Chapter 15, 2005 to 2021: A Reflection on Chapter 15 Decisions and Practical Considerations for Canadians Approaching a Cross-Border Filing

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I. INTRODUCTION

Most Canadian restructuring professionals are familiar with Chapter 15 of the *United States Bankruptcy Code*,[1] which was enacted in 2005 through amendments designed to generally reflect the United Nations Commission on International Trade Law ("UNCITRAL") Model Law,[2] and which, as the United States' expression of the Model Law, reflects US policy on cross-border insolvency.[3]

Chapter 15 has been in force for 15 years, over which time hundreds of petitions have been filed. These petitions have provided an opportunity for the American bankruptcy judiciary to decipher and flesh out Chapter 15. Many of those meaningful insights into the statutory provisions were gained through Canadian-initiated proceedings, as Canada is the most common jurisdiction from which recognition of a foreign proceeding is sought—in 2020, for example, more than half of Chapter 15 filings originated in Canada.[4] However, a significant body of Chapter 15 case law comes from foreign main proceedings in other jurisdictions, which inform a Canadian approach to cross-border insolvency.

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[1] *United States Bankruptcy Code*, 11 USC §§1501–532 [11 USC].

[2] *Model Law on Cross-Border Insolvency*, GA Res 52/158, UNCITRAL, 52nd Sess, UN Doc A/RES/52/158 (1997) [Model Law].

[3] Segaal Schorr, "Avoidance Actions under Chapter 15: Was Condor Correct" (2011) 35:1 Fordham Int'l LJ 350 at 351 [Schorr].

[4] Teadra Pugh, "Whopping Ch 15 Bankruptcy Filings May Be Misleading" (16 November 2020), online: *Bloomberg Law* <news.bloomberglaw.com/bloomberg-law-analysis/analysis-whopping-ch-15-bankruptcy-filings-may-be-misleading>.

In light of the continued popularity of Chapter 15 as a tool in a Canadian insolvency practitioner's "toolkit", and to mark the recent 15th anniversary of Chapter 15, the authors have examined themes in US cases that have shaped, and are still shaping, how Chapter 15 is applied. We focus on a number of areas—including the public policy exception, avoidance actions and releases—to help Canadian insolvency lawyers stay current when preparing for the next cross-border recognition proceeding.

This article is divided into six sections, including Section I, the introduction. Section II discusses some of the key features of Chapter 15 relief as it relates to the issues in this paper.

Section III sets out developments in the public policy exception provisions of Chapter 15, including clarifications of US Bankruptcy Courts' interpretation of when a foreign proceeding or element thereof is "manifestly contrary to public policy".

Section IV explains the treatment of avoidance actions in a Chapter 15 case, highlighting an issue about which two bankruptcy judges in the US Bankruptcy Court for the Southern District of New York have recently come to different conclusions regarding the applicability of certain safe harbour provisions of the US *Bankruptcy Code* to a Chapter 15 proceeding.

Section V describes the uneven treatment of third-party releases in Chapter 15 cases across the 11 US Circuit Courts of Appeal, and the options Canadian practitioners have when seeking recognition of a plan that contemplates a third-party release.

Finally, Section VI provides some brief takeaways from the preceding analyses and puts these developments into the larger context of a relatively facilitative cross-border structure that Canadian and US courts have developed over the last 15 years.

II. KEY FEATURES OF CHAPTER 15 RELIEF

A primer on Chapter 15 is necessary for Canadian practitioners who wish to take a deeper look at cross-border issues. As a full overview of Chapter 15 would repeat analysis that is available elsewhere, and would be beyond the scope of this article, we have set out the key elements of Chapter 15 relief as they relate to the selected topics outlined above.[5]

When a Canadian debtor undergoing an insolvency proceeding needs assistance from the US bankruptcy courts, Chapter 15 establishes the path for relief.[6] In order to access Chapter 15, the representative of the foreign debtor commences a proceeding by filing a petition and any necessary ancillary motions with a US bankruptcy court. The foreign representative must establish that it meets the criteria for a Chapter 15 filing, including that the proceeding is a "foreign proceeding" under the US *Bankruptcy Code*, defined as:

> [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.[7]

Bankruptcy courts regularly recognize that Canadian insolvency proceedings—usually, but not always, commenced under the *Companies' Creditors Arrangement Act*[8]—qualify as foreign proceedings.[9]

A foreign representative may also want to establish that the foreign proceeding is in the country where the debtor's "center of main interest" lies, so that the foreign

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[5] See eg Janice P Sarra, "Southward Bound: Preliminary Evidence on Experience with Chapter 15 of the US *Bankruptcy Code*" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2010*, (Toronto: Carswell, 2011).
[6] 11 USC*, supra* note 1 § 1501(b)(1). The authors note that where a plenary US proceeding has been commenced, under Chapters 7 or 11, Chapter 15 relief may or may not be necessary.
[7] *Ibid* § 101(23).
[8] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].
[9] See eg *In re Essar Steel Algoma Inc* (1 December 2015), Wilmington 15-12271-BLS (Bankr D Del); *In re Cinram Int'l Inc* (25 July 2012), Wilmington 12-11882-KJC (Bankr D Del); *In re Arctic Glacier Int'l Inc* (17 July 2012), Wilmington 12-10605-KG (Bankr D Del); *In re Nortel Networks Corp* (27 Feb 2009), Wilmington 09-10164-KG (Bankr D Del).

proceeding will be recognized as a foreign main proceeding.[10] With the recognition by the bankruptcy court that an insolvency proceeding is a foreign "main" proceeding, a broad range of relief becomes available to the debtor company pursuant to the following sections of Chapter 15:

1. Section 1520 grants certain automatic relief as a matter of right, including a stay of proceedings in favour of the debtor and its assets in the United States;[11]
2. Section 1521 makes certain discretionary relief available to a debtor, providing that a court may, at the request of the foreign representative, grant any "appropriate relief", subject to certain limited exceptions that are expressly detailed in the US *Bankruptcy Code*;[12] and
3. Section 1507 contains additional discretionary relief, permitting the court to provide "additional assistance" to a foreign representative, subject to the consideration of certain specified factors.[13]

The discretionary relief provisions deserve some additional commentary. Section 1521 of the US *Bankruptcy Code* permits the court to "grant any appropriate relief" where such relief is necessary to effectuate the purpose of Chapter 15, and necessary to protect either the assets of the debtor or the interests of the creditors. However, such relief may only be granted where the interests of the creditors and other interested entities are sufficiently protected. United States bankruptcy courts have ruled that "sufficient protection" embodies three basic principles: "the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order

[10] 11 USC, *supra* note 1 §§ 1502(4), 1517(b)(1). As in Canadian insolvency legislation, "center of main interest" is not defined in the US *Bankruptcy Code*. Also as in Canadian insolvency legislation, Chapter 15 does provide a presumption that, in the absence of evidence to the contrary, the debtor's registered office is presumed to be the centre of the debtor's main interests.
[11] *Ibid* § 1520.
[12] *Ibid* § 1521.
[13] *Ibid* § 1507.

prescribed by U.S. law."[14] The policy underlying this limitation is to ensure a balance between the relief granted to the foreign representative and the interests of the persons who may be affected by such relief.[15]

Section 1507 contains different considerations for relief. In determining whether to provide assistance under § 1507, the court is directed to consider whether such assistance will reasonably assure:

1. [The] just treatment of all holders of claims against or interests in the debtor's property;
2. [The] protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
3. [The] prevention of preferential or fraudulent dispositions of property of the debtor;
4. [The] distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
5. [I]f appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[16]

The relationship between §§ 1521 and 1507 is "not entirely clear,"[17] and litigants are often uncertain as to which provision they should rely on for relief.[18] The United States Court of Appeals for the Fifth Circuit in *In re Virtro SAB DDe CV* acknowledged this issue and concluded that, because § 1521 lists specific types of relief, courts should first consider whether the relief falls under one of the specific categories: only if the relief is not explicitly provided for, and is not "appropriate relief" under § 1521, should a court consider § 1507.[19] It is unclear whether this approach will be generally followed;[20] however, given that the factors under § 1507 are seemingly broader than § 1521, proceeding as the court suggested in *In re Vitro* Appeal is a good starting point for Canadian practitioners

[14] *In re Atlas Shipping A/S*, 404 BR 726 at 740 (Bankr SDNY 2009) [*In re Atlas Shipping*].
[15] *In re Rede Energia SA*, 515 BR 69 at 90 (Bankr SDNY 2014) [*In re Rede Energia*].
[16] 11 USC, *supra* note 1 § 1507(b).
[17] *In re Toft*, 453 BR 186 at 188, 190 (Bankr SDNY 2011) [*In re Toft*].
[18] *Ad Hoc Group of Vitro Noteholders v Vitro SAB de CV* (*In re Vitro SAB De CV*), 701 F (3d) 1031 at 1054 (5th Cir Tex 2012) [*In re Vitro* Appeal].
[19] *Ibid* at 1056–57.
[20] *In re Rede Energia, supra* note 15 at 91.

to consider. Regardless of the route chosen, such relief is “largely discretionary and turns on subjective factors that embody principles of comity.”[21]

In considering whether to extend comity to a foreign order, US federal courts also analyze: “(1) whether the foreign proceeding abided by fundamental standards of procedural fairness; (2) whether the foreign proceeding violated the laws or public policy of the United States; and (3) whether the foreign judgment was affected by fraud.”[22] When analyzing the first prong—procedural fairness—US bankruptcy courts have looked to eight factors:

> (1) [W]hether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to the debtors’ potential claimants; (5) whether there are provisions for creditors’ meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.[23]

The second prong—public policy—requires a court to “guard against forcing American creditors to participate in foreign proceedings in which their claims will be treated in some manner inimical to this country’s policy of equality.”[24] The last prong—fraud—dictates that:

> [A] court in the United States will not recognize a foreign judgment obtained by fraud if the effect of the fraud was to deprive the losing party of an adequate opportunity to present its case and there was no adequate opportunity for correction of the fraud in the foreign proceeding, including a timely appeal.[25]

Given the limited scope of automatic relief provided by § 1520, foreign representatives seeking recognition of foreign main proceeding orders will often

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[21] *In re Atlas Shipping*, *supra* note 14 at 738.
[22] *In re PT Bakrie Telecom Tbk*, 628 BR 859 at 878 (Bankr SDNY 2021) [*In re PT Bakrie*].
[23] *Ibid* at 879.
[24] *Ibid*. Note that this discussion of public policy is part of the general analysis of whether to extend comity and is distinct from the public policy analysis under § 1506.
[25] *Ibid*.

be highly dependent on the court's discretion under §§ 1521 and 1507. This is particularly true where the foreign representative seeks to pursue an avoidance action or implement third-party releases. Each of these topics will be discussed in more detail below.

III. PUBLIC POLICY

1. Introduction

Principles of international comity—not to mention practical concerns regarding the complexity of cross-border insolvencies—predispose US bankruptcy courts toward recognizing foreign proceedings under Chapter 15. However, under § 1506 of the US *Bankruptcy Code*, the bankruptcy courts are permitted to refuse such recognition on public policy grounds: "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."[26]

Canadian insolvency legislation contains similar exceptions. Both section 61(2) of the *CCAA* and section 284(2) of the *Bankruptcy and Insolvency Act* state that "nothing in this Part prevents the court from refusing to do something that would be contrary to public policy."[27]

In Canada, these provisions have received minimal consideration by the courts, and the limited consideration that exists suggests that the public policy exception should be narrowly construed. In *Hartford Computer Hardware Inc*, Justice Morawetz (as he then was) noted that section 61(2) should be "interpreted restrictively",[28] while in *Re Marciano*, the Quebec Court of Appeal stated that section 284(2) should be interpreted in the context of private international law, and favourably cited the Supreme Court of Canada's decision in *Beals v Saldanha*.[29] In *Beals*, the Supreme Court held that the refusal to recognize

[26] 11 USC, *supra* note 1 § 1506.
[27] *CCAA*, *supra* note 8, s 61(2); *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*], s 284(2).
[28] *Re Hartford Computer Hardware Inc*, 2012 ONSC 964 at para 18.
[29] *Re Marciano*, 2012 QCCA 1881 at para 72.

foreign proceedings on public policy grounds should be reserved for extreme cases in which the foreign law was “contrary to the Canadian concept of justice”, or “contrary to our view of basic morality.”[30]

At first glance, § 1506 of the US *Bankruptcy Code* is even *more* restrictive than the equivalent Canadian provisions. While Canadian legislation permits a court to refuse to act where doing so would merely be “contrary to public policy”, § 1506 only permits a court to refuse to act where doing so would be “manifestly contrary to the public policy of the United States.”[31] United States bankruptcy courts have in fact placed significant emphasis on the word “manifestly”, and have interpreted its inclusion to restrict the public policy exception to only the most fundamental US policies.[32] However, despite this apparently more stringent threshold, US bankruptcy courts have, in practice, been noticeably more willing than Canadian courts to refuse recognition of foreign insolvencies on public policy grounds. In order to assist Canadian practitioners considering Chapter 15 proceedings, the authors have provided guidance and analysis of the circumstances in which US bankruptcy courts have refused recognition on public policy grounds over the past 15 years.

2. Factors

There is no strict test that US bankruptcy courts apply in determining whether to refuse recognition under § 1506. In *In re Qimonda (2010)*, the US District Court for the Eastern District of Virginia noted that a determination of whether § 1506 prevents the recognition of a foreign insolvency proceeding can be based on both procedural and substantive grounds:

> [I]n deciding whether to apply § 1506, courts have focused on two factors: (i) whether the foreign proceeding was procedurally unfair; and (ii) whether the application of foreign law or the recognition of a foreign main proceeding under Chapter 15 would “severely impinge the value

[30] *Beals v Saldanha*, 2003 SCC 72 at paras 71–77 [*Beals*].
[31] 11 USC, *supra* note 1 § 1506 [emphasis added].
[32] See eg *Vitro, SAB de CV v ACP Master, Ltd* [*In re Vitro, SAB de CV*], 473 BR 117 at 123 (Bankr ND Tex 2012) [*In re Vitro* Bankr].

> and import" of a U.S. statutory or constitutional right, such that granting comity would "severely hinder United States bankruptcy courts' abilities to carry out[…]the most fundamental policies and purposes" of these rights. [33]

The court further stated that three principles have guided courts in determining whether a proposed action in the Chapter 15 proceeding is in fact manifestly contrary to US public policy:

> (1) The mere fact of conflict between foreign law and U.S. law, absent other considerations, is insufficient to support the invocation of the public policy exception.
>
> (2) Deference to a foreign proceeding should not be afforded where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections.
>
> (3) An action should not be taken in a Chapter 15 proceeding if it would frustrate a U.S. bankruptcy court's ability to administer the proceeding and/or would impinge severely a US constitutional or statutory right, particularly if a party continues to enjoy the benefits of the Chapter 15 proceeding.[34]

3. Application to Specific Circumstances

Based on a review of § 1506 jurisprudence, the authors have identified five general categories of cases in which US bankruptcy courts are inclined to refuse recognition under § 1506 that may be of particular assistance to Canadian practitioners: (1) where there is a refusal to respect the automatic stay; (2) as a result of a party's inability to be heard; (3) where the proposed order would violate a party's right to privacy; (4) where the proposed order threatened to stifle patent innovation; and (5) where the proposed order included third-party releases where insider votes were needed in order to approve those releases. We shall review each ground in turn before briefly examining the various grounds on which § 1506 arguments have failed.

[33] *In re Qimonda AG Bankr Litig*, 433 BR 547 at 568–569 (ED Va 2010).
[34] *Ibid* at 570. The purpose underlying the final principle appears to be preventing a party from availing themselves of the legal protections provided by Chapter 15, while at the same time requesting that the court frustrate either its own power or a US constitutional or statutory right.

i. Refusal to respect a stay

In re Gold & Honey, Ltd highlights the first of these five grounds. In that case, a creditor, a local bank, seized the assets of the debtor corporate group in Israel in July 2008, and sought to commence receivership proceedings against the entities in Israeli court. The Israeli court denied the *ex parte* emergency relief sought by the applicant creditor. While the Israeli receivership proceedings were pending, certain of the debtor entities then filed for Chapter 11 relief in the Bankruptcy Court for the Eastern District of New York in late September 2008. The Chapter 11 filing automatically stays all actions against the debtor and its assets, "wherever located," and US courts routinely find that the reach of the stay is worldwide. In early October 2008, notwithstanding this stay, the creditor bank continued to pursue relief in Israel under the previously commenced Israeli receivership proceeding. The Chapter 11 debtors then sought and received a further order from the court reiterating and emphasizing the stay. Nevertheless, the Israeli court eventually appointed receivers on the application of the same creditor bank; these receivers then, rather boldly, filed a Chapter 15 petition seeking recognition of their positions.[35]

Unsurprisingly, the US bankruptcy court took a dim view of this maneuver, which it described as an "offensive use of an automatic stay violation." It found that recognizing the Israeli proceeding would "severely impinge the value and import of the automatic stay" and was contrary to public policy for the following reasons:

- Such recognition would reward and legitimize the creditor's violation of both the automatic stay and the court orders regarding the stay;
- Recognizing a post–Chapter 11 petition seizure of assets would "severely hinder" the US bankruptcy courts' ability to prevent one creditor from obtaining an advantage, and to efficiently distribute the debtors' assets according to the priority scheme of the US *Bankruptcy Code*; and

[35] *In re Gold & Honey, Ltd,* 410 BR 357 at 360–365 (Bankr EDNY 2009).

- Condoning the creditor's conduct would interfere with the court's jurisdiction over the entirety of the debtor's property, "wherever located and by whomever held," as future creditors could simply violate the stay in order to secure foreign assets.[36]

As a result, the court denied the receiver's petition to recognize the Israeli proceeding as a foreign proceeding under Chapter 15. *In re Gold & Honey, Ltd* clearly demonstrates that US bankruptcy courts will not permit a Chapter 15 proceeding to be used to facilitate creditor misconduct. Although this is a radical example on the facts, it serves as a good reminder to Canadian practitioners that foreign approval of creditor conduct will not be determinative, at least where the creditor appears to be seeking to manipulate the cross-border aspects of the process to its advantage and seeking the US court's assistance in doing so. While such fact scenarios may be likely to arise only rarely in Canada, given that US and Canadian practitioners tend to work cooperatively to facilitate coordinated results on both sides of the border, this decision helps delineate the outer limits of self-interested creditor conduct. It also suggests that for creditor-initiated insolvency proceedings in Canada with a significant US component, a proactive Chapter 15 petition may avoid a debtor attempting to circumvent the Canadian jurisdiction by filing a competing petition.

ii. Inability to be heard

US bankruptcy courts have also indicated that they may refuse recognition of a foreign proceeding if a party's right to be heard was violated by the foreign court. In *In re RSM Richter Inc v Aguilar*, various objectors sought to prevent the recognition of an Ontario court order in a Chapter 15 petition to the District Court for the Southern District of New York on the grounds that it deprived the

[36] *Ibid* at 371–372.

objectors of (1) due process and (2) the right to trial by jury.[37] While the objectors failed on both grounds, the court did note that:

> As to due process, while most of the objectors' objections are frivolous, there were various paragraphs of the June 8 Order that conceivably could have been read as permitting the Claims Officer to refuse to receive evidence and to liquidate claims without granting interested parties an opportunity to be heard. At this Court's initiative, the Monitor proposed amendments to the June 8 Order that entirely cured these problems. The Ontario Court promptly adopted these amendments in its August 1 Order, and it is only as a result that this Court now gives its approval to recognition and enforcement of the Procedure.[38]

In re RSM is not the only case in which a US Bankruptcy Court has emphasized the importance of the right to be heard. In *In re ABC Learning Centres Ltd*, for example, the US Bankruptcy Court for the District of Delaware in *obiter* stated that inadequate notice of a proceeding could potentially be grounds for a refusal to grant recognition under § 1506.[39]

Even where a court recognizes a foreign proceeding, it may still, on public policy grounds, refuse to enforce a stay against specific creditors. This is what occurred in *In re Sivec Srl*. In this case, the petitioner, Sivec, was a corporation undergoing an Italian liquidation proceeding. Zeeco, a US creditor of Sivec, filed suit against Sivec in the United States for breach of contract several years after the Italian liquidation proceeding began. Zeeco considered itself to be a secured creditor of Sivec; however, because Sivec did not consider Zeeco a creditor, Zeeco did not receive notice of the Italian liquidation. As a result, Zeeco was unable to participate in the Italian insolvency proceedings, and no funds were set aside to pay Zeeco's purported secured debt. Sivec sought recognition of the Italian proceeding, and for a provisional stay of the US lawsuit to be maintained. Zeeco opposed recognition, and sought to have the stay lifted.[40]

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[37] *In re RSM Richter Inc v Aguilar* (*In re Ephedra Prods Liab Litig*), 349 BR 333 at 335 (SDNY 2006) [*In re RSM*].
[38] *Ibid*.
[39] *In re ABC Learning Centres Ltd,* 445 BR 318 at 336 (Bankr D Del 2010).
[40] *In re Sivec Srl*, 2011 Bankr US Lexis 3206 at 1–3 (Bankr ED Okla 2011).

The US Bankruptcy Court for the Eastern District of Oklahoma had no difficulty deciding that there were no public policy grounds for refusing to recognize the foreign proceeding in general. However, it did deny Sivec's request to maintain the stay, imposed by order in the Chapter 15 filing, and not based on a stay ordered in the Italian proceeding, on the grounds that maintaining the stay "would violate this country's fundamental rights of notice and opportunity to be heard."[41] Because Zeeco had not received notice of the Italian proceeding, its claim became unsecured and would have been subject to penalties for late filing. Noting that Chapter 15 grants the courts broad latitude to craft specific relief, the court recognized the Italian proceeding but also lifted the stay to allow Zeeco's US lawsuit to proceed.[42]

Both *In re RSM* and *In re Sivec Srl* speak to the value of Canadian practitioners and courts providing clear guidance on how stakeholders are given notice of, and are heard in, Canadian insolvency proceedings. Such guidance will be appreciated by a US bankruptcy court that is less familiar with Canadian proceedings. *In re RSM* is a good reminder of the value of flexibility and facilitation in cross-border proceedings, as well the value of proactively addressing sticky public policy issues. A monitor willing to be flexible to accommodate concerns by a US bankruptcy court, and a Canadian court willing to accommodate the monitor, can overcome what may otherwise be serious roadblocks to global restructuring solutions.

iii. Right to privacy

United States bankruptcy courts may also refuse to recognize a foreign order where that order contains provisions that violate the debtor's privacy rights. In *In re Toft*, the US Bankruptcy Court for the Southern District of New York was asked to recognize a German insolvency proceeding through which the foreign representative was granted the right to access and intercept the debtor's email without providing any notice to the debtor. The foreign representative

[41] *Ibid* at 8.
[42] *Ibid* at 11.

commenced a Chapter 15 proceeding for the purpose of gaining access to the debtor's emails, which were held on US servers.[43] The motion was publicly filed, but was brought without notice to the debtor and requested *ex parte* relief, as the debtor had previously proven evasive and intransigent.[44]

While noting the narrow scope of § 1506, the court considered this to be one of the "rare cases" where the relief sought was manifestly contrary to US public policy for both procedural and substantive reasons. While the court acknowledged that not every US rule of law needs to be observed in a Chapter 15 proceeding, Federal Rule of Bankruptcy Procedure 2002(q)(1) was specifically designed for use in Chapter 15 proceedings and required notice to the debtor.[45] Further, the court noted that the powers sought by the proposed foreign representative were far in excess of those typically enjoyed by a US trustee in bankruptcy and could potentially expose those accessing the emails to criminal or civil liability under US law.[46] The court noted the fundamental nature of the right that would be violated if recognition was granted:

> As many cases have held, foreign law need not be identical to U.S. law. Here, however, the relief sought by the Foreign Representative is banned under U.S. law, and it would seemingly result in criminal liability under the Wiretap Act and the Privacy Act for those who carried it out. The relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States. Such relief "would impinge severely a U.S. constitutional or statutory right".[47]

While the reasoning in this case is limited to privacy rights, a Canadian practitioner would be wise to take serious note of the fact that where a law is part of a "comprehensive scheme" that is "built on constitutional safeguards," US bankruptcy courts will take an especially dim view of any Chapter 15 proceedings that seek to substantively depart from those laws.

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[43] *In re Toft*, *supra* note 17 at 188.
[44] *Ibid* at 188–189.
[45] *Ibid* at 200.
[46] *Ibid* at 196–200.
[47] *Ibid* at 198 [citations omitted].

iv. Patent innovation

In perhaps the most extreme example of refusing to grant recognition under § 1506, the US Bankruptcy Court for the Eastern District of Virginia in *In re Qimonda AG* refused to enforce a German insolvency order on the grounds that the order cancelled US patent licences. What makes this decision particularly interesting is that, unlike in *In re Toft*, the Bankruptcy Bourt explicitly acknowledged that no constitutional right was implicated; rather, it was merely a US statutory right regarding patent protection that was at issue. Nevertheless, while acknowledging that local and parochial interests should not be permitted to deny comity, the court concluded that maintaining patent protection, and the culture of technological innovation to which patent protection is crucial, was a fundamental public policy of the United States.[48]

While the Court admitted that "innovation would obviously not come to a grinding halt if licenses to US patents could be cancelled in a foreign insolvency proceeding," it will still "slow the pace of innovation to the detriment of the US economy," which the court considered sufficient to trigger the public policy exception of § 1506. In reaching its conclusions, the court accepted expert testimony suggesting that without patent protection, numerous innovative products may well have come to market later.[49]

This decision should serve as a cautionary tale to cross-border insolvency practitioners: while US bankruptcy courts are generally inclined to recognize foreign insolvencies, *In re Qimonda* demonstrates that fairly technical statutory rights, even without any underlying constitutional concerns, may constitute fundamental public policies of the United States sufficient to justify an exercise of the court's discretion to refuse to grant recognition under § 1506.

[48] *In re Qimonda AG,* 462 BR 165 at 184-85 (Bankr ED Va 2011).
[49] *Ibid* at 185.

v. Third-party releases

As discussed in more detail in Section V, the propriety of third-party releases is a significant issue under US bankruptcy law. This issue comes up in connection with the public policy exception to the recognition of foreign proceedings as well. In *In re Vitro,* Bankr, the petitioner sought Chapter 15 recognition of a Mexican reorganization plan from the US Bankruptcy Court for the Northern District of Texas. As part of the foreign plan, non-debtor subsidiaries of the debtor, which had previously guaranteed over $1.2 billion of the debtor's bonds, were released from their guarantees. These subsidiaries constituted the majority of the creditors, and the Mexican plan was approved as a result of their votes.[50]

As discussed in more detail in Section IV, opinions amongst US circuit courts are split on the issue of whether the US *Bankruptcy Code* permits non-consensual third-party releases, and in what circumstances. In the US Court of Appeals for the Fifth Circuit, where the Northern District of Texas is located, the standard for approval of third-party releases includes the existence of extraordinary circumstances. Because of this, the bankruptcy court in *In re Vitro (Bankruptcy Court)* found that:

> [T]he protection of third party claims in a bankruptcy case is a fundamental policy of the United States. The *Concurso* Approval Order does not simply modify such claims against non-debtors, they are extinguished. As the *Concurso* plan does not recognize and protect such rights, the *Concurso* plan is manifestly contrary to such policy of the United States and cannot be enforced here.[51]

Although this language could be read as categorically precluding the recognition of third-party releases in foreign plans in the Fifth Circuit, there are good arguments for reading the decision more narrowly. The *In Re Vitro* Bankr court distinguished *In re Metcalfe*, which had approved a Canadian order containing third-party releases, on the grounds that there had been near-unanimous approval of the plan by creditors in the Canadian case, who, importantly, were

[50] *In re Vitro* Bankr, *supra* note 32 at 119–21.
[51] *Ibid* at 132.

not insiders of the debtor. Accordingly, the result in *In Re Vitro* Bankr may be more limited given the particularly egregious set of facts at issue there, and Canadian practitioners can take comfort in the fact that they can point to related-party voting protections in the *CCAA* and *BIA* that do not appear to exist under Mexican law.

The US Court of Appeals for the Fifth Circuit upheld the Bankruptcy Court's decision on other grounds. However, the court strongly hinted in *obiter* that the bankruptcy court may have applied § 1506 too broadly. Noting that not all circuits agree regarding third-party releases, the Fifth Circuit stated that "§ 1506 was intended to be read narrowly, a fact that does not sit well with the bankruptcy court's broad description of the fundamental policy at stake as 'the protection of third-party claims in a bankruptcy case.'"[52]

Ultimately, the Fifth Circuit left the public policy issue undecided. As a result, potential uncertainty remains regarding whether third-party releases may be found to trigger the public policy exception of § 1506 when litigated in certain circuits.

vi. Grounds that have not succeeded

Finally, it is also worth noting the various grounds on which § 1506 arguments have failed. These circumstances are numerous and diverse, consistent with the intention that US bankruptcy courts are to grant comity to foreign orders except in compelling circumstances. The following cases where a party failed to prevent recognition on public policy grounds merit attention:

- Allowing recognition where the foreign proceeding did not include the right to a jury trial and where the effect of the failure to have a jury trial would be only to weaken a specific creditor's bargaining position;[53]

[52] *In re Vitro* Appeal, *supra* note 18 at 1069–1070.
[53] *In re RSM*, *supra* note 37 at 335–337.

- Recognizing a foreign proceeding where there was an allegation that the foreign proceeding had been corrupt, but there was insufficient evidence to support the allegation, and despite various objections related to procedural fairness, where the court concluded those arguments could be better pursed via appeal in the foreign jurisdiction;[54]
- Recognizing a foreign proceeding where it was argued that such recognition would negatively affect US credit markets, but the supposed effect could not be quantified;[55]
- Recognition granted despite the fact that US creditors may receive less in the foreign proceeding than they would have received had the proceeding been initiated in the US;[56]
- Recognizing a foreign proceeding despite (a) speculation that the foreign court could in the future approve a plan which is contrary to US public policy;[57] and (b) the fact that the foreign court held meetings with parties without giving notice, where such meetings were common practice in the foreign jurisdiction;[58]
- Affirming a grant of recognition where the foreign proceedings were conducted largely confidentially, but where this was consistent with the general practice of the foreign jurisdiction;[59] and
- Approving recognition even when the Chapter 15 filing may have been a litigation tactic on the grounds that it was the debtor or the foreign representatives (as opposed to the foreign tribunal hearing the foreign proceeding) who had acted in bad faith and violated US public policy.[60]

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[54] *In re Vitro* Bankr, *supra* note 32 at 130*; In re Foreign Econ Indus Bank*, 607 BR 160 at 175 (Bankr SDNY 2019).
[55] *In re Vitro* Bankr, *supra* note 32 at 130.
[56] *In re Ernst & Young, Inc*, 383 BR 773 at 781 (Bankr D Colo 2008).
[57] *In re OAS SA*, 533 BR 83 at 104 (Bankr SDNY 2015).
[58] *Ibid* at 104.
[59] *Morning Mist Holdings Ltd v Krys (In re Fairfield Sentry Ltd)*, 714 F (3d) 127 at 139-140 (3d Cir VI 2013).
[60] *In re Culligan Ltd*, 2021 Bankr US Lexis 1783 at 39–46 (Bankr SDNY 2021).

vii. Public policy issues on the horizon: Cannabis and reverse vesting orders

It is an open question as to how US bankruptcy courts will treat the still-theoretical recognition of foreign proceedings involving cannabis businesses. Recreational cannabis became legal in Canada in 2018, the industry has grown exponentially since and some of those companies have US aspects of their business. Will the federal classification of cannabis as a Schedule I drug under the *Controlled Substances Act*[61] be used to prevent the recognition of foreign cannabis proceedings on public policy grounds? Given the willingness of US bankruptcy courts to rely on the public policy exception to refuse recognition to foreign proceedings that run afoul of purely statutory schemes—as opposed to constitutional concerns—it is certainly possible that US bankruptcy courts would refuse to recognize a foreign main insolvency proceeding involving a cannabis business. It is also possible, however, that a US bankruptcy court may grant limited relief to a foreign representative for a foreign cannabis insolvency if full recognition of a foreign main proceeding is not found to be appropriate under § 1506. The public policy issue will likely be tested if—or when—a sufficiently international cannabis business needs to restructure.

Another untested Chapter 15 issue is the reverse vesting order, which continues to be popular in Canada. The traditional approach to an asset sale in an insolvency proceeding, in both Canada and the United States, is a transaction in which the subject assets are sold to a purchaser, free and clear of their encumbrances, which stay with the insolvent debtor. A reverse vesting transaction contemplates that the purchaser acquires the shares of the debtor, with all undesired assets and liabilities being transferred to a new entity that which becomes subject to, and continues through, the insolvency proceeding. Where appropriate, reverse vesting transactions are generally more efficient and cost-effective than a traditional asset sale. However, it is important to query whether some of the features that make reverse vesting orders such a useful tool

[61] *Controlled Substances Act*, 21 USC § 801 et seq Schedule I contains the most highly controlled substances.

for Canadian practitioners could cause consternation for a US judge being asked to recognize such an order, considering the public policy provisions of Chapter 15.

Commentators have noted that issues surrounding reverse vesting orders include, potentially, the lack of creditor vote regarding a transaction structure that is closer to a plan of arrangement than is a traditional asset sale; how to structure the transaction so that the proceeds of the share sale get to creditors; and the potential lack of consent mechanisms for contract assignments.[62] The *CCAA* and Chapter 15 proceedings of Cirque du Soleil[63] could have provided a chance to test the waters in front of a Chapter 15 court, because in Canada, the sale of the business was effected through a reverse vesting order. However, it appears that the transaction was structured differently so that a more traditional asset sale was put before the US Court, which was approved. As such, whether a US bankruptcy court would take issue with a reverse vesting transaction remains a live issue for insolvency professionals to be aware of.

IV. AVOIDANCE ACTIONS

As noted in Section II, § 1521 of the US *Bankruptcy Code* provides discretionary relief to a foreign representative. While the breadth of relief under § 1521 has been described as "sweeping",[64] the exceptions to that section, delineated in § 1521(a)(7), mean that an important tool in a US bankruptcy professional's toolkit is not available to foreign representatives under Chapter 15: the ability to bring avoidance actions.

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[62] See eg Bradley Wiffen, "Reverse Vesting Transactions: An Innovative Approval to Restructuring" in Jill Corrani & the Honourable D Blair Nixon, eds, *Annual Review of Insolvency Law*, 18th ed, 2020 CanLIIDocs 3594; and David Bish & Christopher Richter, "Reverse Vesting Orders (RVOS): The Next Step in the Evolution of Vesting Orders" (2020) 37:6 Nat'l Insolv Rev 49 at 51–52.

[63] *Arrangement relatif à Cirque du Soleil Canada Inc* [2020] 2020 QCCS 4849; *In Re CDS US Holdings Inc et al*, (29 October 2020), Wilmington 20-11719 (CSS) (Del).

[64] Schorr, *supra* note 3 at 369.

1. Avoidance Actions in the US *Bankruptcy Code*: Overview

Like Canadian insolvency legislation, the US *Bankruptcy Code* includes robust protections against fraudulent conveyances and preferences, generally referred to in the United States as "avoidance claims", occurring prior to the filing of a bankruptcy petition. Unlike Canadian insolvency legislation, a foreign representative under Chapter 15 is expressly precluded from using the avoidance provisions available in the US *Bankruptcy Code*. Considering the facilitative nature of Chapter 15 in general, at first blush it seems striking that avoidance provisions are specifically not available to a foreign representative. Section 1521(a)(7) of the US *Bankruptcy Code* details the limits on the discretionary relief available to a foreign representative:

> (a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—[…]
>
> (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).[65]

The sections referenced in the § 1521(a)(7) exclusion contain the bulk of the US *Bankruptcy Code*'s avoidance powers. Section 544 provides that a trustee may pursue the applicable state law avoidance powers in a bankruptcy proceeding, § 548 deals with fraudulent transfers, § 547 contains preferences provisions and § 550 addresses how the proceeds of such activities can be recovered by the estate.[66]

Section 1523(a) of the US *Bankruptcy Code* provides a procedure to circumvent the avoidance restrictions, allowing a foreign representative to bring any

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[65] 11 USC, *supra* note 1 § 1521(a)(7) [emphasis added]. Certain avoidance powers, including the provision to pursue applicable post-petition transactions (§ 549), are not included in this section, keeping them available to a foreign representative.

[66] *Ibid* §§ 544, 547, 548, 550; Timothy A Barnes, "Avoidance Actions in the United States: Cross-Border Insights" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2011* (Toronto: Carswell, 2012) at 4 [Barnes].

avoidance action carved out by § 1521(a)(7) by commencing a proceeding under Chapter 7 or 11 of the US *Bankruptcy Code*. However, the added expense and complexity of a plenary proceeding on top of a foreign main proceeding may be prohibitive to many debtors.[67]

Despite what appears at first instance to be a blanket prohibition on avoidance actions in Chapter 15 proceedings, US bankruptcy courts have developed a body of case law making fraudulent transfer relief available to foreign representatives under certain circumstances, which is described in greater detail below. Notably, certain US bankruptcy courts have held that the law of the foreign main proceeding can be applied in an avoidance action associated with a Chapter 15 proceeding, which opens up the possibility of using Canadian avoidance laws in the right cases. This is important for Canadian practitioners considering a strategy for a US recognition proceeding; however, recent case law has muddied the waters about the availability of foreign law where the avoidance action deals with certain settlement payments and financial agreements, with bankruptcy judges in the Southern District of New York issuing conflicting decisions within the last year.

2. Foreign Law Avoidance Actions in Chapter 15 Proceedings: General Rule

The guiding case for Chapter 15 avoidance actions is *Condor,*[68] in which the US Court of Appeals for the Fifth Circuit held that the prohibition on a Chapter 15 foreign representative using the US *Bankruptcy Code*'s avoidance powers did not prevent the foreign representative from seeking to void a fraudulent transfer under the law of the foreign main proceeding. This decision, the implications of which have been the subject of much analysis, has made it possible for foreign representatives to plead the law of the foreign proceeding in US courts.[69]

[67] 11 USC, *supra* note 1 § 1523(a).
[68] *Tacon v Petroquest Res Inc (In re Condor Ins Ltd)* 601 F (3d) 319 (5th Cir 2010) [*Condor*].
[69] See eg Barnes, *supra* note 66; Schorr, *supra* note 3.

i. Background of the case

Condor Insurance Limited ("Condor Insurance"), an insurance and surety bond company, became the subject of a winding-up petition in the Federation of Saint Christopher and Nevis ("Nevis") in November 2006.[70] The official liquidators appointed in the Nevis proceeding filed a petition for recognition of the foreign proceedings under Chapter 15 in July 2007. Once the recognition petition was granted, the liquidators filed an adversary complaint in the Chapter 15 proceeding, alleging that Condor Insurance fraudulently transferred certain assets to a related entity, Condor Guaranty, Inc ("Condor Guaranty") to put those assets out of the reach of Nevis creditors, and that many of those assets were now located in the United States. The foreign representatives argued that Nevis fraudulent transfer law applied and that, as such, § 1521(a)(7), which only speaks to US avoidance law, was not applicable.

Condor Guaranty sought to dismiss the complaint for various reasons, including, critically, that §§ 1521(a)(7) and 1523 together prohibit a foreign representative from setting aside any type of pre-petition avoidable transactions in a Chapter 15 proceeding.[71] The bankruptcy court, at first instance, agreed with Condor Guaranty, noting that there are other paths to recovery for the foreign representative, including (a) commencing a bankruptcy proceeding under other US *Bankruptcy Code* chapters, which would permit an avoidance action to be pursued as contemplated under § 1523; and (b) seeking relief in the Nevis court under Nevis law.[72]

On appeal, the district court upheld the bankruptcy court's decision, holding that §§ 521(a)(7) and 1523 are intended to exclude the specified avoidance powers

[70] *Fogerty v Condor Guaranty, Inc (In re Condor Ins Ltd)* 411 BR 314 at 316 (SD Miss 2009) [*Condor* D Ct], aff'g *Condor Guaranty, Inc v Fogerty (In re Condor Ins, Ltd (In Official Liquidation))*, 2008 Bankr US Lexis 4833 (Bankr SD Miss 2008) [*Condor* Bankr], rev'd by *Condor*, *supra* note 68.
[71] *Condor* Bankr, *supra* note 70 at 8–9.
[72] *Ibid* at 10–11. The US Court did not find it compelling that, as the fraudulent transfer involved a US subsidiary and assets located in the United States, there was a risk that Condor Guaranty would simply contest or avoid the Nevis jurisdiction.

under both US and foreign law, absent a Chapter 7 or 11 bankruptcy proceeding.[73]

ii. Application of foreign avoidance laws: The Fifth Circuit settles Condor

The district court's decision was appealed to the US Court of Appeals for the Fifth Circuit, which reversed the district court's decision and remanded the matter back to the bankruptcy court.[74]

The Fifth Circuit started its analysis by considering the larger goals of Chapter 15, recognizing that it implemented the UNCITRAL Model Law, and that Chapter 15 directs courts to "consider its international origin, and the need to promote an application of th[e] chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions" in interpreting its provisions."[75]

The Fifth Circuit also considered academic commentary and the UNCITRAL enactment guide, taking notice that the Model Law:

> [R]epresents a culmination of a long standing effort by the United States and other countries to develop a uniform system guiding needed cooperation. […] The Model Law was "expressly designed to be integrated into local insolvency law" and Chapter 15 closely hewed to the text of the enactment. "Any departures from the actual text of the Model Law […] were as narrow and limited as possible." All this being part of an effort by the United States to harmonize international bankruptcy proceedings for the benefit of American businesses operating abroad.[76]

The Fifth Circuit explained that if US courts were unable to apply any avoidance laws in a Chapter 15 proceeding, foreign debtors could transfer assets to the United States, out of reach of the foreign jurisdiction, without recourse. The only way for a foreign representative to get to those assets would be to initiate a more

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[73] *Condor* D Ct, *supra* note 70 at 317–318.
[74] *Condor, supra* note 68 at 329.
[75] 11 USC, *supra* note 1 § 1523(a); *Condor, supra* note 68 at 321.
[76] *Condor, supra* note 68 at 322; UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, UN Doc A/CN9/442 (1997); Lief M Clark, *Ancillary and Other Cross-Border Insolvency Cases Under Chapter 15 Of The Bankruptcy Code* (Newark, NJ: LexisNexis, 2008); Jay Lawrence Westbrook, "Chapter 15 at Last" (2005) 79:3 Am Bankr LJ 713 at 719.

expansive, more expensive, less efficient plenary proceeding in the United States—"the scenario Chapter 15 was designed to prevent."[77] The Court also noted that it may not have been possible for the matter to be settled entirely in the Nevis court because not all defendants were considered to be within its jurisdictional reach.

The Fifth Circuit noted that only the avoidance sections contained in the US *Bankruptcy Code* are listed in § 1521(a)(7), and that Congress could have—but had not—included more expansive language that would apply to all avoidance actions "whatever their source."[78] When combined with the overarching intention of Chapter 15 to facilitate cooperation among bankruptcy courts, the Fifth Circuit ultimately held that a court has the authority to permit relief under foreign avoidance law pursuant to § 1521(a)(7).

3. The Safe Harbour Provisions as an Exception to the Exception—Or Are They?

While *Condor* sets the general standard for foreign law avoidance actions under Chapter 15, two recent US decisions have created some uncertainty that Canadian practitioners should be aware of when approaching a filing.

i. Overview of safe harbour provisions generally and in Chapter 15

Outside of Chapter 15, § 546(e)[79] of the US *Bankruptcy Code* contains a general prohibition on pursuing an avoidance claim that involves "safe harbor" agreements—for example, commodity, securities and forward contracts (the

[77] *Condor, supra* note 68 at 327.
[78] *Ibid* at 324.
[79] The larger purpose of § 546(e) has been described as to "promote finality and certainty for investors, by limiting the circumstances, eg to cases of intentional fraud, under which securities transactions could be unwound", per *Fairfield Sentry Ltd v Theodoor GGC Amsterdam (In re Fairfield Sentry Ltd)* 596 BR 275 (Bankr SDNY 2018), citing *Whyte v Barclays Bank PLC*, 644 F 'pp'x 60 (2d Cir 2016) (summary order), cert denied, 137 S Ct 2114, 198 L Ed 2d 220 (2017) [*Fairfield 2018*].

"546(e) Qualifying Agreements")—except in cases of "actual," or intentional, fraud under § 548(a)(1)(A):[80]

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.[81]

Section 561(d) applies the § 546(e) safe harbour provisions to a Chapter 15 case, thereby '"limit[ing] avoidance powers to the same extent as in a proceeding under Chapter 7 or 11":[82]

> (d) Any provisions of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting agreements shall apply in a case under chapter 15, so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in any case under this title, and to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of this title (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).[83]

Sections 546(e) and 561(d) read together create a statutory interpretation issue. If US *Bankruptcy Code* avoidance actions are not available to a foreign

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[80] Section 548(a)(1)(A) contemplates that a transfer of property with an actual intent to hinder, delay or defraud a creditor and is commonly referred to as "actual fraud", while § 548(a)(1)(B) contemplates a transfer of property for which the debtor received less than reasonably equivalent value and either the debtor was insolvent, was engaged in business for which the debtor's remaining property represented an unreasonably small capital or intended to incur debts beyond its ability to repay as they matured, which is commonly referred to as "constructive fraud". See eg the *Fairfield* decision, where Judge Bernstein uses these terms throughout his reasons.

[81] 11 USC, *supra* note 1 § 546(e).

[82] *Fairfield Sentry Ltd v Theodoor GGC Amsterdam (In re Fairfield Sentry Ltd)*, 2020 Bankr US Lexis 3489 at 5 (Bankr SDNY 2020) [*Fairfield 2020*], reconsideration denied 2021 Bankr US Lexis 405 (Bankr SDNY 2021).

[83] 11 USC, *supra* note 1 § 561(d).

representative in a Chapter 15 proceeding due to § 1521(a)(7) and *Condor's* interpretation thereof, what is the purpose of § 561(d), which purports to limit avoidance powers in Chapter 15 "to the same extent as in a proceeding under Chapter 7 or 11 of this title"? This issue was litigated and different conclusions were reached in two recent decisions from the US Bankruptcy Court for the Southern District of New York, *In re Fairfield Sentry Ltd*[84] and *In re Bankr Est of Norske Skogindustrier ASA*,[85] each of which is discussed below.

ii. Does the safe harbour provision affect foreign law avoidance actions?

Three relatively recent decisions have addressed which avoidance actions a foreign representative can pursue in a Chapter 15 proceeding where the transactions giving rise to the avoidance litigation would, in a Chapter 11 proceeding, be subject to the § 546(e) safe harbour defence. The Court in *Fairfield* put forward new law on the interplay between §§ 546(e), 561(d) and 1521(7) in two decisions rendered in 2018 and 2020. *Fairfield 2018* and *Fairfield 2020* held that foreign representatives cannot avoid transactions, even if permitted under domestic law, that would otherwise be subject to safe harbour in the United States. However, in 2021, the Re Norske decision expressly conflicted with the ruling in *Fairfield 2020*, leaving the possibility open that a foreign representative may, when relying on the proof of foreign law regarding avoidance actions, seek to avoid certain safe harbour-style transactions.

The two *Fairfield* decisions and the *Norske* decision, and the conflict between them, are detailed below.

iii. A foreign representative cannot pursue foreign law preferences and constructive fraud claims that would have safe harbour protection in a US plenary proceeding

The Fairfield insolvency has a long history. Liquidation proceedings were commenced against a group of investment funds organized under British Virgin

[84] *Fairfield 2020*, *supra* note 82; *Fairfield 2018*, *supra* note 79.
[85] *Bankr Estate of Norske Skogindustrier ASA v Cyrus Capital Partners, LP (In re Bankr Estate of Norske Skogindustrier ASA)*, 2021 Bankr US Lexis 1137 (Bankr SDNY 2021) [*Norske*].

Island (“BVI”) laws in 2008 related to investments in the Bernie Madoff Ponzi scheme. Chapter 15 recognition of the BVI proceedings was granted in 2010.[86] A significant part of the liquidation proceedings included pursing US entities that received redemption payments from the Madoff fraud prior to the discovery of the fraud. In the United States, these payments would have been considered safe harbour transactions and therefore protected from avoidance.

Fairfield 2018 settled the applicability of the safe harbour rules to most foreign law avoidance actions. In *Fairfield 2018*, the bankruptcy court considered a motion by the defendants to dismiss the avoidance actions being brought by the foreign representative under BVI law on the grounds that the transactions were protected from avoidance by the § 546(e) safe harbour provisions of the US *Bankruptcy Code*. In considering the issue, Judge Bernstein analyzed the interplay between §§ 546(e) and 561(d), focusing on whether § 561(d) “makes the safe harbor applicable to proceedings brought by foreign representatives in a chapter 15 case […] under foreign insolvency laws.”[87] Judge Bernstein found that § 561(d) indeed does just that, such that a foreign representative is prevented from avoiding transfers pursuant to § 546(e) qualifying agreements, even under foreign law where it might otherwise be allowed: “A chapter 15 foreign representative cannot exercise the avoidance powers available to a trustee in chapter 7 or chapter 11. Consequently, section 561(d) is necessarily referring to avoidance powers available under non-U.S. law.”[88]

The avoidance actions pled under BVI law were analogous to preference claims and constructive fraud claims under the US *Bankruptcy Code*, which, in the context of being a transaction otherwise caught by § 546(e) safe harbour provisions, cannot be pursued in a Chapter 7 or 11 proceeding and, as such, could not be pursued in the Chapter 15 proceedings.[89] Judge Bernstein

[86] *Fairfield 2020*, *supra* note 82 at 3.
[87] *Fairfield 2018*, *supra* note 79 at 310.
[88] *Ibid*.
[89] As only § 548(a)(1)(A), actual fraudulent transfer claims, are exempt from the safe harbour rule.

dismissed the claims without prejudice to the foreign representative bringing a renewed motion based on the applicability of §§ 546(e) and 561(d).

iv. Can a foreign representative pursue actual fraud claims that in a US plenary proceeding would not be subject to safe harbour? Conflicting cases create uncertainty

Fairfield 2018 was not the final word from Judge Bernstein on safe harbour avoidance issues. In *Fairfield 2020*, the foreign representative brought a renewed motion to deal with the safe harbour issues, arguing that where a foreign law avoidance action is sufficiently analogous to § 548(a)(1)(A) (ie, in that it involves actual fraudulent transfers), the court should consider such avoidance action an exception to the safe harbour provision and avoid the transaction.[90] Judge Bernstein disagreed, holding that it was not possible to advance a claim that was so close to § 548(a)(1)(A) without such claim falling under another safe harbour prohibition, in this case, certain state fraudulent transfer laws that are also unavailable in a Chapter 15 proceeding under § 546(e). Pursuant to Judge Bernstein's holding in *Fairfield 2020*, no foreign law avoidance action can be advanced if it relates to a 546(e) qualifying agreement. The *Fairfield 2020* decision was appealed, which appeal was heard in May 2021, but no ruling has been rendered as of the date of this article's publication.

Less than a year later, Judge Glenn came to a contrary result in *Norske*, noting that he respectfully disagreed with the *Fairfield 2020* analysis.[91] The Norske insolvency began in December 2017 when the Norske group of companies, which together made up one of the world's largest producers of newsprint and magazine paper, commenced insolvency proceedings in Norway. A Chapter 15 petition was filed in 2018. Norske had undergone a number of informal financial restructurings before the formal insolvency proceedings commenced, and allegations about transactions occurring as part of those informal restructurings led the foreign representative to bring avoidance actions in the US bankruptcy

[90] *Fairfield 2020, supra* note 82.
[91] *Norske*, *supra* note 85 at 93.

court against certain entities alleged to have a principal place of business in the United States.[92]

While not deciding the issue at hand due to lack of evidence, Judge Glenn, in a lengthy opinion, held that, while the safe harbour applies in Chapter 15 cases due to § 561(d) of the US *Bankruptcy Code*, in foreign law, avoidance laws that were sufficiently analogous to fraudulent transfer claims under § 548(a)(1)(A) are valid exceptions to the sale harbour rules, just as they are in § 546(e).[93]

Judge Glenn expressed concern that "barring foreign law avoidance claims or imposing an impossibly high standard for the exception to the safe harbor to apply in chapter 15 cases would mean that there is effectively no exception to the safe harbor in such cases."[94] Judge Glenn felt that this result was contrary to the language of § 561(d), which makes § 546(e) applicable to limit avoidance powers in a Chapter 15 proceeding *to the same extent* as in a proceeding under Chapter 7 or 11, as the effect would be to ban all foreign law avoidance actions in Chapter 15, which would make Chapter 15 safe harbour provisions broader than under Chapters 7 and 11, which the court found to be contrary to the intent of the drafters of the US *Bankruptcy Code*.[95]

Ultimately, Judge Glenn allowed the foreign representative to amend its pleadings to more particularly address whether the avoidance actions fit within the safe harbour exemptions of § 546(e).[96] The foreign representative did, in fact, file an amended complaint as permitted by the bankruptcy court, and the defendants have again moved to dismiss. No ruling on those motions has yet been rendered.

Accordingly, when faced with avoidance actions originating in Canada but involving US entities and/or assets in the United States, Canadian restructuring

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[92] *Ibid* at 8–22.
[93] *Ibid* at 93.
[94] *Ibid* at 96.
[95] *Ibid*.
[96] *Ibid* at 9.

professionals can take comfort in case law that permits an avoidance action to be pursued in a Chapter 15 proceeding. Canadian practitioners should be prepared to prove foreign law in Chapter 15 proceedings and to demonstrate that preference and/or transfer at undervalue requirements in the Canadian restructuring legislation are met. However, when seeking to avoid a § 546(e) qualifying agreement, Canadians should be aware they may be left without remedy in the United States, depending on which US court and which judge is hearing the matter.

V. THIRD-PARTY RELEASES

1. Introduction

The significance of third-party releases under the public policy exception has been discussed in some detail above. However, it is important for Canadian practitioners to be aware that US bankruptcy courts may refuse to enforce a third-party release even where the public policy exception is not triggered. This is because only certain specified relief is automatically granted under § 1520 upon recognition—other relief, such as third-party releases, must be specially requested under either § 1521 or § 1507, and is granted at the court's discretion.[97]

As introduced in Section III, §1521 permits the court to "grant any appropriate relief" where such relief is necessary to effectuate the purpose of Chapter 15 and to protect either the assets of the debtor or the interests of the creditors; however, such relief may only be granted where the interests of the creditors and other interested entities are sufficiently protected.[98] Section 1507 permits the court to provide "additional assistance" to a foreign representative.

As third-party releases are not automatically provided for under §1520, a foreign representative must seek relief under either §§ 1521 or 1507 in order for a third-party release to be enforced by a US bankruptcy court under Chapter 15.

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[97] *In re PT Bakrie*, *supra* note 22 at 876.
[98] 11 USC, *supra* note 1 § 1522(a).

Accordingly, the foreign representative must also be prepared to demonstrate why such enforcement would be consistent with the principles of comity outlined above.

2. Application

In practice, US bankruptcy courts are generally inclined to enforce third-party releases, especially when embodied in orders in common law countries such as Canada.[99] However, US bankruptcy courts have refused to enforce third-party releases in certain cases where the foreign proceeding suffered from serious procedural and substantive deficiencies.

At the outset, it is worth noting that different circuit courts of appeal take different views regarding the permissibility of third-party releases under Chapter 11. The majority view, held by the US Courts of Appeal for the Second, Fourth, Sixth, Seventh and Eleventh Circuits, is that such releases may be given without the consent of all of the parties losing rights under the release in certain limited circumstances. The US Court of Appeal for the Third Circuit also recently indicated that it may be willing to approve non-consensual third-party releases under certain circumstances, but given the limited nature of the recent ruling, the Third Circuit cannot yet be placed firmly in the majority camp.[100] The US Courts of Appeal for the Fifth, Ninth and Tenth Circuits, on the other hand, take the minority approach, and have consistently refused to grant third-party releases unless 100% of the impaired creditors vote to confirm the plan.[101] This does not mean that enforcement of third-party releases under Chapter 15 is impossible in circuits that do not permit equivalent releases under Chapter 11; however, as

[99] *In re Metcalfe & Mansfield Alternative Invs,* 421 BR 698 (Bankr SDNY 2010) [*In re Metcalfe*].
[100] *In re Millennium Lab Holdings II*, LLC, 945 F (3d) 126 (3d Cir 2019).
[101] *In re Avanti Communs Grp PLC*, 582 BR 603 at 606 (Bankr SDNY 2018) [*In re Avanti*]. There have been some recent decisions from the Ninth Circuit indicating that courts in this Circuit are taking a closer look at their historical blanket prohibition of third-party releases. See eg *Blixseth v Credit Suisse*, 961 F3d 1074 (9th Cir 2020) (permitting a narrow non-consensual exculpation of the debtors' largest creditor based on its voluntary participation in drafting the plan). However, this should not, at least yet, be viewed as a Circuit-wide deviation of prior precedent.

noted below, courts in such circuits may be more skeptical of foreign third-party releases, and may require a higher degree of justification.

i. Cases in which third-party releases have been enforced

The majority of rulings regarding third-party releases in a Chapter 15 case have emerged from the US Court of Appeal for the Second Circuit, which has consistently decided to enforce such releases. For example, in *In re Metcalfe & Mansfield Alternative Invs*, a foreign representative sought additional assistance under § 1507 in order to enforce third-party releases contained in an Ontario order. This request was granted by the Second Circuit despite the fact that it was unclear whether the releases would have been approved in a Chapter 11 proceeding.[102] The release was justified on the grounds that Chapter 15 decisions must be guided by principles of comity, rather than by the concerns underlying Chapter 11 proceedings.[103] Specifically, the court noted that the Ontario Court of Appeal's reasoning regarding third-party releases under the *CCAA* reflected "similar sensitivity to the circumstances justifying such provisions" and that the United States and Canada shared similar common law traditions and respect for due process.[104] As a result, assistance was provided under § 1507. In *In re Sino-Forest*, the court reached the same conclusion on remarkably similar facts, even though the Canadian proceeding was theoretically still subject to appeal to the Supreme Court of Canada. The US bankruptcy court nevertheless recognized the releases because "the law in Canada and in the Second Circuit is well settled so there is no reason to wait before ruling."[105]

Enforcement may be granted under both §§ 1521 and 1507 in the same proceeding. In the 2018 case *In re Avanti*, the Second Circuit recognized and enforced third-party releases, this time contained within a UK scheme of arrangement. In determining that principles of comity supported such recognition, the court noted that (1) the scheme had near unanimous support; (2) third-party

[102] *In re Metcalfe, supra* note 99 at 685, 696.
[103] *Ibid* at 696–697.
[104] *Ibid* at 698.
[105] *In re Sino-Forest Corp*, 501 BR 655 at 666 (Bankr SDNY 2013) [*In re Sino-Forest*].

releases are common features of UK schemes of arrangement; (3) the creditors were afforded a full and fair opportunity to be heard, consistent with US principles of due process; and (4) failure to enforce the releases "could result in prejudicial treatment of creditors to the detriment of the Debtor's reorganization efforts and prevent the fair and efficient administration of the Restructuring."[106] As a result, the court determined it proper to enforce the scheme under both §§ 1521 and 1507, without distinguishing between the two provisions in its reasoning.[107]

Enforcement has been granted even where the process by which the third-party releases were obtained was without certain procedural safeguards that would have been available in the United States. In *In re Agrokor dd*, the Second Circuit was called upon to recognize and enforce a Croatian settlement agreement that provided third-party releases to two different groups, one of which was a group of Bosnian-Herzegovinian guarantors.[108] Two of these guarantors were affiliates of the debtor, and had voted in favour of the settlement. As insider votes are not permitted under the US *Bankruptcy Code*, the Court considered itself obliged to consider whether these insider votes had tainted the approval of the agreement such that enforcement should not be granted under Chapter 15.[109] Ultimately, the Court concluded that because 78.52% of non-insiders had voted in favour of the plan, the fact that insiders had been able to vote did not taint the result. Further, the Court considered that the Croatian proceeding broadly accorded with the substantive content of US insolvency law, because:

1. The distributions closely followed the waterfall provisions in the US *Bankruptcy Code*, and had met US standards of due process; and
2. The creditors:
    i. Had been grouped into different classes, and had been treated equally within each class;
    ii. Had participated in the drafting of the settlement;

[106] *In re Avanti*, *supra* note 101 at 618–619.
[107] *Ibid* at 619.
[108] *In re Agrokor dd,* 591 BR 163 at 172 (Bankr SDNY 2018).
[109] *Ibid* at 173.

iii. Had the right to submit contested or denied claims for future adjudication, which was demonstrated by the fact that 92 complaints had subsequently been submitted; and
iv. Had received proper notice via the Court's website.

Further, the Court noted that Croatian insolvency law provided for both a centralized distribution and the creation of an automatic stay, and no objections to the recognition of the settlement had been made before the US Bankruptcy Court.[110] Accordingly, enforcement was granted under both §§ 1521 and 1507.

ii. Cases in which enforcement has been refused

Despite the positive case law referenced above, enforcement of third-party releases is not guaranteed. In *In re Vitro (Bankruptcy Court)*, the facts of which are outlined above, the US Bankruptcy Court for the Northern District of Texas, which is within the Fifth Circuit, in addition to finding that the third-party releases were fundamentally contrary to US public policy, also found that third-party releases could not be approved under either §§ 1521 or 1507. In analyzing whether it was proper to recognize the third-party releases approved by the foreign court under § 1521, the court concluded that the approval order at issue neither sufficiently protected the interests of creditors in the United States nor provided an appropriate balance between the interests of creditors and the debtor and its subsidiaries. The court went so far as to say that "one could argue that Vitro SAB, as a holding company, is trying to achieve, through its *Concurso* plan, an entrustment of the distribution of the assets of its non-debtor U.S. subsidiaries without sufficiently protecting the Objecting Creditors."[111] In analyzing § 1507 with respect to the same issue, the court concluded that the order did not provide for the distribution of the proceeds substantially in accordance with the US *Bankruptcy Code*'s priority scheme, because, as under a Chapter 11 proceeding, the creditors would have been free, after distribution, to

[110] *Ibid* at 190–91.
[111] *In re Vitro* Bankr, *supra* note 32 at 132.

pursue the guarantors for any shortfall.[112] Essentially, the court concluded that the presence of third-party releases altered the priority scheme such that it no longer substantially accorded with US law.

On appeal, the US Court of Appeals for the Fifth Circuit confirmed the Bankruptcy Court's general reasoning. The appellate court found that the relief sought was not contained in any of the explicitly enumerated § 1521 provisions,[113] and that it could not be considered otherwise "appropriate relief" under § 1521, on the grounds that (1) third-party releases are generally unavailable under US insolvency law; (2) *In re Metcalfe* had approved third-party releases under § 1507, rather than § 1521; and (3) the Bankruptcy Court's decision was a proper balancing of the interests of creditors and debtors, as required by § 1522.[114]

The Fifth Circuit further concluded that while third-party releases may theoretically be granted under § 1507,[115] the Bankruptcy Court had correctly determined that the distribution of proceeds was not substantially in accord with the priority scheme under the US *Bankruptcy Code* because the entire distribution was premised on the third-party releases—the amounts paid were "inescapably dependent" on the discharge of the guarantors, who were also creditors.[116] The Court further rejected the foreign representative's argument that evidence favouring comity so outweighed these concerns that the Bankruptcy Court's decision amounted to an abuse of discretion. The Court stated the following:

> Vitro has not shown that there existed truly unusual circumstances necessitating the release. To the contrary, the evidence shows that equity retained substantial value. The creditors also did not receive a distribution close to what they were originally owed. Moreover, the affected creditors did not consent to the Plan, but were grouped together into a class with insider voters who only existed by virtue of

[112] *Ibid*.
[113] *In re Vitro* Appeal, *supra* note 18 at 1058–59.
[114] *Ibid* at 1059–60.
[115] *Ibid* at 1062.
[116] *Ibid* at 1065.

> Vitro reshuffling its financial obligations between it and its subsidiaries. It is also not the case that the majority of the impacted group of creditors, consisting predominantly of the Objecting Creditors, voted in favor of the Plan. Nor were non-consenting creditors given an alternative to recover what they were owed in full.[117]

In particular, the court objected to the fact that the plan had *relied* on the support of insiders to succeed. The Court distinguished *In re Metcalfe* on the grounds that the plan there had been approved by non-insider votes, and that the Canadian court had shown sensitivity to the need to justify third-party releases—a sensitivity which "we find absent in the Mexican court's approval of the Plan."[118] The Court emphasized that it reviewed the Bankruptcy Court's findings on a deferential standard of reasonableness,[119] but does not appear to have substantially disagreed with most of the Bankruptcy Court's findings under §§ 1521 and 1507.

While the reasoning of the Bankruptcy Court in *In re Vitro* appears to foreclose any possibility of enforcing a third-party release under either § 1521 or § 1507, the reasons provided by the Fifth Circuit have allowed subsequent case law to distinguish *In re Vitro* on its facts on the basis that *In re Vitro* involved the use of insider votes to obtain the releases and achieve plan confirmation in that case. In *In re Sino-Forest*, the Court emphasized the deferential standard of review that the Fifth Circuit had adopted, and further noted that the Sino-Forest plan had received near-unanimous support and had not relied on insider votes.[120] In *In re Avanti*, the Court noted that *In re Vitro* had "a number of very troubling facts," such as the fact that there had been only a single class of creditors, which included insiders, and similarly emphasized the near unanimous support that the Avanti plan enjoyed.[121]

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[117] *Ibid* at 1067.
[118] *Ibid* at 1068.
[119] *Ibid* at 1069.
[120] *In re Sino-Forest*, *supra* note 105 at 665.
[121] *In re Avanti*, *supra* note 101 at 618.

In re Vitro demonstrates that practitioners must be aware of the importance of the facts underlying a third-party release provision. Even within circuits that are more open to third-party releases, courts may refuse enforcement of these releases where procedural fairness is found to be lacking. This occurred very recently in *In re PT Bakrie*, which was decided in April 2021. In that case, a proposed foreign representative appointed as part of an Indonesian insolvency proceeding sought recognition under Chapter 15, and additionally sought the enforcement of a plan that contained third-party releases under §§ 1521 and 1507.[122] Recognition was opposed by objecting noteholders on the basis that enforcing the releases would have the effect of precluding recovery from a number of parties involved in New York litigation already initiated by the objecting noteholders.[123]

In order to determine whether to extend comity to the foreign order, the Bankruptcy Court considered whether the Indonesian proceeding had "abided by fundamental standards of procedural fairness as demonstrated by a clear and formal record."[124] The Bankruptcy Court found that it had not, and that the reasoning of the Indonesian Court was totally insufficient:

> Here, there is no clear and formal record that sets forth whether or how the foreign court considered the rights of creditors when considering this third-party release. Indeed, the record contains no information about how this third-party release was presented to the Indonesian court for consideration or whether any creditors were heard—or even had the ability to be heard—as to a third-party release
>
> […]
>
> Moreover, there is nothing in the record about the justification for any third-party release. The Commercial Court Judgment does not provide any explanation, nor is there any explanation anywhere else in the records of the PKPU Proceeding. It simply exists in the foreign judgment. The Foreign Representative does not even offer a justification in his pleadings, and instead is content to simply rely on the language of the Commercial Court Judgment itself. But relying on the Commercial Court Judgment is insufficient where it does not

[122] *In re PT Bakrie*, *supra* note 22 at 864.
[123] *Ibid* at 884.
[124] *Ibid*.

> provide any justification for the release, either under Indonesian law or otherwise.[125]

The Bankruptcy Court put great emphasis on the fact that the Indonesian Court had failed to justify the third-party releases, especially because there was evidence before the court that third-party releases must be justified under Indonesian law, and that such releases were not given as a matter of course in Indonesian proceedings.[126] While the Bankruptcy Court took pains to clarify that it was not ruling on whether the releases were permissible under Indonesian law,[127] it harshly criticized the Indonesian Court for failing to provide even a "rudimentary record" by which the US court could understand the Indonesian Court's reasoning and confirm the procedural fairness of the underlying process.[128] In particular, the Court distinguished the Indonesian process from the Ontario order approved in *In re Metcalfe*, noting that the Ontario courts had issued lengthy, reasoned decisions on the appropriateness of the third-party releases.[129]

These difficulties did not forever foreclose recognition, as the Bankruptcy Court explicitly specified that "the parties are free to return to the Indonesian Court to further develop the record on this issue, consistent with the substantive and procedural requirements of Indonesian law."[130] However, on the record then before it, the Bankruptcy Court concluded that the foreign representative had not met the burden for granting additional relief, and consequently denied that relief under both §§ 1521[131] and 1507.[132]

Both *In Re Metcalfe* and *In Re Sino-Forest* should provide comfort to Canadian practitioners that third-party releases that can be justified in accordance with the applicable test developed in the *In Re Metcalfe* Canadian insolvency proceeding

[125] *Ibid* at 884–885.
[126] *Ibid* at 885.
[127] *Ibid* at 886.
[128] *Ibid* at 887.
[129] *Ibid* at 885–886.
[130] *Ibid* at 887.
[131] *Ibid*.
[132] *Ibid* at 891.

will generally be recognized under Chapter 15. However, *In re Bakrie* brings home the advisability of Canadian practitioners ensuring a robust record and judicial endorsement of a third-party release to lessen the risk that a US bankruptcy court will decline to recognize the third-party release, at least without further justification and support.

VI. CONCLUSION

More than 15 years of Chapter 15 jurisprudence has proven the facilitative nature of the US cross-border recognition system. Generally, Canadian practitioners run into little trouble dealing with a system they know well. However, by taking a deeper look at three important areas of cross-border insolvency law, we have highlighted several issues to keep in mind when considering whether a Chapter 15 petition is appropriate for a distressed Canadian debtor, and how to navigate any potential hurdles:

1. While US bankruptcy courts generally adopted a narrow view of the public policy exception, a foreign representative should be aware of potential breaches of both constitutional and purely statutory rights that may offend a US bankruptcy court's sensibilities;
2. Canadian practitioners should be aware of differences between the various US Circuit courts of appeal. Circuit splits on various issues have the potential to become highly relevant in selecting the best forum for a recognition proceeding. Bankruptcy court decisions vary as much—or more than—some jurisdictions in Canada, and where filing location is an option, careful consideration should be undertaken;
3. US bankruptcy courts are not afraid to signal what content they need in a foreign order to facilitate granting recognition, and such suggestions should be accommodated where possible;
4. When considering pursuing avoidance actions, Canadian practitioners should be prepared to rely on Canadian law, and to consider whether the transactions practitioners are seeking to avoid could fall within the US safe

harbour provisions, in which case the uncertainty about whether the avoidance action can succeed may lead to a different cost–benefit analysis of such a proceeding; and

5. When seeking enforcement of third-party releases, the fact that Canada is a common law jurisdiction with highly regarded standards of procedural fairness works strongly in favour of recognition.[133] Nonetheless, ensuring that the Canadian court's reasons are clear and robust, and that the third-party release is clearly justified and supported, may go a long way toward smoothing the path.

We are excited to see what the next 15 years of US Chapter 15 jurisprudence and US–Canadian cooperation brings.

[133] *In re Metcalfe*, *supra* note 99 at 698.