Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C 36, AS AMENDED

AND IN THE MATTER OF TK HOLDINGS INC., AND THOSE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO (the "Chapter 11 Debtors")

APPLICATION OF TK HOLDINGS INC. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

BRIEF OF AUTHORITIES OF THE APPLICANT

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TAB 1

Ontario Supreme Court
Babcock & Wilcox Canada Ltd.,
Date: 2000-02-25

In the Matter of Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of Babcock & Wilcox Canada Ltd.

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: February 25, 2000

Judgment: February 25, 2000

Docket: 00-CL-3667

Derrick Toy, for Babcock & Wilcox Canada Ltd.

Paul Macdonald, for Citibank North America Inc., Lenders under the Post-Petition Credit Agreement.

***Farley J.*:**

[1] I have had the opportunity to reflect on this matter which involves an aspect of the recent amendments to the insolvency legislation of Canada, which amendments have not yet been otherwise dealt with as to their substance. The applicant, Babcock & Wilcox Canada Ltd. ("BW Canada"), a solvent company, has applied for an interim order under s. 18.6 of the *Companies' Creditors Arrangement Act* ("CCAA"):

> (a) that the proceedings commenced by BW Canada's parent U.S. corporation and certain other U.S. related corporations (collectively "BWUS") for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with mass asbestos claims before the U.S. Bankruptcy Court be recognized as a "foreign proceeding" for the purposes of s. 18.6;
>
> (b) that BW Canada be declared a company which is entitled to avail itself of the provisions of s. 18.6;
>
> (c) that there be a stay against suits and enforcements until May 1, 2000 (or such later date as the Court may order) as to asbestos related proceedings against BW Canada, its property and its directors;

(d) that BW Canada be authorized to guarantee the obligations of its parent to the DIP Lender (debtor in possession lender) and grant security therefor in favour of the DIP Lender; and

(e) and for other ancillary relief.

[2] In Chapter 11 proceedings under the U.S. Bankruptcy Code, the U.S. Bankruptcy Court in New Orleans issued a temporary restraining order on February 22, 2000 wherein it was noted that BW Canada may be subject to actions in Canada similar to the U.S. asbestos claims. U.S. Bankruptcy Court Judge Brown's temporary restraining order was directed against certain named U.S. resident plaintiffs in the asbestos litigation:

> …and towards all plaintiffs and potential plaintiffs in Other Derivative Actions, that they are hereby restrained further prosecuting Pending Actions or further prosecuting or commencing Other Derivative Actions against Non-Debtor Affiliates, until the Court decides whether to grant the Debtors' request for a preliminary injunction.

Judge Brown further requested the aid and assistance of the Canadian courts in carrying out the U.S. Bankruptcy Court's orders. The "Non-Debtor Affiliates" would include BW Canada.

[3] Under the 1994 amendments to the U.S. Bankruptcy Code, the concept of the establishment of a trust sufficient to meet the court determined liability for a mass torts situations was introduced. I am advised that after many years of successfully resolving the overwhelming majority of claims against it on an individual basis by settlement on terms BWUS considered reasonable, BWUS has determined, as a result of a spike in claims with escalating demands when it was expecting a decrease in claims, that it is appropriate to resort to the mass tort trust concept. Hence its application earlier this week to Judge Brown with a view to eventually working out a global process, including incorporating any Canadian claims. This would be done in conjunction with its joint pool of insurance which covers both BWUS and BW Canada. Chapter 11 proceedings do not require an applicant thereunder to be insolvent; thus BWUS was able to make an application with a view towards the 1994 amendments (including s. 524(g)). This subsection would permit the U.S. Bankruptcy Court on confirmation of a plan of reorganization under Chapter 11 with a view towards rehabilitation in the sense of avoiding insolvency in a mass torts situation to:

> …enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claims or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust.

[4] In 1997, ss. 267-275 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended ("BIA") and s. 18.6 of the CCAA were enacted to address the rising number of international insolvencies ("1997 Amendments"). The 1997 Amendments were introduced after a lengthy consultation process with the insolvency profession and others. Previous to the 1997 Amendments, Canadian courts essentially would rely on the evolving common law principles of comity which permitted the Canadian court to recognize and enforce in Canada the judicial acts of other jurisdictions.

[5] La Forest J in *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.), at p. 269 described the principle of comity as:

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, 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 protections of its laws…

[6] In *ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]), at pp. 302-3 I noted the following:

> Allow me to start off by stating that I agree with the analysis of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.) when in discussing *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, he states at p.411:
>
> > The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra.* The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional

enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:

> Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem,* such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the slate where the judgment was given has power over the litigants, the judgments of its courts should be respected.* (emphasis added in original)

Morguard Investments was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule - there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process. (my emphasis added)

Certainly the substantive and procedural aspects of the U.S. Bankruptcy Code including its 1994 amendments are not so different and do not radically diverge from our system.

[7] After reviewing La Forest J.'s definition of comity, I went on to observe at p. 316:

> As was discussed by J.G. Castel, *Canadian Conflicts of Laws,* 3rd ed. (Toronto: Butterworths, 1994) at p. 270, there is a presumption of validity attaching to a foreign judgment unless and until it is established to be invalid. It would seem that the same type of evidence would be required to impeach a foreign judgment as a domestic one: fraud practiced on the court or tribunal: see *Sun Alliance Insurance Co. v. Thompson* (1981), 56 N.S.R. (2d) 619, 117 A.P.R. 619 (T.D.), Sopinka, supra, at p. 992.

La Forest J. went on to observe in *Morguard* at pp. 269-70:

> In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.
>
> . . .
>
> Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.

See also *Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.), at p. 39.

[8] While *Morguard* was an interprovincial case, there is no doubt that the principles in that case are equally applicable to international matters in the view of MacPherson J. and myself in *Arrowmaster* (1993), 17 O.R. (3d) 407 (Ont. Gen. Div.), and *ATL* respectively. Indeed the analysis by La Forest J. was on an international plane. As a country whose well-being is so heavily founded on international trade and investment, Canada of necessity is very conscious of the desirability of invoking comity in appropriate cases.

[9] In the context of cross-border insolvencies, Canadian and U.S. Courts have made efforts to complement, coordinate and where appropriate accommodate the proceedings of the other. Examples of this would include *Olympia & York Developments Ltd., Ever fresh Beverages Inc.* and *Loewen Group Inc. v. Continental Insurance Co. of Canada* (1997), 48 C.C.L.I. (2d) 119 (B.C. S.C.). Other examples involve the situation where a multi-jurisdictional proceeding is specifically connected to one jurisdiction with that jurisdiction's court being allowed to exercise principal control over the insolvency process: see *Roberts v. Picture Butte Municipal Hospital* (1998), 23 C.P.C. (4th) 300 (Alta. Q.B.), at pp. 5-7 [[1998] A.J. No. 817];

Microbiz Corp. v. Classic Software Systems Inc. (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.), at p. 4; *Tradewell Inc. v. American Sensors Electronics, Inc.,* 1997 WL 423075 (S.D.N.Y. 1997).

[10] In *Roberts,* Forsythe J. at pp. 5-7 noted that steps within the proceedings themselves are also subject to the dictates of comity in recognizing and enforcing a U.S. Bankruptcy Court stay in the *Dow Corning* litigation [*Taylor v. Dow Corning Australia Pty. Ltd.* (December 19, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.)] as to a debtor in Canada so as to promote greater efficiency, certainty and consistency in connection with the debtor's restructuring efforts. Foreign claimants were provided for in the U.S. corporation's plan. Forsyth J. stated:

> Comity and cooperation are increasingly important in the bankruptcy context. *As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination there would be multiple proceedings, inconsistent judgments and general uncertainty.*
>
> *…I find that common sense dictates that these matters would be best dealt with by one court, and in the interest of promoting international comity it seems the forum for this case is in the U.S. Bankruptcy Court.* Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiffs attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding… (emphasis added)

[11] The CCAA as remedial legislation should be given a liberal interpretation to facilitate its objectives. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 320; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

[12] David Tobin, the Director General, Corporate Governance Branch, Department of Industry in testifying before the Standing Committee on Industry regarding Bill C-5, An Act to amend the BIA, the CCAA and the Income Tax Act, stated at 1600:

> Provisions in Bill C-5 attempt to actually codify, which has always been the practice in Canada. They include the Court recognition of foreign representatives; Court authority to

> make orders to facilitate and coordinate international insolvencies; provisions that would make it clear that foreign representatives are allowed to commence proceedings in Canada, as per Canadian rules – however, they clarify that foreign stays of proceedings are not applicable but a foreign representative can apply to a court for a stay in Canada; and Canadian creditors and assets are protected by the bankruptcy and insolvency rules.

The philosophy of the practice in international matters relating to the CCAA is set forth in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.), at p. 167 where Blair J. stated:

> The Olympia & York re-organization involves proceedings in three different jurisdictions: Canada, the United States and the United Kingdom. Insolvency disputes with international overtones and involving property and assets in a multiplicity of jurisdictions are becoming increasingly frequent. Often there are differences in legal concepts – sometimes substantive, sometimes procedural – between the jurisdictions. The Courts of the various jurisdictions should seek to cooperate amongst themselves, in my view, in facilitating the trans-border resolution of such disputes as a whole, where that can be done in a fashion consistent with their own fundamental principles of jurisprudence. The interests of international cooperation and comity, and the interests of developing at least some degree of certitude in international business and commerce, call for nothing less.

Blair J. then proceeded to invoke inherent jurisdiction to implement the Protocol between the U.S. Bankruptcy Court and the Ontario Court. See also my endorsement of December 20, 1995, in *Everfresh Beverages Inc.* where I observed: “I would think that this Protocol demonstrates the ‘essence of comity’ between the Courts of Canada and the United States of America.” *Everfresh* was an example of the effective and efficient use of the Cross-Border Insolvency Concordat, adopted by the Council of the International Bar Association on May 31, 1996 (after being adopted by its Section on Business Law Council on September 17, 1995), which Concordat deals with, inter alia, principal administration of a debtor’s reorganization and ancillary jurisdiction. See also the UNCITRAL Model Law on Cross-Border Insolvency.

[13] Thus it seems to me that this application by BW Canada should be reviewed in light of (i) the doctrine of comity as analyzed in *Morguard, Arrowmaster* and *ATL, supra,* in regard to

its international aspects; (ii) inherent jurisdiction; (iii) the aspect of the liberal interpretation of the CCAA generally; and (iv) the assistance and codification of the 1997 Amendments.

"Foreign proceeding" is defined in s. 18.6(1) as:

> In this section,
>
> > "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;…

Certainly a U.S. Chapter 11 proceeding would fit this definition subject to the question of "debtor". It is important to note that the definition of "foreign proceeding" in s. 18.6 of the CCAA contains no specific requirement that the debtor be insolvent. In contrast, the BIA defines a "debtor" in the context of a foreign proceeding (Part XIII of the BIA) as follows:

> s. 267 In this Part,
>
> > "debtor" means an *insolvent person* who has property in Canada, a *bankrupt* who has property in Canada or a *person who has the status of a bankrupt* under foreign law in a foreign proceeding and has property in Canada;… (emphasis added)

I think it a fair observation that the BIA is a rather defined code which goes into extensive detail. This should be contrasted with the CCAA which is a very short general statute which has been utilized to give flexibility to meet what might be described as the peculiar and unusual situation circumstances. A general categorization (which of course is never completely accurate) is that the BIA may be seen as being used for more run of the mill cases whereas the CCAA may be seen as facilitating the more unique or complicated cases. Certainly the CCAA provides the flexibility to deal with the thornier questions. Thus I do not think it unusual that the draftees of the 1997 Amendments would have it in their minds that the provisions of the CCAA dealing with foreign proceedings should continue to reflect this broader and more flexible approach in keeping with the general provisions of the CCAA, in contrast with the corresponding provisions under the BIA. In particular, it would appear to me to be a reasonably plain reading interpretation of s. 18.6 that recourse may be had to s. 18.6 of the CCAA in the case of a solvent debtor. Thus I would conclude that the aspect of insolvency is not a condition precedent vis-a-vis the "debtor" in the foreign proceedings (here the Chapter 11 proceedings) for the proceedings in Louisiana to be a foreign proceeding

under the definition of s. 18.6. I therefore declare that those proceedings are to be recognized as a “foreign proceeding” for the purposes of s. 18.6 of the CCAA.

[14] It appears to me that my conclusion above is reinforced by an analysis of s. 18.6(2) which deals with concurrent filings by a debtor under the CCAA in Canada and corresponding bankruptcy or insolvency legislation in a foreign jurisdiction. This is not the situation here, but it would be applicable in the *Loewen* case. That subsection deals with the coordination of proceedings as to a “debtor company” initiated pursuant to the CCAA and the foreign legislation.

> s. 18.6(2). The court may, in respect of a *debtor company,* make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a coordination of proceedings under the Act with any foreign proceeding. (emphasis added)

[15] The definition of “debtor company” is found in the general definition section of the CCAA, namely s. 2 and that definition incorporates the concept of insolvency. Section 18.6(2) refers to a “debtor company” since only a “debtor company” can file under the CCAA to propose a compromise with its unsecured or secured creditors: ss. 3, 4 and 5 CCAA. See also s. 18.6(8) which deals with currency concessions “[w]here a compromise or arrangement is proposed in respect of a debtor company…”. I note that “debtor company” is not otherwise referred to in s. 18.6; however “debtor” is referred to in both definitions under s. 18.6(1).

[16] However, s. 18.6(4) provides a basis pursuant to which a company such as BW Canada, a solvent corporation, may seek judicial assistance and protection in connection with a foreign proceeding. Unlike s. 18.6(2), s. 18.6(4) does not contemplate a full filing under the CCAA. Rather s. 18.6(4) may be utilized to deal with situations where, notwithstanding that a full filing is not being made under the CCAA, ancillary relief is required in connection with a foreign proceeding.

> s. 18.6(4) Nothing in this section prevents the court, on the application of a foreign representative or *any other interested persons,* from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act. (emphasis added)

BW Canada would fit within “any interested person” to bring the subject application to apply the principles of comity and cooperation. It would not appear to me that the relief requested is of a nature contrary to the provisions of the CCAA.

[17] Additionally there is s. 18.6(3) whereby once it has been established that there is a foreign proceeding within the meaning of s. 18.6(1) (as I have concluded there is), then this court is given broad powers and wide latitude, all of which is consistent with the general judicial analysis of the CCAA overall, to make any order it thinks appropriate in the circumstances.

> s. 18.6(3) An order of the court under this Section may be made on such terms and conditions as the court considers appropriate in the circumstances.

This subsection reinforces the view expressed previously that the 1997 Amendments contemplated that it would be inappropriate to pigeonhole or otherwise constrain the interpretation of s. 18.6 since it would be not only impracticable but also impossible to contemplate the myriad of circumstances arising under a wide variety of foreign legislation which deal generally and essentially with bankruptcy and insolvency but not exclusively so. Thus, the Court was entrusted to exercise its discretion, but of course in a judicial manner.

[18] Even aside from that, I note that the Courts of this country have utilized inherent jurisdiction to fill in any gaps in the legislation and to promote the objectives of the CCAA. Where there is a gap which requires bridging, then the question to be considered is what will be the most practical common sense approach to establishing the connection between the parts of the legislation so as to reach a just and reasonable solution. See *Westar Mining Ltd., Re* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.), at pp. 93-4; *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C. C.A.), at p. 2; *Lehndorff General Partner Ltd.* at p. 30.

[19] The Chapter 11 proceedings are intended to resolve the mass asbestos related tort claims which seriously threaten the long term viability of BWUS and its subsidiaries including BW Canada. BW Canada is a significant participant in the overall Babcock & Wilcox international organization. From the record before me it appears reasonably clear that there is an interdependence between BWUS and BW Canada as to facilities and services. In addition there is the fundamental element of financial and business stability. This interdependence has

been increased by the financial assistance given by the BW Canada guarantee of BWUS' obligations.

[20] To date the overwhelming thrust of the asbestos related litigation has been focussed in the U.S. In contradistinction BW Canada has not in essence been involved in asbestos litigation to date. The 1994 amendments to the U.S. Bankruptcy Code have provided a specific regime which is designed to deal with the mass tort claims (which number in the hundreds of thousands of claims in the U.S.) which appear to be endemic in the U.S. litigation arena involving asbestos related claims as well as other types of mass torts. This Court's assistance however is being sought to stay asbestos related claims against BW Canada with a view to this stay facilitating an environment in which a global solution may be worked out within the context of the Chapter 11 proceedings trust.

[21] In my view, s. 18.6(3) and (4) permit BW Canada to apply to this Court for such a stay and other appropriate relief. Relying upon the existing law on the recognition of foreign insolvency orders and proceedings, the principles and practicalities discussed and illustrated in the Cross-Border Insolvency Concordat and the UNCITRAL Model Law on Cross-Border Insolvencies and inherent jurisdiction, all as discussed above, I would think that the following may be of assistance in advancing guidelines as to how s. 18.6 should be applied. I do not intend the factors listed below to be exclusive or exhaustive but merely an initial attempt to provide guidance:

(a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.

(b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.

(c) All stakeholders are to be treated equitably, and to the extent reasonably possible, common or like stakeholders are to be treated equally, regardless of the jurisdiction in which they reside.

(d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis

of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

(e) The role of the court and the extent of the jurisdiction it exercises will vary on a case by case basis and depend to a significant degree upon the court's nexus to that enterprise; in considering the appropriate level of its involvement, the court would consider:

(i) the location of the debtor's principal operations, undertaking and assets;

(ii) the location of the debtor's stakeholders;

(iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;

(iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;

(v) such other factors as may be appropriate in the instant circumstances.

(f) Where one jurisdiction has an ancillary role,

(i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;

(ii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

(g) As effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into the court to review the granted order with a view, if thought desirable, to rescind or vary the granted order or to obtain any other appropriate relief in the circumstances.

[22] Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as

requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft approach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the "comeback" clause in the draft order presented to me and which I find reasonable in the circumstances. It appears appropriate, in the circumstances that BW Canada guarantee BWUS' obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the *Business Corporations Act* (Ontario). I note that there is also a provision for an "Information Officer" who will give quarterly reports to this Court. Notices are to be published in the Globe & Mail (National Edition) and the National Post. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed to the U.S. As discussed above the draft order also includes an appropriate "comeback" clause. This Court (and I specifically) look forward to working in a cooperative judicial way with the U.S. Bankruptcy Court (and Judge Brown specifically).

[23] I am satisfied that it is appropriate in these circumstances to grant an order in the form of the revised draft (a copy of which is attached to these reasons for the easy reference of others who may be interested in this area of s. 18.6 of the CCAA).

[24] Order to issue accordingly.

Application granted.

Appendix

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE FRIDAY, THE 25TH DAY OF

MR. JUSTICE FARLEY FEBRUARY, 2000

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

INITIAL ORDER

THIS MOTION made by the Applicant Babcock & Wilcox Canada Ltd. for an Order substantially in the form attached to the Application Record herein was heard this day, at 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, the Affidavit of Victor J. Manica sworn February 23, 2000 (the "Manica Affidavit"), and on notice to the counsel appearing, and upon being advised that no other person who might be interested in these proceedings was served with the Notice of Application herein.

SERVICE

1. *THIS COURT ORDERS* that the time for service of the Notice of Application and the Affidavit in support of this Application be and it is hereby abridged such that the Application is properly returnable today, and, further, that any requirement for service of the Notice of Application and of the Application Record upon any interested party, other than the parties herein mentioned, is hereby dispensed with.

RECOGNITION OF THE U.S. PROCEEDINGS

2. *THIS COURT ORDERS AND DECLARES* that the proceedings commenced by the Applicant's United States corporate parent and certain other related corporations in the United States for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with asbestos claims before the U.S. Bankruptcy Court (the "U.S. Proceedings") be and hereby is recognized as a "foreign proceeding" for purposes of

Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, (the "CCAA").

APPLICATION

3. *THIS COURT ORDERS AND DECLARES* that the Applicant is a company which is entitled to relief pursuant to s. 18.6 of the CCAA.

PROTECTION FROM ASBESTOS PROCEEDINGS

4. *THIS COURT ORDERS* that until and including May 1, 2000, or such later date as the Court may order (the "Stay Period"), no suit, action, enforcement process, extra-judicial proceeding or other proceeding relating to, arising out of or in any way connected to damages or loss suffered, directly or indirectly, from asbestos, asbestos contamination or asbestos related diseases ("Asbestos Proceedings") against or in respect of the Applicant, its directors or any properly of the Applicant, wheresoever located, and whether held by the Applicant in whole or in part, directly or indirectly, as principal or nominee, beneficially or otherwise shall be commenced, and any Asbestos Proceedings against or in respect of the Applicant, its directors or the Applicant's Property already commenced be and are hereby stayed and suspended.

5. *THIS COURT ORDERS* that during the Stay Period, the right of any person, firm, corporation, governmental authority or other entity to assert, enforce or exercise any right, option or remedy arising by law, by virtue of any agreement or by any other means, as a result of the making or filing of these proceedings, the U.S. Proceedings or any allegation made in these proceedings or the U.S. Proceedings be and is hereby restrained.

DIP FINANCING

6. *THIS COURT ORDERS* that the Applicant is hereby authorized and empowered to guarantee the obligations of its parent, The Babcock & Wilcox Company, to Citibank, N.A., as Administrative Agent, the Lenders, the Swing Loan Lender, and Issuing Banks (as those terms are defined in the Post-Petition Credit Agreement (the "Credit Agreement")) dated as of February 22, 2000 (collectively, the "DIP Lender"), and to grant security (the "DIP Lender's Security") for such guarantee substantially on the terms and conditions set forth in the Credit Agreement.

7. *THIS COURT ORDERS* that the obligations of the Applicant pursuant to the Credit Agreement, the DIP Lender's Security and all the documents delivered pursuant thereto constitute legal, valid and binding obligations of the Applicant enforceable against it in accordance with the terms thereof, and the payments made and security granted by the Applicant pursuant to such documents do not constitute fraudulent preferences, or other challengeable or reviewable transactions under any applicable law.

8. *THIS COURT ORDERS* that the DIP Lender's Security shall be deemed to be valid and effective notwithstanding any negative covenants, prohibitions or other similar provisions with respect to incurring debt or the creation of liens or security contained in any existing agreement between the Applicant and any lender and that, notwithstanding any provision to the contrary in such agreements,

(a) the execution, delivery, perfection or registration of the DIP Lender's Security shall not create or be deemed to constitute a breach by the Applicant of any agreement to which it is a party, and

(b) the DIP Lender shall have no liability to any person whatsoever as a result of any breach of any agreement caused by or resulting from the Applicant entering into the Credit Agreement, the DIP Lender's Security or other document delivered pursuant thereto.

REPORT AND EXTENSION OF STAY

9. As part of any application by the Applicant for an extension of the Stay Period:

(a) the Applicant shall appoint Victor J. Manica, or such other senior officer as it deems appropriate from time to time, as an information officer (the "Information Officer");

(b) the Information Officer shall deliver to the Court a report at least once every three months outlining the status of the U.S. Proceeding, the development of any process for dealing with asbestos claims and such other information as the Information Officer believes to be material (the "Information Reports"); and

(c) the Applicant and the Information Officer shall incur no liability or obligation as a result of the appointment of the Information Officer or the fulfilment of the duties of the Information Officer in carrying out the provisions of this Order and no action or other proceedings shall be commenced against the Applicant or Information Officer as an result of or relating in any way to the appointment of the Information Officer or the

fulfilment of the duties of the Information Officer, except with prior leave of this Court and upon further order securing the solicitor and his own client costs of the Information Officer and the Applicant in connection with any such action or proceeding.

SERVICE AND NOTICE

10. *THIS COURT ORDERS* that the Applicant shall, within fifteen (15) business days of the date of entry of this Order, publish a notice of this Order in substantially the form attached as Schedule “A” hereto on two separate days in the Globe & Mail (National Edition) and the National Post.

11. *THIS COURT ORDERS* that the Applicant be at liberty to serve this Order, any other orders in these proceedings, all other proceedings, notices and documents by prepaid ordinary mail, courier, personal delivery or electronic transmission to any interested party at their addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

MISCELLANEOUS

12. *THIS COURT ORDERS* that notwithstanding anything else contained herein, the Applicant may, by written consent of its counsel of record herein, agree to waive any of the protections provided to it herein.

13. *THIS COURT ORDERS* that the Applicant may, from time to time, apply to this Court for directions in the discharge of its powers and duties hereunder or in respect of the proper execution of this Order.

14. *THIS COURT ORDERS* that, notwithstanding any other provision of this Order, any interested person may apply to this Court to vary or rescind this order or seek other relief upon 10 days’ notice to the Applicant and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

15. *THIS COURT ORDERS AND REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any

province and any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

Schedule “A”

NOTICE

RE: IN THE MATTER OF S. 18.6 OF THE COMPANIES’ CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED (the “CCAA”)

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

PLEASE TAKE NOTICE that this notice is being published pursuant to an Order of the Superior Court of Justice of Ontario made February 25, 2000. The corporate parent of Babcock & Wilcox Canada Ltd. and certain other affiliated corporations in the United States have filed for protection in the United States under Chapter 11 of the Bankruptcy Code to seek, as the result of recent, sharp increases in the cost of settling asbestos claims which have seriously threatened the Babcock & Wilcox Enterprise’s long term health, protection from mass asbestos claims to which they are or may become subject. Babcock & Wilcox Canada Ltd. itself has not filed under Chapter 11 but has sought and obtained an interim order under Section 18.6 of the CCAA affording it a stay against asbestos claims in Canada. Further application may be made to the Court by Babcock & Wilcox Canada Ltd. to ensure fair and equal access for Canadians with asbestos claims against Babcock & Wilcox Canada Ltd. to the process established in the United States. Representations may also be made by parties who would prefer to pursue their remedies in Canada.

Persons who wish to be a party to the Canadian proceedings or to receive a copy of the order or any further information should contact counsel for Babcock & Wilcox Canada Ltd., Derrick C. Tay at Meighen Demers (Telephone (416) 340-6032 and Fax (416) 977-5239).

DATED this day of, 2000 at Toronto, Canada

Court File No. 00-CL-3667

IN THE MATTER OF S. 18.6 of THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST PROCEEDINGS

INITIAL ORDER

MEIGHEN DEMERS
Barristers & Solicitors
Suite 1100, Box 11
Merrill Lynch Canada Tower
Sun Life Centre
200 King Street West
Toronto, Ontario M5H 3T4

DERRICK C. TAY ORESTES PASPARAKIS
Tel: (416) 340-6000
Fax:(416)977-5239
Solicitors for the Applicant

TAB 2

Ontario Supreme Court
Matlack Inc., Re
Date: 2001-04-19

Heard: April 19, 2001

Judgment: April 19, 2001

Docket: 01-CL-4109

E. Bruce Leonard, Shahana Kar, for Applicant, Matlack Inc.

Endorsement. *Farley J.*:

1 This was an application pursuant to section 18.6 of the *Companies' Creditors Arrangement Act* ("CCAA") for recognition of the proceedings commenced by the applicants in the U.S. Bankruptcy Court for the District of Delaware for relief under Chapter 11 of the United States Bankruptcy Code be recognized as a "foreign proceeding" for the purposes of the CCAA and to have this Court issue a stay of proceedings compatible with the Chapter 11 stay and for ancillary relief. That Order is granted with the usual comeback clause and subject to its expiry being May 11, 2001 unless otherwise extended.

2 The one applicant Matlack, Inc. ("Matlack") is a Pennsylvania corporation which is in the business of transporting chemical products throughout the United States, Mexico and Canada. It has developed a substantial Canadian business over the past 20 years and it currently operates a large leased facility in Ontario from which its Canadian licensed fleet services customers throughout Ontario and Quebec. Matlack's Canadian operations are fully integrated into Matlack's North American enterprise from both an operational and financial standpoint.

3 On March 29, 2001, Matlack and its affiliated applicants filed for relief under Chapter 11 and obtained relief precluding creditors subject to the U.S. Bankruptcy Court from commencing or continuing proceedings against the applicants. It is in the interests of all creditors and stakeholders of Matlack that its reorganization proceed in a coordinated and integrated fashion. The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, *wherever they are located.* Harmonization of proceedings in the U.S. and in Canada will create the most stable conditions under which a successful reorganization can be achieved and will allow for judicial supervision of all of Matlack's assets and enterprise

throughout the two jurisdictions. I note that a Canadian creditor of Matlack has recently seized some of Matlack's assets and intends to sell same in satisfaction of Matlack's obligations to it. It would seem to me that in the context of the proceedings, such a seizure would be of a preferential nature and thus unfair and prejudicial to the interests of Matlack's creditors generally.

4 Canadian courts have consistently recognized and applied the principles of comity. See *Morguard Investments Ltd. v. DeSavoye* (1990), 76 D.L.R. (4th) 256; *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Ont. Gen. Div.); *ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]); *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]), at pp. 160-2.

5 In an increasingly commercially integrated world, countries cannot live in isolation and refuse to recognize foreign judgments and orders. The Court's recognition of a foreign proceeding should depend on whether there is a real and substantial connection between the matter and the jurisdiction. The determination of whether a sufficient connection exists between a jurisdiction and a matter should be based on considerations of order, predictability and fairness rather than on a mechanical analysis of connections between the matter and the jurisdiction. See *Morguard supra; Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.).

6 I concur with what Forsyth J. stated in *Roberts v. Picture Butte Municipal Hospital* (1998), [1999] 4 W.W.R. 443, 64 Alta. L.R. (3d) 218, [1998] A.J. No. 817 (Alta. Q.B.), at pp. 5-7 (A.J.):

> Comity and cooperation are increasingly important in the bankruptcy context. *As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty.*
>
> *…I find that common sense dictates that these matters would be best dealt with by one Court, and in the interest of promoting international comity it seems the forum for this case is the U.S. Bankruptcy Court.* Thus, in either case, whether there has been attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiffs attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding… (emphasis added)

7 Based on principles of comity, where appropriate this Court has the jurisdiction to stay proceedings commenced against a party that has filed for bankruptcy protection in the U.S. An Ontario Court can accept the jurisdiction of a U.S. Bankruptcy Court over moveable

property in Ontario of an American company which has become subject to a Chapter 11 order. See *Roberts, supra; Borden & Elliot v. Winston Industries Inc.* (November 1, 1983), Doc. 352/83 (Ont. H.C.).

8 Where a cross-border insolvency proceeding is most closely connected to one jurisdiction, it is appropriate for the Court in that jurisdiction to exercise principal control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings. See *Microbiz Corp. v. Classic Software Systems Inc.* (1996), [1996] O.J. No. 5094 (Ont. Gen. Div.).

Section 18.6(1) of the CCAA provides the following definition:

> "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;

The U.S. Bankruptcy Code's Chapter 11 proceedings would be such a foreign proceeding.

10 As I indicated in *Babcock, supra,* at p. 166: "Section 18.6(4) may be utilized to deal with situations where, notwithstanding that a full filing is not being made under the CCAA, ancillary relief is required in connection with a foreign proceeding". Accordingly, it is appropriate for Matlack to be granted ancillary relief in recognizing the Chapter 11 proceedings and in enforcing the stay of proceedings resulting therefrom. In addition this Court can also grant relief pursuant to section 18.6(5). A stay in Canada would promote a stable atmosphere with a view to the reorganization of Matlack and its affiliates while allowing creditors, *wherever situate,* to be treated as equitably as possible. The stay would also assist with respect to claimants in Canada attempting to seize assets so as to get a leg up on the other creditors. See *Babcock, supra,* at pp. 165-6. Aside from the *Babcock* case, see also *Re GST Telecommunications Inc.* (May 18, 2000), Ground J. and *Re Grace Canada Inc.* (April 4, 2001), Farley J.

11 It would also seem to me that the relief requested is appropriate and in accordance with the principles set down in the Transnational Insolvency Project of the American Law Institute ("ALI"). This Project involved jurists, practitioners and academics from the NAFTA countries—the U.S., Mexico and Canada—and was completed as to the Restatement of the Law in 2000

after six years of analysis.[1] As a disclaimer, I should note that it was my privilege to tag along on this Project with the other participants who are recognized as outstanding in their fields.

12 The Project continues with the development of implementation and practical aids. Most recently this consists of the *Guidelines Applicable to Court-to-Court Communications on Cross-Border Cases.* I understand that Judge Mary Walrath is handling the Chapter 11 case. It will be my pleasure to work in coordination with her on this cross-border proceeding. To assist further with the handling of these matters, I would approve the proposed Protocol from the Canadian side, including what I understand may be the first opportunity to incorporate the *Communication Guidelines,* such to be effective if, as and when Judge Walrath is satisfied with same from the U.S. side.

13 A copy of the ALI Guidelines and the Matlack Protocol are annexed to these reasons for the benefit of other counsel involved in anything similar.

14 Order to issue accordingly.

Application granted.

The American Law Institute

TRANSNATIONAL INSOLVENCY PROJECT

PRINCIPLES OF COOPERATION IN TRANSNATIONAL INSOLVENCY CASES AMONG THE MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

Submitted by the Council to the Members of The American Law Institute for Discussion at the Seventy-Seventh Annual Meeting on May 15, 16, 17, and 18, 2000

The Executive Office

THE AMERICAN LAW INSTITUTE

4025 Chestnut Street

Philadelphia, Pa. 19104-3099

Amended—February 12, 2001

[1] A copy of this material may be obtained from the Executive Office, The American Law Institute, 4025 Chestnut Street, Philadelphia, PA, USA 19104-3099.

Appendix 2

Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases

Introduction:

One of the most essential elements of cooperation in cross-border cases is communication among the administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

The Guidelines at this time contemplate application only between Canada and the United States, because of the very different rules governing communications with Principles of Cooperation courts and among courts in Mexico. Nonetheless, a Mexican Court might choose to adopt some or all of these Guidelines for communications by a sindico with foreign administrators or courts.

A Court intending to employ the Guidelines—in whole or part, with or without modifications—should adopt them formally before applying them. A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the Guidelines.

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

Guideline 1

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Guideline 2

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 3

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 4

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an authorized Representative of the foreign Court on such terms as the Court considers appropriate.

Guideline 5

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

Guideline 6

Communications from a Court to another Court may take place by or through the Court:

(a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parries in such manner as the Court considers appropriate;

(b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed

or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

(c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means in which case Guideline 7 shall apply.

Guideline 7

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate.

(d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by

means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate;

(d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

(a) Each Court should be able to simultaneously hear the proceedings in the other Court.

(b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court to made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

(c) Submissions or applications by the representative or any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submission to it.

(d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

(e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 10

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof of exemplification thereof.

Guideline 11

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List which may include parties that are entitled to receive notice of

proceedings before the Court in the other jurisdiction ("Non-Resident Parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application of motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 16

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 17

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF DELAWARE

In re: MATLACK SYSTEMS, INC., *et al.,* Debtors

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT RSC 1985, c. C-36, SECTION 18.6 AS AMENDED

IN THE MATTER OF AN APPLICATION OF MATLACK, INC. AND THE OTHER PARTIES SET OUT IN SCHEDULE "A" ANCILLARY TO PROCEEDINGS UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

MATLACK, INC. AND THE OTHER PARTIES SET OUT IN SCHEDULE "A" Applicant

Chapter 11

Case No. 01-01114 (MFW)

Jointly Administered

CROSS-BORDER INSOLVENCY PROTOCOL

RE MATLACK, INC. AND AFFILIATES

This Cross-Border Insolvency Protocol (the "Protocol") shall govern the conduct of all parties in interest in a proceeding brought by Matlack, Inc. and certain other parties in the Ontario Superior Court of Justice and a proceeding brought by Matlack Systems, Inc. and certain other parties in the United States Bankruptcy Court for the District of Delaware as Case No. 01-01114.

A. Background

1 Matlack Systems, Inc., a Delaware corporation ("MSI"), is the parent company of a multinational transportation business that operates, through its various affiliates, in the United States, Canada and Mexico.

2 MSI and certain of its affiliates (collectively, the "Matlack Companies") have commenced reorganization cases (collectively, the "U.S. Cases") under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "U.S. Bankruptcy Court"). The Matlack Companies are continuing in possession of their respective properties and are operating and managing their businesses, as debtors in possession, pursuant to sections 1107 and 1108 of the U.S. Bankruptcy Code. An Official Committee of Unsecured Creditors has been appointed in the U.S. Cases (the "Creditor's Committee").

3 One of the Matlack Companies, Matlack, Inc. (for ease of reference, "Mat-lack Canada"), a United States affiliate of MSI, has assets and carries on business in Canada. The Matlack Companies have commenced proceedings (collectively, the "Canadian Case") under section 18.6 of the *Companies' Creditors Arrangement Act* (the "CCAA") in the Ontario Superior Court of Justice (the "Canadian Court"). The Matlack Companies have sought an Order of the Canadian Court (as initially made under the CCAA and as subsequently amended or modified, the "CCAA Order") under which (a) the U.S. Cases have been determined to be "foreign proceedings" for the purposes of section 18.6 of the CCAA; and (b) a stay was granted against actions, enforcements, extra-judicial proceedings or other

proceeding until and including August 15, 2001 against the Matlack Companies and their property.

4 The Matlack Companies are parties to both the Canadian Case and the U.S. Cases. For convenience, the U.S. Cases and the Canadian Case are referred to herein collectively as the "Insolvency Proceedings" and the U.S. Bankruptcy Court and the Canadian Court are referred to herein collectively as the "Courts".

B. Purpose and Goals

5 While the Insolvency Proceedings are pending in the United States and Canada for the Matlack Companies, the implementation of basic administrative procedures is necessary to coordinate certain activities in the Insolvency Proceedings, to protect the rights of parties thereto, the creditors of the Matlack Companies and to ensure the maintenance of the Courts' independent jurisdiction and comity. Accordingly, this Protocol has been developed to promote the following mutually desirable goals and objectives in both the U.S. Cases and the Canadian Case:

• harmonize and coordinate activities in the Insolvency Proceedings before the U.S. Court and the Canadian Court;

• promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;

• honor the independence and integrity of the Courts and other courts and tribunals of the United States and Canada;

• promote international cooperation and respect for comity among the Courts, the parties to the Insolvency Proceedings and the creditors of the Matlack Companies and other parties interested in or affected by the Insolvency Proceedings;

• facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the Debtors, creditors and other interested parties, wherever located; and

• implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Insolvency Proceedings.

C. Comity and Independence of the Courts

6 The approval and implementation of this Protocol shall not divest or diminish the U.S. Court's and the Canadian Court's independent jurisdiction over the subject matter of the U.S. Cases and the Canadian Case, respectively. By approving and implementing this Protocol, neither the U.S. Court, the Canadian Court, the Matlack Companies nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States or Canada.

7 The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the U.S. Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the Canadian Cases.

8 In accordance with the principles of comity and independence established in Paragraph 6 and 7 above, nothing contained herein shall be construed to:

• increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada, including the ability of any such court or tribunal to provide appropriate relief under applicable law on an *ex parte* or "limited notice" basis;

• require the Matlack Companies or any Creditor's Committee or Estate Representatives to take any action or refrain from taking, any action that would result in a breach of any duty imposed on them by any applicable law;

• authorize any action that requires the specific approval of one or both of the Courts under the U.S. Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action is specifically described in this Protocol); or

• preclude any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada or any other jurisdiction including, without limitation, the rights of interested parties or affected persons to appeal from the decisions taken by one or both of the Courts.

9 The Matlack Companies, the Creditor's Committee, the Estate Representatives and their respective employees, members, agents and professionals shall respect and comply with the

duties imposed upon them by the U.S. Bankruptcy Code, the CCAA, the CCAA Order and any other applicable laws.

D. Cooperation

10 To assist in the efficient administration of the Insolvency Proceedings, the Matlack Companies, the Creditor's Committee and the Estate Representatives shall (a) cooperate with each other in connection with actions taken in both the U.S. Bankruptcy Court and the Canadian Court, and (b) take any other appropriate steps to coordinate the administration of the U.S. Cases and the Canadian Case for the benefit of the Matlack Companies' respective estates and stakeholders.

11 To harmonize and coordinate the administration of the Insolvency Proceedings, the U.S. Bankruptcy Court and the Canadian Court each shall use its best efforts to coordinate activities with and defer to the judgment of the other Court, where appropriate and feasible. The U.S. Bankruptcy Court and the Canadian Court may communicate with one another in accordance with the Guidelines for Court-to-Court Communication in Cross-Border Cases developed by the American Law Institute and attached as Schedule "1" to this Protocol with respect to any matter relating to the Insolvency Proceedings and may conduct joint hearings with respect to any matter relating to the conduct, administration, determination or disposition of any aspect of the U.S. Cases and the Canadian Case, in circumstances where both Courts consider such joint hearings to be necessary or advisable and, in particular, to facilitate or coordinate with the proper and efficient conduct of the U.S. Cases and the Canadian Case.

12 Notwithstanding the terms of paragraph 11 above, this Protocol recognizes that the U.S. Bankruptcy Court and the Canadian Court are independent Courts and, accordingly, although the Courts will seek to cooperate and coordinate with each other in good faith, each of the Courts shall at all times exercise its independent jurisdiction and authority with respect to (a) matters presented to such Court and (b) the conduct of the parties appearing in such matters.

E. Retention and Compensation of Professionals

13 Except as provided in paragraph 16 below, any estate representatives appointed in the U.S. Cases, including any examiners or trustees appointed in accordance with section 1104 of the U.S. Bankruptcy Code and any Canadian professionals retained by the Estate Representatives (collectively, the "Estate Representatives"), shall be subject to the exclusive

jurisdiction of the U.S. Court with respect to (a) the Estate Representatives' tenure in office; (b) the retention and compensation of the Estate Representatives; (c) the Estate Representatives' liability, if any, to any person or entity, including the Matlack Companies and any third parties, in connection with the U.S. Case; and (d) the hearing and determination of any other matters relating to the Estate Representatives arising in the U.S. Cases under the U.S. Bankruptcy Code or other applicable laws of the United States. The Estate Representatives and their U.S. counsel and other U.S. professionals shall not be required to seek approval of their retention in the Canadian Court. Additionally, the Estate Representatives and their U.S. counsel and other U.S. professionals (a) shall be compensated for their services in accordance with the U.S. Bankruptcy Code and other applicable laws of the United States or orders of the U.S. Bankruptcy Court, and (b) shall not be required to seek approval of their compensation in the Canadian Court.

14 Any Canadian professionals retained by or with the approval of the Matlack Companies for purposes of the Canadian Case, including Canadian professionals retained by the Creditor's Committee (collectively, the "Canadian Professionals"), shall be subject to the exclusive jurisdiction of the Canadian Court. Accordingly, the Canadian Professionals (a) shall be subject to the procedures and standards for retention and compensation applicable in Canada, and (b) shall not be required to seek approval of their retention or compensation in the U.S. Court.

15 Any United States professionals retained by the Matlack Companies and any United States professionals retained by the Creditor's Committee (collectively, the "U.S. Professionals") shall be subject to the exclusive jurisdiction of the U.S. Bankruptcy Court. Accordingly, the U.S. Professionals (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Bankruptcy Court under the U.S. Bankruptcy Code and any other applicable laws of the United States or orders of the U.S. Bankruptcy Court, and (b) shall not be required to seek approval of their retention or compensation in the Canadian Court.

F. Rights to Appear and Be Heard

16 The Matlack Companies, their creditors and other interested parties in the Insolvency Proceedings, including the Creditor's Committee and the U.S. Trustee, shall have the right and standing to (a) appear and be heard in either the U.S. Court or the Canadian Court in the

Insolvency Proceedings to the same extent as creditors and other interested parties domiciled in the forum country, subject to any local rules or regulations generally applicable to all parties appearing in the forum, and (b) file notices of appearance or other processes with the Clerk of the U.S. Bankruptcy Court or the Canadian Court in the Insolvency Proceedings; *provided, however,* that any appearance or filing may subject a creditor or an interested party to the jurisdiction of the Court in which the appearance or filing occurs; provided further, that appearance by the Creditor's Committee in the Canadian Case shall not form a basis for personal jurisdiction in Canada over the members of the Creditor's Committee. Notwithstanding the foregoing, and in accordance with paragraph 13 above, the Canadian Court shall have jurisdiction over the Estate Representatives and the U.S. Trustee with respect to the particular matters as to which the Estate Representatives or the U.S. Trustee appear before the Canadian Court.

G. Notice

17 Notice of any motion, application or other pleading or paper filed in one or both of the Insolvency Proceedings and notice of any related hearings or other proceedings mandated by applicable law in connection with the Insolvency Proceedings, or this Protocol shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier or other electronic forms of communication) to the following: (a) all creditors, including the Creditor's Committee, and other interested parties in accordance with the practice of the jurisdiction where the papers are filed or the proceedings are to occur; and (b) to the extent not otherwise entitled to receive notice under clause (a) above, the U.S. Trustee, the Office of the United States Trustee, and such other parties as may be designated by either of the Courts from time to time.

H. Joint Recognition of Stays of Proceedings Under the U.S. Bankruptcy Code and the CCAA

18 In recognition of the importance of the stay of proceedings and actions against the Matlack Companies and their assets under section 18.6 of the CCAA and the CCAA Order (the "Canadian Stay") on the successful completion of the Insolvency Proceedings for the benefit of the Matlack Companies and their respective estates and stakeholders, to the extent necessary and appropriate, the U.S. Bankruptcy Court shall extend and enforce the Canadian Stay in the United States (to the same extent such stay of proceedings and actions is

applicable in Canada) to prevent adverse actions against the assets, rights and holdings of the Matlack Companies. In implementing the terms of this paragraph, the U.S. Bankruptcy Court may consult with the Canadian Court regarding (a) the interpretation and application of the Canadian Stay and any orders of the Canadian Court modifying or granting relief from the Canadian Stay, and (b) the enforcement in the United States of the Canadian Stay.

19 In recognition of the importance of the stay of proceedings and actions against the Matlack Companies and their assets under section 362 of the U.S. Bankruptcy Code (the “U.S. Stay”) to the successful completion of the Insolvency Proceedings for the benefit of the Matlack Companies and their respective estates and stakeholders, to the extent necessary and appropriate, the Canadian Court shall extend and enforce the U.S. Stay in Canada (to the same extent such stay of proceedings and action is applicable in the United States) to prevent adverse actions against the assets, rights and holdings, of the Matlack Companies in Canada. In implementing the terms of this paragraph, the Canadian Court may consult with the U.S. Court regarding (a) the interpretation and application of the U.S. Stay and any order of the U.S. Court modifying or granting relief from the U.S. Stay, and (b) the enforcement in Canada of the U.S. Stay.

20 Nothing contained herein shall affect or limit the Matlack Companies’ or other parties’ rights to assert the applicability or non-applicability of the U.S. Stay or the Canadian Stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located.

I. Effectiveness and Modification of Protocol

21 This Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court.

22 This Protocol may not be supplemented, modified, terminated or replaced in any manner except by the U.S. Court and the Canadian Court. Notice of any legal proceeding to supplement, modify, terminate or replace this Protocol shall be given in accordance with paragraph 17 above.

J. Procedure for Resolving Disputes Under the Protocol

23 Disputes relating to the terms, intent or application of this Protocol may be addressed by interested parties to either the U.S. Court, the Canadian Court or both Courts upon notice, in accordance with paragraph 17 above. Where an is sue is addressed to only one Court, in rendering a determination in any such dispute, such Court: (a) shall consult with the other Court; and (b) may, in its sole and exclusive discretion, either (i) render a binding decision after such consultation, (ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to the other Court or (iii) seek a joint hearing of both Courts. Notwithstanding the foregoing, each Court in making a determination shall have regard to the independence, comity or inherent jurisdiction of the other Court established under existing law.

K. Preservation of Rights

24 Neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall prejudice or affect the powers, rights, claims and defences of the Matlack Companies and their estates, the Creditor's Committee, the U.S. Trustee or any of the creditors of the Matlack Companies under applicable law, including the U.S. Bankruptcy Code and the CCAA.

L. Guidelines

25 The Protocol shall adopt by reference the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Guidelines") developed by The American Law Institute for the Transnational Insolvency Project, a copy of which are attached hereto as Schedule "1". In the case of any conflict between the terms of this Protocol and the terms of the Guidelines, the terms of this Protocol shall govern.

TAB 3

COURT FILE NO:CV- 09-00008269-00CL
DATE: 20090714

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF LEAR CANADA, LEAR CANADA INVESTMENTS LTD., LEAR CORPORATION CANADA LTD. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICATION UNDER SECTION 18.6 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: Pepall J.

COUNSEL: *K. McElcheran and R. Stabile* for the Applicants

E. Lamek for the Proposed Information Officer

A. Cobb for J.P. Morgen Chase Bank, N. A.

ENDORSEMENT

Relief Requested

[1] Lear Canada, Lear Canada Investments Inc., Lear Corporation Canada Ltd. (the "Canadian Applicants") and other Applicants listed on Schedule "A" to the notice of motion request:

1. an order pursuant to section 18.6 of the CCAA recognizing and declaring that the Chapter 11 proceedings in the U.S. Bankruptcy Court for the Southern District of New York constitute "foreign proceedings";

2. a stay of proceedings against any of the Applicants or their property; and

3. an order appointing RSM Richter Inc. as information officer to report to this Court on the status of the U.S proceedings.

Backround Facts

[2] Lear Corporation is a corporation organized under the laws of the State of Delaware with headquarters in Southfield, Michigan. Its shares are listed on the New York Stock Exchange. It conducts its operations through approximately 210 facilities in 36 countries and is the ultimate parent company of about 125 directly and indirectly wholly-owned subsidiaries (collectively, "Lear"). Lear Canada Investments Ltd. and Lear Corporation Canada are both wholly-owned indirect subsidiaries of Lear Corporation. They are incorporated pursuant to the laws of Alberta. Lear Canada is a partnership owned 99.9% by Lear Corporation Canada Ltd. and 0.1% by Lear Canada Investments Ltd. and is the only operating entity of Lear in Canada.

[3] Lear is a leading global supplier of automotive seating systems, electrical distribution systems, and electronic products. It has established itself as a Tier 1 global supplier of these parts to every major original equipment manufacturer (“OEM”). Lear has world wide manufacturing and production facilities, four of which are in Canada, namely Ajax, Kitchener, St. Thomas, and Whitby, Ontario. A fifth facility in Windsor, Ontario was closed in May of this year. Lear employs approximately 7,200 employees world wide of which 1,720 are employed by the Canadian operations. 1,600 are paid on an hourly basis and 120 are paid salary. 1,600 are members of the CAW and are covered by 5 separate collective bargaining agreements. Lear maintains a qualified defined contribution component of the Canadian salaried pension plan and 8 Canadian qualified defined benefit plans.

[4] Lear conducts its North American business on a fully integrated basis. All management functions are based at the corporate headquarters in Southfield, Michigan and all customer relationships are maintained on a North American basis. The U.S. headquarters’ operational support for the Canadian locations includes, but is not limited to, primary customer interface and support, product design and engineering, manufacturing and engineering, prototyping, launch support, programme management, purchasing and supplier qualification, testing and validation,

and quality assurance. In addition, other support is provided for human resources, finance, information technology and other administrative functions.

[5] Lear's Canadian operations are also linked to its U.S. operations through the companies' supply chain. Lear's facilities in Whitby, Ajax, and St. Thomas supply complete seat systems on a just-in-time basis to automotive assembly operations of the U.S. based OEMs, General Motors and Ford in Ontario. Lear's Kitchener facility manufactures seat metal components which are supplied primarily to several Lear assembly locations in the U.S., Canada and Mexico.

[6] Lear Corporation, Lear Canada and others entered into a credit agreement with a syndicate of institutions led by J.P. Morgan Chase Bank, N.A. acting as general administrative agent and the Bank of Nova Scotia acting as the Canadian administrative agent. It provides for aggregate commitments of $2.289US billion. Although Lear Canada is a borrower under this senior secured credit facility, it is only liable for borrowings made in Canada and no funds have been advanced in this country.

[7] Additionally, Lear Corporation has outstanding approximately $1.29US billion of senior unsecured notes. The Canadian Applicants are not issuers or guarantors of any of them.

[8] Over the past several years, Lear has worked on restructuring its business. As part of this initiative, it closed or initiated the closure of 28 manufacturing facilities and 10 administrative/engineering facilities by the end of 2008. This included the Windsor facility for which statutory severance amounts owing to all employees have been paid.

[9] Despite its efforts, Lear was faced with turmoil in the automotive industry. Decreased consumer confidence, limited credit availability and decreased demand for new vehicles all led to decreased production. As a result of these conditions, Lear defaulted under its senior secured credit facility in late 2008. In early 2009, Lear engaged in discussions with senior secured facility lenders and unsecured noteholders. It reached an agreement with the majority of them wherein they agreed to support a Chapter 11 plan.

[10] On July 7, 2009, Lear filed voluntary petitions for relief under Chapter 11 of the US Bankruptcy Code and sought "first day" orders in those proceedings in the United States Bankruptcy Court for the Southern District of New York. The Applicants now seek recognition of those proceedings and the orders. Lear expects to emerge from the Chapter 11 proceedings and any associated proceedings in other jurisdictions as a substantially de-leveraged enterprise with competitive going forward operations, and to do so in a timely basis.

Applicable Law

[11] Section 18.6 of the CCAA was introduced in 1997 to address the rising number of international insolvencies. Courts have recognized that in the context of cross-border insolvencies, comity is to be encouraged. Efforts are made to complement, coordinate, and where appropriate, accommodate insolvency proceedings commenced in foreign jurisdictions.

[12] Section 18.6(1) provides that "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally. It is well recognized that proceedings under Chapter 11 of the U.S. Bankruptcy Code fall within that definition and that, while not identical, the substance and procedures of the U.S. Bankruptcy Code are similar to those found in the Canadian bankruptcy regime: *Re United Airlines Inc.*[1]

[13] *Re Babcock & Wilcox Canada Ltd.*[2] provided an early interpretation of section 18.6, and while not without some controversy[3], the practice in Canadian insolvency proceedings has evolved accordingly. In that case, Farley J. distinguished between section 18.6(2) of the Act, which deals with concurrent filings by a debtor company under the CCAA in Canada and corresponding bankruptcy or insolvency legislation in a foreign jurisdiction, and section 18.6(4) which may deal with ancillary proceedings such as this one. As with section 2 of the Act, section 18.6(2) is in respect of a debtor company whereas section 18.6 (4) permits any interested person to apply for recognition. As such, he held that the applicant before him was not required

[1] (2003), 43 C.B.R. (4th) 284 at 285.
[2] (2000), 18 C.B.R. (4th) 157.
[3] See for example, Professor J.S. Ziegel's article "Corporate Groups and Canada-U.S. Cross-Border Insolvencies: Contrasting Judicial Visions", (2001) 35 C.B.L.J. 459.

to meet the Act's definition of "debtor company" which required the company to be insolvent.[4] In addition, he noted that section 18.6(3) provides that an order of the Court under section 18.6 may be made on such terms and conditions as the Court considers appropriate in the circumstances.

[14] Applying those legal principles, the Applicants are entitled to apply for an order pursuant to section 18.6 of the CCAA. They are debtors within the definition of section 18.6(1) and interested persons falling within section 18.6(4). In this regard, while the CCAA does not define the term "person", the BIA definition extends to include a partnership. In the absence of a definition in the CCAA, by analogy it is reasonable to interpret the term "person" as including a partnership.

[15] I must then consider whether the order requested should be granted. In exercising discretion under section 18.6, it has been repeatedly held that in the context of an insolvency, the Court should consider whether a real and substantial connection exists between a matter and the foreign jurisdiction: *Re Matlack Inc.*[5] and *Re Magna Entertainment Corp.*[6] Where the operations of debtors are most closely connected to a foreign jurisdiction and the Canadian operations are inextricably linked with the business located in that foreign jurisdiction, it is appropriate for the Court in the foreign jurisdiction to exercise principal control over the insolvency process in accordance with the principles of comity and to avoid a multiplicity of proceedings: *Re Matlack*[7]. As noted in that case, it is in the interests of creditors and stakeholders that a reorganization proceed in a coordinated fashion. This provides for stability and certainty. "The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, wherever they are located."[8]

[16] I am satisfied that an order recognizing the U.S. proceeding as a foreign proceeding within the meaning of section 18.6(1) should be granted and that a real and substantial

[4] It should be noted that a voluntary filing under Chapter 11 does not require an applicant to be insolvent and a partnership is eligible to apply for relief as well.
[5] (2001), 26 C.B.R. (4th) 45.
[6] (2009), 51 C.B.R. (5th) 82.
[7] Supra, note 5 at para. 8.
[8] Ibid, at para. 3.

connection has been established. The Applicants including Lear Canada are part of an integrated multi-national corporate enterprise with operations in 36 countries, one of which is Canada. Lear conducts its North American business on a fully integrated basis. As mentioned, all management functions are based at the U.S. corporate headquarters and all customer relationships are maintained on a North American basis. As such, the managerial and operational support for the Canadian locations is situate in the United States. In addition, Lear's Canadian operations are linked to the U.S. operations through the Lear's supply chain. As evidence of same, a note to Lear Canada's December 31, 2008 unaudited financial statement states that Lear Corporation provides Lear Canada with "significant operating support, including the negotiation of substantially all of its sales contracts. Such support is significant to the success of the Partnership's future operations and its ability to realize the carrying value of its assets."

[17] I am also of the view that it is both necessary and desirable that the restructuring of this international enterprise be coordinated and that a multiplicity of proceedings in two different jurisdictions should be avoided. Granting relief will enable the Applicants to continue to operate in the ordinary course and preserve value and customer relationships. Coordination will also provide stability. The U.S. Court will be the primary court overseeing the restructuring proceedings of Lear. I also note that in its report filed with the Court, the proposed Information Officer, RSM Richter Inc., expressed its support for the relief requested by the Applicants.

[18] That said, increasingly with the downturn in the global economy, this Court is entertaining requests for concurrent or ancillary orders relating to multi-group enterprises typically with a significant cross-border element. Frequently, relative to the whole enterprise, the Canadian component is small. From the viewpoint of efficiency and speed, both of which are important features of a restructuring, an applicant may be of the view that the Canadian operations do not merit a CCAA filing other than a section 18.6 request. In addressing whether to grant relief pursuant to section 18.6, the Court should, amongst other things, consider the interests of stakeholders in this country and the impact, if any, that may result from the relief requested. This would include benefits and prejudice such as any juridical advantage that may

be compromised.[9] These issues should be addressed by an applicant in its materials. Assuming there are benefits, the existence of prejudice does not necessarily mean that the order will be refused but it is important that these facts at least be considered, and if appropriate, certain protections should be incorporated into the order granted.

[19] By way of example, in this case, the Court raised certain issues with the Applicants and they readily and appropriately in my view, filed additional affidavit evidence and included other provisions in the proposed order. The Court was concerned with the treatment that might be afforded Canadian unsecured creditors and particularly employees and trade creditors. Lear Canada had total current assets of approximately $60US million as at May 31, 2009 which included approximately $20US million in cash. Its total assets amounted to approximately $115US million. Total current liabilities as at the same time period amounted to about $75US million. In addition, pension and other post-retirement benefit obligations were stated to amount to about $170US million. There were also intercompany accounts of approximately $190US million in favour of Lear Canada for total liabilities of about $55US million. Counsel for the Applicants advised that significant pre-petition payments had been made to suppliers and that the intention is for Lear Canada to continue to carry on business.

[20] In the additional evidence filed, the Applicants indicated that they had not yet sought approval of DIP financing arrangements but that under the proposed arrangement, the Canadian Applicants would not be borrowers or guarantors. In addition, the term sheet agreed to between the Applicants and the senior credit facility lenders provided that the Canadian Applicants had agreed to pay all general unsecured claims in full as they become due. Additionally, the Applicants had obtained an order in the U.S. proceedings authorizing them to pay and honour certain pre-petition claims for wages, salaries, bonuses and other compensation and it is the intention of the Applicants to continue to pay all wages and compensation due and to be due to Canadian employees. The Applicants are up to date on all current and special payments associated with the Canadian pension plans and will continue to make these payments going forward. Provisions reflecting this evidence were incorporated into the Court order.

[9] See *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* [2001] 3 S.C.R. 907.

[21] The Canadian Applicants were not to make any advances or transfers of funds except to pay for goods and services in the ordinary course of business and in accordance with existing practices and similarly were not to grant security over or encumber or release their property. They also were to pay current service and special payments with respect to the Canadian pensions. The order further provided that in the event of inconsistencies between it and the terms of the Chapter 11 orders, the provisions of my order were to govern.

[22] The order includes a stay of proceedings against the Applicants and their property, a recognition of various orders and an administration charge and a directors' charge. The order also includes the usual come back provision in which any person affected may move to rescind or vary the order on at least 7 days' notice.

[23] Where one jurisdiction has an ancillary role, the Court in the ancillary jurisdiction should be provided with information on an on going basis and be kept apprised of developments in respect of the debtors' reorganization efforts in the foreign jurisdiction. In addition, stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.[10] In this case, RSM Richter Inc. as Information Officer intends to be a watchdog and monitor developments in the U.S. proceedings and keep this Court informed. This Court supports its request to be added to the service list in the Chapter 11 proceeding and any request for standing before the U.S. Bankruptcy Court for the Southern District of New York that the Information Officer may make. In this regard, this Court seeks the aid and assistance of that Court.

Pepall, J.

[10] See *Re Babcock & Wilcox Canada Ltd.*, supra, note 2 at para. 21.

Released: July 14, 2009

TAB 4

Case Name:

Global Light Telecommunications Ltd. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF The Yukon Business Corporations Act, R.S.Y. 1986, c. 15
AND IN THE MATTER OF Global Light Telecommunications Inc., Un Limited and Brightstar Limited, petitioner

[2004] B.C.J. No. 1153

2004 BCSC 745

33 B.C.L.R. (4th) 155

2 C.B.R. (5th) 210

131 A.C.W.S. (3d) 650

2004 CarswellBC 1249

Vancouver Registry No. L021991

British Columbia Supreme Court
Vancouver, British Columbia

Pitfield J.

Heard: April 26, 2004.
Judgment: June 4, 2004.

(24 paras.)

Corporations and associations law -- Corporations -- Fundamental changes -- Arrangement -- Creditors & debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act.

Application by Global Light Telecommunications, Un Limited and Brightstar for an order sanctioning a consolidated Plan of Arrangement. The consolidated Plan of Arrangement was

approved by 83 per cent of creditors in number and 86 per cent of creditors in dollar value. York Capital Management and others opposed the application on the ground that Brightstar and Un Limited, both Bermuda corporations, were not debtor companies. Brightstar and Un Limited opened bank accounts with nominal deposits to establish assets in Canada to meet the requirements of the Companies' Creditors Arrangement Act.

HELD: Application allowed. The bank accounts opened by Un Limited and Brightstar met the requirements under the Act for them to qualify as creditors. The plan qualified with the requirements of the Companies' Creditors Arrangement Act. The plan was fair and reasonable to the creditors.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, s. 2.

Yukon Business Corporations Act.

Counsel:

Counsel for the Petitioners: Scott A. Turner and David E. Gruber

Counsel for the Respondents UBS Capital Americas II, LLC and Canven V (Barbados) Limited: Gordon D. Phillips

Counsel for York Capital Management LP: Douglas B. Hyndman

Counsel for Credit Suisse First Boston: Alan B. Brown

Counsel for the Monitor: PricewaterhouseCoopers Inc.: Heather M. Ferris

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[Editor's note: A corrigendum was released by the Court June 23, 2004; the corrections have been made to the text and the corrigendum is appended to this document.]

1 **PITFIELD J.**:-- Global Light Telecommunications Inc., Un Limited and Brightstar Limited apply for an order under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-25 sanctioning a consolidated Plan of Arrangement approved by creditors in the manner contemplated by the Act.

2 If approved, the Plan would permit distribution of cash on hand in the approximate amount of US $658,000 to the petitioners' creditors on a rateable basis in the calculation of which the claims of creditors owed more than $100,000 would be capped at $100,000. Creditors with claims in excess of $100,000 would receive shares in a corporation to be incorporated for the purpose of acquiring

Global's interest in Bestel, S.A., a Mexican company that operates a telecommunications network located primarily in Mexico. Share entitlement would be determined on a rateable basis by reference to the gross amount of each creditor's claim.

3 The Plan has been approved by the requisite majority of creditors. However, York Capital Management LP, York Offshore Investors Unit Trust and York Investment Limited oppose the application to sanction on the grounds that Brightstar and Un Limited are not debtor companies for CCAA purposes and cannot be included in the Plan; Brightstar and Un Limited should not have been added as petitioners in the proceeding and the order purporting to do so was a nullity; and the Plan is not fair and reasonable.

4 The relevant background is the following. Global is a Yukon corporation. It raised substantial amounts of capital by issuing shares and various debt instruments. The capital so acquired was used, in part, to capitalize Un Limited as a wholly owned subsidiary. In turn, Un Limited capitalized Brightstar. Both Un Limited and Brightstar are Bermuda corporations. Global also capitalized GST Mextel, Inc., a Delaware corporation, as a wholly owned subsidiary. Following capitalization by Global, Brightstar acquired a 49% interest in New World Network Holdings Ltd., and GST Mextel acquired a 49% interest in Bestel.

5 Global borrowed US $4 million from York pursuant to a series of loan agreements dated June 29, 2001. That sum compares to debts in excess of US $40 million owed to other debenture holders. By January 2002, Global was in default under the York loan agreements. York agreed to extend the loan repayment date to June 30, 2002, in consideration for, among other things, loan guarantees from Brightstar and Un Limited.

6 On June 28, 2002, Global was granted a stay of proceedings under the Act in order to allow it to construct a plan of Arrangement or Compromise for presentation to its creditors. On August 15, 2003, Global applied to add its subsidiary, Un Limited, and that company's subsidiary, Brightstar, as petitioners in the proceeding. The application to add clearly identified the fact that Brightstar and Un Limited had provided guarantees in relation to some of Global's debts. York appeared at the hearing of the application but took no position in relation to it.

7 On August 28, 2003, the court granted an order approving the sale of Brightstar's 49% equity interest in New World Network Holdings Ltd. on condition that the sale price of approximately US $658,000 be remitted to, and held by, the Monitor in trust for the benefit of the petitioners' creditors. York Capital appeared on that application but took no position.

8 On February 18, 2004, the court granted a procedural order authorizing the petitioners to seek creditor approval of the consolidated Plan of Arrangement in respect of which sanction is now sought. Counsel for York appeared on that application but took no position.

9 On March 23, 2004, the Plan was approved by 83% of creditors in number and 86% of creditors in dollar value. The percentages exceeded the minimum required by the Act. This application to sanction followed as a result.

10 At the hearing of this application, York claimed that it had recently learned that Brightstar and Un Limited had opened Canadian bank accounts with nominal deposits of US $100 immediately prior to applying to be added as petitioners. It claimed to have been informed that the accounts were closed immediately after the granting of the order adding them as petitioners. These statements of fact, not verified by affidavit at the time of the hearing, were not disputed by the petitioners. York relied on this information to support its claim that Brightstar and Un Limited, as Bermuda corporations, were not companies that could not benefit from a CCAA proposal because the bank accounts with nominal amount on deposit did not satisfy the CCAA requirement that the companies have assets in Canada before availing themselves of the protection afforded by the Act.

11 Following the hearing, I directed the petitioners to file affidavit evidence explaining the origin, operation, and current status of the bank accounts. The affidavits indicate that each of Un Limited and Brightstar opened an account with HSBC in Vancouver on July 24, 2003. The amount of US $100 was deposited to each account. The monitor deposes as follows in relation to the origin of the funds:

> The funds that were deposited to the Brightstar and Un Limited accounts were provided to Brightstar and Un Limited by Global Light. This was consistent with the dealings between Global Light, Un Limited and Brightstar throughout their existence. Whenever Brightstar or Un Limited required funds in the past, those funds were always provided by Global Light.

12 The affidavit evidence establishes that the accounts have remained open. No additional deposits have been made. The only debits to the accounts have been the bank's monthly minimum balance service charges. At March 31, 2004, the balance in each account was US $45.15.

13 I invited the parties to make additional submissions having regard for the additional evidence. None were forthcoming.

14 York does not challenge the efficacy of the transactions resulting in the creation of the accounts but says the "instant" Canadian bank accounts created shortly before the application to add Brightstar and Un Limited as petitioners do not qualify as assets sufficient to bring Brightstar within the definition of "company" as defined in s. 2 of the Act. In the alternative, York says that the Plan is unfair because Brightstar has no real connection to Canada and consolidation produces an inappropriate result by permitting creditors of a Canadian company to enjoy benefits that should accrue solely to York under the guarantees granted to it by Brightstar.

15 The petitioners submit that the Plan is fair and reasonable. They say that York failed to object to the procedural order that permitted the presentation of a consolidated plan to creditors and did not appeal the order or apply to have it set aside as a nullity.

16 In my opinion, York's claim that Brightstar does not qualify as a company for purposes of the Act must fail. Section 2 of the Act defines "company" as follows:

> ... "company" means any company, corporation or legal person incorporation by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, except banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies; ...

17 The substance of York's claim is that the court must engage in a qualitative or quantitative analysis of the Canadian assets in order to decide whether a company that is not incorporated in Canada and is not doing business in Canada otherwise qualifies as one "having assets ... in Canada". In my opinion, the court must not engage in that kind of analysis. Certainty is required in so far as the availability of the Act is concerned. In my opinion, importing an element of discretion into the question of eligibility would diminish the effectiveness of the Act as a means of assisting in the evolution of plans of arrangement acceptable to companies and their creditors. It is for that reason, I suggest, that courts concerned with the application of the Act have acknowledged the efficacy of "instant assets": see, for example, Nova Metal Products Inc. v. Cominskey (Trustee of) (sub nom. Eland Corp. v. Cominskey) (1990), 1 O.R. (3d) 289 (C.A.); Cadillac Fairview Inc. (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]); Philips Manufacturing Ltd., Re (1991), 9 C.B.R. (3d) 1 (B.C.S.C.); and P.R.O. Holdings Ltd., Re (1998), 24 C.B.R. (3d) 1 (N.B.C.A.). If a de minimis standard is thought to be appropriate in determining whether a company has assets in Canada, it is for parliament to amend the Act accordingly.

18 I conclude that Brightstar qualified as a company at the time it applied to be added as a petitioner. It qualified as a company at the time of the application for the procedural order and at the time of the application to sanction the plan. It would not have qualified without opening the bank account. It would have ceased to qualify if the account balance had been reduced to nil, or if the bank account had been closed. The qualitative and quantitative analyses urged by York are only relevant in the assessment of the suitability of a consolidated plan of arrangement in any particular circumstances. In that regard, York expressed no opposition to a consolidated plan of arrangement when it was first proposed by the petitioners at the time of applying for the procedural order.

19 In considering whether to sanction the Plan, the court must have regard for three well-established principles, as set out in Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can. (1989), 73 C.B.R. 195 (B.C.C.A.) at 201:

1. There must be strict compliance with all statutory requirements;
2. All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the CCCA;
3. The plan must be fair and reasonable.

20 Brightstar qualifies as a company under the CCAA and has complied with the technical requirements. That which has been done to date is authorized by the Act. The only issue is whether

the consolidated Plan is fair and reasonable.

21 York says the Plan is not fair and reasonable because Brightstar has no real connection to this jurisdiction other than a hastily opened bank account of an insignificant amount. This objection amounts to a back door attempt to oppose the permission granted to the petitioners to submit a consolidated proposal to creditors.

22 York must have been aware that the consolidated Plan would deprive it of the right to seek to recover on its guarantees. It did not attempt to suggest in its submissions that the operating relationship among Global, Un Limited and Brightstar was such that consolidation was inappropriate. Indeed, York became involved as a lender to Global, as did other lenders, knowing that Global's capital would be directed to the capitalization of subsidiaries. York did not oppose the application to consolidate at the hearing of the application regarding the procedural order. It did not appeal that order. In the circumstances, York cannot now be heard to complain about adverse effects flowing from the consolidated Plan.

23 Is the Plan otherwise fair and reasonable? In addressing that question the court must not insist on perfection with respect to fairness and reasonableness. Rather, a fair and reasonable plan is meant to be an equitable arrangement in the nature of a compromise: Sammi Atlas Inc., Re (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at 173. Each of the creditors will not necessarily be treated equally, but the Plan must satisfy the majority of creditors on the whole. This Plan has that effect. All creditors became involved with Global and its subsidiaries knowing they were dealing with Global as the parent. While one may query whether the guarantee in favour of York is valid given that it was granted when the group was seemingly insolvent, there is nothing in the evidence tendered by York that would suggest it accommodated the Global group in a manner that should result in it being potentially the sole beneficiary of the sale proceeds of a subsidiary's interest in a distant investment. The majority has voted in favour of the Plan. There is a heavy burden on parties seeking to oppose sanctioning: Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]). York has not discharged that burden.

24 In my view, the Plan is sufficiently fair and reasonable in the circumstances of this case. Accordingly, the application for an order sanctioning the Plan dated February 18, 2004 is granted.

PITFIELD J.

* * * * *

CORRIGENDUM

Released: June 23, 2004.

[1] This is a corrigenum to my reasons for judgment dated June 4, 2004. David E. Gruber should be added as counsel for the petitioners and Heather M. Ferris should be added as counsel for the

monitor, PricewaterhouseCoopers Inc..

PITFIELD J.

TAB 5

251 B.R. 31
United States Bankruptcy Court, D. Delaware.

In re GLOBAL OCEAN CARRIERS LIMITED, et al., Debtors.

No. 00–955(MFW) to 00–969(MFW).
|
July 5, 2000.

Chapter 11 debtors sought to confirm modified plan of reorganization, and also moved for substantive consolidation, and minority shareholder objected and asked that cases be dismissed. The Bankruptcy Court, Mary F. Walrath, J., held that: (1) Chapter 11 debtors each had property in the United States, and thus were eligible to file their bankruptcy petitions; (2) court could not conclude, based upon timing of debtors' modified plan alone, that creditor had been artificially impaired for purpose of procuring acceptance of plan by at least one impaired class; (3) debtors did not satisfy their burden of showing that their modified plan satisfied "best interests of creditors" test; (4) financing was not speculative or uncertain, and did not adversely affect feasibility of proposed plans; (5) absolute priority rule was violated; and (6) motion to substantively consolidate had to be made on notice to those adversely affected.

So ordered.

West Headnotes (20)

[1] **Bankruptcy**
Reorganization cases

Chapter 11 debtors each had property in the United States, and thus were eligible to file their bankruptcy petitions, to the extent that, before petitions were filed, retainers had been paid to bankruptcy counsel present in the United States on behalf of each debtor. Bankr.Code, 11 U.S.C.A. § 109(a).

2 Cases that cite this headnote

[2] **Bankruptcy**
Who May Be a Debtor

Determination as to whether party filing bankruptcy petition is an eligible debtor must be made as of date that petition is filed. Bankr.Code, 11 U.S.C.A. § 109(a).

3 Cases that cite this headnote

[3] **Bankruptcy**
Who May Be a Debtor

Separate determination must be made as to each debtor filing bankruptcy petition, on his/her eligibility for bankruptcy relief. Bankr.Code, 11 U.S.C.A. § 109(a).

2 Cases that cite this headnote

[4] **Bankruptcy**
Evidence and fact questions

Burden of establishing eligibility for bankruptcy relief is upon party filing the bankruptcy petition. Bankr.Code, 11 U.S.C.A. § 109(a).

2 Cases that cite this headnote

[5] **Bankruptcy**
Reorganization cases

Mere fact that Chapter 11 debtors did some business in the United States was not equivalent to having a "place of business" in the United States, within meaning of statute providing that "only a person that resides or has a domicile, a place of business or property in the United States" is eligible to be bankruptcy debtor. Bankr.Code, 11 U.S.C.A. § 109(a).

3 Cases that cite this headnote

[6] **Bankruptcy**
Who May Be a Debtor

It is insufficient, for purposes of establishing party's eligibility for bankruptcy relief, that party had property in the United States at some time in year immediately

preceding petition date; rather, party must have property in the United States when he/she actually files bankruptcy petition. Bankr.Code, 11 U.S.C.A. § 109(a).

1 Cases that cite this headnote

[7] Bankruptcy

Who May Be a Debtor

Relevant consideration, in deciding whether party has property in the United States so as to qualify as eligible debtor, is whether party has bank accounts in United States, not the amount of money deposited therein; it is irrelevant that there is only a relatively small amount in party's United States bank accounts. Bankr.Code, 11 U.S.C.A. § 109(a).

2 Cases that cite this headnote

[8] Bankruptcy

Acceptance

It was appropriate to extend time for creditor to vote on debtors' modified Chapter 11 plan, even after deadline established by court expired, where creditor was not impaired under debtor's initial plan and thus had no opportunity to vote thereon.

1 Cases that cite this headnote

[9] Bankruptcy

Eligibility to vote;impairment

Creditor voting to accept debtors' modified Chapter 11 plan was "impaired" thereunder, though plan required debtors to pay higher rate of interest on creditor's claim, to maintain higher value of collateral and to repay principal balance of loan more quickly, where plan granted debtors immediate access to more than $5.6 million in cash collateral.

1 Cases that cite this headnote

[10] Bankruptcy

Eligibility to vote;impairment

Estoppel

Claim inconsistent with previous claim or position in general

Chapter 11 debtors were not judicially estopped from asserting that creditor voting to accept debtors' modified Chapter 11 plan was "impaired" thereunder, even though treatment of creditor's claim under modified plan was in all respects identical to one of the alternate treatments provided in original plan, which had not treated creditor's claim as unimpaired, where original plan gave creditor the option of declining this alternate treatment and leaving its rights unaffected.

Cases that cite this headnote

[11] Bankruptcy

Eligibility to vote;impairment

While timing of debtors' modified Chapter 11 plan, which debtors proposed in response to concerns that original plan had not been accepted by at least one impaired class, was sufficient to raise concerns as to whether modified plan, under which debtors were allowed to use cash collateral of creditor that was unimpaired under debtors' original plan, had artificially created impaired class, court could not conclude, based upon timing alone, that creditor was artificially impaired and ineligible to vote on plan, where impairment, which involved over $5.6 million in cash collateral, was real and substantial, and where debtors had reasonable basis for such impairment, in order to obtain funds to meet distribution requirements of modified plan.

1 Cases that cite this headnote

[12] Bankruptcy

Confirmation;Objections

Chapter 11 debtors, as proponents of modified plan providing for release of debtors' directors and officers, and of ad hoc committee of noteholders, failed to satisfy burden of showing that releases were appropriate, given that plan had not been accepted by affected class.

Cases that cite this headnote

[13] **Bankruptcy**
Confirmation;Objections

Chapter 11 debtors did not satisfy their burden of showing that their modified plan satisfied "best interests of creditors" test, by providing impaired creditors with at least as much as they would receive in hypothetical Chapter 7 liquidation, where debtors' expert, in valuing debtors' assets, had relied on comparable sales that were two to four months old and had not adjusted his appraised values to reflect rising market since those sales, and where expert had also relied on information given to him by debtors which may not have been completely accurate. Bankr.Code, 11 U.S.C.A. § 1129(a)(7).

1 Cases that cite this headnote

[14] **Bankruptcy**
Confirmation;Objections

Burden of establishing compliance with "best interests of creditors" test is on proponent of Chapter 11 plan. Bankr.Code, 11 U.S.C.A. § 1129(a)(7).

2 Cases that cite this headnote

[15] **Bankruptcy**
Feasibility in general

Financing was not speculative or uncertain, and did not adversely affect feasibility of debtors' proposed Chapter 11 plans, where lenders had issued commitment letter and/or agreed to term sheets which were detailed and contingent only upon final documentation, upon confirmation of plan, and upon no materially adverse changes occurring. Bankr.Code, 11 U.S.C.A. § 1129(a)(11).

4 Cases that cite this headnote

[16] **Bankruptcy**
Feasibility in general

To the extent that debtors' asset valuations were accepted, for purpose of establishing that proposed Chapter 11 plan satisfied "best interests of creditors" test, debtors would not have collateral value necessary to obtain exit financing or to restructure secured debt, or would be in immediate default of credit facilities, and debtors' proposed plan could not be confirmed as failing feasibility requirement. Bankr.Code, 11 U.S.C.A. § 1129(a)(7, 11).

Cases that cite this headnote

[17] **Bankruptcy**
Preservation of priority

Retention of corporate structure among corporate Chapter 11 debtors, by permitting certain debtors to retain their stock in other debtors, would not cause debtors' proposed plan to violate absolute priority rule, to extent that debtors' motion for substantive consolidation was granted, such that each debtor's assets would be available for payment of all creditor claims. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(B).

Cases that cite this headnote

[18] **Bankruptcy**
Preservation of priority

Shareholder's right to designate directors on corporate debtor's board was right that it possessed, not as shareholder, but under its management contract with debtor, such that shareholder's retention of this right under debtor's proposed Chapter 11 plan did not cause plan to violate absolute priority rule. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(B).

Cases that cite this headnote

[19] **Bankruptcy**
Preservation of priority

Absolute priority rule was violated, and proposed Chapter 11 plan could not be confirmed, to extent that plan purported to authorize debtor's largest shareholder to

designate a company owned by his daughter as party to which debtor's stock would be sold, irrespective of whether daughter could be regarded as mere straw party for her father; plan violated absolute priority rule by giving debtor's largest shareholder the exclusive right to determine who would be the owner of reorganized entity, as well as price that would be paid for this ownership interest. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(B).

1 Cases that cite this headnote

[20] Bankruptcy

Other procedural issues

Motion to substantively consolidate Chapter 11 debtors had to be made only on notice to those adversely affected by motion, including noteholders.

Cases that cite this headnote

***34** *OPINION* [1]

MARY F. WALRATH, Bankruptcy Judge.

This case is before the Court on the request of Global Ocean Carriers Limited ("Global Ocean") and fifteen of its affiliates [2] (collectively "the Debtors") for confirmation of their Modified First Amended Plan of Reorganization ("the Modified Plan"). In connection with confirmation, the Debtors also request that their Motion for substantive consolidation be granted and that the ballot of Credit Lyonnais in favor of the Modified Plan be accepted (though filed beyond the voting deadline). The holders of approximately $92 million of the $126 million in outstanding notes ("the Ad Hoc Committee of Noteholders") supports the Debtors' requests. A small noteholder and minority shareholder, Arabella Holdings, Inc. ("Arabella") objects to the relief requested by the Debtors and asks that the cases be dismissed.

For the reasons given below, confirmation of the Modified Plan is denied. Substantive consolidation is also denied without prejudice to the Debtors renewing their motion on notice to all affected creditors. However, Arabella's motion to dismiss these cases is denied, since the Debtors are eligible to file the instant cases.

I. *FACTUAL BACKGROUND*

The Debtors are involved in the international shipping industry. Global Ocean and most of the other Debtors are headquartered in Athens, Greece. [3] The books ***35** and records of the Debtors are located in Athens, Greece. The Debtors are incorporated in Liberia, Cyprus or Singapore with the exception of Marine which is incorporated in the United States, in Delaware.

Global Ocean is the ultimate parent of all the Debtors; the other Debtors are direct or indirect subsidiaries of Global Ocean. Certain of the Debtors own ocean-going vessels. Each vessel is owned by a separate subsidiary for liability purposes. The Debtors collectively own 10 feeder container vessels and 2 Panamax dry bulk carriers.

The vessels are maintained and operated through a non-debtor, Sovereign Navigation Corporation ("Sovereign") [4], pursuant to a Management Agreement with Global Ocean. (Exhibit A–9.) Sovereign performs the general administrative tasks for the Debtors, maintains the books and records of all the Debtors, collects the revenues and deposits them to the bank accounts of Global Ocean, and supervises the chartering and maintenance of the vessels. The daily maintenance, provisioning and chartering of the vessels is done by Tsakos Shipping and Trading, S.A. ("Tsakos Shipping"), under a Technical Management Agreement with Sovereign. (Exhibit A–33.) Most of the vessels are under charter to other companies. Many of the charters are at market or above market rates and are due to expire relatively soon.

Global Ocean is a publicly traded company whose stock was registered on the American Stock Exchange until shortly before the bankruptcy filing. The Tsakos family controls more than 50% of the stock. (Exhibit D–5.) Global Ocean owes approximately $51 million to Credit Lyonnais, which is guaranteed by the Hanjin Debtors and is secured by a first preferred ship mortgage on each of the three Hanjin vessels. In 1997, Global Ocean issued $126 million in 10 1/4% Senior Notes due 2007 ("the Notes"). The Notes were guaranteed by all the other Debtors. The Notes, though unsecured and subordinated to certain senior secured debt, restricted the Debtors' ability to grant

security interests in their assets, including the vessels. (Exhibit A–20 at pp. 10, 11, 104.)

Over the past several years the global shipping industry has been in a recession, with vessel values dropping to a five year low in the summer of 1999. Because of deteriorating charter rates and long periods of unemployment of some of its vessels, the Debtors suffered a net loss of $13.5 million in 1998. Concerned about their ability to meet interest payments due on the Notes, the Debtors met in May, 1999, with representatives of the owners of a vast majority of the Notes for purposes of restructuring the Notes. (Exhibit A–16.) An Ad Hoc Committee of Noteholders was formed and negotiations resulted in an agreement to a restructuring in the fall of 1999. Certain of the Committee members executed a Lock-up Agreement. (Disclosure Statement at Exhibit B.)

At the insistence of the Ad Hoc Committee of Noteholders, the Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code on February 14, 2000. On that same date, the Debtors filed their initial joint Plan of Reorganization and Disclosure Statement. That Plan provided for payment in cash to Noteholders of 50% of their claims on the Effective Date. All other creditors were to be paid in full in accordance with their normal terms and shareholders of Global Ocean would be eliminated. All of the stock in Global Ocean would be issued to Marmaron Company Limited ("Marmaron"), which is owned by Maria Tsakos, in exchange for new capital up to $10 million. Maria Tsakos is the daughter of Captain Panagiotis ***36** Tsakos and the sister of Nikolas P. Tsakos, together the largest existing shareholders. Global Ocean would retain ownership of the other Debtors.

At the request of the Debtors and the Ad Hoc Committee of Noteholders, the plan process was scheduled on a relatively fast track, to assure that the restructuring was concluded by June 30, 2000. The Disclosure Statement was approved, over objections by Arabella, on March 24, 2000, after certain amendments were made to it and the Plan. Voting packages were required to be mailed by March 31, 2000, ballots were due on April 28, 2000, and the confirmation hearing was originally scheduled for May 8, 2000.

After voting on the Plan, however, the only impaired class (the Noteholders) rejected the Plan under the numerosity test. That is, although owners of over $98 million in amount of the outstanding Notes voted to accept the Plan (almost $6 million voted to reject), 321 of the 497 Noteholders voting on the Plan rejected it. Thus, the Plan has been rejected by the vast majority of the small Noteholders, but accepted by the large institutional Noteholders which own the largest amount of Notes.

Opposition to the Plan has been spearheaded by Arabella, an investment company owned by Mr. and Mrs. Katsamas. Mr. Katsamas has been in the shipping industry for twenty years. In December of 1999, Arabella purchased a small number of shares in Global Ocean for $10,000 and purchased $150,000 in face amount of Notes for $55,000. Mr. Katsamas testified that he did so based on his knowledge of the industry and the upward swing in values of vessels since the Summer of 1999. The valuation experts who testified on behalf of the Debtors confirmed that the industry has recovered since last year and that vessel values (and charter hire rates) continue to rise. Mr. Katsamas said he invested in Global Ocean with the expectation that its value would increase as the industry recovered.

After the Plan was rejected by the Noteholders, the Debtors filed the Modified Plan which changed the treatment of Credit Lyonnais in a manner which the Debtors assert impairs it. A ballot was filed by Credit Lyonnais accepting the Modified Plan. The Debtors also filed a Motion for substantive consolidation of the Debtors' cases. In a telephone conference on scheduling and discovery issues, the Debtors asked for expedited consideration of their substantive consolidation motion so that it could be heard at the confirmation hearing, which was rescheduled for June 5, 2000. We granted that request.

The confirmation hearing commenced on June 5 and continued on June 7, 15 and 23. At the conclusion of the testimony, we heard oral argument and held the matter under advisement.

II. *JURISDICTION*

This Court has jurisdiction over these matters, which are core proceedings pursuant to 28 U.S.C. § 1334 and § 157(b)(1), (b)(2)(A), (*L*) and (*O*).

III. *DISCUSSION*

The Debtors, Credit Lyonnais, and the Ad Hoc Committee of Noteholders all support confirmation of

the Modified Plan. To effectuate the Modified Plan, the Debtors ask us to grant their substantive consolidation motion and allow the ballot of Credit Lyonnais, though it was not filed within the original voting deadline.

Arabella objects to the Debtors' requested relief and also asks that we dismiss these chapter 11 cases asserting that the Debtors are not eligible to file under the Bankruptcy Code.

Because it bears on whether we can or should decide all the other issues, we address Arabella's motion to dismiss first.

A. *Motion to Dismiss*

[1] Arabella asserts that none of the Debtors are eligible to file a case under ***37** the Bankruptcy Code. Section 109(a) of the Code articulates who is eligible to file a petition in bankruptcy:

> Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business or property in the United States, or a municipality, may be a debtor under this title.

11 U.S.C. § 109(a).

[2] **[3]** **[4]** The test for eligibility is as of the date the bankruptcy petition is filed. *See, e.g., In re Axona International Credit & Commerce, Ltd.,* 88 B.R. 597, 614–15 (Bankr.S.D.N.Y.1988). The test must be applied to each debtor. *Bank of America v. World of English,* 23 B.R. 1015, 1019–20 (N.D.Ga.1982)(even where parent is eligible to file, subsidiary must be tested separately to see if it is eligible). The burden of establishing eligibility is on the party filing the bankruptcy petition, in this case the Debtors. *See, e.g., In re Secured Equipment Trust of Eastern Air Lines, Inc.,* 153 B.R. 409, 412 (Bankr.S.D.N.Y.1993) and cases cited therein.

In this case, only one of the Debtors, Marine, is incorporated in the United States. Marine was incorporated in Delaware in 1991. The others are incorporated in Cyprus, Singapore or Liberia. Most of the Debtors have their headquarters in Athens, Greece. The Debtors admit that none has a place of business in the United States, except Marine. (Exhibit A–31.)

Since Marine is incorporated in Delaware, the Debtors assert that its stock is located in Delaware. *See* Del. Gen. Corp. L. 169 ("the situs of the ownership of the capital stock of all corporations existing under the laws of this State ... shall be regarded as in this State"). Thus, we conclude that Global Ocean, the owner of the stock of Marine, has property in Delaware.

The Debtors also assert that they have other significant contacts with, and in, the United States. Global Ocean had an initial public offering of its stock in the United States in 1988 and its stock has traded on the American Stock Exchange until recently. In 1997, Global Ocean also issued the Notes in the United States, using American attorneys and investments bankers. All the Debtors, who guaranteed the Notes, submitted to the jurisdiction of the State of New York for all issues arising under the Notes and appointed Marine as their agent for service of process. (Indenture at § 11.14.) When the Debtors sought to renegotiate the terms of the Notes, they met with the Ad Hoc Committee of Noteholders in the United States and negotiated with them through American representatives.

[5] Further, the Debtors presented evidence that some of their vessels have visited ports in the United States on a regular basis. (Exhibit D–9.) However, the Debtors' Exhibit shows that only four of the Debtors' twelve vessels visited the United States for a total of 143 days in the fifteen months prior to the petition date. One of the vessels was in the United States only once (in November, 1999). We do not find this evidence persuasive. Having some business in the United States (and even being physically present in the United States for 30% of the year) is insufficient to constitute having a place of business in the United States.

[6] Further, none of the Debtors' vessels were in the United States on the day the petitions were filed, which is the dispositive date. *See, e.g., Axona,* 88 B.R. at 614. We hold that it is insufficient for purposes of establishing eligibility that the Debtors had property in the United States at some time in the prior year. The Debtors must have property in the United States at the time they actually file their bankruptcy petition. *Id.*

The Debtors assert, however, that they did have property in the United States on the petition date, specifically business documents and funds in bank accounts. The documents were produced by the Debtors to the Ad

Hoc Committee of Noteholders ***38** during the course of their negotiation of the Lock-up Agreement and the Plan. The Debtors assert that these documents are their property and thus sufficient to establish their eligibility to file bankruptcy in this country. *See, e.g., In re Spanish Cay Co., Ltd.,* 161 B.R. 715, 721 (Bankr.S.D.Fla.1993)(advertising and marketing material, together with office equipment and a bank account containing $100, was sufficient property in the United States to create eligibility to file bankruptcy).

However, in this case, the business documents in the hands of the Ad Hoc Committee of Noteholders are not original books and records of the Debtors; they are merely copies. It does not appear that the Debtors expect the return of those. We do not, therefore, find that those documents are property of the Debtors for purposes of establishing eligibility to file bankruptcy in the United States. [5]

The Debtors did have property in the United States on the petition date, however, namely funds in various bank accounts. *See, e.g., In re McTague,* 198 B.R. 428, 429 (Bankr.W.D.N.Y.1996)($194 in bank account was sufficient property for bankruptcy eligibility). One account was at The Bank of New York in New York City (an account in use since 1989) and another was at Chase Manhattan Bank in Delaware (opened shortly before the bankruptcy filing). Both these bank accounts are in the name of Global Ocean. The Debtors' deputy financial officer, Mr. Panagopoulis, testified that the funds in the bank accounts represent the revenues from the operations of all the vessels. Those revenues belong to the vessel owning subsidiaries and, through their ownership of the subsidiaries, the various other Debtors. Mr. Panagopoulis also testified that the funds of the various Debtors have always been commingled and deposited into the Global Ocean account and that none of the other Debtors even have bank accounts.

Arabella sought to discredit this testimony by cross-examining Mr. Panagopoulis about the New York bank account statement for July, 1999. (Exhibit A–21.) That statement showed that in July, 1999, the Debtors withdrew over $4 million from the New York bank account, reducing the funds therein to approximately $10,000. (It was in July, 1999, that the Debtors defaulted on an interest payment due to the Noteholders in the amount of approximately $6.5 million.) Since that time, the Debtors have admitted that that account has had minimal funds. Instead, the Debtors' vessel revenues have been deposited into the Royal Bank of Scotland account of Global Ocean located in Greece.

[7] It is not relevant, as Arabella suggests, that there is only a relatively small amount in the Debtors' bank accounts in the United States (less than $100,000 in both). As the Court in *McTague* concluded:

> Nonetheless, $194 in a bank account is clearly "property," and at least two courts have held that such an account is property "in" the district in which the deposit account is located, even though bank deposits may be viewed as being "in" the place of residence of the depositor for certain other purposes.
>
> Consequently, as applied to the case at bar, the statute does not appear to be vague or ambiguous, and it seems to have such a plain meaning as to leave the Court no discretion to consider whether it was the intent of Congress to permit someone to obtain a bankruptcy discharge solely on the basis of having a dollar, a dime or a peppercorn located in ***39** the United States. The Court will so rule.
>
> Therefore, the Court concludes that ... the language of § 109(a) is clear, and the Court does not have discretion to look behind the language and declare that the quantity of property in the United States will be decisive of eligibility to be a debtor under the Code.

198 B.R. at 431–32.

Thus, we conclude that the bank accounts constitute property in the United States for purposes of eligibility under section 109 of the Bankruptcy Code, regardless of how much money was actually in them on the petition date.

However, Arabella asserts that the Debtors' argument that the funds in the account represent property of all the Debtors is incorrect. On cross-examination, Mr. Panagopoulis admitted that the revenues from the Hanjin vessels were always deposited into Global Ocean's account at Credit Lyonnais in France, as required by the preferred ship mortgage on those vessels. Thus, Arabella asserts that none of the funds of the Hanjin Debtors were deposited into the New York bank account. [6]

The Debtors rely heavily on the *World of English* decision which held that claims by subsidiaries to funds in their parent's bank account located in the United States constituted sufficient property in the United States for eligibility purposes under section 109. 23 B.R. at 1023.

The Debtors also point to the existence of retainers paid by the Debtors to their bankruptcy counsel as evidence of the requisite property in the United States. Before the petitions were filed, retainers totaling $400,000 were paid to bankruptcy counsel, which still hold those funds. The Debtors assert that such retainers held in escrow by counsel for a debtor are property of the estate. *See, e.g., In re Prudhomme,* 43 F.3d 1000, 1003–04 (5th Cir.1995)(unearned portion of retainer is property of estate and court has equitable power to order disgorgement even of earned attorneys' fees); *In re Independent Engineering Co., Inc.,* 232 B.R. 529, 533 (1st Cir. BAP 1999) (retainer paid by third party to debtors' attorney was property of debtors' estate); *In re Tundra Corp.,* 243 B.R. 575, 582–83 (Bankr.D.Mass.2000).

The Debtors assert that they all have an interest in the escrow funds which were paid to counsel on all their behalf. We agree. The retainers were paid on behalf of all the Debtors and, therefore, all the Debtors have an interest in those funds. It is not relevant who paid the retainer, so long as the retainer is meant to cover the fees of the attorneys for all the Debtors, as it clearly was in these cases. *See, e.g., Independent Engineering,* 232 B.R. at 533. Thus, we conclude that the Debtors do have sufficient property in the United States to make them eligible to file bankruptcy petitions under section 109 of the Bankruptcy Code. Arabella's motion to dismiss is denied.

B. *Confirmation*

Several objections to confirmation were interposed by Arabella.

1. *No Impaired Class Has Accepted the Plan*

Under the original Plan, the Noteholders were the only class impaired and entitled to vote. When that class rejected the Plan, the Debtors modified the Plan on May 16, 2000, purporting to impair the claim of Credit Lyonnais. Credit Lyonnais then submitted a ballot (dated May 3, 2000) purporting to accept the Modified Plan. (Exhibit D–9.)[7] The Debtors, therefore, assert they have the minimal one ***40** impaired accepting class required by section 1129(a)(10).

Arabella disputes this contention for several reasons. First, the Credit Lyonnais ballot cannot be counted as it was received after the deadline fixed by the Court for voting on the Plan. Second, the Credit Lyonnais claim is not impaired by the Modified Plan because its treatment is actually enhanced by the changed terms. Third, even if it is impaired, the impairment has been manufactured solely for the purpose of gerrymandering the Plan voting.

a. *Timeliness of the Ballot*

[8] In the Order approving the Disclosure Statement dated March 24, 2000, the Court set April 28, 2000, as the deadline for voting on the Debtors' Plan. The Credit Lyonnais ballot is dated May 3, 2000.

Several courts have held that a late ballot cannot be counted unless the Court, on Motion and after finding excusable neglect, extends the time for voting. *See, e.g., Hanson v. First Bank of South Dakota, N.A.,* 828 F.2d 1310, 1314 (8th Cir.1987); *In re Richard Buick, Inc.,* 126 B.R. 840, 847–48 (Bankr.E.D.Pa.1991). Other courts, however, have been liberal in allowing late ballots. *See, e.g., In re Rhead,* 179 B.R. 169, 177 (Bankr.D.Ariz.1995)(deeming modified plan and oral argument of counsel to be the required motion to extend voting deadline and counting late ballot). Since Credit Lyonnais was not afforded an opportunity to vote on the original Plan, if the Modified Plan does impair its claim, an extension of time to permit it to vote on the Modified Plan is warranted.

b. *Impairment of the Claim*

[9] Arabella insists that the Credit Lyonnais claim is not impaired by the Modified Plan because the treatment of that claim is more onerous to the Debtors than simply reinstating the loan. Under the Modified Plan, the Debtors must (1) pay a higher interest rate to Credit Lyonnais, (2) maintain a higher value of collateral securing its loans (130% instead of 120% of the loan balance), and (3) repay the loan principal balance faster (by paying an extra $3 million by September 30, 2000, and an extra $500,000 semi-annually). (*Compare* Exhibit A–22 *with* Modified Plan at Exhibit A.) In addition, the Debtors must obtain the guarantee of the Credit Lyonnais debt by Captain Tsakos. (*Id.*)

The Debtors assert that it is irrelevant whether Credit Lyonnais' position is improved or not; they assert that *any* change is impairment. *See, e.g., In re L & J Anaheim Assoc.,* 995 F.2d 940 (9th Cir.1993); *Rhead,* 179 B.R. at 177 ("any change of a creditor's rights, whether for the better or for the worse, constitutes impairment and creates the possibility of a 'consenting impaired class'."). Despite their articulation of such a seemingly extreme position, however, both *Rhead* and *L & J Anaheim* dealt with adverse changes to the affected creditor's rights. In *L & J Anaheim,* the creditor lost its right to foreclose in the event of a default, 995 F.2d at 943, and in *Rhead,* the tax lienor was to be paid over three years, 179 B.R. at 176.

We are not required to decide whether improvement in a creditor's legal or contractual rights under a plan constitutes impairment, however, because we readily conclude that Credit Lyonnais' rights are negatively impacted by the Modified Plan. Arabella overlooks the significant impairment of one of Credit Lyonnais' greatest rights, its interest in the restricted cash account. (Exhibit A–22 at § 9.2(a).) Under the Modified Plan, the Debtors are given immediate access to the restricted account (which currently totals over $5.6 million) to make payments to other creditors under the Plan and for operating capital. (Modified Plan at Exhibit A, p. 2; Exhibit D–2.)

Unfettered use of a secured creditor's restricted cash is clearly impairment of that creditor's rights. *See, e.g.,* ***41** *In re Dwellco I Limited Partnership,* 219 B.R. 5 (Bankr.D.Conn.1998)(secured creditor was impaired under plan it proposed because plan provided for use of creditor's cash collateral to pay administrative, priority and unsecured creditors' claims).

Further, if the Debtors do not meet the collateral value requirements of the Modified Plan, it is not a default of the Credit Lyonnais facility, rather the amount of interest due just increases. (*Id.* at pp. 2, 4 and 9.) Such a change of Credit Lyonnais' rights clearly constitutes impairment. *See, e.g., L & J Anaheim,* 995 F.2d at 943 (removal of creditor's ability to foreclose on event of default constitutes impairment).

[10] Arabella argues that the Modified Plan treatment is no different from one of the alternative treatments in the original Plan, under which the Debtors claimed that Credit Lyonnais was not impaired. Arabella asserts, therefore, that the Debtors are judicially estopped from now arguing that Credit Lyonnais is impaired.

There is one significant difference, however. Under the prior Plan, Credit Lyonnais had the option of rejecting the Aida refinance and leaving its rights unimpaired. Thus, the Debtors are not judicially estopped from asserting that the Modified Plan does impair Credit Lyonnais because it does not give Credit Lyonnais the option of leaving its rights unaffected.

c. *Artificial Impairment*

[11] Arabella asserts, however, that because the Debtors have blatantly impaired Credit Lyonnais only for the purpose of obtaining the vote of an impaired class, the impairment should somehow be ignored. It cites to several cases which have condemned such "gerrymandering" of classes for voting purposes. *See, e.g., In re Willows Convalescent Centers, L.P.,* 151 B.R. 220, 222 (D.Minn.1991)("debtor may not manufacture impaired classes merely for the purpose of garnering votes of such classes in favor of its plan") and cases cited therein. Specifically, courts have condemned modifications which improve or only slightly impair a creditor's position for no justifiable reason as being "artificial" impairment, or a mere artifice. *See, e.g., In re Windsor on the River Associates, Ltd.,* 7 F.3d 127, 131 (8th Cir.1993); *In re W.C. Peeler Co., Inc.,* 182 B.R. 435, 437 (Bankr.D.S.C.1995); *In re Dean,* 166 B.R. 949, 954 (Bankr.D.N.M.1994); *In re Meadow Glen, Ltd.,* 87 B.R. 421, 427 (Bankr.W.D.Tex.1988).

In *In re Daly,* 167 B.R. 734 (Bankr.D.Mass.1994), the Court concluded that the debtor could not make a last minute amendment to a plan, solely to create an impaired accepting class. In that case, the Court found that:

> [T]he impairment of Rattey's claim in the most recent plan was plainly contrived and engineered solely to create an accepting impaired class. In earlier versions of the plan, Rattey's claim was *greater* than in the present plan but not impaired. The *timing* of the amendment is telling: the plan was amended to impair Rattey's claim only when it became clear to the Debtor that he could not rely on North Attleboro's priority tax claim to satisfy the requirement of an accepting impaired class. The *extent* of the impairment is also relevant. The impairment of Rattey's claim, though real, pales

> in comparison to the impairment of the unsecured claims....
>
> Thus the impairment of Rattey's claim has no reasonable basis other than the need to create an accepting impaired class. The cases are clear that this is impermissible. A Debtor may not satisfy § 1129(a)(10) by manufacturing an impaired class for the sole purpose of satisfying § 1129(a)(10) and thereby forcing the plan upon a truly impaired class that has voted to reject the plan....*This contrived and artificial impairment* can be viewed either as a violation of the requirement of an accepting impaired class, § 1129(a)(10), or as a violation of the requirement that the plan be proposed in good faith, ***42** § 1129(a)(3), or as both. Whichever way it is viewed, it prevents confirmation of the plan.

167 B.R. at 736–37 (emphasis added) (citations omitted).

While similar to *Daly,* we conclude that the facts of this case are sufficiently different to distinguish it. As noted above, there is a real impairment of the rights of Credit Lyonnais (relinquishing its right to hold onto the restricted cash and its foreclosure remedies); it is not illusory or artificial. Further, the impairment is substantial, affecting over $5.6 million in cash collateral (more than 10% of its outstanding loan balance). In addition, the Debtors have a reasonable basis for the impairment: the funds are necessary to meet the distribution requirements of the Modified Plan. While the timing does suggest that the modified treatment was proposed in order to meet the requirements of section 1129(a)(10), we are loathe to adopt a rule which chills the ability of a debtor to make last minute deals with creditors in order to achieve a consensual plan or otherwise reduce opposition to the plan. [8]

Thus, we conclude that Credit Lyonnais is impaired by the Modified Plan and entitled to vote.

2. *Releases*

[12] Arabella objected to certain release language contained in the Modified Plan. (Modified Plan at Article X.) That section provided for the release of the Debtors' directors and officers and of the Ad Hoc Committee of Noteholders by the Debtors. (*Id.* at Article X B.) In addition, any creditor who (i) accepted the Plan, (ii) was in a class which accepted or is deemed to have accepted the Plan, or (iii) is entitled to receive a distribution under the Plan shall be deemed to have released the Ad Hoc Committee of Noteholders and their representatives from any claims arising from their actions in connection with negotiating the Plan. (*Id.* at Article X C.) Finally, the Modified Plan provided that the Debtors, Reorganized Debtors, the officers and directors of the Debtors, the Indenture Trustee under the Notes, the Ad Hoc Committee of Noteholders and their respective professional advisors would have no liability to anyone for their actions in connection with formulating the Plan, except for gross negligence or wilful misconduct. (*Id.* at Article X E.) [9]

At the confirmation hearing the Debtors offered a proposed Confirmation Order which revised the Modified Plan to delete Article X C and delete any release in Article X E of any third party (thereby providing only for the discharge of the Debtors). This leaves only the release by the Debtors of their officers and directors and the Ad Hoc Committee of Noteholders. (*Id.* at Article X B.)

Arabella argues that this language is still violative of the Code. *See, e.g., In re Continental Airlines,* 203 F.3d 203 (3d Cir.2000). The Debtors have offered no evidence to support even the Debtors' release of any claims they (or any party acting derivatively through them) may have against their officers and directors or the Ad Hoc Committee of Noteholders. *Id.* at 214 (reversing order confirming plan of reorganization which contained releases of third party actions against directors and ***43** officers because record was devoid of evidence to support them). *Cf. In re Zenith Electronics Corp.,* 241 B.R. 92, 111 (Bankr.D.Del.1999), *citing Master Mortgage Inv. Fund, Inc.,* 168 B.R. 930 (Bankr.W.D.Mo.1994)(evidence presented that releasees had made substantial contribution to the plan, the releases were necessary since the releasees were continuing to serve the reorganized debtor, affected parties had voted overwhelmingly in support of the plan and the plan provided for a significant distribution to creditors).

On this record, the Debtors have not met their burden of establishing that the revised releases are appropriate, because of the failure of the affected class (the Noteholders) to support the Modified Plan. We conclude that the "overwhelming support" factor articulated in *Master Mortgage* requires that the affected class accept the plan by at least the percentages required by section 1126 of the Bankruptcy Code.

3. *Best Interests of Creditors*

[13] Arabella asserts that the Modified Plan fails to meet the requirements of section 1129(a)(7) that impaired creditors receive at least as much as they would if the Debtors were liquidated under chapter 7. Under the Modified Plan, the Noteholders are to receive 50% of their claims in cash on the Effective Date. [10] (Modified Plan at Article III B 4.) According to the Debtors' analysis, if they were liquidated under chapter 7, the Noteholders would receive only approximately 30% of their claims. (Disclosure Statement at Exhibit D.)

The Debtors presented testimony by two experts that in their opinion the Debtors' vessels had a total value of $96.7 million without charters and $104.7 million with charters. (Exhibits D–1, D–8.) On cross examination, Arabella sought to discredit that testimony and did an effective job. Both experts admitted that charter rates and vessel values have been increasing over the past year, at an accelerated pace. (Exhibit A–1.) They admitted that the industry had suffered a five year low in the summer of 1999 and that it was recovering. They admitted that the recovery was expected to continue but could not say for how long or if it would reach prior highs.

The Debtors' experts also acknowledged that the Debtors' charter hire agreements were generally at or above market value. [11] Although the Debtors assert that the charter hires are not assignable, and therefore must be ignored in determining the value of the vessels, Arabella disagrees. [12] It is not necessary for us to resolve this issue, because we do not believe that this factor is significant. Since the Debtors' charter hires are of short duration, and market rates are going up, the lack of a long term charter agreement in place may in fact enhance the value of the vessels (allowing a buyer to recharter at higher prices or use the vessel itself). The Debtors' experts ***44** at least acknowledged that the short charter terms did not affect the vessels' value significantly.

Arabella's counsel also pointed to recent sales (and prices at which vessels are currently listed for sale) of vessels comparable to the Debtors' which the experts had not considered. (Exhibits A–7 & A–28.) Counsel also identified numerous appraisals that the Debtors had had done of their vessels as far back as April, 1999, which showed higher values for the vessels, at a time when market values were at a five-year low. (Exhibits A–25 & A–26; Disclosure Statement at Exhibit G.) The Debtors' container ship expert acknowledged that an additional year of depreciation did not account for the difference in value, especially given the rising values of vessels as the industry recovers. The fact that the Debtors had numerous appraisals showing significantly higher values for the vessels at a time when the industry was at an all time low seriously undermines the validity of its evidence of value today.

In fact, the Debtors' Panamax carrier expert's report shows that the Debtors' vessels are today worth $100,000 more than a month ago, $700,000 more than 6 months ago, and at least $2.7 million more than a year ago. He further acknowledged that he relied on comparable sales that are 2 to 4 months old and did not adjust his appraised values to reflect the rising market since those sales.

In addition, it was disclosed on cross examination that the Debtors' container ship expert relied on information given him by the Debtors which might not have been accurate, namely the speed and fuel efficiency of the vessels. For example, the maximum speeds which the expert assumed the vessels could achieve were less than the speeds which the Debtors had represented in their charter agreements for those same vessels. The expert admitted that even one knot in increased speed capability would increase the value of vessels of this size.

Arabella also questioned the values attributed to the vessels by the Debtors because of the terms of the exit financing arranged by the Debtors and the terms of the restructured Credit Lyonnais debt. The exit financing, secured by all vessels except the Hanjin vessels, is in the amount of $45 million and requires that the Debtors maintain an initial value to loan ratio of 125%. (Exhibit A–15.) Thus, Arabella asserts that the Debtors' non-Hanjin vessels must have a current value of least $56 million. Further, the exit financing assumes that the Debtors, within six months, will sell the Tiger Island and Tiger Bay for at least net $3 million (as opposed to the Debtors' appraised value of $2.4 million for those vessels). After that sale (and paydown of the exit financing to $42 million), the Debtors must maintain a value to loan ratio of 143% or $60 million. Thus, Arabella asserts the Debtors' non-Hanjin vessels must be worth at least $56 to $63 million or the lenders would not have committed to making the loan. In fact, the lenders were provided with

an appraisal obtained by the Debtors in December, 1999, showing the non-Hanjin vessels to be worth $67 million. (Exhibit A–3.)

Similarly, the Credit Lyonnais loan of $48,875,000 (Exhibits D–2 & D–4) requires a value to loan ratio of 120% today and 130% by September 30, 2000. (Modified Plan at Exhibit A.) Therefore, to secure the Credit Lyonnais debt, the Hanjin vessels must be worth at least $58.65 to $59.63 million, or approximately $20 million per vessel. This is less than the current list price ($23 million) for sister ships built the same year and significantly less than the list price ($25 million) for comparable vessels, the Trade Maple and Trade Harvest. (Exhibit A–28.)

While we are cognizant that list prices are typically not indicative of market value, the Debtors' container ship expert used, as a comparable, the fact that the owners of the Trade Maple and Trade Harvest had received an offer of $20.9 ***45** million for each. [13] (Exhibit D–1.) On cross examination, it was revealed that that comparable "sale" had not occurred because the sellers rejected it. (Exhibit A–28.)

The Debtors' container ship expert also acknowledged the rising prices of vessels in this industry since 1999. (Exhibit D–1.) In fact, in an industry newsletter which he authors, he reported that the market was "robust." (Exhibit A–1.) This rising market is reflected in the fact that the Debtors' experts appraised the vessels at 5 to 14% higher in May/June, 2000, than the Debtors' estimate of value in its Disclosure Statement filed in March 2000. (Disclosure Statement at Exhibits D & G.)

While Arabella did not introduce expert testimony as to the value of the Debtors' vessels itself, it did bring into doubt the values attributed by the Debtors' experts. That, together with the loans being extended to the Debtors secured by those assets, convinces us that the vessels must have a higher value than the Debtors suggest.

Based on all the evidence presented, we conclude that the value of the Hanjin vessels is $60 million, or $20 million each. Similarly, we conclude that the other vessels must be worth at least $63 million which is the amount necessary to meet the covenants of the exit financing. [14]

In addition to the vessels, the Debtors own other assets with a value of at least $17 million ($15.4 million in cash and $1.7 million in insurance claims). (Exhibits D–2, A–35 to A–40.) Arabella asserts that the Debtors also have causes of action against Sovereign for avoidance of a fraudulent conveyance in the amount of approximately $3.6 million which was paid within the year prior to the bankruptcy filing. (Exhibit A–19.) However, testimony was adduced that that payment was an advance against the management agreement to assure that Sovereign, and Tsakos Shipping, had sufficient funds to pay the actual vessel expenses in case the creditors sought to foreclose or the company was required to file bankruptcy. Arabella also asserts that the fees paid to Sovereign are recoverable as fraudulent conveyances since it questions what services Sovereign actually performs for the Debtors for the $1.2 million fee paid to it each year. The Debtors presented testimony that Sovereign keeps the books and records of all of the Debtors and provides other accounting and administrative services. Based on the unrefuted evidence presented by the Debtors we are unable to attribute any value to those potential causes of action at this time. [15]

Arabella also contests the amount of liquidation expenses. The Debtors' analysis includes over $5.3 million for costs associated with taking the vessels out of charter, relocating, repairing and maintaining them until they could be sold. It also includes $1.2 million for repatriating the vessels' crews, which Arabella calculates is $4,600 per crew member, an expense that it asserts is high. We agree with Arabella that, since most of the vessels are under charter and earning revenues, it would make more sense for a chapter 7 trustee to sell the vessels (or the stock of the companies owning the vessels) in service. The Debtors' experts acknowledged that many sales are with charter. Further, while it is the policy of the United States Trustee in this District not to allow chapter 7 trustees to operate businesses, since the Debtors in this instance operate the vessels only through their contract with Sovereign and Tsakos Shipping (at a profit to the Debtors of approximately $2 million per month before ***46** debt service), a chapter 7 trustee should be able to do the same with minimal exposure. (Disclosure Statement at Exhibit E.) Thus, we conclude that the liquidation expenses are exaggerated and that they will not exceed the normal liquidation expenses which the Debtors estimate to be $650,000.

Based on our conclusion that the vessels have a total value of $123 million and the Debtors have other assets worth at least $17.1 million, their total assets exceed

$140 million. After payment of Credit Lyonnais' secured claim ($51.4 million) and chapter 7 and 11 administrative expenses ($1.5 million), there is available $87 million for distribution to Noteholders. Thus, we conclude that the Noteholders would receive more on liquidation than the 50% distribution ($63 million) they are to receive under the Modified Plan.

[14] The burden of establishing compliance with section 1129(a)(7) is on the proponent of the plan. *See, e.g., In re Trevarrow Lanes, Inc.,* 183 B.R. 475, 479 (Bankr.E.D.Mich.1995); *In re Zaleha,* 162 B.R. 309, 316 (Bankr.D.Idaho 1993); *In re Future Energy Corp.,* 83 B.R. 470, 489 (Bankr.S.D.Ohio 1988) We conclude that the Debtors have failed to meet their burden on this point.

4. *Feasibility*

Arabella also asserts that the Modified Plan is not feasible. Section 1129(a)(11) of the Bankruptcy Code requires that the plan proponent establish that "Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(1).

[15] Arabella asserts that the Debtors have failed to establish that the Modified Plan is feasible because they have not finalized the exit financing or the terms of the Credit Lyonnais restructuring. The Debtors admit that the exit financing is contingent on the lenders' agreement to the final documentation and that Credit Lyonnais, although it has accepted the Modified Plan, must also approve the terms of any documentation relating to its restructured debt. The Debtors also admit that the documentation is not yet complete for either. However, the Debtors presented testimony regarding the terms of both loans to which the parties have agreed in principle and their belief that the final documentation will be substantially similar to those terms. (Exhibit A–15; Modified Plan at Exhibit A.)

With respect to Arabella's assertion that the Plan is not feasible because there is not final documentation of the exit financing or the Credit Lyonnais loan, we reject that position. Both lenders have issued a commitment letter and/or agreed to term sheets which are detailed and contingent only upon final documentation, confirmation of the Modified Plan, and no materially adverse changes occurring. (*Id.*) These conditions are not unusual and certainly do not cause the financing to be speculative or uncertain.

[16] What causes the Debtors a feasibility problem is their assertion about the value of their vessels. As noted in Part 3 above, if the Debtors are correct that the vessels have a value of only $96 to $104 million, so that they meet the best interests of creditors' test under section 1129(a)(7), then the Debtors either (1) will not have the collateral value necessary to obtain the exit financing or restructure the Credit Lyonnais debt or (2) will be in immediate default of those facilities.

Specifically, Arabella argues that the Credit Lyonnais restructuring requires that the Debtors have collateral securing its position equal to 130% of the balance as of September 30, 2000 ($48.875 million) or $63.54 million. Based on the testimony of the Debtors' experts, the value of the Credit Lyonnais collateral (the Hanjin vessels) is only $45 to $51 million. Thus, by ***47** September 30, 2000, the Debtors will have a shortfall of $12.5 to $18.5 million in collateral pledged to Credit Lyonnais.

The Debtors respond that the Credit Lyonnais restructuring does require that the Debtors have collateral in that amount, but that if the Debtors fail to have that level of collateral they will only be required to pay additional interest to Credit Lyonnais. (Modified Plan at Exhibit A, p. 4.) They will not have to post additional collateral, will not have to pay cash to Credit Lyonnais for any deficiency in the collateral base, and will not be in default of the Credit Lyonnais facility. The Debtors note that their projections show that they will have sufficient cash to pay the additional interest penalty if their collateral is not sufficient. (Exhibit D–4.) Thus, rather than require additional financial restructuring in September, the Debtors assert that they have proven that they are reasonably able to comply with the terms of the Modified Plan, which is all that is necessary for confirmation. *See, e.g., In re Briscoe Enterprises, Ltd., II,* 994 F.2d 1160, 1165–66 (5th Cir.1993) (debtor need not guarantee success, only a reasonable assurance of viability is required).

Arabella makes a similar argument with respect to the exit financing. The exit financing requires that the Debtors have collateral equal to 125% of the $45 million loan or $56.25 million. (Exhibit A–15 at p. 6.) If the Debtors'

experts are correct, the collateral securing that loan (the non-Hanjin vessels) is worth only $51.7 to $53.7 million. Based on those collateral valuations, the Debtors will be in immediate default of the exit financing if the Modified Plan is confirmed. Further, the situation will only get worse. Under the exit financing, the Debtors must sell the Tiger Bay and Tiger Island within 6 months and pay the lender $3 million. (*Id.*) The Debtors assert those vessels are worth only $2.4 million for scrap metal. (Exhibit D–1.) Even if the Debtors are able to pay the shortfall from operating profits, they will still need a collateral base of 143% after the sale of the Tiger Island and Tiger Bay or $60 million. (Exhibit A–15.) Unlike the Credit Lyonnais loan, there is no evidence that this covenant of the exit financing is waivable or curable in any other fashion than collateral value.

Thus, we must conclude that, if the Debtors are correct about the value of their vessels, their Modified Plan is not feasible. *See, e.g., In re Preferred Door Co., Inc.,* 990 F.2d 547, 549 (10th Cir.1993)(plan was not feasible where debtor was unable to pay administrative claims on the effective date).

5. *Absolute Priority*

Arabella asserts that the Modified Plan also violates the absolute priority rule, embodied in section 1129(b)(2)(B), in three ways: First, the Debtors who are parents of the subsidiary Debtors are retaining their stock without payment in full of the creditors of the subsidiaries (including the Noteholders whose obligation was guaranteed by each of the non-Hanjin Debtors). Second, Sovereign, a current shareholder of Global Ocean, will continue to control three members of the Global Ocean board of directors. Thus, Arabella asserts that Sovereign is retaining something (the right to name directors of Global Ocean) on account of its equity interest. Finally, under the Modified Plan the stock of Global Ocean will be owned by Marmaron, a company owned by Maria Tsakos, the daughter of the current controlling shareholder of Global Ocean, Captain Tsakos.

[17] The Debtors assert that the retention of stock by some Debtors in the other Debtors is not really significant given the Debtors' request for substantive consolidation. If the Debtors' estates are consolidated, all assets of all Debtors will be available for repayment of creditors and the retention of the corporate stock by some Debtors will not affect any rights of creditors. The Debtors assert, in fact, that the corporate structure is advantageous to the Noteholders and other creditors since it isolates potential tort and ***48** catastrophic liabilities to one vessel-owning subsidiary. We agree with the Debtors' conclusion. If substantive consolidation is granted, for purposes of plan confirmation, all the assets of all Debtors will be considered for repayment of creditors. Thus, the retention of the corporate structure among the Debtors will not adversely affect any creditors and the only equity retention issue should be at the ultimate parent level for purposes of section 1129(b).

[18] With respect to the right of Sovereign to name directors to the Board of Global Ocean, the Debtors argue that Sovereign has that right, not as a shareholder [16], but pursuant to its contract with the Debtors. (Exhibit A–9.) The corporate charter of Global Ocean provides that the manager of its vessels is entitled to name three directors of its board. Thus, the Debtors argue that Sovereign has that right because of the assumption of its Management Agreement by the Debtors (Modified Plan at p. 19), and not because of Sovereign's rights as a 7% shareholder. (Exhibit D–5.)

We agree with the Debtors' conclusion. The corporate charter of Global Ocean gives the fleet manager, whoever that may be, the right to appoint directors to the board. The assumption of the Management Agreement confirms that Sovereign will have that right. Thus, we conclude that Sovereign is not retaining this right as a shareholder.

[19] With respect to the grant of the equity in Global Ocean to Marmaron, the Debtors assert that this does not violate the absolute priority rule because the equity is not being retained by any existing shareholder. Rather, the Debtors assert that the equity is being sold to a non-shareholder. The fact that the purchaser is a relative of the largest shareholder of Global Ocean is not relevant, the Debtors assert. As support for this position, they cite the case of *Beal Bank v. Waters Edge Limited Partnership,* 248 B.R. 668 (D.Mass.2000). In that case, the District Court upheld the decision of the Bankruptcy Court confirming a plan providing for the private sale of the debtor's equity to an insider, the son-in-law of the debtor's shareholder. 248 B.R. at 680. The Court concluded that the absolute priority rule did not prohibit a private sale of the equity in the debtor to anyone other than an existing shareholder. *Id.* The Court did note, however, that the absolute priority rule might prohibit such a sale if the buyer was acting

merely as a straw party for a shareholder. *Id.* It further acknowledged that sales to insiders were subject to special scrutiny in bankruptcy cases. *Id. See also, In re Abbotts Dairies, Inc.,* 788 F.2d 143 (3d Cir.1986).

While Arabella asserts that Maria Tsakos is clearly just a straw party for her father and brother, [17] we do not find it necessary to decide this issue because we disagree with the conclusion of the *Beal Bank* Court. We believe that the Supreme Court decision in *Bank of America v. 203 North LaSalle Street Partnership,* 526 U.S. 434, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999) cannot be read as narrowly as the *Beal Bank* Court suggests. In fact, among numerous predictions of plans which may avoid the result in *LaSalle,* we have found none to suggest that a plan which gives the equity to the largest ***49** shareholder's daughter can pass muster. [18] While a simple solution, we conclude that it is fundamentally flawed.

In the *LaSalle* decision, the Supreme Court concluded that the absolute priority rule was violated where the debtor's plan permitted only its shareholders to invest new capital to obtain all the equity in the company. The Court was particularly concerned by the fact that the debtor had retained the exclusive right to propose a plan, thereby precluding others (including the objecting creditor) from proposing a plan "selling" the equity to another. 526 U.S. at 456, 119 S.Ct. 1411. The Court stated: "Hence it is that the exclusiveness of the opportunity, with its protection against the market's scrutiny of the purchase price by means of competing bids or even competing plan proposals, renders the partners' right a property interest extended 'on account of' the old equity position and therefore subject to an unpaid senior creditor class's objection." *Id.* In *LaSalle,* the "opportunity" which the Supreme Court found was given to the existing shareholders was the *exclusive* right to bid on the equity in the debtor.

The situation in this case is not very different. Here, Captain Tsakos through his control of the Debtors, as the largest shareholder and part of the group controlling over 50% of the stock in Global Ocean, has retained his *exclusive* right, to *determine* who will be the owner of Global Ocean (as well as the price that she will pay for the ownership). This control of Global Ocean is a right which he holds "on account of" his current position as a controlling shareholder of Global Ocean.

Thus, we conclude that the Debtors' Modified Plan violates the absolute priority rule by allowing the existing controlling shareholder to determine, without the benefit of a public auction or competing plans, who will own the equity of Global Ocean and how much they will pay for the privilege. To avoid this result the Debtors must subject the "exclusive opportunity" to determine who will own Global Ocean to the market place test. [19] *LaSalle,* 526 U.S. at 457, 119 S.Ct. 1411. This can be achieved by either terminating exclusivity and allowing others to file a competing plan or allowing others to bid for the equity (or the right to designate who will own the equity) in the context of the Debtors' Plan. *Id.* at 458, 119 S.Ct. 1411 ("whether a market test would require an opportunity to offer competing plans or would be satisfied by a right to bid for the same interest sought by old equity, is a question we do not decide here.").

C. *Substantive Consolidation*

[20] Because it may be relevant to any future plans, we will address the issues raised by Arabella in opposition to the Debtors' Motion for substantive consolidation. Arabella asserts that the Motion should be denied for two reasons: first, notice was not provided to all Noteholders, ***50** whose rights are substantively affected by the Motion, and second, substantive consolidation is not appropriate because it adversely affects the rights of the Noteholders.

Although we did grant the Debtors' request to limit notice of the substantive consolidation Motion, it was as the result of the telephone conference on discovery and scheduling issues. At that time only the issue of reducing the time to answer was addressed. Had Arabella been aware of the request to limit notice (thereby not providing notice to all Noteholders) and raised it with the Court, we would not have granted the Debtors' request for limited notice because we conclude that substantive consolidation would have an effect on the rights of the Noteholders. For example, currently only Global Ocean and the Hanjin Debtors are liable for the Credit Lyonnais debt. Substantive consolidation would make the non-Hanjin Debtors liable for the Credit Lyonnais debt (which currently totals approximately $51 million). According to the Debtors' expert, the Hanjin vessels do not have sufficient value to cover the Credit Lyonnais debt. Thus, any Motion to substantively consolidate these Debtors

must be made on notice to those adversely affected by it, which includes the Noteholders. [20]

IV. *CONCLUSION*

For the reasons given above, we deny confirmation of the Plan and substantive consolidation until appropriate notice can be given. We also deny Arabella's motion to dismiss these cases, concluding that the Debtors are eligible to file the instant cases under section 109 of the Bankruptcy Code.

All Citations

251 B.R. 31

Footnotes

1 This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, made applicable to contested matters by Rule 9014.

2 Global Ocean owns 100% of the common stock of Debtors Mackenzie Shipping Corporation ("Mackenzie"), Zephaniah Pte Limited, Iphigenia Pte Limited and Marine Services Corporation ("Marine"). Mackenzie owns 100% of the common stock of Debtors Malandrino Maritime Company Limited, Selero Shipping Company Limited, Petra Maritime Company Limited, Tolmi Shipping Company Limited, Legrena Marine Company Limited, Iphigenia Pte Limited, Queensland Shipping Company Limited, Melitea Shipping Company Limited, Hedgestone Shipping Company Limited, Korinia Shipping Company Limited and Filiria Marine Company Limited. (The latter three are referred to collectively as "the Hanjin Debtors.") Both Global Ocean and MacKenzie own other subsidiaries that have not filed chapter 11 petitions. (Disclosure Statement at p. 4, n. 6.)

3 Two of the Debtors are headquartered in Singapore as required by its statutes.

4 Nikolas Tsakos owns 70% of Sovereign and owns 7.45% of the stock of Global Ocean. (Exhibit D–5.) An amended (and the latest) schedule 13D filed with the SEC on October 25, 1996, shows that his father, Captain Panagiotis Tsakos, is the largest shareholder (over 30%) of Global Ocean and leads a group controlling well over 50% of the shares of Global Ocean. (*Id.*)

5 To hold otherwise would be to expand bankruptcy eligibility beyond all bounds, by making any entity with a copy of any business record in the United States eligible. Since the eligibility test of section 109 is applicable to involuntary petitions, as well as voluntary petitions, this could result in the filing of bankruptcy petitions in instances where there was no legitimate expectation that the laws of the United States would apply. *See, e.g., Axona,* 88 B.R. at 604–06.

6 There was no evidence presented as to the source of the funds deposited into the Delaware account.

7 There is no evidence regarding when this ballot was received, nor is it even clear that it relates to the Modified Plan, which was not filed until 13 days after the date of the ballot.

8 Many of the courts which condemn artificial impairment are also confronting classification issues; that is, with no legitimate justification, the debtor has created a separate claim of favored creditors which are only slightly impaired to assure the class votes to accept the plan. *See, e.g., Windsor on the River,* 7 F.3d at 131. That issue is not raised here since Credit Lyonnais, as a secured creditor, is entitled to a separate class. *See, e.g., In re Commercial Western Finance Corp.,* 761 F.2d 1329, 1338 (9th Cir.1985)(secured creditors are entitled to be separately classified because their collateral is different).

9 The Amended Plan originally also provided for releases of the Debtors' directors and officers by all creditors entitled to receive a distribution under the Plan (as well as creditors who accepted, or those whose class accepted, the Plan). That language was deleted in the Modified Plan.

10 In addition, interest will be paid from May 1, 2000, until the Effective Date occurs.

11 For example, the Hanjin vessels are chartered at $20,000 per day while the current market rate is $16–17,000 per day. The Debtors' Panamax carrier expert testified that charter rates are now $10,000 compared to $6,000 a year ago and that the Debtors should have no problem finding charters for their Panamax vessels.

12 Arabella notes that the Debtors are assuming the contracts under the Modified Plan. (Modified Plan at p. 19.) Arabella asserts that if the agreements were not assignable under section 365, they could not even be assumed by the Debtors. *See, e.g., In re West Electronics, Inc.,* 852 F.2d 79 (3d Cir.1988) (holding that if contract is not assignable under applicable non-bankruptcy law, debtor cannot assume it under section 365). Thus, they assert that if the charters are assumable by the Debtors, they must be assignable. Further, they note that a chapter 7 trustee could avoid the entire problem of assignability of the charters by simply selling the stock of the vessel-owning subsidiaries. It is typical in this industry to

have a separate subsidiary own only one vessel and sales of stock of such subsidiaries is not unusual. In fact, the Debtors acquired the Hanjin vessels in the same manner.

13 Apparently, because there are so few container vessel sales (only 50 per year of a worldwide fleet of about 2500), the Debtors' container ship expert relied on information beyond reported sales. (Exhibit D–1.)

14 This figure is based on a value of $3 million for the Tiger Island and Tiger Bay and a value of the remaining vessels equal to 143% of the exit financing or $60 million.

15 This is, of course, without prejudice to any action that might be brought to recover such sums.

16 Sovereign is a small shareholder of Global Ocean, owning only about 300,000 of over 4 million shares outstanding. (Exhibit D–5.)

17 There is certainly evidence to support such a conclusion. Mr. Jolliffe was vague in his testimony regarding Maria Tsakos' financial condition and business acumen. In cross-examination of a representative of the exit lender, Mr. Crawley, Arabella established that the exit lender had insisted that the new owner of Global Ocean be the “Tsakos family” or a “Tsakos company,” meaning related to Captain Tsakos. It is significant to note that, while Captain Tsakos will no longer be the controlling shareholder of Global Ocean, he is personally guaranteeing the Credit Lyonnais loan ($51 million) and over $18 million of the exit financing for the Debtors. (Exhibit A–15 at p. 6; Modified Plan at Exhibit A.)

18 *See, generally,* George H. Singer, *Supreme Court Clarifies “New Value Exception” To Absolute Priority Rule—Or Does It?,* 18–AUG Am. Bankr.Inst. J. 1, 33 (1999)(“It would appear that any new value plan filed during the period of exclusivity afforded by § 1121 will now be patently unconfirmable ... unless a mechanism is in place that allows for competing bids ...”), Bruce W. White & William L. Medford, *Conducting Equity Auctions Under LaSalle—The Fog Thickens,* 18–OCT Am. Bankr.Inst. J. 20, 20 (1999)(“Perhaps future equity interest sales should modify the two-step auction offer—first to creditors and then to third parties—and simply treat the sale of equity interests as the sale of any property of the estate.”), Alexander F. Watson, *Left For Dead: The Supreme Court's Treatment Of The New Value Exception In Bank Of America National Trust & Savings Association v. 203 North LaSalle Street Partnership,* 78 N.C. L.Rev. 1190, 1206 (2000)(“Ensuring that the market is the mechanism that determines the value of the firm would help ... to maximize the property, as old shareholders would be forced to pay at least as high a price as anyone else would pay.”).

19 Although Mr. Jolliffe asserted that he talked to another unrelated party about investing in the Debtors, we do not believe that this limited “shopping” of the Debtors is sufficient.

20 This is especially appropriate since the Debtors' Disclosure Statement advised Noteholders that the Debtors were not seeking substantive consolidation of the estates.

TAB 6

In the Matter of MtGox Co., Ltd.

[Indexed as: MtGox Co., Ltd. (Re)]

2014 ONSC 5811

Superior Court of Justice, Newbould J. October 6, 2014

Bankruptcy and insolvency — Foreign proceedings — Japanese company with registered head office in Japan operating online exchange for purchase and sale of bitcoins — Bankruptcy proceedings in respect of company commenced in Japan following loss of large number of bitcoins — Bankruptcy trustee applying under s. 269 of Bankruptcy and Insolvency Act ("BIA") for recognition of foreign bankruptcy proceedings as a foreign main proceeding — Application allowed — Trustee entitled under s. 271 of BIA to automatic stay of actions or proceedings against company in Canada — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 269, 271.

M Ltd., a Japanese company with a registered head office in Japan, operated an online exchange for the purchase and sale of bitcoins. It suspended trading after discovering that approximately 850,000 bitcoins were missing. Bankruptcy proceedings in respect of M Ltd. were commenced in Japan. The bankruptcy trustee brought an application under the *Bankruptcy and Insolvency Act* ("*BIA*") for a declaration that the Japanese bankruptcy proceedings were a "foreign main proceeding" for the purposes of the *BIA* and for related relief.

Held, the application should be allowed.

A "foreign main proceeding" is defined in s. 268(1) of the *BIA* as a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. Section 268(2) provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests. The evidence established that M Ltd. had the centre of its main interests in Japan. The Japanese bankruptcy proceeding was a foreign main proceeding. The trustee was entitled under s. 271(1) of the *BIA* to an automatic stay of actions or proceedings against M Ltd. in Canada.

Cases referred to

Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786, [2000] O.T.C. 135, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157, 95 A.C.W.S. (3d) 608 (S.C.J.); *Braycon International Inc. v. Everest & Jennings Canadian Ltd.*, [2001] O.J. No. 511, 26 C.B.R. (4th) 154, 103 A.C.W.S. (3d) 56 (S.C.J.); *Lear Canada (Re)*, [2009] O.J. No. 3030, 55 C.B.R. (5th) 57, 179 A.C.W.S. (3d) 46 (S.C.J.); *Lightsquared LLP (Re)*, [2012] O.J. No. 3184, 2012 ONSC 2994, 92 C.B.R. (5th) 321 (S.C.J.); *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, J.E. 91-123, 52 B.C.L.R. (2d) 160, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1

Statutes referred to

Bankruptcy Act of Japan, Act No. 75 of June 2, 2004
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2, Part XIII [as am.], ss. 267-284 [as am.], 268(1), (2), 269 [as am.], (1), 270 [as am.], (1), 271(1), (*a*)
Bankruptcy Code, 11 U.S. Code, c. 11, 15
Civil Rehabilitation Act (Japan), arts. 21(1), 25(iii)
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as am.]

Authorities referred to

Sarra, Janis, "Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings", 44 Tex. Intl. L.J. 547
UNCITRAL Model Law on Cross Border Insolvency

APPLICATION for an initial recognition order under Part XIII of the *Bankruptcy and Insolvency Act*.

Margaret R. Sims, for applicant.

[1] NEWBOULD J.: — Nobuaki Kobayashi, in his capacity as the bankruptcy trustee of MtGox Co., Ltd., applied on October 3, 2014 for an initial recognition order pursuant to Part XIII (ss. 267 to 284) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2, as amended ("*BIA*"):

(a) declaring and recognizing the bankruptcy proceedings commenced in respect of MtGox pursuant to the *Bankruptcy Act of Japan*, Act No. 75 of June 2, 2004 before the Tokyo District Court, Twentieth Civil Division as a foreign main proceeding for the purposes of s. 270 of the *BIA*;

(b) declaring that the trustee is a foreign representative pursuant to s. 268(1) of the *BIA*, and is entitled to bring this application pursuant to s. 269 of the *BIA*; and

(c) staying and enjoining any claims, rights, liens or proceedings against or in respect of MtGox and the property of MtGox.

[2] I concluded at the hearing that the relief sought should be granted, for reasons to follow. These are my reasons.

[3] MtGox is a Japanese corporation formed in 2011. It is, and always has been, located and headquartered in Tokyo, Japan. From April 2012 to February 2014, its business was the operation of an online exchange for the purchase and sale of bitcoins through its website located at <http://www.mtgox.com>. Bitcoins are a form of digital currency. At one time, the MtGox exchange was reported to be the largest online bitcoin exchange in the world.

[4] On or about February 10, 2014, MtGox halted all bitcoin withdrawals by its customers after it was subject to what appears to have been a massive theft or disappearance of bitcoins held by it. MtGox suspended all trading on or about February 24, 2014, after it was discovered that approximately 850,000 bitcoins were missing. These events caused, among

other things, MtGox to become insolvent and ultimately led to the Japan bankruptcy proceeding.

[5] On February 28, 2014, MtGox filed a petition for the commencement of a civil rehabilitation proceeding in the Tokyo Court pursuant to art. 21(1) of the Japanese *Civil Rehabilitation Act* ("*JCRA*"), reporting that it had lost almost 850,000 bitcoins. A civil rehabilitation proceeding under the *JCRA* is analogous to a restructuring proceeding in Canada pursuant to the *BIA* or the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[6] Following the filing of the Japan civil rehabilitation petition, MtGox commenced an investigation with regard to the circumstances that led to the Japan civil rehabilitation. However, by mid-April 2014, the Tokyo Court decided to dismiss the Japan civil rehabilitation petition pursuant to art. 25(iii) of the *JCRA*, recognizing that under the circumstances it would be very difficult for MtGox to successfully prepare and obtain approval of a rehabilitation plan or otherwise successfully carry out the Japan civil rehabilitation.

[7] On April 24, 2014, the Tokyo Court entered the Japan bankruptcy order, formally commencing MtGox's Japan bankruptcy proceeding and appointing the applicant as bankruptcy trustee.

[8] MtGox has approximately 120,000 customers who had a bitcoin or fiat currency balance in their accounts as of the date of the Japan petition. The customers live in approximately 175 countries around the world.

[9] MtGox has been named as a defendant in a pending class action filed in the Ontario Superior Court of Justice. The notice of action and statement of claim were provided to the trustee under the Hague Convention on August 29, 2014.

Applicable Law

[10] Various theories as to how multinational bankruptcies should be dealt with have long existed. Historically, many countries adopted a territorialism approach under which insolvency proceedings had an exclusively national or territorial focus that allowed each country to distribute the assets located in that country to local creditors in accordance with its local laws. Universalism is a theory that posits that the bankruptcy law to be applied should be that of the debtor's home jurisdiction, that all of the assets of the insolvent corporation, in whichever country they are situated, should be pooled together and administered by the court of the home country. Local courts in other countries would be expected, under universalism, to recognize and enforce

the judgment of the home country's court. This theory of universalism has not taken hold.

[11] There is increasingly a move towards what has been called modified universalism. The notion of modified universalism is court recognition of main proceedings in one jurisdiction and non-main proceedings in other jurisdictions, representing some compromise of state sovereignty under domestic proceedings to advance international comity and co-operation. It has been advanced by the United Nations Commission on International Trade Law ("UNCITRAL") *UNCITRAL Model Law on Cross Border Insolvency* (the "Model Law"), which Canada largely adopted by 2009 amendments to the *CCAA* and the *BIA*.[1] Before this amendment, Canada had gone far down the road in acting on comity principles in international insolvency. See *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 18 C.B.R. (4th) 157 (S.C.J.) and *Lear Canada (Re)*, [2009] O.J. No. 3030, 55 C.B.R. (5th) 57 (S.C.J.).

[12] In the *BIA*, the Model Law was introduced by the enactment of Part XIII. Section 267 sets out the policy objectives of Part XIII as follows:

> 267. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (*a*) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (*b*) greater legal certainty for trade and investment;
>
> (*c*) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtors;
>
> (*d*) the protection and the maximization of the value of debtors' property; and
>
> (*e*) the rescue of financially troubled businesses to protect investment and preserve employment.

(a) *Recognition of foreign proceeding*

[13] Section 269(1) of the *BIA* provides for the application by a foreign representative to recognize a foreign proceeding. Pursuant to s. 270(1) of the *BIA*, the court shall make an order recognizing the foreign proceeding if (i) the proceeding is a foreign

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1 See Dr. Janis Sarra, "Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings", 44 Tex. Intl. L.J. 547.

proceeding and (ii) the applicant is a foreign representative of that proceeding.

[14] A foreign proceeding is broadly defined in s. 268(1) to mean a judicial or an administrative proceeding in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

[15] The Japan bankruptcy proceeding is a judicial proceeding dealing with creditors' collective interests generally under the *Bankruptcy Act of Japan*, which is a law relating to bankruptcy and insolvency, in which MtGox's property is subject to supervision by the Tokyo District Court, Twentieth Civil Division. As such, the Japan bankruptcy proceeding is a foreign proceeding pursuant to s. 268(1) of the *BIA*.

[16] Section 268(1) of the *BIA* defines a foreign representative as a person or body who is authorized in a foreign proceeding in respect of a debtor company to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation or (b) act as a representative in respect of the foreign proceeding.

[17] The trustee has authority, pursuant to the Japan Bankruptcy Act and the bankruptcy order made by the Tokyo District Court in the Japan bankruptcy proceeding, to administer MtGox's property and affairs for the purpose of liquidation and to act as a foreign representative. Thus, the trustee is a foreign representative pursuant to s. 268(1) of the *BIA*.

[18] In the circumstances, it is appropriate to recognize the Japan bankruptcy proceeding as a foreign proceeding.

(b) *Foreign main proceeding*

[19] A foreign proceeding can be a foreign main proceeding or a foreign non-main proceeding. If the foreign proceeding is recognized as a main proceeding, there is an automatic stay provided in s. 271(1) against lawsuits concerning the debtor's property, debts, liabilities or obligations, and prohibitions against selling or disposing of property in Canada. If the foreign proceeding is recognized as a non-main proceeding, there is no such automatic stay and prohibition and it is necessary for an application to be made to obtain such relief. For that reason, it is advantageous for a foreign representative to seek an order recognizing the foreign proceeding as a main proceeding. The trustee in this case has made such a request.

[20] A foreign main proceeding is defined in s. 268(1) as a foreign proceeding in a jurisdiction where the debtor company has

the centre of its main interests ("COMI"). Section 268(2) provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

[21] In considering whether the registered office presumption has been rebutted, a court should consider the following factors in determining COMI: (i) the location is readily ascertainable by creditors; (ii) the location is one in which the debtor's principal assets and operations are found; and (iii) the location is where the management of the debtor takes place. See *Lightsquared LLP* (*Re)*, [2012] O.J. No. 3184, 92 C.B.R. (5th) 321 (S.C.J.).

[22] The trustee relies on the following facts in support of his position that the COMI of MtGox is in Japan and not in Canada:

(1) MtGox has no offices in Canada, there are no Canadian subsidiaries and no assets in located in Canada;

(2) MtGox is and has always been organized under the laws of Japan;

(3) MtGox's registered office and corporate headquarters are, and have always been, located in Japan, and its books and records are located at its head office in Japan;

(4) the debtor's sole director and representative director, Mr. Karpeles, resides, and at all relevant times has resided, in Japan;

(5) most of the MtGox's bank accounts are located in Japan, including the primary account for operating its business;

(6) MtGox's parent company, Tibanne, provided operational and administrative services to it, including the provision of its primary workforce, in Japan;

(7) MtGox's website clearly disclosed to customers and other third parties that it is a Japanese corporation that is located in Japan;

(8) upon the filing of the Japan petition, MtGox commenced an investigation in Japan with regard to the circumstances that led to the Japan civil rehabilitation, which investigation was subject to the oversight of the Tokyo Court.

[23] Taking into account this evidence, I am satisfied that the COMI of MtGox is its registered head office in Japan and that the Japan bankruptcy proceeding is a foreign main proceeding.

Stay of Proceedings

[24] The effect of recognition of a foreign main proceeding is an automatic grant of the relief set out under s. 271(1) of the *BIA*:

> 271(1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding,
>
> (*a*) no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;
>
> (*b*) if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or otherwise dispose of any other property of the debtor in Canada; and
>
> (*c*) if the debtor is an individual, the debtor shall not sell or otherwise dispose of any property of the debtor in Canada.

[25] The trustee seeks recognition of the Japan bankruptcy proceeding in an effort to maximize recoveries to, and provide for an equitable distribution of value among, all creditors. In particular, the trustee believes that the enjoining of the ongoing litigation against MtGox in Canada, in conjunction with the protections afforded by the Japan bankruptcy proceeding, is essential to this effort.

[26] In *Braycon International Inc. v. Everest & Jennings Canadian Ltd.*, [2001] O.J. No. 511, 26 C.B.R. (4th) 154 (S.C.J.), prior to the adoption of the Model Law in Canada, a stay of an action in Ontario against a United States corporation subject to bankruptcy proceedings in the U.S. under c. 11 of the U.S. *Bankruptcy Code*, 11 U.S. Code, c. 15, in which there was a stay of all proceedings against it was ordered pursuant to the comity principles recognized in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135.

[27] The Model Law, which was adopted in Japan in 2000, provides a transparent regime for the right of foreign creditors to commence or participate in an insolvency proceeding in another state. See Dr. Janis Sarra, *supra*, at footnote 1. Section 271(1)(*a*) of the *BIA* provides for an automatic stay in furtherance of that objective. As the Japanese foreign proceeding is a foreign main proceeding, the trustee is entitled to that automatic stay. The Tokyo Court has order ordered a process for claims to be made with a filing date of no later than May 29, 2015.

[28] There have been two class actions commenced against MtGox in the U.S. The trustee has obtained recognition of the Japan bankruptcy proceedings in the U.S. under c. 15 of the

U.S. *Bankruptcy Code* as a foreign main proceeding, resulting in an automatic stay of the U.S. litigation. The trustee is entitled to the same relief in Canada relating to the class action filed in Ontario.

[29] At the conclusion of the hearing on October 3, 2014, I signed an order reflecting these reasons.

Application allowed.

Stuart Budd & Sons Limited et al. v. IFS Vehicle Distributors ULC et al.

[Indexed as: Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC]

2014 ONCA 546

Court of Appeal for Ontario, Epstein J.A. (in Chambers)
July 14, 2014

Civil procedure — Appeal — Stay pending appeal — Appellants bringing motion challenging jurisdiction of Ontario court to hear action for damages under Arthur Wishart Act (Franchise Disclosure) and other remedies — Motion judge dismissing motion as abuse of process — Order stayed pending appeal — Appeal raising serious issues to be tried — Possibility of being found to have attorned to jurisdiction of Ontario court by taking further steps creating some risk of irreparable harm to appellants — Balance of convenience favouring appellants.

The plaintiffs brought an action for various forms of relief, including damages under the *Arthur Wishart Act (Franchise Disclosure), 2000*. The defendants brought a motion challenging the jurisdiction of the Ontario court to hear the action. The motion judge dismissed the motion as an abuse of process. The defendants brought a motion to stay the order pending the final disposition of their appeal from that order.

Held, the motion should be granted.

The proposed appeal raised several serious issues: the proper test to determine jurisdiction in claims involving franchise legislation with regard to the intersection of jurisdictional issues and joinder; the consequences of the fact that in his determination of the jurisdictional issue, the motion judge referred to only one of the defendants; and the consequences of certain comments by the motion judge that might suggest predetermination of the issues. The possibility of being found to have attorned to the Ontario jurisdiction by taking any further steps in the action created some risk of irreparable harm to the defendants. The balance of convenience favoured the defendants.

Cases referred to

BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust, [2011] O.J. No. 4279, 283 O.A.C. 321, 2011 ONCA 620; *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674, [1997] O.J. No. 2081, 100 O.A.C. 221, 71

TAB 7

Ontario Supreme Court
Microbiz Corp. v. Classic Software Systems Inc.
Date: 1996-10-09

Microbiz Corp. (Plaintiff)

and

Classic Software Systems Inc. (Defendant)

Ontario Court of Justice (General Division) Lederman J.

Judgment – October 9, 1996.

Peter J. Lukasiewicz for Plaintiff Microbiz Corp.

(Doc. Toronto 95-CU-93753)

October 9, 1996. LEDERMAN J.: –

October 1, 1996

[1] Mr. Peter Lukasiewicz for MicroBiz, Ms. Julia Scatz for Haggerty, Ms. I. Sutherland (not a lawyer) for Classic, with leave of the court. Ms. Sutherland served yesterday with volumes of documents requested adjournment of this action and 95-CU-102723. On consent, both actions adjourned to October 9, 1996, a date set by the Registrar of Motions.

[2] Costs of today reserved to the Judge who disposes of these motions.

October 9, 1996

[3] MicroBiz is a New Jersey corporation with its headquarters in that State. It carries on business in the U.S. It carries on business in Ontario only through its distributor, Classic Software. MicroBiz has no assets in Ontario. When it filed for bankruptcy in the U.S. on March 12, 1996 pursuant to the *U.S. Bankruptcy Code,* an automatic stay of all proceedings against it went into effect (as is the case under Canadian bankruptcy laws). MicroBiz's plan of reorganization was confirmed by judgment of Justice Winfield of the U.S. Bankruptcy Court on September 3, 1996. The plan of reorganization provides for distribution to all creditors whose claims are accepted, after adjudication if necessary, of 17.5% of their claims. There is no doubt that under the principles laid down in the *Morguard Investments* case [*Morguard*

Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1 (S.C.C.)] and *United States v. Ivey* [(1996), 27 B.L.R. (2d) 243 (Ont. C.A.)], that judgment of the U.S. Court should be recognized in Canada as there is a real and substantial connection between the U.S. Court's judgment and the subject matter of the proceeding. More importantly, both Classic Software and Haggerty have recognized the judgment and in fact have filed Proofs of Claim in the U.S. proceeding to take advantage of the mechanism provided therein for adjudication of their claims and recovery to the extent of 17.5% of their proven claims. To participate in the U.S. proceedings is beneficial in that it allows Classic and Haggerty to prove their claims and obtain collection in one proceeding rather than obtain judgment on their claims in Ontario and in a separate proceeding in New Jersey seek to effect recovery against the estate of MicroBiz. By filing their Proofs of Claim, Classic and Haggerty have thereby altorned to the jurisdiction of the U.S. Court in New Jersey.

[4] Multiplicity of proceedings in two different jurisdictions should be avoided.

[5] Accordingly, there must be an order staying both Haggerty action and the Classic action in Ontario until further order of the court.

[6] Costs of the motions are fixed at $750.00 payable by Classic and Haggerty forthwith.

Actions stayed.

TAB 8

COURT FILE NO.: 09-CL-8456-00CL
DATE: 20091112

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

B E T W E E N:	)	
	)	
JAMES ROBERT TUCKER, RICHARD HEIS, AND ALLAN WATSON GRAHAM OF KPMG LLP AS JOINT ADMINISTRATORS	)	Orestes Pasparakis and Virginie Gauthier, for the Applicants
Applicants	)	
- and -	)	
AERO INVENTORY (UK) LIMITED and AERO INVENTORY PLC	)	
Respondents	)	
	)	**HEARD:** November 11, 2009

Newbould J.

[1] This application was made on November 11, 2009 under s. 47(1)[1] of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") for an order recognizing the administration proceedings (the "foreign proceedings") commenced in respect of each of Aero

[1] This section and the other sections dealing with cross-border insolvencies in part IV of the CCAA came into effect on September 18, 2009

Inventory (UK) Limited and Aero Inventory plc (the "foreign debtors") in the High Court of Justice of England and Wales as a "foreign main proceeding" for the purposes of section 47 of the CCAA, and for other consequential relief. At the conclusion of the hearing I made the order sought for reasons to follow. These are my reasons.

Factual background

[2] On November 11, 2009, the applicants were appointed by the High Court of Justice of England and Wales (Chancery Division, Companies Court) as administrators (the "Administrators") over Aero Inventory (UK) Limited ("Aero Inventory (UK)") and Aero Inventory plc ("Aero plc").

[3] Aero Inventory (UK) provides procurement and inventory management services in the aerospace industry. These services are provided with regard to consumable and expendable parts required for aerospace maintenance and related activities, such as nuts, bolts and gaskets. Aero plc is the corporate parent of Aero Inventory (UK) and has been listed on the Alternative Investment Market (AIM) of the London Stock Exchange since 2000.

[4] The foreign debtors are both located in New Barnet, Hertfordshire, United Kingdom. Their business operations are managed and administered in the United Kingdom. Aero Inventory (UK) has customers and/or supplies products from the following countries and regions: England, The Republic of Ireland, Australia, Bahrain, El Salvador, Canada, China, Hong Kong, Indonesia, Japan, Switzerland and the United States.

[5] Aero Inventory (UK) has conducted business in Canada since 2007. It provides inventory and procurement services to two Canadian customers, Air Canada and Aveos Fleet Performance Inc. ("Aveos").

[6] While it has a registered address in Quebec, Aero Inventory (UK) has no physical presence in Canada. The property at this address is in fact leased by the foreign debtors' Canadian affiliate, Aero Inventory (Canada) Inc. ("Aero (Canada)"). The foreign debtors have

no premises and no employees in Canada. The inventory of Aero Inventory (UK) is physically located at the premises of its customer.

[7] Aero (Canada) provides services in Canada to the foreign debtors pursuant to a management arrangement. Aero (Canada) has employees but no customers or inventory and no source of revenues other than through its management arrangement.

[8] In November 2007, Aero Inventory (UK) signed a 10-year sole supplier agreement for consumable aircraft parts with ACTS Technical Support & Services Inc., which was later renamed Aveos. This agreement covers the procurement and management of all parts required by Aveos for its operations in Canada and, through its subsidiary Aeroman, in El Salvador.

[9] The entire inventory owned by the foreign debtors in Canada, whether bound for Air Canada or for Aveos, is located at various warehouses across Canada operated by Aveos These warehouses are located in Ontario, Quebec, Manitoba and British Columbia. This inventory is not physically segregated from inventory owned by Aveos and is not within the foreign debtors' control. Further, inventory bound for Air Canada is not segregated from inventory bound for Aveos.

[10] According to the Aveos accounting systems, approximately Cdn. $130 million in inventory owned by the foreign debtors is currently held at Aveos sites across Canada. This represents a supply of over nine months worth of inventory based upon traditional turnover rates.

[11] As stated, on November 11, 2009, James Robert Tucker, Richard Heis and Allan Watson Graham of KPMG LLP were appointed Administrators of the foreign debtors by orders of the High Court of England and Wales. These orders were made pursuant to the *Insolvency Act 1986*. Pursuant to these orders, the Administrators are responsible for managing the affairs, business and property of the foreign debtors. They are required to perform their functions with the objective of: (a) rescuing the foreign debtors as a going concern or in the alternative, winding up or realizing upon the property of the foreign debtors in order to make a distribution to one or more secured or preferential creditors.

Recognition of the UK Proceeding

(a) Jurisdiction

[12] Pursuant to section 9(1) of the CCAA, where a company does not have a place of business in Canada it may file an application in any province in which it has assets. Neither of the foreign debtors appears to have a place of business in Canada. Given that the foreign debtors have assets located within Ontario, this Court has jurisdiction to deal with this application.

(b) Recognition

[13] Under s. 47 of the CCAA, a court shall make an order recognizing a foreign proceeding if it is satisfied that the application for such recognition "relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding." Section 47(1) states:

> If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding. (Underlining added)

[14] Section 45(1) of the CCAA defines "foreign proceeding" as:

> a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

[15] As the Administrators were appointed by the English High Court pursuant to the *Insolvency Act 1986*, there can be no doubt that the foreign proceeding is a "foreign proceeding" within the meaning of s. 45(1) of the CCAA.

[16] It is to be noted that under s. 47(1), the order sought is mandatory if the conditions in that section are met. This is in keeping with the purpose of the new cross-border provisions of the CCAA as set out in s. 44 to promote cooperation with foreign jurisdictions in cases of cross-border insolvencies. This statutory recognition of comity follows the principles of international comity in insolvency situations recognized in such cases as *Olympia & York Developments Ltd. v. Royal Trust Co.*(1993), 20 C.B.R. (3d) 165, *Re United Air Lines Inc.* (2003), 43 CBR (4th) 284 and *Re Lear Canada* (2009), 55 C.BR. (5th) 57.

[17] In this case as the conditions of s. 47(1) have been met, an order recognizing the foreign proceedings shall go. It is to be noted that Lloyds TSB Commercial Finance Limited, which holds a debenture and is owed approximately $500 million, supports the appointment of the Administrators and this application in Canada. The only other party with a registered security interest in Canada is Air Canada, but nothing is owed by the foreign debtors to it. Rather, there is a receivable of approximately $9.6 million owed by Air Canada to Aero Inventory UK.

[18] Under s. 47(2) of the CCAA, a court making an order recognizing a foreign proceeding must specify whether such proceeding is the "foreign main proceeding" or the "foreign non-main proceeding". Under s. 45(1), a "foreign main proceeding" is a “foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.” Section 45(2) provides that in the absence of proof to the contrary, a debtor company’s registered office is deemed to be the centre of its main interests.

[19] Aero Inventory UK has a registered office in Quebec. Thus by virtue of section 45(2), in the absence of proof to the contrary, Quebec is deemed to be the centre of its main interest. However, the foreign debtors have business interests globally and their head office is in the United Kingdom from where they are managed and administered. Aero plc is publicly listed on the AIM of the London Stock Exchange. I am satisfied that this evidence is sufficient to conclude that the main interests of the foreign debtors are centred in the United Kingdom and thus the foreign proceeding should be specified as the "foreign main proceeding".

Other relief sought

(a) Appointment of an Information Officer

[20] The applicants have requested an order appointing KPMG Inc. as an information officer in respect of these proceedings. While the CCAA does not expressly provide for the appointment of an information officer, such an officer is sometimes appointed under the Court's general powers to make appropriate orders in the circumstances. In the case of an application such as this in connection with a cross-border insolvency, the Court is expressly given the power to make such order as it considers appropriate in section 49(1), so long as the order is consistent with any other order that may be made under the Act, and in section 50 which provides:

> 50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

[21] The order sought would authorize, but not require, the information officer to provide such assistance to the Foreign Representative as might be required, and authorize the information officer to respond to reasonable requests for information from stakeholders. The information officer would be required to report to the Court at least once every three months regarding the proceedings and other information the information officer believes material.

[22] In the circumstances of this case, in which the foreign debtors have no place of business or employees in Canada, it is particularly appropriate to have an information officer appointed who can deal with matters as they arise in Canada and who can also provide information and advice to the Foreign Representative as needed. The order sought shall go.

(b) Stay of Set-Off Rights

[23] In this case, because of the fact that the foreign debtors do not have physical control of their inventory in Canada as the inventory is in warehouses operated by Aveos, a concern has been raised that set-off could adversely impact the foreign proceeding and impact the recoveries available to creditors. Although Aveos is a purchaser from Aero Inventory (UK), it apparently is owed approximately $1 million and its contract with Aero Inventory (UK) contains a liquidated damage clause.

[24] As stated, a court on an application under the CCAA in cross-border insolvencies has the power under sections 49(1) and 50 to make an order considered appropriate in the circumstances.

[25] The provisions regarding set-off in section 21 must, however, be considered in the request for relief regarding a stay of set-off. Section 21 provides:

> 21. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

[26] The applicants submit that while the provisions of section 21 of the CCAA may prevent a court from permanently barring all claims of set-off, it does not prevent a court from making an order in appropriate circumstances temporarily staying the determination and enforcement of a person's rights of set-off pending leave of the court. They rely on *Re Air Canada* (2003), 45 C.B.R. (4th) 13. In that case, Farley J. reviewed in some detail the law of set-off and struck from the Initial Order a provision that no person could set off any obligations of Air Canada to such person which arose prior to the Initial Order. Farley J. held that while the Initial Order should recognize the rights of set-off permitted under section 18.1 of the CCAA (now section 21), such rights could be temporarily stayed pending further order of the Court. In that case there was no opposition to such a temporal stay. He stated:

> With respect to the question of what I have described as a temporal stay, there does not appear to be any opposition by the Moving Creditors to the proposition that whatever their rights of set-off in substance are determined to be, that such determination and enforcement of such determined rights should await until a convenient time when AC has stabilized (or I suppose, alternatively cratered). It would seem to me that the likely time for this would be in conjunction with the formation of a reorganization plan of arrangement and compromise. However I leave that question open pending future submissions and further order of the court emanating as a result thereof.

[27] I accept that a court may temporarily stay the right of set-off protected in section 21 of the CCAA. How temporary that stay should be will obviously depend on the circumstances existing at the relevant time.

[28] In his witness statement provided to the High Court in England, Mr. Trupp, a director of the foreign debtors, discussed concerns relating to the fact that the inventory is out of their control. He stated:

> 19. The Companies are, in their current financial position, extremely distressed with the threat of creditor enforcement action in key countries.
>
> and
>
> 29. This matter is now urgent and there are a number of reasons for this urgency, including:
>
> (a) the supply of airline, parts is time critical and must continue uninterrupted;
>
> (c) there is a risk that if the stock is not secured quickly it will disappear or become very difficult to access, particularly as it is not in the physical control of the Companies. There is therefore a risk of significant loss to the secured creditors and creditors generally if there is any delay in getting the administration orders made. Customers have direct control of the stock and could seize it if concerned about the solvency of the Companies;

[29] The applicants submit that no party is unreasonably prejudiced by the proposed set-off relief which is intended to operate only to prevent fresh inventory of the foreign debtors from being appropriated by third parties without an ensuing payment. The proposed relief does not affect the position of the parties on the date of the recognition order but ensures that no further prejudice is caused to the foreign debtors' estate. If the foreign debtors' inventory were in their possession rather than in the possession of third parties, they could control and minimize such potential prejudice by obtaining assurances of payment ahead of providing new supplies.

[30] The applicants are concerned that as Aveos has physical control of the foreign debtors' inventory, any refusal to supply their inventory without assurances of payment might lead to the grounding of several airplanes, thereby causing prejudice to the foreign debtors' customers. They submit that in the circumstances, the better option to ensure continued supply to customers and payment for fresh inventory is by the granting of a temporal stay of any right of set-off

[31] It seems to me that at this stage the relief sought should be granted. The amount of inventory in Canada, $130 million, is substantial. The consolidated interim financial statements of the foreign debtors as at December 30, 2008 indicate that there are total inventories of U.S. $751 million, although Mr. Trupp believes these are inaccurate and may be overstated. It is apparent that the Canadian inventory comprises a substantial portion of the total inventory. That inventory should be properly protected to enable the foreign debtors to attempt to continue as a going concern.

[32] Taking into account the purposes of part IV if the CCAA relating to cross-border insolvencies, as set out in section 44, including co-operation between the courts of the jurisdictions involved and the maximization of the value of the debtor company's property, it is appropriate in this circumstances of this case to stay set-off rights pending further order of this Court. How long that stay should be is a matter of conjecture at this stage. The proceedings have just commenced and what the outcome will be is not possible to know. Thus the length of any stay of set-of rights is an unknown.

[33] The order contains a 4 days notice come-back clause and any person concerned with the order thus has the ability to make application to vary or rescind the order. .

[34] The application is granted in accordance with these reasons.

Newbould J.

Released: November 12, 2009

COURT FILE NO.: 09-CL-8456-00CL
DATE: 20091112

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMES ROBERT TUCKER, RICHARD HEIS, AND ALLAN WATSON GRAHAM OF KPMG LLP AS JOINT ADMINISTRATORS

Applicants

- and -

AERO INVENTORY (UK) LIMITED and AERO INVENTORY PLC

Respondents

Released: November 12, 2009

TAB 9

Case Name:

Lightsquared LP (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as amended
APPLICATION OF Lightsquared LP under Section 46 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as amended
AND IN THE MATTER OF certain proceedings taken in the United States Bankruptcy Court with respect to Lightsquared Inc., Lightsquared Investors Holdings Inc., One Dot Four Corp., One Dot Six Corp. Skyterra Rollup LLC, Skyterra Rollup Sub LLC, Skyterra Investors Llc, TMI Communications Delaware, Limited Partnership, Lightsquared GP Inc., Lightsquared LP, ATC Technologies LLC, Lightsquared Corp., Lightsquared Finance Co., Lightsquared Network LLC, Lightsquared Inc. of Virginia, Lightsquared Subsidiary LLC, Lightsquared Bermuda Ltd., Skyterra Holdings (Canada) Inc., Skyterra (Canada) Inc. and One Dot Six TVCC Corp. (collectively, the "Chapter 11 Debtors"), Applicants

[2012] O.J. No. 3184

2012 ONSC 2994

92 C.B.R. (5th) 321

2012 CarswellOnt 8614

Court File No. CV-12-9719-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: May 18, 2012.
Judgment: July 6, 2012.

(40 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- International insolvencies -- Application by Lightsquared for order declaring applicant a foreign representative and US bankruptcy proceedings a foreign main proceeding and for orders to recognize and enforce in Canada certain orders of the US Court made in Chapter 11 Proceedings, to appoint A&M as Information Officer in respect of these proceedings and to grant an Administration Charge over the Chapter 11 Debtors' property allowed -- Applicant and its affiliates commenced voluntary reorganization proceedings in US -- Affiliates had material assets in other jurisdictions, including Ontario -- Centre of main interests of Canadian debtors was in US.

Application by Lightsquared for an order declaring the applicant a foreign representative and the US bankruptcy proceedings a foreign main proceeding and for orders to recognize and enforce in Canada certain orders of the US Court made in Chapter 11 Proceedings, to appoint A&M as Information Officer in respect of these proceedings and to grant an Administration Charge over the Chapter 11 Debtors' property. The applicant and various of its affiliates commenced voluntary reorganization proceedings in the US seeking relief under Chapter 11 of the US Bankruptcy Code. The affiliates had certain material assets in other jurisdictions, including Ontario. Other than the Canadian Debtors and Lightsquared Bermuda Ltd., all of the affiliates were incorporated pursuant to the laws of the US. The Canadian debtors had guaranteed the credit facilities which were extended to the applicant as borrower and such guarantee was allegedly secured by a priority interest on the assets of the Canadian debtors. As such, counsel argued that the majority of the creditors of the affiliates were also common. The applicant argued that the centre of the main interests of each of the Canadian debtors was in the US.

HELD: Application allowed. The Chapter 11 Proceedings were "foreign proceedings" for the purposes of the Companies' Creditors Arrangement Act and the applicant was a foreign representative. The centre of the main interests of the Canadian debtors was in the US. Therefore, the foreign proceeding was a foreign main proceeding. The court should recognize and enforce in Canada certain orders of the US Court made in the Chapter 11 Proceedings, appoint A&M as Information Officer in respect of these proceedings, and grant an Administration Charge over the Chapter 11 Debtors' property. The appointment of A&M as Information Officer would help to facilitate these proceedings and the dissemination of information concerning the Chapter 11 Proceedings and this relief was appropriate.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, s. 44, s. 45, s. 45(1), s. 45(2), s. 46(1), s. 47(2), s. 48(1), s. 49, s. 49(1), s. 50

Counsel:

Shayne Kukulowicz and Jane Dietrich, for Lightsquared LP.

Brian Empey, for Alvarez and Marsal Inc., Proposed Information Officer.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- On May 14, 2012, Lightsquared LP ("LSLP" or the "Applicant") and various of its affiliates (collectively, the "Chapter 11 Debtors") commenced voluntary reorganization proceedings (the "Chapter 11 Proceedings") in the United States Bankruptcy Court for the Southern District of New York (the "U.S. Court") by each filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

2 The Chapter 11 Debtors have certain material assets in other jurisdictions, including Ontario and indicated at an interim hearing held on May 15, 2012 that they would be seeking an order from the U.S. Court authorizing LSLP to act as the Foreign Representative of the Chapter 11 Debtors, in any judicial or other proceeding, including these proceedings (the "Foreign Representative Order").

3 At the conclusion of the interim hearing of May 15, 2012, I granted the Interim Initial Order to provide for a stay of proceedings and other ancillary relief. A full hearing was scheduled for May 18, 2012.

4 At the hearing on May 18, 2012, the record demonstrated that LSLP had been authorized to act as Foreign Representative by order of The Honorable Shelley C. Chapman dated May 15, 2012. This authority was granted on an interim basis pending a final hearing scheduled for June 11, 2012.

5 LSLP brought this application pursuant to ss. 44-49 of the *Companies' Creditors Arrangement Act* ("CCAA"), seeking the following orders:

(a) an Initial Recognition Order, *inter alia*:

(i) declaring that LSLP is a "foreign representative" pursuant to s. 45 of the CCAA;
(ii) declaring that the Chapter 11 Proceeding is recognized as a "foreign main proceeding" under the CCAA; and
(iii) granting a stay of proceedings against the Chapter 11 Debtors; and

(b) a "Supplemental Order" pursuant to s. 49 of the CCAA, *inter alia*:

(i) recognizing in Canada and enforcing certain orders of the U.S. Court made in the Chapter 11 Proceedings;
(ii) appointing Alvarez and Marsal Canada Inc. ("A&M") as the Information Officer in respect of this proceeding (in such capacity, the "Information Officer");
(iii) staying any claims against or in respect of the Chapter 11 Debtors, the business and property of the Chapter 11 Debtors and the Directors and Officers of the Chapter 11 Debtors;
(iv) restraining the right of any person or entity to, among other things, discontinue or terminate any supply of products or services to Chapter 11 Debtors;
(v) granting a super priority charge up to the maximum amount of $200,000, over the Chapter 11 Debtors' property, in favour of the Information Officer and its counsel, as security for their professional fees and disbursements incurred in respect of these proceedings (the "Administration Charge").

6 Counsel to LSLP submitted that this relief was required in order to:

(i) alleviate any potential harm to the Chapter 11 Debtors or their Canadian assets during the interim period;
(ii) ensure the protection of the Chapter 11 Debtors' Canadian assets during the course of the Chapter 11 Proceedings; and
(iii) ensure that this court and the Canadian stakeholders are kept properly informed of the Chapter 11 Proceedings.

7 The Chapter 11 Debtors are in the process of building a fourth generation long-term evolution open wireless broadband network that incorporates satellite coverage throughout North America and offers users, wherever they may be located, the speed, value and reliability of universal connectivity.

8 The Chapter 11 Debtors consist of approximately 20 entities. All but four of these entities have their head office or headquarter location in the United States.

9 Two of the Chapter 11 Debtors are incorporated pursuant to the laws of Ontario, being SkyTerra Holdings (Canada) Inc. ("SkyTerra Holdings") and SkyTerra (Canada) Inc. ("SkyTerra Canada"). One of the Chapter 11 Debtors is incorporated pursuant to the laws of Nova Scotia, being Lightsquared Corp. "LC" and together with SkyTerra Holdings and SkyTerra Canada, the "Canadian Debtors"). Each of the Canadian Debtors is a wholly-owned subsidiary, directly or indirectly, of the Applicant.

10 Other than the Canadian Debtors and Lightsquared Bermuda Ltd., all of the Chapter 11 Debtors are incorporated pursuant to the laws of the United States.

11 The operations of the Canadian Debtors were summarized by LSLP as follows:

(a) SkyTerra Canada: this entity was created to hold certain regulated assets which, by law, are required to be held by Canadian corporations. SkyTerra Canada holds primarily three categories of assets: (i) the MSAT - 1 satellite; (ii) certain Industry Canada licences; (iii) contracts with the Applicant's affiliates and third parties. SkyTerra Canada has no third party customers or employees at the present time and is wholly dependent on the Applicant for the funding of its operations;

(b) SkyTerra Holdings: this entity has no employees or operational functions. Its sole function is to hold shares of SkyTerra Canada; and

(c) LC: this entity was created for the purposes of providing mobile satellite services to customers located in Canada based on products and services that were developed by the Chapter 11 Debtors for the United States market. LC holds certain Industry Canada licences and authorizations as well as certain ground-related assets. LC employs approximately 43 non-union employees out of its offices in Ottawa, Ontario. LC is wholly dependent on the Applicant for all or substantially all of the funding of its operations.

12 Counsel to LSLP also submitted that the Chapter 11 Debtors, including the Canadian Debtors, are managed in the United States as an integrated group from a corporate, strategic and management perspective. In particular:

(a) corporate and other major decision-making occurs from the consolidated offices in New York, New York and Ruston, Virginia;

(b) all of the senior executives of the Chapter 11 Debtors, including the Canadian Debtors, are residents of the United States;

(c) the majority of the management of the Chapter 11 Debtors, including the Canadian Debtors, is shared;

(d) the majority of employee administration, human resource functions, marketing and communication decisions are made, and related functions taken, on behalf of all of the Chapter 11 Debtors, including the Canadian Debtors, in the United States;

(e) the Chapter 11 Debtors, including the Canadian Debtors, also share a cash-management system that is overseen by employees of the United States-based Chapter 11 Debtors and located primarily in the United States; and

(f) other functions shared between the Chapter 11 Debtors, including the Canadian Debtors, and primarily managed from the United States include, pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions.

13 Counsel further submits that the Canadian Debtors are wholly dependent on the Applicant and other members of the Chapter 11 Debtors located in the United States for all or substantially all of their funding requirements.

14 Further, the Canadian Debtors have guaranteed the credit facilities which were extended to LSLP as borrower and such guarantee is allegedly secured by a priority interest on the assets of the Canadian Debtors. As such, counsel submits that the majority of the creditors of the Chapter 11 Debtors are also common.

15 The Interim Initial Order granted on May 15, 2012, reflected an exercise of both statutory jurisdiction and the court's inherent juridical discretion. In arriving at the decision to grant interim relief, I was satisfied that it was appropriate to provide such relief in order to alleviate any potential harm to the Chapter 11 Debtors or their Canadian assets during the interim period.

16 The issue for consideration on this motion is whether the court should recognize the Chapter 11 Proceedings as a "foreign main proceeding" pursuant to the CCAA and grant the Initial Recognition Order sought by the Applicant and, if so, whether the court should also grant the Supplemental Order under s. 49 of the CCAA to (i) recognize and enforce in Canada certain orders of the U.S. Court made in the Chapter 11 Proceedings; (ii) appoint A&M as Information Officer in respect of these proceedings; and (iii) grant an Administration Charge over the Chapter 11 Debtors' property.

17 Section 46 (1) of the CCAA provides that a "foreign representative" may apply to the court for recognition of a "foreign proceeding" in respect of which he or she is a "foreign representative".

18 Court proceedings under Chapter 11 of the Bankruptcy Code have consistently been found to be "foreign proceedings" for the purposes of the CCAA. In this respect, see *Re Massachusetts Elephant & Castle Group Inc.* (2011), 81 C.B.R. (5th) 102 and *Re Lear Canada* (2009), 55 C.B.R. (5th) 57.

19 I accept that the Chapter 11 Proceedings are "foreign proceedings" for the purposes of the CCAA and that LSLP is a "foreign representative".

20 However, it is noted that the status of LSLP as a foreign representative is subject to further consideration by the U.S. Court on June 11, 2012. If, for whatever reason, the status of LSLP is altered by the U.S. Court, it follows that this issue will have to be reviewed by this court.

21 LSLP submits that the Chapter 11 Proceedings should be declared a "foreign main proceeding". Under s. 47 (1) of the CCAA, it is necessary under s. 47 (2) to determine whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding".

22 Section 45 (1) of the CCAA defines a "foreign main proceeding" as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests".

23 Section 45 (2) of the CCAA provides that for the purposes of Part IV of the CCAA, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests ("COMI").

24 In this case, the registered offices of the Canadian Debtors are in Canada. Counsel to the Applicant submits, however, that the COMI of the Canadian Debtors is not in the location of the registered offices.

25 In circumstances where it is necessary to go beyond the s. 45 (2) registered office presumption, in my view, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests. The factors are:

(i) the location is readily ascertainable by creditors;
(ii) the location is one in which the debtor's principal assets or operations are found; and
(iii) the location is where the management of the debtor takes place.

26 In most cases, these factors will all point to a single jurisdiction as the centre of main interests. In some cases, there may be conflicts among the factors, requiring a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor's true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

27 When the court determines that there is proof contrary to the presumption in s. 45 (2), the court should, in my view, consider these factors in determining the location of the debtor's centre of main interests.

28 The above analysis is consistent with preliminary commentary in the Report of UNCITRAL Working Group V (Insolvency Law) of its 41st Session (New York, 30 April - 4 May, 2012) (Working Paper AICN.9/742, paragraph 52. In my view, this approach provides an appropriate framework for the COMI analysis and is intended to be a refinement of the views I previously expressed in *Re Massachusetts Elephant & Castle Group Inc., supra.*

29 Part IV of the CCAA does not specifically take into account corporate groups. It is therefore necessary to consider the COMI issue on an entity-by-entity basis.

30 In this case, the foreign proceeding was filed in the United States and based on the facts summarized at [11] - [14], LSLP submits that the COMI of each of the Canadian Debtors is in the United States.

31 After considering these facts and the factors set out in [25] and [26], I am persuaded that the COMI of the Canadian Debtors is in the United States. It follows, therefore, that in this case, the "foreign proceeding" is a "foreign main proceeding".

32 Having recognized the "foreign proceeding" as a "foreign main proceeding", subsection 48 (1) of the CCAA requires the court to grant certain enumerated relief subject to any terms and conditions it considers appropriate. This relief is set out in the Initial Recognition Order, which relief is granted in the form submitted.

33 Additionally, s. 50 of the CCAA provides the court with the jurisdiction to make any order under Part IV of the CCAA on the terms and conditions it considers appropriate in the circumstances.

34 The final issue to consider is whether the court should grant the Supplemental Order sought by the Applicant under s. 49 of the CCAA and (i) recognize and enforce in Canada certain orders of the U.S. Court made in the Chapter 11 Proceedings; (ii) appoint A&M as Information Officer in respect of these proceedings; and (iii) grant an Administration Charge over the Chapter 11 Debtors' property.

35 If an order recognizing the "foreign proceedings" has been made (foreign main or foreign non-main), subsection 49 (1) of the CCAA provides the authority for the court, if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, to make any order that it considers appropriate.

36 In this case, the Applicant is requesting recognition of the first day orders granted in the U.S. Court. Based on the record, I am satisfied that it is appropriate to recognize these orders.

37 Additionally, I am satisfied that the appointment of A&M as Information Officer will help to facilitate these proceedings and the dissemination of information concerning the Chapter 11 Proceedings and this relief is appropriate on the terms set forth in the draft order. The proposed order also provides that the Information Officer be entitled to the benefit of an Administration Charge, which charge shall not exceed an aggregate amount of $200,000, as security for their professional fees and disbursements. I am satisfied that the inclusion of this Administration Charge in the draft order is appropriate.

38 The ancillary relief requested in the draft order is also appropriate in the circumstances.

39 Accordingly, the Supplemental Order is granted in the form presented. The Supplemental Order contains copies of the first day orders granted in the U.S. Court.

40 Finally, on an ongoing basis, it would be appreciated if counsel would, in addition to filing the required paper record, also file an electronic copy by way of a USB key directly with the Commercial List Office.

G.B. MORAWETZ J.

TAB 10

Case Name:

Massachusetts Elephant & Castle Group, Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF certain proceedings taken in the United States Bankruptcy Court for the District of Massachusetts Eastern Division with respect to the companies listed on Schedule "A" hereto (The "Chapter 11 Debtors") under Section 46 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
RE: Massachusetts Elephant & Castle Group, Inc., Applicant

[2011] O.J. No. 3280

2011 ONSC 4201

81 C.B.R. (5th) 102

2011 CarswellOnt 6610

205 A.C.W.S. (3d) 25

Court File No. CV-11-9279-00CL

Ontario Superior Court of Justice

G.B. Morawetz J.

Heard: July 4, 2011.
Judgment: July 11, 2011.

(40 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- Affiliated debtor companies -- Compromises and arrangements -- Applications -- Initial applications -- International insolvencies -- Proceedings -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Statutes -- Courts -- Jurisdiction -- CCAA matters -- International insolvencies -- Orders -- Assisting foreign court --

Application by Massachusetts Elephant & Castle Group Inc ("MECG") for certain orders pursuant to ss. 46 to 49 of the Companies' Creditors Arrangement Act ("CCAA") allowed -- Chapter 11 Debtors commenced proceedings ("Chapter 11 Proceedings") in the United States -- MECG was the lead debtor in the Chapter 11 Proceedings -- MECG satisfied the requirements of s. 47(1) of the CCAA and the Court recognized the foreign proceeding as a foreign main proceeding -- Pursuant to s. 48 of the CCAA, mandatory relief was granted -- The discretionary relief, including recognition of the Chapter 11 orders, was granted -- Companies' Creditors Arrangement Act, ss. 45, 46, 47.

Application by Massachusetts Elephant & Castle Group Inc ("MECG") for an Initial Recognition Order declaring that: MECG was a foreign representative pursuant to s. 45 of the Companies Creditors Arrangement Act ("CCAA") and was entitled to bring its application pursuant to s. 46 of the CCAA; the Chapter 11 Proceeding in respect of the Chapter 11 Debtors was a "foreign main proceeding" for the purposes of the CCAA; and any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the directors and officers of the Chapter 11 Debtors and the Chapter 11 Debtors property were stayed. Application by MECG for a Supplemental Order that: recognized in Canada and enforced certain orders of the US Court made in the Chapter 11 Proceeding; granted a super-priority change over the Chapter 11 Debtors' property in respect of administrative fees and expenses; and appointed BDO Canada Limited as Information Officer in respect of the proceedings. The Chapter 11 Debtors, including MECG, operated and franchised authentic British-style restaurant pubs in the United States and Canada. MECG was the lead debtor in the Chapter 11 Proceeding. On June 28, 2011, the chapter 11 Debtors commenced proceedings ("Chapter 11 Proceedings") in the United States Bankruptcy Court for the District of Massachusetts Eastern Division. MECG was the lead debtor in the Chapter 11 Proceedings. On June 30, 2011, the US Court made certain orders at the first-day hearing held in the Chapter 11 Proceedings, including an order appointing MECG as foreign representative in respect of the Chapter 11 Proceeding. The purpose of the Chapter 11 Proceedings was to sell the Chapter 11 Debtors' businesses as a going concern on the most favorable terms possible and keep the Chapter 11 Debtors' business intact to the greatest extent possible. The issue before the Court was whether it should grant the application for orders pursuant to ss. 46-49 of the CCAA and recognize the Chapter 11 Proceeding as a foreign main proceeding.

HELD: Application allowed. Since MECG satisfied the requirements of s. 47(1) of the CCAA, the Court recognized the foreign proceeding. Section 47(2) of the CCAA required the Court to specify in its order whether the foreign proceeding was a foreign main proceedings or a foreign non-main proceeding. Pursuant to s. 45(1) of the CCAA, a foreign main proceeding was a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interest ("COMI"). The location of the debtors' headquarters or head office functions or nerve centre was in Boston, Massachusetts and the location of the debtors' management was in Boston. The entity making up the Chapter 11 Debtors had their COMI in the United States. The foreign proceeding was a foreign main proceeding. The mandatory relief provided for in s. 48 of the CCAA was contained in the

Initial Recognition Order. Section 49 of the CCCA gave the Court discretion to provide further relief if it was satisfied that it was necessary for the protection of the debtor company's property or the interest of a creditor or debtors. The supplementary relief, relating to, among other things, the recognition of Chapter 11 Orders, the appointment of BDO and the quantum of the Administrative charge, all as set out in the Supplemental Order, was appropriate in the circumstances.

Statutes, Regulations and Rules Cited:

Business Corporations Act, R.S.O. 1990, c. B.16,

Canada Business Corporations Act, R.S.C. 1985, c. C-44,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 44, s. 45(1), s. 45(1), s. 45(2), s. 46, s. 46(1), s. 46(2), s. 47, s. 47(1), s. 47(2), s. 48, s. 48(1), s. 49, s. 49(1), s. 50, s. 61, s. 61(1), s. 61(2)

United States Bankruptcy Code, 11 U.S.C. s. 1101-1174, Chapter 11

Counsel:

Kenneth D. Kraft, Sara-Ann Wilson, for the Applicant.

Heather Meredith, for the GE Canada Equipment Financing GP.

ENDORSEMENT

1 G.B. MORAWETZ J.:-- Massachusetts Elephant & Castle Group, Inc. ("MECG" or the "Applicant") brings this application under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*"). MECG seeks orders pursuant to sections 46 - 49 of the *CCAA* providing for:

(a) an Initial Recognition Order declaring that:

(i) MECG is a foreign representative pursuant to s. 45 of the *CCAA* and is entitled to bring its application pursuant s. 46 of the *CCAA*;

(ii) the Chapter 11 Proceeding (as defined below) in respect of the Chapter 11 Debtors (as set out in Schedule "A") is a "foreign main proceeding" for the purposes of the *CCAA*; and

(iii) any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the directors and officers of the Chapter 11 Debtors and the Chapter 11 Debtors' property are stayed; and

(b) a Supplemental Order:

(i) recognizing in Canada and enforcing certain orders of the U.S. Court (as defined below) made in the Chapter 11 Proceeding (as defined below);
(ii) granting a super-priority change over the Chapter 11 Debtors' property in respect of administrative fees and expenses; and
(iii) appointing BDO Canada Limited ("BDO") as Information Officer in respect of these proceedings (the "Information Officer").

2 On June 28, 2011, the Chapter 11 Debtors commenced proceedings (the "Chapter 11 Proceeding") in the United States Bankruptcy Court for the District of Massachusetts Eastern Division (the "U.S. Court"), pursuant to Chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. s. 1101-1174 ("*U.S. Bankruptcy Code*").

3 On June 30, 2011, the U.S. Court made certain orders at the first-day hearing held in the Chapter 11 Proceeding, including an order appointing the Applicant as foreign representative in respect of the Chapter 11 Proceeding.

4 The Chapter 11 Debtors operate and franchise authentic, full-service British-style restaurant pubs in the United States and Canada.

5 MECG is the lead debtor in the Chapter 11 Proceeding and is incorporated in Massachusetts. All of the Chapter 11 Debtors, with the exception of Repechage Investments Limited ("Repechage"), Elephant & Castle Group Inc. ("E&C Group Ltd.") and Elephant & Castle Canada Inc. ("E&C Canada") (collectively, the "Canadian Debtors") are incorporated in various jurisdictions in the United States.

6 Repechage is incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ("*CBCA*") with its registered office in Toronto, Ontario. E&C Group Ltd. is also incorporated under the *CBCA* with a registered office located in Halifax, Nova Scotia. E&C Canada Inc. is incorporated under the *Business Corporations Act*, R.S.O. 1990, c. B.16, and its registered office is in Toronto. The mailing office for E&C Canada Inc. is in Boston, Massachusetts at the location of the corporate head offices for all of the debtors, including Repechage and E&C Group Ltd.

7 In order to comply with s. 46(2) of the *CCAA*, MECG filed the affidavit of Ms. Wilson to which was attached certified copies of the applicable Chapter 11 orders.

8 MECG also included in its materials the declaration of Mr. David Dobbin filed in support of the first-day motions in the Chapter 11 Proceeding. Mr. Dobbin, at paragraph 19 of the declaration outlined the sale efforts being entered into by MECG. Mr. Dobbin also outlined the purpose of the Chapter 11 Proceeding, namely, to sell the Chapter 11 Debtors' businesses as a going concern on the most favourable terms possible under the circumstances and keep the Chapter 11 Debtors' business intact to the greatest extent possible during the sales process.

9 The issues for consideration are whether this court should grant the application for orders pursuant to ss. 46 - 49 of the *CCAA* and recognize the Chapter 11 Proceeding as a foreign main proceeding.

10 The purpose of Part IV of the *CCAA* is set out in s. 44:

> 44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (*a*) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (*b*) greater legal certainty for trade and investment;
>
> (*c*) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
>
> (*d*) the protection and the maximization of the value of debtor company's property; and
>
> (*e*) the rescue of financially troubled businesses to protect investment and preserve employment.

11 Section 46(1) of the *CCAA* provides that "a foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative."

12 Section 47(1) of the *CCAA* provides that there are two requirements for an order recognizing a foreign proceeding:

(a) the proceeding is a foreign proceeding, and
(b) the applicant is a foreign representative in respect of that proceeding.

13 Canadian courts have consistently recognized proceedings under Chapter 11 of the *U.S. Bankruptcy Code* to be foreign proceedings for the purposes of the *CCAA*. In this respect, see: *Babcock & Wilcox Canada Ltd., Re* (2000), 5 B.L.R. (3d) 75 (Ont. S.C.); *Re Magna Entertainment Corp*. (2009), 51 C.B.R. (5th) 82 (Ont. S.C.); *Lear Canada (Re)* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.).

14 Section 45(1) of the *CCAA* defines a foreign representative as:

> a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor company, to
>
> (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or
> (b) act as a representative in respect of the foreign proceeding.

15 By order of the U.S. Court dated June 30, 2011, the Applicant has been appointed as a foreign representative of the Chapter 11 Debtors.

16 In my view, the Applicant has satisfied the requirements of s. 47(1) of the CCAA. Accordingly, it is appropriate that this court recognize the foreign proceeding.

17 Section 47(2) of the *CCAA* requires the court to specify in its order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

18 A "foreign main proceeding" is defined in s. 45(1) of the *CCAA* as "a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interest" ("COMI").

19 Part IV of the *CCAA* came into force in September 2009. Therefore, the experience of Canadian courts in determining the COMI has been limited.

20 Section 45(2) of the *CCAA* provides that, in the absence of proof to the contrary, the debtor company's registered office is deemed to be the COMI. As such, the determination of COMI is made on an entity basis, as opposed to a corporate group basis.

21 In this case, the registered offices of Repechage and E&C Canada Inc. are in Ontario and the registered office of E&C Group Ltd. is in Nova Scotia. The Applicant, however, submits that the COMI of the Chapter 11 Debtors, including the Canadian Debtors, is in the United States and the recognition order should be granted on that basis.

22 Therefore, the issue is whether there is sufficient evidence to rebut the s. 45(2) presumption

that the COMI is the registered office of the debtor company.

23 In this case, counsel to the Applicant submits that the Chapter 11 Debtors have their COMI in the United States for the following reasons:

(a) the location of the corporate head offices for all of the Chapter 11 Debtors, including the Canadian Debtors, is in Boston, Massachusetts;
(b) the Chapter 11 Debtors including the Canadian Debtors function as an integrated North American business and all decisions for the corporate group, including in respect to the operations of the Canadian Debtors, is centralized at the Chapter 11 Debtors head office in Boston;
(c) all members of the Chapter 11 Debtors' management are located in Boston;
(d) virtually all human resources, accounting/finance, and other administrative functions associated with the Chapter 11 Debtors are located in the Boston offices;
(e) all information technology functions of the Chapter 11 Debtors, with the exception of certain clerical functions which are outsourced, are provided out of the United States; and
(f) Repechage is also the parent company of a group of restaurants that operate under the "Piccadilly" brand which operates only in the U.S.

24 Counsel also submits that the Chapter 11 Debtors operate a highly integrated business and each of the debtors, including the Canadian Debtors, are managed centrally from the United States. As such, counsel submits it is appropriate to recognize the Chapter 11 Proceeding as a foreign main proceeding.

25 On the other hand, Mr. Dobbin's declaration discloses that nearly one-half of the operating locations are in Canada, that approximately 43% of employees work in Canada, and that GE Canada Equipment Financing G.P. ("GE Canada") is a substantial lender to MECG. GE Canada does not oppose this application.

26 Counsel to the Applicant referenced *Re Angiotech Pharmaceuticals Limited*, [2011] B.C.J. No. 123, 2011 CarswellBC 124 where the court listed a number of factors to consider in determining the COMI including:

(a) the location where corporate decisions are made;
(b) the location of employee administrations, including human resource functions;
(c) the location of the debtor's marketing and communication functions;
(d) whether the enterprise is managed on a consolidated basis;
(e) the extent of integration of an enterprise's international operations;
(f) the centre of an enterprise's corporate, banking, strategic and management functions;

(g) the existence of shared management within entities and in an organization;
(h) the location where cash management and accounting functions are overseen;
(i) the location where pricing decisions and new business development initiatives are created; and
(j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

27 It seems to me that, in considering the factors listed in *Re Angiotech*, the intention is not to provide multiple criteria, but rather to provide guidance on how the single criteria, *i.e.* the centre of main interest, is to be interpreted.

28 In certain circumstances, it could be that some of the factors listed above or other factors might be considered to be more important than others, but nevertheless, none is necessarily determinative; all of them could be considered, depending on the facts of the specific case.

29 For example:

(a) the location from which financing was organized or authorized or the location of the debtor's primary bank would only be important where the bank had a degree of control over the debtor;
(b) the location of employees might be important, on the basis that employees could be future creditors, or less important, on the basis that protection of employees is more an issue of protecting the rights of interested parties and therefore is not relevant to the COMI analysis;
(c) the jurisdiction whose law would apply to most disputes may not be an important factor if the jurisdiction was unrelated to the place from which the debtor was managed or conducted its business.

30 However, it seems to me, in interpreting COMI, the following factors are usually significant:

(a) the location of the debtor's headquarters or head office functions or nerve centre;
(b) the location of the debtor's management; and
(c) the location which significant creditors recognize as being the centre of the company's operations.

31 While other factors may be relevant in specific cases, it could very well be that they should be considered to be of secondary importance and only to the extent they relate to or support the above three factors.

32 In this case, the location of the debtors' headquarters or head office functions or nerve centre is in Boston, Massachusetts and the location of the debtors' management is in Boston. Further, GE Canada, a significant creditor, does not oppose the relief sought. All of this leads me to conclude

that, for the purposes of this application, each entity making up the Chapter 11 Debtors, including the Canadian Debtors, have their COMI in the United States.

33 Having reached the conclusion that the foreign proceeding in this case is a foreign main proceeding, certain mandatory relief follows as set out in s. 48(1) of the *CCAA*:

> 48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,
>
> (*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> (*d*) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

34 The relief provided for in s. 48 is contained in the Initial Recognition Order.

35 In addition to the mandatory relief provided for in s. 48, pursuant to s. 49 of the *CCAA*, further discretionary relief can be granted if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors. Section 49 provides:

> 49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

> (*a*) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
>
> (*b*) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
>
> (*c*) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

36 In this case, the Applicant applies for orders to recognize and give effect to a number of orders of the U.S. Court in the Chapter 11 Proceeding (collectively, the "Chapter 11 Orders") which are comprised of the following:

(a) the Foreign Representative Order;
(b) the U.S. Cash Collateral Order;
(c) the U.S. Prepetition Wages Order;
(d) the U.S. Prepetition Taxes Order;
(e) the U.S. Utilities Order;
(f) the U.S. Cash Management Order;
(g) the U.S. Customer Obligations Order; and
(h) the U.S. Joint Administration Order.

37 In addition, the requested relief also provides for the appointment of BDO as an Information Officer; the granting of an Administration Charge not to exceed an aggregate amount of $75,000 and other ancillary relief.

38 In considering whether it is appropriate to grant such relief, portions of s. 49, s. 50 and 61 of the *CCAA* are relevant:

> 50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.
>
> ...
>
> 61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions

of this Act.

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

39 Counsel to the Applicant advised that he is not aware of any provision of any of the U.S. Orders for which recognition is sought that would be inconsistent with the provisions of the CCAA or which would raise the public policy exception as referenced in s. 61(2). Having reviewed the record and having heard submissions, I am satisfied that the supplementary relief, relating to, among other things, the recognition of Chapter 11 Orders, the appointment of BDO and the quantum of the Administrative charge, all as set out in the Supplemental Order, is appropriate in the circumstances and is granted.

40 The requested relief is granted. The Initial Recognition Order and the Supplemental Order have been signed in the form presented.

G.B. MORAWETZ J.

* * * * *

SCHEDULE "A"

1. Massachusetts Elephant & Castle Group Inc.
2. Repechage Investments Limited
3. Elephant & Castle Group Inc.
4. The Elephant and Castle Canada Inc.
5. Elephant & Castle, Inc. (a Texas Corporation)
6. Elephant & Castle Inc. (a Washington Corporation)
7. Elephant & Castle International, Inc.
8. Elephant & Castle of Pennsylvania, Inc.
9. E & C Pub, Inc.
10. Elephant & Castle East Huron, LLC
11. Elephant & Castle Illinois Corporation
12. E&C Eye Street, LLC
13. E & C Capital, LLC
14. Elephant & Castle (Chicago) Corporation

TAB 11

CITATION: Caesars Entertainment Operating Company, Inc. (Re), 2015 ONSC 712
COURT FILE NO.: CV-15-10837
DATE: 2015-01-30

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C 36, AS AMENDED

AND IN THE MATTER OF THE CAESARS ENTERTAINMENT OPERATING COMPANY, INC. AND THE DEBTORS LISTED ON SCHEDULE "A" (COLLECTIVELY, THE "CHAPTER 11 DEBTORS")

APPLICATION OF CAESARS ENTERTAINMENT WINDSOR LIMITED UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Katherine McEachern* and *Matthew Kanter*, for Caesars Entertainment Operating Company, Inc. et al.

Robin B. Schwill, for the Ontario Lottery and Gaming Corporation

HEARD and ENDORSED: January 19, 2015
REASONS: January 30, 2015

ENDORSEMENT

INTRODUCTION AND FACTS

[1] On January 15, 2015, Caesars Entertainment Operating Company Inc. ("CEOC") and certain of its subsidiaries (collectively, the "Chapter 11 Debtors") commenced voluntary reorganization proceedings (the "Chapter 11 Proceeding") in the United States Bankruptcy Court for the Northern District of Illinois (the "Illinois Court") by each filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 – 1532 (the "Bankruptcy Code").

[2] Caesars Windsor Entertainment Limited ("CEWL" or the "Applicant"), an Ontario corporation, is an indirect subsidiary of CEOC. CEWL is a Chapter 11 Debtor.

[3] Pursuant to a written resolution (the "Foreign Representation Resolution") of its sole shareholder, Caesars World, Inc. ("Caesars World") CEWL has been authorized to act as the foreign representative of all of the Chapter 11 Debtors for the purposes of recognizing the Chapter 11 Proceeding in Canada, and has been authorized to commence this Application for

recognition of the Chapter 11 Proceeding as a foreign proceeding. CEOC has confirmed its authorization of CEWL to act as foreign representative on behalf of the Chapter 11 Debtors.

[4] CEWL manages Caesars Windsor Hotel and Casino in Windsor, Ontario (the "Windsor Casino"), for and on behalf of the Ontario Lottery and Gaming Corporation ("OLG").

[5] In order to (a) ensure the protection of the Chapter 11 Debtors' Canadian assets and (b) enable the Chapter 11 Debtors, including CEWL, to operate their businesses in the ordinary course during the Chapter 11 Proceeding, CEWL seeks the following orders pursuant to sections 44 and 49 of the *Companies' Creditors Arrangement Act*, R.S.C., 1985 c. C-36 (the "CCAA"):

a. an "Initial Recognition Order," *inter alia*: (i) declaring that CEWL is a "foreign representative" pursuant to section 45 of the CCAA; (ii) declaring that the Chapter 11 Proceeding is recognized as a "foreign main proceeding" under the CCAA; and (iii) granting a stay of proceedings against the Chapter 11 Debtors; and

b. a "Supplemental Order" pursuant to section 49 of the CCAA, *inter alia*: (i) recognizing in Canada and enforcing certain "first day" orders of the Illinois Court made in the Chapter 11 Proceeding (the "First Day Orders"); (ii) staying any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the business and property of the Chapter 11 Debtors and the directors and officers of the Chapter 11 Debtors; and (iii) restraining the right of any person or entity to, among other things, discontinue or terminate any supply of products or services to the Chapter 11 Debtors.

[6] CEWL submits that the requested orders are necessary and appropriate in the circumstances of this case.

[7] On January 12, 2015, a competing involuntary petition in respect of CEOC was filed in the United States Bankruptcy Court for the District of Delaware (the "Delaware Court"). By order of the Delaware Court, the Chapter 11 Proceeding in the Illinois Court has been stayed pending a determination of the proper venue for the Chapter 11 case of CEOC and its subsidiaries (the "Delaware Stay Order"). However, as more fully detailed below, the Delaware Stay Order has permitted the Illinois Court to enter the First Day Orders. CEWL seeks recognition of these First Day Orders in order to ensure stability and the status quo pending the outcome of the venue dispute, and will return to this Court to advise of the outcome of that dispute and to seek any further orders as may be advisable or appropriate in the circumstances.

[8] The Chapter 11 Debtors are part of a geographically diversified casino-entertainment group of companies (collectively, "Caesars") headed by Caesars Entertainment Corporation ("CEC"), a U.S. publicly traded company that owns, operates or manages 50 casinos in five countries in three continents, with properties in the United States, Canada, the United Kingdom, South Africa, and Egypt. CEC is not a Chapter 11 Debtor.

[9] CEC is the majority shareholder of CEOC, a Chapter 11 Debtor. The remaining Chapter 11 Debtors, including CEWL, are direct and indirect subsidiaries of CEOC. The Chapter 11 Debtors are the primary operating units of the Caesars gaming enterprise.

[10] On January 12, 2015, certain petitioning creditors filed an involuntary petition against CEOC under Chapter 11 of the Bankruptcy Code (but not as against the other Chapter 11 Debtors, including CEWL). That involuntary petition has not been resolved.

[11] Meanwhile, the Chapter 11 Debtors commenced their own voluntary proceedings in the Illinois Court on January 15, 2015. Hearings were conducted in both the Delaware Court and the Illinois Court on January 15, 2015, which have culminated in the entering of the Delaware Stay Order, and the First Day Orders.

[12] Notwithstanding the stay, the Delaware Court has permitted CEOC to obtain the First Day Orders from the Illinois Court, which are currently in effect pending litigation over the appropriate venue for the Chapter 11 case of CEOC and its subsidiaries. As such, while any further steps in the Chapter 11 Proceeding in the Illinois Court beyond the First Day Orders are currently stayed, the Applicant submits it is necessary to obtain recognition of the First Day Orders in Canada pending further developments in the Delaware Court. CEWL will advise the Court of any further developments in respect of the venue litigation, and will seek such further orders as may be advisable in the circumstances.

[13] CEWL is the only one of the 173 Chapter 11 Debtors that is not incorporated in the United States. It is a wholly-owned indirect subsidiary of CEOC.

[14] The almost exclusive function of CEWL is to manage the Windsor Casino pursuant to an operating agreement dated as of December 14, 2006 (the "Operating Agreement") between Caesars Entertainment Windsor Holding, Inc. (now CEWL) and the Ontario Lottery and Gaming Corporation ("OLG").

[15] CEWL supplies the management services set out in the Operating Agreement to OLG, in consideration for an operating fee. CEWL does not have an ownership interest in the Windsor Casino.

[16] CEWL operates the Windsor Casino under Caesars' trademarks and branding. The trademarks have been licenced to OLG by Caesars World, a U.S.-based Chapter 11 Debtor and, in turn, sublicensed by OLG.

[17] CEWL's primary assets in Canada consist of (a) its rights under the Operating Agreement and (b) cash on deposit from time to time in its corporate bank accounts.

[18] Windsor Casino Limited ("WCL") is a wholly-owned subsidiary of CEWL. WCL employs the approximately 2,800 employees who work at the Windsor Casino. Certain of the WCL employees are unionized members of Unifor Local 444 (the "Union"). Neither CEWL nor WCL administers a defined benefit pension plan although WCL does administer a defined

contribution pension plan. WCL is not a Chapter 11 Debtor and as such is not a subject of this Application.

[19] CEWL intends to operate the Windsor Casino pursuant to the Operating Agreement in the normal course through the Chapter 11 Proceeding. It is not currently contemplated that the Chapter 11 Debtors will restructure any of the business or operations of CEWL or WCL, or compromise any of their obligations.

[20] The Record establishes that the Chapter 11 Debtors, including CEWL, are managed from the United States as an integrated group from a corporate, strategic, financial, and management perspective. In particular:

a. pursuant the USD, CEWL's corporate decision-making (including with respect to the Operating Agreement and the Chapter 11 Proceeding) is done by its sole shareholder, Caesars World, a Florida corporation;

b. the Chief Executive Officer and President of CEWL (who is resident in Windsor, Ontario), reports to the Chairman of the Board of CEWL (the "Chairman"). The Chairman, who is also an officer of CEOC, resides in the United States and works from the Caesars head office in Las Vegas, Nevada;

c. certain centralized services critical to CEWL's functioning, including the administration of the Caesars brand and intellectual property rights, services related to online hotel booking, and administration of the loyalty "Total Rewards" program for customers are administered and handled from the United States;

d. the majority of the strategic marketing and communications decisions regarding the brand and loyalty programs are made, and related functions taken, on behalf of all Chapter 11 Debtors, including CEWL, in the United States;

e. management fees earned by CEWL under the Operating Agreement may be paid by way of dividend from time to time to CEWL's U.S. corporate partners; and

f. strategic and directional decisions for CEWL are ultimately made in the United States.

[21] CEWL is party to a unanimous shareholder declaration (the "USD") that grants CEWL's sole shareholder, Caesar's World, all the rights, powers and liabilities of the directors of CEWL. The Foreign Representation Resolution authorized CEWL to file as a Chapter 11 Debtor and to act as the foreign representative of all of the Chapter 11 Debtors for the purposes of recognizing the Chapter 11 Proceeding in Canada. By letter dated January 16, 2015, CEOC confirmed CEWL's authorization to act as foreign representative for the Chapter 11 Debtors.

ISSUES

[22] The issues on this Application are:

a. Should this Court recognize the Chapter 11 Proceeding as a foreign main proceeding pursuant to sections 46 through 48 of the CCAA and grant the Initial Recognition Order sought by the Applicant?

b. Should this Court grant the Supplemental Order sought by the Applicant under section 49 of the CCAA?

ANALYSIS

[23] Subsection 46(1) of the CCAA provides that a foreign representative may apply to the Court for recognition of a foreign proceeding in respect of which he or she is a foreign representative.

[24] CEWL has been authorized to act as foreign representative of the Chapter 11 Debtors pursuant to the Foreign Representative Resolution executed by CEWL's sole shareholder. CEOC, for itself and on behalf of its subsidiaries, has written to CEWL confirming its authorization to act as foreign representative of the Chapter 11 Debtors. It is CEWL's position that this authorization is sufficient for purposes of subsection 45(1) of the CCAA.

[25] There is no language in Part IV of the CCAA that requires a foreign representative to be appointed by order of the court in the foreign proceeding.

[26] I accept that for the purposes of this application that CEWL is a "foreign representative".

[27] In response to an application brought by a foreign representative under subsection 46(1) of the CCAA, subsection 47(1) of the CCAA provides that the Court shall grant an order recognizing the foreign proceeding if the proceeding is a foreign proceeding and the applicant is a foreign representative in respect of that proceeding.

[28] Canadian courts have consistently held that court proceedings under chapter 11 of the Bankruptcy Code constitute "foreign proceedings" for the purposes of the CCAA (see: *Re Digital Domain Media Group Inc.*, 2012 BCSC 1565 (B.C.S.C. [In Chambers]) at para. 15; and *Re Lightsquared LP*, 2012 ONSC 2994, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]) at para. 18). I am satisfied that the Chapter 11 Proceeding is a "foreign proceeding".

[29] CEWL submits that it is appropriate for this Court to recognize the Chapter 11 Proceeding as a foreign main proceeding.

[30] If the foreign proceeding is recognized as a foreign main proceeding, there is an automatic stay provided in section 48(1) of the CCAA against proceedings concerning the debtor's property, debts, liabilities or obligations and prohibitions against selling or disposing of property in Canada.

[31] Subsection 45(1) of the CCAA provides that a "foreign main proceeding" is a foreign proceeding in the jurisdiction of the debtor company's centre of main interests ("COMI")."

[32] For the purposes of Part IV of the CCAA, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the COMI.

[33] In *Lightsquared*, the Court found that the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's COMI:

a. the location is readily ascertainable by creditors;

b. the location is one in which the debtor's principal assets or operations are found; and

c. the locations where the management of the debtor takes place.

(see: *Re Lightsquared, supra* at para. 25; and *Re Mt.Gox Co.*, 2014 ONSC 5811, 245 A.C.W.S. (3d) 280 (Ont. S.C.J. [Commercial List]) at para. 21)

[34] While CEWL is incorporated in Ontario and has its registered head office in Ontario, the Applicant submits that Ontario is not its centre of main interests.

[35] I am satisfied that the COMI for the Chapter 11 Debtors is the United States. In arriving at this decision, I have taken into account that CEWL is the only Chapter 11 Debtor that is not incorporated in a U.S. jurisdiction. All of the other 172 Chapter 11 Debtors have their head office or headquarters located in the United States. In addition:

a. the Chapter 11 Debtors operate as an functionally integrated group from a corporate, strategic, financial and management perspective;

b. pursuant to the USD, CEWL's corporate decisions are made by its sole shareholder, Caesars World, a Florida corporation;

c. CEWL's Chief Executive Officer and President report to the Chairman, who resides in the United States and works from the Caesars head office in Las Vegas, Nevada;

d. centralized services critical to CEWL's operations, including the administration of the Caesars brand and intellectual property rights, services related to online hotel booking, the Windsor Casino website, and administration of the "Total Rewards" loyalty program are operated from the United States;

e. strategic and directional decisions for CEWL are ultimately made in the United States.

[36] In the result, I am satisfied that the Chapter 11 Proceeding should be recognized as a "foreign main proceeding".

[37] The relief requested in the Initial Recognition Order is granted.

[38] In the context of cross-border insolvencies, Canadian courts have consistently encouraged comity and cooperation between courts in various jurisdictions in order to enable enterprises to restructure on a cross-border basis (see: *Re Lear Canada* (2009), 55 C.B.R. (5th) 57, 2009 CarswellOnt 4232 (Ont. S.C.J. [Commercial List]) at paras. 11 and 17; and *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]) at para. 9).

[39] Having reviewed the Record, I am satisfied, based on the facts in Mr. James Smith's affidavit and for the reasons set out in the Applicant's factum, that it is appropriate for the Court in this case to exercise its authority under sections 49(1) and 50 of the CCAA to grant the relief sought in the Supplemental Order, in order to maintain the status quo and protect the assets of the Chapter 11 Debtors, while permitting CEWL to continue operating its business as usual in Canada during the Chapter 11 Proceeding.

DISPOSITION

[40] In the result, the Application is granted. The Initial Recognition Order and the Supplemental Order have been signed, with the Supplemental Order having been modified to exclude a stay of actions against directors and officers of the Chapter 11 Debtors, as I consider such requested relief to be beyond the scope of appropriate relief in the Supplemental Order at this time.

RSJ G.B. Morawetz

Date: January 30, 2015

SCHEDULE "A"

LIST OF CHAPTER 11 DEBTORS

Legal Name	State of Formation
CZL Development Company, LLC	Delaware
Harrah's Iowa Arena Management, LLC	Delaware
PHW Manager, LLC	Nevada
190 Flamingo, LLC	Nevada
AJP Holdings, LLC	Delaware
AJP Parent, LLC	Delaware
B I Gaming Corporation	Nevada
Bally's Midwest Casino, Inc.	Delaware
Bally's Park Place, Inc.	New Jersey
Benco, Inc.	Nevada
Biloxi Hammond, LLC	Delaware
Biloxi Village Walk Development, LLC	Delaware
BL Development Corp.	Minnesota
Boardwalk Regency Corporation	New Jersey
Caesars Entertainment Canada Holding, Inc.	Nevada
Caesars Entertainment Finance Corp.	Nevada
Caesars Entertainment Golf, Inc.	Nevada
Caesars Entertainment Retail, Inc.	Nevada
Caesars India Sponsor Company, LLC	Nevada
Caesars Marketing Services Corporation (f/k/a Harrah's Marketing	Nevada

Services Corporation)	
Caesars New Jersey, Inc.	New Jersey
Caesars Palace Corporation	Delaware
Caesars Palace Realty Corporation	Nevada
Caesars Palace Sports Promotions, Inc.	Nevada
Caesars Riverboat Casino, LLC	Indiana
Caesars Trex, Inc.	Delaware
Caesars United Kingdom, Inc.	Nevada
Caesars World Marketing Corporation	New Jersey
Caesars World Merchandising, Inc.	Nevada
Caesars World, Inc.	Florida
California Clearing Corporation	California
Casino Computer Programming, Inc.	Indiana
Chester Facility Holding Company, LLC	Delaware
Consolidated Supplies, Services and Systems	Nevada
DCH Exchange, LLC	Nevada
DCH Lender, LLC	Nevada
Desert Palace, Inc.	Nevada
Durante Holdings, LLC	Nevada
East Beach Development Corporation	Mississippi
GCA Acquisition Subsidiary, Inc.	Minnesota
GNOC, Corp.	New Jersey
Grand Casinos of Biloxi, LLC (f/k/a Grand Casinos of Mississippi, Inc. - Biloxi)	Minnesota

Grand Casinos of Mississippi, LLC—Gulfport	Mississippi
Grand Casinos, Inc.	Minnesota
Grand Media Buying, Inc.	Minnesota
Harrah South Shore Corporation	California
Harrah's Arizona Corporation	Nevada
Harrah's Bossier City Investment Company, L.L.C.	Louisiana
Harrah's Bossier City Management Company, LLC	Nevada
Harrah's Chester Downs Investment Company, LLC	Delaware
Harrah's Chester Downs Management Company, LLC	Nevada
Harrah's Illinois Corporation	Nevada
Harrah's Interactive Investment Company	Nevada
Harrah's International Holding Company, Inc.	Delaware
Harrah's Investments, Inc. (f/k/a Harrah's Wheeling Corporation)	Nevada
Harrah's Management Company	Nevada
Harrah's MH Project, LLC	Delaware
Harrah's NC Casino Company, LLC	North Carolina
Harrah's North Kansas City LLC (f/k/a Harrah's North Kansas City Corporation)	Missouri
Harrah's Operating Company Memphis, LLC	Delaware
Harrah's Pittsburgh Management Company	Nevada
Harrah's Reno Holding Company, Inc.	Nevada
Harrah's Shreveport Investment Company, LLC	Nevada
Harrah's Shreveport Management Company, LLC	Nevada
Harrah's Shreveport/Bossier City Holding Company, LLC	Delaware

Harrah's Shreveport/Bossier City Investment Company, LLC	Delaware
Harrah's Southwest Michigan Casino Corporation	Nevada
Harrah's Travel, Inc.	Nevada
Harrah's West Warwick Gaming Company, LLC	Delaware
Harveys BR Management Company, Inc.	Nevada
Harveys C.C. Management Company, Inc.	Nevada
Harveys Iowa Management Company, Inc.	Nevada
Harveys Tahoe Management Company, Inc.	Nevada
H-BAY, LLC	Nevada
HBR Realty Company, Inc.	Nevada
HCAL, LLC	Nevada
HCR Services Company, Inc.	Nevada
HEI Holding Company One, Inc.	Nevada
HEI Holding Company Two, Inc.	Nevada
HHLV Management Company, LLC	Nevada
Hole in the Wall, LLC	Nevada
Horseshoe Entertainment	Louisiana
Horseshoe Gaming Holding, LLC	Delaware
Horseshoe GP, LLC	Nevada
Horseshoe Hammond, LLC	Indiana
Horseshoe Shreveport, L.L.C.	Louisiana
HTM Holding, Inc.	Nevada
Koval Holdings Company, LLC	Delaware

Koval Investment Company, LLC	Nevada
Las Vegas Golf Management, LLC	Nevada
Las Vegas Resort Development, Inc.	Nevada
Martial Development Corp.	New Jersey
Nevada Marketing, LLC	Nevada
New Gaming Capital Partnership	Nevada
Ocean Showboat, Inc.	New Jersey
Players Bluegrass Downs, Inc.	Kentucky
Players Development, Inc.	Nevada
Players Holding, LLC	Nevada
Players International, LLC	Nevada
Players LC, LLC	Nevada
Players Maryland Heights Nevada, LLC	Nevada
Players Resources, Inc.	Nevada
Players Riverboat II, LLC	Louisiana
Players Riverboat Management, LLC	Nevada
Players Riverboat, LLC	Nevada
Players Services, Inc.	New Jersey
Reno Crossroads LLC	Delaware
Reno Projects, Inc.	Nevada
Rio Development Company, Inc.	Nevada
Robinson Property Group Corp.	Mississippi
Roman Entertainment Corporation of Indiana	Indiana

Roman Holding Corporation of Indiana	Indiana
Showboat Atlantic City Mezz 1, LLC	Delaware
Showboat Atlantic City Mezz 2, LLC	Delaware
Showboat Atlantic City Mezz 3, LLC	Delaware
Showboat Atlantic City Mezz 4, LLC	Delaware
Showboat Atlantic City Mezz 5, LLC	Delaware
Showboat Atlantic City Mezz 6, LLC	Delaware
Showboat Atlantic City Mezz 7, LLC	Delaware
Showboat Atlantic City Mezz 8, LLC	Delaware
Showboat Atlantic City Mezz 9, LLC	Delaware
Showboat Atlantic City Operating Company, LLC	New Jersey
Showboat Atlantic City Propco, LLC	Delaware
Showboat Holding, Inc.	Nevada
Southern Illinois Riverboat/Casino Cruises, Inc.	Illinois
Tahoe Garage Propco, LLC	Delaware
TRB Flamingo, LLC	Nevada
Trigger Real Estate Corporation	Nevada
Tunica Roadhouse Corporation (f/k/a Sheraton Tunica Corporation)	Delaware
Village Walk Construction, LLC	Delaware
Winnick Holdings, LLC	Delaware
Winnick Parent, LLC	Delaware
3535 LV Corp. (f/k/a Harrah's Imperial Palace)	Nevada
Caesars License Company, LLC (f/k/a Harrah's License Company, LLC)	Nevada

FHR Corporation	Nevada
FHR Parent, LLC	Delaware
Flamingo-Laughlin Parent, LLC	Delaware
Flamingo-Laughlin, Inc. (f/k/a Flamingo Hilton-Laughlin, Inc.)	Nevada
Harrah's New Orleans Management Company	Nevada
LVH Corporation	Nevada
Parball Corporation	Nevada
Caesars Escrow Corporation (f/k/a Harrah's Escrow Corporation)	Delaware
Caesars Operating Escrow LLC (f/k/a Harrah's Operating Escrow LLC)	Delaware
Corner Investment Company Newco, LLC	Delaware
Harrah's Maryland Heights Operating Company	Nevada
BPP Providence Acquisition Company, LLC	Delaware
Caesars Air, LLC	Delaware
Caesars Baltimore Development Company, LLC	Delaware
Caesars Massachusetts Acquisition Company, LLC	Delaware
Caesars Massachusetts Development Company, LLC	Delaware
Caesars Massachusetts Investment Company, LLC	Delaware
Caesars Massachusetts Management Company, LLC	Delaware
CG Services, LLC	Delaware
Christian County Land Acquisition Company, LLC	Delaware
CZL Management Company, LLC	Delaware
HIE Holdings Topco, Inc.	Delaware
PH Employees Parent LLC	Delaware

PHW Investments, LLC	Delaware
Caesars Entertainment Operating Company, Inc. (f/k/a Harrah's Operating Company, Inc.)	Delaware
Caesars Entertainment Windsor Limited (f/k/a Caesars Entertainment Windsor Holding, Inc.)	Canada
Octavius Linq Holding Co., LLC	Delaware
Caesars Baltimore Acquisition Company, LLC	Delaware
Caesars Baltimore Management Company, LLC	Delaware
PHW Las Vegas, LLC	Nevada
3535 LV Parent, LLC	Delaware
Bally's Las Vegas Manager, LLC	Delaware
Cromwell Manager, LLC	Delaware
JCC Holding Company II Newco, LLC	Delaware
Laundry Parent, LLC	Delaware
LVH Parent, LLC	Delaware
Parball Parent, LLC	Delaware
The Quad Manager, LLC	Delaware
Des Plaines Development Limited Partnership	Delaware

TAB 12

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Angiotech Pharmaceuticals Ltd. (Re),* 2011 BCSC 115

Date: 20110128
Docket: S110587
Registry: Vancouver

In the Matter of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as amended

And

In the Matter of a Plan of Compromise or Arrangement of Angiotech Pharmaceuticals, Inc. and the other Petitioners Listed on Schedule "A"

Petitioners

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

In Chambers

Counsel for Angiotech Pharmaceuticals	J. Dacks M. Wasserman R. Morse
Counsel for Alvarez & Marsal Canada Inc.	J. Grieve
Counsel for Consenting Noteholders	R. Chadwick L. Willis
Counsel for Wells Fargo	B. Kaplan P. Rubin
Place and Date of Hearing:	Vancouver, B.C. January 28, 2011
Place and Date of Judgment:	Vancouver, B.C. January 28, 2011

[1] I am satisfied that the initial *CCAA* order should be granted. I am also satisfied that the order will permit the petitioners a reasonable time to reorganize their affairs in order to allow them to operate as going concerns.

[2] The plan contemplated by the petitioners is aggressive in terms of time frame. The petitioners are to be complimented on their efforts to seek the Court's assistance in a very timely way, for taking an expedited approach in the face of failed efforts to avoid invoking protection under the *CCAA* regime.

[3] The proposed timetable appears to reflect the petitioners' efforts to provide protection to their creditors, to maintain their employment contracts with their employees, and to continue to provide their valuable medical and pharmaceutical products to the global public.

[4] I am satisfied that I have the jurisdiction to make the order, and I will grant the initial *CCAA* order.

[5] I have been asked by counsel to speak to the issue of the “centre of main interest” because I am told that an application is to be made to the U.S. District Court, in Delaware, which will be filed this Sunday, January 30, 2011, and brought on Monday, January 31, 2011.

[6] The petitioners' intention in that regard is reflected in the evidence. It is well described at para. 65 of their written submissions:

> Although the Petitioners intend that this Court be the main forum for overseeing their financial and operational restructuring, the Petitioners also intend to file petitions under Chapter 15 of the *United States Bankruptcy Code* seeking recognition of this proceeding as a “Foreign Main Proceeding”. The Petitioners would file such petitions on the basis that British Columbia is their “centre of main interest” (“COMI”). The Petitioners intend that A&M, as proposed Monitor, would be the foreign representative in the Chapter 15 proceedings[.]

[7] The factors considered by the courts in Canada that are relevant to the centre of main interest issue are:

(a) the location where corporate decisions are made;

(b) the location of employee administrations, including human resource functions;

(c) the location of the company's marketing and communication functions;

(d) whether the enterprise is managed on a consolidated basis;

(e) the extent of integration of an enterprise's international operations;

(f) the centre of an enterprise's corporate, banking, strategic and management functions;

(g) the existence of shared management within entities and in an organization;

(h) the location where cash management and accounting functions are overseen;

(i) the location where pricing decisions and new business development initiatives are created; and

(j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

See *Re Nortel Networks Corp.*, 50 C.B.R. (5th) 77, (2009) O.J. No. 154 (S.C.J.); and *Re Fraser Papers Inc.*, 56 C.B.R. (5th) 194, (2009) O.J. No. 2648 (S.C.J.).

[8] The petitioners submit that the centre of main interest is British Columbia for a number of reasons. These are set out in their written submissions and in the affidavit of Mr. Bailey, the chief financial officer, sworn today.

[9] At para. 66 of their written submissions, the petitioners state:

> The Petitioners are part of a highly integrated international enterprise that is directed from Angiotech's head office in Vancouver, British Columbia. British Columbia is therefore the Petitioners' COMI [centre of main interest].

[10] Mr. Bailey's affidavit deposes to the following at para. 234:

> As noted previously, the Petitioners are part of an integrated business enterprise with primary operations in Canada and the United States. The Petitioners' COMI is British Columbia notwithstanding their substantial operations in the United States:
>
> (a) all of the Petitioners have assets in Canada and each of the companies comprising Angiotech U.S. has a bank account at the Royal Bank of Canada in Vancouver containing $1,000 on deposit;
>
> (b) the operations of the Petitioners are directed from Angiotech's head office in Canada;
>
> (c) all of the Petitioners report to Angiotech;
>
> (d) corporate governance for the Petitioners is directed from Canada;
>
> (e) strategic and key operating decisions and key policy decisions for the Petitioners are made by Angiotech staff located in Vancouver;
>
> (f) the Petitioners' tax, treasury and cash management functions are managed from Vancouver and local plant finance staff report to senior finance management in Vancouver;
>
> (g) the Petitioners' human resources functions are administered from Vancouver and all local human resources staff report into Vancouver;
>
> (h) primary research and development functions including new product conceptions and development, regulatory and clinical development, medical affairs and quality control are directed from and carried out in Vancouver;
>
> (i) the Petitioners' information technology and systems are directed from Vancouver;
>
> (j) plant management and senior staff of the Petitioners regularly attend meetings in Vancouver;
>
> (k) all public company reporting and investor relations are directed from Vancouver; and
>
> (l) Angiotech's chief executive officer (the “CEO”) is based in Vancouver and in addition to the Senior Management referred above, all sales, manufacturing, operations and legal staff report to the CEO.

[11] I have had an opportunity to read through the evidence contained in Mr. Bailey’s affidavit filed in support of the application. I am satisfied on the evidence before me that the centre of main interest is British Columbia. I accept the petitioners' submissions.

[12] Now I wish to address the point raised by Mr. Grieve concerning the monitor.

[13] The monitor is an officer of the Court. The monitor owes its duties to the Court and does not represent the interests of the petitioners, any creditor, or any other

interested party. I wish the monitor to be appointed as representative of any foreign main proceedings, instead of the petitioners (or anyone acting on their behalf) or any other party, in order to ensure that the U.S. creditors are as fairly treated as any of the other creditors in this case. I wish my request in that regard be put before the U.S. District Court in Delaware when the application concerning the foreign main proceeding is heard.

"P. Walker J."

_____

The Honourable Mr. Justice Paul Walker

IN THE MATTER OF APPLICATION OF AN APPLICATION BY **TK HOLDINGS INC.**
UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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