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THE FOREIGN REPRESENTATIVE: A NEW APPROACH TO COORDINATING THE BANKRUPTCY OF A MULTINATIONAL ENTERPRISE

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INTRODUCTION

The restructuring community describes foreign representatives as being “hot.”¹ But what are foreign representatives – and why has the concept been so successful?

Part II of this article explains the need for foreign representatives and how courts have met that need. Part III takes a closer look at the nine chapter 11² cases to date in which foreign representatives have been appointed and, for six of those cases, examines an issue that arose in each case illustrating the role of the foreign representative.

I. THE NEED FOR FOREIGN REPRESENTATIVES

A. *International Insolvencies*

The term “international insolvency” means “an insolvency which is affected by the laws of two or more countries.”³ For the purposes of this article, there are two main categories of international insolvency situations. The first category contains single entities that are subject to concurrent

¹ *Bankruptcies and Restructurings – Hot Topics for 2001*, THE DAILY DEAL, June 14, 2001.

² 11 U.S.C. §§ 1101 *et seq.* (1994) (Chapter 11).

³ CARL FELSENFELD, A TREATISE ON THE LAW OF INTERNATIONAL INSOLVENCY at 1-5 (2000). Professor Felsenfeld elaborates on this in a footnote:

That is the sense in which the term is used by the International Association of Insolvency Practitioners (INSOL), by those who are toiling with treaties in such places as the United Nations and the European Union.

Under Article 1 of the February 19, 1997 draft of the legislative provisions being drafted by the United Commissions on International Trade Law, for example, the provisions take effect only where there is an insolvency proceeding dealing with more than one state.

Id. at n.8.

insolvency proceedings in two or more jurisdictions. The second category involves multinational corporate groups in which the parent or primary operating company is in insolvency proceedings.⁴

The best known example in the first category is Maxwell Communication Corporation (MCC). MCC, the parent company of an international media conglomerate, commenced both a chapter 11 case in the United States⁵ and Administration proceedings in England⁶. This subjected MCC to the jurisdiction of two insolvency courts, both of which claimed primary responsibility for the administration of MCC's insolvency estate. Similarly, in the personal bankruptcy of Joseph Nakash,⁷ the debtor found himself subject to two bankruptcy regimes when an involuntary bankruptcy petition was filed against him in Israel after he had already commenced a chapter 11 case in the U.S.

Starting with MCC, the insolvency community has developed a number of uni- and bilateral *ad hoc* solutions to deal with concurrent insolvency proceedings, ranging from the appointment of examiners to the negotiation of cross-border insolvency protocols.⁸ The insolvency community has also begun to develop more generalized approaches to concurrent proceedings, including the UNCITRAL Model Law On Cross-Border Insolvency (UNCITRAL Model Law)⁹ and, within the European Union, the E.U.

⁴ For an excellent overview on international insolvency law, see *id.* at 6-2. See also 1 COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE ch. 10 (King ed. 2000); Richard A. Gitlin & Evan D. Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 BUS. LAW. 307 (1987); Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329; Donald T. Trautman, et al., *Four Models for International Bankruptcy*, 41 AM. J. COMP. L. 573, 610 (1993); Jay Lawrence Westbrook, *Choice of Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 518 (1991).

⁵ See *In re Maxwell Communication Corp.*, No. 91-B-15741 (Bankr. S.D.N.Y. 1991). See generally Evan D. Flaschen & Ronald J. Silverman, *The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communication Corporation International Insolvency*, CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 621 (Ziegel ed. 1994) [hereinafter *The Role of the Examiner*]; Leonard Hoffmann, *Cross-Border Insolvency: A British Perspective*, 64 FORDHAM L. REV. 2507 (1996).

⁶ See THE INSOLVENCY ACT OF 1986 (UK) (providing for reorganization-oriented procedure that vests management control in one or more court-appointed administrators); See also 2 EUROPEAN CORPORATE INSOLVENCY ch. 16 (Harry Rajak et al. eds., 2d ed. 1995).

⁷ *In re Nakash*, No. 94-B-44840 (Bankr. S.D.N.Y. 1984). For a general discussion of *Nakash*, see Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 TEX. INT'L L.J. 587, 593 (1998) [hereinafter Flaschen & Silverman, *Cross-Border Insolvency Cooperation*].

⁸ See Evan D. Flaschen, et al., *Foreign Representatives in US Chapter 11 Cases: Filling the Void in the Law of Multinational Insolvencies*, 17 CONN. J. INT'L L. 3 (Fall 2001); see also Flaschen & Silverman, *Cross-Border Insolvency Cooperation*, *supra* note 7.

⁹ The UNCITRAL Model Law, together with the United Nations Commission on International Trade Law's Report on its enactment, can be found at U.N. GAOR, 52nd Sess., Supp. No. 17,

Regulation On Cross Border Insolvencies.¹⁰ The usual approach is to designate one proceeding as the main proceeding and subordinate the other proceedings as secondary proceedings. The administration of the two proceedings is then coordinated and that coordination creates a more valuable estate.

However, what happens when there is a multinational corporate group and different members of the group are the subjects of insolvency proceedings in different jurisdictions? Further, even if only the parent is in insolvency proceedings, how can one continue to focus on reorganizing the worldwide business operations in the face of local cross-defaults and local creditor pressure in a number of different countries?¹¹ For example, as discussed in more detail in Part III of this article, The Singer Company N.V. through its subsidiaries had business operations in more than 150 countries when it commenced chapter 11 proceedings in the U.S.

B. Chapter 11 as a Vehicle for Reorganizing Multinational Enterprises

Chapter 11 is considered a relatively debtor-friendly and flexible vehicle for reorganizing struggling businesses. In particular, chapter 11 leaves existing management in charge as the so-called "debtor in possession."¹² Most other insolvency systems, however, are typically more creditor-oriented and less flexible, and very often vest management of the debtor in an independent administrator or trustee (or equivalent). Thus, U.S.-based multinational corporate groups in need of bankruptcy relief will often commence chapter 11 proceedings for the parent company. At the same time, in order to maintain control over their international operations and

Annex 1, U.N. Doc. A/52/17 (1977). The related "Guide to Enactment of the UNCITRAL Model Law On Cross-Border Insolvency" can be found at U.N. COMM'N ON INT'L TRADE LAW, 30th Sess., U.N. Doc. A/CN.9/442 (1997), U.N. Pub. Sales No. E.99.V.3, available at <http://www.uncitral.org/English/texts/insolven/insolvency.htm>. See generally Andre J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309 (1998); Paul J. Omar, *International Insolvency Co-Operation: The UNCITRAL Model Law*, (May 25, 2000), available at <http://www.mlj.com.my/articles/P.Omar1.htm>; Ronald J. Silverman, *International Law Weekend Proceedings: Advances in Cross-Border Insolvency Cooperation: The UNCITRAL Model Law on Cross-Border Insolvency*, 6 ILSA J. INT'L & COMP. L. 265 (2000).

¹⁰ Council Regulation 1346/2000 of May 30, 2000 on Insolvency Proceedings, O.J. (L 166) 1-13, available at http://europa.eu.int/eur-lex/en/lif/dat/2000/en_300R1346.html. See generally Horst Eidenmueller, *Europäische Verordnung ueber Insolvenzverfahren und zukuenftiges deutsches internationales Insolvenzrecht*, IPRAX 2001, HEFT 1, 3, see also Christoph G. Paulus, *Die Europäische Insolvenzverordnung und der deutsche Insolvenzverwalter*, NZI 10/2001, at 505 et seq.

¹¹ See generally Bruce Leonard, *Managing Default by a Multinational Venture: Cooperation in Cross-Border Insolvencies*, 33 TEX. INT'L L.J. 543, 548 (1998).

¹² See 11 U.S.C. § 1101(1) (1994) (defining "debtor in possession").

avoid the appointment of local trustees, they will seek to avoid local insolvency proceedings for their non-U.S. subsidiaries.

When possible, U.S. companies intending to commence chapter 11 proceedings will spend weeks and even months in planning for the filing. The announcement of a bankruptcy filing and the requirements of bankruptcy law can have a very disruptive effect on a business, its employees, its suppliers, and its customers, so prudent planning makes a great deal of sense.

When the U.S. company is the parent of numerous international subsidiaries, the potential for disruption is multiplied exponentially. Regardless of whether the bankruptcy filing of the parent company is in actual default under local loan facilities (and it often is), local creditors will naturally seek to protect the local assets and reduce their credit exposure, for fear that the parent's bankruptcy is a harbinger of a global liquidation. Local management, too, will inevitably look more to their local interests than to those of the corporate group, particularly in those countries in which directors can be held civilly, and even criminally, liable if they permit an insolvent business to continue to operate outside of local insolvency proceedings.

Further, for tax, capital access, efficiency, and other reasons, multinational enterprises are often structured with a highly complex intercompany debt structure, and a substantial portion of an international subsidiary's asset value consists of intercompany receivables. The parent of a multinational group is often a net intercompany obligor, such that the parent's chapter 11 filing can lead to the likely requirement for international subsidiaries to write down substantially the value of their intercompany receivables, which can lead to a cascade effect of receivable write-downs throughout the international subsidiary group and resultant potential insolvency situations.

Thus, it is even more critical to plan for the chapter 11 filing of a U.S. multinational parent as far in advance as possible, else the parent's chapter 11 filing could lead very quickly to a global meltdown of local, uncoordinated liquidation proceedings.

C. *The Concept of a Foreign Representative*¹³

The concept of a "foreign representative" acting as the international representative of a debtor's estate is not new. Indeed, the United States

¹³ See generally Flaschen et al., *supra* note 8 (discussing concept of "foreign representative"); Gabriel Moss, *Co-ordinating Multi-National Insolvencies and Re-organizations: Brief Paper on "Singer" and "Foreign Representatives,"* INTERNATIONAL INSOLVENCY IN THE NEW MILLENNIUM (International Insolvency Institute CD-ROM, June 11-12, 2001).

Bankruptcy Code¹⁴ expressly recognizes that the duly authorized representative of a foreign insolvency estate is entitled to act as the “foreign representative” of that estate within the U.S.¹⁵ Logically, it was only a matter of time and circumstance for a U.S. bankruptcy court to conclude that it should appoint a foreign representative to represent a U.S. chapter 11 estate in other countries. In fact, the UNCITRAL Model Law also uses the term “foreign representative” for similar purposes,¹⁶ and if the UNCITRAL Model Law is adopted in the U.S. as proposed,¹⁷ the appointment of U.S. foreign representatives will be expressly authorized by statute.

However, as is so often the case when dealing with cross-border insolvency situations, the parties and the courts cannot wait for enabling legislation if they are to maximize the prospects for reorganizing the worldwide business. When the situation involved concurrent insolvency proceedings for the same entity, the courts in *Maxwell*, *Nakash*, and other similar situations implemented the concept of a court-appointed examiner to serve as a mediator and facilitator between the two insolvency estates,¹⁸ often assisted by the negotiation of an *ad hoc* protocol as an aid to the coordination of the two proceedings.¹⁹

The need to create the new role of foreign representative arose as a result of the combination of four factors. The first factor is the bankruptcy of a parent company with international subsidiaries potentially subject to their own insolvency proceedings. This is to be distinguished from the *Maxwell* and *Nakash* situations, in which the concurrent insolvency proceedings involved the same debtor, rather than a parent and a subsidiary.

The second factor is the international reluctance to trust a debtor’s existing management. Very few countries have adopted the debtor-in-possession concept. Instead, as mentioned in Part II.B above, most

¹⁴ 11 U.S.C. §§ 101-1330 (1994).

¹⁵ See *id.* § 101(24) (defining “foreign representative”).

¹⁶ See UNCITRAL Model Law, U.N. GAOR, 52d Sess., No. 17, Annex 1, at art. 2(d), U.N. Doc. A/52/17.

¹⁷ As of the writing of this article, proposed chapter 15 of the Bankruptcy Code, which is an adaptation of the UNCITRAL Model Law, has stalled in Congress as part of the overall debate concerning bankruptcy reform legislation in general.

¹⁸ Just as the Bankruptcy Code already contemplates the existence of foreign representatives, so too does it provide for the appointment of Examiners. However, 11 U.S.C. §1104 (1994) contemplates the appointment of an Examiner primarily to investigate potential fraud or mismanagement. Judge Tina Brozman’s stroke of creativity in *Maxwell*, borne out of the necessity of the situation, was to appoint an Examiner for the purpose of coordinating concurrent insolvency proceedings. See generally Flaschen & Silverman, *The Role of the Examiner*, *supra* note 5.

¹⁹ For a discussion of the concept and implementation of Protocols, see Flaschen & Silverman, *Cross-Border Insolvency Cooperation*, *supra* note 7.

countries replace the corporate governance of a debtor upon insolvency with a court-appointed official such as a trustee, receiver or administrator. Indeed, in most countries, the American concept of leaving existing management in charge is often referred to as "leaving the fox in charge of the hen house."²⁰

The third factor is the desirability of extensive pre-planning before commencing the parent's chapter 11 case, for the reasons discussed in Part II.B above. Ideally, the candidate for foreign representative will be a member of the planning team, so that he or she will be fully informed and prepared to act quickly if appointed by the court in the subsequent chapter 11 case.

The fourth factor is the statutory requirement that an examiner be a "disinterested person."²¹

The ideal approach to address all four of these factors would be for the U.S. bankruptcy court to appoint an estate representative with extensive international experience who has been part of the debtor's team planning for the chapter 11 filing but is also authorized to serve in a quasi-independent and fiduciary capacity. An examiner could certainly have international experience and would serve in an independent capacity, but would be appointed by the United States Trustee, not the bankruptcy court.²²

When The Singer Company N.V. was in financial difficulty in 1999, all four of the above factors were present and a creative approach was needed if Singer was to maximize its prospects for reorganizing its core businesses on a global basis.

II. SELECTED FOREIGN REPRESENTATIVE APPOINTMENTS²³

²⁰ Stacy Notaras, *Foreign Representative Role Growing*, TURNAROUNDS & WORKOUTS, January 15, 2001, at 4 (quoting the co-author).

²¹ See 11 U.S.C. § 1104(d) (1994) (stating "[i]f the court orders appointment of . . . an examiner, . . . the United States Trustee . . . shall appoint . . . one disinterested person to serve as . . . examiner . . ."). Interestingly, the Bankruptcy Code definition of "disinterested person" does not exclude the debtor's pre-petition professionals, other than certain investment bankers. See *id.* § 101(14). However, given the statutory investigatory duties of trustees and examiners, it would seem very unlikely that one of the debtor's pre-petition professionals would be appointed as chapter 11 trustee or examiner. Note, however, that it is not unusual for creditors' committee counsel, and occasionally even debtor's counsel, to serve as chapter 7 trustee upon the conversion of a chapter 11 case.

²² See 11 U.S.C. § 1104(d) (1994) (providing appointment of trustee or examiner is responsibility of United States Trustee, subject to court approval).

²³ The cases described in this Part III are too recent for much, if anything, to have been written about them, other than in another article prepared by the authors and their colleague. See Flaschen & Silverman, *Cross-Border Insolvency Cooperation*, *supra* note 7. Indeed, each of the cases continues to be pending as of the writing of this article, and the respective Foreign Representatives continue in their roles (on a postconfirmation basis in the case of *Singer*), except that the *Outboard Marine* Foreign Representatives were discharged upon the conversion of the *Outboard Marine* chapter 11 case to a chapter 7 case. Even there, however, the chapter 11

A. *The Singer Company N.V.*

1. Background

At the time of its chapter 11 filing in 1999, The Singer Company N.V. (“Singer”) manufactured and/or distributed sewing machines, televisions, VCRs, furniture, and other consumer goods under the Singer[®] and Pfaff[®] brand names (among others) in more than 150 countries through a vast network of subsidiaries and licensed distributors. In the summer of 1999, Singer engaged outside professionals²⁴ to assist in preparing for a likely chapter 11 filing. Recognizing the enormous international complications that would ensue upon a chapter 11 filing, and upon the recommendation of its lead counsel, Singer also engaged international counsel as part of its planning team.

While the preparations were still in process, G.M. Pfaff AG (Pfaff), one of Singer’s largest subsidiaries, applied for insolvency proceedings in Germany without prior consultation with, or notice to, Singer in the U.S. As Singer had guaranteed various of Pfaff’s funded debt obligations, Pfaff’s insolvency filing triggered cross-defaults to Singer’s own funded debt obligations, forcing Singer to commence chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of New York on an emergency basis on September 13, 1999.²⁵

As one would expect, the insolvency filings by Singer and Pfaff had a ripple effect throughout Singer’s worldwide operations, with both local management and local creditors focusing on how to protect local interests as quickly as possible. Self-evidently, further local insolvency filings or substantial local creditor pressure could lead to a global meltdown, effectively destroying any prospects for reorganizing Singer as an international, integrated business enterprise. The risks were compounded by allegations that Singer’s previous management team and the majority of its continuing board of directors had engaged in the potentially fraudulent transfer of substantial assets and value from Singer to other affiliates of Singer’s ultimate controlling shareholder.

In considering the available options, the Singer team concluded that it needed an independent representative to deal with foreign creditors and

debtor’s international counsel was retained as international counsel to the chapter 7 trustee in order to maintain international continuity. In light of the foregoing, any unattributed statements in this Part III are based on the experiences of the authors and their colleagues at Bingham Dana LLP in their capacity as Foreign Representatives and international counsel in each of the cases discussed.

²⁴ Including the international law firm, Skadden, Arps, Slate, Meagher & Flom LLP, and the international accounting and advisory firm, Arthur Andersen.

²⁵ See *In re The Singer Company N.V.*, No. 99-10578 (Bankr. S.D.N.Y., filed Sept. 13, 1999).

foreign courts in order to avoid the perceived taint of the prior management team and the ultimate controlling shareholder and also to minimize the international stigma of the debtor in possession concept. At the same time, Singer had developed a sound business plan for reorganizing its international operations and preferred that the representative be part of the team that had developed and would implement the business plan. In addition, Singer needed the representative to be appointed as quickly as possible to deal with the immediate crises that would arise around the world upon the chapter 11 filing.

Singer considered requesting the appointment of an examiner, but was concerned that this could not be done quickly enough and would, in any event, require the United States Trustee to appoint someone who was not sufficiently familiar with Singer's operations and business plan to act effectively on an emergency basis.

Necessity being the mother of invention, Singer focused on the Bankruptcy Code's recognition of a "foreign representative" of a foreign insolvency estate²⁶ and on the "foreign representative" concept in the UNCITRAL Model Law.²⁷ Singer reasoned that, if the U.S. was willing to recognize a foreign representative from another country, and if the UNCITRAL Model Law proposed a similar concept, a United States bankruptcy court should be able to appoint a foreign representative of Singer's U.S. estate to represent Singer internationally. Accordingly, on the first day of its chapter 11 filing, Singer requested on an emergency basis that Bankruptcy Judge Burton Lifland appoint two members of Singer's international counsel to serve as joint foreign representatives of Singer's estate.²⁸ Based on the record before him, his own extensive international experience (including his participation in the drafting of the UNCITRAL Model Law), and his belief that the Bankruptcy Code was sufficiently flexible to permit the requested relief, Judge Lifland entered an Order appointing joint foreign representatives.²⁹

The main task of Singer's foreign representatives was to ensure that Singer's business plan for a global reorganization of its core business operations was not impeded by uncoordinated, destructive actions of local creditors and even local management (as had been the case with Pfaff's management in Germany). Pursuant to Judge Lifland's instructions, they

²⁶ See 11 U.S.C. § 101(24) (1994) (defining "foreign representative").

²⁷ See *supra* note 16 and accompanying text.

²⁸ The proposal to appoint joint Foreign Representatives was to ensure that at least one Foreign Representative would always be available in the event of an emergency situation.

²⁹ See Order Pursuant to 11 U.S.C. § 105 Authorizing the Appointment of Richard A. Gitlin and Evan D. Flaschen as Joint Foreign Representatives for the Debtors and Setting the Responsibilities of the Foreign Representatives, *In re The Singer Company N.V.*, No. 99-10578 (Bankr. S.D.N.Y., entered Sept. 13, 1999).

pursued the essential objective of ensuring that all creditors, wherever located, were treated equally. The corollary to this was that the foreign representatives needed to act where appropriate in order to prevent local creditors from attaching local assets in order to gain an unequal and more favorable treatment.

While the foreign representatives were vested with the ability to pursue legal remedies where appropriate, by far the more important tool employed by the foreign representatives in fulfilling their duties was to focus on Singer's business plan as a basis for persuading local creditors and management to cooperate with the plans for a coordinated international restructuring:

[The] primary strategy was to make a persuasive business case to rational business people. This approach . . . worked exceptionally well because, in the end, business people tend to make rational decisions without regard to nationality, and it made a lot of business sense to maintain Singer's global operation as a world-wide going concern.³⁰

Pursuing that strategy both domestically and abroad, the entire Singer chapter 11 team—management, Singer's professionals, Singer's creditors' committee³¹ and its professionals, and the foreign representatives—succeeded in avoiding a global meltdown of Singer. The result was that, out of hundreds of operations around the world, foreign (i.e. non-U.S.) insolvency filings were needed in only four countries: Australia, Austria, Brazil and Germany, with only the Pfaff filings in Germany occurring outside of Singer's business plan.³²

In September 2000, virtually one year to the day after Singer entered chapter 11, Singer emerged from chapter 11 pursuant to a confirmed chapter 11 plan of reorganization.³³ The plan facilitated the worldwide reorganization of Singer's businesses, essentially changing Singer's focus from manufacturing to licensing and distributing. Unusually, while court appointments are typically terminated upon plan confirmation, Singer's chapter 11 plan expressly continued the appointment of the foreign representatives so that they could continue to assist Singer on an as-

³⁰ Anthony J. Smits, *The Global Restructuring of Singer*, GLOBAL INSOLVENCY & RESTRUCTURING REVIEW, Sept./Oct. 2000, at 24.

³¹ See 11 U.S.C. § 1102(a) (1994) (mandating United States Trustee appoint committee of creditors holding unsecured claims); *id.* § 1103 (setting forth powers and duties of a creditors' committee).

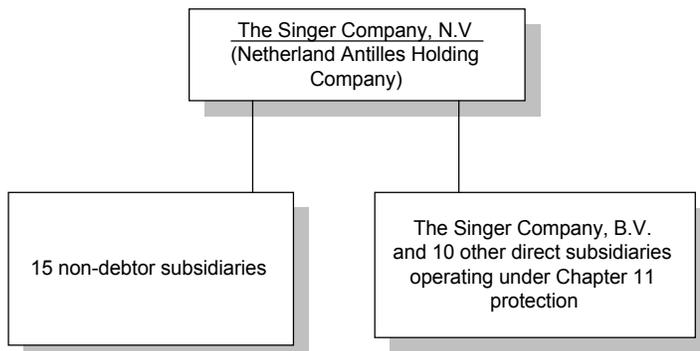
³² On November 8, 1999, the directors of Singer Electrogeraete Vertriebsgesellschaft, mbH applied for voluntary liquidation in Austria in connection with the appointment of a new local distributor. On January 12, 2000, the Foreign Representatives arranged for the opening of Australian "corporate voluntary arrangement" for Singer Australia Limited in order to facilitate the transfer of Singer Australia's assets to a new local distributor.

³³ See 11 U.S.C. §§ 1121-29 (1994) (primary chapter 11 provisions relating to plans of reorganization).

needed basis with ongoing international matters, including consummation of *concordata* proceedings³⁴ for Singer's largest manufacturing subsidiary, Singer Do Brasil Industria E Comercio Ltda, and monitoring the Hong Kong and Bermuda liquidation proceedings involving a Singer affiliate, Akai Holdings.³⁵ As of the writing of this article, Singer's foreign representatives remain in place.³⁶

2. Selected Problem

One of the critical issues in the *Singer* case was the fact that the primary chapter 11 debtor, The Singer Company N.V. (Singer NV), was actually a Netherlands Antilles company. The relevant corporate structure was as follows:



Singer NV was eligible for chapter 11 relief because it had a place of business in New York.³⁷ However, because Singer NV was a Netherlands

³⁴ See PINHEIRO NETO--ADVOGADOS, 1 DOING BUSINESS IN BRAZIL ch. 11 (1997) (discussing Brazilian *concordata* proceedings).

³⁵ Other postconfirmation activities in which the Foreign Representatives were involved included the orderly winding-up and dissolution of Amedo Sewing Machines (Jordan) Limited in the Bahamas and the voluntary winding-up of The Singer Company (Proprietary) Limited in South Africa, in each case after arrangements had been made to appoint new local distributors for Jordan and South Africa. See, e.g., Foreign Representative Report for the Calendar Quarter Ending December 31, 2000 Pursuant to Section 14.2 of the First Amended Joint Plan of Reorganization of The Singer Company N.V. and Its Affiliated Debtors and Debtors in Possession Dated August 24, 2000, *In re* The Singer Company N.V., No. 99-10578 (Bankr. S.D.N.Y., filed Jan. 21, 2001).

³⁶ See, e.g., Foreign Representative Report for the Calendar Quarter Ending September 30, 2001 Pursuant to Section 14.2 of the First Amended Joint Plan of Reorganization of The Singer Company N.V. and Its Affiliated Debtors and Debtors in Possession Dated August 24, 2000, *In re* The Singer Company N.V., No. 99-10578 (Bankr. S.D.N.Y., filed Oct. 31, 2001).

³⁷ See 11 U.S.C. § 109(a) (1994) (providing person with place of business in US is eligible for US bankruptcy relief).

Antilles company, there was a credible threat that disgruntled creditors could force Singer NV into liquidation proceedings in the Netherlands Antilles, a jurisdiction which does not have a reorganization-type insolvency proceeding. As shown in the simplified corporate chart above, Singer NV owned the shares of various debtor and non-debtor subsidiaries. The non-debtor subsidiaries were not subject to insolvency proceedings, but the value represented by them was essential to achieve a reorganization and to allow the corporate group to operate post-bankruptcy.

If Singer NV were to be placed into liquidation proceedings in the Netherlands Antilles, the local liquidator would have the statutory authority to remove the directors of the non-debtor subsidiaries and thereby assume control of these companies. The liquidator could then have sought to sell the stock or the assets of the subsidiaries without regard to Singer's overall reorganization strategy. Further, as Singer NV was a Netherlands Antilles company, it was possible that non-U.S. courts would recognize the liquidator, not the U.S. debtor-in-possession, as the appropriate corporate governance of Singer NV. This could have allowed the liquidator to assert control rights even over the non-U.S. subsidiaries of Singer NV who were themselves also chapter 11 debtors. At best, such actions by a liquidator could have resulted in complicated and protracted multijurisdictional litigation; at worst, they could have destroyed the Singer restructuring and lead to a global liquidation.

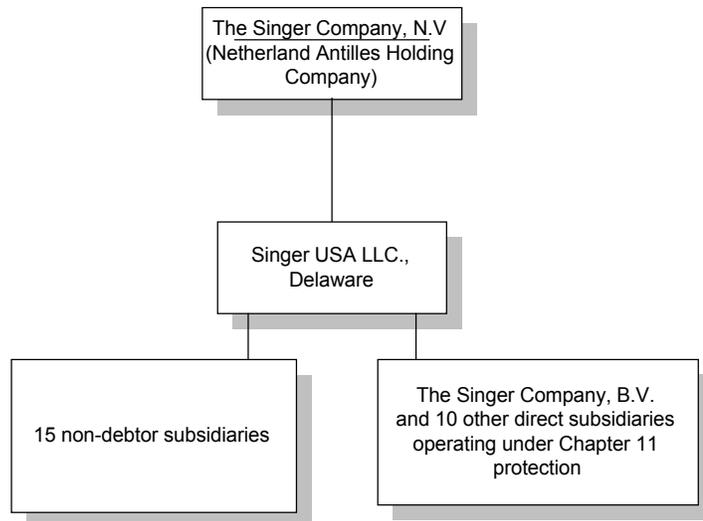
The Singer team was thus faced with a dilemma. They could not ignore Singer NV's jurisdiction of incorporation nor could they avoid liquidation proceedings in that jurisdiction if pursued by disgruntled creditors. Accordingly, Singer needed to develop a strategy that would acknowledge Singer NV's legitimate corporate seat³⁸ but would insulate Singer NV's operating subsidiaries from the likely harmful effects of a Netherlands Antilles liquidation.

The strategy that the foreign representatives and other members of the Singer team developed was as follows. Singer filed a motion seeking authority to create a new wholly-owned U.S. subsidiary of Singer NV, Singer USA LLC (Singer USA).³⁹ After Singer USA was formed, the proposal was to transfer all of Singer NV's assets (Singer NV's equity interests in its subsidiaries) to Singer USA and to cause Singer USA to guarantee all of

³⁸ Even if Singer NV could effect a voluntary corporate dissolution, it still would not be removed from the jurisdiction of the Netherlands Antilles. In any event, Netherlands Antilles law does not permit the voluntary dissolution of insolvent companies, requiring that such companies instead be dissolved through formal liquidation proceedings.

³⁹ Motion To Authorize and Approve, Pursuant to 11 U.S.C. §§ 105(a), 363(b), (A) the Creation of a new U.S. Debtor Subsidiary of The Singer Company N.V. and (B) the Transfer of the Equity Interest of the Singer Entities Held by The Singer Company N.V. to Such New Subsidiary, *In re The Singer Company N.V.*, Case No. 99-10578 (Bankr. S.D.N.Y., filed Dec. 21, 1999).

Singer NV's liabilities. Thereafter, Singer NV's sole asset would consist of its equity interest in Singer USA, resulting in a simplified corporate structure as follows:



The next step would be for Singer USA to file its own chapter 11 petition, thus bringing Singer USA within the protection of the U.S. bankruptcy court. The final step was to propose a chapter 11 plan of reorganization for Singer USA that eliminated Singer NV's equity interest and issued 100% of the new equity in Singer USA to Singer USA's creditors, i.e., the holders of the obligations of Singer NV that Singer USA had guaranteed.

It is certainly the case that Singer could have proposed the same chapter 11 plan for Singer NV without the need to create Singer USA. However, while such a plan would undoubtedly have been enforceable within the U.S., it is less clear that a Netherlands Antilles court would have enforced the plan, particularly as it applied to Singer NV's numerous international creditors who might assert that they were not subject to U.S. jurisdiction.

The proposal was a success, and on August 24, 2000, Judge Lifland confirmed the joint chapter 11 plans of reorganization for Singer USA and its debtor subsidiaries,⁴⁰ with Singer formally emerging from chapter 11 as a

⁴⁰ Findings of Fact, Conclusions of Law, and Order under 11 U.S.C. § 1129 (b) and Fed. R. Bankr. P. 3020 Confirming the First Amended Joint Plan of Reorganization of the Singer Company N.V. and its Affiliated Debtors and Debtors in Possession, *In re The Singer Company N.V.*, No. 99-10578 (Bankr. S.D.N.Y., entered Aug. 24, 2001).

reorganized business on an integrated worldwide basis on September 14, 2000.⁴¹

B. *Outboard Marine Corporation*

1. Background

Outboard Marine Corporation (“OMC”) was one of the world’s largest marine companies. OMC’s products included world-famous brands, such as Johnson and Evinrude outboard motors, and Chris-Craft, Four Winns, and Seaswirl marine craft. OMC had worldwide manufacturing and sales operations and, in the year preceding its insolvency filing, generated revenues in excess of \$1.1 billion.

OMC embarked on a new business strategy, based on the outsourcing of key competencies, including the manufacture of outboard engines. Unfortunately, the strategy proved unsuccessful, ultimately leading to OMC filing for chapter 11 protection in the United States Bankruptcy Court for the Northern District of Illinois on December 22, 2000.⁴² As Singer had done, OMC also retained international counsel prior to the chapter 11 filing in order to assist in the coordination of the OMC’s international operations, which were in jurisdictions such as Australia, Belgium, Brazil, Canada, France, Germany, Hong Kong and Mexico. Again following Singer’s example, OMC applied for the appointment of two partners from the international firm as foreign representatives, and the court approved the application and made the appointments on January 4, 2001.⁴³

OMC’s chapter 11 case, however, was commenced for different reasons than Singer’s chapter 11 case. While Singer sought to reorganize its business on a global basis, OMC’s focus was on effectuating a coordinated going concern liquidation of its primary operating businesses. The two primary tasks assigned to the OMC foreign representatives, therefore, were (i) to seek to preserve the key foreign operating businesses long enough for interested parties to determine whether to bid for those businesses, and (ii) to coordinate the liquidation of OMC’s other international businesses in

⁴¹ See Notice Regarding (A) Entry of Order Confirming the First Amended Joint Plan of Reorganization of The Singer Company N.V. and Its Affiliate Debtors and (B) Occurrence of Effective Date, *In re* The Singer Company N.V., No. 99-10578 (Bankr. S.D.N.Y., filed Sept. 14, 2000).

⁴² See *In re* Outboard Marine Corp., No. 00-3745 (Bankr. N.D. Ill., filed Dec. 22, 2000).

⁴³ See Order Pursuant to 11 U.S.C. § 105 Authorizing the Appointment of Evan D. Flaschen and Anthony J. Smits as Joint Foreign Representatives for the Debtors and Setting the Responsibilities of the Foreign Representatives, *In re* Outboard Marine Corp., No. 00-3745 (Bankr. N.D. Ill., entered Jan. 5, 2001).

order to minimize the intercompany claims against OMC's estate relating to employee, tax, environmental, and other local obligations.

In Canada, for example, the foreign representatives worked with OMC's management and lead counsel to preserve and sell one of the local subsidiaries, Altra Marine Products, Inc. In Mexico, on the other hand, the foreign representatives worked with local management and local counsel to ensure a rapid shut-down of the local subsidiary's operations. Outboard Marine de Mexico S.A. de C.V. employed over 500 employees and had substantial assets consisting of land, building, and fixtures, all of which needed to be liquidated, preferably at limited expense to OMC.

2. Selected Problem

The situation with OMC's German operations was somewhat different and more complex. OMC had licensed certain valuable technology for a direct fuel injection system for two-stroke motors from a German company called Ficht GmbH. The Ficht technology increased the efficiency of OMC's outboard engines, which was particularly important in enabling OMC to continue to meet the ever-tightening emission standards in the U.S. As the technology proved increasingly essential for OMC, OMC acquired a 51% partnership interest in a joint venture that owned the Ficht technology (Ficht Germany), the other 49% of which was controlled by members of the Ficht family. When OMC commenced its chapter 11 case, OMC needed to retain its rights in the Ficht technology as an indispensable component of a going concern sale of OMC's engine business, but OMC's relationship with the Ficht family had deteriorated to the point that the parties barely communicated with each other. This second point was particularly important, because Ficht Germany's partnership agreement required the Ficht family's consent for every major transaction, including the sale or relicensing of the technology.

Given the Ficht family's unwillingness to deal with OMC's management, the foreign representatives undertook the primary responsibility for negotiating with the Ficht family. In fact, even prior to the chapter 11 filing, an attorney with the foreign representatives' law firm traveled to Germany to assess the situation. After the chapter 11 filing, further trips were made to Germany, now formally in the name of the foreign representatives. Given the poor relationship between the Ficht family and OMC management, the foreign representatives were able to utilize both their status as court appointees and their pre-existing familiarity with German civil law concepts and with the German business culture to open a dialogue with the Ficht family and, ultimately, to gain their trust and respect.

The negotiations with the Ficht family were difficult and were interspersed with a "tit for tat" German litigation process concerning

appropriate corporate governance for Ficht Germany. However, after innumerable conference calls and a series of meetings in Germany between the foreign representatives and the Fichtes, the parties reached an agreement for the sale of the Ficht technology to a buyer of OMC's engine business. The agreement, which was complicated by German tax considerations and the need to distribute the consideration from the buyer of the business through OMC's chapter 11 estate and then through to the Fichtes as minority partners in Ficht Germany, was memorialized in a Letter Agreement signed by the Fichtes and by one of the foreign representatives on February 3, 2001. The Letter Agreement with the Fichtes was the last major piece in place to enable OMC to execute an asset purchase agreement two days later for the sale of OMC's engine business to Bombardier Motor Corporation of America.⁴⁴

C. *Owens Corning*

1. Background

Owens Corning, perhaps best known for its Pink Panther[®] corporate mascot, is a world leader in the manufacture and sale of building material systems and composites systems, with over 20,000 employees around the world. On October 5, 2000, Owens Corning and 17 of its U.S. subsidiaries, including Fibreboard Corporation, filed chapter 11 petitions in the United States Bankruptcy Court for the District of Delaware.⁴⁵

While most chapter 11 debtors file for bankruptcy in order to address operational difficulties and/or overleveraged balance sheets, Owens Corning was one of a number of companies to seek chapter 11 relief due to staggering existing and prospective liabilities related to the manufacture or distribution of products containing asbestos. Although Owens Corning last distributed asbestos products in 1972, it received almost 120,000 personal injury claims just during 1998-2000.

Owens Corning both manufactures and sells products throughout the world, often through joint ventures with local partners. Owens Corning typically provided credit support to the foreign operations, often including a guaranty of local funded debt obligations and lease transactions. When Owens Corning filed for chapter 11 relief, it triggered a default with respect to many of those obligations and transactions. To assist Owens Corning in

⁴⁴ After the sale of both the engine business and OMC's marine craft businesses, OMC's chapter 11 case was converted to a chapter 7 case in order to avoid the expense of a chapter 11 disclosure statement and plan process. The Foreign Representatives' law firm was then retained by the chapter 7 trustee as his international counsel and the Foreign Representatives themselves were discharged of any further responsibilities.

⁴⁵ See *In re Owens Corning*, No. 00-03837 (Bankr. D. Del., filed Oct. 5, 2000).

coordinating its international operations and avoiding local enforcement actions and bankruptcies, Owens Corning successfully moved for the appointment of joint foreign representatives.⁴⁶

2. Selected Problem

Owens Corning, together with certain of its debtors and non-debtor subsidiaries, had entered into a US\$1.8 billion credit agreement with a consortium of banks led by Credit Suisse First Boston. At the time of the filing, US\$1.315 billion remained outstanding. Various of Owens Corning's non-debtor subsidiaries served as either co-borrowers under or guarantors of the credit agreement. Owens Corning's chapter 11 filing caused a default with respect to the non-debtor subsidiaries' obligations with respect to the credit agreement, and in various instances also constituted a cross-default under miscellaneous local credit facilities and other contracts. As a result, while restrained by the automatic stay from pursuing remedies against Owens Corning and the other chapter 11 debtors, Owens Corning's banks were arguably entitled to pursue remedies against the relevant non-debtor subsidiaries.

Rather than take a "wait and see" approach, Owens Corning proactively commenced an adversary proceeding against the banks in the bankruptcy court.⁴⁷ The adversary proceeding requested a temporary restraining order and, ultimately, an injunction that would enjoin the banks from seeking to exercise their purported rights under the credit agreement against non-debtor international subsidiaries. According to Owens Corning, "[f]reezing the subsidiaries' assets and then seizing those funds to pay for the total debt owed by all Loan Parties would ruin many of the subsidiaries and would have a direct and adverse effect on the value of the Debtor's stock, significantly impacting any attempt to reorganize the debtor."⁴⁸ Owens Corning argued that injunctive relief against the banks "would allow the Debtors time to contact the Defendants, other creditors, and other banks of the Debtor's foreign subsidiaries and joint ventures to assure those creditors that payment of obligations to them would continue in the ordinary course

⁴⁶ See Order Pursuant to 11 U.S.C. § 105 Appointing Evan D. Flaschen and Richard A. Gitlin as Joint Foreign Representatives and Setting the Responsibilities of the Foreign Representatives, *In re Owens Corning*, No. 00-03837 (Bankr. D. Del., entered Dec. 1, 2000).

⁴⁷ See *Owens Corning v. Credit Suisse First Boston (In re Owens Corning)*, No. 00-03837, Adv. No. 00-01575 (Bankr. D. Del., filed Oct. 5, 2000).

⁴⁸ Memorandum in Support of the Debtors' Motion for Temporary Restraining Order, at 8., *Owens Corning v. Credit Suisse First Boston (In re Owens Corning)*, No. 00-03837, Adv. No. 00-01575 (Bankr. D. Del., filed Oct. 5, 2000).

and would not be disrupted by chapter 11 proceedings in the United States.”⁴⁹

The bankruptcy court granted the requested temporary restraining order and scheduled a hearing to consider whether to grant a preliminary injunction.⁵⁰ This provided enough time for Owens Corning to discuss the situation with its banks, which resulted in the negotiation of a standstill agreement pursuant to which the banks, among other things, agreed that they would not exercise any enforcement right or remedy under the credit agreement and that the relevant lenders under specified bilateral credit facilities would also refrain from exercising any enforcement rights and remedies that existed solely by virtue of the default under the credit facility. In return, Owens Corning agreed that the banks could exercise certain rights to set off various funds on deposit from the non-debtor subsidiaries.⁵¹

D. *Viatel, Inc.*

1. Background

Viatel, Inc. constructed and operated a state-of-the-art pan-European, transatlantic and metropolitan fiber optic network. Viatel also provided other telecommunication services in Europe and the U.S., operating more than 10,400 kilometers of fiber-optic cable linking 59 major cities in Europe. Along with much of the rest of the telecom industry, however, Viatel encountered financial difficulties and, on May 2, 2001, commenced chapter 11 proceedings in the United States District Court for the District of Delaware.⁵² On the same day, Viatel filed an application for the appointment

⁴⁹ Debtors' Verified Complaint for Declaratory and Injunctive Relief at 21, *Owens Corning v. Credit Suisse First Boston (In re Owens Corning)*, No. 00-03837, Adv. No. 00-01575 (Bankr. D. Del., filed Oct. 5, 2000).

⁵⁰ See Order Granting Motion for Temporary Restraining Order and Setting Matter for Preliminary Injunction Hearing, *Owens Corning v. Credit Suisse First Boston (In re Owens Corning)* No. 00-03837, Adv. No. 00-01575 (Bankr. D. Del., entered Oct. 10, 2000).

⁵¹ See Motion for Order (I) Authorizing the Debtors to Enter into, and to Take All Necessary or Appropriate Action to Effectuate the Terms of, a Standstill and Waiver Agreement with Certain Defendants, (II) Terminating the Temporary Restraining Order Entered with Respect to Certain Defendants, (III) Dismissing This Adversary Proceeding With Respect To Certain Defendants, (IV) Authorizing The Debtors to Compromise and Settle Setoff Rights Asserted By the Defendants and Terminating The Stay with Respect to Certain Setoff Rights, and (V) Releasing, Discharging, and Waiving Certain Claims of Defendants, *Owens Corning v. Credit Suisse First Boston (In re Owens Corning)*, No. 00-03837, Adv. No. 00-01575 (Bankr. D. Del., filed May 30, 2001).

⁵² See *In re Viatel, Inc.*, No. 01-01599 (D. Del., filed May 2, 2001). Note that, due to the heavy caseload of the Bankruptcy Court in Delaware, the *Viatel* chapter 11 case was assigned to a District Court judge.

of joint foreign representatives, and the district court approved the application and made the appointment on June 21, 2001.⁵³

As of the writing of this article, Viatel's foreign representatives remained actively involved with the operations of Viatel's subsidiaries throughout Europe, including Belgium, France, Germany, The Netherlands, and Switzerland. Also, while in *Singer, Owens Corning* and *Outboard Marine*, the law firm that employed the foreign representatives also served as international co-counsel to the debtors, emergency circumstances in Viatel led to yet a third role for the law firm. In order to address local liability issues, Viatel worked with the foreign representatives to prepare several of Viatel's UK subsidiaries (collectively, Viatel UK) for Administration in England.⁵⁴ In order to lodge an Administration petition, UK management must submit an independent report pursuant to Rule 2.2 of the Insolvency Rules 1986. A Rule 2.2 report is typically prepared by a licensed insolvency practitioner and must certify to the court that, in the practitioner's view, the prospective debtor is likely able to achieve at least one of the four statutory objectives of Administration proceedings.⁵⁵

At the foreign representatives' suggestion, management retained several practitioners with Ernst & Young (UK) to prepare the Rule 2.2 report for Viatel UK. Matters accelerated, however, and it became a matter of urgency to apply for Administration for Viatel UK and to seek an immediate sale of the business. The application was granted and, as is typical in England, the insolvency practitioners who prepared the Rule 2.2 Report were, at Viatel UK's request, appointed as joint Administrators.⁵⁶ Further, given the need to act expeditiously, the newly-appointed Administrators sought to retain as its primary counsel the London office of the law firm that employed the Viatel foreign representatives, except as to matters where there was a potential conflict between Viatel's chapter 11 estate and Viatel UK's Administration estate. With Viatel's consent, and with appropriate disclosure in the U.S.,⁵⁷ the retention proceeded as requested.

⁵³ See Order Pursuant to 11 U.S.C. § 105 Appointing Evan D. Flaschen and Anthony J. Smits as Joint Foreign Representatives and Setting the Responsibilities of the Foreign Representatives, *In re Viatel, Inc.*, No. 01-01599 (D. Del., entered June 21, 2001).

⁵⁴ See *supra* note 5.

⁵⁵ See *id.* If the Court finds that the debtor will likely not be able to achieve at least one of the four objectives, then the debtor will immediately be placed into winding-up (liquidation) proceedings. *Id.*

⁵⁶ See Order, *In re Viatel Global Communications Ltd.*, No. 3553 of 2001 (Ch., entered June 6, 2001).

⁵⁷ See First Supplemental Disclosure of Bingham Dana LLP With Respect to the Application of Debtors and Debtors in Possession for an Order Authorizing the Employment and Retention of Bingham Dana LLP as Co-Counsel to the Debtors, *In re Viatel, Inc.*, No. 01-01599 (D. Del., filed June 19, 2001).

2. Selected Problem

As described in the *Owens Corning* discussion above, the chapter 11 filing of the parent of a multinational enterprise can often trigger defaults and cross-defaults in local credit facilities and contracts of the parent's international subsidiaries. This issue was of particular concern to Viatel, given that its primary business operations consisted of an interdependent pan-European telecommunications network spread among a number of local subsidiaries. Local creditor action against any one of those subsidiaries could break a link in the telecom network and potentially disrupt the ability of the entire network to continue in operation.

Exactly this problem surfaced when a local utility pursued attachment and garnishment actions against the assets and intercompany obligations of several of Viatel's non-debtor European subsidiaries. These actions could have caused each affected subsidiary to "circle the wagons" in order to protect its own parochial interests, regardless of the effect on the Viatel network as a whole. However, the foreign representatives were able to work with Viatel and with local management in a coordinated fashion to achieve a settlement with the attaching creditor that both protected the local interests and preserved the European network as a whole.⁵⁸

⁵⁸ The authors are unable to comment further on this or other Viatel issues due to the continuing pendency of the *Viatel* chapter 11 case.

E. *Comdisco Inc.*

1. Background

Comdisco Inc. operates three primary business lines focusing, respectively, on equipment leasing, disaster recovery services, and venture capital investments throughout the world. While the leasing and disaster recovery services continued profitably, the venture capital business (together with a recently acquired provider of high speed connectivity services) suffered major reversals due to a primary focus on technology companies, compelling Comdisco to file for chapter 11 protection on July 16, 2001, in the United States Bankruptcy Court for the Northern District of Illinois.⁵⁹

Because Comdisco had reasonable time to prepare its insolvency filing, Comdisco's international counsel and prospective proposed foreign representatives were able to familiarize themselves with the enterprise and assess and advise on potential international problems connected with a chapter 11 filing. The Comdisco team concluded that the preferred strategy was to file chapter 11 petitions for Comdisco and a number of its U.S. subsidiaries but to avoid insolvency filings for its international subsidiaries wherever possible. In furtherance of this objective, Comdisco's international counsel traveled to Comdisco's regional headquarters in Paris, London, and Munich to familiarize themselves with Comdisco's international operations, to assist in educating local management concerning the chapter 11 process and Comdisco's overall strategy, and to identify potential local problems beforehand.

Based on this advance planning, the Comdisco team concluded that prompt action would be needed in Europe to preserve and stabilize local operations in the wake of the chapter 11 filings. Accordingly, on the same day that Comdisco filed its chapter 11 petition in Chicago, Comdisco applied for and obtained an emergency Order appointing joint foreign representatives.⁶⁰ In the hopeful anticipation that the Foreign Representative Order would be entered, attorneys acting for the foreign representatives were again on site in Paris, London, and Munich on the chapter 11 filing date to respond to any immediate crises and to alleviate concerns that local management and employees might have.

⁵⁹ See *In re Comdisco, Inc.*, No. 01-24795 (Bankr. N.D. Ill., filed July 16, 2001).

⁶⁰ See *In re Comdisco, Inc.*, No. 01-24795 (Bankr. N.D. Ill., entered July 16, 2001) (Order Pursuant to 11. U.S.C. § 105 Authorizing the Appointment of Evan D. Flaschen and Anthony J. Smits as Joint Foreign Representatives for the Debtors and Setting the Responsibilities of the Joint Foreign Representatives).

2. Selected Problem

Among Comdisco's many subsidiaries is Comdisco Switzerland S.A. Comdisco Switzerland is a healthy, profitable company, and the chapter 11 filing of Comdisco did not cause appreciable harm to Comdisco Switzerland's business. Somewhat ironically, however, the financial difficulties of Comdisco's largest customer, Swissair, did cause some concern.

The foreign representatives identified the problem early in September 2001 and began to work with Comdisco and local counsel to assess the implications of a possible bankruptcy filing by Swissair. The foreign representatives placed particular emphasis on assessing the potential effect of a Swissair filing on Comdisco Switzerland's balance sheet. If Swissair's bankruptcy required a substantial write-down of Swissair's obligations to Comdisco Switzerland, and if such write-down were to render Comdisco Switzerland insolvent on a balance sheet basis, Swiss law would potentially expose Comdisco Switzerland's to personal liability if they did not quickly commence bankruptcy proceedings for Comdisco Switzerland.

In addition to the damage to Comdisco Switzerland's business that would result from a bankruptcy filing, Comdisco Switzerland was also the parent company of several other key European subsidiaries. A bankruptcy administrator would automatically assume control of Comdisco Switzerland in a Swiss bankruptcy which would, in turn, provide the administrator with effective control over Comdisco Switzerland's subsidiaries, all to the potential detriment of the Comdisco group as a whole.

Fortunately, working with local management and counsel, Comdisco and the foreign representatives were persuaded that Comdisco Switzerland was sufficiently healthy that not even the bankruptcy of its largest customer would render it insolvent. By the time Swissair actually did file for bankruptcy (in early October 2001),⁶¹ therefore, the potential crisis had been averted. Although the exercise ultimately proved to be a false alarm, it underscores the need to understand local laws and implications and to work closely with local management and professionals to anticipate and address potentially damaging situations in the making.

F. Exodus Communications, Inc.

1. Background

⁶¹ For further information on the Swissair insolvency, see the webpage of Swissair's insolvency administrator, www.sachwalter-swissair.ch.

Exodus Communications, Inc. is the world's largest provider of internet infrastructure, web-hosting services and other internet-related support services, with 44 mission critical data centers around the world. In January 2001, still enjoying a high stock value due to the internet bubble, Exodus completed a \$6.5 billion acquisition of GlobalCenter, the web-hosting business of GlobalCrossing.⁶² When the bubble burst a few months thereafter, however, Exodus found itself \$4.5 billion in debt and in need of a rationalization of its capital structure. Accordingly, on September 26, 2001, Exodus filed for chapter 11 in the United States Bankruptcy Court for the District of Delaware.⁶³ Shortly thereafter, Exodus applied for the appointment of joint foreign representatives.⁶⁴

Before the filing of the chapter 11 petition, the Exodus team, including international counsel, identified various international operations that should be liquidated including, ironically, many of the GlobalCenter facilities that had just been acquired several months earlier.⁶⁵ Since the petition date, the foreign representatives have worked with Exodus and its other professionals to facilitate the liquidation and to minimize the effects of the liquidation on Exodus' continuing international operations.

2. Selected Problem

Ordinarily, the voluntary winding-up (corporate liquidation) of an international subsidiary is a relatively straightforward corporate action, especially when the subsidiary is wholly owned. All that is required are the usual shareholder and director resolutions in support of the action and, depending on the jurisdiction, a creditors' meeting informing creditors of the intended winding-up. However, the voluntary winding-up of GlobalCenter (Ireland) Limited ("GC Ireland"), although wholly owned, was not so simple.

The complicating factor for GC Ireland was the fact that, as is often the case for tax reasons, GC Ireland's immediate parent was a Dutch company, GlobalCenter Netherlands BV (GC Netherlands). While Exodus, in turn, was the ultimate shareholder of GC Netherlands, GC Netherlands itself was already the subject of *surseance van betaling* insolvency proceedings in

⁶² See David Shabelman, *Massive Debt Sinks Exodus Communications*, THE DAILY DEAL, Sept. 27, 2001.

⁶³ See *In re Exodus Communications, Inc.*, No. 01-10539 (Bankr. D. Del., filed Sept. 26, 2001).

⁶⁴ See Order Pursuant to 11 U.S.C. § 105 Appointing Evan D. Flaschen and Anthony J. Smits as Joint Foreign Representatives and Setting the Responsibilities of the Foreign Representatives, Nunc Pro Tunc to the Petition Date, *In re Exodus Communications, Inc.*, No. 01-10539 (Bankr. D. Del., entered Nov. 5, 2001).

⁶⁵ See *Exodus To Dispose of Four European Facilities*, Yahoo! Finance, Oct. 25, 2001, available at http://biz.yahoo.com/rf/011025/n25223422_2.html.

The Netherlands.⁶⁶ While management remains in place in *surseance* proceedings, the court also appoints a trustee to serve alongside management whose approval is required for significant corporate actions.⁶⁷ Here, the trustee's approval was required for GC Netherlands' vote as sole shareholder of GC Ireland to initiate Irish liquidation proceedings. Understandably, the newly appointed Dutch trustee was reluctant to approve such a major action on a precipitous basis.

The situation was further complicated by the fact that even though the timing of GC Ireland's insolvency filing was critical, all of GC Ireland's directors had recently resigned.

Fortunately, working with Exodus management, Irish counsel, Dutch counsel, replacement directors, and the Dutch trustee, the foreign representatives succeeded in obtaining the Dutch trustee's concurrence on very short notice. The foreign representatives were also able to draft and implement the various board and shareholder resolutions and creditor consents allowing the winding-up of the Irish subsidiary in a timely manner.

G. Other Foreign Representative Cases

As of the writing of this article, foreign representatives have been appointed in three other chapter 11 cases. However, each of those cases is at such an early stage that it is only possible at this time to give a brief description of the background of each case.

1. Goss Holdings, Inc.

For 116 years, Goss Holdings, Inc. and its subsidiaries have been leading manufacturers of newspaper and other commercial printing press systems. While Goss is headquartered in Illinois, over 50% of its consolidated revenue is derived from sales by its very profitable international operations, including successful businesses in England, France, Japan, and China.⁶⁸

Due to increased competition amid a cyclical downturn in the industry, Goss and its major creditors negotiated a "prepackaged" chapter 11 filing on July 30, 1999.⁶⁹ Goss emerged from that chapter 11 case with a cleaner

⁶⁶ See 2 COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE ch. 33 (King ed. 2000) (discussing Dutch insolvency system).

⁶⁷ See *id.* ¶ 33.05[3][a].

⁶⁸ For more details, see www.gossgraphic.com.

⁶⁹ A "prepackaged" chapter 11 involves the negotiation of a plan of reorganization and solicitation of plan acceptances from affected classes prior to the actual filing of the chapter 11 petition. See 11 U.S.C. § 1126(b) (1994) (describing circumstances under which pre-petition solicitation of acceptances will be binding in ensuing chapter 11 case).

balance sheet but, unfortunately, the industry continued to deteriorate and Goss was again compelled to enter into restructuring discussions with its major creditors. Those discussions revolved around Goss' plan to convert the majority of its debt into equity and reorganize its business operations around foreign subsidiaries in the United Kingdom, France, Japan, Australia, and China.⁷⁰ In order to implement this restructuring, Goss commenced a second pre-packaged chapter 11 case⁷¹ on September 10, 2001.⁷² In order to facilitate its international restructuring, Goss obtained an Order from the United States Bankruptcy Court for the Northern District of Illinois appointing joint foreign representatives of Goss' chapter 11 estate.⁷³

2. Polaroid Corporation

Founded by Edwin Land over 50 years ago, Polaroid Corporation and affiliated companies ("Polaroid") are world famous for developing instant photography technology.⁷⁴ Polaroid products were marketed worldwide and the company had worldwide operations. However, Polaroid came a long way from the high times in 1972 when its stock was trading at "a staggering (for its day) 90 times earnings."⁷⁵ In the second half of 2000, Polaroid staggered for a different reason; it was unable to service its substantial debt obligations. In particular, Polaroid suffered from the emergence of digital imaging and one-hour photo shops, both of which constituted serious competition to its core business line. Although Polaroid started to diversify into the digital imaging field, those efforts were cost-intensive and did not yield a sufficient short-term return.

Polaroid's difficulties were further compounded by the post-WTC slowdown in travel (resulting in substantially fewer consumer purchases of photographic supplies), leading Polaroid to file for chapter 11 bankruptcy protection in the United States Bankruptcy Court for the District of Delaware on October 12, 2001.⁷⁶

⁷⁰ See Press Release, Goss Holdings, Inc., Goss Announces a Worldwide Strategic Reorganization (Oct. 10, 2001), available at <http://www.gossgraphic.com/pg/press/pressrel39.html>.

⁷¹ Colloquially referred to as a "chapter 22."

⁷² See *In re Goss Holdings, Inc.*, No 01-31751 (Bankr. N.D. Ill., filed Sept. 10, 2001).

⁷³ See Order Under 11 USC § 105 Authorizing the Appointment of Evan D. Flaschen and Anthony J. Smits as Joint Foreign Representatives for the Debtors and Setting the Responsibilities of the Joint Foreign Representatives, *In re Goss Holdings, Inc.*, No 01-31751 (Bankr. N.D. Ill., entered Sept. 21, 2001).

⁷⁴ For more details on Polaroid, see www.polaroid.com.

⁷⁵ David Withford, *Polaroid, R.I.P.*, FORTUNE, Nov. 12, 2001, at 44, available at http://www.fortune.com/indexw.jhtml?channel=artcol.jhtml&doc_id=204963.

⁷⁶ See *In re Polaroid Corp.*, No. 01-10864 (Bankr. D. Del., filed Oct. 12, 2001).

In order to facilitate Polaroid's bankruptcy filing and to coordinate its worldwide reorganization efforts, Polaroid obtained interim and final Orders from the Bankruptcy Court appointing joint foreign representatives.⁷⁷

3. ABC-NACO Inc.

ABC-NACO Inc. and affiliated companies are leading suppliers to the railroad and flow control industries. ABC-NACO has operations not only in the U.S., but also Canada, Mexico, Portugal, Scotland, and Sweden, with more than 1000 employees in 18 manufacturing facilities in the U.S. and abroad.⁷⁸

High fuel costs combined with the general decline in U.S. industry since the second quarter of 2000, as well as a decline in the railroad industry in general, forced ABC-NACO to consider and implement restructuring measures. Despite these measures, the decline of the business continued and ABC-NACO, unable to service its substantial debt obligations, was forced to commence chapter 11 proceedings on October 18, 2001.⁷⁹ Like Outboard Marine Corporation, ABC-NACO did not consider it realistic to continue reorganization efforts and, instead, filed for chapter 11 protection in order to facilitate the liquidation of its business operations.

In order to facilitate the preservation of its international operations pending their sale, ABC-NACO obtained an Order from the bankruptcy court appointing joint foreign representatives.⁸⁰

CONCLUSION

In each of the cases discussed in this article, the debtor obtained both the appointment of joint foreign representatives and approval of its retention of the foreign representatives' law firm as international counsel. Through this combination, the debtor obtained the assistance of experienced international counsel both in its pre-bankruptcy planning phase and in the chapter 11 case itself, as well as the ability to be represented internationally by court-appointed representatives of its chapter 11 estate. To date, this

⁷⁷ See Interim Order Pursuant to 11 U.S.C. § 105 Authorizing the Appointment of Evan D. Flaschen and Anthony J. Smits as Joint Foreign Representatives for the Debtors and Setting the Responsibilities of the Joint Foreign Representatives, *In re* Polaroid Corp., No. 01-10864 (Bankr. D. Del., entered Oct. 15, 2001) (pursuant to its terms, and in the absence of any objection, the foregoing Interim Order automatically became a Final Order as of November 5, 2001).

⁷⁸ For more detail, see www.abc-naco.com.

⁷⁹ See *In re* ABC-NACO Inc., No. 01-36484 (Bankr. N.D. Ill., filed Oct. 18, 2001).

⁸⁰ See Order Authorizing the Appointment of Evan D. Flaschen and Anthony J. Smits as Joint Foreign Representatives for the Debtor and Setting the Responsibilities of the Joint Foreign Representatives, *In re* ABC-NACO Inc., No. 01-36484 (Bankr. N.D. Ill., entered Oct. 22, 2001).

approach has been successfully implemented in nine chapter 11 cases, with more likely to come.

More important than the concept of the foreign representative, however, has been the appreciation of the even greater need for experienced planning when a prospective chapter 11 debtor has substantial international operations. Equally, the nine cases in this article have demonstrated the need for creative solutions to international insolvency situations and the ability of the bankruptcy courts and the bankruptcy community to develop such solutions. The foreign representative concept should not be considered the “ultimate solution,” any more than the examiner and protocol concepts were ultimate solutions or the eventual widespread adoption of the UNCITRAL Model Law will be the ultimate solution. Inevitably, the problems of international insolvencies will continue to require new and innovative techniques to address those problems. For, ultimately, bankruptcy is a business problem, not a legal one, and the law and the bankruptcy community will continue to need to evolve and adapt in order to achieve the legitimate business objectives of insolvent multinational operations.