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THE CURIOUS DISAPPEARANCE OF CHOICE OF LAW AS AN ISSUE IN CHAPTER 15 CASES

*Allan L. Gropper**

INTRODUCTION

Nine years have passed since the adoption in the United States of chapter 15 of the Bankruptcy Code, the U.S. version of the Model Law on Cross-Border Insolvency.¹ Chapter 15 authorizes the representative of a foreign insolvency estate to seek recognition and various forms of relief in the United States. Since a chapter 15 case by definition represents a request by a foreign representative to have proceedings in the foreign state recognized in the United States, every chapter 15 petition involves an implicit request that foreign law—or the effects of foreign law—be enforced in or (in some cases) take priority over application of the law of the United States. Nevertheless, the statute is silent on the issue of choice of law, and even though there are a sizable number of opinions that have construed chapter 15 provisions, they rarely acknowledge that a choice of law determination is being made, explicitly or implicitly.

Moreover, most of the cases considering chapter 15 are not merely silent on the issue of choice of law. The provisions of chapter 15 direct the court to give effect to novel and undefined statutory terms that, it is submitted, would be better informed if a choice of law analysis were acknowledged as an important, and sometimes, determinative factor. For example, chapter 15 provides that creditors and the debtor must be “sufficiently protected” before relief can be granted,² and that creditors in the United States must be sufficiently protected before the foreign representative can be entrusted with the distribution of all or part of the

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1. Chapter 15 was adopted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) [hereinafter the Act]. The Act repealed § 304 of the Bankruptcy Code, a much shorter provision that had authorized an ancillary proceeding to recognize and enforce orders and decrees of foreign insolvency courts. 11 U.S.C. § 304, *repealed by* Pub. L. No. 109-8, 119 Stat. 23 (2005). Chapter 15 “incorporates” the Model Law on Cross-Border Insolvency, which was drafted by UNCITRAL, the United Nations Commission on International Trade Law, to “provide effective mechanisms for dealing with cases of cross-border insolvency” U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, *prmbL*, U.N. Sales No. E.14.V.2 (2014) [hereinafter MODEL LAW]. The preamble to the Model Law is § 1501(a) of the United States Bankruptcy Code (hereinafter the Code); the articles of the Model Law generally use the same numbering as the sections of chapter 15 (e.g., Article 2 is § 1502, Article 3 is § 1503, etc.).

2. 11 U.S.C. § 1522(a) (2006).

debtor's assets located in the United States.³ As discussed hereafter, choice of law principles would be useful in giving context to the undefined term, sufficient protection.

There are also several conditions under § 1507,⁴ Article 7 of the Model Law as adopted in the United States, that must be satisfied before a foreign representative can obtain "additional assistance"⁵ beyond that available under § 1521.⁶ It would be useful if choice of law were recognized as an important factor in determining whether additional assistance should be afforded to a foreign representative. As it is, major decisions construing the statute have used tests, such as "balancing harms"⁷ or attempting to determine "how different foreign law is from that of the United States," that are arguably inconsistent with the fundamental goals of chapter 15 to foster cooperation in cross-border insolvency cases and substitute the principle of modified universalism for territorial principles that had previously prevailed.⁸ As discussed hereafter, fair choice of law determinations would

3. 11 U.S.C. § 1521(b) (2006). Sufficient protection is the United States version of "adequate protection," the term used in Articles 21 and 22 of the Model Law. MODEL LAW, *supra* note 1, arts. 21–22. The United States version was renamed so as not to confuse the concept of protection as used in the Model Law with "adequate protection" of secured creditors under domestic U.S. bankruptcy law. H.R. REP. NO. 109-31(I), 115, *reprinted in* 2005 U.S.C.C.A.N. 88, 178; *see also In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627, 636 (Bankr. E.D. Cal. 2006). Neither "sufficient protection" as used in chapter 15 nor "adequate protection" as used in the Model Law is defined in the statute.

4. 11 U.S.C. § 1507 (2006).

5. *Id.*

6. *See infra* text accompanying notes 70 and 95.

7. *See Jaffé v. Samsung Elec. Co., Ltd. (In re Qimoda)*, 737 F.3d 14 (4th Cir. 2013).

8. Section 1501 of chapter 15, substantially identical to the Preamble of the Model Law, provides that:

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. . . .

11 U.S.C. § 1501 (2006). Its goal was to replace territorialism with what has been called the principle of modified universalism, described as "a pragmatic approach that seeks to move steadily toward the ideal of universal proceedings while accepting the reality of step-by-step progress through cooperation." Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 716 (2005); Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT'L L. 819, 824 (2007) (modified universalism "is the approach embodied in the UNCITRAL Model Law on Cross-Border Insolvency (the 'Model Law') enacted as Chapter 15 of the United States Bankruptcy Code ('Chapter 15') and also by the E.U. Regulation on Cross-Border Insolvencies (the 'E.U. Reg.')" (footnotes omitted); Leif M. Clark & Karen Goldstein, *Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies*, 46 TEX. INT'L L.J. 513, 524 (2011) ("In 2005, when the United States enacted the Model Law as Chapter 15 of the Bankruptcy

foster modified universalism in many cross-border cases and make the statute's mandate of cooperation and coordination among courts and estate representatives a reality rather than a hope.

This Article will first describe the few reported decisions in pre-chapter 15 cross-border insolvency cases in the United States that required a choice of law determination.⁹ The Article will next describe choice of law principles that have been developed in the commentary or literature regarding the Model Law, there being no express treatment of choice of law in the statute itself. The Article will then analyze three cases in which a choice of law issue has been presented but largely ignored and consider whether these decisions would have been less parochial, and the goals of chapter 15 promoted, if it had been explicitly acknowledged that a choice of law was required and considered. Finally, it is argued that choice of law analysis can promote another of the principal goals of the Model Law and chapter 15: cooperation among courts and estate representatives of different nations.¹⁰

I. CHOICE OF LAW ANALYSIS IN U.S. CROSS-BORDER INSOLVENCY CASES

Choice of law was not a major issue in most bankruptcy cases in the past, in part because bankruptcy jurisdiction was traditionally territorially based, premised on a country's *in rem* control over property within its borders.¹¹ Traditional bankruptcy theory would thus subject a debtor's

Code, it continued its commitment to the ideals of modified universalism.”). Even before the adoption of chapter 15, it was held that by virtue of the adoption of former § 304, “international comity is a policy that Congress expressly made part of the Bankruptcy Code.” *Maxwell Commc’n Corp. plc v. Societe Generale (In re Maxwell Commc’n Corp. plc)*, 93 F.3d 1036, 1052 (2d Cir. 1996). Comity has been defined as “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is 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 protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

9. It should be noted that most of these cases were plenary proceedings under the U.S. bankruptcy laws and were not ancillary proceedings involving the request of a foreign estate representative for recognition and relief of the type encompassed in chapter 15 and its predecessor, § 304. Nevertheless, it is submitted that their approach to the choice of law issue is relevant.

10. *See* 11 U.S.C. §§ 1525–27 (2006); MODEL LAW, *supra* note 1, arts. 25–27.

11. *See, e.g., Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004) (“A bankruptcy court’s *in rem* jurisdiction permits it to ‘determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is ‘one against the world.’”) (quoting 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 108.70[1] (3d ed. 2004)); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006) (“Bankruptcy jurisdiction, at its core, is *in rem*.”).

property within the jurisdiction of the court to the local insolvency regime, ordinarily to the exclusion of application of any other law.¹²

The more modern cases that have considered choice of law in a bankruptcy context have generally applied a “center of gravity” analysis, deferring to the law of the jurisdiction with the most substantial interest in the matter in dispute. For example, in *Hong Kong and Shanghai Banking Corp., Ltd. v. Simon (In re Simon)*,¹³ the court said, “under the Bankruptcy Code, the bankruptcy court must consider the status and progress of other nations’ insolvency proceedings in determining how to manage domestic bankruptcies. In most cases, the court will defer to where the ‘center of gravity’ of multiple proceedings exists, if one can be ascertained.”¹⁴ Choice of law issues were considered most thoroughly in *Maxwell Commc’n Corp. plc v. Societe Generale plc (In re Maxwell Commc’n Corp. plc)*.¹⁵ There, insolvency proceedings were pending in London and New York regarding Maxwell Communications Corp., the London-based holding company of an international publications empire.¹⁶ Three banks based in London but amenable to suit in New York had been repaid the principal of their debt during the ninety days prior to the U.S. filing.¹⁷ There was no dispute that if U.S. preference law were applied in the U.S. chapter 11 case, the debtor would very likely be able to recover more than \$30 million for the benefit of the estate—a sizable sum for the day.¹⁸ If, on the other hand, English law were applied, the debtor would likely be unable to satisfy the more stringent

12. *Nolte v. Hudson Nav. Co.*, 31 F.2d 527 (2d Cir. 1929) (equity receivership); *Prudential Ins. Co. of Am. v. Land Estates*, 110 F.2d 617 (2d Cir. 1940) (receivership). A notable exception was *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527 (1983), where U.S. bondholders of a Canadian railroad challenged the action of the Canadian parliament in ratifying a modern day restructuring, substituting new bonds with a lower interest rate for the old bonds without the consent of the bondholders. The Supreme Court, Justice Harlan dissenting, held that there was no constitutional protection against the impairment of contracts in Canada, and “that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes.” *Id.* at 537. It concluded “that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.” *Id.* at 538.

13. *Hong Kong and Shanghai Banking Corp., Ltd. v. Simon (In re Simon)*, 153 F.3d 991 (9th Cir. 1998).

14. *Id.* at 999; see also Official Comm. of Unsecured Creditors v. Transpacific Corp. (*In re Commodore Int’l, Ltd.*), 242 B.R. 243, 256 (Bankr. S.D.N.Y. 1999), *aff’d*, No. 00CIV.1679(SAS), 2000 WL 977681 (S.D.N.Y. July 17, 2000) (center of gravity in United States); *Kriegman v. Cooper (In re LLS Am., LLC)*, Adversary No. 11-80093-PCW11, 2012 WL 2564722 (Bankr. E.D. Wash. July 2, 2012) (center of gravity analysis); *Florsheim Grp. Inc. v. USAsia Int’l Corp. (In re Florsheim Grp., Inc.)*, 336 B.R. 126, 130 (Bankr. N.D. Ill. 2005) (center of gravity test); *In re Int’l Admin. Servs., Inc.*, 211 B.R. 88, 95 (Bankr. M.D. Fla. 1997) (foreign state had greater interest in regulating entities conducting business in its territory).

15. *Maxwell Commc’n Corp. plc v. Société Générale (In re Maxwell Commc’n Corp. plc)*, 93 F.3d 1036 (2d Cir. 1996).

16. *Id.* at 1040.

17. *Id.*

18. *Id.* at 1043.

requirements of the English preference statute.¹⁹ Not surprisingly, the banks were sued in the United States, and the debtors argued that U.S. law should apply.²⁰

The Bankruptcy Court and the District Court, on first appeal, explicitly dealt with the choice of law issue.²¹ Chief Judge Brozman in the Bankruptcy Court found that English law should be applied on two grounds. The first was the so-called presumption against extraterritoriality, a doctrine that U.S. laws do not apply to extraterritorial conduct unless the statute explicitly provides for such a result (and extraterritorial application is constitutionally permissible).²² The second ground is more relevant for present purposes. The court said:

The traditional federal choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the controversy. . . . The court is required to evaluate all of the various contacts each jurisdiction has with the controversy in terms of their relative importance with respect to a particular issue and make a reasoned determination as to which jurisdiction's laws and policies are implicated to the greatest extent.²³

The court took note of the “more radical” approach of its appointed expert, Professor Jay L. Westbrook, who advocated for application of the “home country” law—i.e., the law of the debtor’s principal place of business or, to use a chapter 15 term, center of main interests (even though the term probably had not yet been coined).²⁴ It concluded:

19. *Id.* (“British law imposes an additional condition—it limits avoidance to those situations where placing the transferee in a better position was something the debtor intended. *See* Insolvency Act 1986 § 239(5).”).

20. *Id.*

21. *Maxwell Commc’n Corp. v. Barclays Bank plc (In re Maxwell Commc’n Corp. plc)*, 170 B.R. 800, 816–18 (Bankr. S.D.N.Y. 1994); *Maxwell Commc’n Corp. v. Société Générale plc (In re Maxwell Commc’n Corp. plc)*, 186 B.R. 807, 818–24 (S.D.N.Y. 1995).

22. *In re Maxwell Commc’n*, 170 B.R. at 809. The Supreme Court has developed the doctrine in cases such as *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), and, more recently, *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010). There is conflicting authority as to the extent to which “Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate.” *Compare* *Kismet Acquisition, LLC v. Icenhower (In re Icenhower)*, 757 F.3d 1044 (9th Cir. 2014), *and* *French v. Liebmann (In re French)*, 440 F.3d 145 (4th Cir. 2006), *with* *Barclay v. Swiss Fin. Corp. Ltd. (In re Midland Euro Exch. Inc.)*, 347 B.R. 708, 717 (Bankr. C.D. Cal. 2006), *and* *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (S.D.N.Y. 2014).

23. *Maxwell Commc’n*, 170 B.R. at 816 (citations omitted).

24. *Id.* at 816–17. The “center of main interests” of a debtor in a chapter 15 case is presumed, in the absence of evidence to the contrary, to be the location of its registered office, 11 U.S.C. § 1516(c) (2006), but the presumption can be overcome. *See* *Morning Mist Holdings Ltd. v. Kryz (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013). The center of main interests is then determined by a series of tests, such as “the location of the debtor’s headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor’s primary assets; 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/or the jurisdiction whose law would apply to most disputes.” *Id.* at 137 (quoting *In re SPhinX, Ltd.*, 351

In any event, whether one applies the Restatement's traditional choice-of-law analysis or Professor Westbrook's more radical approach, the conclusion is inescapable that, as Professor Westbrook concluded, English law ought govern resolution of these suits. MCC was a publicly-owned holding company, incorporated in England and run, for all intents and purposes, by MCC executives out of Maxwell House in London subject to the direction of an English board of directors. MCC negotiated its loans with these defendants in England and provided that English law would govern resolution of any disputes arising therefrom. The challenged transfers occurred in England and the recipients, two of which were English banks, were located in England. It is certainly questionable whether the defendants reasonably could have expected U.S. law to apply.²⁵

The court's final words were, "[b]ecause I find that English law ought govern, considerations of comity dictate that these suits be dismissed."²⁶

The result in the District Court, the court of first appeal, was similar, although the District Court placed the choice of law portion of its opinion under the heading, "Comity," and noted "courts have naturally looked to international choice of law principles in attempting to apply this canon of statutory construction."²⁷ At the Second Circuit, the next and final appellate level, the Court did not rely on the presumption against extraterritoriality.²⁸ It agreed that there was "a true conflict" between U.S. and English law, "necessitating the application of comity principles to ascertain the compass of the [Bankruptcy] Code."²⁹ It applied "traditional choice of law principles" through the prism of comity and found that English law should prevail because, among other things, "England has a much closer connection to these disputes than does the United States," and "England has a stronger interest than the United States in applying its own avoidance law to these actions."³⁰ It rejected the position of the examiner in the case, who argued that all of the provisions of a unitary bankruptcy statute must be

B.R. 103, 117 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007)). The location most importantly corresponds to the jurisdiction known to creditors as "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." *Id.* at 136 (quoting Council Regulation 2000/1346, On Insolvency Proceedings, pmbl. para. 13, 2000 O.J. (L 160) I, 2 (EC)) (emphasis in original).

25. *Maxwell Commc'n Corp. plc*, 170 B.R. at 817 (footnotes omitted).

26. *Id.* at 818.

27. *Maxwell Commc'n Corp. plc v. Société Générale plc (In re Maxwell Commc'n Corp. plc)*, 186 B.R. 807, 818–24 (S.D.N.Y. 1995). Judge Scheindlin agreed that application of U.S. preference law would offend the presumption against extraterritoriality. *Id.* at 820. She also agreed that "[t]he bankruptcy court clearly did not abuse its discretion in finding that traditional choice of law principles 'point decidedly towards the application of U.K. law.'" *Id.* at 822 (quoting *In re Maxwell Commc'n*, 170 B.R. at 818).

28. *Maxwell Commc'n Corp. plc v. Société Générale plc (In re Maxwell Commc'n Corp. plc)*, 93 F.3d 1036 (2d Cir. 1996).

29. *Id.* at 1050.

30. *Id.* at 1051–52.

applied in a given proceeding, and that, as a result, the *lex fori concursus* or law of the forum (the United States) necessarily governed.³¹ Its conclusion was that “[a]lthough a different result might be warranted were there no parallel proceeding in England—and, hence, no alternative mechanism for voiding preferences—we cannot say the United States has a significant interest in applying its avoidance law.”³²

The “traditional federal choice of law rule” applied by the Bankruptcy and District Courts in *Maxwell* and implicitly by the Second Circuit was also recognized in a proceeding under § 304 of the Bankruptcy Code, the predecessor to chapter 15.³³ In *In re Koreag, Controle et Revision S.A.*,³⁴ a foreign representative sought an order transmitting property located in New York to Switzerland for administration in a Swiss insolvency proceeding pending there.³⁵ The Second Circuit held that the federal common law rule and the conflicts principles of New York, where the litigation was pending, both called for “an interest analysis” to determine which of the conflicting laws of two jurisdictions should prevail.³⁶ It concluded:

Switzerland’s primary interest is in the administration of [the debtor’s] insolvency estate. New York’s primary interest is in defining and protecting the property interests of its citizens and those who do business there. Thus, New York law is more closely related to the particular property dispute at issue. We conclude that New York law should apply.³⁷

Although a “center of gravity” or “interest analysis” has been applied in most plenary bankruptcy proceedings where the issue has arisen, as well as in an application for relief under § 304 of the Bankruptcy Code (such as in *Koreag*), note should be taken of a distinct line of authority that has developed in cases where U.S. creditors of foreign debtors have sought to litigate issues arising out of a foreign insolvency proceeding in the U.S. courts, and the defendant moved to dismiss, citing the principle of comity and arguing that the dispute should be subject to the exclusive jurisdiction of the foreign insolvency court. For example, in *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, the dispute was between a Mexican

31. *Id.* at 1052.

32. *Id.*

33. The legislative history of § 1521 states that the “section does not expand or reduce the scope of relief” previously available under § 304. H.R. REP. NO. 109-31(I), at 116 (2005), reprinted in 2005 U.S.C.A.N. 88, 178. The Bankruptcy Court in *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff’d*, 389 B.R. 325 (S.D.N.Y. 2008), found that chapter 15 imposes a more rigid procedural structure for recognition of a foreign proceeding than § 304, but, like § 304, affords a court “substantial discretion and flexibility” in fashioning relief. *Id.* at 126 (citing Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT’L L. 1019 (2007)).

34. *Koreag, Controle et Revision S.A. v. Refco F/X Assoc., Inc.* (*In re Koreag, Controle et Revision S.A.*), 961 F.2d 341 (2d Cir. 1992).

35. *Id.* at 346.

36. *Id.* at 351.

37. *Id.*

debtor and a group of banks in the United States who held a security interest, under a loan agreement governed by New York law, in receivables earned by the Mexican company from customers in the United States and held in a collection account in New York.³⁸ The banks sued in the United States for a declaration that they owned the funds in the collection account, and the Mexican debtor moved to dismiss on grounds that principles of international comity counseled deference to the foreign bankruptcy court.³⁹ The Second Circuit held that the case should be dismissed on comity grounds, observing that “[w]e have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding.”⁴⁰

Strictly speaking, *Altos Hornos* and similar cases raise the question as to which court should decide the dispute, not the law that the court should apply. Nevertheless, there is an assumption that a U.S. court should decide an issue of U.S. or local law. For example, the *Altos Hornos* court distinguished its prior opinion in *Koreag* by reaffirming “*Koreag*’s rule that U.S. courts may resolve *bona fide* questions of property ownership arising under local [U.S. or State] law while a foreign bankruptcy proceeding is ongoing without deferring to the parallel foreign proceeding on grounds of international comity.”⁴¹ The implication is that the U.S. court should decide an issue of local law. In another § 304 case, *Bank of New York v. Treco (In re Treco)*,⁴² the court held even more explicitly that funds could not be remitted to the Bahamas if a security interest created under U.S. law and held by a U.S. creditor were impaired, and that the U.S. court should decide whether the creditor was in fact secured under local law. In any event, the structure of the Model Law and chapter 15, like § 304, makes it clear that if the foreign representative wants relief in the United States, the U.S. courts will make the final determination.⁴³ Therefore, although cases outside of chapter 15 continue to follow principles similar to those set out in *Altos*

38. JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 420 (2d Cir. 2005).

39. *Id.* at 422.

40. *Id.* at 424. The line of cases referred to, all in the Second Circuit, include *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240 (2d Cir. 1999); *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996 (2d Cir. 1993); and *Cunard SS. Co. Ltd. v. Salen Reefer Services AB*, 773 F.2d 452 (2d Cir. 1985). The *Altos Hornos* court did not find it necessary to perform much analysis in order to find the parties’ choice of New York law to govern the security agreement “unavailing,” brushing aside the security agreement and the debtor’s submission to jurisdiction in New York because “the fact that such clauses are in an agreement does not preclude a court from deferring on grounds of international comity where deference is otherwise warranted.” *Altos Hornos*, 412 F.3d at 429. The Court appeared unconcerned that the lower courts in Mexico had repeatedly refused to recognize the security interest of the U.S. banks and that “[o]nly recently [after six years] did the Mexican federal court rule in J.P. Morgan’s favor.” *Id.* at 428.

41. *Altos Hornos*, 412 F.3d at 426.

42. *Bank of New York v. Treco (In re Treco)*, 240 F.3d 148 (2d Cir. 2001).

43. See 11 U.S.C. § 1501 (2006) (defining the scope and purpose of chapter 15).

Hornos,⁴⁴ under chapter 15, foreign representatives must satisfy specific statutory standards that significantly constrain its approach of strong deference to the foreign court, as well as the foreign law.

II. THE CHOICE OF LAW PRINCIPLES OF THE LEGISLATIVE GUIDE, THE EU REGULATION AND THE GLOBAL RULES

Recent analysis of cross-border choice of law principles in the legal literature reveals a split of authority between use of the *lex fori concursus* as a governing rule and a more nuanced analysis based on a center of gravity or interest analysis.

The *lex fori concursus* is the law of the jurisdiction where the insolvency proceeding is pending. Its foremost advocate for use in cross-border cases is UNCITRAL, which drafted the Model Law.⁴⁵ Although the Model Law contains no specific provisions dealing with choice of law, UNCITRAL has also adopted a Legislative Guide “to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations.”⁴⁶ The Legislative Guide’s position on choice of law issues is strictly in favor of the law of the state where insolvency proceedings are pending. It acknowledges that a choice of law must be made where there is a cross-border conflict, but it resolves all but two such conflicts in favor of the *lex fori concursus*, declaring that “[t]he insolvency law of the State in which insolvency proceedings are commenced (*lex fori concursus*) should apply to all aspects of the commencement, conduct, administration and conclusion” of an insolvency proceeding.⁴⁷ The *lex fori concursus* thus governs not only procedural matters but also the treatment of contracts, setoff rights, treatment of secured creditors, and distribution of proceeds.⁴⁸ Only two exceptions are acknowledged as subject to another law: “the effects of insolvency proceedings on the rights and obligations of the participants in a payment or settlement system or in a regulated financial market”⁴⁹ and “the effects of insolvency proceedings on rejection, continuation and modification of labour contracts.”⁵⁰ The Legislative Guide does not explain why these two quite distinct matters should be subject to a law other than

44. *See* *Oui Fin. LLC v. Dellar*, No. 12 CIV. 7744(RA), 2013 WL 5568732 (S.D.N.Y. Oct. 9, 2013); *cf.* *Barclays Bank PLC v. Kemsley*, 44 Misc.3d 773 (N.Y. Sup. Ct. 2014) (extending comity to U.K. insolvency discharge).

45. *See* MODEL LAW, *supra* note 1.

46. U.N. COMM’N ON INT’L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW, intro. para. 1, U.N. Sales No. E.05.V.10 (2005), available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf [hereinafter LEGISLATIVE GUIDE].

47. *Id.* rec. 31.

48. *Id.* rec. 31(h)–(j), (q).

49. *Id.* rec. 32.

50. *Id.* rec. 33.

the *lex fori concursus*, except that the rights of local employees and those subject to a regulated market are frequently subject to special protections in insolvency proceedings.⁵¹

The position taken by the Legislative Guide, it is submitted, is based on the proposition that adherence to the *lex fori concursus* will provide certainty with respect to the effect of insolvency proceedings on the rights and claims of parties affected by those proceedings so long as the forum of the insolvency case is also the debtor's 'center of main interests.' The basic principle has been forcefully advocated by Professor Westbrook, the expert appointed in the *Maxwell* case and author of the 'radical' approach (as described by the Bankruptcy Judge there) that English law should apply because it was the debtor's home country law. Westbrook contends:

a clear home-country rule that permits creditors to anticipate that one law will control most aspects of a default will greatly benefit predictability and contribute to Transactional Gain. Because we cannot always apply the home-country rule, we must settle for a strong presumption in its favor as we consider each choice of law problem.⁵²

The position of the Legislative Guide is not, however, taken by the European Union Insolvency Regulation—the one statute on cross-border insolvency law that does specifically deal with choice of law.⁵³ The EU Regulation, which is in force in all member states of the EU except Denmark, is designed to coordinate insolvency proceedings throughout the EU and to require cooperation among courts and estate representatives.⁵⁴ Unlike the Model Law, the EU Regulation contains express provisions relating to the "Law Applicable."⁵⁵ Like the Legislative Guide to the Model Law, the EU Regulation starts with the *lex fori concursus*, providing that the "law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their

51. For special protection afforded in the U.S. Bankruptcy Code to employees and participants in financial markets, see, e.g., 11 U.S.C. §§ 502, 546(e) (2006).

52. Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 470 (1991). Westbrook's analysis is supported by the structure of the Model Law, which provides for recognition of a "foreign main proceeding" at the location of the debtor's "center of main interests" or "COMI." See MODEL LAW, *supra* note 1, art.17(2)(a). See also Jay Lawrence Westbrook, *Universalism and Choice of Law*, 23 PENN ST. INT'L L. REV. 625, 630 (2005) ("Given the rapid movement of assets around the world today, no rule can provide a reasonable prediction about the results of a bankruptcy case except a universalist system applying the bankruptcy law of the center of the debtor's main interests."). Westbrook would in fact locate a debtor's COMI based in part on the COMI having a sophisticated bankruptcy law capable of being applied universally.

53. Council Regulation 2000/1346, On Insolvency Proceedings, recital 13, 2000 O.J. (L 160) 1 (EC), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000R1346&from=en> [hereinafter EU Regulation].

54. *Id.* recital 2, 3.

55. *Id.* art. 4.

closure.”⁵⁶ Nevertheless, there are several exceptions to the primacy of the *lex fori concursus*, including not only the two matters recognized in the Legislative Guide (labor and financial contracts), but also third parties’ security rights in collateral not located in the state of the opening of the proceeding;⁵⁷ setoff “permitted by the law applicable to the insolvent debtor’s claim”;⁵⁸ contracts relating to immoveable property;⁵⁹ and the effects of insolvency proceedings on lawsuits pending at the time of the opening of proceedings.⁶⁰ The EU statutory rules are thus far more nuanced than the principles of the Legislative Guide.

Rules similar to those in the EU Regulation have also been proposed in a study published by the American Law Institute and the International Insolvency Institute entitled “Global Rules on Conflict-of-Laws Matters in Insolvency Cases.”⁶¹ The Global Rules, like the conflict of law rules in the EU Regulation, recognize numerous exceptions to the general rule, application of the *lex fori concursus*.⁶² Exceptions include, in addition to those relating to labor and financial contracts,⁶³ protection of the *in rem* rights of secured creditors under the law of a state other than that of the foreign main proceeding;⁶⁴ protection of setoff rights;⁶⁵ and defenses to avoidance proceedings, unless the law of the state other than the forum “has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the selection of the law of that state as the law to govern the transaction in question.”⁶⁶ The Reporters explain that a more limited

range of exceptions to the dominant role of the *lex concursus* is unlikely to prove commercially convenient or acceptable to the majority of parties engaged in international trade and business, given the present stage of uneven development of national laws governing such sensitive matters as security interests, set-off, and transaction avoidance. We therefore

56. *Id.* art. 4(2). This encompasses not only procedural, but also many substantive matters, such as the admission of claims, the effects of insolvency proceedings on contracts, and the rules relating to the “voidness, voidability or unenforceability of legal acts detrimental to all creditors.” *Id.* arts. 4, 2(h), (e), (m).

57. *Id.* art. 5.

58. *Id.* arts. 6, 9, 10.

59. *Id.* art. 8.

60. *Id.* art. 15.

61. AM. LAW INST., *Global Rules on Conflict-of-Laws Matters in Insolvency Cases*, in TRANSNATIONAL INSOLVENCY: GLOBAL PRINCIPLES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES ann. at 200 (2012), available at <http://www.iiglobal.org/component/jdownloads/finish/557/5932.htm> [hereinafter *Global Rules*]. Professors Bob Wessels and Ian Fletcher are the reporters. The rules have not yet been formally adopted by the American Law Institute.

62. *Global Rules*, *supra* note 61, Statement of the Reporters.

63. *Id.*

64. *Id.* r. 15–16.

65. *Id.* r. 17–18.

66. *Id.* r. 23.

proclaim our allegiance to the alternative approach embodied in articles 4–15 of the EU Regulation (notably in articles 5, 6, and 13) whereby additional exceptions to the application of the *lex concursus* are permitted, under controlled circumstances. . . .⁶⁷

A further question is whether the position taken by the UNCITRAL Legislative Guide—strict application of the *lex fori concursus*—or the more nuanced position of the European Regulation is more faithful to the Model Law and to its American counterpart, chapter 15 of the Code. As noted above, the Model Law and chapter 15 are silent on the issue of choice of law, and they do not rule out strict application of the *lex fori concursus*. Nevertheless, it is submitted that several provisions of the Model Law and chapter 15 weigh in favor of the nuanced approach. For example, both the Model Law and chapter 15 require that before substantive relief is granted, “the court must be satisfied that the interests of creditors and other interested persons, are adequately protected.”⁶⁸ Article 21(2) of the Model Law and its U.S. counterpart, § 1521(b), require that creditors in the enacting state be adequately (sufficiently) protected if the court, at the foreign representative’s request, entrusts the distribution of all or part of the debtor’s assets in the enacting state to the foreign representative.⁶⁹ Section 1507 of the U.S. version of the Model Law provides that “additional assistance” beyond that available under §§ 1519 and 1521 can be granted only if “consistent with the principles of comity” and only if such relief “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.⁷⁰

67. *Id.* at 3.

68. See MODEL LAW, *supra* note 1, art. 21. The United States changed the term to “sufficiently protected” and omitted the phrase “the court must be satisfied.” Section 1522(a) reads: “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.” 11 U.S.C. § 1522(a) (2006).

69. 11 U.S.C. § 1521(b); Model Law, *supra* note 1, art. 21.

70. 11 U.S.C. § 1507(b). These are the factors that a court was directed to consider in determining whether to grant relief under § 304 of the Bankruptcy Code, the predecessor to chapter 15.

The statute, especially in the form adopted in the United States, thus contains material limitations on a receiving court's authority to adopt and enforce the *lex fori concursus*.⁷¹

Three recent major chapter 15 decisions in the United States have used the provisions of chapter 15 relating to sufficient protection and additional assistance to sustain application of U.S. law and to reject the *lex fori concursus*.⁷² Each of the cases relied in part on the concept of "sufficient protection." One of them relied more substantially on the holding that the requested relief was additional assistance available only under limited circumstances provided in § 1507. It is submitted that each case would have been better decided if the choice of law issue had been recognized and if a choice of law analysis had been performed. Such analysis would give better effect to principles of sufficient protection and additional assistance than the vague and somewhat parochial tests that the courts used.

III. THREE ILLUSTRATIVE CASES

A. *IN RE QIMONDA AG*

Arguably the most important recent chapter 15 case was *Jaffé v. Samsung Electronics Co., Ltd.*,⁷³ which involved the liquidation of a German company, Qimonda, once one of the world's largest manufacturers of dynamic random access memory devices.⁷⁴ Qimonda had licensed its patents, critical to the semiconductor business, to the giants of the industry, including Samsung, Intel, IBM, and many others.⁷⁵ Under German law, Qimonda's liquidator, Michael Jaffé, was empowered to reject the licenses and relicense the patents at a profit, for the benefit of all creditors of the estate but at the expense of the pre-bankruptcy licensees.⁷⁶ The ability of a debtor to reject intellectual property licenses (and thereby, benefit the estate) had been the rule of law in the United States prior to the addition of § 365(n) to the Bankruptcy Code in 1988,⁷⁷ which gives the licensee of a

71. A recent decision makes the point explicitly that these limitations act as "a brake" on application of comity, or application of the *lex fori concursus*. In *In re Vitro*, the court first noted, among other things, that "[i]n applying the principles of comity, we 'take[] into account the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law.'" *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1053 (5th Cir. 2012) (quoting *In re Artimm, S.r.L.*, 335 B.R. 149, 161 (Bankr. C.D. Cal. 2005)). The court then went on to discuss "certain requirements and considerations that act as a brake or limitation on comity, and preclude granting the relief requested by a foreign representative." *Id.* at 1054 (citing §§ 1506, 1507 and 1521 of chapter 15 of the Code).

72. See *infra* Section III.

73. *Jaffé v. Samsung Elec. Co., Ltd.*, 737 F.3d 14 (4th Cir. 2013).

74. *Id.* at 17.

75. *Id.* at 18.

76. *Id.* at 20.

77. Act of Oct. 18, 1988, Pub. L. No. 100-506, 102 Stat. 2538.

patent the option of retaining its rights under the license for the duration of the contract.⁷⁸ When Qimonda's liquidator asked for an order under chapter 15 enforcing his right under German law to reject the U.S.-based licenses, he presented the U.S. courts with what, it is submitted, is a conflict of law dispute.

There were several U.S. decisions in the *Qimonda* litigation. The first Bankruptcy Court decision allowed Jaffé to reject the licenses.⁷⁹ On appeal the District Court reversed and sent the case back, indicating strongly its view that § 365(n) is fundamental to the ability of licensees to innovate and compete and that failure to apply it would violate U.S. public policy,⁸⁰ contrary to § 1506.⁸¹ On remand, the Bankruptcy Court agreed, although it also held that application of German law would deprive creditors of sufficient protection under § 1522 of chapter 15, which provides that a court may grant relief “only if the interests of creditors and other interested entities, including the debtor, are sufficiently protected.”⁸² On further appeal directly to the Fourth Circuit, that court properly ignored the public policy branch of the decision below; it did not find that § 365(n) represented a policy that was so fundamental to core U.S. legal principles that failure to enforce it would be “manifestly contrary to the public policy

78. Section 365(n)(1) provides:

If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

11 U.S.C. § 365(n)(1) (2006).

79. *In re Qimonda AG*, No. 09-14766-RGM, 2009 WL 4060083 (Bankr. E.D. Va. Nov. 19, 2009), *aff'd in part, remanded in part sub nom. In re Qimonda AG Bankr. Litig.*, 433 B.R. 547 (E.D. Va. 2010).

80. *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 571 (E.D. Va. 2010).

81. Section 1506, based on Article 6 of the Model Law, provides that “[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.” 11 U.S.C. § 1506.

82. *In re Qimonda AG*, 462 B.R. 165, 180–83 (Bankr. E.D. Va. 2011), *aff'd sub nom. Jaffé v. Samsung Elec. Co., Ltd.*, 737 F.3d 14, 21 (4th Cir. 2013).

of the United States” within the meaning of § 1506.⁸³ The Fourth Circuit rested its decision instead on the principle of sufficient protection, concluding that

the bankruptcy court properly recognized that Jaffé’s request for discretionary relief under § 1521(a) required it to consider “the interests of the creditors and other interested entities, including the debtor” under § 1522(a) and that *it properly construed § 1522(a) as requiring the application of a balancing test*. Moreover, relying on the particular facts of this case and the extensive record developed during the four-day evidentiary hearing, we also conclude that the bankruptcy court reasonably exercised its discretion in balancing the interests of the licensees against the interests of the debtor and finding that application of § 365(n) was necessary to ensure the licensees under Qimonda’s U.S. patents were sufficiently protected.⁸⁴

The Fourth Circuit’s opinion is replete with reference to the patents at issue being U.S. patents, and it notes that Jaffé requested in his chapter 15 petition that he be entrusted with the “administration of all of Qimonda’s assets within the territorial jurisdiction of the United States, which largely consisted of the 4,000 U.S. patents.”⁸⁵ But the identity of the beneficiaries of the decision is not clear—whether they are holders (whether U.S. or foreign) of patents whose scope was defined as the territory of the United States; or U.S. citizens entitled to use the patents anywhere in the world; or U.S. citizens entitled to use the patents in the United States.⁸⁶

83. *Jaffé v. Samsung Elec. Co., Ltd.*, 737 F.3d 14 (4th Cir. 2013) (quoting *In re Qimonda AG*, 433 B.R. 547, 565 (E.D. Va. 2010) (citations omitted)).

84. *Id.* at 18 (emphasis added).

85. *Id.* at 17 (“The principal assets of Qimonda’s estate consisted of some 10,000 patents, about 4,000 of which were *U.S. patents*.”) (emphasis added). The term “within the territorial jurisdiction of the United States” is a defined term in chapter 15. 11 U.S.C. § 1502(8) (2006). It means (i) for tangible property, “property located within the territory of the United States,” and (ii) for intangible property, such as patents, 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.” *Id.*

86. The Fourth Circuit returned to the question of the “territorial jurisdiction of the United States” in a footnote that rejected the position of the United States, which had filed an *amicus* brief that expressly refused to endorse the position of any of the parties in the case. The U.S. government argued instead that the decisions below had improperly restrained the operation of a German statute in Germany. The Fourth Circuit stated in response that the bankruptcy court had properly

conditioned its grant of power to Jaffé to “administer the assets of Qimonda AG *within the territorial jurisdiction of the United States*,” with the limitation that he was taking the company’s U.S. patents subject to the preexisting licenses, which he was obliged to treat in a manner consistent with § 365(n). As a result, Jaffé is precluded from rejecting the U.S. patent licenses *as a matter of U.S. law*. Although this limitation may have indirect effects in the German proceeding, it does not represent an impermissible application of U.S. law extraterritorially.

The Fourth Circuit decision endorsed the action of the Bankruptcy Court in balancing the harm to the “U.S. creditors” and the harm to the German estate in determining whether the holders of the “4,000 U.S. patents” would be “sufficiently protected” under § 1522(a) by virtue of application of German law.⁸⁷ As noted above, § 1522(a) requires that creditors and other interested parties, including the debtor, be sufficiently protected by any relief granted under § 1521.⁸⁸ The use of § 1522(a) to protect one subclass of creditors at the expense of another is questionable. The language of § 1522(a) does not distinguish between U.S. creditors and foreign creditors, implying that sufficient protection should be provided to the worldwide creditors of a debtor.⁸⁹ Examined from a worldwide perspective, the “interests of creditors and the debtor” provided for in § 1522(a), were all poorly protected by the action of the U.S. court in showing preference for one subset of creditors (the U.S. creditors) over other creditors generally.

At least one court in the United States has rejected the notion of construing the § 1522(a) requirement of sufficient protection by reference to the nationality or place of business of the creditor. In *SNP Boat Service v. Hotel Le St. James*,⁹⁰ the court noted that § 1521(b) requires that “the interests of creditors *in the United States*” be sufficiently protected before the court may “entrust the distribution of all or part of the debtor’s assets located in the United States to the foreign representative. . . .”⁹¹ By contrast, § 1522(a), on which the court relied in *Qimonda*, does not distinguish among creditors, and the *SNP Boat Service* judge quoted the statement in the Guide to Enactment of the Model Law that disavows the proposition that Article 22 (the source of § 1522) invites a court to distinguish between local and other creditors.⁹² Nevertheless, the Fourth Circuit’s decision in

Jaffé, 737 F.3d at 25, n.3 (emphasis in original). This is about as close as the court came to a conflict of laws analysis.

87. *Id.* at 26–29.

88. 11 U.S.C. § 1522(a) (2006).

89. *Id.*

90. *SNP Boat Serv. v. Hotel Le St. James*, 483 B.R. 776, 782–83 (S.D. Fla. 2012).

91. *Id.* at 782, 784–85 (emphasis added).

92. The Guide to the Enactment of the Model Law on Cross-Border Insolvency states the following:

In many cases the affected creditors will be “local” creditors. Nevertheless, in enacting article 22, it is not advisable to attempt to limit it to local creditors. Any express reference to local creditors in paragraph 1 would require a definition of those creditors. An attempt to draft such a definition (and to establish criteria according to which a particular category of creditors might receive special treatment) would not only show the difficulty of crafting an appropriate text but would also reveal that there is no justification for discriminating [among] creditors on the basis of criteria such as place of business or nationality.

Guide to Enactment, in MODEL LAW, *supra* note 1, para. 198, substantially similar to para. 163 of the 1997 version of the Guide. U.N. COMM. ON INT’L TRADE LAW, *Guide to Enactment*, in

Qimonda rejected this construction of § 1522(a), relying on a reference to “local creditors” in paragraph 35 of the 1997 version of the Guide to Enactment, a very general, introductory description of the purposes of the Model Law that was omitted when the Guide to Enactment was revised in 2013.⁹³

Even if *Qimonda* is arguably wrong in its analysis of § 1522(a), it is an authoritative construction of a U.S. statute by an appellate court and an important precedent.⁹⁴ Further, § 1507 of the statute, as adopted in the United States, also provides a special degree of protection to creditors in the United States.⁹⁵ In the Model Law, article 7 looks like a throwaway; it merely provides, “[n]othing in this Law limits the power of a court or a [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to provide additional assistance to a foreign representative under other laws of this State.”⁹⁶ In the United States, the provision of “additional assistance to a foreign representative under [the Bankruptcy Code] or under other laws of the United States” is circumscribed or enhanced, as the case may be, by three provisos: (i) the additional assistance is subject to the specific limitations stated elsewhere in chapter 15; (ii) the provision of additional assistance must be “consistent with the principles of comity”; and (iii) the additional assistance must reasonably satisfy the same conditions to relief contained in former § 304, which chapter 15 replaced.⁹⁷

Thus, in the United States, the sufficient protection provisions of §§ 1521(b) and 1522(a) are not the only parts of chapter 15 that are relevant

MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.99.V.3 (1997) [hereinafter 1997 GUIDE TO ENACTMENT].

93. Paragraph 35 of the 1997 version of the Guide stated:

The Model Law contains provisions such as the following to protect the interests of the creditors (in particular local creditors), the debtor and other affected persons: the availability of temporary relief upon application for recognition of a foreign proceeding or upon recognition is subject to the discretion of the court; it is expressly stated that in granting such relief the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected (article 22, paragraph 1); the court may subject the relief it grants to conditions it considers appropriate; and the court may modify or terminate the relief granted, if so requested by a person affected thereby (article 22, paragraphs 2 and 3).

1997 GUIDE TO ENACTMENT, *supra* note 92, para. 35.

94. Moreover, a similar construction of the term sufficient protection was seemingly reached in a footnote in the decision of the Fifth Circuit in *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1067 n.42 (5th Cir. 2012), discussed further *infra* Part III.B.

95. See 11 U.S.C. § 1507 (2006).

96. See MODEL LAW, *supra* note 1, art. 7.

97. 11 U.S.C. § 304, *repealed by* Pub. L. No. 109-8, 119 Stat 23 (2005). See *supra* text at note 70 for the conditions to the grant of additional assistance in § 1507. The only change from the conditions in former § 304 is that comity, which was formerly listed as condition (5), is now in the preamble as a general requirement, in that all assistance must be “consistent with the principles of comity.” 11 U.S.C. § 1501.

to the protection of local creditors. Section 1507 potentially provides an even more potent weapon. The importance of that provision is demonstrated by the decision of the Fifth Circuit in *In re Vitro S.A.B. de C.V.*⁹⁸

B. *IN RE VITRO*

In *Vitro*, the U.S. courts declined to enforce, under chapter 15, a Mexican plan that discharged \$1.2 billion of bonds guaranteed by the debtor's operating subsidiaries through partial payment under the debtor's plan.⁹⁹ The bondholders held instruments governed by New York law, the issuers had submitted to the jurisdiction of the New York courts, and the holders obtained judgments in New York against the subsidiaries.¹⁰⁰ The Mexican plan in effect released the subsidiaries from their financial debts through a plan that did not pay certain creditors of the subsidiaries in full.¹⁰¹ The subsidiaries had never filed in the bankruptcy proceedings,¹⁰² and these third-party releases were questionable, at best, under U.S. law.

The *Vitro* court relied in a footnote on the same sufficient protection analysis of § 1522(a) as *Qimonda*.¹⁰³ However, its principal rationale for refusing to recognize the Mexican plan was § 1507(b)(4), which requires that the "distribution of proceeds of the debtor's property [must be] substantially in accordance with the order prescribed by" the Bankruptcy Code.¹⁰⁴ In the *Vitro* decision, the Court found that the relief sought by the Mexican debtor amounted to enforcement of third-party releases, that such relief was not available under the general provisions of §§ 1521 and 1522, that such relief would be "additional assistance under § 1507," and that "the

98. *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031.

99. *Id.* at 1037–38.

100. *Id.* at 1040.

101. *Id.* at 1039.

102. *Id.*

103. Its analysis was brief, the *Vitro* court noting that even if the relief sought by the Mexican representative did not constitute additional assistance, subject to § 1507, "enforcement of this Plan would be precluded under § 1522 for failing to provide an adequate 'balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief.'" *Id.* at 1067 n.42 (quoting *In re Int'l Banking Corp.* B.S.C., 439 B.R. 614, 626 (Bankr. S.D.N.Y. 2010)). Nevertheless, use of § 1522(a) in the *Vitro* case would appear to be more readily justified than in *Qimonda*, because in *Vitro* the U.S. creditors objecting to the Mexican plan held more than \$1.2 billion of bond debt that was initially issued by subsidiaries of *Vitro* and that *Vitro* assumed and paid in part in its plan. The only other "creditors" of any size were the intercompany claims held by the subsidiaries and controlled by the parent; they outvoted the bonds in the plan approval process only because *Vitro* had apparently undertaken what the Fifth Circuit called steps "orchestrating a balance transfer of several billion dollars between itself and its subsidiaries, turning those subsidiaries into creditors, prior to entering into the *concurso* proceeding and failing promptly to disclose the existence of these newly minted insider creditors." *Id.* at 1053. In other words, the vast majority of general creditors not controlled by the debtor was not sufficiently protected.

104. 11 U.S.C. § 1507(b)(4) (2006).

bankruptcy court correctly determined that relief was precluded by § 1507(b)(4).”¹⁰⁵

In order to reach its decision, the Fifth Court had to reconcile the provisions of § 1507, providing for “additional assistance,” with the general provisions of § 1521, which authorizes “any appropriate relief.”¹⁰⁶ On the face of the statute, it is not at all clear where relief under § 1521 (and § 1522, which modifies it) is appropriate and where it should be considered additional assistance under § 1507. The *Vitro* opinion attempts to reconcile the two by a three-step analysis, considering first whether the relief sought is specifically enumerated in § 1521(a) or (b), and, if not, considering whether it is “appropriate relief” available under § 1521.¹⁰⁷ The Court in *Vitro* said that such “appropriate relief” was “relief previously available under Chapter 15’s predecessor, § 304” and then concluded that “[o]nly if a court determines that the requested relief was not formerly available under § 304 should a court consider whether relief would be appropriate as additional assistance under § 1507.”¹⁰⁸ This is a debatable conclusion.¹⁰⁹ In any event, the point for purposes of this Article is that the provisions of

105. *In re Vitro*, 701 F.3d at 1060.

106. *Id.* at 1057–61. Section 1521 provides without qualification that upon recognition, “the court may, at the request of the foreign representative, grant any appropriate relief, including . . .” 11 U.S.C. § 1521 (2006) (emphasis added). Section 1521 then goes on to identify seven specific forms of relief, but its use of the word “including” prior to the list is “not limiting.” See 11 U.S.C. § 102(3) (“‘includes’ and ‘including’ are not limiting”).

107. *Vitro*, 701 F.3d at 1054.

108. *Id.*

109. The Court relied on a passage in the legislative history of § 1521, which stated that the relief available under § 1521 was not intended to reduce or enlarge the relief formerly available under § 304. See H.R. REP. NO. 109-31(I), 116, reprinted in 2005 U.S.C.C.A.N. 88, 178. There is accordingly a basis for the *Vitro* court’s conclusion that § 1521 relief is so limited, and that any further relief would be additional assistance subject to the conditions of § 1507. However, the conditions to the grant of “additional relief” in § 1507 are the same as those that conditioned relief under former § 304. If § 1521 relief is limited to that available under former § 304, and if § 304 had the same conditions to relief as § 1507, the logical result of the *Vitro* court’s analysis is that assistance under § 1507 is identical to that also made available under § 1521. Any such conclusion must be rejected by virtue of the very different wording of the sections as well as the fact that § 1507 relief is “additional assistance,” i.e., additional to that otherwise available under the statute. It is submitted that the legislative history did not get it right. A differently focused analysis would seemingly rely on the difference between the language of § 1521 (appropriate relief) and that of § 1507 (additional assistance). See *In re Sino-Forest Corp.*, 501 B.R. 655, 664 nn.3–4 (Bankr. S.D.N.Y. 2013); *In re Atlas Shipping A/S*, 404 B.R. 726, 741 (Bankr. S.D.N.Y. 2009). See also *CT Inv. Mgmt. Co., LLC v. Cozumel Caribe, S.A. de C.V. (In re Cozumel Caribe S.A. de C.V.)*, 482 B.R. 96 (Bankr. S.D.N.Y. 2012), a case involving funds deposited in the United States by a Mexican debtor. The Bankruptcy Court held that it would not be manifestly contrary to U.S. public policy to issue a temporary stay and give the parties an opportunity to litigate issues regarding the funds in a Mexican court, or to temporarily recognize a Mexican court order that had enjoined the U.S. creditors from applying the funds in escrow to the debt, noting that U.S. bankruptcy courts issue such temporary injunctions where appropriate. *Id.* at 112–13. The court nevertheless conditioned the stay on the parties promptly proceeding to determine the issues in Mexico. *Id.* at 115. *Cozumel Caribe* is also one of the rare chapter 15 cases that that have noted the need to consider conflicts issues in determining the issues in dispute. *Id.* at 115 n.17.

§ 1507, and § 1507(b)(4) in particular, will in certain cases provide an alternative basis than the sufficient protection provisions of § 1522(a) for refusing relief sought by a foreign representative.¹¹⁰

Before drawing any conclusions from these highly visible cases, it is useful to consider one less well-known decision that also relied on the principle of sufficient protection to deny relief to a foreign representative.

C. *IN RE SIVEC SRL*

A third recent decision of the U.S. courts, and one that also rests on the principle of sufficient protection, is *Sivec*, litigation growing out of an American company's purchase of parts manufactured by an Italian enterprise for use on a construction project in Qatar.¹¹¹ The American company had retained in escrow 10% of the purchase price of the parts to cover claims made during a two-year warranty period ending in July 2009.¹¹² By that date, the Italian company had filed for a *concordato preventivo*¹¹³ under Italian law, a plan had been confirmed, and the seller's retainage claim against the U.S. company was apparently the only asset of the Italian estate.¹¹⁴ The Italian judicial receiver duly filed a chapter 15 petition and obtained recognition of the Italian proceeding as a foreign main proceeding, but he was granted very little other relief.¹¹⁵ The U.S. courts denied the receiver's request for a stay of ongoing litigation in Oklahoma of a breach of contract claim by the U.S. purchaser, and the Italian receiver ended up counterclaiming for turnover of the retainage in escrow.¹¹⁶ After a jury found that the Italian receiver was entitled to \$952,840 on the warranty retainage claim, while the American purchaser was entitled to \$1,744,043 on its breach of contract claim, the American purchaser moved in the

110. The Fifth Circuit's decision made it plain that a Mexican plan does not have to conform to U.S. bankruptcy law in order to obtain additional assistance under § 1507. See *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031 (5th Cir. 2012). It quoted an earlier § 304 decision where the Fifth Circuit said, "the foreign laws need not be identical to their counterparts under the laws of the United States; they merely must not be repugnant to our laws and policies." *Id.* at 1044 (quoting *Schimmelpenninck v. Byrne (In re Schimmelpenninck)*, 183 F.3d 347, 365 (5th Cir. 1999)). The *Vitro* court also stressed that "[g]iven Chapter 15's heavy emphasis on comity, it is not necessary, nor to be expected, that the relief requested by a foreign representative be identical to, or available under, United States law." *Id.* at 1053 (citing *In re Metcalfe & Mansfield Alternative Inv.*, 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) (a case that had enforced third-party releases in a chapter 15 proceeding)). However, the result in *Vitro* was to reject the Mexican plan on the ground that it did not follow the order of distribution in a U.S. case closely enough.

111. *In re Sivec SRL*, 476 B.R. 310 (Bankr. E.D. Okla. 2012).

112. *Id.* at 313.

113. *Concordato preventivo* is a form of reorganization under Italian law. See *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 658 (2d Cir. 1997) (under Italian law, the *Concordato Preventivo* "contains provisions that permit restructuring of debts in a fashion similar to Chapter 11 of the United States bankruptcy laws.").

114. *In re Sivec SRL*, 476 B.R. at 313.

115. *Id.* at 315.

116. *Id.*

bankruptcy court for permission to set off its breach of contract claim against its liability on the balance of the escrow (eliminating any liability), and the Italian receiver moved for an order remitting the portion of the escrow to which he was found entitled to Italy.¹¹⁷

The decision of the U.S. bankruptcy court is colored by the failure of the Italian estate to give reasonable notice of the proceedings to the U.S. purchaser; by an abortive, badly handled “request for comity” emanating from Italy; by uncertainty whether the late claim would be admitted in Italy; and by a lack of clarity as to whether setoff rights would be recognized in Italy.¹¹⁸ In any event, the bankruptcy court held that “[c]omity is only to be extended so long as the interests of U.S. creditors are sufficiently protected, and so long as any actions taken are not manifestly contrary to the public policy of the United States.”¹¹⁹ The bankruptcy court further held that it was “unconvinced that the interests of U.S. creditors have been or will be protected in the Italian proceeding.”¹²⁰ Finally, the court held that under U.S. bankruptcy law, the American purchaser “is a secured creditor to the extent of its right to setoff against the retainage it holds,” and its treatment “in Italy would be vastly different than in the United States: its security interest is not merely threatened in the Italian proceeding, it does not exist.”¹²¹ It rejected the request of the Italian receiver for comity or turnover of the property because it did not believe the purchaser’s “interests will be sufficiently protected if it is ordered to turnover the funds and file a claim in Italy, and because the equities and law support recoupment and setoff.”¹²²

IV. THE CHOICE OF LAW ISSUE

In each of the three cases discussed above, the U.S. court resolved the issue in favor of providing sufficient protection to a subset of U.S. creditors. *Vitro* further decided that the relief sought by the foreign representative was additional assistance barred by a specific condition in § 1507 that provides the U.S. courts with broad discretion to deny relief.¹²³ Although the cases all ignore conflict of laws as an issue, it is submitted that they would have been better decided by explicit recognition that each required a choice of law and that a choice of law analysis would have informed the novel concepts of “sufficient protection” and “additional assistance.”

In *Qimonda*, the most difficult of the cases, the Fourth Circuit endorsed a test that it said the bankruptcy court had reasonably applied, balancing the

117. *Id.* at 316–17. The American company would presumably be permitted to file a (late) claim for its breach of contract damages, but this was not entirely clear.

118. *Id.* at 318–22.

119. *Id.* at 320, 324 (citing §§ 1501(a)(3), 1506, 1507(b), 1521, 1522 of chapter 15).

120. *Id.*

121. *Id.*

122. *Id.* at 328.

123. *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1060 (5th Cir. 2012).

harm to holders of the 4,000 “U.S. patents” if German rejection law prevailed against the harm to the German liquidator if § 365(n) of the Bankruptcy Code applied.¹²⁴ It found that such a balancing test was the appropriate way to enforce § 1522(a).¹²⁵ If it arguably erred in using § 1522(a) to weigh the rights of one group of creditors against another, it could have reached the same result by reliance on § 1507 and treatment of the relief sought by the German liquidator as “additional assistance.”¹²⁶

It is suggested that a case like *Qimonda* would be better decided—and would more likely be decided in favor of the application of foreign law—if it were acknowledged that the concept of sufficient protection calls for application of choice of law principles rather than a balancing of the harm to “them” against the harm to “us.” *Qimonda* involved the rights of the administrator of an insolvent estate as a consequence of the default of one of the parties to a contract. The Legislative Guide to the Model Law, the EU Regulation, and the Global Rules deem the contractual rights of an insolvent estate after default an issue to be governed by the *lex fori concursus* or, in the case of *Qimonda*, German law.¹²⁷ This principle recognizes the benefits of uniform treatment of all unsecured creditors throughout the world. It is not certain that this principle would have carried the day and outweighed the concern of the court in *Qimonda* over the effect of rejection on patent rights and entrepreneurship. Even if the result would not have been different upon a choice of law analysis, the courts would at least have construed the novel term, sufficient protection, by reference to familiar concepts. Hopefully, they would have given more weight to the *lex fori concursus*, and the concept of sufficient protection would not have been based on a balancing test that finds no explicit support in either the statute or in the previous resolution of choice of law issues in cross-border insolvency disputes.

It would also have been constructive for the courts in *Qimonda* to consider that traditional contract conflict principles in the United States start with the rule that “[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.”¹²⁸ If the holders of the 4,000 U.S. patents in *Qimonda* had signed license agreements that provided that German law would govern, the parties’ own agreements would point in the direction of application of foreign law and would constitute evidence that the U.S. licensees should have recognized the risk they were taking by contracting

124. *Jaffé v. Samsung Elec. Co., Ltd.*, 737 F.3d 14, 29–31 (4th Cir. 2013).

125. *Id.* at 31.

126. 11 U.S.C. § 1507 (2006).

127. See LEGISLATIVE GUIDE, *supra* note 1, rec. 31; EU Regulation, *supra* note 53, art. 4; *Global Rules*, *supra* note 61, r. 15, 17, 22–23.

128. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

with a German party. They could not reasonably claim to be insufficiently protected by application of German law. Traditional U.S. conflicts law would point in the same direction, on the argument that Germany had a stronger interest in the application of its law, providing for the uniform treatment of licensees worldwide, than the U.S. had in the application of its law, especially if the licensees were not all U.S. entities.¹²⁹

Similar comments may be made with regard to the decision in *Sivec*. The court decided the issue on the basis of the sufficient protection of the U.S. creditor of the Italian estate.¹³⁰ The U.S. creditor in *Sivec* did not have to rely on the general sufficient protection provisions of § 1522(a) but could more appropriately rely on the specific requirement of § 1521(b) that a court must be “satisfied that the interests of creditors in the United States are sufficiently protected” before it can “entrust the distribution of all or part of the debtor’s assets located *in the United States* to the foreign representative. . . .”¹³¹ Although the decision of the bankruptcy court did not take note of the different wording of § 1522 and § 1521(b), there was ample evidence of lack of protection of the rights of the U.S. creditor in the failure of the Italian debtor to give adequate notice of the Italian proceedings, and to make clear how the interests of the U.S. party would be protected in Italy.¹³²

In any event, the real issue in *Sivec* was whether U.S. or Italian law ought to govern the right of the U.S. creditor to set off its claim against the Italian debtor against the escrow account it was holding, presumably in Oklahoma. As noted above, the Italian debtor argued that Italian law recognizes a right of setoff. Thus, it is not entirely clear there was a conflict of laws. If, however, Italy does not recognize that creditors who owe debts to a bankruptcy estate have a preferred right to offset claims against the bankrupt, there would have been a direct conflict. As with almost every other issue, the Legislative Guide would decide this conflict in favor of application of the *lex fori concursus*, or Italian law. The Global Rules (and traditional U.S. conflicts principles), however, are more nuanced. Recognizing a conflict among national laws in the recognition of setoff rights, the Global Rules (like the EU Regulation) provide that “[i]nsolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor’s claim.”¹³³ Under

129. It is recognized, as stated in § 187 of the Restatement of Conflicts, that there are issues, such as the effect of the insolvency of one of the parties, and that the parties to a contract cannot resolve through a choice of law clause in their contract. *Id.* It is suggested, nevertheless, that the choice of German law to govern the contract would point toward application of German insolvency law in this situation.

130. *In re Sivec SRL*, 476 B.R. 310, 324 (Bankr. E.D. Okla. 2012).

131. 11 U.S.C. § 1521(b) (2006) (emphasis added).

132. *See In re Sivec SRL*, 476 B.R. 310.

133. *See Global Rules*, *supra* note 61, r. 17.

the Global Rules, it would appear that the Italian debtor's claim was governed by Oklahoma law, which is presumed to be the law applicable to the escrowed funds and was certainly the law of the *situs* of the funds.¹³⁴ On this analysis, the case was properly decided in favor of the creditor. Moreover, under U.S. law, the right of setoff that the U.S. creditor possessed is viewed as similar to a right of a secured party in collateral.¹³⁵ Under the Global Rules, the *in rem* rights of a secured creditor under the law of a state other than that of the foreign main proceeding are also respected.¹³⁶ On this basis, *Sivec* would not have been justified in stripping the U.S. creditor of its U.S. property rights, and the U.S. creditor would have been entitled to sufficient protection against this result.

In *Vitro*, the principal question was whether it was appropriate to apply Mexican law to discharge the debt of creditors of an affiliate of the debtor by providing them with a partial distribution from the bankruptcy estate.¹³⁷ Under U.S. law such “third-party releases” are valid only under narrow circumstances, and they are invariably rejected in the Fifth Circuit, where the *Vitro* chapter 15 case was pending.¹³⁸ Under Mexican law, applicable at the time of the *Vitro* plan, third-party releases were presumably valid, and a Mexican court had confirmed the *Vitro* plan.¹³⁹ The choice of law issue was whether to apply the majority U.S. rule or Mexican insolvency principles. Neither the recommendations of the Legislative Guide nor the Global Rules deal explicitly with the rights of creditors of an affiliate of the debtor.

As discussed above, the Fifth Circuit decided the case by reference to the conditions to “additional assistance” in § 1507 and, secondarily, by reliance on sufficient protection in § 1522(a).¹⁴⁰ It is suggested that the analysis would have been clarified by application of U.S. conflict of law principles. The protections that the U.S. creditors received from the

134. Although all of the applicable facts in *Sivec* are unknown, due to the absence of a choice of law analysis, it is assumed that the Italian debtor's claim against the U.S. counterparty was governed by the laws of Oklahoma, where the escrow was located. The law governing the underlying contract claim against the Italian debtor is also unknown, but it is assumed that the effects of that claim in the Italian proceeding were governed by Italian law.

135. Another way to analyze the issues would be to view the U.S. party as having a security interest in the escrow account by virtue of its setoff rights. The U.S. court, in fact, found that under U.S. law, the American creditor would be considered to have a security interest in the escrow fund and that remission of the funds to Italy would erode or eliminate that interest. *Sivec*, 476 B.R. at 320, 324. Assuming that Italian law would eliminate the U.S. security interest—and the facts do not clearly establish it—the governing choice of law question would be whether the rights of the creditor should be governed by the location of the collateral or the law governing the insolvency.

136. *Global Rules*, *supra* note 61, r. 15.

137. *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1038–39 (5th Cir. 2012).

138. Cases in the Fifth Circuit “seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions.” *In re Pac. Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009) (collecting cases).

139. *In re Vitro*, 701 F.3d at 1039–40.

140. *Id.* at 1053–61.

guarantees by Vitro's non-debtor subsidiaries were governed by New York law and were confirmed by New York judgments.¹⁴¹ The subsidiaries were not debtors under any bankruptcy law, and there was no *lex fori concursus*, as there were no insolvency proceedings involving the subsidiaries.¹⁴² It is suggested that a choice of law analysis would place the center of gravity in the United States rather than in Mexico, or would deem the United States to have the greater interest in the application of its laws.

V. CHOICE OF LAW AND "COOPERATION" AND "COORDINATION"

Choice of law analysis could also help resolve another issue that arises in many cross-border insolvency cases. One of the salient principles of chapter 15 and the Model Law on which it is based is the requirement of "cooperation" and "coordination." Articles 25 and 26 of the Model Law, adopted in the United States as §§ 1525 and 1526 of chapter 15, require cooperation "to the maximum extent possible" between courts and between estate representatives.¹⁴³ Although the mandate of §§ 1525 and 1526 is similar to the common law doctrine of comity, and although there are many decisions under chapter 15 that speak warmly of comity and cross-border cooperation, there appears to be no reported decision of any U.S. court that enforces cooperation as a binding statutory obligation.

Cooperation and coordination would more likely become a reality if choice of law principles were more frequently used to resolve conflicts that inevitably arise. The potential that a choice of law analysis can resolve even the thorniest cross-border conflict is illustrated by a well-known dispute arising from the Lehman Brothers failure. In *Lehman Brothers Special Financing Inc. v. BNY Corporate Trustee Services Ltd.*,¹⁴⁴ the U.S. court declared unenforceable, by virtue of U.S. insolvency law, a provision in certain collateralized swap agreements that changed the order of priority of payment upon an event of default, including a bankruptcy default.¹⁴⁵ The movant and debtor in question was Lehman Brothers Special Financing Inc. (LBSF), and the default was occasioned by the bankruptcy of Lehman Bros. Holdings Inc. (LBHI), its ultimate parent and the "credit support provider" for LBSF's payment obligations under the swaps.¹⁴⁶ The change in the order of priority was a critical provision in the agreements: prior to a default, the contracts provided that LBSF would have the right to receive

141. *Id.* at 1040.

142. *Id.* at 1043.

143. See MODEL LAW, *supra* note 1, aarts. 25, 26; 11 U.S.C. §§ 1525, 1526 (2006).

144. *Lehman Bros. Special Fin. Inc. v. BNY Corporate Tr. Servs. Ltd.*, 422 B.R. 407 (Bankr. S.D.N.Y. 2010).

145. *Id.* at 418–20.

146. *Id.* at 411. The chapter 11 filing of LBSF took place on October 3, 2008; the filing by the parent took place two weeks earlier on September 15, 2008.

payment under the swaps (and would presumably be obligated to pay the bondholders); after an event of default, when the bondholders would presumably be unpaid, the trustee, on behalf of the bondholders, would have priority rights over the collateral.¹⁴⁷ The conflict of law issue arose because the swaps had been entered into in England, and the collateral was there.

At the time of the decision by the U.S. bankruptcy court, there had already been extensive litigation in England regarding the priority rights of the parties, and the English courts had ruled that the change in priority was valid and enforceable and did not violate an “anti-deprivation principle” under English law.¹⁴⁸ The U.S. court recognized that its decision had “the potential for conflicting rulings due to differences in the law being applied by each tribunal to the underlying dispute.”¹⁴⁹ Nevertheless, it found that “the English Courts did not take into account principles of United States bankruptcy law”; that as general matter “courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States”;¹⁵⁰ and that the English decision was not entitled to preclusive effect or to comity.¹⁵¹ Reaching the U.S. bankruptcy law issues, the court found that the change in priority was invalid as an *ipso facto* provision, that the change had been triggered by the filing of LBHI, and that it was unenforceable under U.S. law.¹⁵² It recognized that “[t]his decision places BNY [the defendant in the United States] in a difficult position in light of the contrary determination of the English Courts confirming that Noteholder Priority applies to claims made against it in England by [the Plaintiff] Perpetual.”¹⁵³ In conclusion, it called

for the parties, this Court and the English Courts to work in a coordinated and cooperative way to identify means to reconcile the conflicting judgments. The Court directs that the parties attend a status conference to be held on the next available omnibus hearing date in the Debtors’ cases

147. *Id.* at 413–14.

148. *Id.* at 410–11. In the English courts, the plaintiff was Perpetual Trustee Company Limited, an English company that held the credit-linked synthetic portfolio notes, and the defendant was BNY Corporate Trustee Services, a corporate trustee doing business in England which apparently held the collateral. *See* Perpetual Tr. Co. Ltd. v. BNY Corporate Tr. Servs. Ltd., [2009] EWHC (Ch) 1912; [2009] EWCA (Civ) 1160.

149. *Lehman Bros.*, 422 B.R. at 411. The principles of the decisions of the lower English courts in effect when the U.S. case was decided were later affirmed in a different case by the U.K. Supreme Court, which did not deal in any substantive manner with the ruling in the United States. *See* Belmont Park Inv. PTY Ltd. v. BNY Corporate Tr. Servs. Ltd., [2011] UKSC 38.

150. *Lehman Bros.*, 422 B.R. at 417 (quoting *Pravin Banker Assoc. Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 854 (2d Cir. 1997)).

151. *Id.* at 416–17.

152. *Id.* at 418–19.

153. *Id.* at 423.

for purposes of exploring means to harmonize the decisions of this Court and the English Courts.¹⁵⁴

This conclusion, it is suggested, left the conflict wholly unresolved. A choice of law determination, deciding whether to apply English or U.S. law to determine the validity of the disputed contractual provision, would have pointed the way to a resolution of the conflict and would thus have promoted one of the major goals of the Model Law and chapter 15, cooperation among courts and among estate administrators.

CONCLUSION: CHOICE OF LAW UNDER CHAPTER 15

Based on the text and developing law under chapter 15 in the United States, it seems difficult to maintain the position taken by the Legislative Guide that the *lex fori concursus* should govern virtually all issues in a cross-border insolvency case. No U.S. case has so held, and the provisions of chapter 15 relating to sufficient protection and the requirement that the five subsections of § 1507 be satisfied if “additional assistance” is to be granted make it likely that a strict *lex fori concursus* rule will not be readily adopted in the United States. Certainly, the requirement of § 1521(b) that creditors “in the United States” be sufficiently protected before property is turned over to a foreign representative would protect secured creditors against loss of their collateral located in the United States by application of foreign law.¹⁵⁵ In a proceeding under chapter 15 and especially in cases involving security interests under chapter 15, absolute deference to the *lex fori concursus* cannot be maintained.

Nevertheless, even if total deference to the *lex fori concursus* cannot be maintained under chapter 15, recognition of the choice of law issues that arise in chapter 15 cases would give appropriate weight to the importance of the *lex fori concursus* as a matter of principle and frame the issues by reference to familiar concepts such as the “center of gravity.” In many cases it would appropriately inform and circumscribe the scope of novel and undefined terms such as “sufficient protection,” and “additional

154. *Id.*

155. One case that dealt explicitly with the provision of sufficient protection to a secured creditor under chapter 15 is *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006). There, a creditor who asserted a judgment lien against property of the foreign debtor in the United States objected to chapter 15 recognition and asserted that it would not be sufficiently protected if the foreign representative was able to use the collateral. The court held that if the creditor in fact held a security interest in the property, the creditor was entitled to sufficient protection, which would be in effect the same adequate protection afforded secured creditors in plenary cases in the United States. As an interim measure, the foreign representative was accordingly permitted to take possession but not to repatriate the collateral. Pre-chapter 15 authority under § 304 of the Bankruptcy Code also required that the U.S. security interests held by creditors be protected. *See Bank of New York v. Treco (In re Treco)*, 240 F.3d 148 (2d Cir. 2001), *supra* text accompanying note 42.

assistance,” and point the way to a resolution of disputes in accordance with the intent of the statute.