## **Delaware Bankruptcy American Inn of Court**

# Chapter 15 & International Bankruptcy Filings January 15, 2013

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## **EXHIBIT 1**

#### Fact Pattern for Chapter 15 Inn of Court

Pierre Mulroney grew up in Montreal, Quebec in Canada and later attended M.I.T. in the United States. While there, he met Vivian Li, from Shanghai, China, in a software engineering class. They fell in love, married, and formed a company in 1994 called "TransData Software, LLC." They formed the Company as a Delaware entity on the advice of Winfred "Skip" Hollister, IV, whom Pierre met in a coffee shop. Skip told Pierre he was at Harvard Law. Under a form operating agreement Skip pulled off an internet web site, Skip filled in the blanks making Vivian and Pierre co-managers. The rest of the operating agreement seemed basic, allowing Vivian and Pierre to create a board of directors to provide guidance, but giving the co-managers the power to make all daily decisions to operate the company.

After they formed the Company, Pierre and Vivian worked together to develop a unique software program that allowed business units in different countries using different data input languages to present the data to other users on the system in their native language. Thus, a corporation with operations in China could permit operators to enter the data in Mandarin while the users in London would instantly see the data entered in English. The software was revolutionary, and as globalization grew, so did TransData. TransData's business model was simple; it licensed its software to much of the Fortune 500 multi-national corporations and large sophisticated government contractors that operated around the world. TransData charged an annual license fee for the software and charged an additional maintenance fee to service or customize the software as each customer needed through service centers in Mumbai, India. The license and maintenance fees generated large profits.

Pierre loved the summers in Quebec but Vivian wanted to stay close to her Chinese ancestry and wanted to make sure the kids spoke Mandarin. As a result, they decided to spend

six months in China each year and six months in Quebec. As they needed capital to grow, Vivian tapped into her family connections in China and was able to convince three of China's largest insurance companies, China Life Insurance, Ping An Insurance, and People's Insurance Company (Group) of China, to invest \$50 million each in the Company in 2002. This investment came in the form of low-interest convertible debentures issued on the Hong Kong Stock Exchange and governed by English law. The debentures required quarterly interest payments and were due in 20 years or at TransData's election would convert into \$500 million worth of non-voting stock. Pierre liked this transaction because it allowed him and Vivian to retain full control of TransData, which remained a single company, operating out of joint headquarters in Montreal and Shanghai. After this investment was made, the Chinese insurance companies each appointed a board member to TransData, joining Vivian and Pierre as board members.

In order to have a presence in its largest market, the United States, the Company used some of the Chinese investment money to open offices in San Francisco in 2003, where it hired a small sales staff and began exploring investment and joint venture opportunities with other investors. One of these opportunities was SF Private Equity, based in Palo Alto. SF Private Equity liked TransData's business model and convinced Pierre that if it too could invest \$150 million the Company could develop technology that would translate data on smart phone applications used on iPad's and Android devices into multiple languages. Vivian liked the opportunity too. So, in 2006, SF Private Equity invested \$150 million in bonds that TransData issued under an Indenture governed by New York law. While these bonds were tradable, SF Private Equity assured Vivian and Pierre they would not sell them. To provide Vivian and Pierre

with comfort, they too agreed that three of their managing directors would join the TransData board and list the Company as one of its portfolio companies on the SF Private Equity web page.

Everything was going well for TransData. As the smartphone industry and iPhones and iPads boomed, so did TransData. In the United States, it was a well-known brand, selling license to its traditional software. In the rest of the world, it became known in the software app development world as the go to company to ensure an app could be used in different languages and in different cultures. From 2003 to 2009, the Company doubled or tripled its annual cash flow, maintaining relatively low expenses. TransData had 50 sales employees in San Francisco. The company also had 175 employees in Montreal, doing mostly accounting and corporate strategy work, another 200 in China doing market research, customer maintenance, and other minor corporate tasks in Asia, and 1,500 employees in Mumbai, doing call center work, software development, and other technical software engineering.

The board met 4 times a year, or each quarter. These meetings lasted for a week and followed a typical pattern. The first quarter, in March would be in Mumbai and focused on software development and strategic relationships. The June Meeting was in Montreal and focused on the U.S. market, quality control, and financial issues. The September meeting was in Massachusetts, where Vivian and Pierre returned for alumnae events and to see old friends. Finally, in December, TransData's board met in Shanghai and focused on budgeting for the year to come and reviewing the strengths, weakness, opportunities, and threats to their business model. Between these formal meetings, the board often convened by phone or more frequently video conference with the Chinese insurance company representatives attending from China or Hong Kong, the SF Private Equity Board Members attending from California or other locations

they happened to be in, usually somewhere in the United States, and Vivian and Pierre attending from wherever they happened to be, usually China or Canada.

This arrangement worked well until early 2011. At that time Guan Guoliang, the representative from China Life sitting on TransData's board was removed from his position as Chairman of China Life due to a suspicion that he had embezzled and misappropriated over \$40 million. When he was removed from his position, he went into hiding and stopped attending the board meetings. An industry protection fund controlled by China's insurance regulator took a nearly 40% stake in China Life and then transferred the ownership to China's main sovereign wealth fund, China Investment Corp. Mr. Guoliang had been a strong and outspoken proponent of Vivian's and TransData. As a result, the early press reports were confusing and suggested that the embezzled money had actually been from TransData and that its Chairman had vanished. Pierre received hundreds of texts and frantically tried to ensure people it was not him that was missing. He even went on CNBC to try and calm the spreading panic.

Additionally in early 2011, Skip sued TransData in the Delaware Court of Chancery claiming that in exchange for the legal services he provided to TransData, Vivian, and Pierre, he was given 50% of the equity of the Company and that since 1994 he had not received any distributions on account of this ownership interest. He alleges breach of fiduciary duties, fraud, implied breach of the duty of good faith and fair dealing, and other causes of action. He seeks over \$1 billion in damages.

In the summer of 2012, China Investment Corporation declared a non-monetary default due to the loss of a significant board member and due to an alleged misuse of the funds to open the California office, accelerated its \$50 million in bonds, and demanded payment in full. Pierre and Vivian did not have the money to pay the bonds in full at that time and China Investment

Corporation filed an involuntary petition in the People's Court in Shangai for reorganization under China's Enterprise Bankruptcy Law of 2007. The People's Court opened an insolvency proceeding in September 2012 against TransData and appointed a local Shanghai accountant, Hu Wan Lap, as the insolvency administrator. Mr. Hu has engaged existing management, Vivian and Pierre, to continue operating the Company; however, the relationship is strained due to Mr. Hu's insistence on pushing the interest of China Investment Corporation over the interest of the Company. Indeed, without telling Vivian and Pierre, he has actively solicited buyers for the Company that will buy 50% of the company's equity. These funds will be used to pay off all debt and allow China Investment Corporation to retain the remaining 50% of the company's equity.

Vivian and Pierre decide to evaluate their options and in late September of 2012, they meet with a variety of financial, legal, and banking professionals in Canada. While they are doing this, they receive a letter from a New York law firm, Squeezum & Howe LLP, purporting to act for Hemlock Capital Advisors, LP. According to this letter, Hemlock owns 62.5% of the bonds Pierre thought SF Private Equity owned. The letter states that under the relevant indenture, the Chinese insolvency proceeding is an event of default. Squeezum & Howe also claim in the letter that they have bought \$50 million worth of the convertible bonds issued in Hong Kong from People's Insurance Company. Squeezum & Howe state that Hemlock Capital would be willing to exchange all of this bond debt for a controlling interest in the Company through a consensual pre-packaged plan of reorganization to be filed in Delaware.

Pierre calls his friends at SF Private Equity to see what was going on. SF Private Equity's representative tells Pierre that with all the bad press from the China filing, they had to sell out some of their investment to hedge their bets, but that Pierre should not worry because

they still own 25%. Pierre does not know who owns the remaining 12.5% of the bonds and assumes they have made their way to other passive investors that will ride along with whatever deal Hemlock Capital is able to extract from the situation. Pierre is aware, however, that Transdata has failed to make the interest payments required on the bonds. As such each of the bondholders currently is owed more than the face amount of the debenture.

Pierre and Vivian are at a loss. Their company they have worked so hard to build seems to be crumbling around them due only to greed, misinformation, and bad press. Fortunately, they have saved their money and lived relatively modestly so they don't really need to work anymore. The business seems otherwise relatively sound and feeling a bit burned out and not knowing how else to pay all the debt the Company owes, Vivian and Pierre decide to file a voluntary insolvency proceeding in Quebec, Canada under the Company Creditors' Arrangement Act in mid-October 2012.

The Canadian Court appoints a monitor to assist Vivian and Pierre with a plan for the Company. From October to December, working with their professionals, TransData develops a set of bidding procedures and SF Private Equity Capital agrees to act as a stalking horse to buy the smart phone division of TransData for \$150 million, which would pay off all of the outstanding debt except for Hemlock Capital's. The bidding procedures then contemplate that absent a further offer to purchase the historic software business after the SF Private Equity Capital, Hemlock Capital will convert its debt into equity of a newly formed company that will then own the historic software business. Pierre and Vivian feel good about the transaction, as it will allow all bondholders to be paid in full, all employees will retain their jobs, and the valuable software can still be used around the world.

After advice of counsel, TransData's monitor files a petition for recognition of the Canadian Proceeding as a main proceeding under Chapter 15 on January 3, 2013 and two days later, Mr. Hu also files a petition for recognition of the Chinese insolvency proceeding as a main proceeding. The Delaware Bankruptcy Court schedules a hearing to consider both petitions on the same day.

After the Court sorts out the recognition petitions, the Monitor files his Motion seeking approval of the sale to SF Private Equity of the smart phone business as approved by the Canadian court following a sales process similar to a § 363 process.

A creditor of Transdata emerges to challenge the terms of the proposed sale on the basis that the software business is worth \$185 to \$225 million, and the smartphone line is valued at \$150 to \$175 million. The creditor claims that the sale is unfairly skewed because Hemlock is receiving a windfall since it holds \$143.75 million in bonds (plus interest) and SF Private Equity is actually only paying \$110 million since the remainder of the purchase price is the value of the bonds it still holds (\$37.5 million) plus interest and fees.

On the day the motion is filed seeking approval of the Canadian sale, Mr. Hu announces he has sold 50% of TransData to Ping An, who will forgive its debt and fund new capital. China Investment Company will also forgive its debt and receive another 50% of the Company. Hemlock's debt will be discharged and not paid under Chinese law. Mr. Hu, Ping An, and China Investment Company have no interest in the historic software business. As such, Mr. Hu files a Motion in the Delaware Bankruptcy Court seeking approval of the People's Court's Order approving the sale and the termination of all of the software license agreements. An *ad hoc* Committee of License Holders appears at this hearing and objects to this sale on the ground that the sale should not be approved because the Monitor's proposed sale is in the best interest of all

of TransData's creditors and thus under § 363 the Court should approve the best deal. In the alternative the *Ad Hoc* Committee argues that 365(n) should apply and that they should be able to continue using the licenses. In response, Mr. Hu argues that the People's Court in China has already approved his transaction and the Bankruptcy Court is obligated to recognize that order without applying the standard § 363 analysis and that the People's Court has allowed for rejection and termination of several of the older, less profitable license agreements.

After the sale process occurs, Hemlock decides its had enough with Mr. Hu and it files a motion for the appointment of an examiner to assist in investigating the Chinese insolvency proceeding. The Monitor Joins in this Motion. Mr. Hu Objects.

## **EXHIBIT 2**

# Chapter 15 BANKRUPTCY CODE, Ancillary and Other Cross-Border Cases

## Chapter 1501

## **Purpose and Scope of Application**

#### 11 U.S.C. § 1501

## § 1501. Purpose and scope of application.

- (a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—
  - (1) cooperation between-
  - (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
  - (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
  - (2) greater legal certainty for trade and investment;
  - (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
    - (4) protection and maximization of the value of the debtor's assets; and
  - (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.
  - (b) This chapter applies where—
  - (1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding;
  - (2) assistance is sought in a foreign country in connection with a case under this title;
  - (3) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or
  - (4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under this title.

(c) This chapter does not apply to-

Overview of Section 1501

¶ 1501.01

- (1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b);
- (2) an individual, or to an individual and such individual's spouse, who have debts within the limits specified in section 109(e) and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States; or
- (3) an entity subject to a proceeding under the Securities Investor Protection Act of 1970, a stockbroker subject to subchapter III of chapter 7 of this title, or a commodity broker subject to subchapter IV of chapter 7 of this title.
- (d) The court may not grant relief under this chapter with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law or regulation for the benefit of claim holders in the United States.

¶ 1501.02	Purpose of Chapter 15; § 1501(a)
¶ 1501.03	Other Bankruptcy Code Provisions Related to Chapter 15
	[1] Foreign Proceeding Defined under Section 101(23)
	[2] Foreign Representative Defined under Section 101(24)
•	[3] Eligibility to Be a Debtor; § 109
	[4] Abstention; § 305
1	[5] Limited Appearance by a Foreign Representative; § 306
1	[6] Jurisdiction and Procedures; 28 U.S.C. §§ 1334 and 157(b)(2)(P)
•	[7] Proper Venue for Ancillary Proceeding; 28 U.S.C. § 1410
¶ 1501.04	Scope of Application of Chapter 15; § 1501(b)
¶ 1501.05	Exclusions from Scope of Chapter 15; § 1501(c)
¶ 1501.06	Exclusion for Funds Subject to State Insurance Law or Regulation; § 1501(d)
¶ 1501.LH	History of Section 1501

## Subchapter I General Provisions

## Chapter 1502

## **Definitions**

#### 11 U.S.C. § 1502

#### § 1502. Definitions.

For the purposes of this chapter, the term—

- (1) "debtor" means an entity that is the subject of a foreign proceeding;
- (2) "establishment" means any place of operations where the debtor carries out a nontransitory economic activity;
- (3) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;
- (4) "foreign main proceeding" means a foreign proceeding pending in the country where the debtor has the center of its main interests;
- (5) "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment;
- (6) "trustee" includes a trustee, a debtor in possession in a case under any chapter of this title, or a debtor under chapter 9 of this title;
- (7) "recognition" means the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter; and
- (8) "within the territorial jurisdiction of the United States", when used with reference to property of a debtor, refers to tangible property located within the territory of the United States and intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States.

## International Obligations of the United States

#### 11 U.S.C. § 1503

## § 1503. International obligations of the United States.

To the extent that this chapter conflicts with an obligation of the United States arising out of any treaty or other form of agreement to which it is a party with one or more other countries, the requirements of the treaty or agreement prevail.

#### **Synopsis**

¶ 1503.01 Overview of Section 1503 ¶ 1503.LH History of Section 1503

## **Commencement of Ancillary Case**

## 11 U.S.C. § 1504

## § 1504. Commencement of ancillary case.

A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515.

#### **Synopsis**

¶ 1504.01 Overview of Section 1504 ¶ 1504.LH History of Section 1504

## Authorization to Act in a Foreign Country

#### 11 U.S.C. § 1505

#### § 1505. Authorization to act in a foreign country.

A trustee or another entity (including an examiner) may be authorized by the court to act in a foreign country on behalf of an estate created under section 541. An entity authorized to act under this section may act in any way permitted by the applicable foreign law.

#### **Synopsis**

¶ 1505.01 Overview of Section 1505 ¶ 1505.LH

History of Section 1505

## **Public Policy Exception**

#### 11 U.S.C. § 1506

## § 1506. Public policy exception.

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

#### Synopsis

¶ 1506.01

Overview of Section 1506

¶ 1506.LH

History of Section 1506

## **Additional Assistance**

### 11 U.S.C. § 1507

#### § 1507. Additional assistance.

- (a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.
- (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—
  - (1) just treatment of all holders of claims against or interests in the debtor's property;
  - (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
  - (3) prevention of preferential or fraudulent dispositions of property of the debtor;
  - (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
  - (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

¶ 1507.01	Power of Court to Provide Additional Assistance; § 1507(a)
¶ 1507.02	Factors Determining Whether to Provide Additional Assistance; § 1507(b)
¶ 1507 LH	History of Section 1507

## Interpretation

## 11 U.S.C. § 1508

## § 1508. Interpretation.

In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.

#### **Synopsis**

¶ 1508.01

Overview of Section 1508

¶ 1508.LH

History of Section 1508

# Subchapter II Access of Foreign Representatives and Creditors to the Court

## Chapter 1509

## **Right of Direct Access**

#### 11 U.S.C. § 1509

#### § 1509. Right of direct access.

- (a) A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.
- (b) If the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter—
  - (1) the foreign representative has the capacity to sue and be sued in a court in the United States;
  - (2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and
- (3) a court in the United States shall grant comity or cooperation to the foreign representative.
- (c) A request for comity or cooperation by a foreign representative in a court in the United States other than the court which granted recognition shall be accompanied by a certified copy of an order granting recognition under section 1517.
- (d) If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States.
- (e) Whether or not the court grants recognition, and subject to sections 306 and 1510, a foreign representative is subject to applicable nonbankruptcy law.
- (f) Notwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property

of the debtor.

¶ 1509.01	Petition for Recognition; § 1509(a)
¶ 1509.02	Rights and Privileges of Foreign Representative upon Grant of Recognition; § 1509(b)
¶ 1509.03	Request for Comity or Cooperation; § 1509(c)
¶ 1509.04	Denial of Recognition; § 1509(d)
¶ 1509.05	Applicability of Nonbankruptcy Law; § 1509(e)
¶ 1509.06	Consequences of Failure to Commence Case or Obtain Recognition; § 1509(f)
¶ 1509.LH	History of Section 1509

## **Limited Jurisdiction**

## 11 U.S.C. § 1510

## § 1510. Limited jurisdiction.

The sole fact that a foreign representative files a petition under section 1515 does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose.

#### Synopsis

¶ 1510.01 Overview of Section 1510 ¶ 1510.LH History of Section 1510

# Commencement of Case under Section 301, 302 or 303

## 11 U.S.C. § 1511

## § 1511. Commencement of case under section 301, 302, or 303.

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

¶ 1511.01	Commencement of Voluntary or Involuntary Case; § 1511(a)
¶ 1511.02	Requirements for Commencement; § 1511(b)
¶ 1511.LH	History of Section 1511

## Participation of a Foreign Representative in a Case under This Title

#### 11 U.S.C. § 1512

§ 1512. Participation of a foreign representative in a case under this title.

Upon recognition of a foreign proceeding, the foreign representative in the recognized proceeding is entitled to participate as a party in interest in a case regarding the debtor under this title.

#### **Synopsis**

¶ 1512.01 Overview of Section 1512 ¶ 1512.LH History of Section 1512

## Access of Foreign Creditors to a Case under This Title

#### 11 U.S.C. § 1513

#### § 1513. Access of foreign creditors to a case under this title.

- (a) Foreign creditors have the same rights regarding the commencement of, and participation in, a case under this title as domestic creditors.
  - (b) (1) Subsection (a) does not change or codify present law as to the priority of claims under section 507 or 726, except that the claim of a foreign creditor under those sections shall not be given a lower priority than that of general unsecured claims without priority solely because the holder of such claim is a foreign creditor.
    - (2) (A) Subsection (a) and paragraph (1) do not change or codify present law as to the allowability of foreign revenue claims or other foreign public law claims in a proceeding under this title.
    - (B) Allowance and priority as to a foreign tax claim or other foreign public law claim shall be governed by any applicable tax treaty of the United States, under the conditions and circumstances specified therein.

#### Synopsis

¶ 1513.01 Rights of Foreign Creditors; § 1513(a)
¶ 1513.02 Priority of Payment to Foreign Creditors; § 1513(b)

¶ 1513.LH History of Section 1513

## Notification to Foreign Creditors Concerning a Case under This Title

#### 11 U.S.C. § 1514

## § 1514. Notification to foreign creditors concerning a case under this title.

- (a) Whenever in a case under this title notice is to be given to creditors generally or to any class or category of creditors, such notice shall also be given to the known creditors generally, or to creditors in the notified class or category, that do not have addresses in the United States. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.
- (b) Such notification to creditors with foreign addresses described in subsection (a) shall be given individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letter or other formality is required.
- (c) When a notification of commencement of a case is to be given to foreign creditors, such notification shall—
  - (1) indicate the time period for filing proofs of claim and specify the place for filing such proofs of claim;
    - (2) indicate whether secured creditors need to file proofs of claim; and
  - (3) contain any other information required to be included in such notification to creditors under this title and the orders of the court.
- (d) Any rule of procedure or order of the court as to notice or the filing of a proof of claim shall provide such additional time to creditors with foreign addresses as is reasonable under the circumstances.

¶ 1514.02 Individual Notice; § 1514(b)	
¶ 1514.03 Form of Notice of Commencement; § 1514(c)	
¶ 1514.04 Additional Time for Creditors with Foreign Addresses; § 1514	d)
¶ 1514.LH History of Section 1514	

## Subchapter III Recognition of a Foreign Proceeding and Relief

## Chapter 1515

## **Application for Recognition**

#### 11 U.S.C. § 1515

## § 1515. Application for recognition.

- (a) A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.
  - (b) A petition for recognition shall be accompanied by-
  - (1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;
  - (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
  - (3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.
- (c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.
- (d) The documents referred to in paragraphs (1) and (2) of subsection (b) shall be translated into English. The court may require a translation into English of additional documents.

## **Presumptions Concerning Recognition**

### 11 U.S.C. § 1516

## § 1516. Presumptions concerning recognition.

- (a) If the decision or certificate referred to in section 1515(b) indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative, the court is entitled to so presume.
- (b) The court is entitled to presume that documents submitted in support of the petition for recognition are authentic, whether or not they have been legalized.
- (c) In the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests.

¶ 1516.01	Presumptions Concerning Foreign Proceeding and Foreign Representative; § 1516(a)
¶ 1516.02	Presumption That Documents Are Authentic; § 1516(b)
¶ 1516.03	Presumptions Concerning Center of Main Interests; § 1516(c)
¶ 1516.LH	History of Section 1516

## **Order Granting Recognition**

#### 11 U.S.C. § 1517

### § 1517. Order granting recognition.

- (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
  - (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
  - (2) the foreign representative applying for recognition is a person or body; and
    - (3) the petition meets the requirements of section 1515.
  - (b) Such foreign proceeding shall be recognized—
  - (1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or
  - (2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.
- (c) A petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time. Entry of an order recognizing a foreign proceeding constitutes recognition under this chapter.
- (d) The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under this chapter may be closed in the manner prescribed under section 350.

¶ 1517.01	Requirements for Recognition; § 1517(a)
¶ 1517.02	Main Versus Nonmain Proceeding; § 1517(b)
¶ 1517.03	Timing; § 1517(c)

## **Subsequent Information**

## 11 U.S.C. § 1518

#### § 1518. Subsequent information.

From the time of filing the petition for recognition of a foreign proceeding, the foreign representative shall file with the court promptly a notice of change of status concerning—

- (1) any substantial change in the status of such foreign proceeding or the status of the foreign representative's appointment; and
- (2) any other foreign proceeding regarding the debtor that becomes known to the foreign representative.

#### **Synopsis**

¶ 1518.01 Overview of Section 1518 ¶ 1518.LH History of Section 1518

## Relief That May Be Granted upon Filing Petition for Recognition

#### 11 U.S.C. § 1519

### § 1519. Relief that may be granted upon filing petition for recognition.

- (a) From the time of filing a petition for recognition until the court rules on the petition, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including—
  - (1) staying execution against the debtor's assets;
  - (2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and
    - (3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a).
- (b) Unless extended under section 1521(a)(6), the relief granted under this section terminates when the petition for recognition is granted.
- (c) It is a ground for denial of relief under this section that such relief would interfere with the administration of a foreign main proceeding.
- (d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.
- (e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under this section.
- (f) The exercise of rights not subject to the stay arising under section 362(a) pursuant to paragraph (6), (7), (17), or (27) of section 362(b) or pursuant to section 362(o) shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter.

#### Synopsis

 $\P~1519.01$ 

Grant of Provisional Relief; § 1519(a)

¶ 1519.02

Termination of Provisional Relief; § 1519(b)

## Effects of Recognition of a Foreign Main Proceeding

## 11 U.S.C. § 1520

## § 1520. Effects of recognition of a foreign main proceeding.

- (a) Upon recognition of a foreign proceeding that is a foreign main proceeding—
  - (1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;
  - (2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate:
  - (3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and
  - (4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.
- (b) Subsection (a) does not affect the right to commence an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor.
- (c) Subsection (a) does not affect the right of a foreign representative or an entity to file a petition commencing a case under this title or the right of any party to file claims or take other proper actions in such a case.

¶ 1520.01	Applicability of Bankruptcy Code Sections upon Recognition; § 1520(a)
¶ 1520.02	Right to Commence Action or Proceeding to Preserve Claim; § 1520(b)
¶ 1520.03	Right to Commence Case under Title 11; § 1520(c)
¶ 1520,LH	History of Section 1520

## Relief That May Be Granted upon Recognition

#### 11 U.S.C. § 1521

#### § 1521. Relief that may be granted upon recognition.

- (a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
  - (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
  - (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
  - (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
  - (4) 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;
  - (5) 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;
    - (6) extending relief granted under section 1519(a); and
  - (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).
- (b) Upon recognition of a foreign proceeding, whether main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.
- (c) In granting relief under this section to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets

that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

- (d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.
- (e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under paragraphs (1), (2), (3), and (6) of subsection (a).
- (f) The exercise of rights not subject to the stay arising under section 362(a) pursuant to paragraph (6), (7), (17), or (27) of section 362(b) or pursuant to section 362(o) shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter.

¶ 1521.01	Overview of Section 1521
¶ 1521.02	Relief Necessary to Protect Assets of Debtor or Interests of Creditors; § 1521(a)
¶ 1521.03	Creditor Protection as Condition to Entrusting Distribution; § 1521(b)
¶ 1521.04	Relief in Foreign Nonmain Proceeding Must Relate to Assets That Should Be Administered in Nonmain Proceeding or Concern Information Required in Such Proceeding; § 1521(c)
¶ 1521.05	Police or Regulatory Acts; § 1521(d)
¶ 1521.06	Standards, Procedures and Limitations Applicable to Injunctions; § 1521(e)
¶ 1521.07	Exercise of Certain Rights Not Stayed; § 1521(f)
¶ 1521.LH	History of Section 1521

# Protection of Creditors and Other Interested Persons

# 11 U.S.C. § 1522

# § 1522. Protection of creditors and other interested persons.

- (a) The court may grant relief under section 1519 or 1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.
- (b) The court may subject relief granted under section 1519 or 1521, or the operation of the debtor's business under section 1520(a)(3), to conditions it considers appropriate, including the giving of security or the filing of a bond.
- (c) The court may, at the request of the foreign representative or an entity affected by relief granted under section 1519 or 1521, or at its own motion, modify or terminate such relief.
- (d) Section 1104(d) shall apply to the appointment of an examiner under this chapter. Any examiner shall comply with the qualification requirements imposed on a trustee by section 322.

#### Synopsis

¶ 1522.01	Relief Granted If Interests of Creditors and Other Interested Entities Sufficiently Protected; § 1522(a)
¶ 1522.02	Conditions to Relief; § 1522(b)
¶ 1522.03	Modification or Termination of Relief; § 1522(c)
¶ 1522.04	Appointment of an Examiner; § 1522(d)
¶ 1522.LH	History of Section 1522

# Actions to Avoid Acts Detrimental to Creditors

# 11 U.S.C. § 1523

# § 1523. Actions to avoid acts detrimental to creditors.

- (a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).
- (b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.

# **Synopsis**

¶ 1523.01	Avoidance Powers of the Foreign Representative; § 1523(a)
¶ 1523.02	Action in Foreign Nonmain Proceeding Must Relate to Assets That Should Be Administered in Nonmain Proceeding; § 1523(b)
¶ 1523.LH	History of Section 1523

# Intervention by a Foreign Representative

# 11 U.S.C. § 1524

# § 1524. Intervention by a foreign representative.

Upon recognition of a foreign proceeding, the foreign representative may intervene in any proceedings in a State or Federal court in the United States in which the debtor is a party.

# Synopsis

¶ 1524.01

Overview of Section 1524

¶ 1524.LH

History of Section 1524

# Subchapter IV Cooperation with Foreign Courts and Foreign Representatives

# Chapter 1525

# Cooperation and Direct Communication Between the Court and Foreign Courts or Foreign Representatives

# 11 U.S.C. § 1525

- § 1525. Cooperation and direct communication between the court and foreign courts or foreign representatives.
- (a) Consistent with section 1501, the court shall cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee.
- (b) The court is entitled to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative, subject to the rights of a party in interest to notice and participation.

#### **Synopsis**

¶ 1525.01 Overview of Section 1525 ¶ 1525.LH History of Section 1525

# Cooperation and Direct Communication Between the Trustee and Foreign Courts or Foreign Representatives

# 11 U.S.C. § 1526

- § 1526. Cooperation and direct communication between the trustee and foreign courts or foreign representatives.
- (a) Consistent with section 1501, the trustee or other person, including an examiner, authorized by the court, shall, subject to the supervision of the court, cooperate to the maximum extent possible with a foreign court or a foreign representative.
- (b) The trustee or other person, including an examiner, authorized by the court is entitled, subject to the supervision of the court, to communicate directly with a foreign court or a foreign representative.

# Synopsis

¶ 1526.01 Overview of Section 1526

¶ 1526.LH History of Section 1526

# **Forms of Cooperation**

# 11 U.S.C. § 1527

# § 1527. Forms of cooperation.

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

- (1) appointment of a person or body, including an examiner, to act at the direction of the court;
- (2) communication of information by any means considered appropriate by the court;
- (3) coordination of the administration and supervision of the debtor's assets and affairs;
- (4) approval or implementation of agreements concerning the coordination of proceedings; and
  - (5) coordination of concurrent proceedings regarding the same debtor.

## **Synopsis**

¶ 1527.01 Overview of Section 1527

¶ 1527,LH History of Section 1527

# Subchapter V Concurrent Proceedings

# Chapter 1528

# Commencement of a Case under This Title after Recognition of a Foreign Main Proceeding

# 11 U.S.C. § 1528

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

After recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States. The effects of such case shall be restricted to the assets of the debtor that are within the territorial jurisdiction of the United States and, to the extent necessary to implement cooperation and coordination under sections 1525, 1526, and 1527, to other assets of the debtor that are within the jurisdiction of the court under sections 541(a) of this title, and 1334(e) of title 28, to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter.

# Synopsis

§ 1528.01 Overview of Section 1528 § 1528.LH History of Section 1528

# Coordination of a Case under This Title and a Foreign Proceeding

### 11 U.S.C. § 1529

# § 1529. Coordination of a case under this title and a foreign proceeding.

If a foreign proceeding and a case under another chapter of this title are pending concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply:

- (1) If the case in the United States is pending at the time the petition for recognition of such foreign proceeding is filed—
  - (A) any relief granted under section 1519 or 1521 must be consistent with the relief granted in the case in the United States; and
  - (B) section 1520 does not apply even if such foreign proceeding is recognized as a foreign main proceeding.
- (2) If a case in the United States under this title commences after recognition, or after the date of the filing of the petition for recognition, of such foreign proceeding—
  - (A) any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the case in the United States; and
  - (B) if such foreign proceeding is a foreign main proceeding, the stay and suspension referred to in section 1520(a) shall be modified or terminated if inconsistent with the relief granted in the case in the United States.
- (3) In granting, extending, or modifying relief granted to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the laws of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.
- (4) In achieving cooperation and coordination under sections 1528 and 1529, the court may grant any of the relief authorized under section 305.

# Coordination of More Than One Foreign Proceeding

# 11 U.S.C. § 1530

# § 1530. Coordination of more than 1 foreign proceeding.

In matters referred to in section 1501, with respect to more than 1 foreign proceeding regarding the debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply:

- (1) Any 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.
- (2) If a foreign main proceeding is recognized after recognition, or after the filing of a petition for recognition, of a foreign nonmain proceeding, any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding.
- (3) If, after recognition of a foreign nonmain proceeding, another foreign nonmain proceeding is recognized, the court shall grant, modify, or terminate relief for the purpose of facilitating coordination of the proceedings.

#### **Synopsis**

¶ 1530.01

Overview of Section 1530

¶ 1530.LH

History of Section 1530

# Presumption of Insolvency Based on Recognition of a Foreign Main Proceeding

# 11 U.S.C. § 1531

§ 1531. Presumption of insolvency based on recognition of a foreign main proceeding.

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under section 303, proof that the debtor is generally not paying its debts as such debts become due.

# **Synopsis**

¶ 1531.01 Overview of Section 1531 ¶ 1531.LH History of Section 1531

# Rule of Payment in Concurrent Proceedings

# 11 U.S.C. § 1532

# § 1532. Rule of payment in concurrent proceedings.

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

# **Synopsis**

¶ 1532.01 Overview of Section 1532

¶ 1532.LH History of Section 1532

# **EXHIBIT 3**





United States Bankruptcy Court,
S.D. Florida,
West Palm Beach Division.
In re BRITISH AMERICAN INSURANCE COMPANY
LIMITED, Debtor in a Foreign Proceeding.

Nos. 09–31881–EPK, 09–35888–EPK. March 22, 2010.

**Background:** Chapter 15 petitioner, who was appointed in action pending in Commonwealth of the Bahamas, sought recognition of such proceeding as foreign main or foreign nonmain proceeding, and second Chapter 15 petitioner, who was appointed in action pending in Saint Vincent and the Grenadines (SVG) that related to same debtor-insurance company, sought recognition of such proceeding as foreign nonmain proceeding. Creditor opposed both petitions.

**Holdings:** The Bankruptcy Court, <u>Erik P. Kimball</u>, J., held that:

- (1) Bahamas proceeding qualified as "foreign proceeding" as defined by Bankruptcy Code;
- (2) SVG proceeding qualified as "foreign proceeding" under Code;
- (3) Bahamas proceeding was not foreign main proceeding;
- (4) Bahamas proceeding was not foreign nonmain proceeding; and
- (5) SVG proceeding was foreign nonmain proceeding.

Ordered accordingly.

West Headnotes

# [1] Bankruptcy 51 2341

51 Bankruptcy
51III The Case

51III(H) Cases Ancillary to Foreign Proceedings 51k2341 k. In general. Most Cited Cases

If a debtor does not have its center of main interests (COMI) or at least an establishment in the country of a foreign proceeding, the bankruptcy court should not grant

recognition of such proceeding and is not authorized to use its power to effectuate the purposes of the foreign proceeding. 11 U.S.C.A. §§ 1515-1518.

# [2] Bankruptcy 51 2341

51 Bankruptcy

51III The Case

51III(H) Cases Ancillary to Foreign Proceedings 51k2341 k. In general. Most Cited Cases

Except with regard to certain relief that may be accorded after recognition of a foreign proceeding, it is not appropriate to rely on case law under former version of Bankruptcy Code in deciding whether to recognize foreign proceeding pursuant to amendments made by Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). 11 U.S.C.A. § 1501 et seq.

# [3] Bankruptcy 51 2341

51 Bankruptcy

51III The Case

51III(H) Cases Ancillary to Foreign Proceedings 51k2341 k. In general. Most Cited Cases

Even in the absence of objection to recognition, bankruptcy court must review petitions for recognition of proceeding pending in foreign country in light of the statutory requirements, although court may rely on certain presumptions provided by statute if a petition for recognition is unopposed. 11 U.S.C.A. §§ 1501 et seq., 1516.

# [4] Bankruptcy 51 = 2341

51 Bankruptcy

51III The Case

<u>51III(H)</u> Cases Ancillary to Foreign Proceedings <u>51k2341</u> k. In general. <u>Most Cited Cases</u>

Bankruptcy court has a duty to review each petition for recognition of foreign proceeding to determine whether it satisfies all requisites for recognition. 11 U.S.C.A. § 1501 et seq.

# [5] Bankruptcy 51 = 2341

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    51 Bankruptcy
    51III The Case
    51III(H) Cases Ancillary to Foreign Proceedings
    51k2341 k. In general. Most Cited Cases
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In ruling on a petition for recognition of foreign proceeding, court must address the following: (1) whether proposed recognition would be manifestly contrary to the public policy of the United States, (2) whether foreign action is a "foreign proceeding" as defined by Bankruptcy Code, (3) whether foreign representative who filed petition for recognition is person or body, (4) whether petition meets formal requirements of Code, (5) whether foreign proceeding is pending in country in which debtor has the center of its main interest (COMI) and thus a foreign main proceeding, and (6) whether debtor has establishment in foreign country in which proceeding is pending, thus making foreign proceeding a foreign nonmain proceeding. 11 U.S.C.A. §§ 101(23), 1506, 1515, 1517.

# [6] Bankruptcy 51 €—2341

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    51 Bankruptcy
    51III The Case
    51III(H) Cases Ancillary to Foreign Proceedings
    51k2341 k. In general. Most Cited Cases
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To satisfy Bankruptcy Code's definition of "foreign proceeding," a proceeding must (1) be collective in nature, (2) be judicial or administrative, (3) be pending in a foreign country, (4) be under a law relating to insolvency or adjustment of debt, (5) subject the assets and affairs of the debtor to the control and supervision of a foreign court, and (6) be for the purpose of reorganization or liquidation. 11 U.S.C.A. § 101(23).

# [7] Bankruptcy 51 €-2341

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    <u>51 Bankruptcy</u>
    <u>51III</u> The Case
    <u>51III(H)</u> Cases Ancillary to Foreign Proceedings
    <u>51k2341</u> k. In general. <u>Most Cited Cases</u>
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For a proceeding to be "collective" within the meaning of Bankruptcy Code's definition of "foreign proceeding," it must be instituted for the benefit of creditors generally, rather than for a single creditor or class of creditors. 11 U.S.C.A. § 101(23).

# [8] Bankruptcy 51 €---2341

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    51 Bankruptcy
    51III The Case
    51III(H) Cases Ancillary to Foreign Proceedings
    51k2341 k. In general. Most Cited Cases
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For purposes of Bankruptcy Code's definition of "foreign proceeding," a "collective" proceeding is one that considers the rights and obligations of all creditors; this is in contrast to a receivership remedy instigated at the request, and for the benefit, of a single secured creditor. 11 U.S.C.A. § 101(23).

# [9] Bankruptcy 51 2341

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51 Bankruptcy
51III The Case
51III(H) Cases Ancillary to Foreign Proceedings
51k2341 k. In general. Most Cited Cases
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In determining whether a particular foreign action is "collective" as contemplated under Bankruptcy Code's definition of "foreign proceeding," it is appropriate to consider both the law governing the foreign action and the parameters of the particular proceeding as defined in, for example, orders of a foreign tribunal overseeing the action. 11 U.S.C.A. § 101(23).

#### [10] Bankruptcy 51 2341

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51 Bankruptcy
51III The Case
51III(H) Cases Ancillary to Foreign Proceedings
51k2341 k. In general. Most Cited Cases
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Word "collective," as used in Bankruptcy Code's definition of "foreign proceeding," contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action; notice to creditors, including general unsecured creditors, may play a role in this analysis. 11 U.S.C.A. § 101(23).

# [11] Bankruptcy 51 = 2341

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    <u>51</u> Bankruptcy
    <u>51III</u> The Case
    <u>51III(H)</u> Cases Ancillary to Foreign Proceedings
    <u>51k2341</u> k. In general. <u>Most Cited Cases</u>
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Proceeding in which judicial manager was appointed for debtor-insurance company under Bahamas law was "collective" in nature, as required for proceeding to qualify as "foreign proceeding" as defined by Bankruptcy Code, where, under Bahamas law, court was required to consider effect of debtor's financial condition on both policyholders and general creditors in deciding whether to appoint judicial manager, court order contemplated winding up of debtor's affairs in which unsecured creditors were intended to take part, despite policyholders' priority, and judicial manager acknowledged his overall duty to creditors in general. 11 U.S.C.A. § 101(23).

# [12] Bankruptcy 51 = 2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

Proceeding in which judicial manager was appointed for debtor-insurance company under laws of Saint Vincent and the Grenadines (SVG) was "collective" in nature, as required for proceeding to qualify as "foreign proceeding" as defined by Bankruptcy Code, where court orders surrounding judicial manager's appointment established that court considered interests of non-policyholder creditors, and proceeding was instituted for benefit of creditors generally and contemplated involvement of creditors collectively. 11 U.S.C.A. § 101(23).

# [13] Bankruptcy 51 2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

Proceedings in which judicial managers were appointed for debtor-insurance company under Bahamas law and under laws of Saint Vincent and the Grenadines were judicial proceedings, as required for each proceeding to be "foreign proceeding" as defined by Bankruptcy Code. 11 U.S.C.A. § 101(23).

# [14] Bankruptcy 51 € 2341

51 Bankruptcy 51III The Case 51III(H) Cases Ancillary to Foreign Proceedings 51k2341 k. In general. Most Cited Cases

Proceedings in which judicial managers were appointed for debtor-insurance company under insurance laws of the Bahamas and of Saint Vincent and the Grenadines required courts to consider debtor's solvency and provide for adjustment of debt through either direct winding up or through appointment of judicial manager, and thus satisfied requirement under Bankruptcy Code's definition of "foreign proceeding" that action be under a law relating to insolvency or adjustment of debt. 11 U.S.C.A. § 101(23).

# [15] Bankruptcy 51 = 2341

51 Bankruptcy
51III The Case
51III(H) Cases Ancillary to Foreign Proceedings
51k2341 k. In general. Most Cited Cases

Proceedings in which judicial managers were appointed for debtor-insurance company under insurance laws of the Bahamas and of Saint Vincent and the Grenadines subjected debtor's assets and affairs to control and supervision of foreign court, as required for each proceeding to be "foreign proceeding" as defined by Bankruptcy Code, where, under both foreign countries' insurance laws and terms of orders of appointment, judicial managers had control over debtor's assets and affairs and acted under supervision of foreign court. 11 U.S.C.A. § 101(23).

# [16] Bankruptcy 51 2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

Under phrase "a law relating to insolvency or adjustment of debt" included in Bankruptcy Code's definition of "foreign proceeding," proceeding subject to recognition as foreign proceeding must be for the purpose of reorganization or liquidation. 11 U.S.C.A. § 101(23).

# [17] Bankruptcy 51 2341

51 Bankruptcy51III The Case

51III(H) Cases Ancillary to Foreign Proceedings 51k2341 k. In general. Most Cited Cases

Proceedings in which judicial managers were appointed for debtor-insurance company under Bahamas law and laws of Saint Vincent and the Grenadines were for purpose of reorganization or liquidation, as required for proceeding to be "foreign proceeding" as defined by Bankruptcy Code, even though, at the time each judicial manager's Chapter 15 petition was filed with bankruptcy court, neither foreign court had entered order directing debtor's reorganization or liquidation where, after petitions were filed, both courts entered orders establishing that proceedings were for purpose of partial reorganization followed by liquidation. <a href="https://dx.edu.org/10.1518/1">11 U.S.C.A. §§ 101(23), 1517(d), 1518(1)</a>.

# [18] Bankruptcy 51 €-2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

Court should consider circumstances arising after filing of Chapter 15 petition in determining whether a foreign action is for the purpose of reorganization or liquidation, as required for action to qualify as "foreign proceeding" as defined by Bankruptcy Code. 11 U.S.C.A. §§ 101(23), 1517(d), 1518(1).

# [19] Bankruptcy 51 2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

Proceeding in which judicial manager was appointed for debtor-insurance company under laws of Saint Vincent and the Grenadines could be for purpose of reorganization or liquidation, such that proceeding could be "foreign proceeding" under Bankruptcy Code, as required for Chapter 15 recognition as foreign nonmain proceeding, even if proceeding pertained only to one of debtor's branch operations and thus could not result in debtor's overall reorganization or liquidation. 11 U.S.C.A. §§ 101(23), 1521(c).

# [20] Bankruptcy 51 2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

Judicial manager seeking recognition of foreign proceeding against debtor-insurance company as foreign main proceeding under Bankruptcy Code bore burden of establishing debtor's center of its main interests (COMI). 11 U.S.C.A. §§ 1502(4), 1516(c).

# [21] Bankruptcy 51 2341

<u>51</u> Bankruptcy
 <u>51III</u> The Case
 <u>51III(H)</u> Cases Ancillary to Foreign Proceedings
 <u>51k2341</u> k. In general. <u>Most Cited Cases</u>

In determining where debtor's center of its main interests (COMI) is located, for purposes of determining whether foreign proceeding is foreign main proceeding, courts typically consider (1) location of debtor's head-quarters, (2) location of those who actually manage debtor, which may be headquarters of a holding company, (3) location of debtor's primary assets, (4) location of majority of debtor's creditors or of a majority of creditors who would be affected by the case, and (5) jurisdiction whose law would apply to most disputes; in addition, courts also consider the expectations of third parties. 11 U.S.C.A. § 1502(4).

# [22] Bankruptcy 51 2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

In determining whether foreign proceeding is foreign main proceeding, it is important that the debtor's center of its main interests (COMI) be ascertainable by third parties. 11 U.S.C.A. § 1502(4).

# [23] Bankruptcy 51 2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

Debtor's center of its main interests (COMI), for purposes of determining whether foreign proceeding is foreign main proceeding, is affected not only by what a debtor does, but by what a debtor is perceived as doing. 11 U.S.C.A. § 1502(4).

# [24] Bankruptcy 51 2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

If the location of a debtor's center of its main interests (COMI) changes between the date on which a Chapter 15 petition is filed and the date a court makes a determination on recognition of proceeding as foreign proceeding, the court may look to the facts on the latter date for purposes of determining COMI. 11 U.S.C.A. §§ 1502(4), 1517(d), 1518(1).

# [25] Bankruptcy 51 €=2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

Debtor-insurance company's center of its main interests (COMI) was not in the Bahamas, even though debtor was formed there and judicial manager appointed under Bahamas law was overseeing debtor's business activity from the Bahamas, and therefore Bahamas proceeding was not "foreign main proceeding" where debtor's headquarters were in Trinidad, the country in which, through subsidiary, its financial, administrative, actuarial, legal, policy administration, and claims processing took place, subsidiary's employees managed debtor's day-to-day affairs, majority of debtor's assets were located in its Eastern Caribbean branches, creditors existed primarily outside the Bahamas, and policyholders and creditors had little reason to believe that debtor had its hub of operations in the Bahamas, given debtor's minimal activities there. 11 U.S.C.A. §§ 1502(4).

# [26] Bankruptcy 51 €---2341

51 Bankruptcy 51III The Case 51III(H) Cases Ancillary to Foreign Proceedings 51k2341 k. In general. Most Cited Cases

Allegations that debtor-insurance company was subject to Bahamas law regulating insurance and should be restructured and wound up in the Bahamas, and that judicial manager appointed for debtor under Bahamas law had, upon his appointment, supplanted debtor's board of directors and all corporate control was ceded to him, did not establish substantive economic activity warranting finding that debtor's center of main interests (COMI) was in the Bahamas for purposes of determining whether Bahamas proceeding was foreign main proceeding under Bankruptcy Code. 11 U.S.C.A. §§ 1502(4).

# [27] Bankruptcy 51 == 2341

51 Bankruptcy
51III The Case
51III(H) Cases Ancillary to Foreign Proceedings
51k2341 k. In general. Most Cited Cases

Debtor-insurance company did not have an establishment in the Bahamas, and therefore foreign proceeding in which judicial manager was appointed for debtor in the Bahamas could not be recognized as foreign nonmain proceeding under Bankruptcy Code; debtor had no business operation in the Bahamas, other than judicial manager's activities pursuant to his appointment, and did not do business in the Bahamas, and judicial manager's retention of counsel and accountants, investigation of assets and liabilities, and reporting to Bahamas court did not constitute business activities of debtor. 11 U.S.C.A. § 1502(2, 5).

# [28] Bankruptcy 51 2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

Petitioner seeking recognition of foreign proceeding as foreign nonmain proceeding has the burden of proof on whether debtor has an establishment in the country of the foreign proceeding. 11 U.S.C.A. § 1502(2, 5).

# [29] Bankruptcy 51 2341

51 Bankruptcy51III The Case

51III(H) Cases Ancillary to Foreign Proceedings 51k2341 k. In general. Most Cited Cases

Whether the debtor has an "establishment" in a country, for purposes of determining whether foreign proceeding in that country may be recognized as foreign nonmain proceeding, must be determined at the time of the filing of the Chapter 15 petition. 11 U.S.C.A. § 1502(2, 5).

# [30] Bankruptcy 51 €—2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

To have an establishment in a country, as required for recognition under Bankruptcy Code of foreign proceeding in that country as foreign nonmain proceeding, the debtor must conduct business in that country; the location should constitute a seat for local business activity for the debtor, which requires a showing of a local effect on the market-place that is more than mere incorporation and record-keeping and more than just the maintenance of property. 11 U.S.C.A. § 1502(2, 5).

# [31] Bankruptcy 51 €-2341

51 Bankruptcy
 51III The Case
 51III(H) Cases Ancillary to Foreign Proceedings
 51k2341 k. In general. Most Cited Cases

Proceeding under laws of Saint Vincent and the Grenadines (SVG) in which judicial manager was appointed for debtor-insurance company was "foreign nonmain proceeding" under Bankruptcy Code; debtor had property in SVG where it conducted business, debtor retained employees at its SVG branch who performed insurance business activity, debtor maintained accounts in SVG relating to its insurance business in that country, and debtor had existing policyholders in SVG. 11 U.S.C.A. § 1502(2, 5).

\*888 Leyza F. Blanco, Esq., Miami, FL, for Debtor.

# \*889 OPINION ON RECOGNITION OF FOREIGN PROCEEDINGS

ERIK P. KIMBALL, Bankruptcy Judge.

Two petitioners, one appointed in an action pending in

the Commonwealth of The Bahamas ("Bahamas") and a second appointed in an action pending in Saint Vincent and the Grenadines ("SVG"), seek recognition of their proceedings under 11 U.S.C. § 1517. The foreign actions relate to the same debtor, British American Insurance Company, Limited ("BAICO"). Petitioner for the Bahamas action seeks recognition of such action as either a foreign main or a foreign nonmain proceeding. Petitioner for the SVG action seeks recognition of such action as a foreign nonmain proceeding.

On the evidence presented, the Court finds that both foreign actions are "foreign proceedings" as defined in <u>11 U.S.C.</u> § <u>101(23)</u>. Thus, each proceeding meets the threshold for recognition under <u>11 U.S.C.</u> § <u>1517</u>.

With regard to the Bahamas proceeding, the petitioner's activities as court-appointed judicial manager are the only evidence offered to support petitioner's allegations that BAICO has the center of its main interest or an establishment in the Bahamas. In the circumstances of this case, such evidence does not support a finding that BAICO has the center of its main interest or an establishment in the Bahamas. Consequently, the Court denies the petition to recognize the Bahamas proceeding as a foreign main or foreign nonmain proceeding.

With regard to the SVG proceeding, the Court finds that BAICO has an establishment in SVG and recognizes the SVG proceeding as a foreign nonmain proceeding.

The petitions request coordination of foreign proceedings under 11 U.S.C. § 1530. Section 1530 contemplates coordination of multiple foreign proceedings recognized under chapter 15. The Court has recognized only a single foreign nonmain proceeding, so relief under 11 U.S.C. § 1530 is denied.

To the extent the petition relating to the Bahamas proceeding requests recognition of multiple foreign actions, through a single petition, such relief is denied. 11 U.S.C. §§ 1504, 1509, and 1515 require a separate petition for each foreign action for which recognition is sought. The Court accepts the petition as requesting recognition only of the proceeding pending in the Bahamas.

Petitioner for the SVG proceeding moves for relief under 11 U.S.C. § 1521. The Court will conduct a further hearing to address such request. In the meantime, the interim relief granted under 11 U.S.C. § 1519 will remain in effect pending order of the Court.

425 B.R. 884, 52 Bankr.Ct.Dec. 286, 22 Fla. L. Weekly Fed. B 390

(Cite as: 425 B.R. 884)

#### I. BACKGROUND

On October 9, 2009, Juan M. Lopez a/k/a John M. Lopez ("Mr.Lopez"), as duly appointed Judicial Manager for BAICO, filed an application (the "Bahamas Petition") with this Court pursuant to sections 1515 and 1517 of 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"). The Bahamas Petition requests entry of an order recognizing a judicial action (the "Bahamas Proceeding") pending before the Commercial Division of the Supreme Court of the Commonwealth of The Bahamas (the "Bahamas Court") as a foreign main proceeding or, in the alternative, as a foreign nonmain proceeding. Upon recognition, the Bahamas Petition requests relief under sections 1520 \*890 and/or 1521, as well as coordination of multiple foreign proceedings under section 1530.

<u>FN1.</u> Unless otherwise noted, references to "section" or "sections" are references to the relevant section or sections of the Bankruptcy Code.

On October 29, 2009, this Court entered an order [DE 11] granting provisional relief under sections 105(a) and 1519 including, without limitation, a stay of execution against assets of BAICO. The provisional relief granted by that order remains in effect subject to further order of this Court [DE 24].

On November 6, 2009, the Court commenced an evidentiary hearing on the Bahamas Petition. The presentation of evidence was not complete on that date and so the Court continued the evidentiary hearing.

On November 23, 2009, Brian Glasgow ("Mr. Glasgow" and with Mr. Lopez, the "Petitioners"), as duly appointed Judicial Manager for BAICO, filed a petition (the "SVG Petition" and with the Bahamas Petition, the "Petitions") pursuant to sections 1515 and 1517. The SVG Petition requests entry of an order recognizing a judicial action (the "SVG Proceeding") pending before the Eastern Caribbean Supreme Court in the High Court of Justice Saint Vincent and the Grenadines (the "SVG Court") as a foreign nonmain proceeding. Upon recognition, the SVG Petition requests relief under section 1521, as well as coordination of multiple foreign proceedings under section 1530.

On December 1, 2009, the Court held a preliminary hearing on the SVG Petition and a hearing on a motion to jointly administer the two cases relating to the Petitions. The Court determined to jointly administer the cases and to

conduct an evidentiary hearing on the SVG Petition concurrently with a continued evidentiary hearing on the Bahamas Petition on February 1, 2010.

Green Island Holdings, LLC ("Green Island"), a creditor of BAICO, opposes recognition of both the Bahamas Proceeding and the SVG Proceeding.

The Court has jurisdiction over these proceedings pursuant to <u>28 U.S.C.</u> §§ <u>157(b)</u> and <u>1334(b)</u>. These are core proceedings pursuant to <u>28 U.S.C.</u> § <u>157(b)(2)(P)</u>. Venue is proper in this district under <u>28 U.S.C.</u> § <u>1410</u>.

#### II. FACTS

Debtor BAICO

BAICO is an insurance company chartered under the laws of the Bahamas. It has or had branch operations in Anguilla, Antigua and Barbuda, Bermuda, The Cayman Islands, Dominica, Guyana, Grenada, Montserrat, Saint Kitts and Nevis, Panama, Saint Lucia, Curacao, the Turks and Caicos Islands, and SVG. BAICO also operates or operated through subsidiaries in Barbados, Trinidad and Tobago ("Trinidad"), Curacao, Aruba, the Turks and Caicos Islands, and the British Virgin Islands.

#### Creditor Green Island

Green Island is a Florida limited liability company. It is the plaintiff in an action against BAICO and British American Isle of Venice (BVI), Ltd. in the United States District Court for the Southern District of Florida [BAICO Ex. 114], and is the plaintiff in an action against BAICO in the Ninth Judicial Circuit in and for Osceola County, Florida. [09–31881 DE 2 Pet. ¶ 22.]

# BAICO Operations Before Appointment of Petitioners

For several years prior to the filing of the Petitions in this Court, and thus prior to appointment of the Petitioners by the Bahamas and SVG Courts, BAICO (a) did not issue insurance policies in or from the Bahamas, (b) did not sell policies to residents of the Bahamas, (c) did no claims adjustment or claims processing in the Bahamas, and (d) had no employees in the \*891 Bahamas. At the time of Mr. Lopez's appointment by the Bahamas Court, BAICO had no bank accounts in the Bahamas. For at least a year prior to Mr. Lopez's appointment, none of BAICO's officers or directors resided in the Bahamas. As of Mr. Lopez's appointment, BAICO's only ties to the Bahamas were that it was chartered in that country and that it had a registered

agent in the Bahamas (a law firm). The registered agent maintained required corporate information for BAICO. Mr. Lopez confirmed that at the time of his appointment BAICO was not transacting business in the Bahamas.

Nearly all of BAICO's operations were undertaken by subsidiaries in Trinidad that acted as BAICO's agents. BAICO has two subsidiaries incorporated under the laws of and operated in Trinidad, British-American Insurance Company (Trinidad) Limited ("BAT") and BA Management Services Limited ("BA Management" and with BAT, the "Trinidad Subsidiaries"). BAICO owns 99.86% of BAT and 100% of BA Management. [BAICO Ex. 103 at 26, 141, 144.] Prior to 2005, BAT was the operational hub of the BAICO group of companies, performing various administrative functions. In 2005, to achieve certain tax benefits, BA Management was formed to assume this role; it commenced operations in 2006. [BAICO Ex. 103 at 145.] BAICO and BA Management are parties to a Services Agreement (the "Services Agreement"). [BAICO Ex. 107.] Under the Services Agreement, BA Management agreed to provide all financial, administrative, marketing, information technology, investment, actuarial, and legal services for BAICO. BA Management's responsibilities include policy administration and claims processing for the BAICO group. [BAICO EX. 103 at 145.] Mr. Lopez testified that BAICO paid for these services and the cost was shared among BAICO's various branch operations.

Lennox McCartney, the Insurance Commissioner for the Bahamas, testified that certain members of BAICO's board of directors met with him in the Bahamas in 2008 and 2009, at his request, to address the company's financial difficulties. Other than a meeting convened on April 20, 2009 for the purpose of changing the company's registered office [BAICO Ex. 108], these meetings with the Insurance Commissioner were the only business conducted by BAICO board members in the Bahamas in recent years. The Insurance Commission then instituted restrictions on BAICO intended to "ring fence" BAICO's operations to insulate against further loss.

As of June, 2009, BAICO had eight directors. Four were resident in Trinidad, one in the United States, one in Barbados, one in Grenada, and one in Saint Kitts. On June 30, 2009, the remaining members of BAICO's board of directors resigned.

Appointment of Mr. Lopez by Bahamas Court

By order dated September 8, 2009 (the "Bahamas Order of Appointment") [BAICO Ex. 17], the Bahamas

Court appointed Mr. Lopez as Judicial Manager for BAICO under Section 77(1)(b) of the Insurance Act, 2005 (the "Bahamas Insurance Act"). The Bahamas Order of Appointment empowers Mr. Lopez to: (a) ascertain the assets of BAICO and their location and take steps to obtain possession of such assets; (b) carry on all or any portion of the business of BAICO so far as may be necessary to preserve the value of BAICO including process claims against BAICO, effect reinsurance recoveries, and pay any class of creditor and any claims, settlements, and expenses in full; (c) seek the assistance of the United States Bankruptcy Court under the provisions of chapter 15 or any other sections of the Bankruptcy Code or take such other action necessary to secure assets of BAICO, including the \*892 assets of BAICO's subsidiaries; (d) incur and pay for all reasonable expenses and disbursements in connection with the running, administration, and management of BAICO's records, affairs, and offices; (e) retain or employ professionals or others if appropriate to assist in running the affairs and business of BAICO and to ascertain and quantify the assets, records, and liabilities of BAICO; (f) render invoices for Mr. Lopez's own remuneration at usual and customary rates; (g) take all actions necessary to see, review, secure, and take possession of any books, papers, writings, documents and records relating to BAICO that are located in the offices of auditors or any other person and bring the same under his control and, where appropriate, into the jurisdiction of the Bahamas; (h) take all actions necessary to see, review, secure, and take possession of the claims and financial records of BAICO; (i) open, operate, and maintain bank accounts in the name of the Judicial Manager or BAICO as necessary; (j) conduct investigations and obtain information as is necessary to locate, protect, secure, take possession of, collect, and get in the assets of BAICO and determine liabilities, or to enable the judicial management to proceed in a speedy and efficient manner; (k) do all such things as may be necessary or expedient for the protection of BAICO's property or assets; (1) enter into commutations, settlements, and compromises with any creditors and any debtors of BAICO; (m) employ and dismiss any employees, consultants, and agents of BAICO; (n) discharge rent, salaries of any employees of BAICO, and other current expenses of BAICO; (o) grant or accept a surrender of a lease or tenancy of any of BAICO's property, surrender any lease, and take a lease or tenancy of any property required or convenient for the business of BAICO; (p) terminate, complete, or perfect as advised any contracts or transactions relating to the business of BAICO; (q) effect insurance in connection with the management and maintenance of the business, property, and assets of BAICO; (r) do all acts and execute in the name and on behalf of BAICO all deeds

receipts or other documents; (s) rank and claim in the bankruptcy, liquidation, or insolvency of any person indebted to BAICO and receive dividends, and accede to trust deeds for the creditors of any such person; (t) manage, adjust, and pay claims against BAICO and/or its policyholders and enter into agreements with third parties for the provision of claims handling and related services to BAICO in relation to BAICO's business; (u) retain and employ barristers, attorneys, solicitors, or other lawyers in any jurisdiction in which BAICO has operations through its subsidiaries or branches and in any other jurisdictions as the Judicial Manager deems appropriate for the purpose of advising and assisting the Judicial Manager in the execution of his powers or in any legal or arbitration proceedings; (v) consider any legal or arbitration proceedings in which BAICO either is a party or of which BAICO presently has conduct or which BAICO would, but for the Bahamas Proceeding, take conduct and pay all fees and expenses and give all instructions and take such action as may be necessary to continue to prosecute or to defend such proceedings or to apply for a stay of such proceedings; (w) consider and if thought advisable commence such actions as may be necessary to protect, recover, or obtain assets and or monies belonging or due to BAICO and commence all other proceedings on BAICO's behalf as may be necessary to have the Judicial Manager's appointment recognized and to protect the assets of BAICO; (x) borrow money from time to time for the proper operation and functioning of BAICO's business; and (y) do all such things reasonably and properly incidental to the exercise of the foregoing powers.

\*893 The Bahamas Order of Appointment provides that Mr. Lopez is BAICO's legal representative in respect to BAICO's equity investments, including BAICO's investments in subsidiaries and minority interests. Mr. Lopez has all rights and privileges afforded to shareholders including the right to vote BAICO's shares at any meetings held by companies where BAICO has a shareholding interest. If appropriate, in Mr. Lopez's discretion, he is empowered to take management control of any of BAICO's subsidiaries by voting BAICO's shares and removing and appointing directors and officers as he sees fit.

The Bahamas Order of Appointment requires Mr. Lopez to provide an interim report to the Bahamas Court stating which of the following courses is most advantageous to the general interests of the policyholders of BAICO:

(a) The transfer of all or any part of the insurance busi-

ness of [BAICO] to some other company in pursuance of a scheme to be prepared by the [Judicial Manager] in accordance with the Insurance Act, 2005,

- (b) The carrying out of its business by [BAICO] either unconditionally or subject to such conditions as the [Judicial Manager] may suggest,
- (c) The winding up of [BAICO], or
- (d) (b) Such other course as the [Judicial Manager] considers advisable.

[BAICO Ex. 17.]

Mr. Lopez testified that while policy holders have priority under Bahamas law he has a fiduciary duty to all creditors. Mr. Lopez stated that he has a duty to maximize recovery for all creditors of BAICO.

Appointment of Mr. Glasgow by SVG Court

By order entered August 4, 2009 (the "SVG Order of Appointment") [BAICO Ex. 86], the SVG Court appointed Mr. Glasgow as Judicial Manager for BAICO under Section 52 of the Insurance Act, No. 45 of 2003 of the Laws of Saint Vincent and the Grenadines (the "SVG Insurance Act").

The SVG Order of Appointment places the affairs, business, and property of BAICO in SVG under Judicial Management. The SVG Order of Appointment stays all actions, proceedings, and claims against BAICO. It empowers Mr. Glasgow, as Judicial Manager, to: (a) ascertain the assets of BAICO and take all steps necessary to obtain possession of such assets; (b) incur and pay for all reasonable expenses and disbursements in connection with the running, administration, and management of BAICO's records, affairs, and offices; (c) if appropriate, retain or employ professionals or others to assist in running the affairs and business of BAICO and for the purposes of ascertaining and quantifying the assets, records, and liabilities of BAICO, such employment being either in the jurisdiction of SVG or any other jurisdiction where BAICO conducted business or entered into contracts with third parties; (d) render invoices for their remuneration at their usual and customary rates; (e) take all actions necessary to see, review, secure, and take possession of any books, papers, writings, documents, and records relating to BAICO that are located in the offices of its auditors or any other person and to bring the same under his control; (f)

take all actions necessary to see, review, secure, and take possession of the claims and financial records of BAICO located in the offices of BAICO or any company affiliated with BAICO or any other person and to bring the same under his control; (g) open, operate, and maintain bank accounts in the name of the Judicial Manager or BAICO as may be necessary; (h) conduct such investigations and obtain such information as is necessary to locate, \*894 protect, secure, take possession of, collect, and get in the assets of BAICO and determine liabilities, or to enable the Judicial Management to proceed in a speedy and efficient manner; (i) do all such things as may be necessary or expedient for the protection of BAICO's property or assets; (j) enter into commutations, settlements, and compromises with any creditors and any debtors of BAICO; (k) employ and dismiss any employees of BAICO; (1) discharge rent, salaries of any employees of BAICO, and other current expenses of BAICO; (m) grant or accept a surrender of a lease or tenancy of any of the property of BAICO and take a lease or tenancy of any property required or convenient for the business of BAICO; (n) terminate, complete, or perfect as advised any contracts or transactions relating to the business of BAICO; (*o*) effect insurance in connection with the management and maintenance of the business, property, and assets of BAICO; (p) do all acts and execute in the name and on behalf of BAICO all deeds receipts or other documents; (q) rank and claim in the bankruptcy, liquidation, or insolvency of any person indebted to BAICO and receive dividends, and accede to trust deeds for the creditors of any such person; (r) manage, adjust, and pay claims against BAICO and/or its policyholders and enter into agreements with third parties for the provision of claims handling and related services to BAICO in relation to BAICO's business; (s) carry on all or any portion of the business of BAICO so far as may be necessary to process claims against BAICO, to effect reinsurance recoveries, and to pay any class of creditor and any claims, settlements, and expenses in full; (t) retain and employ barristers, attorneys, solicitors, or other lawyers in jurisdictions as the Judicial Manager sees fit for the purpose of advising and assisting the Judicial Manager in the execution of his powers or in any legal or arbitration proceedings; (u) consider any legal or arbitration proceedings wherever situate in which BAICO either is a party or of which BAICO presently has conduct or which BAICO would, but for the SVG proceeding, take conduct and pay all fees and expenses, give all instructions in connection therewith, and take such action as may be thought necessary to continue to prosecute or to defend such proceedings or to apply for a stay of such proceedings; (v) consider and if thought advisable commence such actions as may be necessary to protect, recover, or obtain assets and/or monies belonging or due to BAICO and commence all other proceedings as may be necessary to have his appointment recognized and protect the assets of BAICO; (w) borrow such money from time to time as he may consider necessary or desirable for the proper operation and functioning of BAICO's business including any monies borrowed or to be borrowed for expenses incurred by the Judicial Manager, subject to the approval of the Minister of Finance, while operating by virtue of his appointment under the SVG Order of Appointment; and (x) do all such things reasonably and properly incidental to the exercise of the foregoing powers.

The SVG Order of Appointment requires Mr. Glasgow to provide an interim report to the SVG court stating which of the following courses is most advantageous to the general interests of the policyholders of the company:

- (a) The transfer of the business of the company to some other company in pursuant of a scheme to be prepared in accordance with the Insurance Act (whether the policies of the business continue for the original sums insured, with the addition of bonuses that are attached to the policies or for reduced amounts);
- \*895 (b) The carrying out of its business by the company (whether the policies of the business continue for the original sums insured, with the addition of bonuses that attach to the policies, or for reduced amounts);
- (c) The winding up of the company or any part of the business of the company; or
- (d) The dealing with part of the business of the company in one manner, and with another part in another company.

[BAICO Ex. 86.]

Other Proceedings for BAICO

BAICO is subject to judicial proceedings in numerous countries. Foreign courts have appointed judicial managers, provisional liquidators, or controllers, for BAICO and related entities, as follows:

Date Court Name (Position)

425 B.R. 884, 52 Bankr.Ct.Dec. 286, 22 Fla. L. Weekly Fed. B 390

(Cite as: 425 B.R. 884)

July 31, 2009	The Eastern Caribbean Supreme Court in the High Court of Justice Antigua and Barbuda	Cleveland Seaforth (Judicial Manager)
July 31, 2009	The Eastern Caribbean Supreme Court in the High Court of Justice (Anguilla Circuit)	Claudel Romney (Administrator)
July 31, 2009	The Eastern Caribbean Supreme Court in the High Court of Justice Federation of Saint Christopher and Nevis	Lisa Taylor (Judicial Manager)
July 31, 2009	The Eastern Caribbean Supreme Court in the High Court of Justice Saint Lucia	Frank Myers (Judicial Manager)
August 3, 2009	The Supreme Court of Bermuda Commercial Court Companies (Winding-Up)	Stephen Lowe (Provisional Liquidator)
August 5, 2009	The Eastern Caribbean Supreme Court in the High Court of Justice Montserrat	Casey McDonald (Judicial Manager)
August 5, 2009	The Supreme Court of Grenada and the West Indies Associated States High Court of Justice	Reuben M. John (Judicial Manager)
September 15, 2009	The Grand Court of the Cayman Islands	Simon Whicker and Kris Beighton (Controllers)
October 7, 2009	The Supreme Court of the Turks and Caicos Islands	Juan M. Lopez (Judicial Manager)

[BAICO Ex. 18–27; 09–31881 DE 2 Pet. ¶¶ 8–10.]

Reports of Mr. Lopez and Mr. Glasgow

Mr. Lopez submitted a report to the Bahamas Court, dated November 27, 2009, pursuant to section 81(1) of the Bahamas Insurance Act (the "Lopez Report"). [BAICO Ex. 103.] Reports of judicial managers appointed in the "EC Branches" FN2 are attached to the Lopez Report as appendices. Included among these is a report of Mr. Glasgow submitted in the SVG Proceeding, dated October 9, 2009, pursuant to section 52 of the SVG Insurance Act (the "Glasgow Report"). The Glasgow Report was separately admitted as BAICO Exhibit 77. The Lopez Report and the Glasgow Report reflect extensive examinations of BAICO, its business operations, and its assets and liabilities. Both reports recommend a course of action by which BAICO will be restructured in part \*896 using a newly formed entity to assume certain of BAICO's liabilities. [BAICO Ex. 77 at 48–53; BAICO Ex. 103 at 207–17.]

FN2. The Eastern Caribbean Branches, or "EC Branches," comprise branch operations in Anguilla, Antigua, Dominica, Grenada, Montserrat, Saint Kitts, Saint Lucia, and SVG. [BAICO Ex. 103 at 114.]

The Lopez Report includes a detailed liquidation analysis for BAICO as of June 30, 2009. The liquidation analysis reflects all assets and liabilities of BAICO and its branches other than the Cayman branch, which has been

sold, and the Panama, Bermuda, and Curacao branches, which are estimated as having negligible net value. Recovery on BAICO's investment in its subsidiaries is estimated at \$5 million. [BAICO Ex. 103 at 44–45.]

The EC Branches represent the vast majority of both BAICO's assets and its liabilities. [BAICO Ex. 103 at 54.] Before adjustments taken for purposes of the liquidation analysis, the EC Branches' assets represent about 83.7% of BAICO's total assets, and the EC Branches' liabilities represent about 77.3% of BAICO's total liabilities. [BAICO Ex. 103 at 44-45.] The Lopez Report includes separate data "for the small number of transactions that were not directly attributable to BAICO's branches or subsidiaries," referred to in the report as "BAICO standalone." [BAICO Ex. 103 at 45, 64.] Before adjustments, BAICO stand-alone represents about 14.2% of BAICO's total assets and 21.1% of BAICO's total liabilities. The liquidation analysis includes adjustments for various items based on Mr. Lopez's estimation with regard to liquidation value. The adjustments are presented in such a way that it is not apparent whether the adjustments are to be applied to the EC Branches, other branches, or "BAICO stand-alone." However, even if the adjustments are applied to the EC Branches assets to the greatest extent possible, the EC Branch assets account for approximately 78% of the total adjusted assets shown in the liquidation analysis. From the Lopez Report and the other evidence presented, it is not possible to determine whether a significant portion of BAICO's realizable assets are located in any particular EC Branch country. The Court can only discern that most

of BAICO's assets are not located in the Bahamas.

Mr. Lopez's liquidation analysis takes into account the fact that BAICO policyholders will be paid in preference to other unsecured creditors. [BAICO Ex. 103 at 43.] He concludes that in a liquidation of BAICO policyholders will receive a dividend of between 15 and 35 cents on the dollar and non-policyholder, unsecured creditors will not receive any distribution. Because BAICO has policies that will not mature for many years, any distribution will be significantly delayed. [BAICO Ex. 103 at 43–46.]

#### December Orders of Bahamas Court and SVG Court

By order dated December 17, 2009 (the "December Bahamas Order"), the Bahamas Court accepted Mr. Lopez's core findings that BAICO is insolvent and should be reorganized and restructured where possible and then wound up. The Bahamas Court directed Mr. Lopez: (1) to continue to negotiate with third parties to sell, transfer, or dispose of the insurance business, or other assets and liabilities of the branches and subsidiaries of BAICO; (2) to transfer or sell the shares of BAT; (3) to take steps to protect the assets of BAICO and its subsidiaries in the United States by obtaining recognition of the Bahamas Proceeding; (4) to effect the winding-up of BAICO's non-insurance subsidiaries; (5) to investigate related party and other antecedent transactions, the conduct of management and the directors of BAICO, and the conduct of third parties providing services to and conducting transactions with BAICO; (6) to commence legal proceedings against CL Financial Ltd. ("CL Financial"), the parent company of BAICO, in respect of sums presently due \*897 to BAICO; (7) to investigate the assets and liabilities of BAICO's Employee Pension Plan; and (8) to effect the transfer of data and systems from Trinidad to a new administrative hub in the Bahamas. [BAICO Ex. 106.] At the February 1, 2010 hearing, Mr. Lopez testified that his current role involves carrying out the reorganization ordered by the Bahamas Court with a goal toward an eventual winding up of BAICO.

By order dated December 18, 2009 (the "December SVG Order"), based on the recommendations contained in the Glasgow Report, the SVG Court ordered pursuant to section 54(2) of the SVG Insurance Act that: (1) there be a reorganization of BAICO by the transfer of its insurance and investment business to a new company in pursuance of a scheme of arrangement to be prepared in accordance with section 56 of the SVG Insurance Act; (2) the scheme prepared in accordance with the SVG Insurance Act be a plan making provision for the funding of a new company; (3)

Mr. Glasgow is authorized to work with other judicial managers or persons similarly appointed, the governments of the Organization of Eastern Caribbean States, and the Eastern Caribbean Central Bank, to develop such a scheme and make arrangements for any required funding; (4) Mr. Glasgow shall consider and do all things necessary with respect to the establishment of the new company and the transfer of assets and liabilities of BAICO into the new company; and (5) Mr. Glasgow is to continue to negotiate with third parties to sell or dispose of its property and health insurance business and to take such action that may be required to effect such sales or disposals subject to the approval of the SVG Court.

#### BAICO Operations After Appointment of Petitioners

Although Mr. Lopez expects to move BAICO's administrative operations to the Bahamas, Mr. Lopez's own report to the Bahamas Court, filed after the petition here, confirms that BAICO's administrative function remains in Trinidad. [BAICO Ex. 103 at 216.] The Glasgow Report similarly states that BAICO's "main business operation is now located in Trinidad & Tobago since its majority shares were acquired by the Trinidadian company [CL Financial] in 1997." [BAICO Ex. 77 at 5.] BA Management continues to serve the BAICO group under the terms of the Services Agreement. [BAICO Ex. 103 at 145.] The services undertaken by BA Management constitute essentially all of BAICO's day-to-day management operations. BAICO's operations in Trinidad, through the Trinidad Subsidiaries, form a hub from which all of BAICO's operations are overseen. The Trinidad Subsidiaries control BAICO's computer network access and business software, including accounting data. The Trinidad Subsidiaries provide remote information technology support. [BAICO Ex. 77 at 59.] The SVG branch is essentially a "local branch sales and administrative unit supported by a group service company, [the Trinidad Subsidiaries]." [BAICO Ex. 77 at 58.] The Trinidad Subsidiaries process application forms for insurance products sold through the SVG branch. [Id.] The Trinidad Subsidiaries in turn process, adjust, and approve claims routed through the SVG branch. The Trinidad Subsidiaries then issue checks in payment of claims, which are forwarded to the SVG branch for distribution to policyholders. [Id.] Employment contracts for employees of the SVG branch are maintained at the Trinidad Subsidiaries. [BAICO Ex. 77 at 59.] The Trinidad Subsidiaries administer the employee benefits and pension plans for the SVG branch employees. [BAICO Ex. 77 at 60.] These are only examples of the extent to which the Trinidad Subsidiaries operate BAICO. The great weight of evidence\*898 supports the conclusion that BAICO's business remains centered in Trinidad.

The Petitioners note that BAICO has no branch operations in Trinidad, where it acts through its wholly-owned Trinidad Subsidiaries, that BAICO itself does not have an insurance license in Trinidad, and that BAICO has no physical assets in Trinidad in its own name. Petitioners argue that the actions of a subsidiary, such as BA Management, are the actions of a separate corporate entity and should not be attributed to its parent. This argument ignores the broad terms of the Services Agreement and the overwhelming evidence in this case. BAICO delegated its primary business operations to the Trinidad Subsidiaries, and the Trinidad Subsidiaries continue to oversee essentially all of BAICO's ongoing business.

In SVG, BAICO has an administrative staff of nine employees who now act under Mr. Glasgow's control. [Nov. 6, 2009 Tr. 163; BAICO Ex. 77 at 59.] BAICO engages in excess of sixteen full time agents to conduct its businesses in SVG. The SVG branch accepts premiums on old business and conducts all attendant business related to the operation of an insurance company. [Nov. 6, 2009 Tr. 163–64.]

Since their appointment, Mr. Lopez and Mr. Glasgow established bank accounts for BAICO in their respective jurisdictions, engaged lawyers, accountants, and other professionals, and completed extensive investigations of BAICO, its assets and its liabilities. Mr. Lopez oversaw the negotiation and closing of a sale of certain BAICO assets in the Cayman Islands, which sale was approved by the Bahamas Court. [BAICO Ex. 77 at 12–16; BAICO Ex. 103 at 47–59.]

# BAICO Web Site

After his appointment, Mr. Lopez added a notice of his appointment under the Bahamas Insurance Act to the home page of BAICO's web site. [Green Island Ex. 11.] The notice lists a number of other court-appointed representatives in Caribbean countries. Although the notice includes Mr. Lopez's mailing address, it states: "At this time, we recommend you contact the local BAICO office or Court appointed office holder, for further information." The web site provides telephone contact information for offices in various countries, including a "Head Office" in Trinidad, but none for the Bahamas other than Mr. Lopez's mailing address.

#### III. ANALYSIS

These matters arise under the relatively new provisions of chapter 15 of the Bankruptcy Code, entitled "An-

cillary and Other Cross–Border Cases." <u>11 U.S.C. § 1501</u> et seq. Enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, chapter 15 replaced section 304 of the Bankruptcy Code. Section 1501(a) sets out the goals of chapter 15:

- (a) The purpose of this chapter is to incorporate the Model Law on Cross–Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—
- (1) cooperation between—
- (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
- (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
- (2) greater legal certainty for trade and investment;
- (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
- (4) protection and maximization of the value of the debtor's assets; and

\*899 (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

# 11 U.S.C. § 1501(a).

Chapter 15 represents a nearly verbatim enactment of the Model Law on Cross–Border Insolvency (the "Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL") in 1997. 11 U.S.C. § 1501(a); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 43 (Bankr.S.D.N.Y.2008) ("The language of chapter 15 tracks the Model Law, with some modifications that are designed to conform the Model Law with existing United States law."). The Model Law has been enacted in the following countries: Australia (2008), British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2003), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of

Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), and the United States of America (2005). UNCITRAL, Status: 1997–Model Law on Cross-border Insolvency, http:// www. uncitral. org/uncitral/ en/ uncitral texts/insolvency/1997Model status.html (last visited Mar. 22, 2010).

International uniformity is a primary goal of the Model Law and thus of chapter 15. 11 U.S.C. §§ 1501(a), 1508. UNCITRAL expressed the desire that the Model Law be enacted by adopting countries with as few changes as possible "in order to achieve a satisfactory degree of harmonization and certainty." United Nations Commission on International Trade Law (UNCITRAL), Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, ¶ 12, U.N. Doc. A/CN.9/442 (Dec. 19, 1997) [hereinafter "Guide to Enactment"]. FN3 When implementing chapter 15, section 1508 requires the Court to "consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 U.S.C. § 1508. The House Report contemplates courts looking to the Guide to Enactment and the Reports cited therein to aid the courts in achieving a uniform interpretation of chapter 15. H.R.Rep. No. 109-31, pt. 1, at 109-10 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 172-73 (the "House Report").

FN3. The UNCITRAL Model Law on Cross—Border Insolvency with Guide to Enactment is available at http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf.

[1] Sections 1515 through 1518, inclusive, set out a rigid procedure for recognition of a proceeding pending in a foreign country. *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 132 (Bankr.S.D.N.Y.2007), *aff'd*, 389 B.R. 325 (2008). This recognition procedure is completely new to the Bankruptcy Code. It reflects a policy determination by UNCITRAL and Congress that this Court should not assist a representative of a foreign action unless the debtor has a sufficient presence in the country in which the foreign action is taking place. *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333–34 (S.D.N.Y.2008) (citing House Report at 110 (2005); § 1509(b)(3)).

If the debtor does not have its center of main interests or at least an establishment in the country of the foreign proceedings, the bankruptcy court should not grant recognition and is not authorized to use its power to effectuate the purposes of the foreign proceeding. Implicitly, in such an instance the debtor's \*900 liquidation or reorganization should be taking place in a country other than the one in which the foreign proceeding was filed to be entitled to assistance from the United States.

*Id.* at 334 (internal citations omitted).

[2] The general principles of comity that governed acknowledgement of cross-border matters under former section 304 no longer apply to recognition under chapter 15. *Lavie v. Ran,* 406 B.R. 277, 282 (S.D.Tex.2009).

Approaches based purely on the doctrine of comity or on *exequatur* do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as the one contained in the Model Law, on judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts.

Guide to Enactment ¶ 16. Except with regard to certain relief that may be accorded after recognition of a foreign proceeding, it is not appropriate to rely on case law under former section 304. *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.,* 374 B.R. at 132; House Report at 109–10, 119.

[3][4] Even in the absence of Green Island's objection to recognition, the Court must review the Petitions in light of the requirements of chapter 15. *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.,* 374 B.R. at 129–30. If a petition for recognition is unopposed, the Court may rely on certain presumptions provided by section 1516. Even so, the Court has a duty to review each petition to determine whether it satisfies all requisites for recognition. *Id.* 

A person seeking recognition of a proceeding in a foreign country must file a petition for recognition under sections 1504, 1509, and 1515. Upon filing of a petition for recognition, the court will set a hearing on notice as required by Fed. R. Bankr.P.2002(q).

<u>Section 1517</u> sets out the substantive test for recognition of a foreign proceeding. It provides as follows:

(a) Subject to section 1506, after notice and a hearing, an

order recognizing a foreign proceeding shall be entered if—

- (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of <u>section</u> 1502;
- (2) the foreign representative applying for recognition is a person or body; and
- (3) the petition meets the requirements of  $\underline{\text{section}}$  1515.
- (b) Such foreign proceeding shall be recognized—
  - (1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or
  - (2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.
- (c) A petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time. Entry of an order recognizing a foreign proceeding constitutes recognition under this chapter.
- (d) The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under\*901 this chapter may be closed in the manner prescribed under section 350.

#### 11 U.S.C. § 1517.

- [5] In ruling on a petition for recognition under <u>section</u> 1517, the Court must address the following:
- 1. Would the proposed recognition be "manifestly contrary to the public policy of the United States" as contemplated under <u>section 1506</u>?
  - 2. Is the subject foreign action a "foreign proceeding"

as defined in 11 U.S.C. § 101(23)?

- 3. Is the foreign representative who filed the petition for recognition a person or body?
- 4. Does the petition meet the formal requirements of section 1515?
- 5. Is the foreign proceeding pending in the country where the debtor has the center of its main interest and thus a foreign main proceeding?
- 6. Does the debtor have an establishment in the foreign country where the proceeding is pending, thus making the foreign proceeding a foreign nonmain proceeding?

Items 1, 3, and 4 are quickly disposed of in the present case. There is no reason to believe that the proposed recognition of either proceeding is contrary to public policy. Mr. Lopez and Mr. Glasgow are persons. Lastly, the Petitions and supporting documentation filed by Mr. Lopez and Mr. Glasgow meet the formal requisites of section 1515. The Court will address in detail whether the Bahamas Proceeding and the SVG Proceeding are foreign proceedings and, if so, whether they are foreign main or foreign nonmain proceedings.

#### A. Foreign Proceeding

[6] Section 1517(a) and the definitions of "foreign main proceeding" and "foreign nonmain proceeding," found in section 1502, each incorporate the defined term "foreign proceeding." As a preliminary matter, the Court must determine whether the Bahamas Proceeding and the SVG Proceeding constitute foreign proceedings. "The term 'foreign proceeding' means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." 11 U.S.C. § 101(23). Parsing this definition, the proceeding in question must: (1) be collective in nature; (2) be judicial or administrative; (3) be pending in a foreign country; (4) be under a law relating to insolvency or adjustment of debt; (5) subject the assets and affairs of the debtor to the control and supervision of a foreign court; and (6) be for the purpose of reorganization or liquidation.

## 1. Collective in Nature

Green Island argues that the Bahamas Proceeding and

the SVG Proceeding are not "collective" within the meaning contemplated by section 101(23) because the proceedings allegedly were initiated only to protect the interests of BAICO's policyholders, a single class of creditors, to the exclusion of other creditors of BAICO. According to Green Island, although the orders appointing Mr. Lopez and Mr. Glasgow as judicial managers permit them to deal with other creditors, they are not obligated to act for the benefit of those creditors.

Green Island points to a provision in the Bahamas Order of Appointment requiring Mr. Lopez to recommend courses of action that "are most advantageous to the general interests of the policy holders of [BAICO]." Green Island cites a deposition of Mr. Lopez where he agreed that the primary\*902 purpose of his appointment was to take steps that are in the best interest of the policyholders. Finally, Green Island argues that neither Bahamas law nor orders in the Bahamas Proceeding require Mr. Lopez to provide notice to creditors of his appointment as judicial manager or of Mr. Lopez's proposed actions even when subject to approval of the Bahamas Court.

Similarly, although the order appointing Mr. Glasgow as judicial manager permits him to deal with other creditors, Green Island alleges he is not obligated to act for the benefit of those creditors. Green Island points out that at the initial evidentiary hearing in this case, prior to the SVG Petition, Mr. Glasgow defined the scope of his duties as follows: "to take control of the assets, to manage the company, to protect the interest of policy holders, and to do all things in relation to these duties." [Mem. in Opp'n, 09-31881-EPK DE 55 at 7.] The SVG Insurance Act, under which Mr. Glasgow was appointed, is silent on whether Mr. Glasgow's duty as judicial manager extends to general creditors. The SVG Insurance Act directs Mr. Glasgow to focus on the interests of policyholders. From this, Green Island asks the Court to conclude that other creditors are excluded from the process.

[7][8] For a proceeding to be collective within the meaning of section 101(23), it must be instituted for the benefit of creditors generally rather than for a single creditor or class of creditors. "A collective proceeding is one that considers the rights and obligations of all creditors. This is in contrast, for example, to a receivership remedy instigated at the request, and for the benefit, of a single secured creditor." *In re Betcorp Ltd.*, 400 B.R. 266, 281 (Bankr.D.Nev.2009). Section 1501 lists the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors" among chapter 15' s

primary objectives, lending further support to the proposition that a foreign proceeding must be for the general benefit of creditors. *In re Gold & Honey, Ltd.*, 410 B.R. 357, 370 n. 16 (Bankr.E.D.N.Y.2009) (quoting 11 U.S.C. § 1501(a)(3)). The Guide to Enactment suggests that a foreign proceeding must contemplate the "involvement of creditors collectively." Guide to Enactment ¶ 23.

[9][10] From the foregoing, the Court concludes that the word "collective" in section 101(23) contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action. Notice to creditors, including general unsecured creditors, may play a role in this analysis. In determining whether a particular foreign action is collective as contemplated under section 101(23), it is appropriate to consider both the law governing the foreign action and the parameters of the particular proceeding as defined in, for example, orders of a foreign tribunal overseeing the action.

#### Bahamas Proceeding

[11] When deciding whether to appoint a judicial manager under Bahamas law, Section 77(b) of the Bahamas Insurance Act directs the Bahamas Court to consider the effect of the debtor's financial condition on both policyholders and general creditors. Other provisions of the Bahamas Insurance Act state that BAICO's policyholders have priority over unsecured creditors, but this does not mean that Mr. Lopez, as judicial manager, has no duty to general creditors. While acknowledging the priority accorded to policyholders under Bahamas law, Mr. Lopez testified that he has a duty to general, unsecured creditors as well.

In the December Bahamas Order, the Bahamas Court found that limited reorganization and restructuring, followed by a \*903 winding up, "would be most advantageous to the general interest of the policyholders of BAICO, and also for creditors of BAICO," showing that the Bahamas Court considered the interests of creditors other than policyholders. The December Bahamas Order makes it clear that the Bahamas Court intends to oversee a winding up of BAICO after certain contemplated restructuring transactions. Section 91 of the Bahamas Insurance Act provides that in a winding up of BAICO "policyholders have a first priority on the assets of the company and shall rank above all unsecured creditors." Subject to such priority, unsecured creditors obviously are intended to take part in the winding up.

Enacted in 2005, the Bahamas Insurance Act is relatively new. Neither Green Island nor Mr. Lopez offered any case law interpreting the Bahamas Insurance Act. Brian Simms, who testified on behalf of Petitioners as an expert on Bahamas insolvency law, FN4 stated that a judicial manager safeguards the interests of both policyholders and other creditors. He testified that actions detrimental to the creditors alone, even if the policyholders are protected, may be sufficient for appointment of a judicial manager. The Court found Mr. Simms' testimony credible. In light of Mr. Simms' experience in the area of Bahamas insolvency law, including with insurance companies, the Court found his statements persuasive. Mr. Simms' testimony supplements the Court's conclusions based on a review of the relevant provisions of the Bahamas Insurance Act and orders entered in the Bahamas Proceeding.

FN4. Fed.R.Civ.P. 44. 1, made applicable to this bankruptcy proceeding by Fed. R. Bankr.P. 9017, provides: "A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."

Mr. Lopez testified that there will be a claims process when BAICO reaches the winding up stage. Although Mr. Lopez is not now soliciting claims, both he and Mr. Simms testified that Mr. Lopez is accepting claims of unsecured creditors when tendered.

Mr. Lopez acknowledged that there is no current requirement for notice to general unsecured creditors, either of his appointment or of actions brought before the Bahamas Court. However, Mr. Lopez testified that upon institution of the winding up phase for BAICO all policyholders and creditors identified in BAICO's books will receive required notice. Mr. Simms testified that Bahamas law allows parties, including creditors, to be heard in the judicial management process. He stated that section 82 of the Bahamas Insurance Act provides for parties to be heard in connection with the judicial manager's recommendations to the Bahamas Court.

In the Lopez Report, Mr. Lopez repeatedly addresses the interests of general, unsecured creditors of BAICO. Mr. Lopez ultimately projects that general creditors of BAICO will receive no distribution in the eventual winding up of the company due to the priority accorded to policyholders under Bahamas law. However, by addressing the potential distribution to other creditors Mr. Lopez acknowledges his overall duty to creditors in general.

From the foregoing, the Court concludes that the Bahamas Proceeding is collective in nature and satisfies this prong of the definition of foreign proceeding.

#### \*904 SVG Proceeding

[12] Although the SVG Insurance Act provides no guidance on this point, the petition seeking Mr. Glasgow's appointment by the SVG Court [BAICO Ex. 88], the SVG Order of Appointment, and the December SVG Order each contemplate the interests of both policyholders and unsecured creditors. In the petition requesting Mr. Glasgow's appointment, the Supervisor of Insurance stated that the appointment of a judicial manager was in the best interests of BAICO and that of its policyholders and creditors. [BAICO Ex. 88.] In the SVG Order of Appointment, the SVG Court authorized Mr. Glasgow "to pay any class of creditor and any claims, settlement, and expenses in full." [BAICO Ex. 86.] While this language appears in a paragraph addressing a variety of business concerns, including insurance issues, the quoted language is not limited to claims of or against policyholders. The same order empowers Mr. Glasgow to take all appropriate action in pending "legal or arbitration proceedings" by or against BAICO, of any type. In his role as judicial manager, Mr. Glasgow may be involved in litigation relating to claims other than those under BAICO's insurance policies. In the December SVG Order, the SVG Court accepted Mr. Glasgow's findings that the recommended course of action was "most advantageous to the policy-holders and creditors of [BAICO]." [BAICO Ex. 75.] The orders of the SVG Court make it clear that the court is considering the interests of non-policyholder creditors.

Neither Mr. Glasgow nor Green Island offered case law interpreting the SVG Insurance Act. Geoffrey Graham Bollers, a lawyer admitted to practice in SVG, testified on behalf of the Petitioners as an expert on SVG insolvency law. Mr. Bollers stated that Mr. Glasgow, as judicial manager, is charged to safeguard the interests of policyholders and unsecured creditors including trade creditors. He further testified that the reorganization scheme to be filed by Mr. Glasgow pursuant to the December SVG Order will be subject to input from other parties under the SVG Insurance Act. Mr. Bollers stated that creditors, including foreign creditors, may file claims. Mr. Bollers'

testimony was credible. In light of Mr. Bollers' experience with insolvency law in SVG, including insolvency of insurance companies, the Court found his statements persuasive. Mr. Bollers' testimony bolsters the other evidence reviewed above. The SVG Proceeding was instituted for the benefit of creditors generally and contemplates the involvement of creditors collectively.

Based on testimony of Mr. Lopez and Mr. Glasgow, multiple pending foreign actions relating to BAICO are being coordinated through the Bahamas Proceeding for the common benefit of BAICO's policyholders and other creditors. The SVG Proceeding is part of this unified process. The Court found that the Bahamas Proceeding is collective as contemplated under section 101(23). These facts support the conclusion that the SVG Proceeding is itself collective in nature.

Based on the foregoing, the Court determines that the SVG Proceeding is collective in nature, satisfying this prong of the definition of foreign proceeding.

#### 2. Judicial or Administrative

#### Bahamas Proceeding

[13] The Insurance Commission of The Bahamas petitioned the Bahamas Court pursuant to Section 77(1)(b) of the Bahamas Insurance Act for the appointment of Mr. Lopez as judicial manager. The Bahamas Insurance Act and the orders of the Bahamas Court show that the Bahamas Proceeding is a judicial proceeding.

#### \*905 SVG Proceeding

The SVG Supervisor of Insurance petitioned the SVG Court pursuant to Section 52 of the SVG Insurance Act for the appointment of Mr. Glasgow as judicial manager. The SVG Insurance Act and the orders of the SVG Court show that the SVG Proceeding is a judicial proceeding.

#### 3. Foreign Country

The Bahamas and SVG are foreign countries.

4. Under a Law Relating to Insolvency or Adjustment of Debt

[14] Both the Bahamas Insurance Act and the SVG Insurance Act require the relevant court to consider the solvency of the debtor and provide for the adjustment of debt through either a direct winding up or through appointment of a judicial manager.

5. Debtor's Assets and Affairs Subject to the Control and Supervision of a Foreign Court

#### Bahamas Proceeding

[15] Under section 79 of the Bahamas Insurance Act and the terms of the Bahamas Order of Appointment, Mr. Lopez has control over the assets and affairs of BAICO. The same section provides that Mr. Lopez acts under the supervision of the Bahamas Court.

## SVG Proceeding

Under section 53 of the SVG Insurance Act and the terms of the SVG Order of Appointment, Mr. Glasgow has control over the assets and affairs of BAICO in SVG. The same section provides that Mr. Glasgow acts under the supervision of the SVG Court.

### 6. For the Purpose of Reorganization or Liquidation

[16] The phrase "for the purpose of reorganization or liquidation" appears after a comma, at the end of the definition of "foreign proceeding" in <a href="section 101(23">section 101(23</a>). This phrase could relate to one of two concepts in the definition, either the law referenced earlier in the definition, or the subject foreign action itself. Since the definition of "foreign proceeding" already includes the requirement that the proceeding arise under "a law relating to insolvency or adjustment of debt," it would be redundant to conclude the phrase "for the purpose of reorganization or liquidation" also relates to the law governing the foreign action. The only reasonable conclusion is that the definition requires that the particular proceeding subject to recognition be "for the purpose of reorganization or liquidation."

#### Bahamas Proceeding

[17] Prior to the February 1, 2010 hearing in this case, Green Island objected to recognition of the Bahamas Proceeding on the ground that it was not for the purpose of reorganization or liquidation. Under the Bahamas Insurance Act, Mr. Lopez is required to submit a report to the Bahamas Court recommending one of several options outlined in the Bahamas Insurance Act. Bahamas Insurance Act § 81. The Bahamas Court then has the authority to direct whether the proceeding is one for liquidation, partial sale, or continuation of BAICO's business with or without conditions. *Id.* § 82. On the date of the chapter 15 petition here, Mr. Lopez had yet to file his report and the Bahamas Court had issued no order directing reorganization or liquidation. At that time, under the Bahamas Insurance Act, it was possible that the Bahamas Proceeding could be neither

a liquidation nor a reorganization; the Bahamas\*906 Proceeding could have been limited to an examination of BAICO with no further action required by Mr. Lopez or the Bahamas Court. Because the Bahamas Court had ordered neither a winding up nor a reorganization of BAICO, on the date of the chapter 15 petition here the Bahamas Proceeding was not "for the purpose of reorganization or liquidation" and therefore was not a "foreign proceeding."

After the filing of the Bahamas Petition, but prior to the February 1, 2010 hearing in this case, the Bahamas Court entered the December Bahamas Order. By the December Bahamas Order, the Bahamas Court accepted the core findings of Mr. Lopez that BAICO is insolvent and should be reorganized and restructured where possible and then wound up. In that order, the Bahamas Court directed Mr. Lopez: (1) to continue to negotiate with third parties to sell, transfer, or dispose of the insurance business, or other assets and liabilities of the branches and subsidiaries of BAICO; (2) to transfer or sell the shares of BAT; (3) to take steps to protect the assets of BAICO and its subsidiaries in the United States by obtaining recognition of the Bahamas Proceeding; (4) to effect the winding-up of BAICO's non-insurance subsidiaries; (5) to investigate related party and other antecedent transactions, the conduct of management and the directors of BAICO, and the conduct of third parties providing services to and conducting transactions with BAICO; (6) to commence legal proceedings against CL Financial in respect of sums presently due to BAICO; (7) to investigate the assets and liabilities of BAICO's Employee Pension Plan; and (8) to effect the transfer of data and systems from Trinidad to a new administrative hub. [BAICO Ex. 106.] The Bahamas Court determined that these actions should "take place prior to the commencement of formal winding-up proceedings" and ordered that these actions be taken "to simplify the eventual winding-up of BAICO." After entry of the December Bahamas Order, it appears without question that the Bahamas Proceeding is for the purpose of partial reorganization followed by liquidation.

At the continued evidentiary hearing on February 1, 2010, Green Island abandoned its argument that the Bahamas Proceeding was not for the purpose of reorganization or liquidation as of the chapter 15 petition date. Although not stated at the hearing, Green Island likely realized that in light of the December Bahamas Order a determination not to recognize the Bahamas Proceeding on this ground would have resulted only in a delay while Mr. Lopez filed a new chapter 15 petition.

[18] In any case, when determining whether a particular proceeding is for the purpose of reorganization or liquidation, it is appropriate for the Court to consider circumstances arising after the filing of the chapter 15 petition. If facts change after the petition date such that a foreign action formerly for the purpose of reorganization or liquidation loses such status, the Court would decline to recognize such a proceeding. The same logic should apply when, as here, the proceeding has become for the purpose of reorganization or liquidation after the chapter 15 petition date. This approach is consistent with the nature of the recognition process contemplated in sections 1518(1) and 1517(d), which allow for the court to adjust its ruling based on circumstances arising after recognition.

Based on the foregoing analysis, the Court determines that the Bahamas Proceeding satisfies all six components of the definition of "foreign proceeding" under the Bankruptcy Code.

## SVG Proceeding

Under the SVG Insurance Act, Mr. Glasgow is required to submit a report to the SVG Court recommending one of several\*907 options outlined in the SVG Insurance Act. SVG Insurance Act § 54(1). The SVG Court is not bound to accept Mr. Glasgow's recommendation. Id. § 55(1)(b). The SVG Court then has the authority to direct whether the proceeding is one for liquidation, partial sale, or continuation of BAICO's business with or without conditions. On or about October 9, 2009, Mr. Glasgow submitted the Glasgow Report to the SVG Court as required by the SVG Insurance Act. About six weeks later, on November 23, 2009, Mr. Glasgow filed the SVG Petition with this Court. On the date of the chapter 15 petition here, the SVG Court had issued no order directing reorganization or liquidation. As of that date, under the SVG Insurance Act, it was possible that the SVG Proceeding could be neither a liquidation nor a reorganization; the SVG Proceeding could have been limited to an examination of BAICO with no further action required by Mr. Glasgow or the SVG Court. Because the SVG Court had ordered neither a winding up nor a reorganization of BAICO, on the date of the chapter 15 petition here the SVG Proceeding was not "for the purpose of reorganization or liquidation" and therefore was not a "foreign proceeding."

About four weeks after Mr. Glasgow filed the SVG Petition, on or about December 18, 2009, the SVG Court entered the December SVG Order. The December SVG Order accepted Mr. Glasgow's recommendations and directed a reorganization of BAICO pursuant to a scheme, or

plan of reorganization, to be filed by Mr. Glasgow. The SVG Court ordered, pursuant to section 54(2) of the SVG Insurance Act, that: (1) there be a reorganization of BAICO by the transfer of its insurance and investment business to a new company in pursuant of a scheme of arrangement to be prepared in accordance with section 56 of the SVG Insurance Act; (2) the scheme prepared in accordance with the SVG Insurance Act be a plan making provision for the funding of a new company; (3) Mr. Glasgow is authorized to work with other judicial managers or persons similarly appointed, the governments of the Organisation of Eastern Caribbean States, and the Eastern Caribbean Central Bank, to develop such a scheme and make arrangements for any required funding; (4) Mr. Glasgow shall consider and do all things necessary with respect to the establishment of the new company and the transfer of assets and liabilities of BAICO into the new company; and (5) Mr. Glasgow is to continue to negotiate with third parties to sell or dispose of BAICO's property and health insurance business and to take such action that may be required to effect such sales or disposals subject to the approval of the SVG Court.

[19] As with the Bahamas Proceeding, Green Island no longer argues that the timing of the December SVG Order, entered the month following the SVG Petition here, necessitates denial of recognition. The Court considers the impact of the December SVG Order, even though entered after the chapter 15 petition date, for the same reasons stated above in connection with the Bahamas Proceeding. Instead, Green Island argues that the SVG Proceeding pertains to only one of BAICO's branch operations, that the SVG Proceeding cannot by itself result in a reorganization or liquidation of BAICO as a whole, and that the SVG Proceeding is thus not for the purpose of reorganization or liquidation. In short, Green Island argues that for a foreign action to be recognized under chapter 15 it must have comprehensive impact on the debtor such that it could result in an overall reorganization or winding up of the debtor.

Green Island's reading of the requirement that the proceeding be for the purpose of reorganization or liquidation is unduly\*908 narrow. Chapter 15 recognizes that the scope of a foreign nonmain proceeding may be less than all encompassing. Section 1521(c) directs the bankruptcy court to take into account the potential limited impact of the foreign nonmain proceeding in fashioning post-recognition relief. If the court were to recognize a foreign nonmain proceeding only where the proceeding, by itself, could result in a wholesale reorganization or liqui-

dation of the debtor, <u>section 1521(c)</u> would be unnecessary.

It is possible that a foreign nonmain proceeding could be the center of a complete restructuring or liquidation of a debtor. This may occur, for example, where the proceeding is pending in the country of the debtor's formation, that country's law allows for a comprehensive reorganization or winding up based solely on the debtor's formation there, the debtor maintains some non-transitory economic activity in that country, but the debtor's center of main interest is elsewhere. Based on Green Island's argument, this is the only instance where a bankruptcy court should recognize a foreign nonmain proceeding.

Green Island's restricted view would deny recognition to the majority of potential nonmain proceedings. A foreign main proceeding, by definition pending in the country where the debtor has its center of main interest, is likely the primary tool for a reorganization or liquidation of the debtor. A foreign nonmain proceeding for the same debtor is most likely ancillary to the foreign main proceeding, intended to address operations, assets, and liabilities in the country where the foreign nonmain proceeding is pending. In many international insolvency matters, both types of proceedings are necessary to obtain a comprehensive reorganization or liquidation of the debtor. Consistent with the objective of "fair and efficient administration of cross-border insolvencies," 11 U.S.C. § 1501(a)(3), chapter 15 contemplates recognition of no more than one main proceeding and any combination of nonmain proceedings for the same debtor. To require that each of these foreign proceedings, main and nonmain, be able to result in a global reorganization or liquidation is not consistent with the structure of chapter 15.

Based on the foregoing analysis, the Court determines that the SVG Proceeding satisfies all six components of the definition of "foreign proceeding" under the Bankruptcy Code.

#### **B.** Foreign Main Proceeding

[20] Mr. Lopez requests that the Court recognize the Bahamas Proceeding as a foreign main proceeding. The term "foreign main proceeding' means a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4). The concept "center of its main interests" is often shortened to "COMI." "In the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debt-

or's main interests." 11 U.S.C. § 1516(c). Because there is substantial evidence in this case that BAICO's COMI is not in the Bahamas, the presumption under section 1516(c) is rebutted here. Mr. Lopez bears the burden of proof to establish BAICO's COMI. *In re Tri–Continental Exch. Ltd.*, 349 B.R. 627, 635 (Bankr.E.D.Cal.2006).

[21] Neither the Bankruptcy Code nor the Guide to Enactment define COMI. Several courts have likened COMI to the "principal place of business" concept under United States law. *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 129 (citation omitted). United States case law exhibits a developing consensus on the factors\*909 for determination of a debtor's COMI. Courts typically consider the following:

- 1. The location of the debtor's headquarters;
- 2. The location of those who actually manage the debtor (which may be the headquarters of a holding company);
  - 3. The location of the debtor's primary assets;
- 4. The location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and
- 5. The jurisdiction whose law would apply to most disputes.

<u>In re Bear Stearns High-Grade Structured Credit</u> <u>Strategies Master Fund, Ltd., 374 B.R. at 128</u> (citation omitted). These are not exclusive factors, nor must they all be met in each case.

[22][23] Courts also consider the expectations of third parties with regard to the location of a debtor's COMI. The Guide to Enactment explains that the Model Law concept of COMI comes from the European Union Convention on Insolvency Proceedings. Guide to Enactment ¶ 31; *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.,* 374 B.R. at 129. The European Union Convention on Insolvency Proceedings describes COMI as "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.,* 374 B.R. at 129 (quoting Council Reg. (EC) No. 1346/2000, P 13).

Similarly, under chapter 15, "it is important that the debtor's COMI be ascertainable by third parties." *In re Betcorp Ltd.*, 400 B.R. 266, 291 (Bankr.D.Nev.2009). "COMI is affected not only by what a debtor does, but by what a debtor is perceived as doing." *Id.* (citation omitted).

Because the location of a debtor's COMI may change over time, the Court must determine the date on which to apply the COMI analysis. The Petitioners ask the Court to determine COMI as of the filing of their Petitions with this Court. Green Island suggests that the determination should be made as of the date each Petitioner was appointed in the underlying foreign proceedings or, alternatively, that the Court should consider the operational history of BAICO prior to the appointment of the Petitioners in the Bahamas and SVG.

Two bankruptcy courts have addressed the timing of the COMI determination in detail. In each case, the court determined that COMI should be analyzed as of the date of the chapter 15 petition. *In re Betcorp* involved an internet gambling business organized in and operated from Australia but that did business primarily with residents of the United States. 400 B.R. 266 (Bankr.D.Nev.2009). The liquidator in a voluntary winding up under Australia law requested recognition so as to obtain a stay of litigation in the United States, among other things. The objecting creditor argued that the bankruptcy court should consider the operational history of Betcorp, pointing to Betcorp's substantial course of business in the United States prior to the liquidation proceeding and the presence of a significant creditor here. In rejecting a historical analysis for the COMI determination, the <u>Betcorp</u> court expressed concern for the possibility of conflicting COMI determinations in various countries arising from different analyses of a debtor's historical activities. At the time of the chapter 15 petition in *Betcorp*, the Australian liquidator had been in place for more than a year, the debtor had no employees other than those retained by the liquidator, and the liquidator had possession of the debtor's only asset, cash in an Australian bank account. Even if Betcorp's\*910 COMI had at some prior time been located outside Australia, it had moved to Australia in the substantial time after the liquidator's appointment.

The <u>Betcorp</u> decision cites extensively to another bankruptcy court opinion, <u>In re Ran</u>, 390 B.R. 257 (Bankr.S.D.Tex.2008), aff'd, <u>Lavie v. Ran</u>, 406 B.R. 277 (S.D.Tex.2009). The petitioner in <u>Ran</u>, an Israeli bankruptcy trustee, argued that the United States bankruptcy court should consider Mr. Ran's historical ties to Israel, and

find his COMI in Israel, in spite of the fact that Mr. Ran had lived in the United States for more than a decade and had no interests in Israel at the time of the chapter 15 petition. In ruling that the chapter 15 petition date is the appropriate time for the COMI determination, as in *Betcorp*, the *Ran* court based its decision primarily on a desire to maintain international uniformity in the determination of a debtor's COMI.

Chapter 15 itself provides guidance on the temporal focus of the COMI analysis. Under section 1517(b)(1), a foreign proceeding is recognized "if it is pending in the country where the debtor *has* the center of its main interests." (emphasis added). This phrase is stated in the present tense. A chapter 15 case is commenced by the filing of a petition for recognition under section 1504. The present, for purposes of a court making a determination under section 1517(b)(1), can be no earlier than the date the chapter 15 petition was filed.

[24] The text of chapter 15 supports making the COMI determination as of the date the court rules on the issue. Section 1518(1) requires that after recognition a foreign representative must promptly file notice with the court of "any substantial change in the status of such foreign proceeding or the status of the foreign representative's appointment." Section 1517(d) authorizes the court to modify or terminate recognition based on changed circumstances. These provisions exhibit a policy that the recognition process remain flexible, taking into account the actual facts relevant to the court's decision rather than setting an arbitrary determination point. In light of these provisions, if the location of a debtor's COMI changes between the date a chapter 15 petition is filed and the date a court makes a determination on recognition, the court may look to the facts on the latter date for purposes of COMI.

Selecting the latest possible date for the COMI analysis is consistent with the aim of international uniformity stressed in *Ran* and *Betcorp*. Over time, the circumstances affecting recognition may change. Guide to Enactment ¶ 130. If all recognition proceedings, wherever pending, consider the latest available evidence, there is a greater likelihood that the appropriate foreign main and foreign nonmain proceedings will be recognized as such in a consistent manner.

In the present case, the facts relevant to the determination of COMI remained essentially unchanged from the date of the Bahamas Petition through the close of the presentation of evidence.

[25] The Court first considers evidence with regard to the location of BAICO's headquarters. Mr. Lopez argues that BAICO's headquarters is in the Bahamas because Mr. Lopez is in the Bahamas. Mr. Lopez oversees BAICO's business activity under the Bahamas Order of Appointment, has legal custody and control over BAICO's business records (but not necessarily physical custody), and makes all high level business decisions for BAICO from his office in the Bahamas. The Bahamas Order of Appointment empowers Mr. Lopez to take certain actions such as hire and fire employees, remit salaries, incur and pay expenses for the running, administration and management of BAICO's\*911 affairs and offices, and generally carry on all or any part of BAICO's business so far as may be necessary to preserve the value of BAICO. The evidence shows that Mr. Lopez's activities since appointment include the retention of numerous lawyers and accountants, the investigation of assets and liabilities of BAICO, the preparation and filing of the Lopez Report, and overseeing the sale of certain of BAICO's assets. BAICO's entire board of directors resigned prior to Mr. Lopez's appointment as judicial manager. Mr. Simms testified that Mr. Lopez effectively replaced the board of directors of BAICO.

The headquarters of a corporate entity is more than the location of its board of directors. The term headquarters, or head office, contemplates the place where the primary management of an entity's business is undertaken. Management of a corporate entity includes all relevant business functions, such as the financial, administrative, marketing, information technology, investment, and legal functions. Other functions may be relevant depending on the nature of the debtor's business. Here, because BAICO operated as an insurance company, actuarial tasks, underwriting, and claims adjustment should be considered.

The overwhelming evidence presented in this case shows that BAICO's headquarters is not in the Bahamas. In 2005, long prior to the commencement of the Bahamas Proceeding, BAICO entered into the Services Agreement with BA Management, a wholly-owned subsidiary of BAICO located in Trinidad. Under the Services Agreement, BAICO outsourced essentially all of its central management to BA Management. These functions include all financial, administrative, marketing, information technology, investment, actuarial, legal, policy administration, and claims processing for BAICO. BA Management continues to perform all of the same functions for BAICO. Although he plans to move these services to the

Bahamas, Mr. Lopez's own report states that BAICO's administrative hub remains in Trinidad. [BAICO Ex. 103 at 216.] The Glasgow Report confirms this fact, going so far as to describe the SVG branch as a "local branch sales and administrative unit supported by a group service company, [the Trinidad Subsidiaries]." [BAICO Ex. 77 at 58.]

In spite of the breadth of management tasks delegated to BA Management, the Petitioners try to distance BAICO from Trinidad. They argue that BAICO has no branch operations in Trinidad, where it acts only through subsidiaries, that BAICO itself does not have an insurance license in Trinidad, and that BAICO has no physical assets in Trinidad in its own name. Petitioners ask the Court to ignore the Services Agreement, and the fact that BA Management continues to perform nearly all central business functions of BAICO, on the ground that BAICO undertakes these functions through an agent, BA Management, rather than in its own name. This arrangement is not unusual. BA Management is a wholly-owned subsidiary of BAICO, which is in turn owned almost entirely by CL Financial. Both CL Financial and BA Management are located in Trinidad. It is not surprising that CL Financial centralized all of BAICO's management tasks near CL Financial's own place of business. It is also not surprising that CL Financial did not set up BAICO's management hub in the Bahamas. For a significant time prior to Mr. Lopez's appointment, BAICO had no tie to the Bahamas other than was absolutely necessary to maintain its corporate existence and insurance license. The Court is not troubled by the fact that BAICO acted and continues to act primarily through a subsidiary. By its nature, a corporate entity \*912 must carry out its business through employees or agents. It makes no difference that the agent in this case is another corporate entity, and a subsidiary of BAICO, or that BA Management's employees undertake such tasks for BAICO. Indeed, it appears that BA Management's sole purpose was to perform management tasks for BAICO and its related entities to obtain a positive tax benefit for BAICO.

Next, the Court considers the location of those who actually manage BAICO. While a corporate entity is overseen by a board of directors, in larger organizations the day to day management typically is undertaken by others. A board of directors provides guidance and oversight; others operate the business. The evidence addressed immediately above in review of BAICO's headquarters is equally relevant here. While Mr. Lopez acts in place of a board of directors for BAICO, all of the day to day activity,

including all of the primary business functions, remains in Trinidad. Employees of BA Management continue to manage the affairs of BAICO under the terms of the Services Agreement. Mr. Lopez supervises those functions. As suggested in the Lopez Report, Mr. Lopez may in the future move BAICO's administration to the Bahamas. In the meantime, the primary management activities of BAICO continue to take place in Trinidad. For the reasons stated above, it does not matter that these functions are performed through the employees of a wholly-owned corporate agent.

The Court also considers the location of BAICO's primary assets. From the undisputed evidence presented in the Lopez Report, the majority of BAICO's assets is located in the EC Branches and not in the Bahamas.

The Court considers the location of the majority of BAICO's creditors and the jurisdiction whose law would apply to most disputes. The Lopez Report shows that more than 77% of BAICO's liabilities are associated with the EC Branches. About 21 % of BAICO's liabilities are associated with "BAICO stand-alone" in part because BAICO's books do not allow attribution to any particular branch or subsidiary. BAICO has not written insurance policies in the Bahamas since 1997. Since that time, BAICO wrote policies and conducted business in numerous Caribbean countries other than the Bahamas. Prior to Mr. Lopez's appointment, BAICO's activities in the Bahamas were limited to those acts necessary to maintain its corporate existence and licensing. The Court concludes that BAICO's creditors exist primarily outside the Bahamas. Because BAICO did not do business in the Bahamas for an extended period of time, and BAICO's creditors exist mostly outside the Bahamas, it is unlikely that creditors would bring suit in the Bahamas. From the evidence presented, it appears that policyholders and other creditors dealt with local branch offices and subsidiaries, outside the Bahamas, have been directed after Mr. Lopez's appointment to continue to deal with their local offices, and likely would pursue any claims in the locations of those offices. It appears unlikely that the law of the Bahamas would govern most disputes.

The location of a debtor's COMI should be readily ascertainable by third parties. For an extended period prior to Mr. Lopez's appointment, BAICO did not issue policies in the Bahamas or to Bahamas residents, it had no bank accounts in the Bahamas, BAICO's claims adjustment and processing took place entirely outside the Bahamas, and it had no directors or employees in the Bahamas. From the

perspective of policyholders and creditors, little changed after Mr. Lopez's appointment. When Mr. Lopez was appointed, he updated the BAICO web site to reference his appointment and informed regulators and certain other parties of his appointment.\*913 To facilitate performance of his duties as judicial manager, he opened bank accounts for BAICO in the Bahamas and retained counsel and accountants. Based on the evidence presented, including the Lopez Report, policyholders and creditors continue to deal with their local branch offices and BAICO subsidiaries, all in countries other than the Bahamas. Mr. Lopez's notice on the BAICO web site directs parties to deal with their local offices, outside the Bahamas. There is little reason for BAICO's policyholders and other creditors to believe BAICO has its center of main interest—the hub of its business operations—in the Bahamas.

Mr. Lopez argues that the Court may determine BAICO has its COMI in the Bahamas based on BAICO's insurance license and registration in the Bahamas, the regulation of BAICO in the Bahamas, Mr. Lopez's appointment and the broad powers conferred on him in the Bahamas Order of Appointment, and his initial activity as judicial manager including the retention of professionals, investigatory work, and the Lopez Report. The petitioners in *Bear Stearns* made similar arguments.

The debtors in *Bear Stearns* had no employees or managers in the Cayman Islands, where the liquidation proceeding was pending. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 337-38 (S.D.N.Y.2008) (citation omitted). A New York investment manager managed the debtors' affairs. All of the debtors' administrative functions took place in the United States rather than the Cayman Islands. All of the debtors' books and records, other than required corporate records, were maintained in the United States. Prior to the petitioners' appointment in the Cayman Islands, all of the petitioners' liquid assets were located in the United States, although the petitioners redirected the debtors' funds to accounts in the Cayman Islands after their appointment. Other than related entities, the petitioners' sole investor was a United Kingdom entity. Accounts due to the debtors were located outside the Cayman Islands. None of the debtors' contract counterparties were located in the Cayman Islands. Id. Evidence of pre-appointment legal and auditing work in the Cayman Islands did not sway the court. Based primarily on these facts, the court in Bear Stearns declined to recognize the Cayman Islands proceeding.

The facts presented by Mr. Lopez in this case are substantially identical to those presented in *Bear Stearns*. BAICO had no directors, managers, or other employees in the Bahamas at the time of Mr. Lopez's appointment. A Trinidad based, wholly-owned subsidiary managed BAICO's affairs and still does. Other than the location of its registered office, limited professional representation, and Mr. Lopez's oversight, all of BAICO's administrative functions take place in Trinidad rather than in the Bahamas. None of BAICO's books and records, other than required corporate records, were maintained in the Bahamas. Prior to Mr. Lopez's appointment, none of BAICO's liquid assets were located in the Bahamas, although he established accounts in the Bahamas after his appointment. There is no evidence to show that BAICO has any material creditors in the Bahamas. Other than Mr. Lopez's appointment, BAICO's contacts with the Bahamas are limited to those necessary to retain its charter and insurance license.

The petitioners in <u>Bear Stearns</u> were "exempted" companies under Cayman Islands law, a status that prevented them from doing business with parties within the Cayman Islands. <u>In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.</u>, 374 B.R. 122, 132 (Bankr.S.D.N.Y.2007), aff'd, \*914389 B.R. 325 (2008) (citing Companies Law (2004 Revision) of the Cayman Islands § 193). BAICO simply did not do business in the Bahamas. There is no difference for purposes of the COMI determination.

[26] Mr. Lopez argues that BAICO is subject to Bahamas insurance regulation law and should be restructured and wound up in the Bahamas. Mr. Lopez states that upon his appointment he supplanted BAICO's board of directors and all corporate control was ceded to him. Like the court in *Bear Stearns*, this Court finds that "[t]hese allegations do not constitute substantive economic activity" in the Bahamas. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. at 338; accord In re SPhinX, Ltd., 351 B.R. 103, 119 (Bankr.S.D.N.Y.2006) ("In light of the foregoing principles, important objective factors point to the SPhinX Funds' COMI being located outside of the Cayman Islands. As far as the administration of the Debtors' interests is concerned, the SPhinX Funds' hedge fund business was conducted by PlusFunds outside of the Cayman Islands, as were most of the SPhinX Funds' back-office operations, by DPM. The only business done in the Cayman Islands apparently was limited to those steps necessary to maintain the SPhinX Funds in good standing as registered Cayman

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Islands companies and certain SPhinX Funds as SPCs. There were no employees or managers in the Cayman Islands, and the Debtors' boards, which contained no Cayman Islands residents, never met in the Cayman Islands.")

Based on the facts presented, the Court determines that BAICO's formation and regulation in the Bahamas and Mr. Lopez's actions as judicial manager do not constitute sufficient acts to establish BAICO's COMI in the Bahamas. The Court does not conclude that the actions of a foreign representative, such as the judicial manager here, could never be considered evidence in support of a finding of COMI. There may be instances where a foreign representative remains in place for an extended period, and relocates all of the primary business activities of the debtor to his location (or brings business to a halt), thereby causing creditors and other parties to look to the judicial manager as the location of a debtor's business. This could lead to the conclusion that the center of its main interest has become lodged with the foreign representative. The court in **Betcorp** considered similar facts in determining that a debtor's COMI was in the place where the liquidation was pending. In re Betcorp Ltd., 400 B.R. 266, 292-93 (Bankr.D.Nev.2009). While Mr. Lopez could take action to move BAICO's COMI to the Bahamas, and it appears from the Lopez Report that he may do so, he has not done so yet. The primary components of BAICO's business, which directly touch policyholders and other creditors, still occur entirely outside the Bahamas.

For the foregoing reasons, the Court determines that BAICO does not have the center of its main interest in the Bahamas and the Bahamas Petition is not a foreign main proceeding.

### C. Foreign Nonmain Proceeding

Bahamas Proceeding

[27] In the alternative, Mr. Lopez requests that this Court recognize the Bahamas Proceeding as a foreign nonmain proceeding. The term "foreign nonmain proceeding' means 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). "[E]stablishment' means any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2). "Establishment' has been described as a "local place of business."\*915 In re Bear Stearns High-Grade Structured Credit Strategies Master Fund,

Ltd., 374 B.R. at 131. To further define establishment, courts look to the Model Law and the sources used to promulgate it. "Per the [European Union's Convention on Insolvency Proceedings]'s legislative history, a 'place of operations' referred to 'a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional." Lavie v. Ran, 406 B.R. 277, 284 (S.D.Tex.2009) (citing Council, Report on the Convention on Insolvency Proceedings, at 49, No. 6500/96).

[28] Unlike with the determination of COMI, chapter 15 provides no evidentiary presumption in connection with the determination of whether a debtor has an establishment in a particular jurisdiction. The petitioner has the burden of proof on whether a debtor has an establishment in the country of the foreign proceeding.

[29] Whether the debtor has an "establishment" in a country must be determined at the time of the filing of the chapter 15 petition.

The use of the present tense [in section 1502(5) and section 1502(2)] implies that the court's establishment analysis should focus on whether the debtor has an establishment in the foreign country when the foreign representative files for recognition under Chapter 15.... Because courts undertake the establishment analysis when the foreign representative files for recognition, it follows that the court should weigh only the evidence as it exists at the time of filing in the U.S. court.

# Lavie v. Ran, 406 B.R. at 284-85.

[30] To have an establishment in a country, the debtor must conduct business in that country. The location should constitute a "seat for local business activity" for the debtor. *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 131. The terms "operations" and "economic activity" require showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property.

It is undisputed that at the time of the Bahamas Petition, BAICO had no business operation in the Bahamas other than the judicial manager's activities pursuant to his appointment. BAICO does not presently do business in the Bahamas. Mr. Lopez's retention of counsel and accountants, investigation of assets and liabilities, and reporting to the Bahamas Court, do not constitute business activities of

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BAICO. The court in <u>Bear Stearns</u> rejected this same argument in finding that the petitioners failed to prove an establishment in the Cayman Islands. <u>389 B.R. at 339</u>; accord <u>Lavie v. Ran</u>, 406 B.R. 277, 286 (S.D.Tex.2009) ("From the outset, it stretches credulity to view a bankruptcy proceeding as an industrial or professional activity.... Further, though a bankruptcy proceeding does pertain to economic matters, it does not comport with traditional notions of economic activity in the marketplace.")

As one court observed, finding an establishment based solely on the existence of an insolvency proceeding poses two problems.

First, by definition, an insolvency proceeding is a transitory action. WEBSTER'S NEW INTERNATIONAL DICTIONARY 2692 (2d ed.1939) (defining "transitory action" as "[a]n action which may be brought in any county, [such] as actions for debt, etc."). Transitory actions are tied to the person, rather than a location. *See* BLACK'S LAW DICTIONARY 34 (8th ed.2004) (observing that transitory actions are "universally founded on the supposed \*916 violation of rights which, in contemplation of law, have no locality"). In stark contrast, the concept of establishment is location-oriented, in that it focuses on the "place of operations" in which the activity occurs. It would seem an odd result to permit a transitory action to suffice as the basis for finding nontransitory economic activity.

Second, if the proceeding and associated debts, alone, could suffice to demonstrate an establishment, it would essentially rule out the possibility that any proceeding would fall into the third, more nebulous category of proceedings that are neither foreign main nor foreign nonmain. But, this third category was clearly envisioned by the drafters. Therefore, such an interpretation would be contrary to statutory intent and thus violate a key canon of statutory interpretation.

#### Lavie v. Ran, 406 B.R. at 286-87.

The Court determines that BAICO does not have an establishment in the Bahamas and thus does not recognize the Bahamas Proceeding as a foreign nonmain proceeding.

#### SVG Proceeding

[31] At the February 1, 2010 hearing, Green Island conceded that the SVG proceeding is pending in a country where BAICO has an establishment as defined in chapter 15. The evidence shows that BAICO has property in SVG

where it conducts business, retains employees at its SVG branch who perform insurance business activity, maintains accounts in SVG relating to its insurance business in that country, and has existing policyholders in SVG. BAICO is involved in financial transactions in the local SVG market. BAICO has a place of operations in SVG where it conducts non-transitory economic activity. Consequently, the Court will recognize the SVG Proceeding as a foreign nonmain proceeding.

#### IV. ORDER

Accordingly, it is ORDERED that:

- 1. The request for recognition of the Bahamas Proceeding as a foreign main proceeding or, in the alternative, a foreign nonmain proceeding, is DENIED.
- 2. The request for recognition of the SVG Proceeding as a foreign nonmain proceeding is GRANTED.
- 3. Petitioner for the SVG Proceeding requested relief under 11 U.S.C. § 1521. The Court will conduct a further hearing to address such request. Pursuant to 11 U.S.C. § 1521(a)(6), the interim relief previously granted under 11 U.S.C. § 1519 will remain in effect subject to order of the Court.

Bkrtcy.S.D.Fla.,2010. In re British American Ins. Co. Ltd. 425 B.R. 884, 52 Bankr.Ct.Dec. 286, 22 Fla. L. Weekly Fed. B 390

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# **EXHIBIT 4**



C

Only the Westlaw citation is currently available.

United States Bankruptcy Court,
D. Delaware.
In re **ELPIDA** MEMORY, INC., Debtors.

No. 12–10947 (CSS). Nov. 16, 2012.

Richard, Layton & Finger, P.A., <u>Mark D. Collins</u>, <u>Paul N. Heath</u>, <u>Lee E. Kaufman</u>, Wilmington, DE, Davis Polk & Wardwell, LLP, <u>James I. McClammy</u>, <u>Giorgio Bovenzi</u>, New York, NY, <u>Theodore A. Paradise</u>, Tokyo, Japan, for Foreign Representatives.

Landis, Rath & Cobb, LLP, <u>Adam G. Landis</u>, <u>Matthew B. McGuire</u>, Wilmington, DE, for Micron Technology.

White & Case, LLP, <u>Christopher J. Shore</u>, <u>Lydia E. Lin</u>, New York, NY, Fox Rothschild, LLP, <u>Jeffrey M. Schlerf</u>, Wilmington, DE, for the Steering Committee of the Ad Hoc Group of Bondholders.

Bifferato, LLP, Tom Driscoll, Wilmington, DE, for Rambus.

# OPINION FNI

<u>FN1.</u> This Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

### CHRISTOPHER S. SONTCHI, Judge.

#### INTRODUCTION

\*1 The issue before the Court, which appears to be a matter of first impression, is what legal standard applies in a Chapter 15 case to the transfer of assets located in the United States pursuant to a "global" transaction previously approved by another Court in a foreign main proceeding. Based upon the plain meaning of the statue supported by the legislative history, this Court must review the transaction to the extent it impacts assets located in the United States under the legal standards governing a transfer by a trustee outside the ordinary course of business, i.e., is the transaction a sound exercise of the trustee's business

judgment.

#### **JURISDICTION**

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (M), (N) and (O).

# STATEMENT OF FACTS FN2

FN2. The Court has scheduled a hearing on the Rambus Motion and Micron Motion (as defined below) for December 5–6, 2012. Given the necessity that a ruling on the applicable legal standard be entered sufficiently prior to the hearing so that counsel can properly prepare the case for trial, this Court has undertaken to issue this opinion on an expedited basis. As such, the Statement of Facts is not as thorough as the Court would prefer but believes it is sufficient to resolve the issues presently before it.

On February 27, 2012, **Elpida** Memory, Inc. ("**Elpida**") filed a petition for commencement of corporation reorganization proceedings under the Japan Corporate Reorganization Act (Kaishu Kosei Ho) in the Tokyo District Court, Civil Division (the "Tokyo Court"). On March 23, 2012, the Tokyo Court entered its Court Decision on Commencement of Reorganization Proceeding dated March 23, 2012 (the "Commencement Order"). The Commencement Order appointed Messrs. Yukio Sakamoto and Nobuaki Kobayashi as trustees ("Trustees") for **Elpida's** corporate reorganization proceeding in Japan. On March 23, 2012, the Tokyo Court also appointed Mr. Atsushi Toki as examiner of **Elpida**.

On March 19, 2012, Mr. Sakamoto filed a verified petition pursuant to sections 1504 and 1515 of the Bankruptcy Code commencing this chapter 15 case. On March 21, 2012, the Court entered the Order Granting Provisional Relief, Scheduling Recognition Hearing and Specifying Form and Manner of Notice Pursuant to Sections 105(a) and 1519 of the Bankruptcy Code [Docket No. 25]. On April 24, 2012, the Court entered its Order Pursuant to U.S.C. §§ 105, 1504, 1515, 1517, 1520, and 1521 Recognizing Foreign Representatives and Foreign Main Pro-

ceeding [Docket No. 65] (the "Recognition Order"). Under the Recognition Order, the Court recognized **Elpida's** reorganization proceeding in the Tokyo Court as a "foreign main proceeding" and Messrs. Sakamato and Kobayashi as **Elpida's** foreign representatives (the "Foreign Representatives"). FN3

FN3. Messrs. Sakamato and Kobayashi are both the Trustees of Elpida in the Japan proceeding and the Foreign Representatives of Elpida in the Chapter 15 proceeding. Even though they are the same persons they have different jobs. The Court will refer to these gentlemen as Trustees in connection with actions in Japan and Foreign Representatives for actions in this Court.

In mid-September, the Foreign Representatives filed four motions under section 363 of the Bankruptcy Code seeking authorization to enter into four related transactions: (i) Foreign Representatives' Motion for Approval of the Pledge of Certain United States Registered Patents to Apple Inc. [Docket No. 157] (the "Apple Motion"); (ii) Foreign Representatives' Motion for Approval of Security Agreements in Connection with Obtaining Postpetition Financing [Docket No. 143] (the "DIP Financing Motion"); (iii) Foreign Representatives' Motion to Approve Sale of Certain Patents to Rambus Inc. [Docket No. 163] (the "Rambus Motion"); (iv) Foreign Representatives' Motion to Approve Patent License Agreement and Technology Transfer and License Agreement [Docket No. 165] (the "Micron Motion," collectively, the "363 Motions"). All of the transactions under the 363 Motions had been previously approved by the Tokyo Court.

\*2 The Steering Committee of the Ad Hoc Group of Bondholders (the "Steering Committee") initially objected to all of the 363 Motions but subsequently withdrew (reluctantly) its objection to the Apple Motion and the DIP Financing Motion. The Court entered orders granting those motions on October 31, 2012. FN4 The Steering Committee continues to object to the Rambus Motion and the Micron Motion.

FN4. Order Approving Pledge of Certain United States Registered Patents to Apple Inc. [Docket No. 249]; and Order Approving Security Agreements In Connection With Obtaining DIP Financing [Docket No. 250].

The Foreign Representatives also filed related motions under <u>section 107(b)</u> of the <u>Bankruptcy Code</u> to redact

confidential information related to the 363 Motions. The motions to seal in connection with the DIP Financing Motion and Apple Motion were granted without objection. In addition, the motion to seal in connection with the Rambus Motion was withdrawn. The Steering Committee continues to object to the Foreign Representatives' Motion Pursuant to Section 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Rule 9018–1 for Authority to (A) Redact Certain Portions of, and (B) File Under Seal Certain Exhibits to, Foreign Representatives' Motion to Approve Patent License Agreement and Technology Transfer and License Agreement [Docket No. 166] (the "Micron Motion to Seal").

In connection with the Rambus Motion, **Elpida** is selling certain of its patents, some of which are registered in the United States, to Rambus Inc. ("Rambus") under a Patent Purchase Agreement ("PPA"). Under the PPA, Rambus is granting **Elpida** a royalty-free, perpetual license to **Elpida**. The PPA was approved by the Japanese Court on August 10, 2012.

In connection with the Micron Motion, **Elpida** is granting Micron Technology Inc. ("Micron") a license in the patents being sold to Rambus under a Patent License Agreement ("PLA"). Under a sponsorship arrangement between Elpida and Micron that was approved in Japan on July 2, 2012 (and which is not before this Court), the patents cannot be sold to Rambus absent Micron's consent. Micron agreed to consent to the Rambus patent sale, provided that Elpida provide Micron with a non-exclusive, royalty-free, non-sublicensable, perpetual and irrevocable license to the Rambus patents. The PLA was approved by the Japanese Court on August 10, 2012. Earlier, on July 12, 2012, the Japanese Court approved a related Technology Transfer and License Agreement ("TTLA") between **Elpida** and Micron. The PPA, PLA and TTLA all include a transfer of Elpida's property located within the territorial jurisdiction of the United States.

Elpida's reorganization proceeding before the Tokyo Court has continued to move forward, albeit with the opposition of certain of Elpida's bondholders (the "Japanese Bondholders"). On August 14, 2002, the Japanese Bondholders submitted to the Tokyo Court a competing plan proposal (the "Japanese Bondholders' Plan"), pursuant to the Commencement Order authorizing, "reorganization creditors" to submit reorganization plan proposals. On August 21, 2012, Elpida's Trustees submitted to the Tokyo Court a reorganization plan proposal (as amended, the "Trustees' Plan"), pursuant to the Commencement Order

authorizing the Trustees to submit a reorganization plan proposal.

\*3 On October 29, 2012, the Examiner issued his opinion regarding the Trustees' Plan. Immediately thereafter, on October 31, 2012, the Tokyo Court entered an order referring the Trustees' Plan for creditor voting. The same day, the Tokyo Court entered an order determining that the Japanese Bondholders' Plan would not be referred for creditor voting. As of the date of this opinion, the Court understands that the Trustees are preparing the vote solicitation package that will be sent to all secured and unsecured reorganization creditors of **Elpida**.

#### PROCEDURAL POSTURE

The Court has bifurcated its review of the Rambus Motion and the Micron Motion. A hearing on the merits of those motions is scheduled for December 4–5, 2012. At the request of the parties, however, the Court conducted a hearing on November 8, 2012, as to what legal standard would apply to the Court's review of the motions. The Court also considered the Micron Motion to Seal at the November 8th hearing. At the conclusion of the hearing, applying section 107(b) of the Bankruptcy Code, the Court granted in part and denied in part the Micron Motion to Seal. The Court reserved judgment, however, on whether the Court's decision on the Motion to Seal, in whole or in part, should be based upon principles of comity.

This is the Court's decision on the issues before it on November 8th.

#### LEGAL ANALYSIS

### 1. Chapter 15 In General

Chapter 15 of the Bankruptcy Code, which adopted the substance and most of the text of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency ("Model Law"). provides a comprehensive scheme for recognizing and giving effect to foreign insolvency proceedings. FN5 The purpose of Chapter 15 is to adopt the Model Law with the objective of encouraging and increasing the cooperation between U.S. courts and authorities and foreign courts and authorities in cross-border insolvency cases; providing greater certainty and consistency in the law for trade and investment; promoting fair and efficient administration of cross-border insolvencies while protecting the interests of all creditors and other interested parties, including the debtor; protecting and maximizing the value of a debtor's assets; and facilitating the rescue of financially troubled businesses. FN6

FN5. UNCITRAL Model Law on Cross–Border Insolvency, U.N. GAOR 52d Sess., U.N. Doc. A/52/17 (1997). Congress implemented the Model Law through the enactment of Chapter 15 and directed that the Guide to the Model Law be used to instruct its interpretation. See <u>In re Ephedra Prods. Liab. Litg.</u>, 349 B.R. 333, 336 (S.D.N.Y.2006) ("the House Judiciary Committee, in enacting Chapter 15, specifically indicated that the Guide should be consulted for guidance as to the meaning and purpose of [Chapter 15's] provisions" ') (quoting H.R.Rep. No. 109–31)(I), at 106 n. 101).

## FN6. 11 U.S.C. § 1501

Chapter 15 begins with the filing of a petition for recognition. FN7 Where the foreign case is recognized as a foreign main proceeding, FN8 certain mandatory relief goes into effect automatically. The mandatory relief includes the applicability of section 363 of the Bankruptcy Code "to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the section would apply to property of the estate." FN10 After recognition, the Court has discretion to grant a foreign representative relief as provided in section 1521. In addition to relief available after recognition, the foreign representative may request preliminary relief under section 1519, in order to "protect the assets of the debtor or the interests of the creditors" pending the order of recognition. FN11

### FN7. 11 U.S.C. § 1515.

<u>FN8.</u> A "foreign main proceeding" is defined as "a foreign proceeding pending in the country where the debtor has the center of its main interests." <u>11 U.S.C. § 1502(4)</u>.

FN9. 11 U.S.C. § 1520.

FN10. 11 U.S.C. § 1520(a)(2) (emphasis added).

FN11. 11 U.S.C. § 1519(a).

\*4 Section 1507 further provides that the Court is authorized to grant any "additional assistance" available under the Bankruptcy Code or under "other laws of the United States," provided that such assistance is consistent

with the principles of comity and satisfies the fairness considerations set out in the statute. The relationship between section 1507 and section 1521 is not entirely clear; one court has stated that such post-recognition assistance is "largely discretionary and turns on subjective factors that embody principles of comity." FN12 In any event, there is no doubt that the relief available under 1519, 1521, and particularly additional assistance granted pursuant to section 1507 should be consistent with the principle of comity. Section 1507 specifically so provides with respect to "additional assistance," and more broadly, section 1509(b)(3) directs that once a foreign representative obtains recognition, "a court in the United States shall grant comity or cooperation to the foreign representative."

FN12. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (S.D.N.Y.2008), aff'd 374 B.R. 122 (Bankr.S.D.N.Y.2007).

# 3. The Standard Governing A Sale Of Assets In Chapter 15

## a. Setting the Table

In Chapter 15, a "'debtor' means an entity that is the subject of a foreign proceeding." FN13 A foreign proceeding can be either a "foreign main proceeding" or a "foreign nonmain proceeding." FN14 A foreign main proceeding is "a foreign proceeding, pending in a country where the debtor has the center of its main interests." FN15 Recognition "means the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter." Where the foreign proceeding is a foreign main proceeding, section 1520(a) becomes applicable "upon recognition." FN16

FN13. 11 U.S.C. § 1502(1).

FN14. 11 U.S.C. § 1502(4) and (5).

FN15. 11 U.S.C. § 1502(4).

FN16. 11 U.S.C. § 1520(a).

In this case, **Elpida** is the "debtor" and its Japan reorganization proceeding is a "foreign nonmain proceeding." The Japan reorganization proceeding was "recognized" by this Court on upon entry of the Recognition Order on April 24, 2012 at which time <u>section 1520(a)</u>

became applicable to the Chapter 15 case.

Section 1520(a)(2) provides that section 363 of the Bankruptcy Code applies "to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the section would apply to property of the estate." FN17 Section 363(b)(1), in turn, provides that the "trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." Under section 1520(a)(3), "the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by section [ ] 363."

FN17. Under section 1502(a)(8), "within the territorial jurisdiction of the United States' ", when used with reference to property of a debtor, refers to tangible property located within the territory of the United States and intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States."

In this case, the Foreign Representatives (Messrs. Sakamoto and Koboyashi) are the trustees under <u>section</u> 363(b)(1) and they are seeking authority under the Rambus Motion and the Micron Motion to transfer property within the territorial jurisdiction of the United States outside the ordinary course of business to Rambus and Micron, respectively. They clearly have the power to make the request but what standard should be applied?

#### b. Plain Meaning

\*5 In interpreting a statute, the Court must start with an analysis of its plain meaning. "[C]ontemporary Supreme Court jurisprudence establishes that the purpose of statutory interpretation is to determine congressional intent." FN18 To that end, the starting point is to examine the plain meaning of the text of the statute. FN19 As the Supreme Court observed in *Hartford Underwriters Ins. Co. v. Union Planters Bank*, "when a statute's language is plain, the sole function of the courts, at least where the disposition by the text is not absurd, is to enforce it according to its terms." FN20 Additionally, the Supreme Court has repeatedly stated that "[t]he United States Congress says in a statute what it means and means in a statute what it says there."

FN18. Hon. Thomas F. Waldron and Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J.195, 211 (2007).

FN19. *Id.* at 229 ("Statutory analysis ... must start with the text at issue to determine if its meaning can be understood from the text."). *See also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete.").

FN20. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 7, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). See also United States v. Ron Pair Enters., 489 U.S. 235, 240, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989); Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.").

FN21. Hartford Underwriters Ins. Co., 530 U.S. at 6 (quoting Connecticut Nat. Bank, 503 U.S. at 254).

Notwithstanding the foregoing, applying the plain meaning of the statute is the default entrance—not the mandatory exit.  $\frac{FN22}{FN22}$  If the statute is ambiguous, the Court must use other canons of statutory construction, including legislative history where available, to determine the purpose of the statute.  $\frac{FN23}{FN23}$ 

FN22. Waldron and Berman, *supra* note 19, at 232.

FN23. See Price v. Delaware State Police Fed. Union (In re Price), 370 F.3d 362, 369 (3d Cir.2004) ("Thus, ambiguity does not arise merely because a particular provision can, in isolation, be read in several ways or because a Code provision contains an obvious scrivener's error. Nor does it arise if the ostensible plain meaning renders another provision of the Code

superfluous. Rather, a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive. In such situations of unclarity, 'where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived,' including pre-Code practice, policy, and legislative history.") (internal citations omitted).

The result under a plain meaning analysis is straight forward. Section 1520(a) unequivocally states that "sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate." (emphasis added). The emphasized language clearly provides that section 363 and, by implication, its standards are applicable to the transfer of assets located in the United States by a foreign debtor in a foreign main proceeding of assets outside the ordinary course of business. The section 363(b) standard is well-settled. A debtor may sell assets outside the ordinary course of business when it has demonstrated that the sale of such assets represents the sound exercise of business judgment. In determining whether a sale satisfies this standard, the courts in this Circuit require that a sale satisfy four requirements (1) a sound business purpose exists for the sale; (2) the sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the purchaser has acted in good faith. FN24 Thus, under the plain meaning of section 1520(a)(2), this test is applicable to the Rambus Motion and the Micron Motion.

<u>FN24. In re Delaware & Hudson Railway Co.,</u> 124 B.R. 169, 176 (D.Del.1991).

### c. Legislative Intent

Notwithstanding the Supreme Court's repeated admonition that courts are to interpret statutes according to their plain meaning, one could argue that in Chapter 15 cases plain meaning should be subservient to legislative history or more general principles of comity. To that end, section 1508 provides that in interpreting Chapter 15, "the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." FN25 "As each section of Chapter 15 is based on a corresponding article in the Model Law, if a textual provision of Chapter 15 is unclear or ambiguous, the Court may then consider the Model Law and foreign interpretations of it as part of its 'interpretive task.' " FN26

### FN25. 11 U.S.C. § 1508.

FN26. *In re Loy*, 432 B.R. 551, 560 (E.D.Va.2010) (footnote omitted) (citing 11 U.S.C. § 1508; *In re Condor Ins. Ltd.*, 601 F.3d 319, 321 (5th Cir.2010)).

\*6 Section 1520 of the Bankruptcy Code is adopted from Article 20 of the Model Law. EN27 Article 20 of the Model Law provides in relevant part that:

FN27. See The Guide to Enactment of the UNCITRAL Model Law on Cross–Border Insolvency, ¶ 143, U.D. Doc. A/CN.9/422 (1997) (the "Guide to the Model Law").

- 1. Upon recognition of a foreign proceeding that is a foreign main proceeding
- (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- (b) Execution against the debtor's assets is stayed; and
- (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

The parallels between Article 20 and  $\underline{\text{section 1520}}$  are striking.  $\underline{^{\text{FN28}}}$ 

FN28. Italics in original; bold added.

Article 20 Section 1520

	Article 20	Section 1320					
Section	Text	Text	Section				
(1) intro.	Upon recognition of a foreign proceeding that is a foreign main proceeding,	Upon recognition of a foreign proceeding that is a foreign main proceeding—	1520(a)				
(1)(a)	Commencement or continua- tion of individual actions or individual proceedings con- cerning the debtor's assets, rights, obligations or liabilities is stayed;	sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial juris- s diction of the United States;	1520(a)(1)				
(1)(b)	Execution against the debtor's assets is stayed; and						
(1)(c)	The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.		1520(a)(2)				
(2)	The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to [refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or ter-	unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552;	1520(a)(3)				

	mination in respect of the stay and suspension referred to in paragraph 1 of this article].		
(3)	Paragraph 1 (a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor	Subsection (a) does not affect the right to commence an in- dividual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor.	1520(b)
(4)	the commencement of a pro- ceeding under [identify laws of the enacting State relating to	the right of a foreign representative or an entity to file a	1520(c)

\*7 Article 20 of the Model Law has two basic and related concepts aimed at protecting and preserving a multinational debtor's assets: (i) stopping all actions, proceedings and executions against the debtor's assets in all jurisdictions; FN29 and (ii) stopping the debtor from transferring disposing of any of its assets pending further court order. FN30 The drafters of the Model Law considered the stay of actions and enforcement proceedings "necessary to provide 'breathing space' until appropriate measures are taken for reorganization or fair liquidation of the assets of the debtor," and the suspension on transfer "necessary because in a modern, globalized economic system it is possible for multinational debtors to move money and property across boundaries quickly." FN31 Accordingly, the Model Law protects both multinational debtors by forestalling their creditors in a foreign, ancillary jurisdiction, from exercising their remedies, and creditors in the ancillary jurisdiction by suspending the debtor's ability to transfer its assets in that jurisdiction without authorization from their own court system. FN32 Importantly, following the recognition of a main foreign proceeding, the Model Law expressly imposes the laws of the ancillary forum—not those of the foreign main proceedings—on the debtor with respect to transfers of assets located in such ancillary jurisdiction. The Guide to the Model Law explains that:

FN29. See Model Law, Art 20(1)(a),(b).

FN30. See Model Law, Art.20(1)(c).

FN31. Guide to the Model,¶ 32.

FN32. See Model Law, Art. 20(2); Guide to the Model Law, at ¶ 33 ("Exceptions and limitation to the scope of the stay and suspension ... and the possibility of modifying or termination the stay or suspension are determined by provisions governing comparable stays and suspension in insolvency proceeding under the laws of the enacting State (article 20, paragraph 2).").

The automatic consequences envisaged in article 20 are necessary to allow steps to be taken to organize an orderly and fair cross-border insolvency proceeding. In order to achieve those benefits, it is justified to impose on the insolvent debtor the consequences of article 20 in the enacting State (i.e., the country where it maintains a limited business presence), even if the State where the centre of the debtor's main interests is situated poses different (possibly less stringent) conditions for the commencement of insolvency proceedings or even if the automatic effects of the insolvency proceeding in the country of origin are different from the effects of article 20 in the enacting State. This approach reflects a basic principle underlying the Model Law according to which recognition of foreign proceedings by the court of the enacting State grants effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency. Recognition, therefore has its own effects rather than importing the consequence of the foreign law into the insolvency system of the enacting State. FN

FN33. Guide the Model Law ¶ 143 (emphasis added).

In essence, the Model Law follows an *in rem* division of labor between competing sovereignties—tasking the domestic courts with responsibility over and for assets in their jurisdiction. Chapter 15's legislative history leads to the same conclusion as the plain meaning analysis—the sound exercise of business judgment test is applicable.

#### d. Comity

Comity has been defined 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." FN34 Granting comity to judgments in foreign bankruptcy proceedings is appropriate as long as U.S. parties are provided the same fundamental protections that litigants in the United States would receive . FN35

<u>FN34.</u> *Hilton v. Guyot*, 159 U.S. 113, 163–64, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895).

FN35. See id. at 202-03, 16 S.Ct. at 158-59.

\*8 Notwithstanding the direction that a U.S. court grant comity or cooperation to a recognized foreign representative in insolvency matters, "[t]he principle of comity has never meant categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States." FN36 Consistent with the traditional limits of comity, all relief under chapter 15 is subject to the caveat in section 1506, providing the court with authority to deny the relief requested where such relief would be "manifestly contrary to the public policy of the United States." FN37

FN36. In re Treco, 240 F.3d 148, 157 (2d Cir.2001); see also Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir.1997); Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713 (2d Cir.1987); Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir.1985).

<u>FN37.</u> 11 U.S.C. § 1506; *In re Ephedra Prods. Liability Litig.*, 349 B.R. 333 (S.D.N.Y.2006).

Decisions relating to Chapter 15 routinely invoke the

principle of comity. Nonetheless, only two provisions in Chapter 15 actually mention comity. Section 1507 provides that the Court is authorized to grant any "additional assistance" available under the Bankruptcy Code or under "other laws of the United States," provided that such assistance is consistent with the principles of comity and satisfies the fairness considerations set out in the statute. FN38 In addition, section 1509(b)(3) directs that once a foreign representative obtains recognition, "a court in the United States shall grant comity or cooperation *to the foreign representative*." Indeed, section 1508, which establishes a rule of interpretation for Chapter 15, does not mention nor invoke comity.

FN38. Section 1507(b) sets forth several factors for the Court to consider: "whether such additional assistance, consistent with the principles of comity, will reasonably assure—(1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns." (emphasis added). These are five of the six factors that a court was directed to consider in determining whether to grant relief under former § 304 of the Bankruptcy Code, which was repealed when chapter 15 was adopted. The sixth factor was comity. By moving the reference to the introduction, Congress has specified that comity should be considered in connection with all five of the section 1507(b) factors.

**Elpida's** Foreign Representatives urge the Court, in the interest of comity, to defer completely to the Tokyo Court. In other words, this Court should approve the transactions under <a href="section 363">section 363</a> because they were previously approved by the Tokyo Court. At most, they urge, this Court's review is limited to that of <a href="section 1506">section 1506</a> of the <a href="maintenance">Bankruptcy Code</a>—"[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." Moreover, in making the "manifestly contrary to the public policy" inquiry they argue that the Court should examine the Japanese insol-

vency regime as a whole rather than the actual transactions before the Tokyo Court.

There can be no doubt that promoting comity is a general objective of Chapter 15. But it is not the end all be all of the statute. To require this Court to defer in all instances to foreign court decision would gut section 1520. It is important to note that Section 1520 is mandatory. Sections 1507, 1519, 1521, and 1522 provide the Court with broad discretion to "grant any appropriate relief." While those sections cross reference each other they do not mention, let alone authorize, amendment of section 1520 to make section 363 inapplicable. This is not surprising. To do so would be akin to a bankruptcy court holding that section 1129 does not apply to plan confirmation, which would clearly be impermissible.

Section 1507(b) is inapplicable here because the Foreign Representatives are not seeking "additional assistance." Section 1509(b)(3) is not applicable either. The purpose of section 1509, as expressed in the legislative history and case law, is to allow the foreign representative access to, and standing in, courts in the United States other than the chapter 15 court. FN39 Importantly, section 1509(b)(3) requires only that a court grant comity to the foreign representative—not to the foreign court or the orders entered by such court. Thus, when read in the context of the remainder of section 1509 (entitled "Right of direct access"), it is clear that section 1509(b)(3) does not require this Court to grant comity to orders of the Japanese court; but instead, is meant only to streamline the foreign representatives' access to, and cooperation from, other, non-bankruptcy courts in the United States following recognition. The intent is that a foreign representative should be afforded standing in those courts—just as sections 323 and 1107 provide trustees and debtor-in-possession with standing where such standing would not otherwise exist.

## FN39. Section 1509(b) provides:

[i]f *the court* grants recognition under section 1517, and subject to any limitations that *the court* may impose consistent with the policy of this chapter-

- (1) the foreign representative has the capacity to sue and be sued in *a court* in the United States;
- (2) the foreign representative may apply direct

to *a court* in the United States for appropriate relief in that court; and

(3) *a court* in the United States shall grant comity or cooperation to the foreign representative.

11 U.S.C. § 1509(b). (emphasis added). The phrase, "the court," is used in the introductory clause of section 1509(b) to refer specifically to the chapter 15 court granting recognition. In contrast, subsections (1), (2) and (3) use the phrase "a court," in reference to other non-bankruptcy courts, where the rights granted thereby had not previously existed. Section 1509(b)(3), thus, instructs other U.S. courts to grant comity or cooperation to foreign representatives so that they may have direct access to U.S. courts to exercise to fullest extent the rights granted under chapter 15.

\*9 Thus, principles of comity either do not apply or must defer to the plain meaning and legislative history. Again, the sound exercise of business judgment test controls. FN40

<u>FN40.</u> As the Court's decision relates solely to the application of <u>section 363</u> under <u>section 1520</u>, it has not addressed nor decided the standard governing application of <u>section 1506</u>.

#### **CONCLUSION**

While this Court is cognizant of the importance of comity, especially in the context of Chapter 15, it cannot ignore the plain meaning of <a href="section 1520(a)">section 1520(a)</a>. Moreover, the legislative history behind Chapter 15 supports finding that this Court must, in effect, review the motion *de novo* as it relates to assets in the United States and, in so doing, must apply the well-settled standard governing a sale of assets under section 363 of the Bankruptcy Code.

In order for the Foreign Representatives to prevail they must prove by a preponderance of the evidence **Elpida's** entry into the transactions subject to the Rambus Motion and Micron Motion *as it pertains to assets located in the territorial jurisdiction of the United States* was a sound exercise of the Trustees' business judgment. FN41

FN41. Section 107(b) is applicable to Chapter 15. 11 U.S.C. § 103(a) (This chapter, *i.e.*, Chapter 1,

applies in a case under chapter 15). For the reasons set forth above, the Court must review the Micron Motion to Seal under section 107(b) and not under general principles of comity. Thus, the Court will grant in part and deny in part the Micron Motion to Seal for the reasons and to the extent set forth on the record at the November 8 hearing.

An order will be issued.

Bkrtcy.D.Del.,2012. In re Elpida Memory, Inc. Slip Copy, 2012 WL 5828748 (Bkrtcy.D.Del.)

END OF DOCUMENT

# **EXHIBIT 5**

# IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

	(
In re	•
:	Chapter 15
Elpida Memory, Inc.,	
:	Case No. 12-10947 (CSS)
Debtor in a Foreign Proceeding. :	, ,
:	Hearing Date: December 5, 2012 at 10:00 a.m
:	Objection Deadline: (extended by agreement)
:	
	Re: Docket Nos. 163, 165 and 293

OMNIBUS OBJECTION OF THE STEERING COMMITTEE OF THE AD HOC GROUP OF BONDHOLDERS OF ELPIDA MEMORY, INC. TO (I) FOREIGN REPRESENTATIVES' MOTION TO APPROVE PATENT LICENSE AGREEMENT AND TECHNOLOGY TRANSFER AND LICENSE AGREEMENT AND (II) FOREIGN REPRESENTATIVES' MOTION TO APPROVE SALE OF CERTAIN PATENTS TO RAMBUS INC.

The Steering Committee of the Ad Hoc Group of Bondholders (the "Bondholders") of Elpida Memory, Inc. ("Elpida"), by and through its undersigned counsel, respectfully submits this omnibus objection (the "Objection") to (i) the Foreign Representatives' motion for approval of (a) a Patent License Agreement between Elpida and Micron Technology, Inc. ("Micron") and (b) a Technology Transfer and License Agreement between Elpida and Micron [Dkt. No. 165] (the "Micron Motion") and (ii) the Foreign Representatives' motion for approval of a patent purchase agreement between Elpida and Rambus Inc. ("Rambus") [Dkt. No. 163] (the "Rambus Motion" and, together with the Micron Motion, the "363 Motions"). In connection with the Objection, the Bondholders respectfully represent as follows:

<sup>&</sup>lt;sup>1</sup> Capitalized terms not defined herein shall have the meaning ascribed to such terms in the Micron Motion or the Rambus Motion, as applicable.

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III		pida's Proposed Sale of Patents to Rambus and Grant of a Patent License  Micron
	C.	After Learning of a Potential Hynix Bid, the Foreign Representatives Agreed to Terms in the PPA and the Associated Micron PLA that Will Harm Elpida in the
ARG	GUMI	ENT
IV		the Court Should Not Approve the PPA and the Micron PLA Because the Foreign appresentatives Did Not Exercise Sound Business Judgment
	A.	The Value Received by Elpida from Rambus and Micron did not Justify Entry into These Transactions
	B.	Key in the PPA and Micron PLA have the Effect of Curtailing Significantly Elpida's Restructuring Options
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	A.	The TTLA Improperly Entrenches Micron as Elpida's Sponsor

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## PRELIMINARY STATEMENT

Beginning more than six months ago, the two Foreign Representatives in this case, Mr.

Sakamoto and Mr. Kobayashi, executed post-petition agreements committing to transfer assets of Elpida located within the territorial jurisdiction of the United States to Micron and

Rambus.			•							N.			
								·				:	
					. :					Desp	te the	passing	g of
time, pur	portedly	"coming	; clean	" abou	it their	lapse	in judg	ment ar	nd filir	g the	363 M	lotions,	the
Foreign 1	Represen	tatives, a	nd par	rticula	rly, Mı	r. Saka	moto, s	still hav	e not a	answer	ed son	ne very	
basic que	estions at	out these	e trans	action	s —								

- Why in fact were the agreements not promptly disclosed to this Court or any parties in interest in this case at the same time the Foreign Representatives sought approval in the TDC (defined below)?
- Why were the applications for approval in the TDC filed under double seal, such that
  no creditor would even know that an approval application had been filed or an order
  had been entered?
- What is now so secret about the agreements that the Foreign Representatives continue seeking sealing of their
- Why did the Foreign Representatives agree to provisions in the agreements that and further seek to have those provisions approved by the 363 Motions, all while the plan approval process is still ongoing?
- Why won't Mr. Sakamoto, who personally participated in the conception, negotiation and approval of the three agreements, not agree to answer questions about his actions on the record, much less appear in this Court to justify his business decisions?
- Why were none of the assets being transferred to creditors for approval or
- Why do any of the transfers at issue need to occur now, as opposed to some time after consummation of a plan of reorganization?

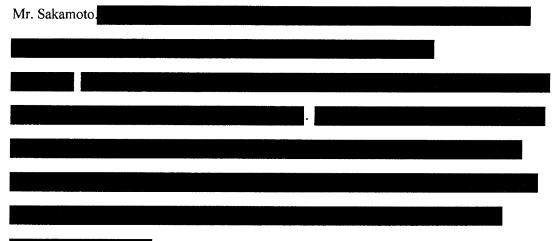
As set forth herein, the only rational explanation for the foregoing is that (1) neither Mr. Sakamoto nor his advisors ever thought they would have to disclose the existence of the transfers either in Japan or the U.S., and (2) now that the proverbial cat is out of the bag, they simply do not want to explain the purpose for, and effect of, those agreements in the ongoing plan process. The reason for that reticence is clear when one examines the timing, context and content of the three agreements subject to the 363 Motions.

There is no dispute that (1) Mr. Sakamoto, as CEO of Elpida, the business trustee appointed in the Japanese Proceeding and one of the two Foreign Representatives recognized in this Court, anointed Micron as the winning bidder to acquire Elpida by May 10, 2012<sup>2</sup> and (2) after an ex parte review by the TDC, obtained Japanese court approval of Micron as Elpida's plan sponsor on July 2, 2012. There is also no dispute that, to combat concerns about fairness and process, Mr. Sakamoto, through his counsel, assured this Court and Elpida's creditors that, notwithstanding the closed nature of the selection process, creditors would have a full and fair opportunity to propose alternate sponsors and file their own plan in Japan. To that end, the Bondholders devoted substantial time and effort actually seeking out potential sponsors and evaluating alternative plan structures for a Japanese plan. Indeed, the backstory of the 363 Motions began shortly after the Japanese press began reporting that SK Hynix, Inc. ("Hynix"), a Korean chip manufacturer and competitor of Micron, was considering becoming an alternative sponsor for a creditor-led plan. Within days, Mr. Sakamoto and his team reacted to the threat to the Micron deal.

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see also, Micron Wins Exclusive Right to Bid For Elpida: source, May 7, 2012 available at http://www.reuters.com/article/2012/05/07/net-us-elpida-micron-idUSBRE8430QA20120507, and attached hereto Exhibit B.

	Thus, the "prize" for cred
exercis	sing their "full and fair opportunity" to challenge the Micron deal and create
other p	participants in the market, is
	That bitter pill apparently was not enough protection against a competing pl
though	. Again, while the press was still circulating news about alternative proposal
Sakam	oto
· .	Indeed, Mr. Sakamoto and his team rushed to implement this sale without
reason	to have it consummated prior to approval of a plan. The patents sold are not
Elpida	does not need the cash, and there was at least one other potential strategic bu
assets.	But there is always more in this deal. Like the $\ensuremath{TTLA}$ , the PPA and $\ensuremath{Micron}$



Once again, Mr. Sakamoto and his team engineered the process to make the prize for attempting to create value in the plan process an assured destruction of value.

Fundamentally, the question before the Court on the 363 Motions is what to do with agreements that (i) utilize U.S. assets in a way that interferes with the maximization of value in an ongoing global plan process and (ii) are otherwise not supported with a showing of some exigency, compelling proof of a fair price and a rational business purpose. The Court has already answered a substantial portion of the question in its November 16, 2012 ruling – the Court should apply section 363 and the relevant case law thereunder to determine whether to attach its imprimatur to the transactions through the force and effect of a U.S. court order. Under any of the relevant case law in this district and circuit, as discussed below, the three transactions do not come close to meeting the relevant standards for approval. The Court should thus deny each of the 363 Motions.

### **STATEMENT OF FACTS**

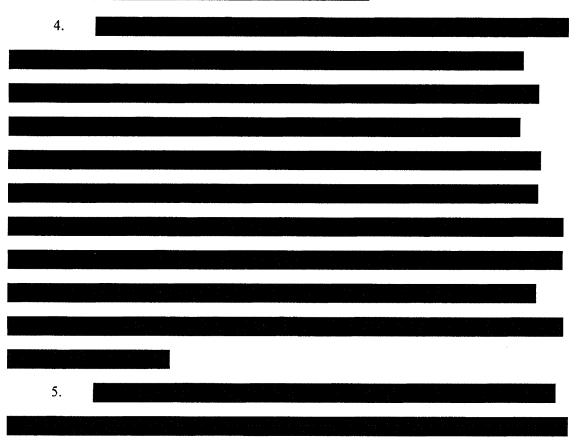
 On February 27, 2012, Elpida filed a petition for commencement of corporate reorganization proceedings (the "Japanese Proceeding") under the Japan Corporate Reorganization Act (the "JCRA") in the Tokyo District Court, Eighth Civil Division (the "TDC"). On March 19, 2012, Mr. Yukio Sakamoto, Elpida's President and Chief Executive Officer, filed a petition for recognition of the Japanese Proceeding as a foreign main proceeding under chapter 15 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware, thereby commencing this chapter 15 case (the "Chapter 15 Case"). On March 23, 2012, the TDC issued its decision to commence corporate reorganization proceedings for Elpida, which, among other things, appointed Mr. Sakamoto and Mr. Nobuaki Kobayashi as Trustees for Elpida. Thereafter, on April 24, 2012, this Court entered its final recognition order recognizing the Japanese Proceeding as a foreign main proceeding and approving Mr. Sakamoto and Mr. Kobayashi as Elpida's Foreign Representatives.

2. On September 14, 2012, the Foreign Representatives disclosed to the Court and the parties in interest in the Chapter 15 Case that they had entered into several transactions

involving Elpida's U.S. assets without this Court's prior approval.<sup>3</sup> The Foreign Representatives subsequently filed motions seeking this Court's approval of such transactions.<sup>4</sup>

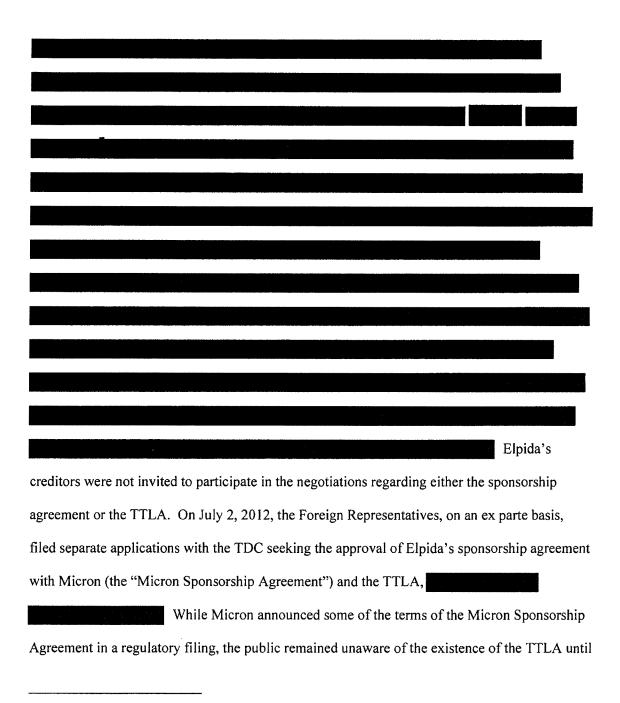
3. On November 16, 2012, the Court issued an opinion holding that the applicable legal standard is the well-settled "business judgment standard" under section 363 of the Bankruptcy Code. See Opinion of Nov. 16, 2012 [Dkt. No. 293] at 20-21.

# I Elpida's Bidding Process and Sponsor Negotiations



<sup>&</sup>lt;sup>3</sup> Although, as explained below, these transactions were approved by the TDC, such approvals were obtained on an *ex parte* and confidential basis without any participation of Elpida's creditors.

<sup>&</sup>lt;sup>4</sup> To avoid disruption to Elpida's business operations, the Bondholders reluctantly decided not to press their objections to the unauthorized transactions relating to Elpida's debtor-in-possession financing and its pledge of certain of Elpida's U.S. assets to one of its largest customers, Apple Inc.

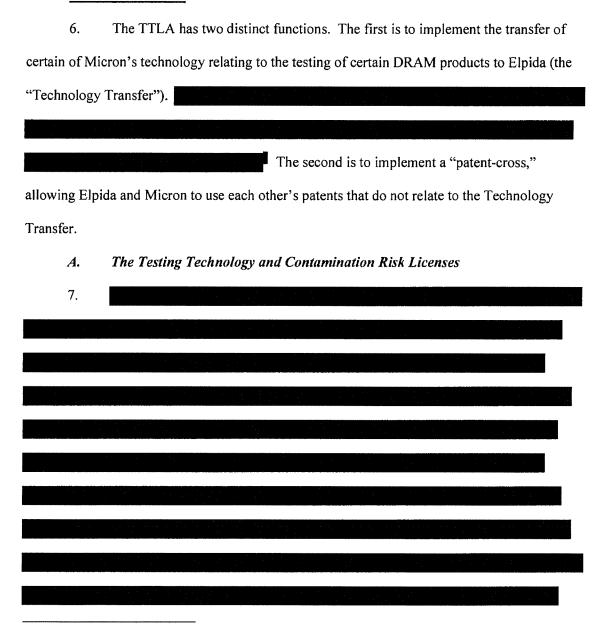


<sup>&</sup>lt;sup>5</sup> The Bondholders have attached the entire deposition transcript for the convenience of the Court, but are only introducing into evidence the specific transcript citations contained in this Objection.

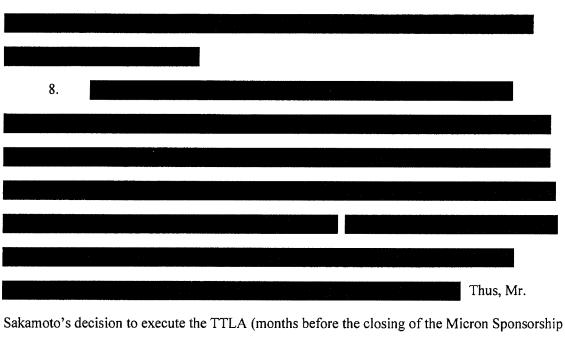
<sup>&</sup>lt;sup>6</sup> SK Hynix, GlobalFoundries in talks with Elpida bondholders – source, May 21, 2012, available at http://www.reuters.com/article/2012/05/21/elpida-skhynix-idUST9E8ER02C20120521, and attached hereto as Exhibit C.

the Foreign Representatives disclosed the transaction to this Court months later, and Elpida and Micron continue to insist that the material provisions of the TTLA be kept from the public.

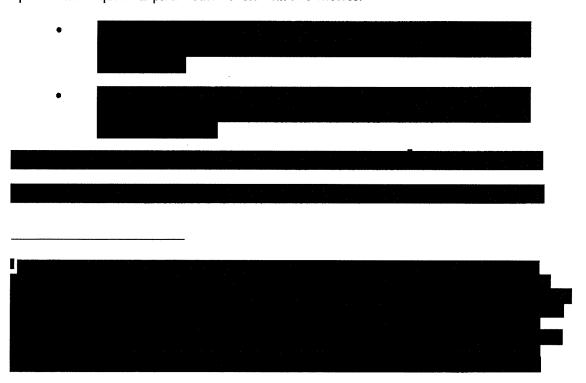
# II The Micron TTLA



<sup>&</sup>lt;sup>7</sup> Attached as Exhibit C to the Declaration of Seiji Nakashima in Support of Foreign Representatives' Motion to Approve Patent License Agreement and Technology Transfer and License Agreement [Dkt. No. 217].



Sakamoto's decision to execute the TTLA (months before the closing of the Micron Sponsorship Agreement or voting commenced on Elpida's reorganization plan) ensured that any other sponsor that acquired Elpida would be left with two choices:



В.	The Cross-Licenses	
9.		
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