MLA COMMITTEE ON MARITIME BANKRUPTCY AND INSOLVENCY

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Noteworthy Chapter 15 Decisions

- *In re Daewoo Logistics Corp., 461 B.R. 175 (Bankr. S.D.N.Y. 2011).* U.S. bankruptcy court recognized as a "foreign main proceeding" under Chapter 15 of the Bankruptcy Code a rehabilitation proceeding commenced by the debtor in Korea. The court's recognition order expressly granted stay relief to the debtor. Months after the recognition order was entered, the debtor's rehabilitation proceeding in Korea was closed, although the foreign representative of the debtor never advised the Court of this fact as required under Section 1518 of the Code. Following the close of the Korean rehabilitation proceeding, a creditor of the debtor arrested a vessel belonging to the debtor that was situated in the State of Texas . The debtor's foreign representative sought to stop the arrest proceeding on grounds that it violated the automatic stay built into the original Chapter 15 recognition order. ***Held***, given the purposes of Chapter 15, and in the absence of other compelling circumstances, the automatic stay imposed by a recognition order is coterminous with the foreign proceeding to which it is associated, and does not prohibit third party actions against the debtor or its property in the United States after the close of the foreign proceeding.

- *In re The Containership Co (TCC) A/S, 2012 Bankr. LEXIS (Bankr. S.D.N.Y. 2012).* U.S. bankruptcy court recognized as a "foreign main proceeding" under Chapter 15 of the Bankruptcy Code a reconstruction proceeding commenced by the debtor in Denmark. The debtor, a defunct liner shipping company, listed among its principal assets in the reconstruction proceedings, certain minimum quantity commitment ("MQC")claims against dozens of shippers, all arising under service contracts entered into the debtor and the shippers prior to the debtor's financial demise. Following the entry of a recognition order by the court, the foreign representative of the debtor commenced separate adversary proceedings against each of the shippers, seeking to recover monies allegedly due from them under the service contracts (so-called minimum commitments). The shipper-respondents sought relief from the stay, claiming that the debtor violated various provisions of the Shipping Act of 1984, and asserting that the Federal Maritime Commission ("FMC") had exclusive and/or primary jurisdiction over their Shipping Act claims against the debtor. The court found that the technical expertise of the FMC was not required in connection with these claims and, therefore, the FMC had neither exclusive nor primary jurisdiction with respect to the claims. ***Held***, that, in the absence of compelling reasons to defer to the expertise of the FMC, the presence of alleged violations of the Shipping Act which might give rise to defenses or counterclaims by shippers in MQC litigation brought by an ocean common carrier does constitute "cause" sufficient to modify the automatic stay under section 362 of the Code (following analysis of the 12 factors set forth by the Second Circuit in *In re Sonnax Indus., 907 F.2d 1280 (2d Cir. 1990)*).

- *SNP Boat Service SA v. Hotel Le St. James, 2012 U.S. Dist. LEXIS (S.D. Fla. Apr. 11, 2012).* Debtor SNP became embroiled in a commercial dispute with a Canadian company (St. James) concerning and condition and value of a vessel transferred by the Canadian company. SNP brought suit against St. James in France, and St. James brought a countersuit against SNP in Canada. Debtor then commenced a *sauvegarde* proceeding (functional equivalent of reorganization) in France, and St. James submitted a claim, thereby submitting itself to the jurisdiction of the French court. During the pendency of the proceeding, St. James obtained a default judgment against the debtor in Canada and domesticated that judgment in the U.S., later seizing two vessels belonging to the debtor which were located in Florida. Before the vessels could be sold, a foreign representative of the debtor commenced Chapter 15 proceedings, which were formally recognized by a U.S. bankruptcy court The foreign representative then sought a court order which would entrust the seized vessels to him for eventual distribution to creditors in France. St. James opposed the motion and sought discovery on the fairness of the French proceeding in which it was then participating. Following a series of discovery disputes, and the entry of an order by the bankruptcy court to allow discovery on the issue of due process in France, the court denied the entrustment motion and dismissed the proceeding as a sanction against the foreign representative. Foreign representative appealed to the district court and the district court reversed, in part. ***Held***, under principles of comity, a U.S. bankruptcy court may only determine if foreign jurisprudence provides due process in principle to foreign litigants; inquiries into the relative fairness of a foreign main proceeding with respect to an individual creditor are not allowed.

- *In re Atlas Shipping A/S, 404 B.R. 726 (Bankr. S.D.N.Y. 2009).* U.S. bankruptcy court recognized as a "foreign main proceeding" under Chapter 15 of the Bankruptcy Code a reconstruction proceeding commenced by the debtor in Denmark. Following recognition, foreign representative of the debtor sought to vacate nine Rule B attachments totaling $4.3 million (obtained by non-U.S. creditors of the debtor) and entrust the attached funds to the foreign representative for administration in the Danish bankruptcy proceeding, based upon principles of comity and the statutory wording of Chapter 15. The foreign representative established that the attachments (both pre-bankruptcy and post-bankruptcy) would be dissolved under Danish law. The attaching creditors opposed the relief sought by the foreign representative. ***Held***, the vacatur of Rule B attachments and the entrustment of attached funds to a foreign representative is supported by principles of comity and sections 1521(a)(5) and 1521(b) of Chapter 15 insofar as it constitutes turnover relief; a turnover order does not constitute avoidance under applicable provisions of the Code.

- *Evridiki Navigation, Inc. v. The Sanko Steamship Co.,* 880 F. Supp. 2d 666, 2012 U.S. Dist. LEXIS 105540 (D. Md. 2012). Rule B attachments against vessel belonging to Japanese steamship company are vacated following the filing of a Chapter 15 petition by the foreign representative of the company. Petition had not been formally recognized by the bankruptcy court, although a preliminary injunction including stay protection had been issued. ***Held***, a district court may vacate Rule B attachments as being "futile and inequitable" in circumstances where it was likely that foreign insolvency proceedings will be recognized by the bankruptcy court and where preliminary injunction recited that the petition held a high likelihood of success on the merits. The decision underscores the importance of obtaining preliminary injunctive relief in Chapter 15 proceedings as a matter of course.

- *Armada (Singapore) Pte Ltd. v. Chetan Shah,* 480 B.R. 129, 2012 U.S. Dist. LEXIS 90230 (S.D.N.Y. 2012). Appeal taken to the district court from a bankruptcy court order granting a petition for recognition as a foreign main proceeding of an insolvency proceeding voluntarily commenced in India by the debtor. Appellant maintained that the petitioner did not meet its burden of stabling that that the foreign insolvency proceeding met the definitional requirements of a "foreign proceeding" for purposes of 11 U.S.C. §101(23). ***Held***, that as a threshold matter, a foreign representative must establish that the foreign proceeding meets the constituent elements of Section 101(23), which defines the term "foreign proceeding" to mean 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." ***Held, further***, that a person challenging recognition on public policy grounds has the burden of showing under Section 1506 that recognition would be *manifestly* contrary to U.S. public policy.

- *In re AJW Offshore, Ltd., et al.,* 2013 Bankr. LEXIS (Bankr. E.D.N.Y. Mar. 19, 2013). Following the recognition by the bankruptcy court of liquidation proceedings in the Cayman Islands as foreign main proceedings under Sections 1502(4) and 1517(b)(1), the foreign representatives of the debtors sought additional relief pursuant to Section 1521(a), including authority to seek turnover under Sections 542 (*Turnover of property to the estate*) and 543 (*Turnover of property by a custodian*) pursuant to Section 1521(a)(7). A law firm holding records which were the subject of the foreign representatives' application objected to the relief sought, arguing that the turnover powers embodied in Sections 542 and 543 were not authorized by Chapter 15. ***Held***, based upon a plain reading of the Bankruptcy Code, that a bankruptcy court is not prohibited from authorizing a foreign representative to access and employ, pursuant to Section 1521(a)(7), the turnover powers contained in Sections 542 and 543 of the Code, provided, that, the protections afforded to creditors and other interested parties under Section 1522 are taken into account, and, ***further held***, that the use of Sections 542 and 543 by a foreign representative in the context of a Chapter 15 proceeding is not inconsistent with principles of international comity.

- *In re Millenium Global Emerging Credit Master Fund Limited,* 474 B.R. 88, 2012 U.S. Dist. LEXIS 88782 (S.D.N.Y. 2012). Appeal from an order by the bankruptcy court which recognized a liquidation proceeding in Bermuda involving two offshore investment funds (the "Funds") as a foreign main proceeding. On appeal, the appellant challenged the bankruptcy court's findings that Bermuda was the Funds' COMI,[1] arguing instead that the correct COMI was the United Kingdom (in which event the foreign proceeding should be recognized as a *foreign non-main proceeding* instead of a *foreign main proceeding*). ***Held***, although the Funds were managed from the United Kingdom, a preponderance of the evidence (including the relative expectation interests of creditors) supported the conclusion that Bermuda was the COMI of the

[1] Note that the district court recognized the bankruptcy court's conclusion that COMI should be determined as of the date of commencement of the foreign proceeding. As a result of the Second Circuit's subsequent holding in *Morning Mist Holdings Ltd.,* discussed *infra*, it is now the law of the Circuit that the determination should be made as of the date of the Chapter 15 filing.

Funds. The appellant also challenged the bankruptcy court's ruling on public policy grounds, arguing that the bankruptcy court's refusal during the recognition hearing to allow detailed questioning about a London arbitration involving the Funds was contrary to U.S. public policy favoring "openness and transparency in court proceedings." ***Held***, the failure to receive evidence on the arbitration did not offend U.S. public policy because (1) the public policy exception in Section 1506 of the Bankruptcy Code is narrowly construed and is limited to the most "*fundamental policies*" of the United States, and (2) trial courts have broad discretion to determine what evidence is relevant to a given proceeding. Decision of the bankruptcy court affirmed.

- *Morning Mist Holdings Ltd. v. Krys,* 2013 U.S. App. LEXIS 7608 (2d Cir. 2013). Appeal from the judgment of the U.S. District Court for the Southern District of New York, affirming an order of the U.S. Bankruptcy Court for the Southern District of New York, which recognized the debtor's liquidation proceedings in the BVI as a "foreign main proceeding." The issue on appeal was whether the debtor had its COMI in the BVI and, specifically, when COMI should be measured. ***Held,*** that the relevant time period for the determination of a debtor's COMI is the date when the Chapter 15 petition is filed, subject to inquiry by the court into prior time periods in order to prevent the bad faith manipulation of COMI in specific situations. Appellant further challenged recognition of public policy grounds, arguing that the confidentiality of BVI liquidation proceedings was contrary to U.S. public policy for purposes of Section 1506. ***Held,*** that the right to access court documents is not absolute and, therefore, restrictions placed on access to such documents by the BVI court are not *manifestly* contrary to U.S. public policy.

- *Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de CV,* 701 F.3d 1031, 2012 U.S. App. LEXIS 24443 (5th Cir. 2012), *cert. denied*, 2013 U.S. LEXIS 3161 (Apr. 16, 2013). Cross-appeals taken in a Chapter 15 case. *First*, certain creditors appealed from a decision of the district court, affirming an order of the bankruptcy court, that recognized a Mexican *concurso* proceeding (akin to a debtor-in-possession proceeding) as a foreign main proceeding pursuant to Section 1517. Appellants argued that the foreign representatives in the Chapter 15 proceeding – who were appointed by the debtor's board of directors and not the Mexican court – did not satisfy the statutory definition of "foreign representatives" under Section 101(24). ***Held,*** that in order for a representative to be "authorized in a foreign proceeding," an official appointment by a foreign court is not a *per se* requirement, and, ***further, held,*** that, for purposes of Section 101(24), a foreign representative appointed by a debtor that remains in control of its assets is not disqualified from serving as such. *Second,* the debtor appealed from a decision of the district court, affirming an order of the bankruptcy court, which denied the entry of an order sought by the debtor which would have given full force and effect in the U.S. to a Mexican court order approving the *concurso* plan in the case. The specific issue on appeal was whether the bankruptcy court erred as a matter of law when it refused to enforce to *concurso* plan because it extinguished certain guarantee claims held by noteholders (pursuant to an indenture issued in the U.S.) against non-debtor subsidiaries of the debtor. Noting that the types of relief afforded a foreign representative under Sections 1521 and 1507 were expansive, but subject to differing standards, the court ***held, that***, in reviewing requests for relief under Chapter 15, a court should look *first* to the enumerated provisions of Section 1521(a)(1)-(7), *second* to the forms of "appropriate relief" previously recognized under the former Section 304, and, *third*, to Section

1507. ***Held, further, that***, the bankruptcy court did not abuse its discretion in refusing to enforce a *concurso* plan that permitted non-debtor releases.