AMERICAN BANKRUPTCY INSTITUTE

2017 Caribbean Insolvency Symposium

"You Can't Always Get What You Want...": Update on Chapter 15 Assistance to Foreign Trustees and by Caribbean Courts in U.S. Cases

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2017

Chapter 15 Update

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I. DETERMINING CENTER OF MAIN INTERESTS

Since the Second Circuit's decision in *In re Fairfield Sentry*,[2] there have been further developments about locating a debtor's "center of main interests," or COMI. *Fairfield Sentry* established the principle that the debtor's COMI is to be determined at the time of its chapter 15 filing, not at the time it began its foreign bankruptcy proceeding. Consequently, a debtor may have its center of main interests in Country A while it is an operating entity; however, if it commences liquidation proceedings in Country B, its center of main interests may have shifted to Country B by the time it files a chapter 15 petition in the United States. This may be true even though Country B was simply a letter box jurisdiction while the debtor was in operation. Thus, even though a BVI-incorporated fund would likely have a U.S. COMI based on *Bear Stearns*[3] while it was conducting business, its COMI may shift when its only remaining activity is the winding down process. *Fairfield Sentry* left open questions regarding how much liquidation activity must have occurred before COMI shifts.

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

The OAS debtors were a group of infrastructure companies that were based in Brazil; however, among this group was an Austrian-incorporated special purpose financing vehicle. Notes issued by that entity, OAS Investments, and held by some U.S. hedge funds were the focus of a dispute in the Brazilian bankruptcy of the OAS debtors. Those notes had been guaranteed by two other debtors and a non-debtor affiliate. Prior to the bankruptcy, the debtors had engaged in a series of transactions that undermined those guarantees. For example, one of the debtor-guarantors transferred R$301 million to a non-guarantor affiliate. Two other guarantors merged, thus, according to the noteholders, eliminating their structural priority in the previously separate assets in the absorbed entity. The noteholders raised objections in the Brazilian proceedings, some of which spilled over to the chapter 15 petition that followed.

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[1] Special thanks to University of Miami law students Latriece Jones and George Bugg for excellent research assistance.

[2] Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), 714 F.3d 127 (2d Cir.2013)

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

When the Brazilian foreign representative filed a chapter 15 petition in the Southern District of New York, two of the noteholders objected, arguing, in part, that Brazil was not the center of main interests for OAS Investments. OAS Investments, after all, was a separate legal entity that was incorporated in Austria. While the court acknowledged that "the COMI analysis when applied to a special purpose financing vehicle proves less straightforward than the typical case," the court determined that the offering memoranda for the OAS Investments notes all pointed to Brazilian law: the notes were guaranteed by Brazilian entities; OAS Investments was a special purpose entity with the principal purpose financing the Brazilian operating entities; and the "Risk Factors" all discussed the risks associated with the Brazilian entities, not with the Austrian special purpose entity. Accordingly, from the perspective of noteholders' *ex ante* expectations of applicable law, the court found that the entity's nerve center and headquarters were in Brazil.[4]

In re Creative Finance, Ltd. 543 B.R. 498 (Bankr. S.D.N.Y. 2016)

In re Creative Finance, Ltd., explores the outer limits of *Fairfield Sentry.* The debtors were two BVI-incorporated businesses that did most of their business in the UK and conducted most of their operations from Spain and Dubai. After being sued in the UK, the principal of the two funds engaged in what the New York bankruptcy court described as "the most blatant effort to hinder, delay and defraud a creditor this Court has ever seen."[5] After the UK court had circulated a draft ruling that would require the debtors to pay a $5 million judgment, the principal moved all of the debtors' liquid assets to the BVI then placed the funds into insolvency proceedings there.

Although such a transfer was most certainly a fraudulent transfer, the BVI liquidator took almost no action at all to investigate or pursue this action. Instead, the liquidator did only the statutory minimum and then sought relief in the U.S. under chapter 15, in the Southern District of New York, in an effort to enjoin any efforts by the judgment creditor to seize U.S.-based assets.[6]

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[4] In re OAS S.A., 533 B.R. 83, 101 (Bankr. S.D.N.Y. 2015).

[5] In re Creative Finance, Ltd. 543 B.R. 498, 501 (Bankr. S.D.N.Y. 2016).

[6] *Id.* at 509 ("After his appointment, and before the filing of the Chapter 15 petitions in this Court, the Liquidator never collected any assets of the Debtors, nor did he liquidate any assets. He did not shut down any businesses of the Debtors, pay any taxes, or bring any causes of action on behalf of the Debtors' estates. Nor did he conduct any investigation, despite circumstances crying out for investigation here.").

The judgment creditor objected to the chapter 15 petition, arguing, in part, that the debtors' COMI was not in the BVI. The court agreed. Unlike *Fairfield Sentry* in which the court had found the debtors' COMI shifted during the liquidation proceedings, in *Creative Finance* the court found that the liquidator had not engaged in activities significant enough to shift the debtors' COMI: the liquidator had not even engaged in "even the most basic activities – such as getting bank records, ledgers, journals and back-up documents for cash receipts and expenditures."[7] The liquidator had also done virtually nothing to investigate the disappearance of $9.5 million from the debtors.[8] Accordingly, the liquidators' "efforts were so minimal that the Debtors' COMI never shifted from Spain, Dubai, or (possibly) England, where Sevilleja actually did business, to the BVI."[9]

This factual finding that the Debtors' COMI had not shifted to the BVI precluded recognition of the BVI proceeding as either a foreign main or nonmain proceeding, thus denying recognition altogether to the BVI liquidation. Interestingly, the court further held that "[a]s offended as the Court is by the Debtors' conduct here," it was inappropriate to apply section 1506's public policy exception; instead, the recognition determination was limited to application of section 1517. Likewise, the court concluded that it was not necessary to consider whether the case could be dismissed for bad faith under section 305.

In re Sovereign Assets Ltd., Case No. 14-13009 (SCC), Bankr. S.D.N.Y., Dec. 4, 2016

In an unreported decision, a New York bankruptcy court again examined the extent to which foreign liquidation proceedings alone can justify finding the debtor's COMI to be in the liquidation jurisdiction. The debtor, Sovereign Assets Ltd., was an Israeli real estate firm that operated under Israeli law and was registered with the Tel Aviv Stock Exchange. Its primary business, though, was investing in U.S. real estate. The debtor was placed into liquidation proceedings in Israel, at which point the company stopped all operations there – it closed its one office, fired its employees, and had no assets in Israel. Thus, by the time the Israeli foreign representative sought U.S. recognition under chapter 15, there was only a letter box and some minimal liquidation activity taking place in Israel. The objecting parties argued that this was insufficient to establish COMI. Judge Chapman rejected this argument. She suggested she

[7] *Id.* at 511.
[8] *Id.*
[9] *Id.*

might have been amenable to this argument if the company had lacked a prior connection with Israel; however, because the debtor was an Israeli company that had prior contacts with Israel, the debtor's COMI was in Israel even though the liquidation activity was the debtor's only remaining connection at the time of the chapter 15 petition.

II. PUBLIC POLICY – SECTION 1506

In re Petroforte, 542 B.R. 899 (Bankr. S.D.Fla. 2015)

Petroforte was the principal company in an extensive network of gasoline and ethanol distributors. During the Brazilian bankruptcy case, the court extended Petroforte's bankruptcy to cover nearly 300 other companies, thus broadly expanding the Petroforte Estate. Although the Brazilian bankruptcy court issued these extension orders *ex parte*, the affected entities had an opportunity to appeal these orders – which they did, without success.

The foreign representative sought relief under chapter 15 in order to conduct discovery related to some of these companies that had been involuntarily brought into the Petroforte Estate. These potential discovery targets objected to chapter 15 relief, arguing that the Brazilian *ex parte* extension of the bankruptcy estate was against U.S. public policy, under section 1506. First, they argued that the Brazilian substantive consolidation orders conflicted with U.S. bankruptcy law. Second, they argued that the *ex parte* nature of those Brazilian orders denied the parties their due process.

The chapter 15 court rejected both arguments. The court stated the rule that section 1506 public policy arguments require the U.S. chapter 15 court to consider "(1) whether the foreign proceeding was procedurally unfair; and (2) whether the application of foreign law or the recognition of foreign main proceeding under Chapter 15 would 'severely hinder United States bankruptcy court' abilities to carry out ... the most fundamental policies and purposes' of these rights."[10]

As to the procedural prong, the court found that there was ample due process afforded the objecting parties. Even though the Brazilian court had issued *ex parte* orders, the objectors "were allowed to present both argument and evidence on appeal" from those orders.[11] Second, as to the substance, the court found that the Brazilian substantive consolidation orders were not

[10] *Id.* at 907 (quoting *In re British Isle of* Venice (BVI), Ltd., 441 B.R. 713, 717 (Bankr.S.D.Fla.2010).
[11] *Id.*

offensive. U.S. bankruptcy law authorizes bringing non-debtor parties into the bankruptcy estate.[12] The differences between Brazilian and U.S. law relate to the requirements for obtaining such relief, not in the actual scope of the relief. Accordingly citing a prior decision from *In re OAS*, the court found "that different requirements in Brazil for obtaining relief available in the U.S. do not render the extension of the Petroforte estate over Rabello and Securinvest manifestly contrary to U.S. policy."[13]

In re: Massa Falida de Mappin Lojas de Departamento SA, No. 16-25541 (Bankr. S.D. Fla. 2016)

In another chapter 15 petition emanating from Brazil, the foreign representative sought an order recognizing the Brazilian proceeding as a foreign main proceeding and freezing the assets of the principal of the Brazilian debtors. The debtors were a department store chain, Mappin Lojas, an affiliated telecommunications firm, Mappin Telecomunicaoes Ltda., and Casa Anglo Brasileira S.A. Ricardo Mansur owned both Mappin Lojas and Mappin Telecomunicaoes through Casa Anglo.

In the Brazilian bankruptcy court proceeding, the court found that Mansur had engaged in fraudulent transactions, and it issued an *ex parte* veil piercing order, thus making Mansur personally liable for the debts of the debtors. The liquidator then began to attempt to track down Mansur's personal assets around the world. The liquidator authorized a foreign representative to obtain recognition in the UK first, thus obtaining court-approval to administer Mansur's UK-based assets. At that point, it was believed that Mansur moved Miami Beach, Florida, where he purportedly continued to lead a lavish lifestyle.

Accordingly, the foreign representative filed a chapter 15 petition in the Southern District of Florida to track down Mansur's Miami Beach assets. Mansur objected, arguing that such an order was against U.S. public policy, as the veil piercing order had been issued *ex parte*. Because he had not appealed that order, he had not offered argument or evidence in his defense.

Ruling from the bench, Judge Robert Mark ruled that it was irrelevant whether Mansur had actually appealed the Brazilian veil piercing order – what mattered was that Mansur had the opportunity to do so. Because he could have appealed that order in Brazil, he was foreclosed from arguing that the *ex parte* order violated his due process rights.

[12] In re Petroforte Brasileiro de Petroleo Ltda., 542 B.R. 899, 909 (Bankr. S.D. Fla. 2015)
[13] *Id.* at 908.

In re Irish Bank Resolution Corp. Ltd., 538 B.R. 692 (D. Del. 2015); 559 B.R. 627 (Bankr. D. Del. 2016)

As part of the winding down of the Irish Bank Resolution Corporation, the Irish foreign representative filed a chapter 15 petition in the Delaware bankruptcy court. Judge Sontchi issued two orders relating to the scope of section 1506. The first arose from the bankruptcy court's recognition order recognizing the Irish proceeding as a foreign main proceeding.[14] Objecting parties had argued that the Irish proceeding should not be recognized because it unfairly discriminated against U.S. creditors, thus asking the court to deny recognition under section 1506. The bankruptcy court rejected that argument, and that order was recently affirmed on appeal by Judge Stark. The court stated the section 1506 doctrine as follows: "This public policy exception has been narrowly construed to apply 'where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections' and where recognition 'would impinge severely a US. constitutional or statutory right.'"[15] The court found the 1506 arguments unpersuasive: "The provisions objected to by Appellants parallel provisions in laws adopted by the United States in response to the global financial crisis."[16] Further, procedurally, the objectors were unable to present evidence of due process violations.

The second bankruptcy court order concerned the foreign representatives' motion to compel Yahoo! Inc. to turn over all electronically stored information in a Yahoo! account believed to be relevant to a litigation pending in Ireland involving the liquidation of the Irish Bank Resolution Corporation.[17] Judge Sontchi ruled that the Irish order offended U.S. policy, and thus fit within the narrow section 1506 exception. The court cited *In re Toft*,[18] a case in which Judge Gropper had denied a request from a German foreign representative to compel the production of emails. Likewise, Judge Sontchi determined that the U.S. Stored Communications Act[19] does not authorize an email service provider a user's emails without the user's consent.[20]

[14] The bankruptcy court opinion is found at 2014 WL 9953792 (Bankr. D. Del. April 30, 2014).
[15] 538 B.R. 692, 698 (quoting *In re ABC Learning Centres Ltd.*, 728 F.3d 301, 309 (3d Cir. 2013).
[16] *Id.*
[17] 559 B.R. 627 (Bankr. D. Del. 2016).
[18] 453 B.R. 186 (Bankr. S.D.N.Y. 2011).
[19] 18 U.S.C. § 2702(a)(1).
[20] 559 B.R. at 653.

III. POST RECOGNITION COOPERATION: CHOICE OF LAW

In re Hanjin Case No. 16-27041 (Bankr. D. N.J. 2016)

The recent bankruptcy of the South Korean shipping company Hanjin Shipping Co. has highlighted some of the critical choice of law questions that linger beneath the surface of the Model Law's procedures. Hanjin Shipping Co. filed bankruptcy in South Korea on August 31, 2016, shortly after a failed attempt to voluntarily restructure its debt.[21] The filing was a "free fall" type bankruptcy case: there was no plan in hand and no DIP financing lined up. It triggered immediate problems in the shipping industry, stranding over $14 billion of goods on Hanjin (or Hanjin-chartered) vessels.[22] This sparked panic among port terminal authorities, shipowners, suppliers, and ground transporters. Terminal authorities refused to allow the ships to enter port, out of concern that Hanjin would be unable to pay docking fees. Hanjin was likewise worried about entering some ports, as it knew that creditors lay in wait there to enforce liens against the ships.[23] Even as to ships in port, there was uncertainty as to who would pay to unload the ships and what would be done with all the empty cargo boxes.

The Korean foreign representative sought chapter 15 relief in the Bankruptcy Court for the District of New Jersey on September 2, 2016, seeking provisional relief in the form of a broad stay of any collection efforts against ships entering U.S. territories – including relief under section 365(e) that would prevent counterparties from terminating their prepetition contracts with Hanjin. The court granted such relief on an interim basis.

Stevedores and marine terminal operators objected to this relief, arguing that it unfairly shifted the risk of Hanjin's insolvency onto them.[24] Loading and unloading vessels for an insolvent company could leave these service providers with large claims against the estate, without any protection, effectively forcing these parties to extend credit to a foreign debtor that did not even have a DIP loan. The Maritime Lien Act, they argued, granted them statutory liens against the ships and their cargo, which liens attached and were automatically perfected upon

[21] In re Hanjin Shipping Co., Ltd., Case No. 16-27041 (Bankr. D. N.J. 2016), Declaration of Tai-Soo Suk in Support of (I) Verified Chapter 15 Petition; (II) Motion of Foreign Representative for Entry of Provisional Relief in Aid of Foreign Main Proceeding; and (III) Certain Related Relief."

[22] Linda Chiem, "Five Key Questions Raised by Hanjin Shipping's Bankruptcy," Law360 (Sept. 16, 2016).

[23] See World Fuel Services, Inc. v. MV Hanjin Montevideo, Case No. 2:16-CV-06584 (C.D. Ca. 2016)(showing a U.S. court issued an arrest warrants against Hanjin property docked at the Port of Long Beach).

[24] Preliminary Objection of Maher Terminals LLC to the Interim Provisional Relief Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief, In re Hanjin Shipping Co., Ltd., Case No. 16-27041 (JKS), Doc. 50 (Bankr. D. N.J. Sept. 8, 2016).

delivering necessary services to the ships. To the extent these liens arose from services provided pre-petition, they argued that they had a right to adequate protection. To the extent services were provided post-petition, they argued that the automatic stay should not prevent them from enforcing their maritime liens against non-estate property, namely vessels chartered (but not owned) by Hanjin.[25]

On September 9, the court granted the requested provisional relief to the foreign representative.[26] On a motion for reconsideration, the court issued an opinion, ruling that the maritime lienholders could not seek to enforce their liens, even against non-debtor property.[27] The court reasoned that the universalist character of chapter 15 and the Model Law on Cross-Border Insolvency compelled it to provide necessary relief to the foreign proceeding:

> Nothing in the Bankruptcy Code or in this country's vital public policy concerns would mandate that the Maritime Lienholders be permitted to enforce lien rights that were not enforceable under United States law when the Korean stay went into effect. Their remedy, the court explained, was to file a claim in the Korean bankruptcy proceeding…. To protect the interests of the Debtor's global rehabilitation and creditors as a whole, the Debtor's vessels had to be allowed to enter United States ports under the protection of the stay.[28]

To the extent the Maritime Lienholders had a claim for adequate protection, the court said their remedy was to file a claim in the Korean proceeding. In so ruling, the bankruptcy court was in line with prior shipping company bankruptcies in ruling that a maritime lien may arise under U.S. law but that the effect of such a lien was a matter of foreign insolvency law. For example, in Atlas Shipping, the chapter 15 court held that it would be up to the Danish insolvency court to determine the impact of a maritime lien created in the United States.[29]

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[25] *See also* Limited Objection of World Fuel Services to Recognition of Foreign Proceeding and Related Relief, Doc. 54.

[26] Order Granting Provisional Relief Pursuant to Sections 362, 365(e), 1519, 1520, and 105(a) of the Bankruptcy Code Pending Hearing on Petition for Recognition as a Foreign Main Proceeding, Doc. 102.

[27] Decision and Order on Maritime Lienholders' Motion for Reconsideration, Doc. 191 (aff'd 2016 WL 6679487 (D. N.J. Sept. 16, 2016).

[28] *Id.*

[29] In re Daebo Int'l Shipping Co., 543 B.R. 47 (Bankr. S.D.N.Y. 2015) (deferring to Korean law); In re STX Pan Ocean, Case No. 13-12046, Doc. 45 (Bankr. S.D.N.Y. July 12, 2013) (deferring to Korean court); In re Atlas Shipping, 404 B.R. 726, 747 (Bankr. S.D.N.Y. 2009) (deferring to Danish court to determine the effect, if any,

Although not groundbreaking, then, *In re Hanjin* is an interesting case in that it illustrates the virtues and limitations of the Model Law. By filing a chapter 15 petition in the U.S., the Korean foreign representative was able to stay all collection actions in the United States, allowing ships to come to port and be unloaded, thus preserving value. At the same time, though, Hanjin illustrates some of the "blindspots" in the Model Law. The Model Law deliberately sidesteps choice-of-law questions, but the bankruptcy court's ruling could not avoid this issue. The significance of U.S. federal maritime liens, it held, was a matter for the Korean Court to determine. Note, this is in contrast to the Fourth Circuit's approach in *In re Qimonda*,[30] which held that the treatment of executory intellectual property licenses was a matter of U.S. bankruptcy law, even though the patents belonged to a German company that was being liquidated in Germany.

The following case further illustrates the inconsistencies that arise as bankruptcy courts are compelled to make choice-of-law questions within a statutory framework that has not specifically addressed this issue.

In re Sanjel (Bankr. W.D. Tex. 2016)

The debtors were a Canadian group of entities that provided energy services. After commencing proceedings in Canada under the Companies' Creditor Arrangement Act (CCAA), the foreign representative sought and obtained chapter 15 relief in the Western District of Texas Bankruptcy Court.[31] The chapter 15 court recognized the CCAA proceeding as a foreign main proceeding. It further extended the automatic stay to shield certain insiders of the debtors. Subsequently, two employees sought to lift the stay as to the debtors' D&O, to permit a collective action proceeding to continue under the Fair Labor Standards Act.[32] The named plaintiffs in two collective actions asked the court to lift the stay, without first requesting such relief from the main bankruptcy proceeding in Canada. The plaintiffs' concern was that the statute of limitations on their FLSA claims would expire during the case. Section 108(c) of the bankruptcy extends the statute of limitations as to claims against the *debtor*. The plaintiffs' concern was that this would not stay the action as against the non-debtor officers.

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of the creditor's maritime lien); Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 715 (2d Cir. 1987) (deferring to Swedish insolvency proceeding).

[30] Jaffe v. Samsung Elecs. Co., 737 F.3d 14 (4th Cir. 2013).

[31] In re Sanjel, Case No. 16-50778 (Bankr. W.D. Tex. 2016).

[32] In re Sanjel, Case No. 16-50778, Doc. 388 (Bankr. W.D. Tex. 2016).

In determining whether to lift the chapter 15 stay, the court disagreed with the Delaware Bankruptcy Court's treatment of a similar issue in the bankruptcy of Nortel. In *Nortel*, Judge Gross had denied a lift stay motion filed by certain securities class action plaintiffs, directing such plaintiffs to instead seek relief from the main proceeding in Canada.[33] The court reasoned that principles of comity compelled such a procedure: "I can't ignore the fact that this is a Chapter 15 case as opposed to a Chapter 11 case . . . . And the fact is, the issue of comity still is foremost in the Court's mind."[34] With that comity issue in mind, the court stated that "I do think that these are matters which could have and should have been brought before the Canadian court in the first instance, the court which is the main proceeding here."[35]

The Texas bankruptcy court disagreed with this approach, finding that "it would be unreasonable and exceedingly burdensome to require Movants to go to Canada and request that the Canadian Court lift the D&O Stay to allow Movants to pursue claims in Colorado based wholly on a statutory right created by United States law to protect employees within the United States."[36] Ultimately, the court decided to lift the stay in a very limited fashion, limiting the impact, if any, on the foreign proceeding. The stay was lifted only to allow the plaintiffs to do limited discovery to determine the identity of the potential defendants and to file an action in Colorado for the purpose of preserving their claims only.

The court's careful fashioning of the lift-stay order suggests the court was quite conscious of the potential impact this might have on the Canadian proceeding. But, unlike the Nortel court, it did not cite principles of comity. Instead, it focused on the statutory language in 1522 that permits courts to modify their orders for relief. From a statutory point of view, it seems beyond a doubt the court had the authority to enter this order. The question, which remained just beneath the surface, was whether such a matter should have been brought under Canadian or U.S. law. The court suggests that it must be under U.S. law because the claims arose from a U.S. statute designed to protect U.S. employees. That same reasoning, though, would have likewise applied to Nortel, where plaintiffs had claims under U.S. securities laws designed to protect U.S. investors.

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[33] In re Nortel Networks Corp., Doc. 09-10164 (Bankr. D. Del. 2009).
[34] Doc. 13-4 Hrg. Feb. 26, 2010, p. 37, ll. 6-10.
[35] *Id.* at ll. 11-13.
[36] In re Sanjel, Case No. 16-50778, Doc. 388 at 11 (Bankr. W.D. Tex. 2016). ("In fact, the Nortel court provided no reasoning as to why it believed the Canadian Court to be the proper venue for seeking such relief.").

IV. DISTRIBUTION: NORTEL WRAPS UP(?)

In December 2016, the Delaware bankruptcy court approved the disclosure statement for Nortel Networks, Inc., a full eight years after the case began. As of this writing (December 16), the plan has not yet been approved. In fact, the court has ordered mediation to resolve objections to the plan prior to the scheduled January 24, 2017 confirmation hearing. As it currently stands, the plan proposes to distribute the $9 billion from the global asset sales, with 57% earmarked for the Canadian estate, 24% to the U.S. estate, and the balance to Nortel estates around the world.

In many ways, Nortel illustrates both the promise and limitations of the Model Law on Cross-Border Insolvencies. Almost certainly, the Model Law enabled the asset sale, generating more proceeds than would have been available in a piecemeal, state-by-state liquidation. The Model Law facilitated the sort of inter-court cooperation that made possible such a result, creating the universalist framework to maximize the value of the estate.

At the same time, the long, drawn out litigation over allocating the proceeds reveal the limits of universalism: the Model Law's silence as to an international priority scheme and the lack of a cram down option invite territorialist litigation. Over 10% of the estate value (over $2 billion) has been spent on professional fees – a good deal of which was allocated to divvying up the proceeds. These high professional fees do not raise questions as to whether the Model Law game is even worth the candle; however, these fees do raise questions about how the universalist game can be improved. Distributional priorities often reflect deeply held policy choices, e.g., the relative priority of labor claims is a sharply divisive issue. Without a cross-border "cram down rule," the Model Law invites significant litigation as to distribution of proceeds.

Ogier

Chapter 15

You can't always get what you want…

Chapter 15 protection

Foreign "main" and "non-main" proceedings

Chapter 15 protection

Applicability to cross-border insolvency

- Where a debtor is in a foreign insolvency proceeding, the US bankruptcy court may grant recognition of that foreign proceeding under Chapter 15.
- The protections that are conferred to the debtor depend on:
  - Chapter 15 eligibility being established; and
  - the foreign proceeding being categorized as either a foreign "main" proceeding or a foreign "non-main" proceeding

Foreign "main" proceeding

COMI

- Requires the foreign proceeding to be pending in a country where the debtor has the center of its main interests ("COMI")
- In the absence of evidence to the contrary, the debtor's registered office is presumed to be the debtor's COMI
- But presumption can be displaced by other factors

Foreign "non-main" proceeding

Establishment

- Non main proceeding is not default classification where the foreign proceeding is not the "main" proceeding
- Must establish that the foreign proceeding is pending in a country where the debtor has an "establishment"
- "Establishment includes "place of operations" and "non-transitory economic activity"
- Can have several jurisdictions where debtor has an "establishment", but only one COMI

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Bear Stearns (2007)

No COMI or establishment in Cayman

- Petitions for Chapter 15 recognition will not be "rubber-stamped", even in the absence of opposition
- Registered office was the only connection to Cayman
- Other evidence presented by petitioner displaced presumption that location of registered office was its COMI
- Also no "establishment" in Cayman as no "place of operations" or "non-transitory economic activity" in Cayman
- Acknowledged difficulty where exempted companies have a statutory bar on engaging in business in Cayman

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Fairfield Sentry (2012) - BVI

Relevant time period for assessing COMI

- Operational history, time of initiating foreign proceedings, or time of filing Chapter 15 petition?
- Debtor's COMI to be determined as of the time of filing the Chapter 15 petition
- But court may look at the time period between foreign liquidation proceedings being initiated and filing of Chapter 15 petition to ensure that debtor has not manipulated its COMI in bad faith

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Drawbridge Special Opportunity Fund v Barnet (2013)

Property requirement

- S.109 of Bankruptcy Code applies – need to show US residence, domicile, place of business or property
- Eligibility requirement for property in the US may be established "*without an inquiry into the circumstances surrounding the debtor's acquisition of property*."

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Octaviar (2014) - Australia

Eligibility to make Chapter 15 petition

- Only a debtor that resides or has a domicile, place of business, or property in the US may obtain recognition of a foreign proceeding under Chapter 15 (s109 Bankruptcy Code)
- Claims and causes of action, though intangible, constitute "property"
- Retainer held in trust account of US counsel also "property"
- Funds were transferred to trust account in good faith, rather than to manipulate s109 eligibility
- In any event, s109 simply requires property in the US - the circumstances surrounding the debtor's acquisition of the property and the size of the property are irrelevant

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Suntech (2014)

COMI successfully migrated

- Incorporated in Cayman, but business carried out in US and China
- China was COMI prior to liquidation
- Scheme of arrangement agreed with bond holders and Suntech placed into provisional liquidation in Cayman
- Cayman JPLs changed principal address to Cayman, opened Cayman bank account, took physical possession of assets, borrowed money, held board meetings in Cayman and began to wind up Suntech's affairs
- But appointment of a Cayman director possibly motivated by wish to shift COMI away from China
- Overall JPL's actions were in furtherance of legitimate goal of winding up Suntech, rather than transferring COMI, and COMI not manipulated in bad faith

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Suntech (2014)

- "*to prevent an ineligible foreign debtor from establishing eligibility to support needed chapter 15 relief [would] contravene the purposes of the statute to provide legal certainty, maximize value, protect creditors and other parties' interests and rescue financially troubled businesses*"

Ogier

Creative Finance (2016) - BVI

Importance of liquidators' activity to COMI migration

- Debtor incorporated in BVI, but operations in England, Spain and Dubai
- No ruling on COMI pre-liquidation, but likely to be England, Spain or Dubai
- Can migrate site of COMI between commencement of liquidation and Chapter 15 petition, provided that liquidator conducts sufficient activities in new location
- Liquidator appointed in BVI only performed minimal statutory functions
- Even though managing a liquidation requires less effort than running an active business, even the most basic activities were not undertaken by liquidator in BVI (ie getting in bank records, ledgers, journals, receipts and expenditures)
- COMI not migrated to BVI
- Never conducted any non-transitory economic activity in BVI or had any seat for local business in BVI, so not a foreign "non-main" proceeding either

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Where to next?

Shift from objective to subjective analysis

- Objective analysis of evidence relevant to COMI pre-liquidation still applies
- But COMI can be migrated by liquidators carrying out activity in another jurisdiction post-liquidation and prior to filing Chapter 15 petition
- Liquidators' activities must be meaningful
- Actions cannot be taken with the *intention* of transferring COMI, but not bad faith if they merely have that *effect*
- Contrasts with manipulating Chapter 15 eligibility (ie opening US bank account prior to petition), which *is* acceptable
- Focus may now shift from determining COMI by reference to objective factors, to analyzing subjective intention of liquidators

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Cayman Approach to Assistance

Statutory scheme and common law powers

Part XVI of Companies Law

International Cooperation

Upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of:

- Recognising the right to act in the Islands
- Staying enforcement
- Examination of person in possession of information
- Ordering the turnover of any property belonging to a debtor

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Part XVI of Companies Law

International Cooperation

The Court shall be guided by

- Just treatment of all creditors
- Prevention of fraudulent dispositions
- Distribution of debtor's estate
- Non-enforcement of foreign taxes, fines and penalties
- Comity

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Case law

- Modified universalism
- Cambridge Gas
- Singularis
- Picard v Primeo
- Ardent Harmony Fund

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Application of statutory scheme

***Picard* (2015)**

- Companies Law does not confer a general power on the Court to assist foreign representatives
- Must be within scope of orders permitted by Companies Law
- Making a transaction avoidance order (ie claw-back) falls within Court's power to make an order ancillary to the turning over of property belonging to a debtor
- But Cayman law on transaction avoidance must be applied, even if the distribution scheme is governed by foreign law

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Common law assistance

***Singularis* (2014) – PC from Bermuda**

- Common law supplements statutory power to assist foreign insolvency proceedings
- Assistance must be consistent with local law, public policy and court's own statutory and common law powers
- Does not extend to relief which foreign representative does not have under the laws by which they were appointed
- Cayman liquidators did not have the power to obtain the material sought as a matter of Cayman law, so Bermudan Court could not assist by ordering that the material be provided in Bermuda

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Common law assistance

Ardent Harmony Fund 2016

- Anti suit injunction available to protect principle of universality and to prevent free for all
- Sanction for Chapter 11 relief

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