AMERICAN COLLEGE OF BANKRUPTCY/
INTERNATIONAL INSOLVENCY INSTITUTE

FOREIGN COMPANIES USING CHAPTER 11

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I. WHY WOULD A FOREIGN COMPANY USE CHAPTER 11?

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

A. Ability of debtor management to remain "in possession"

B. Release and exculpation of debtor-owned causes of action against directors, officers and professionals.

C. Potential for third party releases (in some courts in the U.S. under some circumstances)

D. Possibility of reorganization with a discharge rather than liquidation

E. Ability to bind holdouts under a plan of reorganization supported by a super-majority

F. Ability to stretch out secured debt

G. Ability to convert unsecured debt to equity

H. Post-petition Debtor in Possession financing, including priming financing if adequate protection can be shown

I. Sale of assets free and clear of liens, with liens to attach to proceeds

J. Cure, assume and assign, and reject executory contracts and leases

K. Exit financing with a securities law exemption.

L. Strong powers to recover preferences and fraudulent conveyances

M. Specialized bankruptcy courts

N. U.S. law addresses property of the debtor "wherever located"

O. Major creditors are ordinarily present in the U.S. and subject to U.S. jurisdiction, especially financial creditors

II. SUFFICIENCY OF CONNECTIONS WITH THE UNITED STATES

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

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

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

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

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

1. "[O]nly a person that ***resides or has a domicile, a place of business or property in the United States***, or a municipality, may be a debtor under this title."

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

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

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

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

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

3. *In re Aerovias Nacionales de Colombia S.A. Avianca,* 303 B.R. 1 (Bankr. S.D.N.Y. 2003) (28 employees in the U.S. compared to 4000 in Columbia were sufficient).

4. *In re JPA No. 111 Co. Ltd.,* 2022 WL 298428 (Bankr. S.D.N.Y. Feb. 1, 2022), involved the Chapter 11 filing of a Japanese single-purpose entity created to purchase an aircraft leased to

Vietnam airlines. U.S. jurisdiction (and a stay of foreclosure) was based on the debtor's interest in a retainer deposited with debtor's counsel in the U.S. The Court sustained the case against the contention that the retainer was an insufficient contact and the petition had been filed in bad faith.

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

III. EXTRATERRITORIAL REACH OF U.S. BANKRUPTCY LAW

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

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

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

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

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

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

2. In re: Deak & Co., Inc., 63 B.R. 422 (Bankr. S.D.N.Y. 1986) (Avoidance Powers)

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

"[L]ong-standing principle of American law that 'legislation of Congress unless a contrary intent appears is meant to apply only within the territorial jurisdiction of the U.S." (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281).

Because of the "presumption against territoriality," unless the **"affirmative intention of the Congress is clearly expressed,"** a

Congressional enactment is presumed to be "primarily concerned with domestic conditions."

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

1. *Nakash v. Zur,* 190 B.R. 763 (Bankr. S.D.N.Y. 1996) (the reference to assets "wherever held" in Section 541 was intended to give Bankruptcy Code's automatic stay extraterritorial effect; commencement by Israeli receiver of Israeli bankruptcy proceeding violates the automatic stay).

2. *In re Rimsat*, 98 F.3d 956 (7th Cir. 1996) (injunction in involuntary Chapter 11 trumps previously filed Nevis receivership)

3. *In re Simon*, 153 F.3rd 991 (9th Cir. 1998) (extraterritorial effect of discharge injunction against a creditor who filed a proof of claim)

4. *In re Gucci,* 309 B.R. 679 (S.D.N.Y. 2004) (procedures in Switzerland and Italy to enforce an arbitral award pursued in violation of the automatic stay were void. See also 2005 WL 1538202 (S.D.N.Y. 2005), *aff'd,* 197 F.App'x. 58 (2d Cir. 2006).

5. *French v. Liebmann* (In re *French*), 440 F.3d 145 (4th Cir. 2006), cert. denied, 549 U.S. 815 (2006) (avoidance of transfer abroad by U.S. debtor did not constitute extraterritorial application of U.S. law).

6. *See also, In re Gold & Honey, Ltd.,* 410 B.R. 357 (Bankr, E.D.N.Y. 2009) (denial of Chapter 15 recognition because an Israeli case was filed in defiance of U.S. stay).

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

1. *In re Maxwell Comm. Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994; (aff'd, 186 B.R. 807 (S.D. N.Y. 1995); aff'd, 93 F.3d 1036 (2nd Cir. 1996) (where there were parallel reorganization proceedings pending in the U.S. and England, the court declined to apply U.S. preference avoidance provisions to a foreign transaction where the foreign jurisdiction had the primary interest in the transaction in

question and parties had no reason to suspect the application of U.S. law). This Second Circuit decision did not rely on the presumption against exterritoriality, as had the lower court decisions, rather rested its ruling solely on the principle of comity (and choice of law).

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

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

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

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

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

4. Five months after the *Fisker* decision was issued, another bankruptcy judge in New York concluded in *In re Arcapita* (*"Arcapita"*), 575 B.R. 229 (Bankr. S.D.N.Y. 2017), that a cross-border transfer attacked as a preference was domestic and thus, it was not necessary to determine if the Bankruptcy Code's

preference provisions extended beyond U.S. borders. Focusing on the location of the transfers (instead of all components of the transaction), the judge found that the non-U.S. defendants use of correspondent U.S. banks to receive the transfers made the transfers domestic.

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

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

I. *In re Picard*, 917 F.3d 86 (2nd Cir 2019), arose out of the Madoff Ponzi scheme. The Second Circuit held that the U.S. trustee could sue to recover avoidable transfers from foreign entities who had received subsequent transfers initially made from a U.S. debtor (the Madoff company) to a feeder fund registered in the British Virgin Islands but doing business in the U.S. (and which had been recognized as a foreign main proceeding under Chapter 15). The BVI feeder fund received the transfers from Madoff and then paid them to third parties in Europe who did no deal directly with Madoff in the U.S.

1. The Second Circuit held that the focus of a §548 fraudulent conveyance avoidance is to recover property fraudulently a transferred from a U.S. debtor.

2. Thus it was not an extraterritorial exercise of U.S. bankruptcy power to use §550(a)(2) to recover that property from a foreign subsequent transferee.

3. The Court further held that a decision of a court in the BVI that the transaction could not be avoided under BVI law was not a defense as comity would not override the express provisions of U.S. law, which has a strong interest in the recovery of fraudulent conveyances.

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

1. Sheehan left Ireland decades ago and lives near Chicago. He bought shares in an Irish hospital and Irish personal real estate both financed by a loan from an Irish bank which took a lien on the Irish shares and real estate. The current loan holder bought it out of the Irish bank's insolvency proceeding. Sheehan defaulted on the loan, litigated in an Irish court trying to stop foreclosure, and lost. A receiver was appointed to take charge of the collateral and sell it.

2. Sheehan then filed a Chapter 11 case in Chicago where he had lived for many years. Sheehan notified the loan holder and receiver that they would violate the automatic stay if they went forward with the foreclosure in Ireland. They went forward anyway.

3. Sheehan filed an adversary proceeding in the Chicago bankruptcy court to sanction the loan holder and receiver for violating the automatic stay. The bankruptcy court dismissed the adversary proceeding for lack of in personam jurisdiction over the loan holder and receiver defendants. The district court upheld that dismissal and so did the Seventh Circuit.

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

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

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

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

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

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

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

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

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

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

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

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

12. While acknowledging that an intentional tort can create minimum contacts with a state when a defendant "**expressly aims its actions at the state with the knowledge that they would cause harm to the plaintiff there,"** the Seventh Circuit concluded that the Sheehan case was not that, but took place in Ireland with minimal contact with Chicago. As the Seventh Circuit analyzed it, the transaction at issue took place when (i) Sheehan went to Ireland to buy property and took out a loan secured by it, (ii) the lender had been given authority by an Irish court to foreclose on the collateral and was doing so, (iii) the only connection to Chicago was (a) Sheehan's residence and the court where he filed his bankruptcy and (b) that Sheehan had sent a notice to defendants in Ireland about the presence of the automatic stay emanating from Chicago.

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

> "We also find that the alleged injury to Sheehan did not arise out of defendants' forum-related activities. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, —— U.S. ——, 141 S. Ct. 1017, 1025, 209 L.Ed.2d 225 (2021). All of the acts taken by the defendants to assert control and ownership over the Irish property occurred in Ireland. *See, e.g., Philos Techs., Inc. v. Philos & D, Inc.*, 802 F.3d 905, 915 (7th Cir. 2015) (even an informational business trip to Illinois did not turn a primarily Korean business deal into one with jurisdictional contacts in Illinois). Moreover, the few letters that Breccia sent to Sheehan announcing the receivership and start of the liquidation of Sheehan's collateral for defaulted loans were nothing more than ministerial actions taken in light of the Irish court's disposition of the litigation in Ireland. They do not constitute taking aim at Illinois and were far from sufficient to create minimum contacts with Illinois."

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

Commentary about *Sheehan:*

15. The Seventh Circuit did not address that, when defendants were put on notice of the automatic stay and chose to violate it, they committed an intentional violation of a stay intended to protect a debtor in a bankruptcy case that emanated from and was controlled by the bankruptcy court in Chicago. Section 362(a) provides that a "petition filed under section 301…operates as a stay, applicable to all entities" of actions against property of the estate. Pre-1978 Bankruptcy Code, such a stay was an injunction issued by court order. Under the Code, a stay is automatically

issued upon filing the Chapter 11 petition, and the bankruptcy court is put in charge of whether the stay will continue, or it will "grant relief from the stay…such as by terminating, annulling , modifying, or conditioning such stay." § 362(d).

16. Rejecting it as out of circuit and from a lower court, the Seventh Circuit did not address the analysis in *In re Probulk Inc.,* 407 B.R. 56 (Bankr. S.D. N.Y. 2009) that focused on these federal statutes. In *Probulk*, a New York Chapter 7 Trustee was trying to do an orderly liquidation of a fleet of refrigerator ships that were all over the world, and English insurers used the initiation of the U. S. bankruptcy case as an excuse to terminate insurance contracts covering the ships. This challenged the ability of a U.S. Trustee to carry out an orderly liquidation of assets.

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

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

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

> foreseeable effect on the administration of this estate that 11 U.S.C. § 362(a) was designed to prevent." These issues must be reached herein."

18. Under the *Probulk* analysis, the defendants in *Sheehan* had aimed their violation at the Chicago bankruptcy court when they took away its control over the automatic stay protecting an asset of the estate, and were subject to its jurisdiction to remedy that violation of its order.

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

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

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

22. As to the importance of the ability to effectuate U.S. proceedings abroad, see the discussion of *Fargo*, *Yukos* and *Northshore Mainland Services (BahaMar)* below. See also the

following cases involving cooperation among parallel proceedings in the U.S. and abroad.

23. In *In re Gold & Honey, Ltd.,* 410 B.R. 357 (Bankr. E.D.N.Y. 2009), the Bankruptcy Court held that Israeli receivers had violated the automatic stay by virtue of their appointment in Israel. However, it recognized as a practical matter that there were good reasons for the Israeli proceedings to continue, saying:

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

24. In *In re Dunne,* 2015 WL 7625629 (Bankr. D. Conn. Nov. 25, 2015), an Irish citizen who (like Sheehan) had moved to the U.S. was in a Chapter 7 case in Connecticut. His

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

25. The Delaware Chapter 11 filing by a Chilean company, Alto Maipo SpA, raised issues with some similarity to those in *Sheehan.* The Debtor was a Chilean hydroelectric plant operator and moved

to assume a contract that it alleged was critical to its ability to reorganize under Chapter 11. The Chilean supplier, relying in part on an *ipso facto* termination clause in the contract, objected to the assertion of U.S. jurisdiction over it and to the entry of an order permitting the assumption. In an oral decision that was reported widely in the financial press, the Delaware Bankruptcy Court denied the motion, on the basis that it would have to adjudicate the debtor's contract rights rather than the estate's property rights under the contract and that it would have to enjoin a foreign counterparty. See Global Restructuring Review, September 30, 2022.

III. IV. LIMITS ON USE OF CHAPTER 11 BY FOREIGN COMPANIES

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

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

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

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

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

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

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

§ 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—

(1) the **interests of creditors and the debtor would be better served** by such dismissal or suspension; or

(2) (A) **a petition under section 1515 for recognition of a foreign proceeding has been granted; and**

(B) **the purposes of chapter 15 of this title would be best served** by such dismissal or suspension.

(b) **A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section**.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is **not reviewable by appeal or otherwise by the court of appeals** under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States.

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

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

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

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

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

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

b. economy and efficiency of administration;

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

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

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

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

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

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

> "The pendency of a foreign insolvency proceeding alters the balance by introducing considerations of **comity** into the mix. The Second Circuit, in this regard, has frequently underscored the importance of judicial deference to foreign bankruptcy proceeding. 'Deference to foreign insolvency proceedings will, in many cases, facilitate equitable, orderly and systematic' distribution of the debtor's assets." *Maxwell Commun. Corp.,* 93 F.2d at 1048 (quoting *Cunard S.S. Co.,* 773 F.2d at 458); accord *J.P.Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.,* 412 F.3d 418, 424, (2d Cir. 2005) ("We have repeatedly held that U.S. Courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding … In such cases, **deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and, consistent with the principles of Lord Mansfield's holding, do not contravene the law or public policy of the United States."**)

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

6. As to running a parallel Chapter 11 case in the U.S., the Court noted that it would be very difficult to enforce its orders against the

company's primary assets in Argentina, especially because there was already an Argentinean insolvency proceeding pending.

B. In *In re Monitor Single Lift I, Ltd., et al.*, Monitor Oil PLC (PLC) and two subsidiaries (MSL I and FinCo) commenced Chapter 11 cases in New York.

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

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

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

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

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

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

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

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

5. Said differently, the New York Bankruptcy Court did not dismiss a U.S. Chapter 11 case that the debtor had filed to use §365 executory contract provisions to preserve a development contract asset because creditors, who didn't want more money spent on that contract, argued that the debtor's COMI in England, where there were no similar provisions permitting the preservation of that contract, would be a more appropriate place to

conduct a bankruptcy proceeding for that company, when no such English proceeding was pending.

6. The Bankruptcy Court did not dismiss a U.S. case that the Debtor had fled to preserve an asset in favor a case that had not been filed at the Debtor's COMI where it could not preserve that asset.

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

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

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if— …
>
> > (2) (A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and (B) **the purposes of chapter 15 of this title would be best served by such dismissal or suspension.**
>
> (b) **A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section**.

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

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

> **§ 1529. Coordination of a case under this title and a foreign proceeding**
>
> If a foreign proceeding and a case under another chapter of this title are pending concurrently regarding the same debtor, the court shall seek cooperation and coordination

under sections 1525, 1526, and 1527, and the following shall apply:

(1) **If the case in the United States is pending at the time the petition for recognition of such foreign proceeding is filed—**

(A) any relief [to be]granted under section 1519 or 1521 must be consistent with the relief granted in the case in the United States; and

(B) section 1520 does not apply even if such foreign proceeding is recognized as a foreign main proceeding.

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

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

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

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

> (3) In granting, extending, or modifying relief granted to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the laws of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.
>
> (4) In achieving cooperation and coordination under sections 1528 and 1529, the court may grant any of the relief authorized under section 305.

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

> **§ 1528. Commencement of a case under this title after recognition of a foreign main proceeding.**
>
> After recognition of a foreign main proceeding, a case under another chapter of this title [such as Chapter 11] may be commenced only if the debtor has assets in the United States. **The effects of such a [plenary U.S.] case shall be restricted to the assets of the debtor that are within the territorial jurisdiction of the United States** and, to the extent necessary to implement cooperation and coordination…to other assets of the debtor that are *within* the jurisdiction of the court…to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter.

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

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

purposes of chapter 15 of this title would be best served by such dismissal."

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

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

1. "Cooperation between… courts;"

2. "Greater legal certainty for investments;"

3. "Fair and efficient administration;"

4. "Protection and maximization of the value of the debtor's assets;" and

5. "Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

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

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

F. §1506 requires adherence to US public policy.

§ 1506. Public policy exception

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

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

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

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

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

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

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

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

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

1. to explain how the representative will give deference under §1529(1) to the court's rulings in the prior filed Chapter 11 case that is carrying out U.S. reorganization policy that §1506 requires to be respected;

2. to explain any concern the representative has about how the Chapter 11 case will carry out the purposes listed in §1501(a)(1)-(5);

3. to describe what, if any, changes the representative wants to see in the plan of reorganization that has been proposed under Chapter 11 standards that reflect U.S. public policy that §1506 requires to be respected;

4. to explain why the debtor's Chapter 11 reorganization should not be permitted to go to prompt confirmation, especially if it has already proceeded substantially through the confirmation process.

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

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

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

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

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

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

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

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

§1527. Forms of cooperation

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

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

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

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

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

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

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

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

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

1. Swiss corporation operated a foreign exchange trading platform in the U.S.

2. Swiss Federal Banking Commission started a proceeding against debtor.

3. Involuntary Chapter 7 was then initiated in the U.S.

4. Swiss proceeding received Chapter 15 recognition as a foreign non-main proceeding.

5. The Chapter 7 case was not dismissed under §305(a) because it protected the interests of U.S. creditors; the two cases were not consolidated.

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

1. Canadian company and its U.S. subsidiary both filed a Canadian CCA case.

2. Canadian Monitor obtained U.S. Chapter 15 recognition of the Canadian case as the main case.

3. U.S. creditors filed an involuntary Chapter 7 against the U.S. subsidiary company.

4. Assets were sold with proceeds mostly attributable to the U.S. Company.

5. Canadian Monitor said he would take action to subordinate the Canadian parent's intercompany claim against the U.S. subsidiary company; but it had not been done.

6. Canadian Monitor's 305(a) Motion to dismiss was denied because petitioning creditors had raised valid concerns about whether the Canadian case was protecting their interests.

IX. DISMISSAL UNDER A §1112 TOTALITY OF CIRCUMSTANCES ANALYSIS

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

1. alleged absence of valid reorganization purpose;

2. alleged aims that lie outside of Bankruptcy Code;

3. alleged lack of good faith;

4. comity; and

5. Act of State Doctrine.

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

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

1. A Colombian airline filed a Chapter 11 case in New York. Originally, aircraft lessors with large claims moved to dismiss, but they made deals and dropped their objections.

2. Ultimately dismissal was sought by one U.S. supplier creditor who argued that it was unseemly for a U.S. court to take jurisdiction over the reorganization of an enterprise whose main center of activities was abroad. This is the "solitary main case" venue concept discussed above.

3. The single remaining objector asked for dismissal under §305(a)(1) ("the interests of creditors and the debtor would be better served by dismissal or conversion") and §1112.

4. The debtor opposed dismissal, along with the creditors' committee, the second largest equipment lessor, employees, and other large creditors, the shareholders and implicitly the Colombian government.

5. The case was working. Avianca had been able to maintain its routes and continue its business, benefiting the debtor, creditors-including employees, public and the nation of Columbia. Avianca had been able to negotiate deals with major suppliers, employees, taxing authorities and others.

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

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

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

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

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

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

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

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

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

3. Yukos filed a Chapter 11 case in S.D. Texas in late 2004 to stay the foreclosure auction, keep its assets, and reorganize its debts. The Bankruptcy Court issued a TRO enjoining non-governmental entities such as Deutsche Bank and Gasprom from participating in the sale of these assets, formal service of process had not been effected on the Russian government.

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

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

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

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

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

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

a. Act of state doctrine type concerns:

"Finally, although the act of state doctrine, standing alone, does not compel dismissal of the instant case, the evidence indicates that Yukos was, on the petition date, one of the largest producers of petroleum products in Russia, and was responsible for approximately 20 percent of the oil and gas production in Russia. The sheer size of Yukos, and correspondingly, its impact on the entirety of the Russian economy, weighs heavily in favor of allowing resolution in a forum in which participation of the Russian government is assured." 321 B.R. at 411.

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

> "The vast majority of the business and financial activities of Yukos continue to occur in Russia. Such activities require the continued participation of the Russian government, in its role as the regulator of production of petroleum products from Russian lands, as well as its role as he central taxing authority of the Russian Federation." 321 B.R. at 411.
>
> "Indeed, since most of Yukos' assets are oil and gas within Russia, its ability to effectuate a reorganization without the cooperation of the Russian government is extremely limited." 321 B.R. at 411.
>
> Because the Russian government had a significant role in ongoing operations of Yukos, it was simply not feasible for a plan of reorganization confirmed by the U. S. bankruptcy court to be carried out in Russia.

c. This ignored the alternate purpose of the Plan of Reorganization that Yukos had filed providing that, if the company could not be

reorganized as a going concern because of Russian government actions, a U.S. bankruptcy trustee would be appointed to pursue causes of action against the Russian government.

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

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

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

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

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

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

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

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

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

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

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

c. In February 2014 Russia invaded Crimea.

d. **In June 2014, Yukos shareholders obtained an over $50 billion arbitral award against the Russian government for (i) selling Yukos' major asset to a company created by the Russian government over night in a shopping center, in a transaction financed by the Russian treasury, after Gasprom and Deutsche Bank had been enjoined from participating in that sale; and (ii) causing Yukos to be liquidated even though it had enough remaining assets to reorganize and pay its disputed tax claim in full.**

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

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

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

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

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

4. **Despite the U.S. automatic stay, the Bahamian government commenced insolvency proceedings in the Bahamas on**

behalf of all creditors, and provisional liquidators were appointed.

5. Creditors thereafter moved in the Delaware bankruptcy court to dismiss the U.S. Chapter 11 proceedings.

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

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

8. The Court found that (i) "The central focus of this proceeding is the unfinished Project located in The Bahamas;" (ii) creditors would have expected that insolvency proceedings for the Project would take place in the Bahamas; and (iii) pursuit of the U.S. cases would only generate additional litigation and the Bahamian government appeared poised not to cooperate with the result.

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

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

a. The following additional companies have pursued Chapter 11 cases, most successfully confirming a plan of reorganization

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

2.In re China Fishery Group Limited (Cayman), 2016 Bankr. LEXIS 3852; 2016 WL 6875903 (Bankr. S.D.N.Y. Oct. 28, 2016) (Peruvian fishing business) *(The* Bankruptcy Court granted in part and denied in part lenders'

motion to appoint a chapter 11 trustee; lenders claimed debtors had acted in bad faith in filing chapter 11 petitions notwithstanding earlier agreement to sell assets or turn over the keys; Court appointed trustee only over certain of the filing companies; lenders did not move to dismiss cases); see also 2017 WL 3084397 (Bankr. S.D.N.Y. July 19, 2017).

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

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

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

6. Seadrill (UK offshore driller)

7. Philippine Airlines

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

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

10. Grupo Aeromexico (Mexican airline)

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

12. Grupo Posadas (Mexican hotel chain)

13. Kumtor Gold Co. (mine in Kyrgyzstan)

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

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

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