Professional Responsibility and Ethics Issues Arising from Cross-Border Representations in Insolvency Cases

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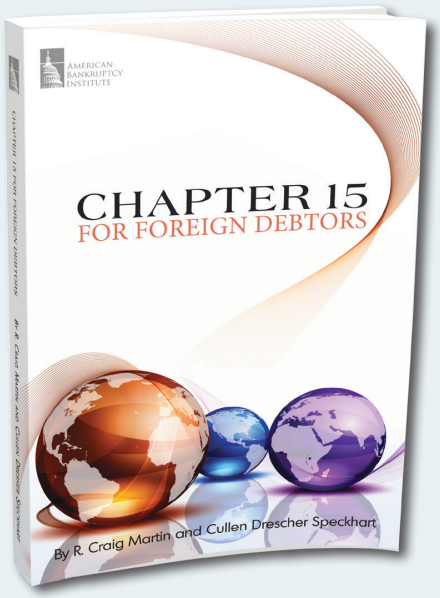

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CAYMAN ISLANDS

Supplement No. 8 published with Gazette No. 21 of 8th October, 2012.

LEGAL PRACTITIONERS LAW

(2012 REVISION)

Law 9 of 1969 consolidated with Laws 11 of 1972, 4 of 1980, 14 of 1982, 33 of 1983, 6 of 1984, 6 of 1986, 13 of 1987, 4 of 1996, 20 of 1998 (part), 23 of 2001, 30 of 2002, 22 of 2006, 29 of 2009, 18 of 2011 and with the Legal Practitioners (Variation of Annual Practising Fee) Regulations, 2001 and the Legal Practitioners (Variation of Annual Practising Fee) Regulations, 2006.

Revised under the authority of the Law Revision Law (1999 Revision).

Originally enacted-

Law 9 of 1969-13th August, 1969
Law 11 of 1972-11th May, 1972

(c) is qualified to practise as an attorney-at-law under regulations made under section 20.

(2) A person who is qualified under subsection (1) may apply for admission to practise as an attorney-at-law and such application shall be made in writing addressed to a judge and be filed in the office of the Clerk of Court together with-

(a) the certificate of the applicant's call to the Bar or, as the case may be, of his admission to the Faculty of Advocates or of his admission as solicitor, Writer to the Signet or Law Agent aforesaid, or the corresponding certificate relating to any qualification referred to in paragraph (b) or (c) of subsection (1); and

(b) an affidavit signed by him in the presence of the Clerk of Court, who shall subscribe his name as a witness thereto, verifying that the certificate is a true certificate and that the applicant is the person named therein and that he is qualified as prescribed by subsection (1) (hereinafter referred to as "the prescribed qualification"):

Provided that a judge may exempt any such person from producing the said certificate and from verifying the same if he is otherwise satisfied that the applicant possesses the prescribed qualification

(3) A judge may, for due cause, refuse to admit any applicant to practise as an attorney-at-law notwithstanding that he may possess the prescribed qualification unless such person is being admitted to practise as an attorney-at-law under paragraph (c) of section 3(1).

Limited admission as attorney-at-law

4. (1) A judge shall have power to admit to practise as an attorney-at-law, for the purpose of any specified suit or matter in regard to which the person so admitted has been instructed-

(a) by an attorney-at-law in the Islands; or

(b) where the Clerk of Court has certified that it is not possible to assign the services of an attorney-at-law to a person to whom a legal aid certificate has been granted under section 3 of the Legal Aid Law (1999 Revision), by such person,

1999 Revision

any person who possesses the prescribed qualification, if such person has come or intends to come to the Islands for the purpose of appearing, acting or advising in that suit or matter, and an application for such admission is made in such manner as the judge may think fit.

(2) A person admitted to practise as an attorney-at-law under subsection (1) shall be entitled to practise for the purpose of the suit or matter concerned but not otherwise.

(3) The Clerk of Court shall not issue a certificate under paragraph (b) of subsection (1) unless he is satisfied that every reasonable effort has been made to obtain the services of an attorney-at-law in the Islands for the person to whom the legal aid certificate has been granted, and that there is no attorney-at-law in the Islands who is willing and able to advise or represent that person under the Legal Aid Law (1999 Revision). 1999 Revision

Enrolment of attorneys-at-law

5. (1) The Clerk of Court shall, upon application from any person admitted to practise as an attorney-at-law under section 3, enter his name in a book to be kept for the purpose by the Clerk and to be called the Court Roll and, upon his name being so enrolled, such person shall be entitled to a certificate of enrolment under the seal of the court.

(2) Any person whose name is so enrolled shall, subject to section 12, be entitled to practise as an attorney-at-law in every court in the Islands.

(3) Any person practising as an attorney-at-law and whose name is so enrolled shall be deemed to be an officer of the Grand Court.

(4) Subject to section 4, no person whose name is not so enrolled shall be entitled to practise in any court in the Islands.

Right to sue for fees and costs

6. Every attorney-at-law who has been admitted to practise and enrolled shall be entitled to sue for and recover his fees and costs in respect of services rendered as an attorney-at-law and shall be subject to all the liabilities which by law attach to an attorney-at-law.

Suspension and striking off Roll

7. (1) A judge shall have power, for reasonable cause shown, to suspend any attorney-at-law from practising as such during any specified period or to order his name to be struck off the Court Roll.

(2) Before a judge takes such action as is laid down in subsection (1) hereof, he shall communicate or cause to be communicated in writing to the attorney-at-law concerned the nature of the complaint against him and such attorney-at-law shall be entitled to call witnesses and to be heard.

(3) A judge may, if he thinks fit, at any time, order the Clerk of Court to replace on the Court Roll the name of an attorney-at-law whose name had been struck off the Roll.

Rule 1.04

An attorney's primary duty is to his client, to whom he must act in good faith. He must at all times and by all proper and lawful means advance and protect his clients' best interests without fear or regard for self-interest.

Rule 1.06

Except in the specific circumstances contemplated by statute, an attorney has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and may not divulge such information except where:

(1) the attorney is reasonably seeking to establish or collect his or her fee; or

(2) the attorney is defending himself or his partners or employees against an allegation by the client of malpractice or misconduct or against a criminal charge; or

(3) the information is or has become public knowledge; or

(4) disclosure is required by law; or

(5) disclosure to the attorney's professional indemnity insurer is required in order to maintain or secure the attorney's cover; or

(6) the attorney forms the view that there is a serious and imminent risk to the health or safety of the client; or

(7) the attorney has an overriding duty to a court or tribunal.

Rule 1.11

An attorney must not without the informed consent of such person act or continue to act for any person where there is a conflict of interest between the attorney on the one hand and an existing or prospective client on the other hand; nor similarly may the attorney agree to act for any such person when, at the time he takes instructions, it is reasonably foreseeable that such a conflict may arise during the course of his doing so.

Rule 1.13

(1) As soon as he becomes aware of a conflict or likely conflict of interest among clients, an attorney shall forthwith take the following steps:

(i) advise all clients involved of the areas of conflict or potential conflict;

(ii) advise the clients involved that they should take independent advice as may be appropriate;

(iii) decline to act further for any party in the matter where so acting would or would be likely to disadvantage any of the clients **involved unless the parties have given their prior informed consent to the attorney continuing to act.**

(2) Unless the relevant parties have given their prior informed consent, it is not acceptable for attorneys in the same firm to continue to act for more than one client in a transaction. The use of an information barrier such as a "Chinese wall" should be considered carefully and appropriate safeguards adopted with respect to segregating confidential information. Such a device does not overcome a conflict of interest that has already arisen.

(3) Save as hereinafter set out, an attorney must disclose to his client all information received by the attorney in the course of his business which relates to the client's affairs. The exception to this rule is that an attorney should not disclose to a client details of any enquiry or request to such practitioner from a third party to act against or otherwise in connection with that client's interests and the attorney has advised such third party that he cannot assist or act for it or where such disclosure is otherwise prohibited by any law or regulation or by the order of any governmental, judicial authority or agency.

Rule 7.03

An attorney must make all reasonable efforts to ensure that legal processes are used for their proper purposes only and that their use is not likely to cause unnecessary embarrassment, distress or inconvenience to another person's reputation, interests or occupation.

Chapter 8 - Court Proceedings and Practice

Rule 8.01

The overriding duty of an attorney acting in litigation is to ensure in the public interest that the proper and efficient administration of justice is served. Subject to this, the attorney has a duty to act in the best interests of the client.

Rule 8.05

An attorney must not act as both advocate and witness in the same matter.

Rule 8.06

In litigation matters, as in the course of other aspects of practice, an attorney must avoid a conflict of interest.

Supplement No. 5 published with Gazette No. 14 of 7th July, 2009.

CONFIDENTIAL RELATIONSHIPS (PRESERVATION) LAW

(2009 Revision)

Consolidated with Laws 26 of 1979 and 22 of 1993.

Revised under the authority of the Law Revision Law (1999 Revision).

Originally enacted-

Law 16 of 1976-8th September, 1976
Law 26 of 1979-6th September, 1979
Law 22 of 1993-24th September, 1993.

Consolidated and revised this 16th day of June, 2009.

Notes:

1. *This revision replaces the 1995 Revision which should now be discarded.*
2. ***See notes A and B on page 9.***

Confidential Relationships (Preservation) Law (2009 Revision)

CONFIDENTIAL RELATIONSHIPS (PRESERVATION) LAW

(2009 Revision)

ARRANGEMENT OF SECTIONS

Confidential Relationships (Preservation) Law (2009 Revision)

CONFIDENTIAL RELATIONSHIPS (PRESERVATION) LAW

(2009 Revision)

1. This Law may be cited as the Confidential Relationships (Preservation) Law (2009 Revision). Short title

2. In this Law - Definitions

"Authority" means the Cayman Islands Monetary Authority established under section 3(1) of the Monetary Authority Law (2008 Revision) and includes any employee of the Authority acting under the Authority's authorisation. 2008 Revision

"bank", "licensee" and "trust company" have the meanings ascribed to them in the Banks and Trust Companies Law (2009 Revision); 2009 Revision

"business of a professional nature" includes the relationship between a professional person and a principal, however the latter may be described;

"confidential information" includes information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorised by the principal to divulge;

"criminal" in relation to an offence means an offence contrary to the criminal law of the Islands;

"Governor" means the Governor in Cabinet;

"normal course of business" means the ordinary and necessary routine involved in the efficient carrying out of the instructions of a principal including compliance with such laws and legal process as arises out of and in connection therewith and the routine exchange of information between licensees;

"principal" means a person who has imparted to another confidential information in the course of the transaction of business of a professional nature;

"professional person" includes a public or government official, a bank, trust company, an attorney-at-law, an accountant, an estate agent, an insurer, a broker and every kind of commercial agent and adviser whether or not answering to the above descriptions and whether or not licensed or authorised to act in that capacity and every person subordinate to or in the employ or control of such person for the purpose of his professional activities; and

"property" includes every present, contingent and future interest or claim direct or indirect, legal or equitable, positive or negative, in any money, moneys worth, realty or personalty, movable or immovable, rights and securities thereover and all documents and things evidencing or relating thereto.

Application and scope
*See note A on page 9.

*3. (1) Subject to subsection (2), this Law has application to all confidential information with respect to business of a professional nature which arises in or is brought into the Islands and to all persons coming into possession of such information at any time thereafter whether they be within the jurisdiction or thereout.

(2) This Law has no application to the seeking, divulging or obtaining of confidential information-

(a) in compliance with the directions of the Grand Court under section 4;
(b) by or to-
  (i) any professional person acting in the normal course of business or with the consent, express or implied, of the relevant principal;
  (ii) a constable of the rank of Inspector or above investigating an offence committed or alleged to have been committed within the jurisdiction;
  (iii) a constable of the rank of Inspector or above, specifically authorised by the Governor in that behalf, investigating an offence committed or alleged to have been committed outside the Islands which offence, if committed in the Islands, would be an offence against its laws;
  (iv) the Financial Secretary, the Authority or, in relation to particular information specified by the Governor, such other person as the Governor may authorise;
  (v) a bank in any proceedings, cause or matter when and to the extent to which it is reasonably necessary for the protection of the bank's interest, either as against its customers or as against third parties in respect of transactions of the bank for, or with, its customer; or
  (vi) the relevant professional person with the approval of the Financial Secretary when necessary for the protection of himself or any other person against crime; or
(c) in accordance with this or any other law.

Directions regarding the giving in evidence of confidential information
*See note B on page 9.

*4. (1) Whenever a person intends or is required to give in evidence in, or in connection with, any proceeding being tried, inquired into or determined by any court, tribunal or other authority (whether within or without the Islands) any confidential information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted.

(2) Application for directions under subsection (1) shall be made to, and be heard and determined by, a Judge of the Grand Court sitting alone and *in camera.* At least seven days' notice of any such application shall be given to the Attorney-General and, if the Judge so orders, to any person in the Islands who is a party to the proceedings in question. The Attorney-General may appear as *amicus curiae* at the hearing of any such application and any party on whom notice has been served as aforesaid shall be entitled to be heard thereon, either personally or by counsel.

(3) Upon hearing an application under subsection (2), a Judge shall direct-

(a) that the evidence be given;
(b) that the evidence shall not be given; or
(c) that the evidence be given subject to conditions which he may specify whereby the confidentiality of the information is safeguarded.

(4) In order to safeguard the confidentiality of a statement, answer or testimony ordered to be given under subsection (3) (c), a Judge may order-

(a) divulgence of the statement, answer or testimony to be restricted to certain named persons;
(b) evidence to be taken *in camera*; and
(c) reference to the names, addresses and descriptions of any particular persons to be by alphabetical letters, numbers or symbols representing such persons the key to which shall be restricted to persons named by him.

(5) Every person receiving confidential information by operation of subsection (2) is as fully bound by this Law as if such information had been entrusted to him in confidence by a principal.

(6) In considering what order to make under this section, a Judge shall have regard to-

(a) whether such order would operate as a denial of the rights of any person in the enforcement of a just claim;
(b) any offer of compensation or indemnity made to any person desiring to enforce a claim by any person having an interest in the preservation of secrecy under this Law; and
(c) in any criminal case, the requirements of the interests of justice.

(7) In this section -

"court" bears the meaning ascribed to it in section 2 of the Evidence Law (2007 Revision); 2007 Revision

"given in evidence" and its cognates means make a statement, answer an interrogatory or testify during or for the purposes of any proceeding; and

"proceeding" means any court proceeding, civil or criminal and includes a preliminary or interlocutory matter leading to or arising out of a proceeding.

Offences and penalties

5. (1) Subject to section 3(2), whoever-

(a) being in possession of confidential information however obtained-
(i) divulges it; or
(ii) attempts, offers or threatens to divulge it; or
(b) wilfully obtains or attempts to obtain confidential information,

is guilty of an offence and liable on summary conviction to a fine of five thousand dollars and to imprisonment for two years.

(2) Whoever commits an offence under subsection (1) and receives or solicits on behalf of himself or another any reward for so doing is liable to double the penalty therein prescribed and to a further fine equal to the reward received and also to forfeiture of the reward.

(3) Whoever, being in possession of confidential information, clandestinely, or without the consent of the principal, makes use thereof for the benefit of himself or another, is guilty of an offence and liable on summary conviction to the penalty prescribed in subsection (2), and for that purpose any profit accruing to any person out of any relevant transaction shall be regarded as a reward.

(4) Whoever being a professional person, entrusted as such with confidential information, the subject of the offence, commits an offence under subsection (1), (2) or (3) is liable to double the penalty therein prescribed.

(5) For the removal of doubt it is declared that, subject to section 3(2), a bank which gives a credit reference in respect of a customer without first receiving the authorisation of that customer is guilty of an offence under subsections (1) and (4).

Regulations

6. The Governor may make regulations for the administration of this Law.

Attorney-General's fiat

7. No prosecution shall be instituted under this Law without the consent of the Attorney-General.

Publication in consolidated and revised form authorised by the Governor in Cabinet this 16th day of June, 2009.

Carmena Watler
Clerk of Cabinet

Notes-A: ***See section 18 of the Tax Information Authority Law (2009 Revision) which deals with the protection, in certain circumstances, of persons disclosing confidential information under that law.***

B: ***Section 19 of the Tax Information Authority Law (2009 Revision) deems that section 4 of this Revised Law shall not apply to confidential information given by any person in conformity with a request under that law.***

Confidential Relationships (Preservation) Law (2009 Revision)

Confidential Relationships (Preservation) Law (2009 Revision)

Confidential Relationships (Preservation) Law (2009 Revision)

(Price $ 2.40)

CAYMAN ISLANDS

Supplement No. 3 published with Extraordinary No. 5, dated 22 January, 2009.

THE COMPANIES WINDING UP RULES 2008

ORDER 25

OFFICIAL LIQUIDATOR'S LAWYERS

Appointment of Lawyers (O.25, r.1)

1. (1) Subject to obtain the Court's sanction pursuant to paragraph 11 of Part I of the Third Schedule to the Law, the official liquidator may retain attorneys and/or foreign lawyers (whether or not temporarily admitted as attorneys) only on terms of engagement which comply with the requirements of this Rule.

(2) The terms upon which lawyers are engaged by the official liquidator must be stated in writing and shall be signed by both parties.

(3) Every engagement letter or retainer agreement shall contain particulars of the basis upon which the lawyers will be remunerated, including, if applicable, a statement of the agreed hourly rates.

(4) The official liquidator shall not retain (whether directly or indirectly) any foreign lawyer unless he (being a sole practitioner) or the firm of which he is a partner or employee has signed an engagement letter or retainer agreement which expressly states that –

(a) the contract is government by Cayman Islands law;

(b) the lawyer/law firm submits to the exclusive jurisdiction of the Court for all purposes in connection with the engagement;

(c) the lawyer/law firm understands and agrees that the amount of fees payable by the official liquidator is subject to taxation in accordance with this Order;

(d) the lawyer/law firm shall have no right to exercise any lien over his files as against the official liquidator

(5) The official liquidator has no authority to engage any lawyers on terms which are inconsistent with the requirements of this Rule and any term of an engagement letter or retainer agreement which is inconsistent with the requirements of this Rule shall be void and of no effect.

(6) Nothing in this rule shall affect the validity or effectiveness of any engagement letter or retainer agreement made prior to 1 March 2013.

Lawyer's Fees (O.25, r.2)

2. (1) All lawyers engaged by the official liquidator shall be remunerated on a time spent basis (at agreed hourly rates which are stated in the engagement letter) unless the Court has sanctioned some other basis of remuneration.

(2) If the official liquidator or the liquidation committee consider that the amount of fees and expenses charged by the official liquidator's lawyer is excessive, the official liquidator may require that such fees and expenses be taxed on the indemnity basis by the taxing officer.

(3) Conversely, if the lawyer considers that the amount which the official liquidator offers to pay is inadequate, he may require that his bill of costs be taxed on the indemnity basis by the taxing officer.

(4) The lawyer shall be entitled to be paid out of the assets of the company as an expense of the liquidation the amount(s) stated in the costs certificate and the official liquidator shall have no authority to pay more than that amount.

Procedure for Taxation of Lawyer's Fees (O.25, r.3)

3. (1) A taxation under this Order shall be governed by and conducted in accordance with GCR Order 62.

(2) The lawyer shall prepare a bill of costs in GCR Form 314 and serve it on the official liquidator.

(3) The official liquidator shall state the extent to which he disagrees with the amount charged and/or the scope of the work done by completing column 4 and returning the completed bill of costs to the lawyer within 21 days or such other period as may be agreed.

(4) In addition to completing column 4, the official liquidator may also serve a written statement of his objections to the amount charged.

(5) Proceedings for taxation of the bill of costs shall be commenced (by either party) by lodging the following documents with the taxing officer –

(a) an application for taxation in GCR Form 301;

(b) the bill of costs, completed in accordance with this Rule;

(c) any written statement of objections by the official liquidator;

(d) any written reply by the lawyer; and

(e) a copy of the engagement letter or retainer agreement.

Subsequent Procedure on Taxation (O.25, r.4)

4. (1) A taxation shall be inquisitorial in nature.

(2) The taxing officer shall enquire into the bill of costs and determine the amount to be paid in accordance with Rule 4 for which purpose the taxing officer shall obtain such written explanations from the official liquidator and/or the lawyer as may be appropriate to enable him to make such determination fairly.

(3) The taxation shall be conducted in accordance with the Guidelines issued from time to time by the Grand Court Rules Committee pursuant to GCR Order 62, rule 16(3), insofar as such Guidelines relate to taxation on the indemnity basis.

(4) The taxing officer may require the lawyer to produce –

(a) his time records;

(b) his files and any other documents reflecting the work done; and

(c) invoices in respect of any disbursements included in the bill of costs.

(5) The taxing officer shall not give reasons for any of his decisions.

(6) The taxing officer shall send an office copy of his costs certificate to the official liquidator and to the lawyer.

Criteria Applicable on Taxation (O.25, r.4)

4. (1) The lawyer is entitled to be fairly remunerated in accordance with the terms of his engagement letter for all work reasonably and properly done on the instructions of the official liquidator.

(2) In determining whether the remuneration claimed is fair, the taxing officer shall have regard to all the relevant circumstances, including –

(a) the difficulty or novelty of the issues involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by the attorneys engaged;

(c) the number and importance of the relevant documents (however brief) prepared or perused;

(d) the overall size of the estate;

(e) the amount of money or value attributable to the issues involved; and

(f) the overall importance to the liquidation of the issues involved.

(3) In determining whether the work done by the lawyer was reasonably and properly done, the taxing officer shall have regard to all the relevant circumstances, including –

(a) the duties of the official liquidator;

(b) the instructions given by the official liquidator; and

(c) any relevant directions given by the Court.

(4) Work done by the lawyer shall be presumed not to have been done reasonably and properly if the work done or advice given caused or contributed to a breach of duty on the part of the official liquidator.

(3) The Court shall not be obliged to give the attorney a reasonable opportunity to appear and show cause where proceedings fail, cannot conveniently proceed or are adjourned without useful progress being made because the attorney –

(a) fails to attend in person or by a proper representative;

(b) fails to deliver any document for the use of the Court, which ought to have been delivered or to be prepared with any proper evidence or account, or

(c) otherwise fails to proceed.

(4) In any other case, an application for a wasted costs order shall be made by summons setting out the grounds of the application which shall be supported by an affidavit containing full particulars of all the facts and matters relied upon by the applicant.

(5) A copy of a summons issued under this rule and the supporting affidavit must be served –

(a) on the attorney personally; or

(b) in the case of an application against Crown Counsel or any other attorney acting on behalf of the Attorney General, on the Attorney General.

(6) The Court may direct that notice of any proceedings or order against an attorney under this rule be given to his client in such manner as may be specified in the direction.

(7) The Court shall direct that notice of any proceedings or order under this rule against Crown Counsel shall be given to the Attorney General.

PART IV: TAXATION OF COSTS

Basis of taxation (O.62, r.13)

13. (1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these rules the term "the standard basis" in relation to the taxation of costs shall be construed accordingly.

(2) Where the amount of costs is to be taxed on the standard basis, the taxing officer will only allow costs which are not only reasonable but are also proportionate to the matters in issue having regard to -

(a) the amount of money involved;

(b) the importance of the case; and

(c) the complexity of the issues.

(3) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these rules the term "the indemnity basis" in relation to the taxation of costs shall be construed accordingly.

(4) Where the Court makes an order for costs without indicating the basis of taxation or an order that costs be taxed on a basis other than the standard basis or the indemnity basis, the costs shall be taxed on the standard basis.

Costs payable to a trustee, personal representative or official liquidator out of any fund (O.62, r.14)

14. (1) Unless the Court otherwise orders, every taxation of a trustee's, personal representative's or official liquidator's costs where -

(a) he is or has been a party to any proceedings in that capacity; and

(b) he is entitled to be paid his costs out of any fund, shall be on the indemnity basis.

(2) On a taxation to which this rule applies, costs shall be taxed on the indemnity basis but shall be presumed to have been unreasonably incurred if they were incurred contrary to the duty of the trustee or personal representative or official liquidator as such.

Costs payable to an attorney where money claimed by or on behalf of a person under disability (O.62, r.15)

15. (1) This rule applies to any proceedings in which -

(a) money is claimed or recovered by or on behalf of, or adjudged, or ordered, or agreed to be paid to, or for the benefit of, a person under disability, or

(b) money paid into court is accepted by or on behalf of a person under disability.

Amount of costs (O.62, r.16)

16. (1) The amount of costs to be allowed on taxation shall (subject to rule 17 and to any order of the Court fixing the costs to be allowed) be in the discretion of the taxing officer.

(2) In exercising his discretion the taxing officer shall have regard the Guidelines issued by the Rules Committee pursuant to paragraph (3), to all the relevant circumstances, and in particular to –

(a) the circumstances of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the attorney;

(c) the number and importance of the relevant documents (however brief), properly prepared or perused;

(d) where money or property is involved, its amount or value;

(3) The Rules Committee may issue guidelines relating to –

(a) the procedure in respect of taxation;

(b) the form and content of bills of costs; and

(c) the nature and amount of fees, charges, disbursements, expenses or remuneration which may be allowed on taxation, and, for the avoidance of doubt, including the maximum rates that may be allowed on a taxation.

Allowance or disallowance of items and allowance of increased sums (O.62, r.17)

17. (1) Where the costs of any action or matter are to be taxed the Court may, if it thinks fit, direct that any item of work shall be allowed, disallowed, restricted or qualified on taxation.

(2) An application for a direction under paragraph (1) may be made at the trial or hearing of the proceeding or on notice to be served on the party by whom the costs are payable within 14 days after the making of the order for their payment, provided that where an application which could have been made at the trial or hearing is made subsequent thereto, the Court may refuse the application on the ground that it ought to have been made at the trial or hearing.

Foreign lawyers (O.62, r.18)

18. (1) Work done by foreign lawyers may be recovered on taxation under these rules on the standard basis provided that -

(a) the foreign lawyer has been temporarily admitted as an attorney; and

(b) the work was done after he was admitted.

(2) Work done by foreign lawyers who are temporarily admitted must be fully itemised in the bill of costs and may not be treated as a disbursement.

(3) Whenever a claim is made for work done by foreign lawyers, the taxing officer will investigate whether it has resulted in a duplication or increase in the cost of the proceedings and any such increase shall be disallowed**.**

(4) Work done by local attorneys for the purpose of instructing foreign lawyers and vice versa shall be disallowed.

(5) The taxing officer shall disallow any item which appears to have been incurred, or the costs of which appears to have been increased, because the successful party has engaged both local attorneys and foreign attorneys.

(6) Time spent and disbursements incurred in respect of written and oral communication between foreign lawyers and local attorneys will be disallowed.

(7) The overriding principle is that a paying party should not be required to pay more because the successful party has engaged a foreign lawyer than he would have been required to pay if the successful party had employed only local attorneys.

Litigants in person (O.62, r.19)

19. (1) The costs of a litigant in person to be taxed on the standard basis shall be taxed subject to the provisions of this rule.

(2) Where it appears to the taxing officer that the litigant in person has suffered pecuniary loss in doing any item of work to which the costs relate, there may be allowed such costs as would have been allowed if the work and disbursements to which the costs relate had been done or made by an attorney on the litigant's behalf together with any payments reasonably made by him for legal advice relating to the conduct of or the issues raised by the proceedings, provided that the amount allowed in respect of any such item of work shall be such sum as the taxing officer thinks fit but not exceeding, except in the case of a disbursement or expense, two-thirds of the sum which would have been allowed in respect of that item of work if an attorney had been employed or the actual amount of pecuniary loss suffered, whichever is the less.

(3) Where it appears to the taxing officer that the litigant has not suffered any pecuniary loss in doing any item of work to which the costs relate, he shall be allowed in respect of the time reasonably spent by him on that item an amount not exceeding $30 per hour.

CAYMAN ISLANDS

Supplement No. 3 published with Extraordinary No. 5, dated 22 January, 2009.

THE COMPANIES WINDING UP RULES 2008

ORDER 21

INTERNATIONAL PROTOCOLS

Application and definitions (O.21, r.1)

1. (1) In this Order "company in liquidation" means a company which is incorporated under the Law and is the subject of an official liquidation under Part V.

(2) This Order has no application to foreign companies which are the subject of an official liquidation under Part V.

(3) This Order applies –

(a) when a company in liquidation is the subject of a concurrent bankruptcy proceeding under the law of a foreign country; or

(b) when the assets of a company in liquidation located in a foreign country are the subject of a bankruptcy proceeding or receivership under the law of that country.

(4) In this Order –

(a) "foreign officeholder" means a person appointed by a foreign court or other authority to exercise powers similar to those of an official liquidator in respect of a company or to exercise powers similar to those of a receiver in respect of assets of a company;

(b) "foreign court or authority" means the foreign court or foreign governmental authority which has appointed and exercises supervisory jurisdiction over a foreign officeholder;

(c) "international protocol" means an agreement made in respect of a company in liquidation between an official liquidator and a foreign officeholder with the approval of the Court and of the foreign court or authority.

Consideration of international protocols (O.21, r.2)

2. (1) It shall be the duty of the official liquidator of a company in liquidation to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder.

(2) The purpose of an international protocol is to promote the orderly administration of the estate of a company in liquidation and avoid duplication of work and conflict between the official liquidator and the foreign officeholder.

(3) An international protocol agreed between the official liquidator and a foreign officeholder of a company in liquidation shall take effect and become binding upon them only if and when it is approved by both the Court and the foreign court or authority.

Scope of international protocols (O.21, r.3)

3. (1) An international protocol may define and allocate responsibilities between the official liquidator and foreign officeholder (by reference to geographical location or otherwise) in respect of –

(a) the formulation and promotion of restructuring proposals, including a scheme of arrangement pursuant to section 86 of the Law;

(b) the preservation of assets located outside the Islands;

(c) the realisation of assets located outside the Islands;

(d) the pursuit of causes of action against debtors or other persons outside the Islands;

(e) procedures for the exchange of information between the official liquidator and foreign officeholder;

(f) procedures for reporting to and communicating with the liquidation committee and with creditors and/or contributories;

(g) procedures for co-ordinating sanction applications made to the Court and to the foreign court or authority;

(h) administrative procedures relating to the adjudication of proofs of debt and consequential appeals or expungement applications;

(i) procedures relating to the payment of claims; and

(j) procedures relating to the remission of funds between the official liquidator and foreign officeholder.

(2) An international protocol may establish procedures for the review, approval and payment of –

(a) the remuneration of the official liquidator and foreign officeholders;

(b) the fees of counsel to the official liquidator and lawyers engaged by the foreign officeholder; and

(c) other expenses incurred by the official liquidator and/or foreign officeholder.

(3) Any provision contained in international protocol which is contrary to the provisions of the Law or purports to exclude the jurisdiction of the Court in respect of the company in liquidation shall be void and of no effect.

CAYMAN ISLANDS LAW OF PRIVILEGE - Notes

Privilege under Cayman Islands Law

1. Legal Professional Privilege ("Privilege") is a term used in Cayman Islands law to describe one of the grounds upon which a person may claim that certain documents are protected from disclosure[1]. Once Privilege is established, the right to withhold a document is an absolute right, and is not subject to a balancing act by the Court[2]. The term encompasses both Legal Advice Privilege and Litigation Privilege[3]. The specific elements of both forms of Privilege are discussed below, but there are principles that apply to both doctrines.

2. Firstly, Privilege belongs to the client and not to the lawyer who gives the advice or prepares the document[4]. Accordingly, Privilege may be waived only by the client, even if its lawyer wishes to waive Privilege. Moreover, the lawyer is under a professional obligation to assert Privilege until it is waived by the client[5].

3. Secondly, Privilege does not cease to exist upon expiration of the client in whom it vests[6]. For example, where Privilege is vested in a company, the dissolution of the company does not mean that documents to which Privilege attached can then be disclosed by the legal advisor. On this basis, if the client ceased to exist or changed status of the as an independent and separate entity at some point, any communications to which Privilege attached at the time the client was in existence and independent and separate would not be lost.

4. The ways in which Privilege may be waived are several. Waiver of Privilege can be express or implied. Should a document imbued with Privilege be disclosed by Party A to a third party, and thereby be deprived of its confidentiality (one of the requisites of

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[1] *Halsbury's Laws of England, Volume 11, 5th Edition, Chapter 14, paragraph 556*
[2] R v Derby Magistrates Court, Ex p. B [1996] A.C. 487 at para 509
[3] *Three Rivers District Council v Governor and Company of the Bank of England* [2004] UKHL 48 at para 10
[4] *Ibid at para 61*
[5] R v Central Criminal Court, Ex P Francis and Francis [1989] 1 A.C. 346 at page 381
[6] Bullivant v Attorney General for Victoria [1901] A.C. page 196, HL

Privilege) as between those parties, it does not mean that privilege has been waived as against any other party[7].

Legal Advice Privilege

5. The "Attorney-client" privilege in the United States, as I understand it, is the analogue to the Cayman Islands "Legal Advice Privilege".

6. Under Legal Advice Privilege, communications between a client and its legal adviser are privileged and protected from disclosure provided they are confidential and spoken or written to or by the legal adviser in his professional capacity and for the purpose of receiving or giving legal advice or assistance[8]. A document coming into existence under these conditions or for such purposes is also privileged, even though it is not in fact communicated by a legal adviser to the client[9].

7. As noted above, Legal Advice Privilege, as a form of Privilege, belongs to the client and can be waived only by the client[10].

8. As a general matter, communications between an attorney and a third party are not protected by Legal Advice Privilege unless the third party is acting as an agent of the client for the purpose of communications to give or receive legal advice[11]. Based on the principle that communications between an attorney and the client created for the purpose of giving or receiving legal advice are protected by Legal Advice Privilege, where communications between the client and attorney contain information communicated by a third party, which is not privileged, they are still wholly privileged, notwithstanding that they contain the unprivileged information from the third party[12].

9. As Legal Advice Privilege does not apply to communications between the client and third parties who are not legal advisors, this includes third parties who are accountants and

[7] USP Strategies v London General Holdings Ltd [2004] EWHC 373 (Ch) at para 19d.
[8] *Halsbury's Laws of England, Volume 11, 5th Edition, Chapter 14, paragraph 561.*
[9] *Southwark and Vauxhall Water Co. v Quick* (1878) 3 Q.B.D. pages 322 and 323.
[10] Ibid at 2
[11] Wheeler v Le Marchant (1881) 17 Ch.D. page 684
[12] Re Sarah C Getty Trust [1985] Q.B. page 956

financial advisors[13]. However, as explained, the mere provision of a communication to which Privilege attaches to a third party does not waive Privilege as far as anyone else is concerned.

Litigation Privilege

10. The "Work Product" privilege in the United States, as I understand it, is the analogue of the Cayman Islands "Litigation Privilege".

11. Litigation Privilege applies to confidential communications made between an attorney and the client, between an attorney and a non-professional agent, between an attorney and a third party, or between the client and third parties, for the sole or dominant purpose of litigation that is either contemplated or already commenced[14]. Litigation Privilege also applies to all documents brought into being for the purposes of litigation[15]. This would include communications between the attorney and/or the client, accountants and financial advisors.

12. As a general rule, "Litigation" includes all adversarial proceedings, be they of a civil or criminal nature. The definition will also include similar proceedings in a foreign court. In some cases "Litigation" is not necessarily confined to legal courts, as tribunals and arbitrations have in the past been included. The general rule is that non-adversarial proceedings are not included.

13. The test for whether litigation is contemplated is an objective one, and is satisfied if litigation is "reasonably in prospect"[16].

14. In Litigation Privilege, Cayman Islands law does not distinguish between "fact work product" and "opinion work product", as those concepts have been explained to me.

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[13] *R. (on the application of Prudential Plc) v Special Commissioner of Income Tax [2013] 2 W.L.R. pages 325* and 326
[14] Ibid at 1, para 102
[15] Ibid at 1, para 10
[16] Ibid at 1, para 83

Ownership of the Documents

15. As a general matter, documents prepared during the course of a retainer between client and attorney, and which are prepared for the benefit of the client, belong to the client[17]. The Documents consist of such documents and therefore are capable of being privileged.

16. The fact that a company can delegate a function to a small group of individuals and, thereby, create a unit capable of separate identity, at least in the context of Privilege, is illustrated by the penultimate decision[18], made by the English Court of Appeal, in the *Three Rivers District Council v Bank of England* group of cases, which was ultimately decided in the House of Lords (now the Supreme Court in England and Wales) as referenced at footnotes 3, 4, 10, 14, 15 and 16 above. In the Court of Appeal the "client", for the purpose of assessing to whom the legal advice privilege in the documents belonged, was deemed to be a group of three employees, formed to constitute an inquiry unit in order to compile information to be submitted to the Bank of England's attorneys. The "client" was not deemed to be the bank, whose employees formed the inquiry unit, or, indeed, any other employees outside of those which formed the inquiry unit. The House of Lords declined to revisit the Court of Appeal's ruling on the identity of the "client" and that decision therefore remains intact.

Waiver of Privilege

17. The assertion that "Under Cayman Islands law…privilege is waived by disclosure of otherwise confidential information to third parties" is not strictly speaking accurate. It is correct that disclosure of a confidential document to a third party will lead to loss of confidentiality of the document as between the disclosing and receiving parties, and privilege cannot be claimed by the disclosing party as against the receiving party. However, in "Phipson on Evidence"[19] emphasis is placed on the distinction between loss of confidentiality and waiver of privilege. In Chapter 26, "Loss and Waiver of Privilege", the author states:

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[17] *Halsbury's Laws of England, Volume 65, 5th Edition, Chapter 6, paragraph 785*
[18] Three Rivers District Council v Governor and Company of the Bank of England (no 5) [2003] Q.B. 1556, CA
[19] Phipson on Evidence, 17th Edition, Hodge M. Malek QC et al, 26-03

> "*The waiver may give rise to an obligation to produce further associated privileged documents, known as collateral waiver, to prevent "cherrypicking" or a partial disclosure to the court. This potential consequence of waiver does not arise where there is simply a loss of confidentiality in one or more documents*."

18. Moreover, disclosure of privileged material will destroy the confidentiality and preclude the ability to claim privilege in that document or information, as between the disclosing party and the receiving party, but not as between the disclosing party and other parties to whom the material has not been disclosed. Therefore, by way of example, the provision of information by A to B does not lead to a loss of confidentiality between A and C and it follows, therefore, that privilege in the information provided to B was not waived as between A and C

19. Waiver of privilege can be:

    19.1. By express or implied agreement; or

    19.2. By conduct in the course of litigation making a fair adjudication impossible with such waiver; or

    19.3. By destroying the confidentiality of the privileged material.

20. Mere reference to a document does not lead to a presumption of waiver of privilege in that document, whether reference is made in pleadings[20] or in an affidavit[21].

21. The Memorandum alludes to the practice commonly known as "cherry-picking" when it refers to the practice of "unfairly indulging in selective disclosure among the privileged material". However, "cherry-picking" is not relevant in the instant case. A is not seeking to gain an advantage in proceedings against C by relying on a document which it declines to produce for reasons of privilege. Therefore, the principle of fairness in proceedings, to which the Memorandum alludes, plays no part in the instant case.

[20] Roberts v Oppenheim (1884) 26 Ch. D. 274
[21] Tate & Lyle International Co Ltd v Government Trading Corp, The Times, October 24 1984

22. In *Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd* [2003] EWCA Civ 901[22], Waller LJ referred at paragraph 11 of his judgment to the following passage from *Disclosure* by Paul Matthews and Hodge M. Malek QC:

> "*The key word here is 'deploying'. A mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege, and this is so even if the document referred to is being relied on for some purpose, for reliance in itself is said not to be the test. Instead, the test is whether the contents of the document are being relied on, rather than its effect*."

[22] Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd [2003] EWCA Civ 901

Cayman Islands Law and Rules

Provided by: Laura Hatfield, S O L O M O N H A R R I S, Grand Cayman, Cayman Islands

1. Ss. 4 and 5 of the Legal Practitioners Law (2012 Revision)
2. Rules 1.04, 1.06, 1.11, 1.13, 7.03, 8.05 and 8.06 of the Cayman Islands Attorneys Code of Conduct;
3. Confidential Relationships (Preservation) Law (2009 Revision)
4. CWR O. 25 – Official Liquidators' Lawyers
5. GCR O. 62 , rr 13, 14, 16, 17 and 18 – Costs Protocol
6. CWR O. 21 – International Protocols; and
7. Cayman Islands Law of Privilege Memo

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Bankruptcy Without Borders: A Comprehensive Guide to the First Decade of Chapter 15

By: Peter Gilhuly, Kim Posin, Adam Malatesta and Mark Broude

International Origins

- Chapter 15 was enacted in 2005 as part of a worldwide effort to foster the orderly administration of cross-border restructurings.
- Chapter 15 is based on the Model Law on Cross-Border Insolvency (the "Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL").
- Chapter 15 is the only chapter of the Bankruptcy Code predicated on international coordination and cooperation and that encourages courts to look beyond the U.S. for guidance.
  - In interpreting chapter 15, courts must consider its international origin and the need to promote an application that is consistent with the application of similar statutes adopted by foreign jurisdictions. 11 U.S.C. § 1508.
  - Courts may consider the Model Law and foreign interpretations of it as part of its "interpretive task."

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Commencement of a Chapter 15 Case

- A chapter 15 case is commenced by filing a petition for recognition of a foreign proceeding in compliance with sections 1515 and 1517. 11 U.S.C. § 1504. Recognition of a foreign proceeding and other matters under chapter 15 are core proceedings. 28 U.S.C. § 157(b)(2)(P).
- The foreign representative must prove that the foreign proceeding is either a foreign main proceeding or a foreign nonmain proceeding.
  - A foreign main proceeding is a "foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4). Center of main interests is often referred to as "COMI".
  - A foreign nonmain proceeding is "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." 11 U.S.C. § 1502(5).

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Commencement of a Chapter 15 Case

- A petition for recognition must be filed in the district:
  - in which the debtor has its principal place of business or principal assets in the U.S.;
  - if the debtor does not have a place of business or assets in the U.S., in which there is pending against the debtor an action or proceeding in a Federal or State court; or
  - in a case other than those specified above, in which venue will be consistent with the interests of justice and the convenience of the parties having regard to the relief sought by the foreign representative. 28 U.S.C. § 1410.
- Section 109(a) requires that a debtor reside or have a domicile, a place of business or property in the U.S.
  - The courts are split as to whether section 109(a) applies to the debtor in a foreign proceeding under chapter 15.
    - Compare *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F. 3d 238 (2d Cir. 2013) (section 103(a) makes all of chapter 1, including section 109(a), applicable to chapter 15) with
    - *In re Bemarmara Consulting a.s.*, Case No. 13-13037 (Bankr. D. Del. Dec. 17, 2013) (section 109(a) is not applicable in a chapter 15 proceeding).

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Recognition of a Foreign Proceeding

- Recognition is defined as "the entry of an order granting recognition of a foreign main proceeding or a foreign nonmain proceeding." 11 U.S.C. § 1502(7).
- Recognition of the foreign proceeding is a condition to further rights and duties of the foreign representative.
- Equitable considerations should not bear on whether recognition of a foreign proceeding is appropriate.

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Recognition and Direct Access

- If a bankruptcy court recognizes a foreign proceeding:
  - the foreign representative may sue and be sued in a U.S. court;
  - the foreign representative may apply directly to a U.S. court for appropriate relief; and
  - U.S. courts must grant comity or cooperation to the foreign representative. 11 U.S.C. § 1509(b).
- A foreign representative's failure to obtain recognition does not affect their right to sue in a U.S. court to collect or recover a claim which is the property of the debtor. 11 U.S.C. § 1509(f).
- Subject to certain limitations, irrespective of whether recognition is granted, a foreign representative is subject to applicable nonbankruptcy U.S. law. 11 U.S.C. § 1509(e).

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Establishing a Foreign Proceeding

- The foreign representative carries the burden of proof as to the existence of a "foreign proceeding."
- The foreign representative must establish each of the following:
  - the existence of a proceeding;
  - that is either judicial or administrative;
  - that is collective in nature;
  - that is in a foreign country;
  - that is authorized or conducted under a law related to insolvency or the adjustment of debts;
  - in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and
  - which proceeding is for the purpose of reorganization or liquidation. 11 U.S.C. § 101(23).

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Establishing a Foreign Proceeding: Existence of a Judicial or Administrative Proceeding

- A "proceeding" has been identified as "acts and formalities set down in law so that courts, merchants and creditors can know them in advance, and apply them evenly in practice." *In re Betcorp Ltd.*, 400 B.R. 266, 278 (Bankr. D. Nev. 2009).
- The hallmark of a proceeding is a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets.
- A court filing is not required in order to be considered a "proceeding."
- The fact that a reorganization or liquidation plan in the foreign proceeding has already been approved will not prevent recognition so long as the foreign proceeding has not yet been closed.

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Establishing a Foreign Proceeding: Collective in Nature

- "A collective proceeding is designed to provide equitable treatment to creditors, by treating similarly situated creditors in the same way, and to maximize the value of the debtor's assets for the benefit of all creditors." *Armada (Singapore) Pte Ltd. v. Shah (In re Ashapura Minechem Ltd.)*, 480 B.R. 129, 136-37 (S.D.N.Y. 2012).
- A collective action may exist even where a receivership is run solely for the benefit of the debtor's secured creditors along with a separate liquidation. *See In re ABC Learning Ctrs. Ltd.*, 728 F.3d 301, 308-09 (3d Cir. 2014).
- Other characteristics of a collective action include:
  - adequate notice to creditors under applicable foreign law;
  - provisions for the distribution of assets according to statutory priorities; and
  - a statutory mechanism for creditors to seek court review.

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Establishing a Foreign Proceeding: Under Law Related to Insolvency/Adjustment of Debts

- The insolvency laws of a number of different countries, including Great Britain, France, Italy, Spain, Switzerland, Mexico, Canada, Australia, the Czech Republic, the Republic of Kazakhstan, and the Republic of Korea, among others, have been found to satisfy this requirement.
- The debtor does not necessarily need to be insolvent or to be contemplating use of any insolvency laws to adjust its debts.

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Establishing a Foreign Proceeding: Assets and Affairs Subject to Foreign Court

- Chapter 15 defines a "foreign court" as "a judicial or other authority competent to control or supervise a foreign proceeding." 11 U.S.C. § 1502(3).
- An administrative agency would qualify as a "foreign court."

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Petition for Recognition – Filing Requirements

- A petition for recognition must be accompanied by:
  - (a) the decision commencing the foreign proceeding and appointing the foreign representative; (b) a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative; or (c) other evidence of the foreign proceeding and appointment of the foreign representative (11 U.S.C. 1515(b));
  - a statement identifying all foreign proceedings with respect to the debtor (11 U.S.C. 1515(c));
  - a corporate ownership statement containing the information described in Bankruptcy Rule 7007.1; and
  - a list of all persons authorized to administer foreign proceedings of the debtor, all parties to litigation pending in the U.S. in which the debtor is a party, and all entities against whom provisional relief is being sought under section 1519.

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Provisional Relief While Petition for Recognition is Pending

- While a petition is pending, courts may grant provisional relief "where relief is urgently needed to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1519(a).
- Such relief includes, but is not limited to:
  - staying execution against the debtor's assets;
  - entrusting the administration or realization of all or part of the debtor's assets located in the U.S. to the foreign representative or another person to protect and preserve the value of assets that are perishable, susceptible to devaluation or otherwise in jeopardy; and
  - any relief referred to in sections 1521(a)(3), (4) or (7).

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Provisional Relief While Petition for Recognition is Pending

- Provisional relief:
  - automatically terminates when the petition is granted unless extended;
  - will be granted only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected; and
  - may be denied where it would interfere with the administration of the foreign main proceeding. 11 U.S.C. §§ 1519(b), (c); 1522(a).
- Courts may not enjoin a police or regulatory act of a governmental unit; nor stay the exercise of any rights that would not be subject to the stay arising under section 362(a) pursuant to section 362(b)(6), (7), (17) or (27) or pursuant to section 362(o). 11 U.S.C. § 1519(d), (f).

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Provisional Injunctive Relief

- The standards, procedures and limitations applicable to an injunction apply to requests for provisional relief. 11 U.S.C. § 1519(e).
  - *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.")
- Courts have been inconsistent as to whether (i) section 1519(e) applies only to requests for injunctive relief under section 1519 and (ii) an adversary proceeding is required to obtain provisional relief under section 1519.

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Conditions to and Modifications of Provisional Relief

- Courts may condition relief under section 1519 as appropriate, including requiring security or a bond. 11 U.S.C. § 1522(b).
- Courts may modify or terminate relief granted under section 1519 at their own behest or at the request of the foreign representative or an entity affected by such relief only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected. 11 U.S.C. § 1522(a).

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Public Policy Exception

- Courts may abstain from acting under chapter 15 if such action would be "manifestly contrary" to U.S. public policy. 11 U.S.C. § 1506.
- Courts have read the public policy exception narrowly and applied it sparingly.
- At least three principles guide courts in their public policy analysis:
  - the mere fact of a conflict between foreign and U.S. law is insufficient to support invocation of the exception;
  - exception applies where the procedural fairness of the foreign proceeding is in doubt or cannot be cured; and
  - exception applies where the action would impinge severely a U.S. constitutional or statutory right or frustrate a U.S. court's ability to administer the chapter 15 proceeding.

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Public Policy Exception and Recognition

- Parties opposing the recognition of a proceeding generally bear the burden of proof on applying the public policy exception.
- Courts have generally declined to invoke the public policy exception. However, at least one court denied recognition on the grounds that doing so would be manifestly contrary to U.S. public policy.
  - *See In re Gold & Honey, Ltd.*, 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009) (holding that recognizing the receivership proceeding "would reward and legitimize [the creditor's] violation of both the automatic stay and . . . [the bankruptcy court's orders] regarding the stay").

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Order Recognizing Foreign Proceeding

- Chapter 15 requires that a petition for recognition be decided "at the earliest possible time." 11 U.S.C. § 1517(c).
- Subject to the public policy exception, after notice and a hearing, an order recognizing a foreign proceeding will be entered if:
  - such foreign proceeding is a foreign main proceeding or a foreign nonmain proceeding;
  - the foreign representative that submitted the petition is a person or body; and
  - the petition meets the requirements of section 1515. 11 U.S.C. § 1517(a).
- Petitioner bears the burden to persuade court that the debtor's COMI is the location of the foreign proceeding or, that the debtor has an establishment in that place.

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Order Recognizing Foreign Proceeding

- Only parties directly affected by the relief provided by a recognition order have standing to appeal its entry.
  - "Potential future harm" is not sufficient to confer standing to appeal a recognition order.
- Recognition may be modified or terminated to the extent that it is shown that the grounds for granting recognition were fully or partially lacking or have ceased to exist. In considering such action, the court is required to give due weight to possible prejudice to parties that have relied upon the order granting recognition. 11 U.S.C. § 1517(d).

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Automatic Relief Upon Recognition of Any Foreign Proceeding

- Upon recognition of a foreign proceeding, the foreign representative:
  - has standing in a case concerning the debtor pending under another chapter of the Bankruptcy Code to initiate actions under sections 522, 544, 545, 547, 548, 550, 553 and 724(a); and
  - may intervene in any proceeding in a state or federal U.S. court in which the debtor is a party. 11 U.S.C. §§ 1523(a), 1524.

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Automatic Relief Upon Recognition of a Foreign Main Proceeding

- Upon recognition of a foreign main proceeding, sections 361 and 362 apply with respect to the debtor and the property of the debtor within the territorial jurisdiction of the U.S. -- tangible property located within the territory of the U.S. and intangible property deemed under applicable nonbankruptcy law to be located within that territory. 11 U.S.C. §§ 1502(8); 1520(a)(1).
  - Section 361 provides the requirements for adequate protection under sections 362, 363 or 364.
  - Section 362 describes the parameters of the automatic stay.
    - Absent exigent circumstances, the stay is normally coterminous with the stay in the corresponding foreign proceeding.
    - Applications of section 1520(a)(1) generally reject an extraterritorial interpretation that would stay miscellaneous foreign proceedings having no meaningful nexus to property located in the U.S.

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Automatic Relief Upon Recognition of a Foreign Main Proceeding

- Upon recognition of a foreign main proceeding, sections 363, 549 and 552 apply to a transfer of an interest of the debtor in property within the territorial jurisdiction of the U.S. to the same extent that the sections would apply to property of an estate. 11 U.S.C. § 1520(a)(2).
  - Section 363 deals with the use, sale or lease of the debtor's property.
  - Section 549 authorizes the avoidance of transfers that are (1)(a) authorized solely by section 303(f) or 542 and (b) occur after commencement of the case or (2) not authorized by the Bankruptcy Code or the court.
  - Section 552 explains when property acquired by the debtor post-petition may be subject to a pre-petition security interest.

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Automatic Relief Upon Recognition of a Foreign Main Proceeding

- Upon recognition of a foreign main proceeding:
  - unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided in sections 363 and 552. 11 U.S.C. § 1520(a)(3).
    - The reference to section 552 may be "a typographical error" as the legislative history indicates that section 542 was intended instead of section 552. *See In re Tien Chiang*, 437 B.R. 397, 402 n. 13 (Bankr. C.D. Cal. 2010) (citing H.R. Rep. No. 109-31, at 115 (2005)).
  - section 552 will apply to property of the debtor that is within the territorial jurisdiction of the United States. 11 U.S.C. § 1520(a)(4).

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Discretionary Relief Upon Recognition of a Foreign Proceeding

- Upon recognition of a foreign proceeding, the court may grant additional "appropriate" relief where "necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521.
- Courts may also entrust the distribution of the debtor's U.S. assets to the foreign representative or another authorized person if the interests of U.S. creditors are sufficiently protected.
  - Sufficient protection embodies three basic principles: "the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law." *In re Artimm, S.r.l.*, 335 B.R. 149, 160 (Bankr. C.D. Cal. 2005).

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Discretionary Relief Upon Recognition of a Foreign Proceeding

- Potential discretionary relief under section 1521 includes:
  - staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent not already stayed by section 1520(a) (11 U.S.C. § 1521(a)(1));
  - staying execution against the debtor's assets to the extent not already stayed under section 1520(a) (11 U.S.C. § 1521(a)(2));
  - suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent not already suspended under section 1520(a) (11 U.S.C. § 1521(a)(3));
  - providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities (11 U.S.C. § 1521(a)(4));

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Discretionary Relief Upon Recognition of a Foreign Proceeding (continued)

- entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court (11 U.S.C. § 1521(a)(5));
- extending relief granted under section 1519(a) (11 U.S.C. § 1521(a)(6)); and
- granting any additional relief that may be available to a trustee, except for relief available under sections 522, 545, 547, 548, 550 and 724(a) (11 U.S.C. § 1521(a)(7)).

- This list is not exhaustive and additional relief under section 1521 may also be granted. Additional relief may also be available under section 1507.
- Relief under section 1521 will only be granted if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected. 11 U.S.C. § 1522(a).

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Discretionary Relief Upon Recognition of a Foreign Proceeding

- In granting discretionary relief to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under U.S. law, should be administrated in the foreign nonmain proceeding or concerns information relating to such proceeding.
- Courts may not enjoin police or regulatory acts of a governmental unit; nor stay the exercise of any rights that would not be subject to the stay arising under section 362(a) pursuant to section 362(b)(6), (7), (17) or (27) or pursuant to section 362(o). 11 U.S.C. § 1521(d), (f).
- The standards, procedures and limitations applicable to an injunction apply to requests for the relief in sections 1521(a)(1), (2), (3) and (6). 11 U.S.C. § 1521(e).

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Discretionary Relief Upon Recognition of a Foreign Proceeding

- Courts may condition relief under section 1521, including requiring security or a bond. 11 U.S.C. § 1522 (b).
- Courts may modify or terminate relief granted under section 1521 at their own behest or at the request of the foreign representative or an entity affected by such relief only if the interests of the creditors and other interested entities, including the debtor, are "sufficiently protected" even though it would adversely affect the debtor's estate. 11 U.S.C. § 1522 (a), (c).

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Additional Post-Recognition Relief under Section 1507

- If recognition is granted, the court may grant a foreign representative "additional assistance" available under the Bankruptcy Code or "other laws of the United States." 11 U.S.C. § 1507. Section 1507 is intended to be expansive.
- In determining whether to provide additional assistance, courts will consider whether such assistance will reasonably assure:
  - just treatment of all holders of claims against or interests in the debtor's property;
  - protection of U.S. claim holders against prejudice and inconvenience in the processing of claims in such foreign proceeding;
  - prevention of preferential or fraudulent dispositions of debtor property;
  - distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by the Bankruptcy Code; and
  - if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns. 11 U.S.C. § 1507(b).

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Section 1507 and Comity

- Comity is a "principal objective" of chapter 15.
- The Supreme Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protections of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (U.S. 1895).
- Comity was included in the introductory paragraph of section 1507(b) to emphasize its importance.
- While recognition of a foreign proceeding turns on the strict application of objective criteria under section 1517, post-recognition relief, including relief under sections 1507 and 1521, is largely discretionary and turns on subjective factors that embody principles of comity.

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Section 1507 vs. Section 1521

- In *Ad Hoc Group of Vitro Noteholders v. Vitro SAB De CV (In re Vitro SAB De CV)*, 701 F.3d 1031 (5th Cir. 2012), the Fifth Circuit adopted a three-step analysis for considering requests for relief under chapter 15:
  - Step 1: Because section 1521 provides specific forms of relief, a court should initially consider whether the relief requested falls under one of section 1521's explicit provisions.
  - Step 2: If neither subsection (a) or (b) to section 1521 lists the requested relief, a court should decide whether it can be considered "appropriate relief" under § 1521(a). This, in turn, requires consideration of whether such relief has previously been provided under old section 304. A court should also consider whether the requested relief would otherwise be available in the United States.
  - Step 3: Only if the requested relief appears to go beyond the relief previously available under old section 304 or currently provided for under U.S. law should a court consider section 1507.

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Section 1507 and Third-Party Releases

- Courts have been inconsistent in enforcing foreign orders that include third party releases.
  - Compare *Ad Hoc Group of Vitro Noteholders v. Vitro SAB De CV (In re Vitro SAB De CV)*, 701 F.3d 1031, 1043 (5th Cir. 2012) ("While the relief available under Chapter 15 may, in exceptional circumstances, include enforcing a foreign court's order extinguishing the obligations of non-debtor guarantors, [the debtor] . . . has failed to demonstrate that comparable circumstances were present here") with
  - *In re Sino-Forest Corp.*, 501 B.R. 655, 663 (Bankr. S.D.N.Y. 2013) (holding that because the parties to the Canadian proceeding "had a full and fair opportunity to litigate the issues, and the trial court reached a reasoned decision . . . that such relief was appropriate in the circumstances[,]" it was appropriate to provide "additional assistance" under section 1507 and grant comity to order approving a third-party non-debtor release) a*nd In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010) (recognizing and enforcing a Canadian order granting a non-debtor release).

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Public Policy Exception and Post-Recognition Actions

- Courts have declined to apply the public policy exception in the following scenarios:
  - in approving process that denied jury trial right (*see In re RSM Richter Inc. v. Aguilar (In re Ephedra Prods. Liab. Litig.)*, 349 B.R. 333, 335 (S.D.N.Y. 2006); and
  - where trustees conducted a confidential investigation and submitted findings under seal (*see In re Transbrasil S.A. Linhas Aereas*, 2014 Bankr. LEXIS 1891, at *5-6 (Bankr. S.D. Fla. Apr. 24, 2014)).
- Courts have applied the public policy exception in the following scenarios:
  - in considering request to compel internet service providers to disclose to foreign representative all of debtor's existing and future emails (*see In re Toft*, 453 B.R. 186, 188 (Bankr. S.D.N.Y. 2011); and
  - in considering request not to apply section 365(n) to a rejected patent license *(see In re Qimonda AG*, 462 B.R. 165, 185 (Bankr. E.D. Va. 2011)).

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Section 1506 and Third Party Releases

- Courts vary in their application of the public policy exception of section 1506 to the granting of third party non-debtor releases.
  - Compare *Vitro, S.A.B. de C.V. v. ACP Master, Ltd.* (*In re Vitro, S.A.B. de C.V.)*, 473 B.R. 117, 132 (Bankr. N.D. Tex. 2012) (finding protection of third party claims in a bankruptcy case is a fundamental policy of the U.S. and plan was manifestly contrary to such policy where it extinguished claims against non-debtor third parties) with
  - *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685, 698 (Bankr. S.D.N.Y. 2010) (granting comity to Canadian orders that included non-debtor third party releases because the U.S. and Canada "share the same common law traditions and fundamental principles of law") and *In re Sino-Forest Corp.*, 501 B.R. 663, 663, 665 (Bankr. S.D.N.Y. 2013) (granting comity to order that included non-debtor third party release and finding comity was justified where the parties in the Canadian proceeding had a full and fair opportunity to litigate the issues and the foreign court reached a reasoned and fair decision).

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Foreign Main Proceedings and Foreign Nonmain Proceedings

- Recognition of a foreign main proceeding provides for certain rights that are not applicable to recognition of a foreign nonmain proceeding.
- A foreign proceeding may be neither a foreign main proceeding or a foreign nonmain proceeding.
  - *See Lavie v. Ran (In re Ran)*, 607 F.3d 1017 (5th Cir. 2010) (finding that a foreign proceeding pending in Israel was neither a foreign main proceeding or a foreign nonmain proceeding); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 132 (Bankr. S.D.N.Y. 2007) ("Section 303(b)(4) . . . specifically provides that an involuntary case may be commenced under chapter 7 or 11 . . . by a foreign representative of the estate in a foreign proceeding so that a foreign representative is not left remediless upon nonrecognition.")

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Foreign Main Proceedings: COMI Determination

- Unless there is evidence to the contrary, the debtor's registered office or habitual residence is presumed to be its COMI.
  - The presumption in favor of the registered office can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that the registered office does not reflect the debtor's COMI. Where rebutted, the foreign representative retains the burden of persuading the court, by a preponderance of the evidence, regarding the debtor's COMI.
  - The location of a debtor's registered office is not the preferred determinative criterion of COMI where there is a separation between a corporation's jurisdiction of incorporation and its "real seat." Instead, courts will look to where the debtor conducts its regular business
  - Habitual residence is virtually identical to the concept of domicile, which is established by physical presence in a location coupled with an intent to remain their indefinitely.

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Foreign Main Proceedings: COMI Determination

- Some courts have held that a debtor's COMI is where it conducts its regular business, so that it is ascertainable by third parties.
  - Relevant business activities include liquidation activities and administrative functions. Courts also consider the location of headquarters, decision-makers, assets, creditors, and the law applicable to most disputes
  - Where the foreign representative either relocates all of the debtor's primary business activities to a location or halts the debtor's business completely, creditors are likely to look to the foreign representative's location as the debtor's COMI.
  - The debtor's motive in moving to a different country may be relevant to the COMI determination. *See In re SPhinX, LTD.*, 351 B.R. 103, 121-22 (Bankr. S.D.N.Y. 2006) (declining to recognize foreign main proceeding where representatives were forum shopping).
  - Although a helpful guide, consideration of these specific factors is neither required nor dispositive.

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Foreign Main Proceedings: COMI Determination

- Some courts have equated COMI with principal place of business -- where officers "direct, control, and coordinate the corporation's activities, *i.e.*, its nerve center, which will typically be found at its corporate headquarters." *Hertz Corp. v. Friend*, 559 U.S. 77, 78 (2010).
- Factors to be considered in determining the location of the nerve center include:
  - the location of corporate and executive offices;
  - the site where day-to-day control is exercised;
  - the exclusivity of decision making at the executive office and the amount of managerial authority at that location;
  - the location where corporate records and bank accounts are kept;
  - where the board of directors and stockholders meet;
  - where executives live, have their offices, and spend their time;
  - the location where corporate income tax is filed;
  - the location designated in the corporate charter; and
  - the location where major policy, advertising, distribution, accounts receivable departments and finance decisions originate.

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Relevant Time Period for Determining a Debtor's COMI

- Some courts have concluded that the relevant time period for determining a debtor's COMI is when the petition for recognition is filed "subject to an inquiry into whether the process has been manipulated." *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 130 (2d Cir. 2013).
- Other courts, however, have focused on the date of the commencement of the foreign proceeding as the relevant timeframe for a COMI determination. *See In re* Millennium *Global Emerging Credit Master Fund Ltd*., 474 B.R. 88, 92 (S.D.N.Y. 2012); *In re Kemsley*, 489 B.R. 346, 354-56 (Bankr. S.D.N.Y. 2013) ("Life is fluid, but COMI is a concept that is determined as of a fixed date (commencement of a foreign insolvency case) based on the circumstances that then existed.").

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Foreign Nonmain Proceedings

- A foreign nonmain proceeding is a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an "establishment" -- "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2), (4).
  - The EU Convention's legislative history provides that a "place of operations" is a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.
  - Mere presence of assets or debts or the existence of a bankruptcy proceeding in a foreign location is likely not sufficient. However, the absence of any assets in a location supports a conclusion that recognition is inappropriate.
- The Fifth Circuit has held that relevant time period to determine existence of an establishment is when the petition for recognition is filed. *See Lavie v. Ran*, 607 F.3d 1017 (5th Cir. 2010).

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Foreign Nonmain Proceedings

- Courts have generally been more willing to find that a debtor has an establishment in a given location, which may stem from the fact that a finding that a foreign proceeding is neither a main proceeding or a nonmain proceeding severely limits the ability of the debtor and its creditors to seek cooperation from the U.S.
  - For example, one court granted a petition for recognition of a foreign nonmain proceeding where "no negative consequences would appear to result" therefrom because a consideration of the COMI factors supported a finding that the proceeding was not a foreign main proceeding. *In re SPhinX, LTD.*, 351 B.R. 103, 122 (Bankr. S.D.N.Y. 2006).

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Access of Foreign Creditors to Cases under Title 11

- Foreign creditors have the same commencement and participation rights as domestic creditors in title 11 cases. 11 U.S.C. § 1513.
  - Section 1513 does not, however, alter or codify current law regarding the prioritization of claims under section 507 ("Priorities") or section 726 ("Distribution of property of the estate").
  - In addition, section 1513 does not alter or codify current law as to the allowability of foreign revenue claims or other foreign public law claims, and is an exception to chapter 15's general policy of nondiscrimination.
    - Such claims, including tax and Social Security claims, have been traditionally denied enforcement in the U.S., both in and outside of bankruptcy proceedings.

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Notice to Foreign Creditors

- Whenever notice is to be provided to creditors, such notice shall also be given to all known foreign creditors or to foreign creditors in the notified class or category. 11 U.S.C. § 1514.
- When foreign creditors are to be notified regarding the commencement of a case, such notification must:
  - specify the time period and place for filing proofs of claim;
  - indicate whether secured creditors need to file proofs of claim; and
  - contain any other information required to be included in such notification to creditors under title 11 and the orders of the court.
- Any court rule or order regarding notice or filing a proof of claim must grant additional time to foreign creditors "as is reasonable under the circumstances." 11 U.S.C. § 1514(d).
  - Unless the court for cause orders otherwise, a foreign creditor must receive at least 30 days' notice of the time fixed for filing a proof of claim.
  - Bankruptcy Rule 2002(p) provides that if notice would not be sufficient to give a foreign creditor reasonable notice, the court may order that the notice be supplemented or the time prescribed be enlarged.

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Cooperation with Foreign Courts and Foreign Representatives

- Courts are required to cooperate "to the maximum extent possible" with foreign courts and foreign representatives directly or through a trustee. 11 U.S.C. § 1525.
- U.S. courts are permitted to communicate directly with, or request information or assistance directly from, the foreign court or foreign representative subject to the rights of all parties in interest to receive notice and to participate.
- Bankruptcy Rule 2002(q)(2) requires that U.S. courts provide notice by mail to certain parties of the court's intention to communicate with a foreign court or foreign representative.
- Subject to the supervision of the court, the trustee or other authorized person is also required to cooperate "to the maximum extent possible" with foreign courts and foreign representatives and is entitled, subject to supervision of the court, to communicate directly with the foreign court and foreign representatives. 11 U.S.C. § 1526.

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Cooperation with Foreign Courts and Foreign Representatives

- The cooperation required by sections 1525 and 1526 may be implemented "by any appropriate means," including:
  - appointment of a person or body, including an examiner, to act at the direction of the court;
  - communication of information by any means considered appropriate by the court;
  - coordination of the administration and supervision of the debtor's assets and affairs;
  - approval or implementation of agreements concerning the coordination of proceedings; and
  - coordination of concurrent proceedings regarding the same debtor. 11 U.S.C. § 1527.
- This list is not exhaustive and courts and other interested parties should engage in other forms of cooperation that would further the purpose and intent of chapter 15 to promote cross-border cooperation and comity.

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Commencement of a Case Under Another Chapter of Title 11 After Recognition

- Upon recognition of a foreign proceeding, the foreign representative may commence a voluntary or involuntary case under sections 301, 302 or 303. 11 U.S.C. § 1511(a).
- Recognition of a foreign main proceeding creates a rebuttable presumption that the debtor is generally not paying debts as they become due for the purpose of commencing an involuntary bankruptcy case under section 303. 11 U.S.C. § 1531.
- If the court has recognized a foreign main proceeding, the foreign representative may commence a voluntary case under section 301 or 302.
- The foreign representative must advise the court where the petition for recognition was filed that he or she intends to commence a case under section 1511(a) prior to the commencement thereof. 11 U.S.C. § 1511(b).

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Commencement of a Case Under Another Chapter of Title 11 After Recognition

- After recognition of a foreign main proceeding, a case under another chapter of title 11 may be commenced only if the debtor has assets in the U.S. 11 U.S.C. § 1528.
  - Section 1528 generally limits the effect of the subsequent title 11 case to the debtor's assets that are "within the territorial jurisdiction of the United States" but the effect of the title 11 case may be extended to foreign assets as necessary to implement cooperation and coordination under sections 1525, 1526, and 1527 if those foreign assets are subject to the jurisdiction of the court under section 541(a) and 28 U.S.C. § 1334(e) and are not subject to the jurisdiction and control of a recognized foreign proceeding.
- If another title 11 case is commenced after recognition, relief in effect in the chapter 15 case will be reviewed and modified or terminated to the extent it is inconsistent with the newly commenced case. 11 U.S.C. § 1529.

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Coordination of a Foreign Proceeding and a Case under Another Chapter of Title 11

- When a foreign proceeding and a case under another chapter of title 11 regarding the same debtor are pending concurrently, the court will seek cooperation and coordination under sections 1525, 1526 and 1527, subject to certain guidelines, based on the sequence in which the cases were filed. 11 U.S.C. § 1529.
  - If a case under another chapter of title 11 is pending when the petition for recognition of the foreign proceeding is filed, any relief granted under section 1519 or 1521 must be consistent with the relief granted in the pending title 11 case, and the relief provided for in section 1520 will not apply.
  - If the other title 11 case is commenced after the filing of the petition for recognition, any relief in effect under section 1519 or 1521 will be reviewed and modified or terminated if it is inconsistent with the other title 11 case.
  - If a foreign main proceeding has been recognized, the stay and suspension referred to in section 1520(a) will be modified or terminated if inconsistent with the relief granted in the other title 11 case.
- In order to achieve cooperation and coordination, the court may dismiss or suspend a case pursuant to section 305.

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Coordination of Multiple Foreign Proceedings

- Where representatives from multiple foreign proceedings involving the same debtor seek recognition in the U.S, the court will seek cooperation and coordination under sections 1525, 1526, and 1527, subject to the following guidelines:
  - relief granted under section 1519 or 1521 to a representative of a foreign nonmain proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
  - if a foreign main proceeding is recognized after recognition of a foreign nonmain proceeding, or after the filing of a petition for recognition, any relief in effect under section 1519 or 1521 will be reviewed and modified or terminated to the extent it is inconsistent with the foreign main proceeding; and
  - if, after recognition of a foreign nonmain proceeding, another foreign nonmain proceeding is recognized, the court will grant, modify, or terminate relief for the purpose of facilitating coordination of the proceedings. 11 U.S.C. § 1530.
- Under Bankruptcy Rule 1014, if petitions commencing cases under title 11 or seeking recognition under chapter 15 are filed in different districts and involve the same or related debtors, proper venue will be determined in the district in which a petition was first filed.

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Payments Rules in Concurrent Proceedings

- An unsecured creditor that has received payment on account of its claim in a foreign proceeding may not receive payment for the same claim in the U.S., if payment to other creditors of the same class in the U.S. proceeding is proportionately less than the payment the creditor received in the foreign proceeding. 11 U.S.C. § 1532.
- If, however, creditors of the same class are to be paid a proportionately greater amount in the U.S. proceeding, the creditor may participate in any such distribution to the extent necessary to receive a proportionately equal share of the proceeds.

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Closure or Dismissal of a Chapter 15 Case

- A chapter 15 case may be closed in the manner prescribed in section 350.
- In the alternative, a foreign representative may seek and the court, after notice and a hearing, may dismiss a case or suspend all proceedings in a case if:
  - the interests of creditors and the debtor would be better served by such dismissal or suspension; or
  - a petition for recognition of a foreign proceeding has been granted and the purposes of chapter 15 would be best served by such dismissal or suspension.
- Courts that have construed section 305(a)(1) have generally agreed that abstention under this provision is an extraordinary remedy.

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Cross Border Ethics and Professionalism

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Introduction – An Overview

- Cross Border Insolvency Matters Implicate More Than One Legal System
- Mixed Business and Legal Considerations
- Conflicting Laws and Compatible Laws
- Conflicting Ethics and Professionalism Concerns

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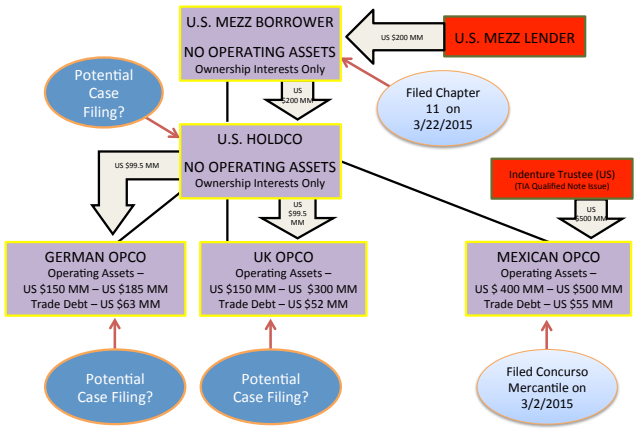
The Hypothetical



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Anticipating Cross Border Ethical and Professionalism Issues

- Understanding the applicable ethics laws and rules and identifying potential conflicts
- Drafting engagement letters when practicing law in more than on jurisdiction

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Retention Issues

- Retention by a party in a court supervised proceeding in a non - U.S. jurisdiction and the impact such retention may have on a retention in a U.S. case *(In re Cenargo)*
- U.S. Trustee concerns and differing (and possibly conflicting) disclosure requirements
- Retention by a party in a U.S. case and the impact such retention may have on a retention in a non-U.S. proceeding

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Conflicts

- U.S. rules regarding conflicts tend to be tighter, but often can be waived; European rules regarding conflicts tend to be looser, but generally cannot be not be waived

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Professional Responsibility Obligations May Operate Differently In Different Jurisdictions

- To whom do you, as counsel, owe a duty (e.g., loyalty, zealous representation, etc.)?
- How do you balance the competing interests of, and directions provided by, multiple "clients"?

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Questions of Allegiance

- In a cross-border insolvency case, upon the appointment of a provisional liquidator or a bankruptcy trustee, to whom does the professional owe a duty of loyalty?
- Is your client the board of directors that originally hired you or the provisional liquidator/bankruptcy trustee appointed in a case under applicable law?

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Compensation Matters

- Can legal fees generated outside of the U.S. by a professional be subject to scrutiny, reduction, etc., in a U.S. bankruptcy case under Chapter 11 or Chapter 15?

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Signing Documents

- May a U.S. licensed attorney sign documents under oath for use in a foreign insolvency proceeding?

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Differing Ethical Obligations: U.S. and Non-U.S. Jurisdictions

- Query: If U.K. counsel violates an ethical obligation under the applicable N.Y. Laws and Rules –
  - Is his or her N.Y. law partner subject to sanction in N.Y. for the UK lawyer's conduct?
  - Is the firm subject to sanction (and does it matter how the firm is structured, i.e., as a single entity or as separate U.S. and non-U.S. entities?)
  - Does it matter if the violation of the N.Y. laws and rules is also a violation of the U.K. laws and rules?

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Stay Violations

- Query: If a U.K. partner takes an action in the U.K. that violates the U.S. automatic stay, are his or her U.S. colleagues on the hook?

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Professional Responsibility Concerns

- Duties as *Officer of the Court* – will you become an officer of a foreign court or owe duties to a foreign court?
- Professional Responsibility – Conflicting Regimes
  - your duties as an *officer of the court* in a foreign jurisdiction may conflict with your obligations in your home jurisdiction to, among other things, zealously represent your client and follow her directions

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Bankruptcy Planning

There is Nothing Wrong – Or Is There?

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Bankruptcy Planning

- Is it ethical to engage in bankruptcy planning with the intention of avoiding the law of a jurisdiction less favorable to your client?
- Do courts review pre-filing activities for manipulation (*See e.g., Fairfield Century Limited – 2d Cir.)*?
- Establishing jurisdiction, e.g. by opening an office or a bank account or the like

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Ethical Limits

- What are the risks of accepting the representation of a client intent on pursuing insolvency proceedings in a court with which the client has tenuous ties?

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Establishing *COMI*

- What is *COMI*?
  - Establishing *COMI*
  - A Court recently denied Chapter 15 recognition of UK bankruptcy case after determining that debtor's *COMI* is in the US (*In re Kemsley*)
  - The Second Circuit has determined that a foreign debtor's COMI should be determined on the date that the Chapter 15 petition is filed (*Fairfield Century Limited – 2d Cir.)*

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COMI Shifting

- *COMI* shifting – Is *COMI* subject to manipulation?
- the Second Circuit has left lower courts with discretion to consider whether there has been either an obvious attempt to manipulate *COMI* or bad faith conduct regarding *COMI,* during the pre-filing period (*Fairfield Century Limited – 2d Cir.)*
- COMI may be shifted to a more debtor-friendly jurisdiction if doing so furthers the debtor's restructuring and if the foreign administrators act consistently with the powers they are granted by the court in the foreign proceeding (*In re Suntech Power Holdings Co., Ltd. - SDNY*)

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COMI – Ethics

- Is it ethical to manufacture *COMI* in a jurisdiction other than the U.S. to intentionally disadvantage creditors by denying them potential avoidance action recoveries under chapter 7 and chapter 11 in the U.S.?

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Eligibility for Chapter 15

- Does an entity have to have a residence, domicile, place of business or assets in the U.S. to be eligible for Chapter 15?
- Courts disagree – *Drawbridge* – 2d Cir. – says yes, while, *Bemarmara Consulting* – Bankr. D. Del. – says no

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Questions of Allegiance

- In a cross-border insolvency case, upon the appointment of a provisional liquidator or a bankruptcy trustee, to whom does the professional owe a duty of loyalty?
- Is your client the board of directors that originally hired you or the provisional liquidator/bankruptcy trustee appointed in a case under applicable law?
- How do you balance the competing interests of, and directions provided by, multiple "clients"?

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Foreign Reporting Requirements, Disclosure and Due Process

- Foreign Administrator or Liquidator's reporting requirements may be at odds with a US practice
  - Reports and filings may not be public in a foreign jurisdiction but QUERY what if they are obtained by non-creditors or other third parties?
  - Reports may disclose more or less than is typical in US forums, or than is needed for trading purposes or general transparency practices

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Differing Disclosure/Discovery Regimes

- Secrecy laws versus required disclosures – jurisdictional conflicts
- For example, in certain situations, such as a sale of assets pursuant to section 363 of the U.S. Bankruptcy Code, disclosure requirements are stringent. The seller is required to disclose the status of any insider purchasers and relevant relationships between creditors, the debtor, etc.

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Differing or Conflicting Rules Governing Discovery

- A Concern for counsel: Different standards for the interception of electronic communications in transit for discovery purposes

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Disclosure Troubles

- Counsel's Conundrum: What to do when a disclosure obligations in a non-U.S. insolvency proceeding conflicts with confidentiality rules at home?

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Due Process Concerns

- "Notice and a hearing" in the US versus lesser due process/disclosure standard in a non-US jurisdiction
- How do US courts view ex-parte orders issued in a non-US jurisdiction

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