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THE PUBLIC POLICY EXCEPTION: HAS § 1506 BEEN A SIGNIFICANT OBSTACLE IN AIDING FOREIGN BANKRUPTCY PROCEEDINGS?

Omer Shahid*

INTRODUCTION

As the economy has become more globalized, there has been an apparent need to address instances of cross-border insolvency. Recognizing the problems associated with such a rapid globalization in the areas of international trade and investment, the United Nations Commission on International Trade Law ("UNCITRAL") adopted the Model Law on Cross-Border Insolvency ("Model Law") on May 30, 1997 in order to provide a guideline for national insolvency laws that may be incapable of dealing effectively with financially distressed businesses operating on the international level.¹ Among the issues the Model Law is aimed at addressing are "cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place."² By providing a framework that will better equip national insolvency laws to confront and resolve insolvency cases of a cross-border nature, the Model Law’s goal is to provide a predictable, smooth, and easy way for courts of


² Id. at ¶ 1.
foreign nations (1) to communicate with one another, (2) to enable them to recognize foreign insolvency proceedings, and (3) to open their doors to foreign representatives (i.e., administrators of foreign insolvency proceedings).³ Allowing the lack of coordination among foreign courts and administrators to persist would not only increase the likelihood that insolvent debtors would fraudulently hide their assets, but would also gravely diminish “the possibility of rescuing financially viable businesses and saving jobs.”⁴ Therefore, by laying down such a harmonized framework, the UNCITRAL hopes that the Model Law, when adopted by various States (i.e., incorporated into their national laws), will allow foreign courts and administrators to avoid these dangers by facilitating the process of arriving at solutions that would promote international trade and investment, while at the same time keeping the best interests of both the creditors and the debtor in mind.⁵ Despite providing a framework that would ensure predictability, the Model Law “respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law.”⁶ A nation that adopts the Model Law would maintain its substantive insolvency law while giving aid to other nations procedurally so that the insolvency laws of other nations could be carried out without any international barriers. However, public policy considerations might arise when the non-uniform insolvency laws of other nations are allowed to be enforced procedurally around the globe. Article 6 of the Model Law confronted this concern.

Article 6 of the Model Law, known as the “public policy exception,” provides: “Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.”⁷ So in spite of the fact that the Model Law is supposed to make the recognition of foreign proceedings much easier, there is an appreciation that a nation would be unwilling to recognize a foreign proceeding if it patently violates that nation’s public policy. If various nations do have different public policies, would it not then make the goal of providing and carrying out a harmonized and predictable framework impracticable? What would happen if an insolvency proceeding taking place in State A is brought by a foreign representative to State B to be recognized, and the latter State believes it to violate an aspect of its domestic public policy? Would this not hinder the cooperation and coordination among foreign courts and administrators? Would

³ See id. at ¶ 3.
⁴ Id. at ¶ 17.
⁵ Id.
⁶ Id. at ¶ 3.
⁷ Id. at art. 6.
the effects of the Model Law’s implementation not be astonishingly unpredictable if a court can refuse the recognition of a foreign proceeding on the grounds that it contravenes some part of its public policy while that same proceeding does not violate the public policy of the nation where the proceeding is taking place? Would this not then foster the environment of irregularity that the Model Law was supposed to overcome? How should the courts interpret the “public policy exception” that would carry out the goals of predictability, harmony, and fairness in the recognition of foreign proceedings?

Recognizing the issues just raised, it is without any doubt that the UNCITRAL chose to use the word “manifestly” in the text of Article 6 purposely. The word “manifestly” is used deliberately in order “to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.”8 Therefore, the UNCITRAL expects that the refusal of recognizing a foreign insolvency proceeding would be rarely used.9 UNCITRAL recommends, then, that among considering other competing interests, the court should interpret Article 6 in such a way as to strike a balance between “general public policy goals” and “the goals of insolvency and predictability in commercial relations.”10 An issue arises here because there are nations that interpret their public policy broadly, while there are others that limit it only to situations where an action would contravene fundamental principles. Although the Model Law does not provide an authoritative definition of “public policy” in Article 6, it does favor the narrow approach of the nations that would limit it only to fundamental principles.11 The Model Law recommends that the adopting nations should give a narrow interpretation to Article 6 by “recogniz[ing] 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.”12 If this dichotomy is not made and public policy is thus interpreted as broadly in the international realm as it is at the domestic level, then international cooperation among foreign courts and administrators will surely suffer.13 Therefore, in order to encourage

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8 Id. at ¶ 89.
9 Id. at ¶ 20.
11 Model Law and Guide, supra note 1, at ¶ 87.
12 Id. at ¶ 88.
13 Id.
international coordination, the Model Law posits that public policy should be narrowly limited to interpret a nation’s fundamental principles such as constitutional guarantees and protections.\(^\text{14}\) Other instances of exclusion would be in areas such as “foreign tax claims, fines and penalties, claims relating to personal injury, [and] claims relating to negligence and gambling debts.”\(^\text{15}\) Moreover, overriding the recognition of foreign insolvency proceedings for the protection of public policy interests would be understandable to safeguard the environment, public health and safety, and to prevent abuse against the debtor.\(^\text{16}\) For the reasons of cultivating a cross-border environment of predictability, harmony, fairness, cooperation, and coordination, the courts should keep in mind the principles of comity and reciprocity when it comes to interpreting Article 6 and other provisions of the Model Law.


It is the purpose of this note to provide a case study of how the courts in the United States have interpreted the “public policy exception” in their respective legislations. There will be an analysis of cases where the courts have either denied or granted recognition of foreign insolvency proceedings when the claimants have objected to procedures they believe are “manifestly contrary” to the public policy of the United States. By conducting such an analysis of how these courts have dealt with the “public policy exception,” the ultimate goal is to see whether the courts of the United States have been consistent in their interpretation and application of the “the public policy exception.” This way, we will see whether the courts, in practice, have actualized the Model Law’s goal of providing a harmonized and predictable pathway towards dealing with cross-border insolvencies. By conducting such a survey, we will see how the courts of the United States have contributed to the analysis of the public policy considerations in international insolvency law in their own unique and rich ways. Thus, this case study is relevant due to the fact that if courts interpret and...

\(^\text{14}\) Id. at ¶ 87.

\(^\text{15}\) Legislative Guide, supra note 10, at 251.

\(^\text{16}\) Id. at 86-87.

apply the public policy exception broadly and loosely, the provision will indubitably become a significant obstacle to granting recognition or relief to representatives of foreign proceedings who seek aid from U.S. courts. Under this type of approach, Congress’ major intent in adopting the Model Law (i.e., to facilitate communication and aid between U.S. courts and foreign courts in international bankruptcy proceedings) would no doubt be completely frustrated.

Part I of the Note will provide a discussion of Chapter 15. This section will detail how Chapter 15 was created to adopt the provisions of the Model Law. The discussion will use the legislative history of the new chapter of the U.S. Bankruptcy Code to show Congress’ intent to incorporate the spirit of the Model Law in order to remedy the procedural limitations that were in place before the adoption. Part I will also show how the legislature wanted the federal courts to interpret the public policy exception, which is situated in § 1506 of the U.S. Bankruptcy Code, narrowly and only to the most fundamental public policies of the United States. But this inevitably leads to an important question: What is considered to be a fundamental American public policy that would be violated when a foreign proceeding is recognized? In other words, what are the conditions and circumstances in which a bankruptcy court or another federal court would declare a foreign proceeding as being manifestly contrary to the public policy of the United States?

Parts II and III attempt to answer this question. Part II focuses on four cases where the courts have recognized foreign proceedings over objections made under § 1506. The courts in each case held the recognition of foreign proceedings over various objections under § 1506 – even those that may seem, at first, to be a fundamental American public policy. The courts in these cases show how narrowly the courts have applied the public policy exception when it comes to recognizing a foreign proceeding.

Part III focuses on a single case that was decided by the bankruptcy court of the Eastern District of New York in August of 2009. The case is crucial as it is the first case that has been found to violate a fundamental American public policy under the meaning of § 1506. This section will provide a detailed analysis of the case to show what the bankruptcy court found to be a fundamental American public policy that will be violated if relief was granted. It is hoped that by providing this analysis, the reader will see how the bankruptcy court distinguished some of the cases mentioned in Part II while still applying the public policy exception narrowly.

Finally, Part IV will conclude that the United States courts have narrowly interpreted § 1506 and, therefore, have stayed true not only to Congress’ legislative intent, but also to the spirit of the UNCITRAL Model Law.
I. CHAPTER 15 OF THE U.S. BANKRUPTCY CODE

Chapter 15, which incorporated most of the provisions of the Model Law, was added to the U.S. Bankruptcy Code on October 17, 2005. It was part of a set of reforms known as the Bankruptcy Abuse Prevention and Consumer Act of 2005 (BAPCA). Chapter 15 replaced 11 U.S.C. § 304. While § 304 was “enacted in 1978 to provide specific procedures by which a representative in a foreign bankruptcy proceeding could obtain relief in U.S. courts to facilitate the foreign proceeding,” there is a reason why Chapter 15 superseded it:

While § 304 afforded bankruptcy courts substantial flexibility to fashion remedies in order to foster principles of international comity and respect for the judgments of other countries, it nevertheless was limited in scope. Filing of a § 304 petition “did not initiate a normal bankruptcy case,” nor was it the exclusive remedy for a foreign representative seeking the assistance of U.S. courts. Thus, there was no centralized forum for addressing requests for U.S. judicial relief in connection with reign proceedings, and jurisprudence developed on a case-by-case basis. Chapter 15 changes that, centralizing initial requests for comity and cooperation in the U.S. bankruptcy courts and setting forth simple... procedures for foreign representatives seeking comity or cooperation from U.S. courts.

Therefore, Chapter 15 replaced § 304 and was enacted into the Bankruptcy Code to provide easier and more predictable procedures for U.S. courts. Chapter 15 also aids the courts in recognizing foreign proceedings, all in

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18 Alesia Ranney-Marinelli, Overview of Chapter 15 Ancillary and Other Cross-Border Cases, 82 AM. BANK. L.J. 269, 270 (Spring 2008).
20 Ranney-Marinelli, supra note 18, at 269.
21 Id. at 269-70. See also Aaron L. Hammer & Matthew E. McClintock, Understanding Chapter 15 of the United States Bankruptcy Code: Everything You Need to Know About Cross-Border Insolvency Legislation in the United States, 14 L. & BUS. REV. AM. 257, 262-3 (Spring 2008) (stating that unlike § 304, “Chapter 15 sets forth a comprehensive framework for addressing cross-border insolvency cases, including providing for the recognition of a wider variety of foreign proceedings, allowing representatives of foreign insolvency proceedings to have direct access to the U.S. court system, and allowing for the commencement of full-blown bankruptcy cases under chapters of the Bankruptcy Code”).

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the hopes of promoting comity and cooperation, which the Model Law thought to be extremely important in solving cases of cross-border insolvency.

Under Chapter 15, a foreign representative can file a petition to obtain recognition of a foreign proceeding in order to obtain aid from the courts of the United States. Once the petition is filed, the case begins. However, at this point, before recognition is granted, the foreign representative does not enjoy “the vast majority of rights...and benefits under Chapter 15.” The court, in which the foreign representative has brought its petition for recognition, must grant recognition of a foreign proceeding when three criteria have been met: (1) there is, in fact, a foreign proceeding (whether a main proceeding or non-main proceeding); (2) the foreign representative applying for recognition is a person or body; and (3) the petition fulfills the requirements listed in § 1515. Once there is recognition, “the foreign representative earns the power to bring a number of actions, including actions to avoid preferences, fraudulent transfers, wrongful setoffs and improper post-petition transfers.” If the foreign proceeding is a non-main proceeding, however, “the court must be satisfied that such an action relates to assets that should be administered in the foreign nonmain proceeding.” There is, however, one caveat to granting recognition of a foreign proceeding and providing relief: it must be subject to § 1506, better known as “the public policy exception.”

Section 1506 provides: “Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.” It is important to note that the wording of this provision is remarkably similar to that of Article 6 of the Model Law. The reason why this is so is due to the fact that the U.S. Congress intended for § 1506 to mirror Article 6 of the Model Law:

This provision follows the Model Law article [6] exactly, is standard in UNCITRAL texts, and has been narrowly interpreted on a consistent basis in courts around the world. The word ‘manifestly’ in international usage restricts the

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22 Ranney-Marinelli, supra note 18, at 280.
23 Filing a petition for recognition is subject to the requirements enlisted in 11 U.S.C. § 1515.
24 Ranney-Marinelli, supra note 18, at 280-1. See also Henry, supra note 19, at 357 (stating that a foreign representative receives “much broader powers” once a foreign proceeding is recognized).
26 Henry, supra note 19, at 357. See also 11 U.S.C. § 1521.
27 Henry, supra note 19, at 357. See also 11 U.S.C. § 1523(b).
public policy exception to the most fundamental policies of the United States.30

Here, Congress makes it clear that the public policy exception should be interpreted narrowly and that a court can deny recognition of a foreign proceeding or withhold relief on public policy grounds only if granting such recognition or relief would violate a fundamental U.S. public policy. Besides interpreting the public policy exception narrowly, the courts must also interpret the provision in an international context rather than a national one.31

A foreign representative is not required to show that a U.S. public policy will not be violated when filing a petition for recognition or relief in a U.S. court; it is up to either an interested party or the court to raise such an issue.32 “Thus, bankruptcy judges are at the front line of protecting public policy interests, and may be the first line of defense for creditors who are too small or disorganized to raise public policy objections on their own.” 33 Although courts have the power to protect public policy interests, they have, to date, been hesitant to refuse recognition of foreign proceedings on public policy basis. 34 “At least one court, however, has explicitly noted that recognition of a foreign proceeding is subject to § 1506’s public policy considerations.” 35 To date, there have been a handful of cases where the courts have dealt with § 1506 – each in its own way contributing to the development of the role of public policy in international insolvency law in the United States.

II. CASES THAT HAVE GRANTED RECOGNITION OVER PUBLIC POLICY OBJECTIONS

A. In re Ephedra Products Liability Litigation36

In re Ephedra Products Liability Litigation was one of the first cases

31 See 11 U.S.C. § 1508 (providing that “[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions”).
33 Id.
34 8 NORTON BANKRUPTCY LAW AND PRACTICE § 154:9 (3d ed. 2009).
35 Id. (citing In re Oversight and Control Com’n of Avanzit, S.A., 385 B.R. 525, 532 (Bankr. S.D.N.Y. 2008)).
that interpreted and applied § 1506 of the Bankruptcy Code. Prior to the ban of ephedra, a stimulant derived from mostly shrubby plants of the genus Ephedra, by the U.S. Food and Drug Administration in 2004, a Canadian company by the name of Muscletech marketed products in the United States that contained ephedra.37 “Some of the consumers suffered severe injuries, such as heart attacks and strokes, and eventually more than thirty civil actions for personal injuries and wrongful deaths allegedly caused by ephedra were filed against Muscletech in state and federal courts in the United States.”38 Muscletech, in early 2006, brought an insolvency proceeding in the Ontario Supreme Court. That court appointed a Monitor that appeared in the court at the Southern District of New York (“S.D.N.Y.”) to serve as the foreign representative of the Ontario Supreme Court. The S.D.N.Y. court granted the Monitor’s motion to have the court recognize the insolvency proceeding in Canada as a “foreign main proceeding.”39 Back in Canada, the Monitor and other interested parties negotiated a claims resolution procedure in order to quickly evaluate all credit claims, including the plaintiffs in the Muscletech actions in the United States, who had filed claims and appeared in the insolvency proceeding in Canada.40 Although the Ontario court approved of the claims resolution procedure with the consent of the majority of claimants, four claimants filed oppositions against such an order. The S.D.N.Y. court granted the Monitor’s motion to recognize the Ontario court’s approval of the claims resolution procedure. However, it was subject to the Ontario court approving some amendments to the claims resolution procedure “designed to assure greater clarity and procedural fairness.”41 The Ontario court then approved these amendments to the claims resolution procedure. The S.D.N.Y. court then finally granted the Monitor’s motion to recognize and enforce the Ontario court’s order approving the amended claims resolution procedure and, thus, granting recognition of the foreign main proceeding in Canada.

The S.D.N.Y. court addressed the four objections arguing that granting recognition of the foreign proceeding in Canada would violate U.S. public

37 Id. at 334.
38 Id. The federal cases were first consolidated and transferred to the court at the Southern District of New York. The state cases were later transferred to the same court and consolidated with the federal courts pursuant to 28 U.S.C. § 157(b)(5).
39 Id. See also 11 U.S.C. § 1502(4) (providing that a foreign main proceeding “means a foreign proceeding pending in the country where the debtor has the center of its main interests). Center of main interests (COMI) analysis is a hot issue in international insolvency law. Compare In Re SPhinX, Ltd., 351 B.R. 103 (Bankr. S.D.N.Y. 2006), with In re Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122 (Bankr. S.D.N.Y. 2007).
40 In re Ephedra, 349 B.R. at 334.
41 Id.
policy. The four objectors stated that the claims resolution procedure would deny them due process and trial by jury. The amended claims resolution procedure “provide[s] for mandatory mediation and, if the mediation results in a plan approved by specified majorities of creditors, for the estimation and liquidation of the remaining claims by a Claims Officer appointed by the Ontario Court.” 42 The S.D.N.Y. court found the objectors’ argument concerning due process frivolous since the amendments “entirely cured” the problems that were raised by the pre-amended claims resolution procedure. 43

The S.D.N.Y. court similarly denied the objectors’ argument concerning trial by jury. The court held that “neither § 1506 nor any other law prevents a United States court from giving recognition and enforcement to a foreign insolvency procedure for liquidating claims simply because the procedure alone does not include a right to jury.” 44 The court looked at the legislative history of the public policy exception in the Bankruptcy Code and stated that since it was based on the Model Law, the provision should be interpreted restrictively. In determining whether the denial of a trial by jury in a foreign proceeding would be “manifestly contrary” to a fundamental public policy of the United States, the court turned to how other federal courts have dealt with the issue. The court found that prior decisions by other federal courts did not invalidate foreign judgments against U.S. citizens in foreign places where the concept of a trial by jury is unknown. 45 While the court acknowledged that the trial by jury is an important constitutional right, it stated that “the notion that a fair and impartial verdict cannot be rendered in the absence of a jury trial defies the experience of most of the civilized world.” 46 Therefore, according to the court, recognition of a foreign proceeding would not be denied when the foreign court provides a “fair and impartial proceeding.” 47 Since the Ontario court approved the amended claims resolution procedure and it, thus, “plainly affords claimants a fair and impartial proceeding[,] [n]othing

42 Id. at 335.
43 Id. Some of the key problems of the Ontario court’s order approving the pre-amended claims resolution procedure were that a Claims Officer could refuse evidence and that he could liquidate claims without giving interested parties the opportunity to be heard.
44 Id. at 335-6.
45 See, e.g., In re Union Carbide Corp. Gas Plant Disaster at Bhopal, 809 F.2d 195, 202-3 (2d Cir. 1987) (affirming district court’s finding that Indian courts were adequate forums despite the fact that there was an absence of juries).
46 In re Ephedra Products Liability Litigation, 349 B.R. at 337. The reader must keep in mind that although the result might be different in a purely domestic case, this is a case concerning the recognition of a foreign proceeding, so the principle of comity is prevalent behind the court’s reasoning.
47 Id.

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more is required by § 1506 or any other law.”48 Also, the court determined that the objectors’ arguments were grounded in the concern of having their bargaining position lessen in negotiating their claims in front of a claims officer instead of a jury. The court determined that the “[d]eprivation of such bargaining advantage hardly rises to the level of imposing on plaintiffs some fundamental unfairness.”49 For these reasons, the S.D.N.Y. court granted the recognition of the amended claims resolution procedure and the foreign proceeding in Canada.

B. In re Iida50

In this case, a debtor, an individual who happens to be a Japanese citizen, was declared bankrupt under the Japanese bankruptcy law. Another Japanese citizen was appointed as a trustee of the debtor’s estate in the Japanese bankruptcy proceeding. This proceeding is similar, albeit with some procedural differences, to a Chapter 7 case in the United States in that it applies to both individual and corporate insolvencies seeking liquidation.51 At the time of the commencement of the Japanese bankruptcy proceeding, the debtor had assets in Hawaii. He owned all of the stocks of three Hawaiian corporations. “The Hawaii Corporations held several valuable property interests, including substantial ownership interests in two limited partnerships that owned and operated the Kahala Mandarin Oriental Resort and the Kona Village Resort, two luxury hotels in Hawaii.”52 Before the commencement of the Japanese bankruptcy proceeding, the debtor was an officer and director of the Hawaiian corporations. However, there were other officers and directors as well, including Henry Fong.53 Despite having assets in Hawaii, the debtor and his corporations did not have any creditors in the United States.54 As part of his duty to liquidate and administer the debtor’s estate assets in the Japanese bankruptcy proceeding, the trustee became the sole shareholder. Pursuant to being the sole shareholder, the trustee took steps to gain control of the Hawaiian corporations. The trustee went to Fong to show proof of the former’s appointment as trustee. Fong consulted the legal advice of both the counsel of the Hawaiian corporations and the debtor’s personal lawyers. Fong was advised

48 Id.
49 Id.
50 In re Iida, 377 B.R. 243 (9th Cir. B.A.P. 2007).
51 See id. at 247 n.2.
52 Id.
53 Id. at 248. Fong was a treasurer and a vice-president of at least two of the corporations.
54 Id. at 247.
to accept the trustee’s authority as the single shareholder, which he eventually did. After this development, the trustee continued to take steps in restructuring the management of the Hawaiian corporations. The articles of incorporation for these corporations provided that they could have one officer and one director if there was only one shareholder. Furthermore, “[t]he by-laws of the Hawaii Corporations permitted the shareholders to remove any and all of the directors by a vote of a majority of the shares then entitled to vote. The by-laws also allowed the directors to remove and replace any officer at any time.”

The by-laws also provided that shareholders should remove and replace any officers at an annual or special shareholder meeting. However, the shareholders were allowed to replace and remove an officer without holding an annual or special meeting “so long as all the shareholders consented in writing, and such written consent was filed with or made part of the minutes of the board of directors or the corporate records.”

In January and March of 2005, the trustee, in a series of written consents, appointed Fong as the sole director of the corporations. Fong then removed all the rest of the officers of the corporations as the sole director and his actions were approved by the trustee in the shareholder consents. The Japanese bankruptcy court entered an order in September 2005 which authorized the trustee to sell one of the resorts and also to “exercise all powers of decision with respect to the stock of all companies whose stock the debtor owned.”

After seven months, since the sale of the last of the two resorts and after one year, the trustee exercised his right as the single shareholder to remove the debtor and other officers from the board of the corporations, the debtor brought a complaint against the trustee in a Hawaiian state court in April 2006. The complaint sought a declaratory judgment that would declare the debtor as the sole shareholder of the Hawaiian corporations and would reinstate the debtor as the director of these corporations. The complaint also sought an injunction against the trustee that would forbid the trustee from removing the debtor as the director of the corporations and also to enjoin the trustee from distributing the proceeds from the sales of the Hawaiian corporations’ assets.

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55 Id. at 248.
56 Id.
57 Id. at 248-49.
58 Id. at 249.
59 Id. at 249-50.
60 Id. at 250.
61 Id.
62 Id.
A few months later, in September 2006, the Japanese bankruptcy court issued an order authorizing the trustee to “(1) exercise the shareholders’ rights to remove and replace directors and officers; (2) distribute any proceeds from the liquidation of assets or any remaining assets without notifying the debtor or obtaining his consent; and (3) take such action as was necessary to ensure that the” order is recognized and given full legal effect in both the state and federal courts of the United States.63

Pursuant to the order of the Japanese bankruptcy court, the trustee filed a Chapter 15 petition in June 2006 in order to get the Japanese bankruptcy proceeding to be recognized as a foreign main proceeding. The debtor filed an opposition to the petition for recognition on the grounds that even though the Japanese bankruptcy proceeding is a foreign main proceeding; recognition of that proceeding would be manifestly contrary to the public policy of the United States.64 “Specifically, the debtor contended that the Foreign Representative [the trustee] was required to obtain permission from the United States Bankruptcy Court under chapter 15 or its predecessor § 304 before acting in the January and March 2005 to remove the [debtor] as director[,] and officer[,] of the Hawaii Corporations.”65 In July 2006, the U.S. bankruptcy court issued an order that allowed the trustee, as the foreign representative, to commence an ancillary proceeding that would allow it to seek relief under §§ 151966, 152067, and 152168 of the U.S. Bankruptcy Code.69 The trustee then soon removed the declaratory judgment action from the Hawaiian state court to the federal bankruptcy court. Thereafter, the trustee filed a motion to dismiss the complaint, alleging that the debtor filed the complaint in order “to circumvent Japanese bankruptcy law and the orders of the Japanese bankruptcy court and to challenge the authority of and actions taken by the Foreign Representative as shareholder of the Hawaii Corporations in his efforts to administer and liquidate the Japanese bankruptcy estate.”70 The debtor opposed the motion to dismiss, reiterating his public policy argument by stating that the trustee had no right to remove the debtor as a director of the Hawaiian corporations since both federal

63 Id.
64 Id. at 251.
65 Id.
66 See 11 U.S.C. § 1519 (listing types of relief that may be granted upon the filing of the petition for recognition).
67 See 11 U.S.C. § 1520 (providing a list of what happens once the bankruptcy court recognizes a foreign proceeding as a foreign main proceeding).
68 See 11 U.S.C. § 1521 (listing types of relief that may be granted once the bankruptcy court recognizes a foreign proceeding, whether it is main or not).
69 In re Iida, 377 at 251.
70 Id. at 252.
bankruptcy and state laws required the trustee to obtain an order from a court within the United States officially recognizing his status as a trustee in the Japanese bankruptcy proceeding.\(^{71}\) In November 2006, the bankruptcy court, treating the motion to dismiss as a motion for summary judgment, determined that the trustee had the authority to remove and replace the debtor, that he had a right to do so as the sole shareholder; that he complied with the Hawaiian state courts and the by-laws of the corporations when removing and replacing the debtor; that the court was compelled by the principle of comity to recognize the Japanese bankruptcy proceeding; and, finally, that nothing in the Hawaiian state law and the U.S. Bankruptcy Code “required the Foreign Representative to obtain a federal or Hawaii state court order recognizing his authority to act in his capacity as trustee in the Japanese bankruptcy proceeding.”\(^{72}\) Therefore, the bankruptcy court granted the trustee’s motion for summary judgment and dismissed the debtor’s complaint with prejudice.\(^{73}\) The debtor then appealed to the Bankruptcy Appellate Panel (B.A.P.) of the Ninth Circuit.

On appeal, the B.A.P. affirmed the bankruptcy court’s opinion. The B.A.P. provided analysis under both § 304 and Chapter 15 because when the trustee exercised his authority in removing and replacing the debtor, § 304 was in effect; but when the trustee received recognition, Chapter 15\(^{74}\) was in effect. Although the B.A.P. determined that Chapter 15 should apply in the case and that the case law under § 304 would not serve as precedent for Chapter 15 cases, § 304 case law should nevertheless be informative in Chapter 15 analysis, especially when it comes to comity.\(^{75}\) In addressing the debtor’s public policy argument, the B.A.P. stated that § 1506 of the U.S. Bankruptcy Code was to be interpreted narrowly and should only be invoked when “the most fundamental policies of the United States” were violated.\(^{76}\) The B.A.P. rejected the debtor’s argument that the trustee needed to obtain an order from either the bankruptcy court or the state law recognizing his status, rights, and privileges as trustee in the Japanese bankruptcy proceeding before removing and replacing any officer. The B.A.P. held that a foreign representative need not obtain a prior order from either a bankruptcy court or state court recognizing his status as a trustee of a

\(^{71}\) Id.

\(^{72}\) Id.

\(^{73}\) Id.

\(^{74}\) Chapter 15 applies to all cases from October 17, 2005 and onwards, as stated above.

\(^{75}\) In re Iida, 377 B.R. at 256. See 11 U.S.C. § 304(c)(5). That section provided:

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with - 

(S) comity . . . .

\(^{76}\) In re Iida, 377 B.R. at 259.
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foreign bankruptcy proceeding before exercising control over assets in the United States. As a result, the trustee here can avail himself of the reliefs listed in § 1521 of the Bankruptcy Code.

In other words, the bankruptcy court, deciding to grant grief under §§ 1521(a) and (b), simply gives the foreign representative the green light to proceed with his or her duties as trustee, provided that the United States creditors’ interests are sufficiently protected. In this case, there are no United States creditors with interests to protect.

Hence, there are not any fundamental public policy considerations to be worried about in granting recognition to the Japanese bankruptcy proceeding as a foreign main proceeding.

C. In re Ernst & Young, Inc.

In In re Ernst & Young, Inc., the Friedmans, Israeli citizens living in Canada, moved to California. The Friedmans formed the Klytie’s Developments, Inc. (KDI) in March 2005 under the laws of Canada. The registered office for KDI was in Alberta, Canada. The Friedmans owned a substantial amount of stock in KDI with the remainder left in the ownership of Sharkey, a resident of Denver, Colorado. “In July, 2005, KDI formed and registered Klytie’s Developments, LLC (KD/CO) in Colorado” for which Sharkey was responsible for operating under the Friedmans’ supervision and direction. Through both KDI and KD/CO, the Friedmans and Sharkey sought investments in a fund in order to finance and purchase real estate developments around the world. Almost $8 million were raised by investors located in Canada, the United States, and Israel. Money that was raised by KD/CO was stored in U.S. banks and a considerable amount of the funds were transferred to the Friedmans and KDI. However, in early 2006, the Securities Commissioner of Colorado commenced an investigation of KDI and KD/CO, after which the Coloradan commissioner forwarded his findings to the Securities Commission in Alberta, which started its own investigation. In October 2006, the Coloradan commissioner filed a complaint against the two entities, the Friedmans and Sharkey in Denver, Colorado. The court there ordered the defendants to refrain

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77 Id. at 263.
78 Id. at 259.
80 Id. at 774.
“from selling interests in the fund, and from brokering, dealing, or selling securities in Colorado. The defendants were also prohibited from dissipating assets or destroying records of KDI or KD/CO.” 81 Subsequently, the Alberta Securities Commission commenced its own action against the KDI and the Friedmans in Canada and obtained an order that froze all money in their accounts in two Canadian banks. The Friedmans then entered into a settlement agreement with the Albertan commission “under which KDI and the Friedmans admitted to committing fraud, agreed to pay [the Alberta Securities Commission] $220,000 (Can.), and agreed to refrain from work in the securities field for 25 years.” 82 However, that was not an end to the Friedmans’ and Sharkey’s legal troubles. In June 2007, some plaintiffs filed a complaint in the federal district court in Colorado. The defendants moved to stay that action pending the outcome of the legal proceedings in Canada and also the outcome of the criminal indictments against one of the Friedmans and Sharkey that was entered by the grand jury of Jefferson County, Colorado in October 2007.

In August 2007, the Court of Queen’s Bench in Alberta, District of Calgary issued an order which appointed Ernst & Young as Receiver for KDI, KD/CO, and the Friedmans. Among other orders, the Court of Queen’s Bench “authorized the Receiver to seek recognition of its orders and to seek ‘aid and recognition’ of courts in the United States.” 83 The Receiver then filed a petition for recognition of the Canadian foreign proceeding as a “foreign main proceeding” due to the fact that KDI was incorporated in Alberta, Canada, the location of the entities’ operations and principal assets. Furthermore, “the [p]etition states recognition as a foreign main proceeding is necessary to assist the Receiver in investigating and pursuing assets of KDI and its related entities located in Colorado and elsewhere in the United States.” 84 Alternatively, the Receiver argued for the Canadian proceeding to be recognized as a “foreign nonmain proceeding.” 85 The Coloradan commissioner and the plaintiffs, however, objected to the Receiver’s request for the Canadian proceeding to be recognized as a foreign main proceeding. The commissioner and the plaintiffs contended that the defendants’/debtors’ center of main interests (COMI) were not in Alberta but instead in Colorado since KD/CO had the primary responsibility for the fraud. The plaintiffs also alleged that the money

81 Id. at 775.
82 Id.
83 Id. at 776.
84 Id.
85 See 11 U.S.C. § 1502(5) (providing that a foreign non-main proceeding “means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment).
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channeled through that KD/CO went through U.S. banks. Furthermore, they argued that granting recognition of the Canadian proceeding as the foreign main proceeding would run contrary to the U.S. public policy since (1) it will harm the recovery efforts already under way in Colorado; (2) it will not provide relief against all parties since Sharkey is not a party in that proceeding; (3) the plaintiffs’ rights will be undermined because the proceeding will allow the Receiver to take funds held by the Colorado court in order to distribute it under Canadian law; and (4) the cost of pursuing assets sustained by the Receiver will go beyond the claims of creditors in the United States.86

The bankruptcy court of the federal district court in Colorado had to determine whether the Canadian proceeding was a foreign main proceeding under a COMI analysis and if it was, whether such a proceeding would be “manifestly contrary” to a fundamental public policy of the United States.

The court first conducted a COMI analysis to determine whether the Canadian proceeding was a foreign main proceeding. The court employed the COMI analysis used by Judge Lifland in the In re Bear Sterns case. In that case, since the Bankruptcy Code did not provide any help in determining what type of evidence is required to rebut the presumption that the debtor’s COMI is its place of registration or incorporation, Judge Lifland provided various factors that could be relevant to such a determination. These factors include:

[T]he location of the debtor’s headquarters; the location of those who actually manage the debtor (which conceivably could be headquarters of a holding company); the location of the debtor’s primary assets; the location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.87

After conducting a COMI analysis under these factors, the court determined that the Canadian foreign proceeding was a foreign main proceeding.

Since the court determined that the Canadian proceeding was a foreign main proceeding, the court had to determine whether recognizing it as such would make § 1506 applicable. The court stated that § 1506 should be interpreted narrowly and restricted only to “the most fundamental policies of the United States [that] are at risk.”88 The court rejected the parties’ argument that

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86 In re Ernst & Young, Inc., 383 B.R. at 778.
87 In re Bear Sterns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. at 128.
88 In re Ernst & Young, Inc., 383 B.R. at 781.
allowing the Canadian proceeding to be recognized as the main proceeding would make the investors in the United States receive less (since investors from Canada and Israel will also be included here) than they would if these local investors received from the Colorado courts. The court found this argument to be unpersuasive since “[a]ll wronged investors should share in the assets accumulated in the Receivership Proceeding, regardless of nationality or locale.” The court also rejected the objecting parties’ argument that allowing the Canadian proceeding to be recognized as the foreign main proceeding would make the Coloradan investors receive less during distribution since the costs sustained by the Receiver in such a proceeding would deplete the debtors’ assets significantly. In rejecting this argument, the court stated that the “[c]osts of liquidation are a reality, whether through a foreign proceeding, or through a United States bankruptcy case.” For these reasons, the court held that granting recognition of the Canadian proceeding as the foreign main proceeding would not be “manifestly contrary” to the public policy of the United States. Hence, just because the local investors would receive less in an international proceeding than they would in a domestic proceeding and because the costs of liquidation will deplete the debtors’ assets, the public policy considerations of § 1506 will not necessarily be invoked.

D. In re Metcalfe & Mansfield Alternative Investments

This is an interesting January 2010 case that arose out of the recent global financial crisis. Specifically, the case arose out of the crisis in Canada’s non-bank sponsored Asset-Backed Commercial Paper (ABCP) market. The Canadian ABCP market froze in August 2007. Investors in the Canadian ABCP market lost confidence in the transparency of the market which was brought on by news of the widespread defaults on the sub-prime mortgages in the United States. These investors were afraid that the some of the assets that backed the ABCP market had substantial exposure to sub-prime mortgages. “With no new investment, no reinvestment, and no liquidity funding available, coupled with the timing mismatch between the short-term ABCP and the longer-term

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89 Id.
90 Id.
PUBLIC POLICY EXCEPTION

underlying assets, payments due on the ABCP could not be made.”

Soon, a restructuring plan was devised by stakeholders. Besides providing for market-wide transparency, restructuring of the transactions of “leveraged super senior” swaps, the plan provided for a non-debtor, third-party release and injunction. This release and injunction would protect asset providers from “liability and actions on account of any and all past, present and future claims, rights, interests, actions, rights of indemnity, liabilities, demands, duties, injuries, damages, expenses, fees or causes of action of whatsoever kind or nature in any way related to the third-party ABCP market in Canada.”

The release was included into the plan because the asset providers were seen as being crucial in the restructuring of the market. It would also protect them from the claims of investors for indemnity or contribution claims after the implementation of the plan.

In the Canadian proceedings, the issue of the non-debtor, third party debtor release and injunction were the issue before the Canadian courts. Both the Ontario Court and the Ontario Court of Appeals in June and August 2008, respectively, held that the release and injunction were properly included in the plan and that the plan was “fair and reasonable.”

Ernst & Young, Inc., the court-appointed monitor and financial advisor to the plan, filed a Chapter 15 petition in order to have the Canadian proceedings recognized as the foreign main proceeding. The monitor acted so due to the express provisions in the plan that “request[ed] aid, recognition and assistance by U.S. courts in carrying out the terms of the orders.” Although there was no party claiming that the enforcement of the non-debtor, third-party release and injunction would violate a fundamental public policy of the United States, pursuant to § 1506, the bankruptcy court of the S.D.N.Y. took into consideration that particular analysis.

The monitor argued “that the third-party non-debtor release and injunction provisions included in the Plan and Sanction Order should be enforced in the United States because, if this were a plenary case under chapter

93 In re Metcalfe, 2010 WL 20603, at *3.
94 The restructuring of the Canadian ABCP market would become the largest restructuring program in Canada’s history.
96 Id. at *5.
97 Id. at *6.
98 Id. at *7.
99 Id.
such provisions would pass the muster under the rigorous standards for release and injunction provisions established by the Second Circuit. The Second Circuit, through its case law, has imposed strict limitations upon the bankruptcy courts to enforce non-debtor, third-party release and injunction provisions. For example, in In re Metromedia Fiber Network, Inc., the Second Circuit held that since non-debtor, third-party release provisions in plans of reorganization increase the likelihood of abuse, they should only be enforced in the rarest of cases. Furthermore, in In re Johns-Manville Corp., the Second Circuit severely limited the enforcement of the non-debtor, third party releases by the bankruptcy courts only when the released claims have a direct impact on the res of the bankruptcy estate. In Travelers Indemnity Co. v. Bailey, the Supreme Court of the United States reversed Manville on other grounds. Although the Manville case was overruled on other grounds, the S.D.N.Y. bankruptcy court stated in the case at bar that “[i]t is unclear whether the circuit panel’s decision remains binding law in this Circuit on other issues decided by the panel – specifically on the jurisdictional limits on a bankruptcy court’s power to approve a third-party non-debtor release and injunction.” The bankruptcy court further provided that “[e]ven if the circuit panel decision is not binding, it may nevertheless be persuasive with respect to the jurisdictional issue.” The monitor argued that the standard in Metromedia was met here because the Canadian courts also applied a rigorous standard in determining the validity of the non-debtor, third-party release and injunction. Although the bankruptcy court said that it might be so, the standard in Manville seems to go the other way when applied in a plenary Chapter 11 case. The bankruptcy court, however, stated that the principles behind the “enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.”

100 Id. at *8.
101 See id.
102 In re Metromedia Fiber Network, Inc., 416 F.3d 136 (2d Cir. 2005).
103 Id. at 141-42.
104 In re Johns-Manville Corp., 517 F.3d 52 (2d Cir. 2008).
105 Id. at 66.
107 See id. at 2206.
109 Id.
110 Id. at *8.
111 Id. at *9.
The bankruptcy court stated that under Chapter 15 analysis, recognition is limited by the public policy considerations of § 1506. The bankruptcy court said that the public policy exception of Chapter 15 should be “narrowly construed.” The bankruptcy court declared that even though the Second Circuit severely restricts a bankruptcy court to enforce non-debtor, third party releases and injunctions, they are not entirely precluded. The bankruptcy court noted that the Canadian courts that dealt with the issue in this case had expressed similar concerns before holding the release and injunction to be valid.

The bankruptcy court further stated that comity should be extended to a foreign common law jurisdiction that has similar procedures to that of the United States. “The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process.” Since the issue over the non-debtor, third-party release and injunction had been litigated and the Canadian courts took into consideration the concerns that accompany the enforcement of those provisions, the principle of comity suggests that the bankruptcy court should not question the Canadian courts who believed that such a provision is necessary in the face of the Canadian ABCP market crisis. Therefore, § 1506 should “not preclude giving comity to the Canadian Orders in this case.”

III. NOT SO SWEET: IN RE GOLD & HONEY, LTD., THE CASE THAT FOUND PUBLIC POLICY VIOLATION

In In re Gold & Honey, the bankruptcy court of the Eastern District of New York (“E.D.N.Y.”) refused to recognize an Israeli bankruptcy proceeding due to the public policy consideration of § 1506. Decided in August 2009, this case is an important breakthrough since it is the first case, and only case thus far, where a bankruptcy court has refused to recognize a foreign proceeding due to it being “manifestly contrary to the public policy of the

112 Id. at *11.
113 Id.
115 In re Metcalfe, 2010 WL 20603, at *12.
116 Id. at *11.
The debtors in the case are Gold & Honey LP and Gold & Honey, Ltd. The former is a New York limited partnership that has an office in Port Washington, New York. Gold & Honey, Ltd., on the other hand, is a corporation that was organized under the laws of Israel, is a general partner of Gold & Honey LP and is a 49.5% equity holder of that partnership. The First International Bank of Israel (FIBI) is a foreign banking corporation that was organized under the laws of Israel and was a pre-petition lender to Gold & Honey LP. In return for the loans, Gold & Honey LP and Gold & Honey, Ltd. pledged some equipments, machinery, and accounts receivable as collateral security for repayment of the loans.\(^\text{119}\)

Around March 2008, FIBI started litigation in Israel and in July 2008, it seized a large amount of assets of both Gold & Honey LP and Gold & Honey, Ltd. and started an Israeli receivership proceeding. In September 2008, the debtors filed a Chapter 11 petition, thereby prompting the automatic stay. In October 2008, FIBI continued to have a receiver appointed before the Israeli court for the proceeding. At an October 2008 hearing before the Israeli court, FIBI stated that the automatic stay did not apply to FIBI as it attempts to gain control of the property of the bankruptcy estate of the debtors.\(^\text{120}\) At the exact same time, the debtors asked the bankruptcy court in the Eastern District of New York to issue an order that would determine that the automatic say applied to their “property wherever located and by whomever held, and, in particular, to the Israeli Receivership Proceeding.”\(^\text{121}\) FIBI made a special appearance in which it asserted that it was not within the bankruptcy court’s jurisdiction and that the Israeli proceeding was also not within its jurisdiction. The bankruptcy court determined that the automatic stay did apply to debtors’ property everywhere and regardless of who held it.\(^\text{122}\) The bankruptcy court further warned FIBI that if it continued to pursue the Israeli proceeding before the Israeli court, “it did so at its own peril.”\(^\text{123}\) FIBI, however, disregarded the bankruptcy court’s advice and continued to prosecute the Israeli proceeding. FIBI presented the Israeli court with the stay order of the bankruptcy court, which prompted the Israeli court to issue an order at the end of October 2008 that refused to give effect to the stay order.\(^\text{124}\) In November 2008, the Israeli court appointed an attorney for FIBI and an accountant as permanent receivers...
of the Israeli proceeding.\textsuperscript{125} In January 2009, FIBI filed a motion for relief pursuant to §§ 362(d)(1) and (d)(2) to lift the automatic stay.\textsuperscript{126} By the end of the month, FIBI filed petitions for recognition under Chapter 15. FIBI filed the petitions in order to have the Israeli receivership proceeding recognized as a foreign main proceeding of the debtors. The bankruptcy court refused to recognize the Israeli receivership proceeding as a foreign proceeding – whether main or non-main – because according to the Bankruptcy Code, the Israeli proceeding is not collective in nature.\textsuperscript{127} Furthermore, the bankruptcy court doubted that one of the receivers of the Israeli proceeding would work in the full interests of the other creditors since he is employed as an attorney for FIBI at the same time.\textsuperscript{128} The bankruptcy court also refused to recognize the Israeli proceeding for two other reasons: “the Receivers were appointed in violation of the automatic stay; and recognition of the petitions would have an adverse effect on public policy, pursuant to section 1506.”\textsuperscript{129}

The bankruptcy court found that the receivers were appointed in violation of the automatic stay since the automatic stay applied as soon as the debtors filed petitions under Chapter 11. The stay enjoined FIBI from pursuing the receivership proceeding in Israel, however, FIBI refused to comply with the stay even when the bankruptcy court strongly advised it to do so. FIBI knew that the automatic stay applied to the debtors’ property everywhere and in the

\begin{itemize}
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Sections 362(d)(1) and (2) of the Bankruptcy Code provide basis for relief from the automatic stay. They state:
    \begin{enumerate}
      \item On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
      \begin{enumerate}
        \item for cause, including the lack of adequate protection of an interest in property of such party in interest;
        \item with respect to a stay of an act against property under subsection (a) of this section, if—
          \begin{enumerate}
            \item the debtor does not have an equity in such property; and
            \item such property is not necessary to an effective reorganization.
          \end{enumerate}
      \end{enumerate}
    \end{enumerate}
  \item \textsuperscript{127} 11 U.S.C. §§ 362(d)(1) and (2).
  \item \textsuperscript{128} 11 U.S.C. § 101(23) defines “foreign proceeding” as:
    The term “foreign proceeding” means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.
  \item \textsuperscript{129} In re Gold & Honey, 410 B.R. at 371 n.17.
  \item \textsuperscript{129} Id. at 368.
\end{itemize}
hands of whomever and “[i]t would fly in the face of the Bankruptcy Code for this Court to recognize the petitions here and authorize the post-petition appointed Receivers to proceed in the United States when they were appointed as the result of a knowing and willful violation of the stay by FIBI.” The case law of the Second Circuit further entails that a violation of the automatic stay would make an action void. Furthermore, the bankruptcy court provided that although the Israeli court lifted the stay for FIBI, the bankruptcy court, and not the Israeli court, had the power to lift the stay and not the Israeli court.

The bankruptcy court then analyzed whether the recognition of the Israeli proceeding would violate a fundamental public policy of the United States pursuant to § 1506. The court provided that in determining whether recognition of a petition would violate § 1506, the court must apply the provision narrowly and only to the most fundamental of American public policies that are at risk. The receivers relied on the In re Ernst & Young case in arguing that the public policy exception should not apply to their case. The bankruptcy court, however, distinguished that case from the case at bar by stating that the former case did not involve a fundamental American public policy. The receivers also relied upon the In re Ephedra Products Liability case. The bankruptcy court also distinguished that case from the case at bar and stated that although the former case involved a fundamental American right (i.e., trial by jury), bankruptcy cases usually do not have jury trials. Violation of the automatic stay, however, would make the stay absolutely meaningless.

Recognizing a foreign seizure of a debtor’s assets postpetition would severely hinder United States bankruptcy courts’ abilities to carry out two of the most fundamental policies and purposes of the automatic stay — namely, preventing one creditor from obtaining an advantage over other creditors, and providing for the efficient and orderly distribution of a debtor’s assets to all creditors in accordance with their relative priorities.

Furthermore, the bankruptcy court stated that recognizing the Israeli

130 Id.
132 In re Gold & Honey, 410 B.R. at 369.
133 See id. at 372.
134 Id.
135 Id.
136 Id.
proceeding would only legitimize FIBI’s actions and would invite a future creditor to violate the stay in order to obtain a debtor’s assets located outside of the United States, while at the same time allowing it to receive benefits within American jurisdiction. For this reason, the bankruptcy court held that the recognition of the Israeli receivership proceeding and its providing of relief would violate a fundamental American public policy under the meaning of § 1506.

IV. CONCLUSION

The five cases mentioned above illustrate how the courts in the United States have applied the § 1506 public policy exception when it came to both recognizing foreign bankruptcy proceedings and providing relief in those cases. Since Chapter 15 was added to the U.S. Bankruptcy Code less than five years ago, there was virtually no case law on point that would guide the courts when it came to applying § 1506 to the cases at hand. These courts had to turn to the legislative intent in Congress’ adoption of the Model Law. Both the legislative intent and Article 6 of the UNCITRAL Model Law provide that when it comes to applying the public policy exception, the courts should construe that provision narrowly. So the question inevitably arises: Did the courts in these five cases apply § 1506 narrowly?

Four of the five cases, faced with public policy concerns when determining whether to grant recognition of a foreign bankruptcy proceeding and/or when providing relief, concluded that § 1506 should not bar the recognition of the foreign bankruptcy proceeding or in granting relief in their respective cases. Although, in these cases, there were legitimate public policy issues raised, such as the place of the foreign main proceeding not recognizing a trial by jury, the courts still determined that the fundamental public policies of the United States were not under threat if the foreign proceeding was recognized or a petition of relief was granted. Therefore, it is clear that the courts in these cases interpreted and applied § 1506 narrowly.

The only case where a court found that a fundamental public policy of the United States was violated under § 1506 was the Gold & Honey case. In that case, the E.D.N.Y. bankruptcy court held that the Israeli receivership should not receive any relief since it violated the automatic stay. We are led to ask whether this case interpreted and applied § 1506 broadly and whether this may threaten the system of making it easier to grant recognition or relief to

137 See id.
138 It should be noted, however, that the courts did consult older cases that dealt with the issue of comity.
cross-border insolvency proceedings. The interesting thing about this case is that unlike the other cases mentioned above, the Gold & Honey case focused on the action of the foreign party seeking assistance. The cases where the courts found no public policy violations under § 1506 focused upon the procedures and laws of a foreign jurisdiction (such as the lack of trials by jury in Canada) while the Gold & Honey case focused upon the behavior of the foreign party seeking relief. Nevertheless, we can conclude that the court did not interpret and apply § 1506 broadly since it explicitly recognized that the section should be applied narrowly and that the automatic stay is of such fundamental importance in U.S. bankruptcy law that in assisting the Israeli receivership, the automatic stay would be rendered meaningless. Furthermore, finding a public policy violation under § 1506 would not place similar hurdles to granting recognition to international insolvency proceeding and relief as was the case when § 304 was the law.

Thus, although courts consult § 1506 when it comes to assisting international insolvency proceedings in the form of granting recognition and relief, the five cases above have demonstrated that § 1506 has not been interpreted nor applied broadly. Based on the cases thus far, § 1506 would not pose much of a threat in granting recognition or relief when it comes to international insolvency proceedings. In other words, § 1506 has been construed so narrowly by at least four of the five cases that it is safe to assume that it will not play much of a significant role in granting recognition and relief to representatives of foreign proceedings. Therefore, these cases demonstrate how the courts of the United States, when faced with public policy concerns under § 1506, have stayed true to not only the congressional intent, but also to the spirit of the UNCITRAL Model Law.

139 It may be argued that in the Iida case, the debtor claimed that the Japanese trustee did not officially obtain recognition of his status from state law or a bankruptcy court. Hence, it may be argued, that the court focused upon the trustee's behavior. This is not the case, however. The issue in the case was whether the Hawaiian state law and the Bankruptcy Code required such an action from the trustee. The focus was not so much on the behavior of the trustee, but what the Hawaiian state law and the Bankruptcy Code entailed. Ultimately, the argument can be made that the court accepted the trustee's argument that the debtor was seeking to avoid Japanese bankruptcy law, which the court found to be similar to U.S. bankruptcy law, despite some procedural differences. In the Gold & Honey case, the court was focused wholly upon the Israeli receivership violating the automatic stay.