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International Alternative Forms to Chapter 11: Pros & Cons of Filing Outside of the U.S.

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International Alternative Forms to Chapter 11 - Pros & Cons of Filing Out of the U.S.

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Increasingly organizations are weighing up the benefits and disadadvantages of chapter 11 in the U.S., in comparison to restructuring proceedings in other jurisdictions. Wise organizations are ready to take advantage of these benefits that other jurisdictions can offer either as an alternative or supplement to chapter 11, which in turn changes the landscape of the restructuring market within the U.S..

This outline breaks down these key considerations for organizations will make when choosing between jurisdictions and how this works in practice.

1. **Where can the company restructure?**

    a. A company may be able to choose from more than one jurisdiction for its restructuring or similar proceedings
        i. UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI") and its broad application
            1. MLCBI was issued by the UNCITRAL secretariat on May 30, 1997 and was designed to assist States in developing a modern, harmonized, and fair insolvency framework to more effectively address instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency
            2. Legislation based on MLCBI has now been adopted in 57 States in a total of 60 jurisdictions
            3. Modified universalism lies at the heart of MLCBI, and unlike territorialism, requires a "central" proceeding that serves a coordinating role
            4. Identifying the jurisdiction for the "central" proceeding is the main task of a system of modified universalism

    b. Generally, the key factors considered in choosing a jurisdiction for the restructuring or similar proceedings are the location of the
        i. Incorporation
        ii. Main operations
        iii. Law governing the company's funded debt or other agreements

c. Other considerations may include:
    i. Threshold eligibility requirements
        1. Does a company need to be insolvent or otherwise in financial distress to be eligible for the restructuring process?

d. There may be a need for more than one proceeding, especially if there are assets in more than one jurisdiction
    i. Where is the debtor's center of main interest (COMI)?
        1. MLCBI establishes a rebuttable presumption that the debtor's place of registration is the debtor's COMI, but additional factors can be considered[1]
            a. In the U.S., various factors have been deemed relevant by courts in determining a debtor's COMI, including the location of the debtor's headquarters, managers, employees, investors, primary assets, or creditors, as well as the jurisdiction the law of which would apply to most of the debtor's disputes. *See In re SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007)
            b. The concept of COMI has been interpreted differently under the European Insolvency Regulation ("EIR Recast") from that under Chapter 15 of the U.S. Bankruptcy Code
                i. Both EIR Recast (Article 3) and Chapter 15 (11 U.S.C. § 1516(c)) presume the debtor's registered office coincides with COMI; however, the European courts have set a high bar for the rebuttal of this presumption, requiring sufficient evidence from the applicant that COMI is elsewhere
                ii. Two other notable differences include:
                    1. *Timing for determining COMI*. Under the EIR Recast, COMI is identified at the moment when an insolvency application has been filed. In the U.S., courts have concluded that COMI should be determined

[1] The Guide to Enactment and Interpretation of the Model Law lists, among other things, certain secondary factors, including, the location of debtor's books and records, the location where financing was organized or authorized, or from where the cash management system was run, the location in which the debtor's principal assets or operations are found, the location of the debtor's primary bank, the location of employees, he location in which commercial policy was determined, the site of the controlling law or the law governing the main contracts of the company, the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed, the location from which contracts (for supply) were organized, the location from which reorganization of the debtor was being conducted, the jurisdiction whose law applies to most disputes, the location in which the debtor was subject to supervision or regulation, and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

at the time or around the time the filing for the recognition of the proceeding in the U.S. is made

2. *Recognition*. Proceedings that fall under the EIR Recast have automatic recognition across all EU Member States. In the U.S., recognition is not automatic and requires an application by a foreign representative pursuant to Chapter 15 of the Bankruptcy Code (11 U.S.C. § 1515)

e. When considering a chapter 11 filing of a foreign business, it may be important to analyze the principles of abstention under section 305 of the bankruptcy code
    i. See, e.g., *Baha Mar* (dismissing chapter 11 cases in favor of a Bahamian liquidation proceeding, where substantially all assets were located in the Bahamas.

2. International alternative forms to chapter 11

a. To what extent can UK schemes and other foreign proceedings such as the new Dutch WHOA proceeding or the Singapore scheme be used to restructure the debt of U.S. companies or companies with operations in the U.S.
    i. The U.S. does not follow the Gibbs Rule
        1. a decision of a foreign court approving a scheme or plan that modifies or discharges U.S. law governed debt is enforceable, provided that the foreign court properly exercises jurisdiction over the foreign debtor in an insolvency proceeding, and the foreign court's procedures comport with broadly-accepted due process principles
    ii. Where requisite consent of creditors can be obtained, companies can change the governing law of the debt documentation and establish jurisdiction outside of the U.S.
        1. *Syncreon* (one of the first uses of an English scheme to restructure debt issued by a U.S.-based global enterprise)
    iii. Certain UK proceedings allow for the restructuring of certain classes of debt without affecting other obligations of the debtor
        1. The restructuring plan has been particularly popular as it introduced a cross-class cram down option; in a scheme of arrangement
    iv. The changes happening in the UK and the concerning new precedent
        1. No absolute priority rule, no unfair discrimination test, ability to get unlimited non-debtor releases of financial guarantees using a manufactured shell company, super easy access to the UK which can be manufactured overnight without requiring a COMI shift, no

marketing requirement where equity has exclusive right to retain control, de facto no requirement to treat pari debt relatively similarly (recent Adler precedent), ability to mark select creditors to liquidation value (imagine chapter 11 with literally on the best interest test as a hurdle to confirmation and you have the UK, with zero exaggeration).

2. Why given that incredibly flexibility in the UK, a sponsor would be unwise to utilize chapter 11 and lose control if they can retain control and maximum flexibility using a UK RP

b. The restructuring frameworks of Canada, the Netherlands, Singapore, the Caymans, and BVI, among others, have also be considered as alternatives or supplements to chapter 11
    i. Changes on the back of the EU directive (in particular in Germany, Netherlands, Spain, France)
        a. Why continental processes aren't yet fit for purpose and why they don't really pose a threat to chapter 11 as an alternative for multinationals
            i. Relatively recent implementation with case law still in development
            ii. Remote protection for new money
                1. *E.g.*, the German StaRUG does not allow for a super senior or a specific bridge loan concept. The company must finance its restructuring through already available means
            iii. Limited moratorium duration

c. Restructuring/insolvency proceedings in several other jurisdictions have regularly been recognized in chapter 15 cases, including Brazil, Mexico, Canada, the UK, Hong Kong, and others
    i. A proceeding pending elsewhere must be a foreign proceeding and a foreign main or non-main proceeding as defined in the Bankruptcy Code in order to be recognized under chapter 15. *See In re Paul Shimmin, as Liquidator of Comfort Jet Aviation, Ltd.*, No. 22-10039, 2022 Bankr. LEXIS 2932 (Bankr. W.D. Okla. Oct. 14, 2022); *see also In re Global Cord Blood Corp.*, No. 22-11347, 2022 WL 17478530 (Bankr. S.D.N.Y. Dec. 5, 2022) (denying a petition to recognize a Cayman Islands proceeding brought under section 92(e) of the Cayman Islands Companies Act and finding that the proceeding in Cayman Islands was not a "collective proceeding brought for the purpose of reorganization or liquidation.")
    ii. A foreign debtor must satisfy the general debtor eligibility requirements set forth in the Bankruptcy Code for its foreign proceeding to be recognized. *See Drawbridge Special Opportunities Fund LP v. Barnet (In re*

Barnet), 737 F.3d 238, 247 (2d Cir. 2013). *But cf. In re Al Zawawi*, 637 B.R. 663 (M.D. Fla. 2022) (disagreeing with the Second Circuit and concluding that section 109(a) of the Bankruptcy Code does not apply in chapter 15 cases)

d. Will U.S. parents filing in the U.S. be able to use any of the new foreign restructuring laws to restructure the debt of their subsidiaries rather than fund the subsidiaries they wish to retain and keep them out of a proceeding altogether?
    i. UNCITRAL Model Law on the Insolvency of Enterprise Groups

3. Key considerations in choosing the optimal jurisdiction where more than one option is available

a. Financial restructuring or operational restructuring?
    i. Financial restructurings may be easier to accomplish in one jurisdiction, with recognition proceedings where warranted
        1. Proposal for a new Bankruptcy Code Chapter ("Chapter 16") that would be similar to the UK scheme of arrangement
    ii. Operational restructurings may be more difficult to accomplish in one main proceeding and may require parallel proceedings
        1. E.g., lease and executory contract assumption/rejection issues – it may not be possible to bind a foreign landlord/contract counterparty on a foreign lease/executory contract through chapter 11 (e.g., *In re Alto Maipo*)

b. Is certain relief easier to obtain in a foreign jurisdiction?
    i. Thresholds required to confirm a restructuring
    ii. Third party releases may be much easier to obtain in a foreign proceeding and have been recognized in chapter 15 cases even if they would not be permissible in a U.S. case
        1. E.g., *In re Avanti Communications Group PLC* (enforced a UK court order granting non-consensual third-party releases, reasoning that principles of comity and consistency with due process standards of the U.S. justified enforcement of the UK scheme of arrangement containing such releases); *In re PT Pan Brothers Tbk*, Case No. 22-10136 (Bankr. S.D.N.Y. 2022) (recognizing a Singapore proceedings as foreign non-main and granting additional assistance, including third-party releases)

c. Will stakeholders agree to the chosen jurisdiction?
    i. *TV Azteca* – involuntary case in the U.S. vs. voluntary case in the U.S.

d. Will the restructuring be recognized in all relevant jurisdictions?
    i. The worldwide applicability of the chapter 11 automatic stay
        1. A bankruptcy court has *in rem* jurisdiction over all of the property in a debtor's estate, which includes all property "wherever located and by whomever held." 11 U.S.C. § 541(a); 28 U.S.C. § 1334(e)(1); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004). The filing of a bankruptcy petition triggers an automatic stay prohibiting any attempts to exercise control over any property of the estate. 11 U.S.C. § 362(a)(3). Prohibitions on such attempts, however, cannot be enforced if a court does not have personal jurisdiction over the party holding the property.
        2. Is there personal jurisdiction? The court's ability to assert control over any property in the estate located in a foreign jurisdiction depends on whether the court has personal jurisdiction over the foreign citizens and entities holding that property. Due process requires that out-of-forum defendants must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Wash. Off. of Unemp't Comp. & Placement, 326 U.S. 310, 316 (1945).
            a. The requirements for specific personal jurisdiction include: first, defendants must have purposefully directed their activities at the forum state or purposefully availed themselves of the privilege of conducting business in the forum; second, the alleged injury must arise out of or relate to the defendants' forum-related activities; and third, any exercise of personal jurisdiction must comport with traditional notions of fair play and substantial justice. *Rogers v. City of Hobart, Ind.*, 996 F.3d 812, 819 (7th Cir. 2021)
            b. Was *In re Sheehan* correct?
                i. Sheehan was a retired surgeon who immigrated from Ireland to Illinois. He obtained a loan from an Irish bank to buy an interest in an Irish medical company and purchase real estate in Ireland. The loan was secured by the shares of the Irish medical company.
                ii. Sheehan defaulted on the loans and the acquiror of the loans (an Irish company) foreclosed on the collateral—the shares after commencing foreclosure proceedings in Irish courts.
                iii. Sheehan then filed for chapter 11 in Illinois and sought to stay the Irish receiver's efforts to take

control of the Irish medical company shares and the real estate in Ireland.

iv. The Court found there was no personal jurisdiction and therefore it could not enforce the stay over the party holding the estate's property
    1. liquidating property in Ireland after receiving permission from an Irish court to do so is not activity directed toward Illinois merely because it might have an effect on a resident and citizen of Illinois.
    2. "'express aiming' remains the crucial requirement when a plaintiff seeks to establish personal jurisdiction (*Calder v. Jones*, 465 U.S. 783 (1984))

v. Compare: *Lamonica v. North of England Protecting and Indemnity Ass'n, Ltd., et. al. (In re Probulk, Inc.)*, 407 B.R. 56,. 60 (Bankr. S.D.N.Y. 2009)
    1. Prohibiting insurers from terminating debtors' insurance contracts based on so-called "cesser" clauses, which provided for the automatic termination of insurance coverage upon the commencement of proceedings under any bankruptcy or insolvency law
    2. "termination of the debtors' insurance because of an insolvency event would have the immediate, substantial, direct and foreseeable impact on U.S. debtors that § 541(c)(1)(B) and § 362(a) were designed to prevent"
    3. "where the Trustee has shown a substantial course of business between the parties and a substantial effect within the United States, as well as a clear need for immediate relief and severe injury absent that relief, a foreign entity cannot stand mute and contend, in effect, 'catch me if you can'"

c. Consider the disparate results from two matters in the *Avianca* bankruptcy
    i. Avianca sought a TRO against Ecuadorian vendor for violation of the automatic stay. Vendor had a Florida-based parent company. The Bankruptcy

Court found that it lacked personal jurisdiction, and that indirect ownership by the Florida-based parent was insufficient to create minimum required contacts with the U.S.

ii. Avianca sought sanctions against 150 Brazilian and Colombian creditors for violation of the discharge after bankruptcy proceedings. The Bankruptcy Court found that it did have personal jurisdiction over the creditors, because they had filed proofs of claim in the bankruptcy cases. The court gave foreign creditors 30 days to discontinue their lawsuits, or have their bankruptcy claims disallowed (consider how effective of a remedy this is; what other remedies may be available?)

3. Even if personal jurisdiction exists, entities may consider themselves not to be bound and enforcement can be complicated
    a. The chapter 11 debtor's appetite for enforcement may depend on leverage
        i. Consider a foreign contract counterparty to an executory contract that is valuable to the chapter 11 debtor that commenced arbitration proceedings in the foreign jurisdiction to resolve the contract dispute. The debtor may have valid business reasons to let the arbitration continue (including to liquidate a portion of the claim) instead of strictly enforcing the automatic stay.

ii. Will the U.S. court recognize a foreign restructuring?
    1. The Model Law and chapter 15
        a. Needs to be a proceeding in the jurisdiction where the debtor has its center of main interest--COMI (foreign main proceeding) or at least an establishment, *i.e.*, any place of operations where the debtor carries out a nontransitory economic activity (foreign non-main proceeding)[2]
        b. Public policy exception
            i. Section 1506 of the Bankruptcy Code gives the court discretion to refuse to take an action under chapter 15 if such action would be "manifestly contrary" to United States public policy.

[2] A proceeding taking place in the jurisdiction of the debtor's COMI will be deemed a "main foreign proceeding" and will be afforced certain immediate and automatic relief (e.g., in chapter 15, the automatic stay will apply automatically upon recognition, whereas in a chapter 15 case recognizing a foreign non-main proceeding, it will only apply upon request and if certain conditions are satisfied).

1. *In re Toft*, 66 C.B.C.2d 323, 453 B.R. 186 (Bankr. S.D.N.Y. 2011) (refusing to grant the request of a German administrator for recognition and comity to an order that permitted interception of the debtor's email in violation of U.S. law, finding that such an order would be manifestly contrary to U.S. public policy); *In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009) (denying recognition of Israeli receivership on grounds (among others) that continued prosecution of the receivership in violation of the automatic stay that applied in the debtors' chapter 11 cases was manifestly contrary to the public policy of the United States).

c. Possible pushback in the US in the context of chapter 15 recognition, given how far these UK outcomes deviate from acceptable US outcomes
d. Potential exception where foreign proceeding is not "collective", or primarily for "the purpose of reorganization or liquidation"
    i. *e.g., Global Cord Blood* (finding that a Cayman provisional liquidation proceeding seeking recognition under chapter 15 in order to pursue discovery in the United States would not be recognized, as the proceeding was more akin to an action based on corporate governance and fraud claims than a collective insolvency proceeding)

2. Comity?
    a. Is commencing a chapter 15 case is a prerequisite to obtaining comity with respect to a foreign insolvency proceeding?
        i. *Moyal v. Münsterland Gruppe GmbH & Co. KG*, 539 F. Supp. 3d 305 (S.D.N.Y. 2021) (chapter 15 recognition is not a prerequisite to grant comity to foreign proceedings on the request of a party other than a foreign representative)
        ii. *HFOTCO LLC v. Zenia Special Mar. Enter.*, No. H-19-3595, 2021 U.S. Dist. LEXIS 126127 (S.D. Tex. July 7, 2021) (chapter 15 recognition is a prerequisite to obtaining comity from any U.S. court with respect to foreign insolvency proceedings).

e. Speed, cost, and opportunity for other parties to participate and be heard
    i. Chapter 11 vs. UK Restructuring Plan

4. Nuances in use of chapter 11 across sectors

a. Use of chapter 11 by Airline Debtors
    i. Chapter 11 is routinely invoked by foreign debtors, and with increasing frequency by aircraft lessors and aviation companies
    ii. Recent examples of traditional filings in the aviation industry include Colombia-based Avianca, Chile-based LATAM, Mexico-based Aeroméxico, Sweden-based Scandinavian Airlines, Philippines based Philippine Airline
b. Debtor-friendly filing requirements
    i. Section 109 of the Bankruptcy Code permits an entity to file for chapter 11 as long as it has a domicile, place of business, or property in the United States
    ii. Amount of property that will qualify is nominal (one court has said that "a dollar, a dime or a peppercorn" in the United States is enough to make a company eligible for chapter 11 relief)
    iii. In the case of an airline, this may include, for example, gates or slots at U.S. airports, a reservations office located in the U.S., U.S. dollar-denominated debt, U.S.-law governed contracts, or even undrawn legal retainers maintained in U.S. bank accounts
c. Chapter 11 offers many useful tools not available in other insolvency regimes which are of particular interest to airlines and aviation companies experiencing financial distress
    i. e.g.,
    ii. A worldwide stay applicable to virtually all acts to collect on pre-filing debts (contrasted with, for example, English and Irish schemes of arrangement which do not come with an automatic stay, so creditors are not enjoined from pursuing enforcement actions)
    iii. Providing an organized and efficient forum in which to reach agreements with key stakeholders (lessors, labor unions)
    iv. Continuity of management and the board
    v. Provisions that enable an airline/aviation debtor to rationalize its fleet and eliminate burdensome aircraft-related debt obligations, such as by renegotiating existing aircraft leases (e.g., to provide for power-by-the-hour-based rent terms), abandoning unwanted assets, rejecting burdensome contracts and leases, and exercising rights to purchase aircraft on favorable terms
    vi. Ability to reject collective bargaining agreements in certain circumstances
    vii. Ability to sell assets free and clear
    viii. Ability to bind dissenting creditors,
    ix. Access to debtor-in-possession (DIP) financing to fund operations and the restructuring process
    x. Ability to file without a pre-negotiated plan

xi. Ability to bind foreign creditors to a chapter 11 process
    1. A foreign airline debtor will have significant creditors outside the U.S. and there are many ways to bind such creditors to a chapter 11 process, including through the threat of sanctions in the U.S. for violating the automatic stay or a U.S. federal court order
    2. Creditors that file a proof of claim in a chapter 11 process also submit themselves to the jurisdiction of the U.S. bankruptcy court

d. Section 1110 of the Bankruptcy Code, which provides aircraft financiers and lessors with certain unique remedies in chapter 11, including relief from the automatic stay to repossess aircraft if the debtor does not agree to perform its obligations and cure any defaults under the lease or security agreement within 60 days, will not typically apply to a foreign airline's chapter 11 proceedings
    i. Only applicable to FAA-certificated U.S. air carrier debtors who meet certain criteria
e. [While the effectiveness of the automatic stay could, in theory, be modified by special remedies provided under the Cape Town Convention, such issue has never been litigated to judgment in the U.S. and there are strong arguments that the Cape Town Convention does not apply in chapter 11]
f. Chapter 15 also offers a process by which a debtor may seek recognition and enforcement in the U.S. of a restructuring proceeding in another jurisdiction, and multiple aviation companies have successfully utilized chapter 15 to reinforce their foreign restructuring plans (e.g., Norwegian Air Shuttle ASA, Nordic Aviation Capital (2020))

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Appendix 1: III-UNCITRAL, New York: "seeking perfection is a fantasy"
Originally published by Global Restructuring Review, 26 April 2023, Ben Clarke

On the fifth anniversary of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIRJ), lawyers, judges and academics from around the world discussed gaps that can be plugged by the new law and whether the UK will ever override the "questionable and outdated" Gibbs rule.

At a conference hosted by the International Insolvency Institute in New York last week, University of Nottingham professor Irit Mevorach explained that UNCITRAL Working Group V drafted the latest law after the English case of Rubin highlighted a gap in the relief provisions of the existing Model Law on Cross-Border Insolvency (MLCBI). "There was also an acknowledgment that we need more tools to facilitate asset tracing and recovery," Mevorach said.

In the Rubin case, the UK Supreme Court refused to enforce an avoidance order made by a US bankruptcy court because it was directed towards a speci c person that had not submitted to the court making the order. The new model law deals explicitly with recognition and enforcement of insolvency-related judgments, to try to remove such uncertainties that have arisen since the MLCBI was introduced 25 years ago.

Mevorach noted that Article X of the MLIRJ includes a statement indicating the relief provision in the MLCBI does allow for the recognition and enforcement of insolvency-related judgments, so there are now two instruments relevant to the recognition and enforcement of insolvency-related judgments.

"That creates certain overlaps and potential inconsistencies and uncertainties that it is good to be aware of as we start to operationalise and try to adopt the Model Law on Insolvency-Related Judgments," she said. She explained that while the relief provision in the MLCBI is discretionary, the MLIRJ has a requirement to recognise and enforce insolvency-related judgments – albeit with eight grounds to refuse recognition, including in relation to public policy, fraud, inconsistency with previous judgments and jurisdictional grounds.

Mevorach said the two separate laws will give countries options and allow them to tailor relief to particular circumstances. "The Model Law system isn't perfect but seeking perfection is a fantasy," she said. "We need to make the most of what we have and in my view we have some good options here".

Options include adopting the MLIRJ as a standalone instrument or integrating it into the MLCBI if the country has already enacted that. "The less good option is to not do anything," Mevorach said. In a later panel, London-based Fresh elds Bruckhaus Deringer counsel Katharina Crinson said she doesn't mind laws that overlap. "Overlaps mean I get to choose what suits my particular circumstances best," she said. "Overlaps are difficult but insolvency is already a niche sport; overlaps give options and options can be beneficial."

The conference came as the UK became the first country to enter a consultation period last year to seriously consider adoption of the MLIRJ, with an approach that would include implementing Article X and bringing in procedural guidelines for the courts to follow.

Mark Smith, a government lawyer in the UK who advises the Insolvency Service, told delegates in New York that the response had been "a bit mixed" and they were preparing to publish the government's response soon.

Asked later in the day by Adam Crane of Cayman Islands rm Baker & Partners why the UK has been so quick to explore adoption of the new model law, Morrison Foerster restructuring head Howard Morris said the UK has "lost a great deal" since Brexit.

The loss of the European Insolvency Regulation has concerned the profession, Morris said, but consulting early on the new model law is a statement that the UK wants to remain present in international restructuring and insolvencies.

"Are we more universalist now? I don't think we are," said Morris. "I think we've become modified universalist, which some translate as meaning we're in favour of universalism so long as English law is paramount!"

Morris said that implementing Article X would make the least change to the UK's existing law derived form the MLCBI, but would overcome the challenge posed by Rubin and allow courts t recognise judgments.

"No doubt" Gibbs will be overridden

With panellists and delegates from many countries around the world, much of the debate as devoted to the UK's rule in Gibbs, which Crane said is "antithetical" to the model laws' purposes of protecting and maximising the value of insolvency estates.

"Every English lawyer knows exactly what the world's attitude will be towards Gibbs, it's going to be a mixture of disapproval based on their principled impropriety and let's face it, jealously, because it attracts work to their location," said Morris.

But while Morris noted most English lawyers believe the Rubin judgment was wrong and came as a surprise, many would defend Gibbs. He said that international trade and commerce has grown throughout his career and led to a "titanic battle" between competing governing laws as to which laws will be chosen by parties who have no relationship to a particular jurisdiction.

Because of the success of English law on the international stage, parties with no connection to the jurisdiction choose English law, Morris said, adding that the principled view is that if parties want English law, they want everything that goes with it – English judges and predictable outcomes but also the rule in Gibbs.

On a more practical basis, London has become a centre for international restructurings and there is a fear local practitioners would lose work if Gibbs was overridden, he said. WongPartnership restructuring head Smitha Menon said Singapore has a "really rm, universalist approach" and practitioners there don't like the Gibbs rule because it is a threat to good forum shopping, which she said is an efficient way to maximise value for insolvent estates.

"We also find the principles underly the [Gibbs] decision to be quite questionable and outdated," Menon said. "We think the court was wrong to characterise it as a contractual issue."

"We feel primacy should have been given to the fact that it is about insolvency, which is a collective proceeding, and that overrides contractual considerations," she said. "Policy trumps contract."

Morris said he has "no doubt" that Gibbs will be overcome eventually but he urged delegates to look at how much progress has been made in the international insolvency arena in recent decades.

"Each time that we recognise a foreign proceeding and foreign judgment it is a ceding of the absolute authority of one's nation's courts," he said. "The degree of international cooperation that's been achieved, albeit slowly and slower than many would like, is remarkable."

Morris praised the achievements of the UNCITRAL Model Law. "It's a journey which at the outset of my career was unthinkable, that we would come together as an international comity of nations to such a degree that we are sitting trying to further progress and get over the remaining bumps in the road."

The one-day III conference, chaired by Blank Rome of counsel Evan Zucker, was hosted at the US Bankruptcy Court for the Southern District of New York and supported by UNCITRAL.

Speakers
Judge Martin Glenn, US Bankruptcy Court for the SDNY, USA
Evan Zucker, Blank Rome, USA
Harold Foo, Ministry of Law, Singapore
Stacy Lutkus, McDermott Will & Emery, USA
Irit Mevorach, University of Nottingham, UK
Judge Allan Gropper, former SDNY bankruptcy judge, USA
Rodrigo Rodriguez, University of Lucerne, Switzerland
Susana Hidvegi, Riveron, Colombia
Adam Crane, Baker & Partners, Cayman Islands
Debra Grassgreen, Pachulski Stang Ziehl & Jones, USA
Smitha Menon, WongPartnership, Singapore
Howard Morris, Morrison Foerster, UK
Robert van Galen, NautaDutilh, Netherlands

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Appendix 2: FOREIGN COMPANIES USING CHAPTER 11

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I. WHY WOULD A FOREIGN COMPANY USE U.S. CHAPTER 11?

Favorable features of U.S. Chapter 11 along with the broad reach of U.S. bankruptcy law:

A. Possibility of reorganization with a discharge rather than liquidation;
B. Ability to bind holdouts under a plan of reorganization supported by a super-majority;
C. Ability to stretch out secured debt;
D. Ability to convert unsecured debt to equity;
E. Post-petition Debtor in Possession financing, including priming financing if adequate protection can be shown;
F. Sale of assets free and clear of liens, with liens attaching to proceeds;
G. Cure, assume and assign, and reject executory contracts and leases;
H. Exit financing with a securities law exemption;
I. Strong powers to recover preferences and fraudulent conveyances;
J. Ability of debtor management to remain “in possession”;
K. Release and exculpation of debtor-owned causes of action against directors, officers and professionals;
L. Potential for third-party releases (in some courts in the U.S. under some circumstances);
M. Specialized bankruptcy courts;
N. U.S. law addresses property of the debtor “wherever located”; and
O. Major creditors are ordinarily present in the U.S. and subject to U.S. jurisdiction, especially financial creditors.

II. SUFFICIENCY OF CONNECTIONS WITH THE UNITED STATES

A. Bankruptcy Code §§301 and 303 – Who may commence a case?

1. §301 - a voluntary case can be commenced by "an entity that may be a debtor".

2. §303 – an involuntary case can be commenced by three creditors with non-contingent, undisputed claims aggregating at least $15,325.

3. Chapter 15 - a foreign representative who has been recognized under Chapter 15 can commence a voluntary case under §301 or an involuntary case under §303.

B. Bankruptcy Code §109 – Who May Be a Debtor?

1. "[O]nly 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."

2. If an entity has a foreign domicile, **how much of a place of business** does it need to have in the U.S. to be eligible to be a Chapter 11 debtor?

3. If an entity has a foreign domicile and does not have a place of business in the U.S., **how much "property in the United States"** is needed to be eligible for relief under the Bankruptcy Code?

C. Case law generally supports a literal reading of §109 and there has not been a materiality threshold for the (i) size of the office or (ii) amount of property in the United States that is required to create eligibility for plenary Chapter 11 relief.

1. *In re Axona Int'l. Credit & Commerce Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988), aff 'd 115 B.R. 442 (S.D.N.Y.1990) (bank accounts containing approximately $500,000 were sufficient).

2. *In re Global Ocean Carriers Ltd.*, 251 B.R. 31 (Bankr. D. Del. 2000) (a few thousand dollars in U.S. bank accounts and the unearned portion of U.S. counsel's retainer were sufficient; note, however, that debtors had a U.S. affiliate that was incorporated under Delaware law and was formed to raise financing in the U.S.).

3. *In re Aerovias Nacionales de Colombia S.A. Avianca*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003) (28 employees in the U.S. compared to 4,000 in Columbia were sufficient).

4. *In re JPA No. 111 Co. Ltd.*, 2022 WL 298428 (Bankr. S.D.N.Y. Feb. 1, 2022), involved the Chapter 11 filing of a Japanese single-purpose entity created to purchase an aircraft leased to Vietnam airlines. U.S. jurisdiction (and a stay of foreclosure) was based on the debtor's interest in a retainer deposited with debtor's counsel in the U.S. The Court sustained the case against the contention that the retainer was an insufficient contact and the petition had been filed in bad faith.

5. As described below, eligibility for plenary relief does not end the inquiry.

III. EXTRATERRITORIAL REACH OF U.S. BANKRUPTCY LAW

A. §541 defines "property of the estate".

"Property of the estate" includes ***"the following property, wherever located and by whomever held…*** [with limited exceptions] all legal or equitable interests of the debtor in property as of the commencement of the case…"

B. 28 U.S.C. §1334(e) provides that the District Court in which a case under Title 11 is commenced is granted exclusive jurisdiction over:

"all of the property, wherever located, of the debtor as of commencement of the case…"

C. Early lower court cases gave extraterritorial effect to various provisions of the Bankruptcy Code.

1. *United States Lines, Inc. v. G.A.C. Marine Fuels, Ltd. (In re McLean Industries, Inc.)*, 76 Bankr. 291 (Bankr. S.D.N.Y. 1987) (automatic stay).

2. *In re Deak & Co., Inc.,* 63 B.R. 422 (Bankr. S.D.N.Y. 1986) (avoidance powers).

D. In EEOC *v. Arabian Oil Co. and Aramco Services Co.*, 499 U.S. 244 (1991), a non-bankruptcy case, the Supreme Court established a "presumption against extraterritoriality."

> "[L]ong-standing principle of American law that 'legislation of Congress unless a contrary intent appears is meant to apply only within the territorial jurisdiction of the U.S.'" (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281).
>
> Because of the "presumption against territoriality," **unless the "affirmative intention of the Congress is clearly expressed**," a Congressional enactment is presumed to be "primarily concerned with domestic conditions."

E. Numerous post-1991 opinions have found that bankruptcy extraterritoriality survived Arabian Oil.

1. *Nakash v. Zur*, 190 B.R. 763 (Bankr. S.D.N.Y. 1996) (the reference to assets "wherever held" in §541 was intended to give Bankruptcy Code's automatic stay extraterritorial effect; commencement by Israeli receiver of Israeli bankruptcy proceeding violates the automatic stay).
2. *In re Rimsat*, 98 F.3d 956 (7th Cir. 1996) (injunction in involuntary Chapter 11 trumps previously filed Nevis receivership).
3. *In re Simon*, 153 F.3rd 991 (9th Cir. 1998) (extraterritorial effect of discharge injunction against a creditor who filed a proof of claim).
4. *In re Gucci*, 309 B.R. 679 (S.D.N.Y. 2004) (procedures in Switzerland and Italy to enforce an arbitral award pursued in violation of the automatic stay were void. See also 2005 WL 1538202 (S.D.N.Y. 2005), aff'd, 197 F.App'x. 58 (2d Cir. 2006).
5. *French v. Liebmann* (In re French), 440 F.3d 145 (4th Cir. 2006), cert. denied, 549 U.S. 815 (2006) (avoidance of transfer abroad by U.S. debtor did not constitute extraterritorial application of U.S. law).
6. *See also, In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr, E.D.N.Y. 2009) (denial of Chapter 15 recognition because an Israeli case was filed in defiance of U.S. stay).

F. Some post-1991 opinions questioned whether avoidance of a transfer outside the U.S. is an extraterritorial application of U.S. law.

In re Maxwell Comm. Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994; aff'd, 186 B.R. 807 (S.D. N.Y. 1995); aff'd, 93 F.3d 1036 (2nd Cir. 1996) (where there were parallel reorganization proceedings pending in the U.S. and England, the court declined to apply U.S. preference avoidance provisions to a foreign transaction where the foreign jurisdiction had the primary interest in the transaction in question and parties had no reason to suspect the application of U.S. law). This Second Circuit decision did not rely on the presumption against exterritoriality, as had the lower court decisions. Instead, it rested its ruling solely on the principle of comity (and choice of law).

G. In 2010 and 2013, the Supreme Court continued to limit the extraterritorial effect of U.S. statutes in the absence of a clear Congressional intent that extraterritorial effect is intended. See *Morrison v. Nat'l. Australia Bank Ltd.*, 561 U.S. 247 (2010); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (terms like "any" and "every" are not enough to rebut the presumption).

H. Since 2013, a split has continued about exercise of extraterritorial jurisdiction in bankruptcy cases, with some, but not all, cases declining to apply avoiding powers extraterritorially.

1. In *Kismet Acquisition LLC v. Icenhower*, 757 F.3d 1044 (9th Cir. 2014), the Ninth Circuit held that 28 U.S.C. §1334(e) expressed Congress' intent to exercise extraterritorial jurisdiction and upheld the avoidance of a Mexican transfer of Mexican property by a debtor in a U.S. bankruptcy case.

2. *In re Ampal-American Israel Corp.*, 562 B.R. 601 (Bankr. S.D.N.Y. 2017) held that a U.S. debtor's payment of legal fees to an Israeli law firm could not be avoided as a preference because the transfer itself occurred entirely outside the U.S., and the Bankruptcy Code provisions pertaining to preferences were not intended by Congress to apply to transfers outside the U.S.

3. In *In re FAH Liquidating Corp.* 572 B.R. 117 (Bankr. D. Del. 2017), the trustee of a liquidating trust created by a confirmed plan of Fisker Automotive ("*Fisker*"), a maker of hybrid electric vehicles, sued a German auto manufacturer to recover a series of payments under a constructive fraudulent transfer theory. The bankruptcy judge, using a "center of gravity" or "all components" test, found the transfers to be extraterritorial and also determined that §548 was intended to apply extraterritorially.

4. Five months after the *Fisker* decision was issued, another bankruptcy judge in New York concluded in In re Arcapita ("Arcapita"), 575 B.R. 229 (Bankr. S.D.N.Y. 2017), that a cross-border transfer attacked as a preference was domestic and thus, it was not necessary to determine if the Bankruptcy Code's preference provisions extended beyond U.S. borders. Focusing on the location of the transfers (instead of all components of the transaction), the judge found that the non-U.S. defendants' use of correspondent U.S. banks to receive the transfers made the transfers domestic.

5. In a subsequent decision in the case, the District Court, in *Bahrain Islamic Bank BisB v. Arcapita Bank BSC(C)*, 640 B.R. 604 (S.D.N.Y. 2022), reaffirmed lower court findings that personal jurisdiction over the Bahraini bank was properly premised on the bank's transfer of millions of dollars through New York. It also rejected the Bank's appeal to comity, finding that there was no conflict between Bahrain law and U.S. law, and it found that setoff rights asserted in Bahrain did not render the Bank's conduct extraterritorial. The Court's order is now on appeal to the Second Circuit Court of Appeals.

6. *In re Midland Euro Exch.*, 347 B.R. 708, 718-20 (Bankr. C.D.Cal. 2006), and King v. Export Dev. *Canada (In re Zetta Jet USA, Inc.),* 2020 WL 7682136 (Bankr. C.D. Cal. July 29, 2020), the courts declined to apply avoidance powers extraterritorially.

I. *In re Picard*, 917 F.3d 86 (2nd Cir 2019), arose out of the Madoff Ponzi scheme. The Second Circuit held that the U.S. trustee could sue to recover avoidable transfers from foreign entities who had received subsequent transfers initially made from a U.S. debtor (the Madoff company) to a feeder fund registered in the British Virgin Islands but doing business in the U.S. (and which

had been recognized as a foreign main proceeding under Chapter 15). The BVI feeder fund received the transfers from Madoff and then paid them to third parties in Europe who did not deal directly with Madoff in the U.S.

1. The Second Circuit held that the focus of a §548 fraudulent conveyance avoidance is to recover property fraudulently transferred from a U.S. debtor.
2. Thus, it was not an extraterritorial exercise of U.S. bankruptcy power to use §550(a)(2) to recover that property from a foreign subsequent transferee.
3. The court further held that a BVI court's decision that the transaction could not be avoided under BVI law did not require comity that would override the express provisions of U.S. law that expresses a strong interest in the recovery of assets fraudulent transferred away from U.S. debtors.

J. *In re Sheehan*, 48 F 4th 513 (7th Cir 2022) analyzed issues of in-personam jurisdiction in connection with extraterritorial application of the Bankruptcy Code.

1. Sheehan left Ireland decades ago and lives near Chicago. He bought shares in an Irish hospital and Irish personal real estate, both financed by a loan from an Irish bank which took a lien on the Irish shares and real estate. The current loan holder bought it out of the Irish bank's insolvency proceeding. Sheehan defaulted on the loan, litigated in an Irish court trying to stop foreclosure, and lost. A receiver was appointed to take charge of the collateral and sell it.
2. Sheehan then filed Chapter 11 in Chicago where he had lived for many years. Sheehan notified the loan holder and receiver that they would violate the automatic stay if they went forward with the foreclosure in Ireland. They went forward anyway.
3. Sheehan filed an adversary proceeding in the Chicago bankruptcy court to sanction the loan holder and receiver for violating the automatic stay. The bankruptcy court dismissed the adversary proceeding for lack of in-personam jurisdiction over the loan holder and receiver defendants. The district court upheld that dismissal and so did the Seventh Circuit.

4. The Seventh Circuit acknowledged that the bankruptcy court has jurisdiction over property of the estate wherever it is by whomever it is held, and that the filing of a bankruptcy case stays actions against that property.

> "A bankruptcy court has in rem jurisdiction over all of the property in a debtor's estate, which includes all property "wherever located and by whomever held." 11 U.S.C. §541(a); 28 U.S.C. §1334(e)(1); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448, 124 S. Ct. 1905, 158 L.Ed.2d 764 (2004).
>
> The filing of a bankruptcy petition triggers an automatic stay prohibiting any attempts to exercise control over any property of the estate. 11 U.S.C. §362(a)(3)."

5. However, it went on to say that to enforce the stay, it must have personal jurisdiction over the party acting against the property.

> > "Prohibitions on such attempts, however, cannot be enforced if a court does not have personal jurisdiction over the party holding the property. *Hood,* 541 U.S. at 448, 124 S. Ct. 1905 ("Because the court's jurisdiction is premised on the res, however, a nonparticipating creditor cannot be subjected to personal liability."); *Freeman v. Alderson*, 119 U.S. 185, 188, 7 S. Ct. 165, 30 L.Ed. 372 (1886) ("The state has jurisdiction over property within its limits owned by non-residents and may therefore subject it to the payment of demands against them of its own citizens.... If the non-resident possesses no property in the state, there is nothing upon which its tribunals can act."). …"
>
> > "the court's ability to assert control over any property in Sheehan's estate located in Ireland depends on whether the court has personal jurisdiction over the Irish citizens and entities holding that property."

6. The Seventh Circuit rejected Sheehan's argument that the Irish property should be deemed to be at the place of the bankruptcy case that creates the bankruptcy estate and issues the automatic stay. The Ninth Circuit had used this assumption in *In re Simon*, 153 F.3rd 991 (9th Cir. 1998).

7. The Seventh Circuit described elements of specific jurisdiction relying substantially on cases involving state jurisdiction over state law causes of action, that are different than a violation of an injunction based on a federal statute that the Seventh Circuit had acknowledged to have national and worldwide application.

> "[F]irst, defendants must have purposefully directed
> their activities at the forum state or purposefully availed themselves of the privilege of conducting business in the forum; second, the alleged injury
> must arise out of or relate to the defendants' forum- related activities; and third, any exercise of personal jurisdiction must comport with traditional notions of fair play and substantial justice."

8. The Seventh Circuit expressed a strong view that personal jurisdiction should be premised on actions that a defendant has "purposefully directed" at the forum state.

> *"[S]ee also NBA Properties*, 46 F.4th at 625 ("The question is not whether the plaintiff purchased enough goods to subject the defendant to personal jurisdiction. The focus is whether [the defendant] **purposefully directed** its conduct at Illinois.")."

9. The Seventh Circuit described how the facts in the Supreme Court's *Calder* opinion showed calculation to cause injury in California whereas those in its *Walden* opinion would merely cause damage at the Atlanta, Georgia airport to a resident of Nevada, they were not aimed at Nevada.

10. The Seventh Circuit concluded that "liquidating property in Ireland after receiving permission from an Irish court to do so did not qualify as activity **directed toward Illinois** merely because it would have an effect on a resident citizen of Illinois."

> "Thus, for example, "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not

> convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Asahi Metal Indus*., 480 U.S. at 112, 107 S. Ct. 1026. Likewise liquidating property in Ireland after receiving permission from an Irish court to do so is not activity directed toward Illinois merely because it might have an effect on a resident and citizen of Illinois."

11. While acknowledging that an intentional tort can create minimum contacts with a state when a defendant **"expressly aims its actions at the state with the knowledge that they would cause harm to the plaintiff there,"** the Seventh Circuit concluded that the Sheehan case was not that but took place in Ireland with minimal contact with Chicago. As the Seventh Circuit analyzed it, the transaction at issue took place when (i) Sheehan went to Ireland to buy property and took out a loan secured by it,

> (ii) the lender had been given authority by an Irish court to foreclose on the collateral and was doing so, (iii) the only connection to Chicago was (a) Sheehan's residence and the court where he filed his bankruptcy and (b) that Sheehan had sent a notice to defendants in Ireland about the presence of the automatic stay emanating from Chicago.

12. The Seventh Circuit said that the receiver sending notices of the start of liquidation of the collateral to Sheehan in Chicago was merely "ministerial" and did not cause defendants to **aim illegal acts at Illinois**. Rather, according to the Seventh Circuit, "all of the acts taken by the defendants to assert control and ownership over the Irish property occurred in Ireland."

> "We also find that the alleged injury to Sheehan did not arise out of defendants' forum-related activities. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, – — U.S. ——, 141 S. Ct. 1017, 1025, 209 L.Ed.2d 225 (2021). All of the acts taken by the defendants to assert control and ownership over the Irish property occurred in Ireland. *See, e.g., Philos Techs., Inc. v. Philos & D, Inc.,* 802 F.3d 905, 915 (7th Cir. 2015) (even an

> informational business trip to Illinois did not turn a primarily Korean business deal into one with jurisdictional contacts in Illinois). Moreover, the few letters that Breccia sent to Sheehan announcing the receivership and start of the liquidation of Sheehan's collateral for defaulted loans were nothing more than ministerial actions taken in light of the Irish court's disposition of the litigation in Ireland. They do not constitute taking aim at Illinois and were far from sufficient to create minimum contacts with Illinois."

13. Based on this view of events, the Seventh Circuit found no in-personam jurisdiction and dismissed the adversary proceeding that sought to hold the property owner and receiver accountable for violating the automatic stay in a Chicago Chapter 11 case.

Commentary about Sheehan:

14. The Seventh Circuit did not address that, when defendants were put on notice of the automatic stay and chose to violate it, they committed an intentional violation of a stay intended to protect a debtor in a bankruptcy case that emanated from and was controlled by the bankruptcy court in Chicago. Section 362(a) provides that a "petition filed under §301…operates as a stay, applicable to all entities" of actions against property of the estate. Pre-1978 Bankruptcy Code, such a stay was an injunction issued by court order. Under the Bankruptcy Code, a stay is automatically issued upon filing the Chapter 11 petition, and the bankruptcy court is put in charge of whether the stay will continue, or it will "grant relief from the stay…such as by terminating, annulling, modifying, or conditioning such stay." §362(d).

15. Rejecting it as out of circuit and from a lower court, the Seventh Circuit did not address the analysis in *In re Probulk Inc.*, 407 B.R. 56 (Bankr. S.D. N.Y. 2009) that focused on these federal statutes. In *Probulk*, a New York Chapter 7 trustee was trying to do an orderly liquidation of a fleet of refrigerator ships that were

all over the world, and English insurers used the initiation of the U.S. bankruptcy case as an excuse to terminate insurance contracts covering the ships. This challenged the ability of a U.S. trustee to carry out an orderly liquidation of assets.

> "The question raised is whether the trustee will be able to wind down the debtors' operations in a reasonable fashion with insurance coverage for the vessels or whether he will have to abandon the vessels immediately."

16. The court in *Probulk* found that this contract termination done in England presented two central things: (i) a strong U.S. interest in administering bankruptcy estates that justifies a bankruptcy court to enjoin attempts to divest it of (a) jurisdiction over property of the estate, and (b) the ability to determine the rights of all creditors wherever they might be; and (ii) whether jurisdiction might be found when an action "had a substantial, direct and foreseeable impact on the administration of the estate."

> "In *In re McLean Industries, Inc*., 68 B.R. at 697, n. 4, the Court left open two "highly interesting issues": (i) whether "in-personam jurisdiction may be posited on the notion that the interest of the United States in administering bankruptcy proceedings of domestic corporation is so strong as to justify the right of its courts, in the exercise of exclusive jurisdiction over the property of the estate afforded by 28 U.S.C. §1334(d) [now §1334(e)(1)], to enjoin attempts to divest them of that jurisdiction and to determine the rights of all creditors wherever they may be"; and (ii) whether "jurisdiction may be found on the basis that [action taken abroad] had a substantial, direct and foreseeable effect on the administration of this estate that 11 U.S.C. §362(a) was designed to prevent." These issues must be reached herein."

17. Under the *Probulk* analysis, the defendants in Sheehan had aimed their violation at the Chicago bankruptcy court when they took away its control over

the automatic stay protecting an asset of the estate and were subject to its jurisdiction to remedy that violation of its order.

18. In *In re Picard*, 917 F.3d 86 (2nd Cir 2019), the Second Circuit held that it was important to U.S. policy, indeed to the U.S. economy, to be sure that assets fraudulently transferred away from a debtor in the U.S. could be recovered from third parties in Europe who had never dealt with the debtor in the U.S. In *Sheehan*, the Seventh Circuit did not show as much concern for protecting the bankruptcy court's control over the automatic stay, which is a crucial part of every U.S. debtor corporation's ability to preserve its going concern value and the employment it supports.

19. In addition, the Seventh Circuit did not take into account that the loan holder who violated the automatic stay had received comfort from a U.S. bankruptcy court about owning the loan and lien that it enforced against Sheehan. The Delaware bankruptcy court had confirmed, through a U.S. Chapter 15 case, the transfer of the loan from the Irish insolvency of the original lender over to the holder who used it to violate the stay in the *Sheehan* Chapter 11 case.

20. Query whether, although Sheehan is wrong, it might have reached the correct policy result based on its facts. Assuming there was jurisdiction over the foreign trustee in *Sheehan*, there were reasons to permit the foreign proceedings to go forward, including (i) the cooperation (comity) concepts of Chapter 15 and (ii) the difficulty of effectuating relief abroad, especially where there is a foreign judicial proceeding.

21. As to the importance of the ability to effectuate U.S. proceedings abroad, see the discussion of *Fargo, Yukos and Northshore Mainland Services (BahaMar)* below. See also the following cases involving cooperation among parallel proceedings in the U.S. and abroad.

22. In *In re Gold & Honey, Ltd*., 410 B.R. 357 (Bankr. E.D.N.Y. 2009), the bankruptcy court held that Israeli receivers had violated the automatic stay by

virtue of their appointment in Israel. However, it recognized as a practical matter that there were good reasons for the Israeli proceedings to continue, saying:

> "This Court also recognizes, under principles of both comity and practicality, that the most efficientand most sensible cross-national use of judicial and parties' resources is to have the Israeli Court decide what the debtor-creditor relationships are as between FIBI, GH Ltd. and GH LP, and how to effectuate each parties' rights and remedies, particularly given the choice of law provisions in the parties' agreements, the situs of FIBI and GH Ltd. being in Israel, and most of the relevant assets being located in Israel." (footnote omitted).

23. In *In re Dunne*, 2015 WL 7625629 (Bankr. D. Conn. Nov. 25, 2015), an Irish citizen who (like Sheehan) had moved to the U.S. was in a Chapter 7 case in Connecticut. His Chapter 7 trustee moved for an order either finding that a stay was not in effect or providing relief from the stay so that the debtor could be adjudicated a bankrupt in Ireland. The debtor's wife opposed the motion. The U.S. court found that the Chapter 7 trustee was proceeding cooperatively in tandem with a large creditor in Ireland and supported the opening of formal proceedings there. It determined that the automatic stay did not stay actions the Official Assignee in Ireland was taking to pursue assets there, finding that "The [Chapter 7] trustee and the Official Assignee are acting together and are, in essence, *de facto* co-administrators of each other, working for the same purpose." It held alternatively that there were grounds to grant relief from the stay "for cause" under §362(d)(1) *nunc pro tunc* to the date of the commencement of proceedings in Ireland. *See* sections VI and VII below discussing co-operation with foreign cases.

24. The Delaware Chapter 11 filing by a Chilean company, Alto Maipo SpA, raised issues with some similarity to those in Sheehan. The debtor was a Chilean hydroelectric plant operator and moved to assume a contract that it alleged was critical to its ability to reorganize under Chapter 11. The Chilean supplier, relying

in part on an ipso facto termination clause in the contract, objected to the assertion of U.S. jurisdiction over it and to the entry of an order permitting the assumption. In an oral decision that was reported widely in the financial press, the Delaware bankruptcy court denied the motion, on the basis that it would have to adjudicate the debtor's contract rights rather than the estate's property rights under the contract and that it would have to enjoin a foreign counterparty. See Global Restructuring Review, September 30, 2022.

IV. LIMITS ON USE OF CHAPTER 11 BY FOREIGN COMPANIES

A. Dismissal for insufficient §109 connections with U.S. to be qualified to be a debtor. *See* discussion above about the small amount of property in the U.S. necessary to sustain U.S. jurisdiction.

B. Dismissal under §305(a) in deference to foreign proceedings previously or subsequently commenced.

1. Dismissal under §305(a)(1) because the "interests of creditors and the debtor would be better served".

2. Dismissal under §305(a)(2) because "**the purposes of chapter 15…would be best served".**

C. Dismissal under a §1112 **totality of circumstances** analysis

V. ABSTENTION AND DISMISSAL UNDER NEW §305 (that replaced old section 304)

§304 was repealed in 2005 and replaced with §305 which contains provisions expressly referring to Chapter 15.

§ 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.

VI. DISMISSAL UNDER §305(a)(1) WHERE "THE INTERESTS OF CREDITORS AND THE DEBTOR WOULD BE SERVED"

A. *In re Compania de Alimentos Fargo*, S.A., 376 B.R. 427 (Bankr. S.D.N.Y. 2007) applied §305(a)(1) using a seven-part analysis, but ultimately decided based on comity which had been the standard under repealed predecessor §304.

1. In *Fargo*, the bankruptcy court applied §305(a)(1) to dismiss an involuntary Chapter 11 case that had been brought by creditors in New York against the largest bread maker in Argentina which was already in a bankruptcy case in Argentina.

2. Even though the U.S. involuntary case was filed after Chapter 15 became effective, the court never considered whether a foreign debtor had to be recognized in order to move to dismiss such an involuntary case brought by its creditors.

3. The court said it took seven factors into account in deciding whether to abstain

a. "whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court;

b. economy and efficiency of administration;

c. whether federal proceedings are necessary to reach a just and equitable solution;

d. whether there is an alternative means of achieving an equitable distribution of assets;

e. whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case;

f. whether a non-federal insolvency has proceeded so far that it would be costly and time consuming to start afresh with the federal bankruptcy processes; and

g. the purpose for which bankruptcy jurisdiction has been sought."

4. The court then gave great weight to **comity** in favor of a foreign insolvency case that was already pending.

> "The pendency of a foreign insolvency proceeding alters the balance by introducing considerations of **comity** into the mix. The Second Circuit, in this regard, has frequently underscored the importance of judicial deference to foreign bankruptcy proceeding. 'Deference to foreign insolvency proceedings will, in many cases, facilitate equitable, orderly and systematic' distribution of the debtor's assets.' *Maxwell Commun. Corp.*, 93 F.2d at 1048 (quoting *Cunard S.S. Co.*, 773 F.2d at 458); accord *J.P.Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424, (2d Cir. 2005) ("We have repeatedly held that U.S. Courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding … In such cases, **deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and, consistent with the principles of Lord Mansfield's**

holding, do not contravene the law or public policy of the United States.")."

5. The court decided to abstain from hearing the U.S. involuntary bankruptcy case because it concluded that "the Argentine Courts can determine and adjust the parties' rights in a fair and equitable manner."

6. As to running a parallel Chapter 11 case in the U.S., the court noted that it would be very difficult to enforce its orders against the company's primary assets in Argentina, especially because there was already an Argentinean insolvency proceeding pending.

B. In *In re Monitor Single Lift I, Ltd., 381 B. R. 455 (Bankr. S.D. N.Y. 2008)*, Monitor Oil PLC (PLC) and two subsidiaries (MSL I and FinCo) commenced Chapter 11 cases in New York.

1. Monitor had companies, operations and insolvency cases in many jurisdictions.

2. They supplied oil and gas production support services, focusing on operations in the North Sea.

3. PLC, the parent, was headquartered in London; MLS I was a Cayman corporation headquartered in NY; FinCo was a Delaware corporation with an office in New York. Each filed a Chapter 11 case in New York.

4. Debtors and second lien creditors (first lien was paid off) supported continuing U.S. Chapter 11 proceedings.

5. The Ad Hoc Committee of bondholders did not want the company to go forward with a development contract for a project that §365 of Chapter 11 permitted the parent company to preserve. The Committee preferred an English insolvency proceeding that would not provide that power.

6. The Ad Hoc Committee opposed continuation of Chapter 11 proceedings and asked the court to abstain under §305(a)(1) in favor of an insolvency case which could be filed at the parent company COMI in the UK but had not been filed.

7. Court declined to dismiss the Chapter 11 case, applying a "seven factor test" to determine whether, under §305(a)(1), "the interests of creditors and the debtor would be better served by…dismissal or suspension." It found that the debtor had made rational choice to file Chapter 11 to use §365 to preserve its development contract, thus dismissal would not be in the debtor's interests.

8. Court concluded that comity did not apply where there is no pending foreign proceeding for the Chapter 11 company.

9. Said differently, the New York bankruptcy court did not dismiss a U.S. Chapter 11 case that the debtor filed to use §365 executory contract provisions to preserve a development contract asset because creditors, who didn't want more money

spent on that contract, argued that the debtor's COMI in England would be a better place for the case. There was no case pending in England so no comity issues were presented.

10. The bankruptcy court did not dismiss a U.S. case that the debtor had fled to preserve an asset in favor a case that had not been filed at the debtor's COMI where it could not preserve that asset.

VII. DISMISSAL UNDER §305(a)(2) BECAUSE THE "PURPOSES OF CHAPTER 15 OF THIS TITLE WOULD BE BEST SERVED BY SUCH DISMISSAL OR SUSPENSION"

A. §305(a)(2) permits a foreign representative who has been recognized under Chapter 15 to move to dismiss a pending Chapter 7 or 11.

> (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— …
>
> (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.**

B. §1529 contemplates that there might be a plenary U.S. case filed either before or after a foreign proceeding for the debtor and provides that in either circumstance a Chapter 15 case is to give substantial deference to the plenary U.S. case.

1. §1529(1) provides that if a Chapter 15 case filed after a U.S. plenary Chapter 11 case is already pending, **then the relief to be granted "must be consistent with the relief granted in the [earlier filed Chapter 11] case in the United States."**

> **§1529. Coordination of a case under this title and a foreign proceeding.** If a foreign proceeding and a case under another chapter of this title are pending concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply:
>
> (1) **If the case in the United States is pending at the time the petition for recognition of such foreign proceeding is filed—**
>
> (A) any relief [to be] granted under section 1519 or 1521 must be consistent with the relief granted in the case in the United States; and
>
> (B) section 1520 does not apply even if such foreign proceeding is recognized as a foreign main proceeding.

2. §1529(2) provides that if a Chapter 11 case is filed after Chapter 15 recognition of a foreign proceeding, **then the relief that has been ordered in the Chapter 15 case under §1519 or §1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the [Chapter 11] case in the United States.** The Bankruptcy Code sections automatically ordered applicable by §1520 "shall be modified or terminated if **inconsistent with** the relief granted in the case in the [Chapter 11 case] in United States."

(2) **If a case in the United States under this title commences after recognition**, or after the date of the filing of the petition for recognition of such foreign proceeding—

(A) any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the case in the United States; and

(B) if such foreign proceeding is a foreign main proceeding, the stay and suspension referred to in section 1520(a) shall be modified or terminated if inconsistent with the relief granted in the case in the United States.

(3) In granting, extending, or modifying relief granted to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the laws of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

(4) In achieving cooperation and coordination under sections 1528 and 1529, the court may grant any of the relief authorized under section 305.

3. §1528 provides that a plenary Chapter 11 case filed after a foreign main proceeding has been recognized under Chapter 15 only applies assets of that foreign debtor located in the U.S. unless **the foreign debtor asks the U.S. court to exercise its extraterritorial jurisdiction.**

§ 1528. Commencement of a case under this title after recognition of a foreign main proceeding.

After recognition of a foreign main proceeding, a case under another chapter of this title [such as Chapter 11] may be commenced only if the debtor has assets in the United States. **The effects of such a [plenary**

> **U.S.] case shall be restricted to the assets of the debtor that are within the territorial jurisdiction of the United States** and, to the extent necessary to implement cooperation and coordination… to other assets of the debtor that are within the jurisdiction of the court… to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter.

VIII. APPROACH FOR APPLYING §305(a)(2)(B) TO A PRIOR PENDING FOREIGN COMPANY CHAPTER 11 CASE

A. §305(a)(2) applies when (i) there is another foreign proceeding for a Chapter 11 debtor in a foreign country, (ii) the representative of that foreign proceeding has been recognized in a Chapter 15 case, and (iii) that representative asks that the U.S. case be dismissed saying that "the purposes of chapter 15 of this title would be best served by such dismissal."

B. Some argue that a purpose of Chapter 15 is for a plenary reorganization case to be conducted at the COMI of the debtor company. Based on this "venue concept," they argue that a plenary Chapter 11 case for a foreign company with its COMI outside the U.S. is a "solitary main case" that is contrary to the purposes of Chapter 15 and should be dismissed. This approach was rejected in *Monitor Single Lift*.

C. This "venue concept" is not specified in §1501(a) as one of the purposes of Chapter 15. Indeed, many of the purposes listed there can be achieved by prompt confirmation of a fair and equitable Chapter 11 plan.

1. "Cooperation between… courts;"
2. "Greater legal certainty for investments;"
3. "Fair and efficient administration;"
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."

D. Chapter 11 is widely recognized as a good system to preserve the value of investments and employment.

E. Chapter 11 expresses a U.S. federal policy to reorganize businesses, preserving going concern value through a plan of reorganization that is in the *best interests of creditors* (meaning pay creditors more than in liquidation) and is *fair and equitable*.

F. §1506 requires adherence to U.S. public policy.

§ 1506. Public policy exception

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. This provision has been construed very narrowly by all courts of appeal that have considered it.

G. Confirming a Chapter 11 plan will often be the best way both to (i) respect U.S. public policy as required by §1506, and (ii) carry out the purposes of Chapter 15 that are listed in §1501(a).

H. Moreover this "venue concept" is at odds with the provisions of §1529 about coordinating a U.S. Chapter 11 case and a foreign proceeding which provide for deference to the Chapter 11 proceeding.

1. §1529(1) and (2) require deference to be given to a Chapter 11 case, whether (i) first filed before Chapter 15 recognition of the representative of a foreign proceeding, or (ii) filed after a representative of a foreign proceeding has been recognized.

2. §1529(2) even contemplates a U.S. Chapter 11 filing by a foreign debtor after its representative has been recognized under Chapter 15.

3. §1528 contemplates a US Court exercising its extraterritorial jurisdiction to aid a foreign main case.

4. §1529(4) and §§1525-28 encourage cooperation between that plenary U.S. case and the foreign case.

I. Issues concerning (i) abstention under §305(a)(2) to serve the "purposes of Chapter 15," (ii) deference to a Chapter 11 case under §1529(a)(1) & (2), and (iii) deference to U.S. public policy under §1506, can all be dealt with when a foreign representative seeks recognition at a hearing under §1517, if the bankruptcy court asks the foreign representative:

1. to explain how the representative will give deference under §1529(1) to the court's rulings in the prior-filed Chapter 11 case that is carrying out U.S. reorganization policy that §1506 requires to be respected;
2. to explain any concern the representative has about how the Chapter 11 case will carry out the purposes listed in §1501(a)(1)- (5);
3. to describe what, if any, changes the representative wants to see in the plan of reorganization that has been proposed under Chapter 11 standards that reflect U.S. public policy that §1506 requires to be respected;
4. to explain why the debtor's Chapter 11 reorganization should not be permitted to go to prompt confirmation, especially if it has already proceeded substantially through the confirmation process.

J. In connection with such a recognition hearing, the bankruptcy court that is already presiding over the U.S. foreign company Chapter 11 case might communicate pursuant to §§1525, 1526 and 1527 with the court presiding over the foreign case about (1) coordinating the debtor's reorganization, (2) the fairness of the reorganization, and (3) enforcement of rulings related thereto.

K. §§1525-1527 encourage this kind of cooperation.

§1525. Cooperation and direct communication between the court and foreign courts or foreign representatives

(a) Consistent with section 1501, the court shall cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee.

(b) The court is entitled to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative, subject to the rights of a party in interest to notice and participation.

§1526. Cooperation and direct communication between the trustee and foreign courts or foreign representatives

(a) Consistent with section 1501, the trustee or other person, including an examiner, authorized by the court, shall, subject to the supervision of the court, cooperate to the maximum extent possible with a foreign court or a foreign representative.

(b) The trustee or other person, including an examiner, authorized by the court is entitled, subject to the supervision of the court, to communicate directly with a foreign court or a foreign representative.

§1527. Forms of cooperation

Cooperation referred to in sections 1525 and 1526 may be implemented by any appropriate means, including—

(1) appointment of a person or body, including an examiner, to act at the direction of the court;

(2) communication of information by any means considered appropriate by the court;

(3) coordination of the administration and supervision of the debtor's assets and affairs;

(4) approval or implementation of agreements concerning the coordination of proceedings; and

(5) coordination of concurrent proceedings regarding the same debtor.

L. Procedures for such coordination are provided by the *Guidelines for Communication and Cooperation Between Courts in Cross Border Insolvency Matters* (as promulgated by the Judicial Insolvency Network Conference October 10-11, 2016).

IX. A NUMBER OF CASES APPLYING §305(a)(2) HAVE REJECTED ABSTAINING FROM AN ALREADY PENDING PLENARY U.S. PROCEEDING

A. *In re Tradex Swiss AG*, 348 B.R. 34 (Bankr. Mass. 2008)

1. Swiss corporation operated a foreign exchange trading platform in the U.S.
2. Swiss Federal Banking Commission started a proceeding against debtor.
3. Involuntary Chapter 7 was then initiated in the U.S.
4. Swiss proceeding received Chapter 15 recognition as a foreign non-main proceeding.
5. The Chapter 7 case was not dismissed under §305(a) because it protected the interests of U.S. creditors; the two cases were not consolidated.

B. *In re RHTC Liquidating Co.*, 424 B.R. 714 (Bankr. W.D. Pa. 2010)

1. Canadian company and its U.S. subsidiary both filed a Canadian CCA case.
2. Canadian Monitor obtained U.S. Chapter 15 recognition of the Canadian case as the main case.
3. U.S. creditors filed an involuntary Chapter 7 against the U.S. subsidiary company.
4. Assets were sold with proceeds mostly attributable to the U.S. company.
5. Canadian Monitor said he would take action to subordinate the Canadian parent's intercompany claim against the U.S. subsidiary company; but had not done it.
6. Canadian Monitor's 305(a) motion to dismiss was denied because petitioning creditors had raised valid concerns about whether the Canadian case was protecting their interests.

X. DISMISSAL UNDER A §1112 TOTALITY OF CIRCUMSTANCES ANALYSIS

A. While requirements of "property" or "place of business in the United States" might not be significant constraints on a plenary U.S. filing, §1112 provides for an expansive **facts and circumstances** inquiry that permits the bankruptcy court to dismiss Chapter 11 cases on a number of broad grounds including:

1. alleged absence of valid reorganization purpose;
2. alleged aims that lie outside of Bankruptcy Code;
3. alleged lack of good faith;
4. comity; and
5. Act of State Doctrine.

All these issues were presented in Avianca and Yukos. Avianca was kept and confirmed a Chapter 11 plan. Yukos was dismissed. The following discusses why.

B**.** *In re Avianca,* 303 B.R. 1 (Bankr. S.D.N.Y. 2003)

1. A Colombian airline filed a Chapter 11 case in New York. Originally, aircraft lessors with large claims moved to dismiss, but they made deals and dropped their objections.
2. Ultimately dismissal was sought by one U.S. supplier creditor who argued that it was unseemly for a U.S. court to take jurisdiction over the reorganization of an enterprise whose main center of activities was abroad. This is the "solitary main case" venue concept discussed above.
3. The single remaining objector asked for dismissal under §305(a)(1) ("the interests of creditors and the debtor would be better served by dismissal or conversion") and §1112.
4. The debtor opposed dismissal, along with the creditors' committee, the second largest equipment lessor, employees, and other large creditors, the shareholders and implicitly the Colombian government.
5. The case was working. Avianca had been able to maintain its routes and continue its business, benefiting the debtor, creditors- including employees, public and the nation of

Columbia. Avianca had been able to negotiate deals with major suppliers, employees, taxing authorities and others.

6. Avianca's most important contract rights, especially its aircraft leases, were centered in the U.S. where the lessors were headquartered.

7. There was no indication that creditors including those in the U.S., Colombia, and elsewhere would be unfairly prejudiced by the application of U.S. bankruptcy principles. Colombian creditors had, in fact, participated fully in the U.S. case, and virtually all major creditors supported the filing.

8. Colombia's bankruptcy law was only four years old and gave the debtor no leverage in dealing with executory contracts and leases. Avianca's reorganization would have ended quickly and in futility had the debtor not been able to deal with its aircraft lessors. No attempt was made to start a case in Colombia.

9. §305(a)(2) did not apply because no foreign proceeding was pending.

10. Applying the §305(a)(i) best interests of debtor and creditors standard, the case was allowed to proceed in the U.S., rather than forcing the debtor to file in Colombia where it would have liquidated.

11. The airline, still intact as a going concern, was eventually sold to a Brazilian purchaser in a §363 sale adhering to international standards.

C. *In re Yukos Oil Co*., 321 B.R. 396 (Bankr. S.D. Tex. 2005)

1. Yukos was a major oil and gas company in Russia, privatized in the early 1990's, it had 100,000 employees and was responsible for 20% of Russia's oil production.

2. The Russian government assessed a $27.5 billion tax claim against Yukos and had scheduled an auction sale where Gasprom was to be the only bidder with financing organized by Deutsche Bank.

3. Yukos filed a Chapter 11 case in S.D. Texas in late 2004 to stay the foreclosure auction, keep its assets, and reorganize its debts. The bankruptcy court issued a TRO enjoining non-governmental entities such as Deutsche Bank and Gasprom from

participating in the sale of these assets, formal service of process had not been affected on the Russian government.

4. Deutsche Bank moved to dismiss Yukos' Chapter 11 based on technical issues, and the bankruptcy court ruled against Deutsche Bank on each of them.

a. **Alleged lack of jurisdictional basis under Bankruptcy Code §109**. The court found that $480,000 deposited in Southwest Bank of Texas by a subsidiary in the name of Yukos Oil Company was a sufficient basis for eligibility to file.

b. **Alleged forum non-conveniens**. The court declined to extend use of this concept to dismiss an entire plenary Chapter 11 case noting that "with respect to [plenary] bankruptcy cases (as opposed to proceedings arising under or related to bankruptcy cases), Congress has statutorily prescribed exclusive jurisdiction and venue."

c. **International Comity**. The court ruled that this did not form an independent basis for dismissal but is a factor to be considered under §1112(d).

d. **Act of State Doctrine** that this U.S. court should refrain from adjudicating politically sensitive disputes that implicate the legality of sovereign acts of foreign states. The court ruled that the filing of this case did not necessarily require judging the legality of Russian government actions.

5. Deutsche Bank also moved to dismiss on a totality of the circumstances analysis under §1112 and the bankruptcy court granted that motion for two primary reasons.

a. Act of state doctrine type concerns.

"Finally, although the act of state doctrine, standing alone, does not compel dismissal of the instant case, the evidence indicates that Yukos was, on the petition date, one of the largest producers of petroleum products in Russia, and was responsible for approximately 20 percent of the oil and gas production in Russia. The sheer size of Yukos, and correspondingly, its impact on the entirety of the Russian economy,

weighs heavily in favor of allowing resolution in a forum in which participation of the Russian government is assured." 321 B.R. at 411.

b. Inability to reorganize Yukos because of the need for Russian government cooperation.

"The vast majority of the business and financial activities of Yukos continue to occur in Russia. Such activities require the continued participation of the Russian government, in its role as the regulator of production of petroleum products from Russian lands, as well as its role as the central taxing authority of the Russian Federation." 321 B.R. at 411.

"Indeed, since most of Yukos' assets are oil and gas within Russia, its ability to effectuate a reorganization without the cooperation of the Russian government is extremely limited." 321 B.R. at 411.

Because the Russian government had a significant role in ongoing operations of Yukos, the court concluded that it was simply not feasible to confirm a plan of reorganization
that could be carried out in Russia.

This ignored the alternate relief requested Yukos' Plan of Reorganization providing that, if it could not be reorganized as a going concern because of Russian government actions, a U.S. bankruptcy trustee would be appointed to pursue causes of action against the Russian government.

6. Later, Yukos was forced into involuntary bankruptcy in Russia and a liquidator was appointed. He came to New York to seek U.S. Chapter 15 recognition to try to use the extraterritorial power of a U.S. Bankruptcy Code to stop the sale of a refinery in Lithuania. That refinery was owned by a foreign subsidiary of Yukos, which was not subject to Russian bankruptcy law, which does not assert extraterritorial jurisdiction.

a. As a condition of continuation of the TRO blocking this sale, the Russian liquidator was required to permit Yukos to present a plan of reorganization at the meeting of creditors in Yukos' Russian bankruptcy.

b. The plan Yukos proposed would have sold ancillary assets to pay Russian tax claims in full and still left billions of value for shareholders.

c. Russian authorities ignored this plan, and liquidated Yukos anyway, subjecting Russia to liability in a later arbitration initiated by shareholders.

d. The New York Chapter 15 court ultimately permitted the sale of the Lithuanian refinery by Yukos' foreign subsidiary.

e. Yukos former management and the Russian liquidator continued to litigate about control over the proceeds from the sale of the refinery.

f. The parties eventually agreed to remove this dispute from the U.S. Chapter 15 court to a court in the Netherlands.

g. Ultimately the Dutch courts awarded the $2 billion of refinery sale proceeds to the Yukos management parties.

7. Facts established in connection with the Yukos U.S. Chapter 11 and 15 cases were the basis for over $50 billion of judgments and awards against the Russian government.

a. In 2013, Yukos obtained a ruling from the European court of Human Rights that Russia had collected its tax claim in such a manner that it had improperly destroyed Yukos' equity value.

b. At the end of 2013, just before the Sochi Olympics, Mikhail Khodorkovsky was released from Russian jail and has not returned to Russia.

c. In February 2014, Russia invaded Crimea.

d. In June 2014, Yukos shareholders obtained an over $50 billion arbitral award against the Russian government for (i) selling Yukos' major asset to a company created by the Russian government overnight in a shopping center, in a transaction financed by the Russian treasury, after Gasprom and Deutsche Bank had been enjoined from participating in that sale; and (ii) causing Yukos to be

liquidated even though it had enough remaining assets to reorganize and pay its disputed tax claim in full.

e. These facts had been established in the Yukos U.S. Chapter 11 and 15 cases.

D. *In re Northshore Mainland Services, Inc.*, 537 B.R. 192 (Bankr. D. Del. 2015)

1. The Delaware bankruptcy court abstained under §305(a)(1) from hearing the cases filed by Bahamian debtors who were engaged in construction of the Baha Mar project in the Bahamas, a huge resort owned by non-Chinese interests, being financed and constructed by Chinese interests.

2. There were construction delays and the company lacked financing to complete the project.

3. Chapter 11 cases were filed for the entire group of companies in Delaware and DIP financing was proposed to complete construction and open the hotel as a going concern.

4. Despite the U.S. automatic stay, the Bahamian government commenced insolvency proceedings in the Bahamas on behalf of all creditors, and provisional liquidators were appointed. No motion was brought to sanction this as an automatic stay violation.

5. Rather, creditors asked the Delaware bankruptcy court to dismiss the U.S. Chapter 11 proceedings.

6. The bankruptcy court found that the totality of the facts and circumstances did not justify dismissal under §1112(b) because the debtors had "filed chapter 11 cases in an [appropriate] effort to maintain control of the Project and to reorganize, rather than liquidate."

7. The bankruptcy court found, nevertheless, under §305(a)(1) that "the interests of creditors and the debtor would be better served" and the principle of **comity** vindicated by dismissal of all the cases, except the one filed by a Delaware corporation against which a proceeding had not been commenced in the Bahamas.

8. The court found that (i) "The central focus of this proceeding is the unfinished Project located in The Bahamas;" (ii) creditors would have expected that insolvency proceedings

for the Project would take place in the Bahamas, and (iii) pursuit of the U.S. cases would only generate additional litigation and the Bahamian government appeared poised not to cooperate with the result.

9. After the Bahamian government had caused the Bahamian proceedings to be started even in the face of the automatic stay of the earlier filed U.S. cases, it was clear that the Bahamian government did not want the U.S. Chapter 11 case to go forward.

X. Including the cases discussed earlier in this paper, nearly 20 foreign companies have used Chapter 11 to reorganize.

Including the following additional companies, nearly 20 foreign headquartered companies have pursued Chapter 11 cases, and most have successfully confirmed a plan of reorganization.

1. *In re Navigator Gas Transport PLC*, 358 B.R. 80 (Bankr. S.D.N.Y. 2006) (foreign shipper).

2. *In re China Fishery Group Limited (Cayman)*, 2016 Bankr. LEXIS 3852; 2016 WL 6875903 (Bankr. S.D.N.Y. Oct. 28, 2016) (Peruvian fishing business) (bankruptcy court granted in part and denied in part lenders' motion to appoint a Chapter 11 trustee; lenders claimed debtors had acted in bad faith in filing Chapter 11 petitions notwithstanding earlier agreement to sell assets or turn over the keys; court appointed trustee only over certain of the filing companies; lenders did not move to dismiss cases); see also 2017 WL 3084397 (Bankr. S.D.N.Y. July 19, 2017).

3. *In re Abeinsa Holdings, Inc.*, 562 B.R. 265 (Bankr. Del. Dec. 14, 2016) (Spanish energy company).

4. *In re Sun Edison, Inc.*, 577 B.R. 120, (Bankr. S.D.N.Y. 2017 (Korean/Singaporean joint venture).

5. *In re National Bank of Anguilla (Private Banking Trust) Ltd.*, 580 B.R. 64, (Bankr. S.D.N.Y. 2018) (Anguillan bank Chapter 11).

6. Seadrill (UK offshore driller).

7. Philippine Airlines.

8. LATAM Airlines Group (Chilean airline) (In *In re LATAM Airlines Group S.A.*, 620 B.R. 722 (Bankr. S.D.N.Y. 2020), the court described the background to the filing, found that the filing had been authorized properly under Chilean law, and considered a motion for approval of DIP financing under §364 of the Bankruptcy Code. It rejected aspects of the financing arrangement on the ground that they constituted a sub rosa plan under U.S. law, but the arrangement was amended and the case continued. There are numerous subsequent decisions not involving cross-border issues. See 2022 WL 272167 (Bankr. S.D.N.Y. Jan. 28, 2022) (court approved settlements of claims filed by parties that had financed aircraft); 55 F.4th 377 (2d. Cir. 2022) (Circuit Court affirmed confirmation of Chapter 11 plan; issued involved only payment of post-petition interest); 2022 WL 790414 (Bankr. S.D.N.Y. March 15, 2022) (court approved backstop agreement), leave to appeal denied, 2022 WL 1471125 9 (S.D.N.Y. May 10, 2022). The case raised interesting issues as to the rights of shareholders under Chilean law to seek recovery in the U.S. case, but there are no judicial holdings on point.

9. Avianca Holdings (Columbian airline - second filing) (*In re Avianca Holdings S.A.,* 618 B.R. 684 (Bankr. S.D.N.Y. 2020), court considered the debtors' rejection of a credit card sale/processing agreement governed inpart by Colombian law. In *In re Avianca Holdings, S.A.*, 632 B.R. 124 (Bankr. S.D.N.Y. 2021), court approved the debtors' disclosure statement and an opt- out structure for otherwise consensual third-party releases).

10. Grupo Aeromexico (Mexican airline).

11. Noble Corp. plc (U.K. offshore driller).

12. Grupo Posadas (Mexican hotel chain).

13. Kumtor Gold Co. (mine in Kyrgyzstan).

14. *In re Automotores Gildemeister SpA,* (Chilean company).

***Yukos* and *North Shore Mainland* were sent away essentially because of opposition by the government at the company's COMI.**

Most foreign governments have not opposed when companies headquartered in their country have used Chapter 11 to reorganize and preserve their going concern and the employment it supports.

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

December 18, 2015

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 Hank Johnson
Ranking Member,
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
House of Representatives
Washington, DC 20515

Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: **Proposed Amendments to Bankruptcy Code to Facilitate Restructuring of Bond and Credit Agreement Debt**

Dear Reps. Marino and Johnson and Sens. Grassley and Leahy,

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.

The NBC is pleased to present for your consideration proposed legislation that would facilitate court supervision of bond restructurings under a new chapter 16 of the Bankruptcy Code. The proposal is a result of the NBC's Committee to Rethink Chapter 11, a project that the NBC initiated in 2009 to examine how chapter 11 could be modernized to accommodate substantial changes in finance, economics, and law since it was first adopted in 1978.

The NBC approved the proposal at its 2014 Annual Meeting. I attach a copy of the Report describing the need for the proposal, its principal features, and the reasons for its adoption. While chapter 11 facilitates prepackaged plans that substantially reduce the cost, expense, and disruption of an ordinary chapter 11 case, it can still be an expensive and cumbersome process compared to an out-of-court workout. Recent court decisions under the Trust Indenture Act would require affected lenders' unanimous consent to an out-of-court workout. Chapter 16 proposes a middle ground, preserving both the flexibility of chapter 11's collective action and super-majority voting rules for a workout involving only borrowed money and court supervision of the process to protect the minority while reducing the expense and complexity of using chapter 11's prepackaged plan process.

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I also attach copies of a draft of chapter 16 statutory language and of a report updating the 2014 report and describing the statutory language, which the NBC approved at its 2015 Annual Meeting.

We would welcome an opportunity to discuss this proposal with you or your staffs. We believe it would provide an important addition to the Bankruptcy Code's important tool kit of preserving jobs, investments, and businesses.

Sincerely,

/s/ Richard Levin

Richard Levin, Chair
rlevin@jenner.com
(212) 891-1601

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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.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

Technical and Advisory Services to Congress. To facilitate the work of Congress, the NBC offers members of Congress, Congressional Committees and their staffs the services of its Conferees as non-partisan technical advisors. These services are offered without regard to any substantive positions the NBC may take on matters of bankruptcy law and policy.

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REPORT OF THE NATIONAL BANKRUPTCY CONFERENCE

Adopted at the 2014 Annual Meeting

PROPOSAL FOR A NEW CHAPTER FOR RESTRUCTURING BOND AND CREDIT AGREEMENT DEBT (CHAPTER 16)

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PROPOSAL FOR A NEW CHAPTER FOR RESTRUCTURING BOND AND CREDIT AGREEMENT DEBT (CHAPTER 16)

The *Anglo Irish Bank*[1] decision involved a fact-specific challenge to the modification of noteholders' right to principal or interest upon the vote of a specified majority in amount of the notes issued pursuant to an indenture governed by English law. In contrast to English law, which permits such modifications by a less than unanimous vote, under the U.S. Trust Indenture Act (the "TIA"), the modification of payment terms is prohibited under most indentures (irrespective of their terms) without the unanimous consent of all holders of the securities. The application of this provision of the TIA was a central issue in two recent cases: *Marblegate Asset Management v. Education Management Corp.*, -- F. Supp. 3d --, No. 14 Civ. 8584, 2014 U.S. Dist. LEXIS 178707 (S.D.N.Y. Dec. 30, 2014), and *Meehancombs Global Opportunities Funds, L.P. v. Caesars Entertainment Corp.*, -- F. Supp. 3d --, No. 14 Civ. 7091 (SAS), 2015 U.S. Dist. LEXIS 5111 (S.D.N.Y. Jan. 15, 2015), both of which can be viewed as making out of court restructurings involving bonds covered by the TIA by a less than unanimous bondholder vote more difficult than previously thought.

Some have proposed that U.S. law should permit an indenture to provide for the modification of payment terms by a majority or supermajority vote, without the unanimous consent of those involved (to avoid the "holdout" problem). At the same time, however, the *Anglo Irish Bank* case also illustrates the risk of coercive tactics on the part of issuers where there are no statutory safeguards or limitations on the exercise of power by a majority of the noteholders. (In that case, the terms of the exchange offer included an exit consent under which those who participated in the exchange offer voted to modify the terms of the indenture so that noteholders who rejected the exchange and were "left behind" would receive the functional equivalent of a peppercorn in exchange for the cancellation of their notes.[2]) Moreover, even if U.S. law permitted public indentures to provide for modification of payment terms with less than unanimous consent, this would not necessarily solve the holdout problem, as there is no guarantee that parties would actually draft non-unanimous consent provisions into new indentures. Indeed, even though syndicated credit facilities are not bound by the TIA and thus

[1] *Assénagon Asset Mgmt. S.A. v. Irish Bank Resolution Corp. Ltd. (Formerly Anglo Irish Bank Corporation Limited)* [2012] EWHC 2090 (Ch).

[2] In October 2010, Anglo Irish launched an exchange offer, pursuant to which subordinated noteholders were invited to exchange their bonds for new senior notes (for every €1 of subordinated notes, noteholders would receive 20 cents of new senior notes) *provided* that they also voted in favor of a resolution which, if passed by more than 75% of voting noteholders, would allow Anglo Irish to redeem all of the outstanding subordinated notes for a nominal amount (equal to €0.01 per €1,000 in principal amount). The English Chancery Court rejected this "exit consent" as coercive.

could, in theory, provide for less than unanimous consent, in practice, nearly all such facilities still require unanimity.

This memorandum proposes a different solution to the holdout problem in the case of claims for borrowed money involving a trust indenture or under a loan agreement involving multiple lenders. That solution would center on a new, streamlined procedure under a new chapter of the Bankruptcy Code that would permit a court to impose on all members of the affected creditor class a modification of payment terms that has been accepted by the requisite disinterested majority or super majority vote, without triggering the whole panoply of Bankruptcy Code provisions, requirements and limitations that typically accompany the filing of a petition under the Bankruptcy Code.

BACKGROUND

Section 316(b) of the TIA generally provides that an obligor under a qualified indenture cannot extend the maturity or alter the interest rate provided for under that indenture, absent the unanimous consent of affected bondholders. 15 U.S.C. § 77ppp(b) ("the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security . . . shall not be impaired or affected without the consent of such holder . . . ."). In the U.S., section 316(b)'s unanimity requirement governs all TIA-qualified indentures without regard to any language in the indentures contrary to or inconsistent with section 316(b), although most qualified indentures contain language that parallels the language in section 316(b). *See* George W. Shuster, Jr., *The Trust Indenture Act and International Debt Restructurings*, 14 Am. Bankr. Inst. L. Rev. 431 (2006). Section 316(b) was enacted during the Great Depression and as part of a package of legislation driven by then-SEC Chairman William O. Douglas (which package also included the Chandler Act amendments to the Bankruptcy Act of 1898) out of concern that the interests of minority stakeholders would be sacrificed for the "desires and conveniences of the dominant group." H.R. Rep. No. 10292, 75th Congress, Apr. 25, 1938, at 36; *see also UPIC & Co. v. Kinder-Care Learning Ctrs, Inc.,* 793 F. Supp. 448, 452 (S.D.N.Y. 1992) ("Enactment of Section 316(b) is attributable to the Securities Exchange Commission's concern about the motivation of insiders and quasi-insiders to destroy a bond issue through insider control, and the generally poor information about a prospective reorganization available to dispersed individual bondholders."). While successful in shielding the minority from majority abuse, the unanimity required under the TIA and most U.S. syndicated loan agreements impedes beneficial out of court restructurings.

Without the ability to bind dissenting parties — who may choose to hold out to gain negotiating leverage or simply to free-ride off the concessions of others — many distressed companies must turn to a filing under chapter 11 of the Bankruptcy Code to effectuate purely financial restructurings. Although a chapter 11 filing, or the threat of chapter 11, can be used to restructure bond debt over the objections of minority debtholders, a chapter 11 filing is a blunt

and imperfect tool in this context. The debtors are required to incur considerable expense, and, potentially, business disruption in adhering to various administrative requirements, complying with court approval obligations for many transactions and funding a creditors committee. Indeed, the debtor must prepare and file motions for any first-day relief that would be necessary on or soon after the petition date, seek approval of all non-ordinary course transactions during the pendency of the case, prepare a plan and disclosure statement and participate in the proceedings necessary to obtain approval of the disclosure statement and confirmation of a plan. Studies show that it is not unusual for the cost of larger chapter 11 cases to exceed 2% of the debtor's assets.[3] Even a prepackaged bankruptcy, where the court proceeding can be as short as 30 days, comes with considerable cost.[4] Moreover, because a chapter 11 filing may trigger *ipso facto* clauses that are enforceable in the case of certain types of executory contracts (*see* 11 U.S.C. § 365(e)(2)) and securities contracts, forward contracts, commodities contracts, repurchase agreements and swap agreements (*see* 11 U.S.C. §§ 555-56, 559-60), a chapter 11 filing necessitated solely by a holdout problem can inflict serious "collateral damage" on a debtor. Where disinterested financial creditors are the only affected creditors and a supermajority of them can agree to the terms of a restructuring of their obligations, a chapter 11 filing, in any form, may be inefficient and unnecessarily risky. A streamlined court-sanctioned process can provide a far less burdensome alternative that remains consistent with the purpose of the TIA.

The SEC report that served as the basis for the TIA focuses heavily on the need to protect minority stakeholders, but does not suggest an absolute bar on binding holdouts in a negotiated arm's-length workout. SEC Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, June 18, 1936 at 63 ("some coercion may have to be exerted upon minorities" in order to affect workouts). The concern addressed by the TIA is where "the power to coerce should rest, *unchecked*, in the hands of the majority." *Id.* (emphasis added). To prevent abuse, the TIA offers minority stakeholders that are bound to workouts an avenue to judicial review, and the legislative history of the TIA

[3] *See* Lynn M. LoPucki & Joseph W. Doherty, *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*, 1 J. Empirical L. Stud. 111, 140 (2004) (finding that, "for a group of 48 firms with assets ranging from about $65 million to $7.5 billion, and averaging $881 million . . . firms expended, on average, 2.2 percent of assets on professional fees (1.9 percent after the removal of a single outlier)" but cautioning that "[p]rofessional fees and expenses are almost certainly subject to a scale effect."); Stephen J. Lubben, *What We "Know" About Chapter 11 Cost Is Wrong*, 17 Fordham J. Corp. &. Fin. L. 141, 166-67 (2012) (finding that fees in the largest quartile of cases studied were approximately 2% of the size of the debtor, and noting that "[t]he relationship between size and standardized cost demonstrates a strong downward trend.").

[4] Although prepackaged bankruptcies are certainly shorter than more traditional proceedings, they are not necessarily cheaper, as debtors must incur considerable expense preparing the prepackaged case prior to the petition date. 17 Fordham J. Corp. &. Fin. L. at 178 ("[P]repackaged cases do not appear to be any cheaper than traditional chapter 11 cases, once we account for at least some of the cases' pre-bankruptcy costs . . . . Prepackaged cases are only "cheaper" chapter 11 cases in the sense that the fees recorded after the petition is filed are lower.").

makes plain that "[e]vasion of judicial scrutiny of debt-readjustment plans is prevented" by the statute. H.R. Rep. No. 10292, 75th Congress, Apr. 25, 1938, at 35.

Indeed, appellate courts have allowed a majority of lenders to alter the payment terms of debt instruments over minority objections, even when such documents apparently contained unanimous consent provisions, in instances where the court below approved the substantive fairness of such alteration/settlement. *See, e.g.*, *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 330-31 (2007) (upholding a settlement altering financial terms because "[unanimity] provisions concerning amendment, modification and waiver of . . . agreements [did] not preclude the Administrative Agent and 95.5% of the Lenders from" reaching a post-default settlement binding on all lenders); *In re Delta Air Lines*, Inc. 370 B.R. 537, 549 (Bankr. S.D.N.Y. 2007) ("In default situations where contractual rights are already impaired by exogenous events, non-impairment clauses are moot and the Trustee's power to sue and settle subject to direction by a majority in amount or a specified minimum percentage will be sustained over the objection of a minority or individual.") (collecting cases), *aff'd* 309 Fed. Appx. 455 (2d Cir. 2009); *see also In re Residential Capital, LLC*, 497 B.R. 720, 748 (Bankr. S.D.N.Y. 2013) (approving, in the absence of investor consent, a settlement with the insurer involving commutation of rights under insurance policies and noting that "Section 316(b) [of the TIA]'s restrictions on majority action are inapplicable in insolvency proceedings"). While a review in the context of a chapter 11 proceeding—as in *Beal Savings* and *Delta*—is certainly sufficient to provide the judicial oversight envisioned by the TIA, it is not necessary.[5]

Other countries have developed specialized procedures that allow debtors to restructure bank or bond debt with judicial oversight without having to initiate broader insolvency proceedings:

- In England and Wales, a company or any of its creditors may institute a scheme of arrangement pursuant to the Companies Act 2006. A scheme of arrangement is not an insolvency procedure and does not include a moratorium on creditor action. Schemes of arrangement are binding on all members of each class of creditors and shareholders able to vote on the scheme, provided (i) the approval of the relevant majority[6] of each class is obtained and (ii) the scheme is sanctioned by the court. The scheme is subject to court review and approval and will be approved if it is fair, reasonable and represents a genuine attempt to reach

[5] *See* James E. Spiotto, *Defaulted Securities: The Prudential Indenture Trustee's Guide* (1990), at XIX-20 (Section 316(b) "does not (and cannot be read to) bar a settlement on how debt owed pursuant to an indenture will be paid" and "should not be read to 'hold up' the rights of the majority" so long as minority interests are adequately represented and the resolution is subject to judicial review.).

[6] If a simple majority in number of those voting in person or by proxy and a three-quarters majority in value is obtained at any meeting, a further application is made to the court for an order sanctioning the compromise or arrangement.

agreement between a company and its creditors. The question for the reviewing court is not whether the scheme itself is reasonable but whether a creditor could reasonably have approved it. Schemes of arrangement have proven popular with English companies[7] as well as certain non-English companies[8] with the requisite connection to the U.K.

- Spain's "cram down" procedure came into force on March 9, 2014 pursuant to Real Decreto-ley 4/2014, de 7 de marzo, por el que se adoptan medidas urgentes en material de refinanciación y reestructuración de deuda empresarial ("Royal Decree-Law 4/2014"). Among other things, Spain's procedures allow a company to cram down a debt modification that (i) extends the term of the debt for up to five years or (ii) converts debt into profit participating loans with a term of no more than five years, so long as it obtains the consent of creditors representing at least 60% of the total outstanding debt. If the scheme is supported by creditors representing at least 75% of the total outstanding debt, then the scheme may cram down a modification that (i) extends the term of the debt for up to ten years, (ii) converts debt into profit participating loans with a term of no more than ten years, (iii) reduces the amount owed, (iv) capitalizes debt (although dissenting lenders may opt for a write off instead of such capitalization), (v) provides for payment in kind, or (vi) converts debt into convertible notes, subordinated debt, PIK interest loans or any other financial instrument with tenor, ranking or other features different from the original debt.[9]

- The Netherlands is considering creating a similar scheme to England's scheme of arrangement.[10]

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[7] Adam Gallagher and Victoria Cromwell, *European Update: English Schemes of Arrangement: A Tool for European Restructuring*, 31-8 ABIJ 38 (Sept. 2012) ("The ability to cram down dissenting (and even secured) creditors has made schemes particularly attractive.").

[8] *See, e.g., Re Magyar Telecom B.V*. [2013] EWHC 3800 (Ch) (Netherlands); *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch) (Germany); *Primacom Holding GmbH and others v. Credit Agricole and others* [2011] EWHC 3746 (Ch) (Germany); *In re La Seda de Barcelona SA* [2010] EWHC 1364 (Ch) (Spain).

[9] *See* Hogan Lovells*, Royal Decree-Law 4/2014, of 7 March 2014, on Urgent Matters in Relation to Refinancing Agreements and Debt Restructuring*, available at http://www.hoganlovells.com/files/Publication/0e3ca987-166b-41da-8775 3b0beb3c8ced/Presentation/ PublicationAttachment/9178befe-4b40-41ca-9dc0401a94af4eef/Hogan%20Lovells%20 %20RDL% 20March%202014.pdf.

[10] *See* Linklaters, *Banking Update: The Preliminary Draft for a New Dutch Insolvency Act: Old Ideas Parading as New Ones?*, Feb. 2, 2009, available at http://www.linklaters.com/Publications/Publication2051Newsletter/PublicationIssue20090202/Pages/PublicationIssueItem3926.aspx.

Moreover, many jurisdictions allow principal and interest terms to be modified without any court oversight, if permitted by the loan documents:

- Without an equivalent of section 316(b) of the TIA, Germany, France, Italy, Spain, England and the Netherlands all permit indentures to provide that a majority or supermajority of debtholders may modify the payment terms for all (including dissenting) debtholders. The debtholders' freedom of contract is generally respected[11] without court review, although courts might not enforce revised financial terms in subsequent proceedings if the amendment process is deemed to be oppressive or an abuse of the power of the majority to bind the minority.[12]

- Certain South American jurisdictions have similar rules. In Peru and Brazil, for instance, an indenture may provide that a majority (or supermajority) of debtholders can agree to modify the principal and interest terms of the indenture and bind any dissenting holders.[13] Likewise, in Chile, if the indenture is silent, any change to the payment provisions of an indenture requires unanimous approval, but the indenture may be drafted to allow for modification of such terms with a supermajority of holders of 75% or more.[14]

A new chapter of the Bankruptcy Code, with the provisions outlined below, would be consistent with the spirit of the TIA and current U.S. jurisprudence, and build upon the progress of several other developed countries.

THE PROPOSED NEW CHAPTER OF THE BANKRUPTCY CODE.

The basic elements of the proposal are as follows:

1. A new chapter of the Bankruptcy Code will provide for a new type of summary proceeding that could be instituted: (i) only by the debtor and (ii) only for the limited

[11] Freedom of contract is a fundamental principle of English law, such that English courts often function to enforce consensual bargains. *See*, *e.g. Printing and Numerical Registering Co. v. Sampson* (1875) L.R. 19 Eq 462 ("if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.").

[12] *See, e.g. Anglo Irish Bank, supra* note 2.

[13] Ley General de Sociedades [General Law of Corporations], art. 323, (Peru) available at http://www.congreso.gob.pe/ntley/Imagenes/Leyes/26887.pdf.

[14] Ley 18.045 de Mercado de Valores, Diario Oficial, Oct. 22, 1981, as amended March 19, 1994, *available at* https://www.svs.cl/sitio/english/legislacion_normativa/marco_legal/ley18045_ingles_07122011.pdf.

purpose of modifying the rights of one or more classes of claims for borrowed money under an indenture or a loan agreement.

2. The filing of a case under this new chapter would trigger virtually none of the provisions, requirements or prohibitions ordinarily triggered by the filing of a case under the Bankruptcy Code. Thus, for example:

(a) There would be no "estate."

(b) There would be no automatic stay.

(c) There would be no avoiding powers. However, the running of the applicable reach-back periods under sections 544, 545, 547 548, and 553 of the Bankruptcy Code would be tolled during the pendency of this proceeding.

(d) During the pendency of the case, the debtor would not be subject to any restrictions that would not apply in the absence of a bankruptcy filing. There would be no restriction on the payment of prepetition debt. The debtor would not require court approval for any transaction including, for example, the sale, use or lease of property outside the ordinary course of business, debt incurrence or the settlement of a dispute.

(e) There would be no provision for the appointment of a creditors or equity committee; no provision for the appointment of an examiner; and no provision for the appointment of a trustee.

3. *Ipso facto* clauses triggered by the filing of this new type of proceeding would be unenforceable — without exception. There would be no exception to this absolute prohibition on the enforceability of *ipso facto* clauses for "safe harbored" contracts like swap and repurchase agreements; nor for contracts of the type described in Section 365(c) of the Bankruptcy Code; nor for any other contract or right, whether or not executory (to negate the *American Airlines*[15] ruling). The fact that the debtor has asked a court to make a debt restructuring binding on the dissenters within an accepting class should not, by itself, be permitted to trigger defaults and forfeitures. Because this proceeding would not trigger any automatic stay, parties could exercise all of their rights in the event of any other type of default, *provided* that any involuntary chapter 7 or chapter 11 petition filed after the filing of a case under this new chapter would be held in abeyance until the earliest to occur of: (i) confirmation of a plan; (ii) the dismissal of the case; and (iii) the 90th day following the filing of the petition (or such later date as the court may fix for cause). In addition, a "change in control" provision triggered by a change in control resulting from the provisions of a confirmed plan would be unenforceable.

[15] *In re AMR Corp.*, 730 F.3d 88 (2d Cir. 2013).

4. The petition would have to be accompanied by the filing of the plan[16] and, if the debtor solicited consents prior to the petition date in accordance with Section 4(b)(i) below, the previously solicited acceptances upon which the debtor intends to rely to obtain confirmation of the plan. Only the debtor could propose a plan. In order to approve the proposed modification, the bankruptcy court would have to make the following findings:

(a) A super majority (either two thirds or seventy five percent) in amount of all claims in the class (whether or not voted) accepted the plan. (There would be no numerosity requirement.) Consent must be affirmative; an abstention would be the functional equivalent of a "no" vote. However, for purposes of tabulating the vote, debt held by the following parties would be disregarded and will not be treated as part of the claims in the class (*i.e.,* will be excluded from the denominator of the voting fraction as well as the numerator) in determining whether the requisite majority has accepted the plan: (i) debt held by the issuer or any affiliate or insider of the issuer; and (ii) debt held by parties who were found to have disqualifying conflicts of interest, akin to those that would result in vote disqualification under the modified version of section 1126(e) proposed in the Mayer/Pachulski Memo on Classification and Voting as finally approved by the Conference. Moreover, notwithstanding Section 510(a) of the Code or any provision in any contract or applicable law, and except as otherwise provided in the last sentence of this subparagraph, only the registered or beneficial holder of a claim in a class that is impaired under the plan could vote that claim. Thus, provisions in intercreditor agreements that purport to give "senior" creditors the power to vote the claims of "junior" creditors would be nullified for purposes of the plan vote.[17] *Provided, however,* that the foregoing nullification and unenforceability of voting provisions in intercreditor agreements will not apply to the vote of any class if: (A)(i) the class does not consist of claims arising under publicly issued debt and (ii) all holders of claims in the class have ceded their right to vote their claims pursuant to an intercreditor agreement or (B)(i) holders of claims in the class have ceded their right to vote to insurers of such claims and (ii) such insurers are the economic stakeholder with respect to such claims.

(b) the solicitation of consents either: (i) if accomplished prior to the petition date, complied with applicable non-bankruptcy law; or (ii) if accomplished subsequent to the petition date, included the provision to each creditor in the impaired class, along with the ballot, of a disclosure statement approved by the court as complying with Section 1125 following a

[16] The new chapter of the Bankruptcy Code would contemplate a "plan" that is far more limited than plans in a chapter 11 context.

[17] The rationale for this element of the proposal is that the basic premise underlying the weight given to the supermajority vote is that dissenters are being bound by the vote of other members of the same class who share their economic interest in maximizing the recovery of that class. This rationale breaks down when the majority of the claims are voted, not by holders of claims in the class that would be bound by the vote, but by a creditor or creditors in some other class whose interests are adverse to those of the creditors who will be bound by the vote.

disclosure statement hearing. Thus, if the debtor chose the second option, there would be both a hearing to approve the disclosure statement (followed by a vote on the plan), and a hearing on confirmation of the plan.

(c) the plan offers and provides the same treatment in all respects to all creditors in the class, whether they accepted or rejected the plan, unless a creditor agrees to less favorable treatment. No payment by the debtor to any creditor in the class could be made outside the plan. Thus, a consent fee or the like could not be paid only to those who accepted the proposal, and no member of the class could receive any special consideration in exchange for its vote. Further, no fee or other compensation shall be paid in connection with any "Exit Financing" to any holder of claims in an impaired class unless the opportunity to participate, and obtain such fee or other compensation, is offered to every "Qualified Holder" in such class on a basis proportionate to its claims relative to the claims of all Qualified Holders in such class. "Exit Financing" means any loan, any purchase of notes, stock or other property, or any other financing contemplated by the Chapter 16 plan. A "Qualified Holder" is a person who is qualified to participate in such exit financing under applicable nonbankruptcy law. Moreover, no other consideration could be provided to any member of the class, directly or indirectly, that was not offered to all members of the class; provided, however, that the debtor's pre-petition or post-petition payment of the professional fees incurred by a creditor or group of creditors in connection with the negotiation and documentation of the plan would not constitute grounds for denying confirmation, so long as the court found that the creditor or group of creditors had played a material role in the negotiation and documentation of the plan. A finding by the court that this condition had not been satisfied would not be grounds for requiring disgorgement of any professional fees so paid by the debtor; it would simply be grounds for denying confirmation. Any such payment would have to be disclosed in the Disclosure Statement, and any party holding a claim in the same class as the recipient of the payment could object to confirmation of the Plan on the grounds that the recipient did not satisfy the "material role" requirement referred to above.

(f) The plan satisfies the "best interests" test contained in Section 1129(a)(7) as to: (i) every holder of a claim in an impaired class of unsecured claims who rejected the plan; and (ii) if the plan modifies the rights of holders of claims in a secured creditor class with respect to their collateral in a manner that could not be accomplished under the terms of the applicable contracts by the vote of those holders of claims in the class who accepted the plan, every holder of a claim in a class of secured claims who rejected the plan.

5. Notice of the hearing on confirmation of the plan and of the opportunity to object to the plan must be served on all creditors on the day the petition is filed. Creditors in the affected class would be given 25 days' notice of the deadline for objecting to confirmation of the plan. If no objection is timely filed, the court shall confirm the plan without further hearing. If an objection is filed, the hearing must be held.

6. If, at the hearing, it appears that the debtor has not obtained the requisite majority of acceptances, whether as a result of the disqualification of votes (a disqualified vote would count, in substance, as an abstention), or otherwise, confirmation would be denied and the case dismissed, without prejudice to the debtor's right to refile another case under this chapter (or any other chapter of the Bankruptcy Code) and try again. There would be no provision for conversion of a case under this chapter to a case under chapter 7 or chapter 11 of the Bankruptcy Code.

7. If a case under this chapter is dismissed for failure to obtain the requisite plan acceptances, or otherwise, any future Bankruptcy Code proceeding by or against the debtor would have to be filed in the same court in which the first proceeding was filed.

8. Section 1145 of the Bankruptcy Code would apply to securities issued under the plan.

9. The Plan would be binding on only the debtor and the class or classes of creditors affected by the plan. There would be no discharge of any debt other than the specific class or classes of debt affected by the plan; as to such classes, the obligations of the debtor would be governed by the plan.

DISCUSSION

The primary benefit of the above proposal would be that a debtor seeking to modify a class of debt without unanimous consent would not be subject to all of the costs and burdens incident to a typical chapter 11 case: There would be no limitation or prohibition on the payment of prepetition debt; no need for court approval for out of the ordinary course of business transactions or, indeed, any other type of transaction, etc. The court's jurisdiction and control over the debtor would be limited to determining whether to approve the proposed debt modification and make it binding on the dissenters. Further, the broadened prohibition against the enforcement of *ipso facto* clauses would prevent the collateral damage that might otherwise accompany a chapter 11 filing.

Some time ago, the Committee discussed a similar concept. During those discussions, the following concerns (which are not necessarily consistent with one another) were expressed:

A. One committee member questioned the need for a special Bankruptcy Code provision for filing a summary proceeding in the bankruptcy court to obtain approval of the modification. Given the relative speed with which prepackaged plans involving the modification of the rights of a single class of creditors (such as bank debt or bonds) or even multiple classes of liquidated debt for borrowed money can be confirmed, the summary proceeding really would not

add very much in the way of greater speed, efficiency or economy. The countervailing argument is that the new proceeding would be substantially more streamlined and inexpensive and have less of an impact on creditors whose claims are not being modified than a prepackaged chapter 11 case, because there would be no automatic stay, no requirement of court approval for non-ordinary course transactions, and no restriction on the payment of pre-petition debt, etc. Further, unlike a prepackaged chapter 11 case, the new proceeding would not pose various risks to the debtor's value that can accompany the filing of a case under current chapter 11 of the Bankruptcy Code. Those avoided risks include: (i) the operation of ipso facto clauses in "safe harbored" commercial transactions (because such "safe harbors" would not apply in the new summary proceeding); and (ii) the inability to assume certain types of contracts such as certain non-exclusive intellectual property licenses (because the filing of the new proceeding would not constitute an enforceable default under any such contract, and all contracts that are not the basis for debt in the modified class would "ride through" without having to resort to a contested assumption process).

B. At the other end of the spectrum, concern was expressed that even with the requirement of Bankruptcy Court review and approval, there was insufficient protection for the minority because of the failure to include tests such as the "best interests" test in the new summary proceeding. This concern has been addressed by including a requirement that the "best interests" test be satisfied as to (i) any dissenting creditor in an impaired unsecured creditor class; and (ii) where rights as to collateral are modified in a manner that could not be accomplished outside of bankruptcy by the same majority of secured creditors in the class as voted to accept the plan, any dissenting holder of claims in a secured creditor class. Concern was also expressed that a dominant holder of the class of debt being modified (such as a single holder or commonly controlled group of holders) could vote for a plan that gave them control of the reorganized debtor and the minority little voice in its affairs. However, this concern could be addressed, at least in part, by providing that if a commonly controlled group of holders holds some large percentage of the debt in the class (for example, over 50%), a "numerosity" requirement would apply in addition to the requirement of an affirmative vote by the holders of the requisite majority in amount of claims. This requirement would apply only where a party objected to the approval of the modification on the grounds that a commonly controlled group of class members held more than 50% of the debt in the class. If that predicate was established, the burden would shift to the debtor to demonstrate that the requisite majority in number of claims had accepted the modification.

PROPOSAL FOR A NEW CHAPTER 16 OF THE BANKRUPTCY CODE FOR THE RESTRUCTURING OF BOND AND CREDIT AGREEMENT DEBT

Prepared by the National Bankruptcy Conference
December 18, 2015

PROPOSAL FOR A NEW CHAPTER 16 OF THE BANKRUPTCY CODE FOR THE RESTRUCTURING OF BOND AND CREDIT AGREEMENT DEBT

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SEC. 1. Amend section 103 of title 11 to add the following new 103(l):

"(l) Chapters 1 and 16 of this title and those sections identified in section 1601 of this title apply in a case under chapter 16 of this title. Chapter 16 of this title applies only in a case under such chapter."

SEC. 2. Amend section 109 of title 11 to add the following new 109(i):

"(i) Only a person, other than an individual, that may be a debtor under chapter 11 of this title and owes, on the date of the filing of the petition, a debt for borrowed money under a loan agreement may be a debtor under chapter 16 of this title.".

SEC. 3. Amend section 524(a)(1) of title 11 to replace "1228, or 1328" with "1228, 1328, or 1650.".

SEC. 4. Amend section 1511 of title 11 to add the following new 1511(c):

"(c) If a foreign representative commences a case under chapter 16 of this title—

(1) sections 1520, 1521(a), and 1521(e) of this title do not apply in the debtor's case under chapter 15 of this title, unless such chapter 16 case is dismissed; and

(2) the foreign representative may not initiate in the chapter 16 case an action under section 1523 of this title.".

SEC. 5. Amend section 1930(a)(3) of title 28 to replace "title 11, $1,167" with "title 11, or under chapter 16 of title 11, $1,167.".

SEC. 6. Add the following new chapter at the end of title 11:

CHAPTER 16. ADJUSTMENT OF DEBTS FOR BORROWED MONEY

SUBCHAPTER I—GENERAL PROVISIONS

§ 1601. Applicability of other sections of this title

(a) Sections 301, 305, 306, 342, 349(a), 502(a), 502(b)(1), 502(b)(9), 502(e), 502(j), 509, 510(a), 524(a), 524(e), 525, 553(a)(1), 1109(a), 1125, 1126(a), 1126(b), 1126(e), 1142, 1143, 1144, 1145, and 1146 of this title apply in a case under this chapter.

(b) A term used in a section of this title made applicable in a case under this chapter by subsection (a) of this section or section 103(l) of this title has the meaning defined for such

term for the purpose of such applicable section, unless such term is otherwise defined in section 1602 of this title.

(c) Any reference to a claim filed under section 501 in a section made applicable in a case under this chapter by subsection (a) of this section or section 103(l) includes a claim filed or deemed filed under section 1622 of this title.

§ 1602. Definitions for this chapter

In this chapter, the following definitions shall apply—

(1) "exit financing" means a loan or any other financing to or for the benefit of the debtor, or the purchase of debt or equity securities issued by the debtor, provided for by the plan;

(2) "loan agreement" means an agreement under which a claim against the debtor for borrowed money or reimbursement obligations in respect of letters of credit arises, or which evidences such a claim, including a credit agreement, a security constituting or evidencing a claim against the debtor for borrowed money, a trust or other indenture under which such a security is outstanding, and any security agreement or arrangement or other credit enhancement related to any of the foregoing, including any guarantee by the debtor of any of the foregoing;

(3) "professional fees" means compensation and reimbursement of expenses paid or to be paid to an attorney or other professional person;

(4) "property of the estate", when used in a section that is made applicable in a case under this chapter by section 103(l) or 1601 of this title, means property of the debtor;

(5) "qualified holder" means a person who is qualified under applicable nonbankruptcy law to participate in the exit financing provided for by the plan; and

(6) "trustee", when used in section 959(b) of title 28 or a section that is made applicable in a case under this chapter by section 103(l) or 1601 of this title, means debtor.

§ 1603. Right to be heard

A party in interest, including the debtor, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in the case.

SUBCHAPTER II—CASE ADMINISTRATION

§ 1621. List of creditors

The debtor shall file with the petition a list of creditors holding claims arising under or relating to a loan agreement in each class that is impaired under the plan.

§ 1622. Claims

(a) A holder of a claim in a class that is impaired under the plan or an indenture trustee under an indenture under which such claim arises may file a proof of claim.

(b) A proof of claim is deemed filed under subsection (a) of this section for any claim that appears in the list filed under section 1621 of this title, except a claim that is listed as disputed, contingent, or unliquidated.

(c) If a creditor of the kind described in subsection (a) of this section does not timely file a proof of such creditor's claim, the debtor, an entity that is liable to such creditor with the debtor, or an entity that has secured the creditor, may file a proof of such claim.

(d) The rights of the holder of a claim that is not in a class of claims that is impaired under the plan shall not, with respect to such claim, be affected, modified, or limited by the failure of such holder to file a proof of such claim in a case under this chapter. Notwithstanding section 502(a) of this title, a proof of claim filed by a creditor with respect to a claim that is not in a class that is impaired under the plan shall be of no force or effect, and any rights, objections, defenses, offsets, or counterclaims that the debtor has respecting such claim shall not be affected, modified, or limited by the filing of any such proof of claim or the failure to object to any such proof of claim.

§ 1623. Tolling of time periods

All time periods specified in sections 547, 548, 549, 550(c), and 553, and all time periods in applicable nonbankruptcy law referred to in sections 544(b) and 546(b), are tolled during the pendency of a case under this chapter.

§ 1624. Rights of the debtor

The debtor may operate the debtor's business; use, sell, or lease the debtor's property; or incur debt, without notice or a hearing, whether or not in the ordinary course of business.

§ 1625. Termination or modification of rights and obligations

Notwithstanding a provision in a contract or applicable nonbankruptcy law—

(1) a contract to which the debtor or an affiliate of the debtor is a party may not be terminated or modified, and any right or obligation under such contract may not be terminated or modified, at any time after the commencement of a case under this chapter solely because of a provision in such contract or applicable nonbankruptcy law that is conditioned on—

(A) only with respect to creditors whose claims are in a class that is impaired under the plan, the insolvency or financial condition of the debtor at any time before the closing of the case, except that this paragraph shall not apply if the case is dismissed;

(B) the commencement of a case under this title; or

(C) a change in control of the debtor provided for in the plan, which change in control occurs at any time on or before the effective date of the plan; and

(2) a governmental unit may not deny, revoke, suspend, or refuse to renew a person's eligibility to participate in a governmental program, including a program that

provides funding, solely because such person or another person with whom such person has been associated is or has been a debtor in a case under this chapter.

§ 1626. Rights of creditors under nonbankruptcy law

The rights of a creditor to enforce any claim and to exercise any rights or remedies of such creditor with respect to such claim under applicable nonbankruptcy law shall not be stayed, avoided, modified, or otherwise limited by operation of any provision of this title or by any order, process, or judgment of a court enforcing or carrying out any provision of this title, except—

(a) as provided in section 1625;

(b) to the extent that the rights of holders of claims in a class that is impaired under the plan as confirmed under this chapter are stayed, avoided, modified, or otherwise limited under such plan; or

(c) in a case commenced under section 1627 of this title.

§ 1627. Commencement of a case under chapter 7 or chapter 11

(a) A petition under chapter 7 or chapter 11 may be filed by or against the debtor under section 301 or 303 of this title at any time during the pendency of a case under this chapter if the debtor may be a debtor under the chapter under which the petition is filed.

(b) Unless the court orders otherwise for cause, if an involuntary petition is filed against the debtor under section 303 of this title during the pendency of a case under this chapter by a holder of a claim in a class that is impaired under the plan or by an indenture trustee under an indenture under which such claim arises, all proceedings in the involuntary case shall be suspended.

(c) If an involuntary petition is filed against the debtor under section 303 of this title during the pendency of a case under this chapter, the failure to pay any debt owed on account of a claim that is impaired under the plan shall not be considered in determining whether the requirements of section 303(h)(1) of this title have been satisfied.

(d) Subsections (b) and (c) of this section shall not apply in a case under this chapter after—

(1) a plan is confirmed under this chapter;

(2) the case under this chapter is dismissed; or

(3) 90 days after the filing of the petition under this chapter, or such later date as the court, on request of a party in interest made before the expiration of such 90-day period, may fix for cause.

§ 1628. Dismissal and conversion

(a) On request of the debtor at any time, the court shall dismiss a case under this chapter.

(b) A case under this chapter shall be dismissed if—

(1) the debtor fails to file a plan or a required disclosure statement timely under section 1641 of this title;

(2) a plan is not confirmed within 90 days after the filing of the petition under this chapter, or by such later date as the court, on request of a party in interest made before the expiration of such 90-day period, may fix for cause; or

(3) the court enters an order denying confirmation of a plan because an impaired class of claims has not accepted the plan.

(c) A case under this chapter may not be converted to a case under another chapter.

SUBCHAPTER III—THE PLAN

§ 1641. Filing of plan and disclosure statement

(a) Only a debtor may file a plan in a case under this chapter.

(b) The debtor shall file the plan with the petition.

(c) If the debtor intends to solicit acceptances of the plan after the commencement of the case, and a disclosure statement approved by the court is required under section 1125 of this title for such solicitation, the debtor shall file a disclosure statement with the petition.

§ 1642. Classification of claims

A plan may place a claim in a particular class only if such claim is substantially similar to the other claims of such class. A claim secured by a lien on property in which the debtor has an interest shall not be placed in the same class as a claim that is not secured by a lien on property in which the debtor has an interest, regardless of the value of the property securing such lien.

§ 1643. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1642 of this title, classes of claims arising under or relating to a loan agreement that are impaired under the plan;

(2) specify the treatment of any class of claims arising under or relating to a loan agreement that is impaired under the plan;

(3) provide that, with respect to each claim and interest, other than claims in an impaired class of claims arising under or relating to a loan agreement, the plan leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest;

(4) provide the same treatment for each claim of a particular impaired class, except to the extent that—

(A) the holder of a particular claim agrees to a less favorable treatment of such claim; or

(B) all holders of claims in such class that had a material role in the negotiation and documentation of the plan are reimbursed for professional fees under paragraph (b) of this section.

(b) A plan may provide for the reimbursement of professional fees incurred by a creditor in connection with the creditor's material role in the negotiation and documentation of the plan.

§ 1644. Impairment of classes of claims

A class of claims is impaired under a plan unless, with respect to each claim of such class, the plan leaves unaltered the legal, equitable, and contractual rights to which such claim entitles the holder of such claim.

§ 1645. Acceptance of plan

(a) A class of claims has accepted a plan if such plan has been accepted by creditors that hold at least two-thirds in amount of the allowed claims of such class, determined without including the claim of, or the acceptance or rejection of the plan by—

(1) a holder that is the issuer, or any affiliate or insider of the issuer, of the debt on which the claim is based;

(2) a holder that has, by reason of any direct or indirect claim against the debtor or an affiliate of the debtor, an interest that is adverse to the interest of such class and that is of greater importance and economic value to such holder than its claim in such class; and

(3) a holder whose claim is designated under section 1126(e) of this title.

(b) Notwithstanding any other section of this title or any provision in a contract or applicable nonbankruptcy law, any waiver or transfer by a creditor to another creditor of the right to accept or reject a plan under this chapter shall be void, except as provided in subsection (c) of this section.

(c) A provision of a contract that waives or transfers to another creditor the right to accept or reject a plan shall be effective if—

(1) the claim of such creditor does not arise from debt securities that are registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78l and 78o(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f), and all holders of allowed claims in the class have agreed to waive or transfer the right to accept or reject a plan; or

(2) all holders of allowed claims in the class transferred to an insurer of such claim the right to accept or reject a plan, and such insurer holds the economic interest in such claims.

§ 1646. Modification of plan

(a) The debtor may modify a plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1642 and 1643 of this title. After the debtor files a modification of such plan, the plan as modified becomes the plan.

(b) The debtor shall comply with section 1125 of this title with respect to the plan as modified.

(c) Any holder of a claim that has accepted or rejected a plan is deemed to a have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.

§ 1647. Disclosure statement hearing

(a) If the debtor intends to solicit acceptances of the plan after the commencement of the case, and a disclosure statement approved by the court is required under section 1125 of this title for such solicitation, the court, after notice and a hearing, may approve the disclosure statement.

(b) A party in interest may object to the approval of the disclosure statement.

§ 1648. Confirmation hearing

(a) The court, after notice and a hearing, may confirm the plan.

(b) A party in interest may object to confirmation of the plan.

§ 1649. Confirmation of plan

The court shall confirm a plan only if all the following requirements are met:

(1) The plan complies with the provisions of this title made applicable by sections 103(l) and 1601 of this title and with the provisions of this chapter.

(2) The debtor complies with the provisions of this title made applicable by sections 103(l) and 1601 of this title and with the provisions of this chapter.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the debtor to any holder of a claim in a class of claims impaired under the plan, or to a professional employed by such creditor, for services or for costs and expenses or otherwise in connection with the case, or in connection with the plan and incident to the case, has been disclosed.

(5) With respect to each class of claims—

(A) such class has accepted the plan, and

(B) except as provided in paragraph (3) of this subsection, each holder of a claim of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is no less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.

(3) Subparagraph (B)(ii) of this paragraph shall not apply to a holder of a claim in an impaired class if—

(i) the claims in such class are secured by a lien on property in which the debtor has an interest, unless such lien is of inconsequential value; and

(ii) the plan modifies the rights of the holders of such claims with respect to such liens only in a manner that could be accomplished under the applicable agreement with the consent of such holders that have accepted the plan.

(4) Any consent fee or other payment made or to be made, under the plan or otherwise, to any holder of a claim in such impaired class of claims in connection with the solicitation of acceptances or rejections of a plan, or otherwise in relation to the plan, has been offered to all holders of claims in such class whether or not such holders have accepted the plan, except for professional fees paid or to be paid by the debtor to a creditor in connection with the creditor's material role in the negotiation and documentation of the plan.

(5) No fee or other remuneration shall be paid to any holder of a claim in such impaired class in connection with any exit financing, unless the plan provides that every qualified holder of claims in such class has an opportunity to participate in such exit financing and to receive such fee or other remuneration, whether or not such holder has accepted the plan, on a basis proportionate to its allowed claim relative to the allowed claims of all qualified holders in such class.

(6) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

§ 1650. Effect of Confirmation

(a) The provisions of a confirmed plan bind the debtor and all holders of claims in classes impaired by the plan.

(b) Except as provided in the plan or the order confirming the plan, the confirmation of the plan discharges the debtor from any liability on a claim in a class that is impaired by the plan, whether or not—

(1) a proof of such claim is filed or deemed filed under section 1622 of this title;

(2) such claim is allowed under section 502 of this title; or

(3) the holder of such claim has accepted the plan.

§ 1651. Closing and reopening cases

(a) After the effective date of the plan, the court shall close the case.

(b) A case may be reopened in the court in which such case was closed to accord relief to the debtor or for other cause.

REPORT OF THE NATIONAL BANKRUPTCY CONFERENCE

Adopted at the 2015 Annual Meeting

STATUTORY DRAFT OF PROPOSAL FOR A NEW CHAPTER FOR RESTRUCTURING BOND AND CREDIT AGREEMENT DEBT (CHAPTER 16)

REPORT OF THE NATIONAL BANKRUPTCY CONFERENCE
Adopted at the 2015 Annual Meeting

STATUTORY DRAFT OF PROPOSAL FOR A NEW CHAPTER FOR RESTRUCTURING BOND AND CREDIT AGREEMENT DEBT (CHAPTER 16)

At the 2014 Annual Meeting, the Conference approved a proposal of the Committee to Rethink Chapter 11 to address the problem of "holdouts" in bond restructurings.

Section 316(b) of the Trust Indenture Act (TIA) generally provides that the rights of any bondholder to payment "shall not be impaired or affected without the consent of such holder."[1] While protecting minority bondholder rights, the TIA's unanimity requirement also may prevent reasonable and necessary restructuring proposals that are supported by a substantial majority of holders from being implemented other than through a chapter 11 filing. Minority holders (including purchasers on the secondary market) may be incentivized to withhold consent in the hopes of being "bought off" or to achieve other objectives (such as enhancing the holdout's other positions in the debtor's capital structure), particularly where a chapter 11 filing would have negative economic consequences for the debtor.

In response to the holdout problem, the Committee to Rethink Chapter 11 proposed that a new chapter be added to the Bankruptcy Code – to be designated either chapter 10 or 16. The new chapter would provide a streamlined, judicial procedure for restructuring TIA-governed indentures and other "loan agreement" obligations that

[1] TIA section 316(b) (15 U.S.C. § 77ppp(b)) provides:

> b) Prohibition of impairment of holder's right to payment:
>
> Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder, except as to a postponement of an interest payment consented to as provided in paragraph (2) of subsection (a), and except that such indenture may contain provisions limiting or denying the right of any such holder to institute any such suit, if and to the extent that the institution or prosecution thereof or the entry of judgment therein would, under applicable law, result in the surrender, impairment, waiver, or loss of the lien of such indenture upon any property subject to such lien.

require unanimous or super-majority consent that could not be obtained through an out-of-court restructuring. Only loan agreement creditors would be impaired, although the debtor would be protected from the exercise of "ipso facto" rights based upon the bankruptcy filing by other creditors (including contractual counterparties).

The Committee to Rethink Chapter 11's "holdout" proposal was presented at the Conference's "Rethinking Chapter 11" conference in Washington, D.C. on May 28-29, 2015. A copy of the Memorandum distributed at the conference is included with this Report.

There have been significant judicial developments since the 2014 Annual Meeting that have heightened interest in TIA § 316 and highlighted the need for a process like that envisioned in proposed new chapter. In a pair of decisions, Judge Failla of the Southern District of New York held that TIA § 316 protects more than the legal right to payment; it also protects the practical right to be paid. Thus, a restructuring that left the debtor unable to satisfy its obligations to bondholders could violate the TIA as to nonconsenting holders, even if the restructuring did not alter the dissenters' legal right to payment of principal and interest. *See Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.*, 2014 WL 7399041 (S.D.N.Y. Dec. 30, 2014), and *Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Corp.*, 2015 WL 3867643 (S.D.N.Y. June 23, 2015). Judge Scheindlin of the Southern District of New York reached essentially the same conclusion in *Caesars Entm't Operating Co. v. BOKF, N.A. (In re. Caesars Entm't Operating Co.*), 2015 U.S. Dist. LEXIS 137235 (S.D.N.Y. Oct. 6, 2015).

In light of the growing interest in the TIA requirements for bond restructurings, Conferee Resnick was asked to take the lead in drafting a comprehensive amendment to the Bankruptcy Code that would implement the Committee to Rethink's proposal. The Business Debtor Committee discussed Conferee Resnick's proposed legislation and formed a drafting group consisting of Conferees Resnick, Pachulski, Levinson, and Shaffer. After the exchange of various drafts and further discussion, the Business Debtor Committee approved the proposed amendment for submission to the Conference, which also has been reviewed and edited by the Drafting Committee.

A copy of the proposed legislation to create a new chapter is enclosed with this Report. In summary, the new chapter will be a streamlined version of chapter 11. However, no estate will be created, and there will be no automatic stay. The avoiding powers will not apply, although the period for creditors to bring avoiding power actions under state law will be tolled during the pendency of the case. With limited exceptions for ipso facto clauses, no creditors' rights may be affected except those of holders of debt arising under loan agreements whose claims are impaired.

Only the debtor may file a plan, which must be filed with the petition and confirmed within 90 days (unless extended for cause). Confirmation will require a vote of 2/3 in dollar amount in each impaired class, and compliance with a version of the best interests test. There will be no cram down.

The Drafting Committee discussed the placement of the new chapter, "Adjustment of Debts for Borrowed Money," and whether it should be designated as "chapter 16" or "chapter 10." Arguments for designating it chapter 10 include (1) it is similar in a number of respects to chapter 11 (kind of a "Chapter 11 Light"), so it makes sense to place it next to chapter 11, and (2) all three business rehabilitation chapters (chapters 10, 11, and 12) would be together. It has also been noted that 36 years has passed since we had a Chapter X, so it should not confuse the bar to now have a new chapter 10. An argument for designating it chapter 16 is that it would signify the new chapter's more limited scope (as is chapter 15). After considering these arguments, as between chapter 10 and chapter 16, the Drafting Committee voted (3-2) that it should be designated as chapter 10, but no member thought that this was an important issue. One member suggested that we consider designating it as "chapter 10.5," but others did not indicate support for that suggestion (an argument against it is that a chapter 10.5 designation would complicate the designation of section numbers). Each member indicated that his or her vote was based on only a mild preference between chapter 10 and chapter 16. Because the Conference approved the proposal as "chapter 16" at its 2014 Annual Meeting, and the closeness of the vote of the Drafting Committee, we continued the chapter 16 designation in the version of the new chapter. However, the Drafting Committee wants to raise this issue so that the Conference may consider the most appropriate placement of this new chapter.

The following is a brief, section-by-section summary of the proposal. The section numbers are based upon a chapter 16 designation, but could easily be adapted to be in a new chapter 10.

Section 1: Only chapters 1 and 16 apply in a chapter 16 case (chapters 3, 5, and 11 do not apply, except as expressly provided in section 1601(a)).

Section 2: Eligibility for chapter 16 is the same as for chapter 11, except (i) an individual cannot be a debtor, and (ii) the debtor must have debt for borrowed money under a "loan agreement" (defined in proposed section 1602 as including a credit agreement or indenture).

Section 3: Adds reference to chapter 16 in section 524(a)(1) effect-of-discharge provision.

Section 4: Amends section 1511 to change the effects of recognition of a foreign proceeding when the foreign representative invokes chapter 16; ensures that recognition does not cause the application of various Code provisions that are excluded from chapter 16.

Section 5: Imposes filing fee for chapter 16 case equal to fee for chapter 11 case.

Section 6: Adds chapter 16.

1601 Incorporates various provisions of chapters 3, 5, and 11, but ***excludes*** among others: (i) involuntary cases (§ 303), (ii) trustees and examiners (§§ 321-326, 1104-1105), (iii) official committees (§ 1103), (iv) retention and compensation of professionals (§§ 327-331), (v) adequate protection and the automatic stay (§§ 361-362), (vi) court approval for sales (§ 363), (vii) court approval for financing (§ 364), (viii) treatment of executory contracts and leases (§ 365), (ix) creation of an estate (§ 541), and (x) the avoiding powers (§§ 544-551).

1602: Additional or modified definitions for chapter 16.

1603: Right to be heard – similar to section 1109.

1621: Debtor shall file list of creditors.

1622: Proofs of claim are only filed by creditors in impaired class and do not need to be filed if on the debtor's list (other than listed as disputed, contingent, or unliquidated).

1623: Tolls avoiding power limitation periods during chapter 16 case.

1624: Debtor may operate business, whether or not in ordinary course.

1625: Overrides application of ipso facto clauses (without "safe harbor" exceptions or exceptions for non-assignable contracts) vis-à-vis debtor and its affiliates (i) as to all parties, if based upon the filing of the chapter 16 case, and also (ii) as to impaired creditors, if based upon the debtor's insolvency or financial condition. Prohibits governmental revocation or suspension based upon chapter 16 filing.

1626: Unimpaired creditors' rights are not affected, except as provided in section 1625, or if a chapter 7 or 11 case is commenced for the debtor.

1627: Chapter 16 does not preclude the filing of a chapter 7 or 11 case (including an involuntary case). However, an involuntary case commenced by impaired creditors is suspended, unless the court orders otherwise (this suspension will end if a chapter 16 plan is confirmed, the chapter 16 case is dismissed, or it is more than 90 days after the commencement of the chapter 16 case, unless the court extends the time for cause).

1628: Debtor has right to dismiss case. Case shall be dismissed if plan is not confirmed within 90 days (unless extended for cause), or if confirmation is denied because an impaired class has rejected the plan. Case cannot be converted.

1641: Only debtor can file plan, which must be filed with the petition.

1642: Claims must be classified with similar claims. Cannot classify an undersecured creditor's deficiency claim with unsecured creditors.

1643: Plan shall (i) designate impaired classes (which can only be claims arising under or relating to a loan agreement), (ii) specify treatment of impaired classes, (iii) leave unimpaired all other creditors, and (iv) provide for the same treatment for all creditors in each impaired class (except those creditors who participated in plan process may receive reimbursement of fees).

1644: Claim is impaired unless the plan leaves unaltered the legal, equitable, and contractual rights to which such claim entitles the holder of such claim.

1645: Plan must be accepted by creditors holding at least 2/3 in amount of claims in each impaired class, including claims that are not voted (no numerosity requirement, and 2/3 requirement excludes votes of insiders and affiliates, and of parties that have "an interest that is adverse to the interest of such class and that is of greater importance and economic value to such holder than its claim in such class"). Limits waivers and transfers of right to vote.

1646: Debtor may modify a plan at any time before confirmation, but may not if the plan as modified fails to meet the requirements of sections 1642 and 1643.

1647: If the debtor solicits acceptances postpetition, court may approve disclosure statement.

1648: Court may confirm plan after notice and hearing. Parties in interest may object.

1649: Court shall confirm plan only if (i) the debtor and plan comply with the applicable Code requirements, (ii) plan is proposed in good faith and not be any means forbidden by law, (iii) payments made to holders of impaired claims and their professionals are disclosed, (iv) each impaired class has accepted the plan (no cram down), and (v) the best interests test is satisfied as to each holder of a claim in an impaired class (except with respect to value given up with respect to lien rights that also could have been given up outside of the chapter 16 case). Consent fees and exit financing fees must be offered to all creditors in class.

1650: Plan binds the debtor and holders of impaired claims. Impaired claims are discharged except as provided in the plan.

1651: Court shall close case after effective date. Case may be reopened.

Faculty

Olya V. Antle is an associate with Cooley LLP in New York and represents a broad range of actors in complex restructuring proceedings, bankruptcy litigation and cross-border insolvency matters across a variety of industries, including energy, retail, health care and technology. She works closely with her clients to develop new and creative solutions for overcoming challenges that frequently arise in the restructuring arena. A frequent speaker on insolvency-related topics, Ms. Antle serves as one of the International Insolvency Institute's delegates to the United Nations Commission on International Trade Law (Working Group V) and is a participant in the World Bank's Insolvency & Creditor/Debtor Regimes Task Force meetings. She received her B.A. in economics and music performance, *summa cum laude* and Phi Beta Kappa, in 2008 from Randolph-Macon Woman's College and her J.D. in 2011 from New England School of Law.

Ronit J. Berkovich is a partner in the Restructuring Department of Weil, Gotshal & Manges LLP in New York, where she represents debtors, creditors, lenders, investors, and acquirers of assets in all aspects of distressed situations. She has served as debtors' counsel in several of the largest and most significant chapter 11 cases in history, including General Motors, Lehman Brothers, WorldCom/MCI and Takata. Ms. Berkovitch has experience representing large and mid-market companies in out-of-court workouts, international restructurings and prepackaged chapter 11 cases in a variety of industries, and she has provided advisory services to Fortune 500 companies and other companies on corporate structuring strategies. She also has expertise on restructuring strategies for managing litigation claims, including mass torts and government claims, and has recently developed deep knowledge of insolvency laws as applied to cryptocurrency companies. Ms. Berkovich has received several prestigious awards and recognition for her work. Most recently, she won the 2023 *Law360* Distinguished Legal Writing Awards for her Bloomberg article, "Crypto Downturn Will Bring Legal, Regulatory Clarity." In 2022, she was recognized as a "Northeast Trailblazer" by *The American Lawyer*, named "Highly Regarded" for Restructuring and Insolvency in the U.S. by *IFLR1000*, and named among the 500 Leading Global Bankruptcy & Restructuring Lawyers by *Lawdragon*, among others. Prior awards include *The American Lawyer* "Dealmaker of the Year" in 2019 and *Law360* "Bankruptcy MVP" in 2018. Ms. Berkovich actively lectures on various topics relating to restructuring, including for organizations such as ABI, PLI, Bloomberg Law, the American Bar Association, the Turnaround Management Association, the New York City Bar Association and Columbia Law School. She is the co-editor of the Weil Bankruptcy Blog and has written extensively on restructuring-related topics, including articles published in *The Banking Law Journal*, *The American University Law Review*, *Real Estate Finance* and the *Harvard Law School Bankruptcy Roundtable*. She also taught legal research and writing at Harvard Law School for two years and an undergraduate seminar in economics at Harvard College. Ms. Berkovich received her B.A. with distinction from the University of Virginia in 1997 and her J.D. *magna cum laude* from Harvard Law School in 2001.

Robert A. Britton is a partner in the Restructuring Department of Paul, Weiss, Rifkind, Wharton & Garrison LLPin New York, where he focuses his practice on representing debtors, equity owners, creditor groups and distressed investors in acquisitions, out-of-court restructurings and chapter 11 cases. Some of his recent experience includes advising key parties of interest in the restructurings of Revlon, Glass Mountain, GTT Communications, Diamond Offshore Drilling, Gulfport Energy, Tem-

plar Energy, American Achievement, Exide Technologies, Sears and OmniMax International. Mr. Britton is a 2020 honoree of ABI's "40 Under 40" program and is listed in *Lawdragon* as one of "500 Leading US Bankruptcy & Restructuring Lawyers." He has received several awards for his work, including the "Corporate Turnaround (Large)" award for The Turnaround Atlas Awards in 2022 for his work on Gulfport Energy's chapter 11 cases. In addition, the *International Financial Law Review* (IFLR) awarded him its 2021 "Restructuring Deal of the Year" award for his representation of The Chatterjee Group in the restructuring of McDermott International, and its 2020 "Deal of the Year: Restructuring and Insolvency" for his work advising the restructuring subcommittee for the board of directors of Sears. The Turnaround Management Association also awarded him its 2020 "Transaction of the Year: Large Company" award for his work in the chapter 11 case of Trident USA. Mr. Britton is a frequent contributor to a number of industry publications, including the *Harvard Business Law Review*, *Bloomberg Law Reports-Bankruptcy Law*, *New York Law Journal* and *The Bankruptcy Strategist*. He received his A.B. *cum laude* from Augustana College and his J.D. *magna cum laude* from the University of Illinois College of Law.

Jennifer C. DeMarco is a partner in Clifford Chance's Global Financial Markets group in New York and chair of its Americas Financial Restructuring group, and specializes in financial restructuring and bankruptcy. She primarily represents investors, financial institutions and companies in multi-jurisdictional distressed situations and debt restructurings. Complementary to her financial restructuring experience, Ms. DeMarco is an experienced bankruptcy court litigator, having appeared in bankruptcy courts throughout the U.S. She is recognized by *IFLR1000*, The Best Lawyers in America, *Who's Who in American Law*, *Who's Who of American Women* and *Legal 500*. Ms. DeMarco received her B.A. from Lafayette College and her J.D. from Fordham University.

Christopher R. Donoho, III is a partner with Hogan Lovells US LLP in New York and global head of its Business Restructuring and Insolvency practice group. He is experienced in domestic and cross-border private-equity portfolio company restructurings, bondholder group representations and distressed M&A. He has played a leading role on numerous award-winning deals, including advising the Kodak Pension Plan in the Eastman Kodak Company chapter 11 case (which won the Turnaround Management Association's 2014 Mega Turnaround of the Year Award, where he received an individual award for his contributions), representing Orexigen Therapeutics in its chapter 11 proceedings and successfully negotiating a court-approved § 363 sale of Orexigen's assets to Nalproprion Pharmaceuticals (winner of The M&A Advisor's 2018 Turnaround Award for Healthcare/Life Sciences Deal of the Year (Under $500m)), and representing the unsecured creditors' committees in the Abengoa chapter 11 cases, having confirmed plans of reorganization delivering substantial value to unsecured creditors and now is pursuing additional recoveries for the liquidating trustees (which won The M&A Advisor's 2017 Turnaround Award for § 363 Sale of the Year (Over $250m - $500m)). From 2015-19, Mr. Donoho served as the office administrative partner of the firm's New York office. He received his A.B. from Brown University in 1991 and his J.D. from Vanderbilt University in 1994.

Hon. Allan L. Gropper is a U.S. Bankruptcy Judge for the Southern District of New York, appointed on Oct. 4, 2000. In 1972, he joined the law firm of White & Case, becoming a partner in 1978. He was for many years head of the firm's bankruptcy and reorganization practice group and was active in many of the nation's largest chapter 11 cases, including Manville Corp., Texaco, LTV Corp., Federated Department Stores/Allied Stores Corp., Maxwell Communications Corp., MGM, United States

Lines, Pan American World Airways and Waterman Steamship Corp. He also was active in international insolvencies and restructurings and was located in the White & Case Hong Kong office from 1999-2000. Judge Gropper has lectured in several foreign countries on insolvency matters and is a co-editor of a two-volume text, *International Insolvency*, published in 2000. He is an adjunct professor of law at Fordham Law School and teaches a course on international insolvency law. Judge Gropper received his B.A. *cum laude* from Yale University in 1965 and from 1965-66 was a Fulbright tutor at Christ Church College in Kanpur, India. He received his J.D. *cum laude* from Harvard Law School in 1969 and became an attorney in the Civil Appeals Unit of the New York City Legal Aid Society.

Rick Morris is a managing director at HPS Investment Partners, LLC in New York, where he is focused on, among other things, distressed-credit investing. Prior to joining HPS in 2018, he was a managing director at Goldman Sachs, where he held various roles in New York and London, including head of EMEA Distressed Research and co-head of EMEA Distressed Trading. Prior to Goldman Sachs, Mr. Morris was a managing director at Merrill Lynch on its Global Distressed Trading and Investing desk in New York. Prior to that, he was a corporate restructuring attorney at Skadden, Arps, Slate, Meagher & Flom, where he represented debtors, senior lenders and distressed investors in complex corporate restructuring and cross-border transactions. Mr. Morris received his B.A. from Rutgers University and his J.D. from Rutgers Law School.

Maja Zerjal Fink is a partner with Arnold & Porter Kaye Scholer LLP in New York, where she represents clients in distressed situations, corporate reorganizations, distressed-investment litigation, and insolvency proceedings in the U.S. and across the globe. Recognized by ABI in its "40 Under 40" Class of 2020, *Law360* (2020), *Super Lawyers* (2020) and *The Legal 500* (2019) as a "Rising Star," she has been involved in some of the largest reorganization cases in the U.S., including the restructuring of Puerto Rico's outstanding debt load of more than $74 billion. Ms. Zerjal Fink has represented clients in a number of high-profile restructurings, including Hertz, Cineworld, Caesars Entertainment Operating Corp., MF Global Holdings, Seadrill Partners, Penn Virginia Corp., Rotech Healthcare, SIGA Technologies, Breitburn Energy Partners, Trident Microsystems and Phoenix Brands. She also represented B. Endeavour Shipping Co. in its chapter 15 case and has advised clients in several cross-border matters. Ms. Zerjal Fink has given guest lectures at Harvard Law School and University of Pennsylvania Carey Law School, and writes extensively on restructuring topics, including in Bloomberg Law and Debtwire. She is also a member of the editorial board of *International Corporate Rescue*, a corporate restructuring and insolvency journal that has published more than 30 of her articles. Ms. Zerjal Fink maintains an active *pro bono* practice and has been awarded a Pro Bono Star award by Human Rights First for her work in asylum cases. She also is an active member of the Harvard Law School Association and serves on its executive committee and the board of the New York City chapter. Ms. Zerjal Fink received her B.A. from the University of Ljubljana in Slovenia, where she was first in class, and her LL.M. from Harvard Law School, where she was Dean's Scholar in Corporate Reorganization and senior editor of the *Harvard Business Law Review*.