

## International Comity After Chapter 15: A Residual Right to Recognition?

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### Introduction

This paper addresses the extent to which the common law right of recognition of foreign legal proceedings, recognized in Clarkson v. Shaheen, 544 F.2d 624 (2d Cir. 1978), and elsewhere, survives the implementation of Chapter 15.

Prior to the enactment of Chapter 15 of the Bankruptcy Code (“the Code”), a foreign representative had three ways to appear in the U.S. courts to seek recognition of a foreign insolvency proceeding: (a) the foreign representative could commence a full U.S. bankruptcy case under Chapter 7 or 11 of the Code; (b) the foreign representative could file a petition in federal bankruptcy court under Section 304 of the Code, which permits the bankruptcy court to order relief “ancillary to a foreign insolvency proceeding”; and (c) the foreign representative, without filing under the Code, could appear in federal or state court to seek relief on grounds of international comity, the venerable common-law doctrine that courts should respect the jurisdiction and rulings of foreign courts, and generally abstain from taking actions that might interfere in their proceedings.<sup>2</sup> Though generally invoked defensively, comity can be used affirmatively as well, to request that a U.S. court grant certain relief in recognition of proceedings pending abroad. Such was the situation in Clarkson v. Shaheen, 716 F.2d. 126, 127

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<sup>2</sup> The Supreme Court has described the doctrine of comity as:

[n]either a matter of absolute obligation on one hand, nor a mere courtesy upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

(2d Cir. 1983), in which a Canadian trustee in bankruptcy was permitted to pursue an affirmative cause of action in New York.

Chapter 15 has changed the options available to the foreign representative. Now, foreign representatives seeking to initiate any proceedings in the United States must first file in U.S. Bankruptcy Court for recognition of a foreign proceeding as either a foreign main proceeding or foreign nonmain proceeding. Following recognition, the foreign representative may then seek additional relief in bankruptcy court, or from federal or state courts in the United States. Under the new Chapter 15 regime, option (c), above, is apparently no longer available: a federal district court recently held that a foreign representative's failure to commence a recognition proceeding under Chapter 15 deprived the court of the authority to consider a request for a stay. That decision, U.S. v. J.A. Jones Construction, 333 B.R. 637 (E.D.N.Y. 2005), was consistent with the intent of Chapter 15's drafters, who aimed to eradicate the "abuse of comity" by limiting the forums in which comity may be invoked to those which are most familiar with international insolvency procedures.<sup>3</sup>

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<sup>3</sup> The legislative history of Chapter 15 includes the following passage, in which the drafters state their concern about the "abuse of comity":

Subsections (b)(2), (b)(3), and (c) [of Chapter 15] make it clear that chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings. The goal is to concentrate control of these questions in one court. That goal is important in a Federal system like that of the United States with many different courts, state and federal, that may have pending actions involving the debtor or the debtor's property. This section, therefore, completes for the United States the work of article 4 of the [UNCITRAL] Model Law ("competent court") as well as article 9. Although a petition under current section 304 is the proper method for achieving deference by a United States court to a foreign insolvency under present law, some cases in state and Federal courts under current law have granted comity suspension or dismissal of cases involving foreign proceedings without requiring a section 304 petition or even referring to the requirements of that section. Even if the result is correct in a particular case, the procedure is undesirable, because there is room for abuse of comity. Parties would be free to avoid the requirements of this chapter and the expert scrutiny of the bankruptcy court by applying directly to a state or Federal court unfamiliar with the statutory requirements. Such an application could be made after denial of a petition under this chapter. This section concentrates the recognition and deference process in one United States court, ensures against abuse, and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor. H.R.Rep. 108-40(I), 214-15 (2003).

Neither Jones Construction nor the drafters of Chapter 15 completely does away with international comity. In many ways, Chapter 15 actually strengthens the bundle of rights that foreign representatives have in U.S. courts. Indeed, one of the primary objectives of the drafters of Chapter 15 was to write into the Code certain aspects of the common law doctrine of international comity—many of which were frequently applied by bankruptcy courts in proceedings brought pursuant to Section 304. Section 1507, for example, directs the court to consider requests for assistance “consistent with the principle of comity.” 11 U.S.C. §1507. But the drafters of Chapter 15 also intended to systematize and streamline U.S. courts’ handling of cases involving foreign representatives. As Professor Westbrook has noted, Chapter 15 “has a broader impact than the provision it replaces, § 304 of the Bankruptcy Code. It centralizes every aspect of the international practice.” See Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L.J. 713, 714 (2005). One apparent consequence of this effort to centralize proceedings is that option (c), above, is no longer a viable option for most foreign representatives: recognition, apparently, is now a necessary prerequisite for relief in the U.S. courts.

Still, it remains something of an open question what remains of the doctrine of comity under Chapter 15. For a foreign representative who has not filed for recognition in a U.S. bankruptcy court, comity no longer serves as valid grounds for the suspension or dismissal of an action in U.S. court. But some actions in U.S. court may still be pursued absent recognition: Chapter 15 explicitly states that a foreign representative may still sue “to collect or recover a claim which is the property of the debtor.” Might the foreign representative be able to invoke international comity to obtain other relief, short of suspension or dismissal? It thus becomes a question of where the line is drawn: for which relief or which actions is it necessary to obtain

recognition, and for which does the common law doctrine of international comity still apply independently of Chapter 15?

There are, furthermore, public policy reasons why a residual right of recognition grounded in international comity would be valuable. As barrister Gabriel Moss has argued, the implementation of Chapter 15 absent the use of a residual “mode of assistance” would be valuable because its absence would mean that many major insolvency proceedings involving typical offshore operations would fail to be recognized in the United States, potentially resulting in unnecessary delay, expense, complications, and perhaps even conflict between various jurisdictions. See generally Gabriel Moss, “Death of the Sphinx: Chapter 15 Closes U.S. Door on Recognition of Offshore Hedge Fund Liquidation,” *Insolvency Intelligence* 2007, 20(10), 157-159 (2007); Gabriel Moss, “Beyond the Sphinx: Is Chapter 15 the Sole Gateway?” *Insolvency Intelligence* 2007, 20(4), 56-59 (2007) (commenting on *In re SPhinX Ltd.*, 351 B.R. 103 (S.D.N.Y. 2006); advocating residual common law right of recognition along the lines of *Cambridge Gas Transport Corp v. Official Committee of Unsecured Creditors of Navigator Holdings Plc.* [2006] 3 All E.R. 829; [2006] B.C.C. 962).

This paper argues that even though the common-law doctrine of international comity articulated in Clarkson has largely been superseded by Chapter 15, there exist a few areas where foreign representatives may access U.S. courts without a grant of recognition from a U.S. bankruptcy court. Though these avenues may be of only limited help to foreign representatives who seek to circumvent filing for recognition in U.S. bankruptcy court, they are worth noting as areas where international comity may persist independently of Chapter 15. Four of these possible areas are discussed below.

## **1. Section 1509(f) Exception**

First, as mentioned above, Chapter 15 explicitly grants a foreign representative the right to access the U.S. courts without prior recognition proceedings under certain limited circumstances. Section 1509(f) of the Code provides as follows:

(f) Notwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor.

11 U.S.C. §1509(f).

Referring to both the failure to “commence a case” and the failure to “obtain recognition,” the text of section 1509(f) suggests that the right granted to the foreign representative in this section exists regardless of the procedural status of the foreign representative’s petition for recognition. The right exists if the case for recognition has not been filed; it exists if the case for recognition has commenced but remains pending when the foreign representative sues; it apparently even exists should the foreign representative’s recognition petition prove unsuccessful.

Though section 1509(f) permits the foreign representative to sue in U.S. courts to collect or recover a claim, the strength of this right is depends on how expansively the phrase “property of the debtor” is interpreted. The legislative history of section 1509(f) provides but one example of what the drafters of Chapter 15 may have envisioned: “an account receivable.” See H.R. Rep. 108-40(I), 215 (2003). Though the legislative history does not indicate so explicitly, the example of an account receivable—a concrete piece of property that is the subject of everyday transactions and lawsuits—suggests that the section 1509(f) exception to the recognition

requirement may be aimed at preserving the efficiency of the bankruptcy courts. For example, in the case of a foreign debtor whose only contacts with the United States are accounts receivable from customers in the United States, it seems unnecessary and wasteful for the foreign debtor to be required to file for recognition in U.S. bankruptcy court for permission to collect these debts. This would be equally true if the foreign debtor had, for whatever reason, unsuccessfully filed for recognition; in that case, the account receivable may well be uncollectible by the foreign debtor.

In preserving the foreign representative's residual right to appear in U.S. court to collect or recover a claim, section 1509(f) may permit a foreign representative attempting to collect or recover a claim (as opposed to attempting to halt or dismiss a proceeding) a some degree of comity. Neither the text of section 1509(f) nor the legislative history suggest that concern for international comity has anything to do with the section 1509(f) exception to the recognition requirement. If anything, 1509(f) seems to be designed to preserve judicial efficiency, not international comity. Yet the fact that section 1509 at least in some limited way preserves access to U.S. courts independent of recognition means that, in practice, once in state or federal courts, foreign representatives are free to work comity-based arguments into their requests for collection or recovery of property. Given the breadth and resilience of the doctrine of international comity, it is likely that some courts hearing such property-recovery claims will discuss comity in their holdings, and the doctrine will continue to find its way into the case law. Thus, while it may be difficult to characterize section 1509 itself as a resilient bastion of international comity, it deserves mention as an important, if narrow, avenue through which the doctrine of comity may survive Chapter 15.

## **2. Section 1509(d) Order Following Denial of Recognition**

Second, some vestige of the common law doctrine of international comity may remain in the discretion that Chapter 15 grants the bankruptcy court judge, regarding how to handle a case in which a foreign representative has been denied recognition. Section 1509(d) provides that:

(d) If the court denies recognition under [Chapter 15], the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States.

11 U.S.C. §1509(d).

The key word in section 1509(d) is “may”; a plain reading of the statute thus suggests that the bankruptcy court judge denying recognition to a foreign representative (for whatever reason) has the discretion to issue an order to prevent the foreign representative from obtaining comity or cooperation, but, as the statute does not use the word “shall,” the judge is not required to issue such an order. As written, section 1509(d) seems to imply that if a court denied recognition to a foreign representative but declined or otherwise failed to issue an order preventing the foreign representative from obtaining comity, that foreign representative may still be entitled to some grant of comity in a U.S. court. After all, had the drafters of Chapter 15 wanted to automatically deny any possibility of comity or cooperation to foreign representatives that have been denied recognition, it could have stated so much more directly, without employing a phrasing that apparently allows the bankruptcy court judge denying recognition some modicum of input into future courts’ handling of the denied foreign representative.

The drafters of Chapter 15 may well have intended as much. The legislative history on this point states simply that subsection (d) of section 1509 “has been added to ensure that a foreign representative cannot seek relief in courts in the United States after being denied

recognition by the court under this chapter.” See H.R. Rep. 108-40(I), 215 (2003). Yet, while it is clear enough that the drafters of Chapter 15 intended to keep foreign representatives that have been denied recognition out of the U.S. courts, their stated intention conflicts somewhat with their statutory phrasing. As written, the bankruptcy court denying recognition is afforded some degree of discretion to craft as strict or as permissive an order as deemed necessary.

In addition, should the bankruptcy court judge choose to issue an “appropriate order” to prevent a foreign representative from obtaining comity or cooperation following a denial or recognition, the phrasing of that order could be particularly important in defining the contours of the foreign representative’s residual right to comity. If the order failed to refer to both “comity” and “cooperation,” for example, the foreign representative may have a colorable argument that the omission could indicate some residual entitlement to comity. In practice, however, it may be very difficult to distinguish between comity and cooperation.

The holding in Jones Construction would seem to cut against interpreting section 1509(d) to permit courts denying recognition the discretion to decide whether the denied foreign representative should be afforded comity or cooperation. See Jones Construction, 333 B.R. at 639 (stating that, absent recognition, the court has no authority to consider the foreign representative’s request for a stay). The holding in Jones Construction can be distinguished, however, from a situation in which a foreign representative seeks recognition of a foreign proceeding, is denied, but the bankruptcy court either does not issue an order prevent the foreign representative from obtaining comity or cooperation from other U.S. courts, or issues an order permissive enough to allow it some degree of comity and/or cooperation. First of all, in Jones Construction, the foreign representative did not seek recognition before seeking relief in the district court. See Jones Construction, 333 B.R. at 638-39 (noting that foreign representative had

taken no steps to formally inform U.S. courts of receivership, and no recognition petition was filed). In addition, the relief requested by the foreign representative—a stay—is both rather extensive and an explicitly within the purview of Chapter 15. See 11 U.S.C. § 1519(a)(1) (giving court option of stay in foreign nonmain proceeding); 11 U.S.C. § 1520 (automatically implementing stay in foreign main proceeding). Had the relief requested on grounds of international comity been somewhat milder—a request for certain information, perhaps—and not explicitly referred to in the text of Chapter 15, the result might be different. Jones Construction is, at present, the only published federal case (including bankruptcy cases) interpreting Code section 1509.

While it may be hard to imagine what sort of request would be such that it would be denied recognition but worthy of some degree of comity, it is at least theoretically possible that such a request could be made before, and perhaps granted by, a court other than the one denying the foreign representative recognition.

### **3. Section 1501(c) Entities Excluded from Chapter 15**

A third area where a residual right of recognition on the grounds of international comity may exist is with regard to those entities to which Chapter 15 does not apply at all. Section 1501(c) specifies some types of entities to which Chapter 15 does not apply:

(c) This chapter does not apply to--

- (1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b);

(2) an individual, or to an individual and such individual's spouse, who have debts within the limits specified in section 109(e) and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States; or  
(3) an entity subject to a proceeding under the Securities Investor Protection Act of 1970, a stockbroker subject to subchapter III of chapter 7 of this title, or a commodity broker subject to subchapter IV of chapter 7 of this title.

11 U.S.C. §1501(c)

Excluded by section 1501(c)(1), the entities referred to in section 109 include:

(b) A person may be a debtor under chapter 7 of this title only if such person is not--

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or

(3)(A) a foreign insurance company, engaged in such business in the United States; or (B) a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978 in the United States.

Thus, Chapter 15 is not applicable to those entities excluded from Chapter 7 liquidation proceedings, including railroads, certain types of banks, small businesses, and certain other entities. As Chapter 15 explicitly does not apply to these entities, it logically follows that Chapter 15's procedures for recognition of foreign proceedings do not apply to these entities either.

Jones Construction was also a Chapter 15 case, therefore its holding, that a foreign representative's failure to commence a recognition proceeding under Chapter 15 deprived the court of jurisdiction to consider a request for a stay, would likewise not apply to an entity listed above. As a consequence, it is reasonable to conclude that the common law doctrine of international comity continues to apply in cases involving entities not subject to Chapter 15.

Indeed, the legislative history of Chapter 15 confirms this conclusion, stating that:

The first exclusion in subsection (c) constitutes, for the United States, the exclusion provided in article 1, subsection (2), of the Model Law. Foreign representatives of foreign proceedings which are excluded from the scope of chapter 15 may seek comity from courts other than the bankruptcy court since the limitations of section 1509(b)(2) and (3) would not apply to them.

H.R. Rep. 108-40(I), 214

At present, no court has ruled on a matter involving one of the ineligible entities in a Chapter 15 case. In one recent Chapter 15 case, however, a bankruptcy court acknowledged that

some entities are ineligible for Chapter 15 relief. In In re Tri-Continental Exchange, 349 B.R. 627 (Bankr. E.D. Cal. 2006), the bankruptcy court considered the issue of whether the status of the debtor in that case as a foreign insurance company renders the debtor ineligible for chapter 15 relief. Citing section 1501(c)(1), which explicitly removes foreign insurance companies from the list of entities excluded from eligibility for Chapter 15 under section 109(b), the bankruptcy court held that the debtor was eligible for relief under Chapter 15. See In re Tri-Continental Exchange, 349 B.R. at 632.

The court in Tri-Continental Exchange further observed that: “[t]he possibility that an entity that is ineligible to be a debtor under the Bankruptcy Code could be the subject of a Chapter 15 proceeding necessitated a special definition of ‘debtor.’” Citing section 1502, the court noted that the definition of “debtor” for the purposes of Chapter 15 is “an entity that is the subject of a foreign proceeding.” *Id.* Though technically dicta, the court’s commentary on the definition of “debtor” under Chapter 15 suggests that some courts hearing Chapter 15 proceedings are willing to interpret Chapter 15 expansively, to allow for broad application to a variety of foreign debtors. This, in itself, suggests that some judges would rather expand the applicability of Chapter 15 than perpetuate the existence of an expansive doctrine of international comity existing independently of Chapter 15.

Though, in practice, cases involving entities potentially ineligible for Chapter 15 relief may be few and far between—most foreign representatives seeking to avail themselves of the doctrine of international comity in U.S. courts will likely be corporations falling outside of the exclusions listed above—it nevertheless remains true that the residual right of recognition apparently continues to exist in this area, and those entities excluded in section 109(b) also enjoy a greater degree of comity than those not excluded, for whom Chapter 15 applies.

#### 4. Section 1506 Public Policy Exception

Finally, a fourth area where there may exist a residual right to recognition on the grounds of international comity is under Chapter 15's public policy exception clause. Section 1506 provides that "[n]othing in [Chapter 15] prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. §1506. This public policy exception may provide a limited opportunity for courts to rule on the grounds of comity, where a foreign representative can successfully argue to that to rule otherwise would be "manifestly contrary" to public policy. Therefore, the public policy exception articulated in section 1506 should be considered to be one of the remaining areas where international comity may continue to exist after Chapter 15. Put differently, if failing to grant particular relief on the grounds of international comity would be "manifestly contrary" to the public policy of the United States, a court may rely on section 1506, and grant comity consistent with public policy.

The legislative history of section 1506 emphasizes that the public policy clause should be construed narrowly. The legislative history notes that section 1506 follows the exact language of the UNCITRAL Model Code, adopting language that, appearing standard in UNCITRAL texts, amounts to global boilerplate on the matter of public policy exceptions to international insolvency rules. See H.R. Rep. 108-40(I), 213. The legislative history also states that public policy exceptions such as this one have been "narrowly interpreted on a consistent basis in courts around the world. *Id.* The drafters of Chapter 15 further state that, consistent with international statutory usage, the word "manifestly" restricts the public policy exception to only "the most fundamental policies of the United States." *Id.*

It is difficult to say what sort of factual circumstances might justify granting comity on the grounds that not granting comity would be counter to U.S. policy. So far there have been relatively few cases interpreting section 1506. Those courts addressing the matter have generally restated the drafters' intent to apply the public policy exception narrowly, and ruled accordingly.

In In re Tri-Continental Exchange, 349 B.R. 627 (Bankr. E.D. Cal. 2006), the bankruptcy court recited the legislative history of section 1506 but added that the public policy exception “could be invoked as a rationale for imposing specific protections.” Tri-Continental Exchange, 349 B.R. at 638. Further investigating the rationale for interpreting section 1506 narrowly, the court cited UNCITRAL’s guide to the Model Law on Cross-Border Insolvency (the “UNCITRAL Guide”), which states as follows:

For the applicability of the public policy exception in the context of the Model Law it is important to note that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, as well as the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if public policy would be understood in an extensive manner.

Tri-Continental Exchange, 349 B.R. at 638 n.16 (citing *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, U.N. Gen. Ass., UNCITRAL 30th Sess., U.N. Doc. A/CN.9/442 (1997)).

In spite of the drafters' and the Guide's emphasis on interpreting the public policy exception narrowly, the court in Tri-Continental Exchange seemed to interpret the fact that such a clause exists as granting it some degree of discretion. The court stated that the public policy exception is one of several "ample tools for dealing with the manner in which a chapter 15 case is administered." Tri-Continental Exchange, 349 B.R. at 638. Though not specifically relying on section 1506 in its ruling, or citing specific policy grounds for its decision, the court in Tri-Continental Exchange reiterated the importance, and to some extent, the breadth, of the public policy exception in ruling against a creditor's request for certain restrictions on the assets of the foreign debtor. See Tri-Continental Exchange, 349 B.R. at 640.

Another case interpreting the public policy exception, In re Ephedra Products Liability Litigation, 349 B.R. 333 (S.D.N.Y. 2006), provides some insight into how great a public policy concern might need to be to warrant relief from some aspect of Chapter 15 under section 1506. In that case, a Canadian manufacturer of dietary supplements initiated insolvency proceedings in New York after its supplements were alleged to have caused serious injuries, subjecting the manufacturer to massive liability. After filing insolvency proceedings in Canada, the Canadian courts established a procedure for dealing with claims brought by U.S. claimants; this procedure was opposed by certain U.S. claimants who, among other arguments, claimed that the public policy exemption in section 1506 should be invoked to avoid subjecting U.S. claimants to the Canadian court's procedure for processing U.S. claims, which would deprive the U.S. claimants of the right to a jury trial.

Considering the legislative history of section 1506 as well as the UNCITRAL Guide, the Ephedra Products Court reiterated that the public policy exception is only to be granted under narrow circumstances that are "manifestly contrary to the public policy of the United States."

Ephedra Products, 334 B.R. at 336. Recognizing and affirming the Canadian claims process even though it deprived U.S. claimants of a jury trial, the court granted comity under Chapter 15 to the foreign proceeding, which it characterized as a “fair and impartial proceeding.” *Id.* In doing so, it made a strong statement that the public policy exception in section 1506 is to be interpreted narrowly—so much so, that even foreign proceedings depriving seriously injured U.S. claimants from a jury trial through which to be made whole fall outside the purview of the public policy exception.

The only other court to interpret the public policy exemption in section 1506 also declined to extend the public policy exception. In In re SPhinX, Ltd., 351 B.R. 103 (Bankr. S.D.N.Y. 2006), the bankruptcy court held that the additional regulations on liquidation imposed on a debtor by a liquidation proceeding in the Cayman Islands did not contravene U.S. public policy enough to warrant relief under section 1506. See In re SPhinX, 351 B.R. at 117 n. 18.

These cases interpreting the public policy exception in section 1506 all involve the question of whether to extend international comity (though Chapter 15 recognition) to foreign proceedings; perhaps ironically, those requesting relief under section 1506 are actually those *opposing* the extension of international comity, in favor of U.S. proceedings that do not defer to foreign insolvency proceedings. As discussed above, however, the residual right of comity may also exist in the converse set of circumstances: where a foreign representative invokes section 1506 to request comity. By my research, no courts have yet addressed this situation.

Ultimately, the strength of a residual right of recognition on international comity grounds permitted under section 1506 depends on the nature of the relationship between international comity and U.S. public policy, particularly the question of how central international comity is to public policy, and whether the expression of international comity should be limited to expression

in Chapter 15 proceedings. In Tri-Continental Exchange, Ephedra Products, and SPhinX courts were asked to deny Chapter 15's comity-based protections to foreign debtors, on the grounds of public policy concerns. In rejecting these requests to deny Chapter 15 recognition and extent Chapter 15's comity-based protections, these courts essentially indicated that international comity and public policy are coherent and compatible, not antagonistic (at least with regard to the specific factual circumstances of those cases). They indicated that international comity as expressed through Chapter 15 is a high priority for U.S. public policy. (To some extent, this also constitutes commentary on the relationship between *public* policy and *foreign* policy). The approach taken by the Tri-Continental Exchange, Ephedra Products, and SPhinX courts is essentially consistent with the high priority placed on comity by the Supreme Court in the case originally articulating the principle, Hilton v. Guyot. See Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (stating priority of international comity to be somewhat higher than courtesy yet lower than absolute obligation; emphasizing importance of comity for maintaining foreign relations).

Thus, section 1506 may provide a limited space for courts to rule on comity grounds, where the public policy of the United States would seem to militate in favor of extending comity. As seen in the above cases, courts readily recognize that U.S. public policy is in favor of comity, and have used this as grounds for granting recognition under Chapter 15, not granting recognition independently of Chapter 15.

## **Conclusion**

It was clearly the Chapter 15 drafters' intent to supersede the common law doctrine by codifying it in Chapter 15; their stated concern was to streamline the system of foreign recognition and to reduce the likelihood of an "abuse of comity." In this regard, it is apparent

that the drafters have been successful. None of the four arguments articulated above are, in themselves, particularly strong arguments in favor of a common law residual right of recognition based on international comity, independent of Chapter 15. However, there remain in theory areas where the common law doctrine of international comity would still seem to apply—most prominently, perhaps, regarding proceedings ineligible for Chapter 15 relief, as discussed above—even though the factual circumstances required for most of these exceptions generally seem strained and unlikely. These exceptions may be of only limited help to foreign representatives who seek to circumvent filing for recognition in U.S. bankruptcy court. It remains certain, however, that the legal landscape for international comity has changed significantly with the arrival of Chapter 15.