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Recent Developments in Cross-Border Bankruptcies

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I. Introduction

Cross-border insolvencies continue to become more frequent in light of today's global economy. In the United States, foreign debtors may avail themselves of relief under various provisions of the Bankruptcy Code, including Chapter 11 and Chapter 15. Chapter 15 is largely modeled on the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency, and serves as a platform to extend comity to foreign insolvency proceedings. Foreign debtors also have used Chapter 11 to implement debt restructurings in instances where out of court reorganizations or restructuring under foreign laws would have been more costly or difficult to complete. This paper highlights recent developments in cross-border insolvency cases.

II. Foreign Proceedings – Automatic Stay & Foreign Judgment Issues

The interplay between Chapter 15 and the substantive law of the foreign main proceeding raises increasingly complex, and often-times fact-specific, questions. Such issues include the demarcations between the foreign and Chapter 15 automatic stay and the tension between, on the one hand, comity and deference to foreign courts and relief available in the U.S. on the other. These questions can also weigh on the operational aspects of a broader restructuring, at times helping determine when to file for chapter 15 recognition as well as the level of activity in the subsequently-recognized Chapter 15 case.

1. Foreign Proceeding Stays – Extension & Scope

An increasingly common question before U.S. courts is the extent to which facets of foreign proceedings that extend the stay beyond the company itself should be recognized. Perhaps most notably, such fact patterns have arisen particularly with respect to cases against Directors and Officers after recognition of the foreign stay. U.S. courts have come to different conclusions through largely fact-specific analyses. For instance, in Nortel, weighing towards principles of comity, the court held that U.S.-based claimants must seek relief with the foreign court. In contrast, in Sanjel and Abeinsa, the courts held in favor of granting relief from the stay.

A related set of questions is which factors U.S. courts should consider in deciding whether to recognize and enforce the foreign stay. Based on prior decisions, such factors include, but are not necessarily limited to: (i) whether extension and recognition is routinely granted in foreign jurisdictions; (ii) whether it would be routinely granted in the U.S.; (iii) whether U.S. creditors object to recognition of the stay; and (iv) potential harm to non-creditor third parties.

a) In re Sanjel (USA), Inc. no 16-50778 (Bankr. W.D. Tex Jul. 28, 2016)

i) In April, 2016, the Court of the Queen's Bench of Alberta (the "Canadian Court") entered an order (the "Initial Order"), enjoining collection of debts against the company and extending the stay to its Directors and Officers (D&O).

ii) The monitor overseeing the Debtor's proceedings filed a petition seeking recognition of the foreign proceedings. Shortly thereafter, the U.S. Bankruptcy Court in the Western District of Texas entered an order granting such recognition.

iii) Prior to commencement of the proceedings, two individuals filed claims, in the District Court for the District of Colorado, alleging violations of the Fair Labor Standards Act ("FLSA").

iv) The bankruptcy court undertook a "balancing of the hardships" analysis under §1522. The court reasoned that because the Initial Order individuals were enjoined from pursuing claims against the debtor, and such injunction could feasibly be extended long enough for the statute of limitations to expire, that "modifying the [stay against the directors and officers] would appear to be the only way to ensure protection of Movants' interests so that consents may be filed within the applicable statute of limitations period." (In re Sanjel at 11.)

v) Though the court noted the burden to the Debtors of additional litigation, it found that this did not outweigh the potential harm to the movants.

b) In re Abeinsa Holding, Inc. No. 16–10790 (Bankr. D. Del December 14, 2016)

i) Several entities within Abeinsa Holdings ("Abeinsa"), the engineering and construction arm of Spanish renewables conglomerate Abengoa SA, filed for Ch. 11 in Delaware Bankruptcy Court.

- The Ch. 11 proceeding is part of a much larger global restructuring of Abengoa, comprising a Spanish main proceeding, a Brazilian proceeding, Mexican proceeding a Chapter 15 proceeding and several parallel Ch. 11proceedings in different U.S. jurisdictions.

ii) Abeinsa's Chapter 11 plan included broad and expansive third-party releases, to which the U.S. Trustee strongly objected.

- The Plan defined Released Parties to include: (a) the Debtors and their Representatives, (b) the Parent and its Representatives, (c) each of: (i) the Note Agents, (ii) the Creditors' Committee, (iii) each of the Creditors' Committee's members (solely in their capacity as members), (iv) the Restructuring Committee, (v) the NM1 Committee, (vi) each of the Consenting Existing Creditors, (vii) each of the New Money Financing Providers, (viii) each of the Consenting Other Creditors, and (ix) with respect to each of the foregoing Entities or Persons in clause (c), their respective Representatives, professionals, affiliates, subsidiaries, principals, partners, limited partners, general partners, shareholders, members, managers, management companies, investment managers, managed funds, as applicable, together with their successors and assigns.
    - "Representatives" is broadly defined in the Plan to mean "any current or former officers, directors, employees, attorneys, advisors,

other Professionals, accountants, investment bankers, financial advisors, consultants, agents and other representatives (including their respective officers, directors, employees, independent contractors, members and professionals).

iii) The court agreed with the U.S. Trustee that a creditor has three means of effecting third party releases: (i) voting in favor of the plan; (ii) voting against the plan, but not checking the opt-out box; and (iii) when it is entitled to vote but fails to do so (and thus also fails to "out-out").

iv) Recognizing this proceeding as part of a larger multi-jurisdictional process, the court determined that in this context the first approach is applicable, and thus all creditors who vote in favor of the plan are deemed to consent to the third-party release.

c) In re Nortel Networks Corp., 2013 WL 6053845 (D. Del., 2013)

i) On January 14, 2009, Nortel commenced proceedings under Companies' Creditors Arrangement Act ("CCAA"); on the same day, the foreign representative field a petition in DE Bankruptcy Court seeking recognition of the Canadian proceedings.

ii) The petition was granted, recognizing the Canadian Proceedings as the Foreign Main Proceedings; additionally, many other Nortel affiliates have filed various proceedings globally as part of the broader restructuring efforts.

iii) Shareholders petitioned to modify the stay in order to proceed with certain securities litigation claims against former directors and officers of Nortel.

iv) The Court upheld the Bankruptcy Court's prior decision, finding that in properly relied on principles of comity and, correspondingly, that the claimants should seek relief with the Ontario Court.

2. Balance Between Comity & Deference to Foreign Courts versus Relief under U.S. Law

Over the last decade, hundreds of chapter 15 cases have been filed, and, as commentators have noted, "most of these filing have resulted in recognition of a foreign proceeding."[1] Furthermore, Courts have held, on multiple occasions, that the foreign relief need not be identical to that available in the U.S. However, there have been examples where a U.S. court has declined to grant comity to foreign orders. Two recent cases – In re Toft and Irish Bank Resolution Corp. – have declined to grant comity in situations involving discovery not permissible under U.S. law.

a) In re Toft, 453 B.R. 186 (Bankr. S.D.N.Y. 2011)

[1] https://www.law360.com/newyork/articles/315676/ch-15-check-recent-rulings-on-foreign-proceedings

i) In June 2010, an involuntary proceeding was commenced in Germany with respect to Dr. Toft. Dr. Toft declined to cooperate with the administration by refusing to turn over certain documents.

ii) Correspondingly, the German court entered a so-called "mail interception order," a relatively common tool in Germany, which allowed the administrator to intercept Dr. Toft's physical and electronic mail, some of which was held on U.S.-based servers.

iii) The German administrator filed a Chapter 15 case, seeking recognition and allowing enforcement of the mail interception order within the United States.

iv) Though recognizing that the mail interception order was not uncommon in Germany, the U.S. Court declined to allow enforcement in the U.S. on public policy grounds.

b) In re Irish Bank Resolution Corporation Limited (in Special Liquidation), 559 B.R. 627 (Bankr. D. Del. 2016)

i) Irish Bank Resolution Corporation was established to wind down the affairs of certain financial institutions under Irish Law. In connection with the process, the Debtor's foreign representatives filed discovery motions in the U.S. in connection with certain individuals email accounts.

ii) The court based on its reasoning on the interplay of the Stored Communications Act (SCA) and the Bankruptcy Code, finding that the foreign representative failed to demonstrate that they were entitled to the email discovery. In addition, the Court found that the SCA does not enable the foreign representative to compel Yahoo, as the email provider, to turn over the contents of an account without user consent.

3. Timing of Chapter 15 Commencement

Many factors influence the considerations regarding timing of the Chapter 15 proceeding in context of the foreign main proceeding. A key driver in recent cases, however, has been the need for the protection of the automatic stay with respect to U.S.-based assets outside the scope of the foreign stay.

a) In re Daebo International Shipping Co., Ltd., Case No. 15–10616 (S.D.N.Y., 2016)

i) After the Court vacated maritime attachments made with respect to Daebo assets by SPV1, LLC ("SPV"), SPV appealed arguing in favor of a stay pending appeal.

ii) The Court held that even though SPV "has not shown reasonable prospect of success on appeal," since Daebo has not shown how it will be prejudiced if the appeal is granted, the balance of the equities weighs in favor of granting the appeal.

b) Hanjin Shipping Co., Ltd. (D. N.J., Sept. 20, 2016).

i) Hanjin is a South Korea-based global container-cargo business that transports in excess of 100 million tons of cargo annually. On August 31, 2016, Hanjin filed an

application under South Korea's Debtor Rehabilitation and Bankruptcy Act. On September 2, 2016, its Foreign Representative filed for Chapter 15 Recognition in the U.S.

ii) Before recognition was granted, certain of Hanjin's creditors subsequently-denied filed motions for relief from the stay arguing that they should be able to exercise certain remedies against Hanjin vessels and assets.

iii) At a hearing regarding the creditors' Motion for Reconsideration, the court summed up the issue as: "whether the maritime lien rights available under United States law should be enforceable despite the issuance of the stay Order in Korea."

iv) The court found that ultimately Hanjin was likely to obtain recognition, and thus allowing creditors to exercise remedies could be incongruent with the broader Korea-focused reorganization proceedings.

v) Though noting that §1522 permits the court to allow imposition of such remedies, the court granted provision relief under §1519 of the Bankruptcy Code in light of the ongoing global proceeding.

c) LG Electronics, Inc., and LG Electronics U.S.A., Inc. v. Toshiba Samsung Storage Technology Korea Corporation (District Court, D. Del, June 9, 2016)

i) Toshiba Samsung Storage Technology Korea Corporation (TSST-K) filed a motion for an interim 60-day stay, pending both a decision by the Seoul Central District Court regarding whether to institute a proceeding (TSST-K already filed for bankruptcy protection in Seoul), as well as a potential subsequent Chapter 15 recognition in the U.S.

ii) The court noted that courts typically consider three factors with respect to granting a discretionary stay: (1) whether granting the stay will simplify the issues for trial; (2) the status of the litigation, particularly whether discovery is complete and a trial date has been set; and (3) whether a stay would cause the non-movant to suffer undue prejudice from any delay, or allow the movant to gain a clear tactical advantage. (Citing FMC Corp. v. Summit Agro USA, LLC, Civil Action No. 14-51- LPS, 2014 WL 3703629, at *2 (D. Del. July 21, 2014)).

iii) The court found that it would be unclear if granting the stay would in fact simplify the issues for trial – reasoning that the contrary could be just as likely. Furthermore, the court found the risk of prejudice to LG to be significant, weighing against the stay. Correspondingly, the court denied the motion for a discretionary provisional 60-day stay.

III. Recent Developments in Chapter 15 Recognition Cases

1. Section 109 Property Requirement

As foreign debtors have sought ancillary relief under Chapter 15, bankruptcy courts have been confronted with the question of whether companies must comply with general eligibility requirements for debtors under the Bankruptcy Code, including the requirement that a company have a domicile, residence, assets or property in the U.S. To date, courts in the Second and Third Circuits have reached different conclusions regarding the applicability of these general requirements to Chapter 15 cases, as highlighted by the below line of decisions.

a) In re Barnet, 737 F.3d 238 (2d Cir. 2013)

i) The Second Circuit's decision in *In re Barnet* reversed a bankruptcy court's ruling granting recognition to Octaviar Administration Pty Ltd., an Australian company that had not introduced any evidence of assets or operations in the United States.

ii) In July 2009, the Supreme Court of Queensland, Australia, ordered that Octaviar Administration be liquidated. In August 2012, the company's foreign representatives petitioned the U.S. Bankruptcy Court for the Southern District of New York for recognition of the Australian proceeding as a foreign main proceeding under section 1515.

iii) The Bankruptcy Court granted a recognition order in September 2012.

- The Bankruptcy Court concluded that no controlling precedent required a Chapter 15 debtor to satisfy the requirements in section 109(a) that the debtor have a residence, domicile, place of business or assets in the United States.

iv) On appeal, the Second Circuit vacated the recognition order.

- The Second Circuit held that foreign entities seeking recognition under Chapter 15 must, in addition to satisfying the requirements for recognition set forth in Chapter 15, satisfy section 109(a) of the Bankruptcy Code by demonstrating that the debtor has a residence, domicile, place of business or assets in the United States.

- In reaching this conclusion, the Second Circuit determined that all that was required was a "straightforward" statutory interpretation of the Bankruptcy Code. As the court explained:

  - Section 103 of the Bankruptcy Code 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." *In re Barnet*, 737 F.3d at 247.

  - 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).

- A debtor that is the subject of a foreign proceeding, therefore, must meet the requirements of section 109(a) before a bankruptcy court may grant recognition of the foreign proceeding.

- "Because Foreign Representatives made no attempt to establish that [Octaviar Administration] had a domicile, place of business or property in the United States, recognition should not have been granted." *In re Barnet*, 737 F.3d at 247.

b) <u>In re Octaviar Admin. Pty Ltd</u>, 511 B.R. 361 (Bankr. S.D.N.Y. 2014)

i) Following the Second Circuit decision in *Barnet*, Octaviar filed a second Verified Petition Under Chapter 15 for Recognition of a Foreign Proceeding (the "Second Chapter 15 Petition").

ii) Octaviar's Second Chapter 15 Petition argued that Octaviar met the eligibility standards under section 109(a) of the Bankruptcy Code because it had property in the United States in the form of valid legal claims, as well a retainer held by their Counsel in New York.

iii) The bankruptcy court granted the Second Chapter 15 petition, holding that:

- Octaviar's legal claims and retainer constituted property in the United States, and

- Not granting recognition might deprive the foreign representative of the opportunity to bring causes of action in the United States, thus undermining the policy underlying Chapter 15.

iv) With respect to the threshold question of whether Octaviar had property as defined in section 109(a), the court agreed that Octaviar's legal claims in the U.S. against Drawbridge (the party opposing recognition) and other entities constituted "intangible property."

v) While the legal claims were the focus of the court's discussion and, in and of themselves, sufficient – the court also pointed out that Octaviar's retainer in New York also constituted property under section 109(a).

vi) With respect to policy considerations, Drawbridge's "arguments [were] in the nature of a *forum non conveniens* defense," centered on the fact that Octaviar was asserting similar claims in Australia. *In re Octaviar*, 511 B.R. at 374. However, the court disagreed – in no small part because Drawbridge refused to consent to jurisdiction in Australia – finding that not granting recognition may deny the debtor's ability to pursue potentially valid claims.

c) <u>In re Suntech Power Holdings Co.</u>, 520 B.R. 399 (Bankr. S.D.N.Y. 2014)

i) The U.S. Bankruptcy Court for the Southern District of New York interpreted *Barnet* as establishing a very minimal hurdle: to satisfy section 109(a), all a debtor must do is establish a bank account in New York immediately before filing bankruptcy.

ii) The debtor was a Cayman Islands holding company. It was the parent corporation for several direct and indirect subsidiaries, with its main operations in Wuxi, China.

- Its principal American subsidiary, Suntech America, Inc., was incorporated in Delaware and had its principal place of business in California.

- Before the bankruptcy filing, Suntech's connections with New York were flimsy, at best.

  - It had no New York office.

  - It had designated CT Corp. in New York City as its agent for service of process under an indenture. Its corporate debt had been listed on the New York Stock Exchange.

- The day before the bankruptcy petition was filed, the debtor transferred $500,000 from the Cayman Islands to a newly created bank account at the Bank of New York ("BONY").

iii) The Bankruptcy Court concluded that, notwithstanding the debtor's meager contacts with New York, the BONY account was sufficient to satisfy the requirements of section 109(a) and *Barnet*.

- Bankruptcy Judge Stuart Bernstein first held that under New York law, the BONY account was the debtor's property because the account was subject to the debtor's control.

- The court then held that the establishment of the BONY account in New York before the Chapter 15 case proceeding was sufficient to render the debtor eligible under section 109(a).

  - Judge Bernstein noted that section 109(a) says nothing about the *amount* of the debtor's property that must be in the United States and does not establish some monetary threshold that the debtor must satisfy.

  - Furthermore, the court emphasized that section 109(a) does not require an "inquiry into the circumstances surrounding the debtor's acquisition of the property." *In re Suntech*, 520 B.R. at 413 (quoting *In re Octaviar*, 511 B.R. at 373).

  - Judge Bernstein additionally concluded that there was nothing improper about the debtor's conduct in this case.

    (i) The court noted the purpose of Chapter 15 is to provide relief to foreign debtors and reasoned that the Code should not be interpreted in a way that denied such relief: "Shutting the door on the Debtor, where it has no other

access, will hinder the restructuring of this multi-national business as contemplated by Chapter 15." *Id.*

(ii) He emphasized that Chapter 15 relief is designed to provide legal certainty, maximize value, protect creditors and other parties in interest and rescue financially troubled businesses. *See* 11 U.S.C. § 1501(a).

d) In re Berau Capital Res. Pte Ltd, 540 B.R. 80 (Bankr. S.D.N.Y. 2015)

i) Berau Capital Resources Pte. Ltd. ("Berau") was a Singapore-based special purpose vehicle controlled by PT Berau Coal Energy Tbk ("BCE Group") – a coal mining and export company.

ii) Berau was organized to raise funds for BCE Group; it issued $450 million of senior secured notes (the "Notes"), guaranteed by the parent company, under New York law and with New York specified as the choice of forum.

iii) Shortly before the Notes were due, Berau and BCE Group initiated insolvency proceedings in the High Court of the Republic of Singapore. Shortly after, Berau filed for recognition of the foreign main proceeding pursuant to Chapter 15.

iv) Notably, none of Berau's creditors opposed the bankruptcy court's recognition of the Singaporean proceeding. However, the court nevertheless utilized its ability to independently assess whether an adequate jurisdictional basis existed for the commencement of a proceeding.

v) The court held that a debtor's "intangible property" – for Berau, contractual rights through bond indentures issued under New York law – was sufficient for eligibility as a debtor under section 109(a).

vi) The court's reasoning was premised on the logical inconsistency inherent in allowing creditors to initiate claims under New York law but denying the debtor bankruptcy protection. Furthermore, the court found that the provisions selecting New York as the choice of law were valid under various of New York's statutory provisions.

vii) The court also noted that Berau's attorney retainer would have been sufficient U.S. property for purposes of recognition.

e) In re Bemarmara Consulting A.S., No. 13-13037 (KG) (Bankr. D. Del. Dec. 17, 2013)

i) In *In re Bemarmara*, the U.S. Bankruptcy Court for the District of Delaware considered— and expressly rejected—the Second Circuit's reasoning in *Barnet*. The Bankruptcy Court stated that Third Circuit precedent, a reading of the statute and policy considerations warranted disagreement with *Barnet*.

ii) Bemarmara Consulting A.S. was a Czech company involved in a Czech insolvency proceeding that petitioned for foreign recognition under Chapter 15.

iii) The Bankruptcy Court held that a foreign debtor is not required to have assets in the United States to obtain recognition under Chapter 15.

- First, the court noted that, under Third Circuit precedent, in the absence of a finding that the motion for recognition is manifestly contrary to public policy, recognition is mandatory in aid of the main proceeding. *In re ABC Learning Ctrs., Ltd.*, 728 F.3d 301 (3d. Cir. 2013).

- Bankruptcy Judge Kevin Gross expressly rejected the Second Circuit's decision in *Barnet* and declined to follow it.

  - First, the court noted that *Barnet* was not controlling precedent on the Bankruptcy Court in Delaware and opined that the Third Circuit likely would not agree with *Barnet*'s holding.

  - The court noted that section 109(a) provides for "debtor[s] under this title," whereas it is a foreign representative, not the debtor, who seeks recognition under Chapter 15.

  - Judge Gross noted that some commentators have reflected on the possibility that section 109(a) was not intended to apply in Chapter 15, and that a scrivener's error is responsible for it being included in this section.

  - In addition, Judge Gross noted that section 1502, the definitions section of Chapter 15, defines "debtor" as "an entity that is the subject of a foreign proceeding." Nothing in that definition, he commented, requires that the debtor have assets to qualify under Chapter 15.

2. Foreign Representatives

A foreign debtor's Chapter 15 proceeding is initiated by and managed through a "foreign representative" authorized to administer the debtor's reorganization or act as a representative of the foreign reorganization proceeding. Although parties occasionally object to a debtor's appointment of a particular foreign representative, Chapter 15 is fairly flexible in its conception of who may serve as a foreign representative and such challenges often fail. Specifically, multiple courts have held that a foreign representative may be appointed by the debtor itself and need not be specifically appointed by a foreign court. Moreover, the foreign representative may be appointed specifically for the purpose of representing the debtor in proceedings in other jurisdictions.

a) Relevant Bankruptcy Code provisions:

i) Section 101(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."

ii) Section 1515(a): "A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition."

iii) Section 1509(b)(3): "If the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter—a court in the United States shall grant comity or cooperation to the foreign representative."

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

i) Mexican holding company Vitro S.A.B. de C.V. filed a Chapter 15 petition for recognition of its Mexican bankruptcy proceeding as a foreign main petition. Vitro's Board of Directors had appointed two individuals to act as Vitro's foreign representatives. Ad hoc group of noteholders objected that the individuals were not properly appointed as foreign representatives because they were not appointed by the Mexican court and because Vitro did not have the powers of a debtor in possession.

ii) The court held:

- It was not necessary that individuals be officially appointed by the Mexican court. In this case, the Mexican court had also denied a motion to enjoin the individuals from acting as foreign representatives, which constituted "tacit approval" of the individuals as representatives.

- Although section 1509(b) instructs a court to grant "comity" to the foreign representative, which has connotations of a judicial proceeding, its accompanying instruction to grant "cooperation" indicates a much broader meaning.

- Individuals were authorized to represent the reorganization since they were appointed by debtor in possession Vitro. Section 101(24) contemplates reorganizations with debtors in possession and such debtors in possession do not necessarily have to qualify as U.S. Chapter 11 debtors in possession. Drafting history of the Model Law indicates that drafters understood "debtor in possession" to mean debtors who remained in control of their assets and could technically be regarded as exercising administrative functions.

c) In re OAS S.A., 533 B.R. 83 (Bankr. S.D.N.Y. 2015)

i) Three entities in infrastructure companies group OAS had bankruptcy proceedings pending in Brazil (the "OAS Debtors"). The Board of Directors of the OAS Debtors appointed individual Tavares as foreign representative for its Chapter 15 proceeding. Noteholders objected that Tavares was not qualified to serve as foreign representative because he had not been authorized by the Brazilian court to exercise those powers, because the OAS Debtors lacked authority to appoint Tavares and because Tavares was personally disqualified or unable to perform the functions of a foreign representative.

ii) The court largely followed *Vitro* and held:

- It was not necessary for the court to appoint Tavares as foreign representative. *Vitro* did not turn on the Mexican court's tacit approval of the foreign representatives and such approval is not necessary.

- The OAS Debtors had sufficient control over their assets to be debtors in possession for purposes of the Model Law and thus had authority to appoint Tavares as foreign representative.

- Filing a Chapter 15 petition as a foreign representative constitutes an aspect of administering the debtor's reorganization or liquidation for purposes of section 101(24). Tavares's specific appointment by the OAS Debtors for this purpose was thus sufficient to qualify him as their Chapter 15 foreign representative.

- Plain language of section 101(24) does not require a foreign representative to represent the foreign court and a person or body authorized to administer the reorganization or liquidation of the debtor is qualified to act as a Chapter 15 foreign representative.

3. Center of Main Interests ("COMI")

A debtor's center of main interests ("COMI") determines whether a foreign insolvency proceeding is a "main" or "nonmain" proceeding, which in turn affects the relief that the Bankruptcy Code and U.S. courts may provide to the foreign debtor. Although some earlier cases had held that courts should determine COMI as of the time a foreign insolvency proceeding is first commenced, recent decisions have held that where there is a delay in seeking Chapter 15 relief, courts should determine COMI as of the time of the foreign debtor's Chapter 15 filing, with some flexibility to allow courts to consider a larger time frame to consider COMI manipulation. Courts also have focused on the practical substance of debtors' business arrangements over mere formalities in making a COMI determination, examining factors such as flows of money and a particular debtor's place in the larger overall scheme of an organization's business.

a) Relevant Bankruptcy Code provisions

i) Section 1502: "(4) foreign main proceeding" means a foreign proceeding pending in the country where the debtor has the center of its main interests;

(5) foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment;"

ii) Section 1516(c): "In the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."

b) In re Fairfield Sentry Ltd., 714 F.3d 127 (2d. Cir. 2013)

i) In December 2008, company Fairfield Sentry Limited ceased doing business, and in July 2009 began liquidation proceedings in the British Virgin Islands ("BVI"). In June 2010, the liquidator in that proceeding filed a Chapter 15 recognition petition.

ii) The court held that the time frame for determining a debtor's COMI is the time of filing of the Chapter 15 petition, but that to mitigate a debtor's ability to manipulate its COMI, a court also may consider the time period between initiation of foreign proceeding and filing of Chapter 15 petition.

iii) The court declined to follow the decision *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), which analogized the standard for a COMI to the concept under U.S. law of a company's "principal place of business" and held that the time of foreign proceeding's commencement was the relevant time frame for the COMI determination.

iv) The court identified various factors that could be considered in the COMI analysis, including those factors enumerated in *In re SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), such as location of the debtor's headquarters, location of those who actually manage the debtor, location of the debtor's primary assets, location of the majority of the debtor's creditors or creditors who would be affected by the case and jurisdiction whose law would apply to most disputes. In addition, other activities such as where the company's administration and liquidation occurred, could be considered.

v) In this case, the court affirmed the bankruptcy court's findings that Fairfield's COMI was the BVI because it had stopped doing business in the U.S. well before the filing of the Chapter 15 petition and no longer had management or assets in the U.S. The fact that Fairfield's affairs were orchestrated from the BVI and that its liquidation proceedings were pending there also weighed in favor of finding the BVI to be its COMI.

c) <u>In re Suntech Power Holdings Co.</u>, 520 B.R. 399 (Bankr. S.D.N.Y. 2014)

i) For a partial description of the facts of the case, refer to II.d) *supra*.

ii) Suntech selected Joint Provisional Liquidators ("JPLs") to, among other things, seek Chapter 15 recognition of Suntech's provisional liquidation proceeding pending in the Cayman Islands.

iii) The court followed *In re Fairfield Sentry Ltd.* in holding that COMI is determined as of the time of the debtor's Chapter 15 filing but that a court may consider the time period between initiation of foreign proceedings and Chapter 15 filing to offset a debtor's ability to manipulate its COMI.

iv) Suntech's presumptive COMI was the Cayman Islands because it was incorporated there.

v) In following COMI factors listed in *Fairfield Sentry* and *In re SPhinX, Ltd.*, the court noted that although China was Suntech's actual COMI when the Cayman Islands provisional liquidation proceeding was commenced, commencement of that proceeding combined with the JPLs, who were centered in the Cayman Islands, conducting liquidation activities in the Cayman Islands was sufficient to shift Suntech's COMI to the Cayman Islands by the time the JPLs filed the Chapter 15 petition.

vi) The evidence supported a finding that the JPLs' actions, such as transferring stock certificates and registries to the Cayman Islands and opening a bank account there, were undertaken in furtherance of their provisional liquidation duties and were not bad-faith efforts to manipulate the company's COMI.

d) In re OAS S.A., 533 B.R. 83 (Bankr. S.D.N.Y. 2015)

i) For a partial description of the facts of the case, refer to III.c) *supra*.

ii) One of the OAS Debtors, OAS Investments GmbH, was a special purpose financing vehicle incorporated in Austria.

iii) In determining OAS Investments's COMI, the court again followed *Fairfield Sentry* regarding time frame for determining COMI and regarding COMI factors.

iv) Austria was OAS Investments's presumed COMI because it was its place of incorporation, but other factors were strong enough to overcome presumption. OAS Investments loaned (indirectly through another OAS entity) proceeds of notes to OAS Group members. The ultimate source of repayment was from OAS Group and OAS was the sole shareholder of OAS Investments. Brazil was thus the nerve center of OAS Investments.

v) This finding was also consistent with the expectations of creditors because the offering memoranda for OAS Investments's notes stated that the notes were guaranteed by OAS under the laws of Brazil and that OAS Investments was a special purpose finance company for and a wholly-owned subsidiary of OAS Group.

4. Public Policy Exception & Government-Facilitated Foreign Proceedings

Through two 2015 decisions, bankruptcy courts in Delaware and Florida helped clarify considerations regarding the public policy exception to Chapter 15 recognition. The first decision granted recognition despite the application of a trustee's broader veil-piercing powers under Brazilian law; the second granted recognition despite application of Irish law with respect to a government-facilitated restructuring of a financial institution. Broadly, the decisions can be read to stand for the proposition that recognition may be granted despite the application of a differing legal system, as long it is not contrary to U.S. law.

a) Relevant Bankruptcy Code provision: Section 1506

i) Section 1506: "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."

ii) The legislative history explains that the public policy exception should be narrowly construed and only invoked when the most fundamental policies of the United States are at risk.

b) In re Petroforte Brasileiro de Petroleo Ltda., 542 B.R. 899 (Bankr. S.D. Fla. 2015)

i) Petroforte Brasileiro de Petroleo LTDA ("Petroforte") filed for bankruptcy in Brazil, and the court granted recognition of the foreign main proceeding.

ii) The recognition extended not just to the debtor, Petroforte, but also to Katia Rabello ("Rabello") and Securinvest Holdings, S.A. ("Securinvest"), Petroforte's counterparties to an ill-fated sale-leaseback transaction – which the Brazilian court "determined to be fraudulent and in large part responsible for the insolvency of Petroforte." *In re Petroforte*, 542 B.R. at 904.

iii) In Brazil, if the trustee can demonstrate an intent to defraud creditors with respect to the third parties' transactions with the debtor, it can pierce the corporate veil of *third parties* and bring their assets into the estate.

iv) Rabello and Securinvest moved to dismiss the claims against them in the U.S. on the basis that extending the Petroforte case to them would be "manifestly contrary" to U.S. public policy, per section 1506, as the trustee would have less expansive veil-piercing powers in the U.S.

v) The court denied Rabello and Securinvest's motion to dismiss, holding that although Rabello and Securinvest were brought into the case under "procedures different" from the Bankruptcy Code, the trustee's use of veil-piercing powers under Brazilian law was not contrary to U.S. public policy. *Id.* at 903.

c) In re Irish Bank Resolution Corp., 538 B.R. 692 (D. Del. 2015)

i) The Irish Bank Resolution Corporation ("IBRC") was the successor entity to the Anglo Irish Bank Corporation, which was nationalized following the 2008 global financial crisis.

ii) On December 18, 2013, the U.S. Bankruptcy Court for the District of Delaware granted recognition of IBRC's foreign main proceeding, which some of IBRC's U.S. creditors appealed.

iii) IBRC's creditors provided three main lines of reasoning, all of which the court rejected.

- First, the creditors contended that IBRC was ineligible for Chapter 15 because the Bankruptcy Code excludes foreign banks with a branch or agency in the U.S.

from eligibility for relief. However, the court found no evidence that IBRC had a U.S. branch or agency at the time of filing and specified that the filing date was the relevant assessment period.

- Second, the court found that IBRC's Irish proceeding was a "foreign main proceeding," despite the creditors' contention to the contrary.

- Finally, the creditors argued that recognizing the Irish proceeding would be contrary to U.S. public policy because such proceeding incorporates provisions that discriminate against U.S. creditors for the benefit of the Irish government. However, the court agreed with IBRC that the contested provisions in fact "parallel provisions in laws adopted by the United States in response to the global financial crisis." *In re Irish Bank Resolution Corp.*, 538 B.R. at 698.

iv) Through this decision, the court helped clarify the considerations for Chapter 15 recognition of a government-facilitated foreign proceeding.

IV. Section 363 Sales in the Chapter 15 Context

When using, selling and/or leasing assets, foreign representatives should consider the standard for approval in their main proceeding and whether the use, sale and/or lease will involve property or assets located within the territorial jurisdiction of the United States. If it does, a recent court ruling suggests that debtors should plan to comply with the requirements of Bankruptcy Code 363 to the extent they seek to obtain recognition of the transaction by the Chapter 15 court.

a) Relevant Bankruptcy Code provisions:

i) Section 1520: "(a) Upon recognition of a foreign proceeding that is a foreign main proceeding . . . (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 the estate** . . ." (emphasis added).

ii) Section 1502(8): "'[W]ithin the territorial jurisdiction of the United States', when used with reference to property of a debtor, refers to tangible property located within the territory of the United States and intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States."

iii) Section 363(b)(1) provides that the "trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."

b) Krys v. Farnum Place, LLC (In re Fairfield Sentry Ltd.), 768 F.3d 239 (2d Cir. 2014)

i) Fairfield Sentry Limited, a British Virgin Islands-based investment fund heavily exposed to Bernard L. Madoff Investment Securities, was placed into liquidation in July 2009 in the BVI. In June 2010, Fairfield's Chapter 15 petition seeking recognition of the BVI proceeding as the main foreign proceeding was granted.

ii) In December 2010, Fairfield sold its core asset – a Securities Investor Protection Act ("SIPA") claim – through an auction process in the BVI to Farnum Place, LLC. The parties signed a trade confirmation (the "Trade Confirmation") setting forth the material terms and conditions of the sale. Shortly after the sale, an unrelated third-party settlement increased the value of the SIPA claim by approximately $40 million.

iii) Consequently – and despite the BVI court approving the Trade Confirmation – Fairfield's foreign representative sought to have the U.S. bankruptcy court disapprove the sale per section 363(b) and section 1520(a)(2) of the Bankruptcy Code.

iv) The Second Circuit's Analysis

- The Second Circuit analyzed whether it was required to conduct a review under section 363.
    - An asset sale in a Chapter 15 bankruptcy proceeding requires section 363 review if it involves a "transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States." 11 U.S.C. § 1520(a)(2).
    - Because Fairfield Sentry's claim in the Madoff liquidation that it sought to transfer was subject to seizure and garnishment in the United States, the court determined that it was an asset within the territorial jurisdiction of the United States and therefore was subject to section 363 review.
- The Second Circuit found that the bankruptcy court erred when it gave deference to the BVI court's approval of the Trade Confirmation under principles of comity.
    - The bankruptcy court was *required* to conduct a section 363 review when the debtor sought a transfer of an interest in property within the territorial jurisdiction of the United States.
    - The BVI court declined to rule on whether the Trade Confirmation required approval under section 363 and, therefore, it is not clear that the BVI court even wanted deference in this instance.
- The Second Circuit remanded the case to the lower courts for section 363 review with guidance, including:
    - the standard for section 363 sale approval: "'that a judge . . . expressly find from the evidence presented before him at the hearing a good business reason"

to approve the sale." *Krys*, 768 F.3d at 243 (quoting *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)).

- The court pointed to the following additional considerations: (i) all factors – including the change in asset valuation – must be considered; (ii) the bankruptcy court's principal responsibility is to maximize the value of the estate for the benefit of creditors; (iii) the court must consider the increase in value of Fairfield Sentry's claim between signing the Trade Confirmation and approval by the bankruptcy court as part of its analysis, and nothing limits the bankruptcy court's review to the date of signing of the Trade Confirmation.

V. Foreign Debtors Filing Chapter 11

a) Introduction to Foreign Debtors Using Chapter 11

i) Foreign debtors also frequently have the option of filing their primary insolvency proceeding in the U.S. under Chapter 11. A debtor that has property in the U.S. is eligible to file under Chapter 11, *see* 11 U.S.C. § 109(a), and courts have been lenient in determining how much U.S. property (including funds in bank accounts) is sufficient for these purposes. As discussed below, a filing in the U.S. under Chapter 11 provides many advantages to a foreign debtor.

ii) There are many appealing advantages for debtors to restructuring under Chapter 11:

- Well-developed insolvency laws. Chapter 11 is the most well-developed law of any insolvency regime in the world for helping troubled companies restructure their affairs.

- Companies can confirm a reorganization plan with less than unanimous stakeholder support.

- U.S. bankruptcy courts can handle corporate groups unlike many international regimes.

- U.S. bankruptcy courts are more adept at handling mobile assets, and U.S. bankruptcy court orders ostensibly reach assets regardless of location.

- European jurisdictions, even the United Kingdom, have relatively little experience restructuring bond debt and complex capital structures. Given this and the increased use of high-yield bond debt in Europe, corporations may turn to U.S. courts more frequently for bankruptcy and restructuring.

b) Foreign Entity Eligibility for Chapter 11

i) A person (including a corporation, *see* 11 U.S.C. § 101(41)) is eligible to file for Chapter 11 if it "resides or has a domicile, a place of business, or property in the United States." 11 U.S.C. § 109.

ii) "Property in the United States" is the hook for foreign debtors.

- While an enterprise need not have its headquarters, significant assets or employees in the U.S., each entity seeking Chapter 11 protection must have property in the U.S.

- Cases have held that a U.S. bank account with as little as a few hundred or a thousand dollars would suffice.

c) Considerations for Foreign Chapter 11 Filers

i) Are non-U.S. obligations being affected, and can the company enforce U.S. bankruptcy orders against creditors and assets in foreign jurisdictions? For example, the bulk of a foreign shipping company's assets are likely located outside of the U.S. and in multiple foreign jurisdictions.

ii) U.S. restructuring proceedings may not be recognized in many EU Countries. In that case, Chapter 11 may have to be combined with local proceedings

iii) The extraterritorial reach of the automatic stay of section 362 is uncertain. Debtors may want to seek authority in first-day orders to pay foreign creditors who might otherwise be able to take action against a debtor in a non-U.S. jurisdiction.

iv) Despite the propriety of a foreign debtor seeking Chapter 11 protection under section 109, a creditor can file a motion to dismiss pursuant to section 305(a)(1), which provides that a court may dismiss or suspend proceedings in a case if "the interests of creditors and the debtor would be better served by such dismissal or suspension."

- *In re Aerovias Nacionales de Colombia S.A. Avianca*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003). Avianca was a publicly traded airline in Colombia providing passenger and cargo service. Its property in the U.S. included leased aircraft. After filing for Chapter 11 protection, a set of creditors moved to dismiss pursuant to section 305(a)(1). The court found that Avianca would not be "better served" by dismissal of the case. The creditors made no showing that Avianca could have obtained jurisdiction over its creditors were it to file in Colombia.

v) A creditor can also seek to dismiss pursuant to section 305(a)(2) if it can make a showing that (i) a petition for recognition of a foreign proceeding has been granted; and (ii) the purposes of Chapter 15 would be best served by such a dismissal.

d) <u>In re Inversiones Alsacia S.A.</u>, No. 14-12896 (MG) (Bankr. S.D.N.Y.)

i) Alsacia is just a recent example in the broad trend of foreign debtors seeking Chapter 11 protection.

ii) Alsacia is one of the largest bus operators in Santiago, Chile. All of its operations are in Chile, but it owned New York bank accounts, set up before it filed Chapter 11, established by the indenture governing the notes it sought to restructure.

iii) High levels of fare evasion and declining ridership had affected its ability to make its senior secured debt payments. The debt obligations were U.S.-dollar denominated and New York law governed. Alsacia, the issuer, and the notes' three guarantors (two Chilean, one Bermudan) filed Chapter 11 petitions.

iv) The Prepackaged Plan:

- Alsacia sought and obtained confirmation of a prepackaged Chapter 11 plan in the Southern District of New York in 2014.
- Solicitation of the senior secured creditors occurred before the petition date. No senior secured noteholders voted against the prepackaged plan. Qualified senior secured noteholders received new notes with adjusted repayment schedules and a catch-up interest payment in cash.
- Because the Plan impaired only the senior secured noteholders, no other classes of creditors needed to be solicited.
- This structure allowed Alsacia to continue satisfying its Chilean obligations (trade creditors, employees, etc.) and ensured that bus service was not disrupted in Santiago.

VI. Consequences of Foreign Companies Filing U.S. Bankruptcy Proceedings

Complex global companies have increasingly turned to multi-jurisdictional proceedings to effectuate restructurings. The reasons for this have been myriad, ranging from the need to protect assets through the automatic stay – as is the case with Hanjin – to utilizing multiple parallel processes to effectively divide the operations of a company, as is the case with Abengoa's ongoing proceeding. Other strategies have included appointment of a trustee to oversee assets, as utilized in China Fishery's case.

a) In re China Fishery Group Limited (Cayman)

i) China Fishery Group (CFG), a large multi-national fishing company controlled by the Hong Kong-based Ng family, initiated multi-jurisdictional proceedings in the summer of 2016. On June 30, 2016, CFC's non-Peruvian affiliates filed for Chapter 11; the Peruvian entities filed in Peru and sought Chapter 15 recognition of the proceeding.

ii) After various allegations of self-dealing actions by the equity holders as well as one of the lenders, the primary creditors sought appointment of a Chapter 11 trustee to ensure optimal recovery and utilization of assets.

iii) Framing the issue in context of section 1104(a)(2) of the Bankruptcy Code, under which a court shall appoint a trustee when that appointment "is in the best interests of creditors, any equity security holders, and other interests of the estate . . .," the court held that even though such appointment is the "exception not the rule" the various allegations and complexity of the proceedings warranted doing so to maximize estate value and ensure equitable outcomes.

b) Abengoa S.A.

i) Abengoa is a large Seville-based renewables-focused conglomerate. Along with a large Spanish homebase, it has significant Brazilian, Mexican and U.S. operations.

ii) On November 25, 2015, the ultimate parent company in the Abengoa group filed for *pre-concurso* under article 5bis of the Ley 22/2003, de 9 de julio, Concursal (the "Spanish Insolvency Act"), "a pre-insolvency statute that permits a company to enter into negotiations with certain creditors for restructuring its financial affairs," which was approved by the court in Seville, Spain (the "Spanish Court") on December 14, 2015.

iii) Underscoring the complexity of Abengoa's restructuring, along with the Spanish Proceedings, affiliates of Abengoa are currently undergoing three parallel U.S. Chapter 11 proceedings – in Kansas, Missouri and Delaware – along with a separate insolvency process in Brazil and Mexico. Further, Atlantica Yield, Abengoa's publicly-traded affiliated YieldCo, is not a party to any of the insolvency proceedings and has expressed that it does not intend to file.

iv) With respect to the parent company proceedings, Abengoa has been able to execute what is, at a high level, a complex debt-for-equity swap. However, the other proceedings are still ongoing and Abengoa is attempting to sell its stake in non-Debtor Atlantica Yield.

v) Because proceedings are still ongoing, the outcome is impossible to discern. However, at this stage, it appears that Abengoa's multi-jurisdictional strategy may have added optionality, but at the same time, may have also contributed to disaggregation of the company, by nature of the relatively insulated processes.

VII. Extraterritoriality: Application of Bankruptcy Code Avoidance & Recovery Statutes

In *Morrison v. National Australia Bank Ltd.*, the Supreme Court of the United States established that barring clear Congressional intent to the contrary, federal legislation is only intended to apply within the United States. Subsequent decisions – such as *In re Madoff Securities* in the Southern District of New York – have applied *Morrison*'s test to hold that fraudulent transfer avoidance laws did not have extraterritorial application, as Congress did not intend for those provisions of the Bankruptcy Code to apply to transfers that occurred wholly abroad.

However, as discussed below in VIII.c) *infra*, a recent bankruptcy court decision in the Southern District of New York found that the Bankruptcy Code's avoidance and recovery statutes applied extraterritorially, resulting in a potential split within the District.

a) The Presumption Against Extraterritoriality

Unless a contrary intent appears, federal legislation is intended only to apply within the territorial jurisdiction of the United States. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).

i) "When a statute gives no clear indication of extraterritorial application, it has none." *Id.*

ii) "Rather than guess anew in each case, this Court applies the **presumption in all cases**, preserving a stable background against which Congress can legislate with predictable effects." *Id.* at 248 (emphasis added).

iii) The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

iv) *Morrison*'s impact:

- Blocked large securities actions from U.S. courts.
- Has been extended to apply in criminal cases.
- Recently interpreted in the bankruptcy decisions discussed below.

b) SIPC v. Bernard L. Madoff Inv. Sec. LLC, 513 B.R. 222 (S.D.N.Y. 2014), supp'd by No. 12-mc-115 (JSR), 2014 WL 3778155 (S.D.N.Y. July 28, 2014)

i) The trustee appointed under the Securities Investor Protection Act ("SIPA") sought to recover against various foreign subsequent transferees, including $50 million in subsequent transfers of alleged Madoff Securities customer funds received by CACEIS Bank Luxembourg and CACEIS Bank (together, "CACEIS").

ii) CACEIS had not directly invested with Madoff Securities, but with Fairfield Sentry Limited and Harley International (Cayman) Limited, two Madoff Securities feeder funds that in turn invested those funds with Madoff Securities.

iii) CACEIS and other similarly situated defendants moved to dismiss the trustee's complaints, alleging that section 550(a)(2) of the Bankruptcy Code does not apply extraterritorially and, therefore, does not reach the subsequent transfers made abroad by one foreign entity to another.

iv) The court's holdings:

- The court held that since the transfers trustee sought to recover were transfers of assets abroad and the component events of the transaction occurred internationally, recovery of these transfers required extraterritorial application of section 550(a).
    - Under *Morrison*, the transaction being regulated by section 550(a)(2) is the recovery of a transfer of property (or the value therefore) to a subsequent transferee, not the relationship of that property to a perhaps-distant debtor.

- The court held that this extraterritorial application was not intended by Congress because nothing in the language of section 550(a) suggests that the section was intended to apply abroad. The context of the statute also did not make such a suggestion, as section 541's definition of all property of the estate, located domestically or abroad, does not supply any extraterritorial authority to the Bankruptcy Code's avoidance and recovery provisions because fraudulently transferred property becomes property of the estate only after its recovery. Additionally, although the trustee argued that public policy necessitates the extraterritorial application of section 550 to avoid situations where U.S. debtors transfer all assets offshore and then retransfer those assets to avoid the reach of U.S. bankruptcy law, the court rejected this argument and found that a trustee could utilize the laws of such countries to avoid an evasion.

c) Extraterritorial Applications of Avoidance & Recovery Statutes

Arguably departing from the *Morrison* framework, a recent decision in the U.S. Bankruptcy Court for the Southern District of New York, *In re Lyondell Chemical Co.,* held that extraterritorial fraudulent transfers fell within the scope of Congressional intent and thus were a cause of action for which relief could be pursued by the debtor in bankruptcy court. At the same time, other courts have found different bases for extraterritorial application, such as the Ninth Circuit's substantive consolidation analysis in *In re Icenhower*.

d) In re Lyondell Chem. Co., 543 B.R. 127 (Bankr. S.D.N.Y. 2016)

i) In late 2007, Basell AF S.C.A. ("Basell"), a Luxembourg-based polymer specialist, acquired Houston-based Lyondell Chemical Company through a leveraged buyout transaction ("LBO") that was, as the court noted, "100% financed by debt." *In re Lyondell Chem. Co.*, 543 B.R. at 132. In the transaction, Basell paid Lyondell's shareholders about $12.5 billion, while also assuming Lyondell's existing debt. As a consequence, the post-LBO entity had over $21 billion of secured indebtedness, just as the economic climate grew increasingly precarious. Less than a year after the LBO, Lyondell filed for Chapter 11 protection.

ii) Though myriad claims arose in connection with Lyondell's bankruptcy, this particular action pertained to the extraterritorial application of section 548 and section 550 of the Bankruptcy Code governing fraudulent transfer claims.[2]

iii) The court held that section 548 can be applied extraterritorially, arguably departing from earlier decisions in *In re Maxwell Communication Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994), and *In re Madoff Securities*, 513 B.R. 222 (S.D.N.Y. 2014).

[2] In the same decision, the court granted a motion to dismiss for lack of personal jurisdiction with respect to the trustee's claims to hold various defendants, including Basell's pre-merger parent company, liable for extra-contractual tort under Luxembourg law

iv) Analytically, the inquiry requires two steps. First, the court must determine whether the transaction was indeed extraterritorial. Second, if it was, the court then assesses whether Congress intended for extraterritorial application of the statute in question.

v) With respect to the first prong, because the transfer occurred outside of the U.S. between two Luxembourg-based entities, the court concluded that despite some arguable connection to the U.S., it was indeed extraterritorial.

vi) On the second prong, the court – relying in part on a broad and global definition of estate property – departed from earlier decisions to find evidence of Congressional intent for section 548 to apply extraterritorially.

e) <u>In re Icenhower</u>, 757 F.3d 1044 (9th Cir. 2014)

i) Debtors filed for bankruptcy in the Southern District of California. Prepetition, the debtors purchased property in Mexico and transferred it to a non-debtor shell company controlled by the debtors.

ii) Post-petition, the non-debtor shell company sold the property to the defendants.

iii) The bankruptcy court found that the non-debtor shell company was the debtor's alter ego and substantively consolidated it with the bankruptcy estate. It thus found that the sale of the property to the defendants was avoidable under section 549(a) and the defendants were required to return their interest in the property to the estate.

iv) The district court affirmed the decision of the bankruptcy court.

v) On appeal to the Ninth Circuit, the defendants argued that the bankruptcy court's application of the law was extraterritorial and improper.

vi) The court's holding:

- The Ninth Circuit applied *Morrison*'s test of whether Congress intended extraterritorial application of the statute.

- The court found that because the debtor and the non-debtor shell were substantively consolidated, the property was property of the estate as of the petition date. The court relied on previous precedent to find that "Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate." *In re Icenhower*, 757 F.3d at 1051 (quoting *In re Simon,* 153 F.3d 991, 996 (9th Cir. 1998)).