucci Am.*, 768 F.3d at 136. As the Second Circuit noted in *Gucci America*, courts undertake a two-step analysis to ascertain specific personal jurisdiction: "First, the court must decide if the defendant has purposely directed his activities at the forum and the litigation arises out of or relates to those activities." *Id.* (internal quotation marks and alterations omitted). "Second, once the court has established these minimum contacts, it determines whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Id.* (internal quotation marks and alterations omitted) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

Here, Petitioners argue that jurisdiction is proper because some of Santander's activities in the District relate to the subject matter of the discovery they seek. In support of this argument, Petitioners claim that (1) Santander executives met with analysts and investors in New York City in the days following the "resolution" and subsequent acquisition of Banco Popular to raise capital needed to help facilitate the acquisition; (2) Santander's private counsel wrote letters to the Securities and Exchange Commission to request exemptive relief from certain securities law requirements concomitant with the acquisition of Banco Popular; and (3) Santander allegedly retained investment banks in New York, prior to the sale of Banco Popular, to explore financing options for its acquisition. *See, e.g.*, Del Valle Ruiz Pet'rs' Mem. at 15–16; PIMCO Pet'rs' Mem. at 21–23.

The Court finds none of these alleged activities sufficient to exercise specific personal jurisdiction. With respect to specific jurisdiction over a *nonparty*, as is the case here, generally

courts in this District "first assess the connection between the nonparty's contacts with the forum and the [discovery] order at issue, and then decide whether exercising jurisdiction for the purposes of the order would comport with fair play ad substantial justice." *Gucci Am.*, 768 F.3d at 137. As Santander points out, however, in this case all of Santander's alleged New York activities took place "*after* the Resolution had already been adopted," and thus, the activities "shed[] no light on the regulators' decision to effect the Resolution"—the specific focus of all of Petitioners' foreign proceedings. Santander's Mem. at 14–15. *See, e.g.*, Rubinstein Decl. Exs. 1–2 (applications for litigation against the Single Resolution Board, the European Commission, and Spain involving decisions leading up to and including the Resolution and resultant sale of Banco Popular); Calamari Decl. ¶¶ 43–49 (detailing same). Accordingly, the litigation abroad cannot be said to arise out of or relate to Santander's activities in the forum.

* * * *

The overwhelming majority of courts that have wrestled with the evolving interpretation of Section 1782 have concluded that, at the very least, a corporation is not "found" in a district merely because it maintains offices or conducts business in the district. The Court agrees with this view. The threshold inquiry to establish jurisdiction "is *not* whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systematic, it is whether that corporation's affiliations with the State are *so continuous and systematic* as to render it essentially *at home* in the forum State." *Daimler*, 571 U.S. at 138–39 (emphases added) (internal quotation marks and alterations omitted); *see also Lockheed Martin Corp.*, 814 F.3d at 629 ("When a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how 'systematic and continuous,' are *extraordinarily unlikely* to add up to an 'exceptional case.'"). Here, Petitioners have failed to establish that Santander

conducts anything other than some level of systematic and continuous business in its offices in the District. This is insufficient to satisfy personal jurisdiction here.

B. Discovery from Santander Investment Securities Inc.

PIMCO Petitioners also seek discovery from Santander Investment Securities Inc. (hereinafter, "SIS"). Santander concedes that SIS maintains its principal place of business within the District. *See* PIMCO Pet'rs' Mem. at 5. Consequently, the Court finds that constitutional due process principles and Section 1782's "resides or is found" requirement are satisfied as to SIS. Moreover, at oral argument, Santander conceded, and the Court is independently satisfied, that Petitioners have established Section 1782's other statutory requirements—i.e., that the discovery sought is for use in a proceeding before a foreign tribunal, and that the application for discovery was made by interested persons. *See* 28 U.S.C. § 1782(a). Therefore, the Court concludes that it has statutory authority to grant discovery from SIS.

The Court also finds that discovery against SIS is appropriate. In so finding, the Court has considered the "twin aims" of Section 1782: providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts. *Kiobel*, 895 F.3d at 244. The Court is satisfied that, based on the circumstances present in this case and consideration of *Intel*'s discretionary factors, both aims are furthered by this decision.

First, the Court credits Petitioners' arguments that the documents they seek are currently beyond the reach of the foreign tribunals. While Santander has been ordered to produce documents in at least one foreign proceeding, *see* PIMCO Pet'rs' Reply at 7 (noting that the Spanish Central Criminal Court has ordered Santander to produce certain documents), Santander

is not a party in any of the foreign proceedings.[6] Nor is Santander an especially *active* participant in the criminal proceeding in which it has produced documents. *See* Santander's July 19, 2018 Letter to the Court, Case No. 18 Misc. 127, Doc. 52 (stating that it has produced only twelve documents related to the Spanish Central Criminal Court's order to produce documents). This fact generally weighs in favor of granting Petitioners Section 1782 aid.

Second, insofar as Santander argues that this Court cannot compel it to produce documents located abroad, or that producing documents located abroad would be unduly burdensome and intrusive, the Court disagrees. *See In re Delight Int'l Ltd.*, 16 Misc. 125 (JMF), 2018 WL 2849724, at *4 (S.D.N.Y. June 11, 2018) (surveying case law on the question whether Section 1782 authorizes discovery of documents outside the United States and concluding that "the Eleventh Circuit and the district judges who have held that Section 1782 can reach documents abroad have the better of the argument" in light of the plain language of the statute and legislative history). Accordingly, PIMCO Petitioners' application will be granted as to SIS.

III. CONCLUSION

[6] The Court notes that Santander has pending motions to intervene in most, if not all, of the foreign proceedings, but they have not yet been granted.

For the reasons stated above, Del Valle Ruiz Petitioners' application for an Order to conduct discovery against Santander for use in foreign proceedings is DENIED. PIMCO Petitioners' application for an Order to conduct discovery is DENIED insofar as it requests discovery from Santander, and GRANTED insofar as it requests discovery from SIS.

The Clerk of Court is respectfully directed to terminate the open motion in Case No. 18 Misc. 85, Doc. 1, and to close that case. The Clerk of Court is further directed to terminate the open motions in Case No. 18 Misc. 127, Docs. 1, 9.

It is SO ORDERED.

Dated: October 19, 2018
New York, New York

Edgardo Ramos, U.S.D.J.