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CORPORATE BANKRUPTCY PANEL
**CHAPTER 15 CHOICE OF LAW: HOW FAR DO I NEED TO
GO TO GET MY MONEY BACK?**

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Scott Cousins^{***}
Andrea Hartley^{****}
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MR. RISENER: We're now going to step into our Corporate Panel, which this year will be about choice of law in chapter 15 avoidance actions. Chapter 15 of course came along with BAPCPA as Judge Diehl discussed, and we have some very fantastic panelists with us to discuss this issue. I would like to now introduce the panelists. I think they will have some very insightful words on this topic.

First, she is a restructuring associate in the New York office of Kirkland & Ellis, LLP, and a graduate of NYU Law School. She has been involved in chapter 15 matters representing creditors as well as various chapter 11 matters from both the creditor and debtor side. Please welcome Ameneh Bordi. Thank you so much for joining us today, Ms. Bordi. It's a pleasure to have you.

Next, he is a Director at the Bayard firm in Delaware and co-chair of the firm's business restructuring and liquidations group. He has more than twenty-five years of experience in the restructuring field, and he has participated in many of the largest and the most complicated business reorganizations, liquidations, and distressed sales and acquisitions in Delaware's state and federal courts. He is also experienced in out-of-court restructurings and workouts, and has appeared in many bankruptcy jurisdictions across the country. Please welcome Mr. Scott Cousins. Thank you so much, Scott. We can't wait to hear from you.

She is the chair of Akerman's bankruptcy and reorganization practice group, a nationally recognized team, serving as bankruptcy counsel or receivers in many of the largest bankruptcy filings in the United States. She counsels clients

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in the financial services, real estate, hospitality, restaurant, and retail sectors on business reorganizations and liquidations, assumption and rejection of leases, workouts, debt restructurings, assignments for the benefit of creditors, and creditors' rights, and has substantial experience with fraudulent conveyance and preferential transfer litigation. Please welcome Ms. Andrea Hartley from Akerman LLP.

Finally, she is a partner in Cassels Brock's restructuring and insolvency group. As a former U.S. practitioner, her strength is in working with U.S.-based clients to understand the challenges of the Canadian insolvency landscape and developing solutions in complex proceedings. Her practice focuses on corporate restructurings, with an emphasis on debtors, DIP lenders, and informal committees in cross-border proceedings. Her restructuring matters encompass a variety of industries including mining, oil and gas, renewable energy, manufacturing, and entertainment. Please welcome Ms. Natalie Levine.

Thank you all for coming down and joining us for this panel. We're going to start with a short refresher on chapter 15. It is an interesting area of practice that will only continue to grow as our world continues to shrink, and more and more international companies rely on assistance from U.S. bankruptcy courts.

I'm going to start this off by going through this. I've prepared a short, abbreviated version of the PowerPoint slides that are in your materials. I'd like to just go ahead. Chapter 15 Choice of Law, a quick overview. As I said, chapter 15 was created under BAPCPA. It became effective in October of 2005. It's based on the UNCITRAL Model Law on Cross-Border Insolvency, and it has forty-one adopting countries. Its purpose is to provide effective mechanisms for dealing with cases of cross-border insolvency. It has multiple objectives, but the main focus of these objectives is promoting comity between different international courts and insolvency systems.

Basically what's going to happen in a chapter 15 case is a foreign representative is going to file an ancillary case in the United States, and to do that you have to prove the existence of a foreign proceeding and your authority as a representative. You can either have a foreign main proceeding or a foreign non-main proceeding, and these turn on the center of main interests.

In the foreign main proceeding, the debtor's center of main interest will be located in the country where the foreign proceeding is occurring. In a non-main proceeding, the debtor will have an establishment in the forum where the proceeding is being handled, but the center of main interest of that debtor is elsewhere.

So this center of main interest, if you were thinking that it might be defined, you would be mistaken. Naturally, as with many other terms in the Code, it is undefined but the presumption is that the center of main interest is in the country where the debtor's registered office is located. However, that presumption is not dispositive. Factors include the location of their headquarters, the location of management, the location of the majority of creditors, and the applicable law of most of those disputes. The big case on this is *In re Suntech Power Holdings Co.*

Now we'll turn to avoidance actions. When you file a chapter 15 case, a court can apply either U.S. law or it can apply foreign insolvency law. For example, you could apply the law of the forum where the debtor's center of main interest is located. In this case you would most likely use that forum's avoidance provisions.

How do you choose which to apply? This is going to be a little bit more of a theoretical background before we get into some of the practical experiences of our panelists. There are two main tests. They are the law of the forum and the center of gravity. The law of the forum's main advocate is Professor Jay Westbrook at the University of Texas. He's a prolific writer and scholar in chapter 15 and cross-border insolvency generally. The center of gravity test has been upheld in several judicial opinions.

The law of the forum, or if you want to be really fancy, the *lex fori concursus*. Basically the rule here is that the law of the forum in which the case is pending should control. Professor Westbrook also calls this the home country rule. Usually this means that whatever the debtor's home country, that insolvency law is to be applied. Only a couple of notable cases have applied this test. The really seminal one is *Fogerty v. Petroquest Resources, Inc.* in the *In re Condor Insurance* bankruptcy. That was decided at the Fifth Circuit. The other one is *In re French* which was decided at the Fourth Circuit in 2006. Since it's the seminal case, we're going to focus, I'm going to go through a little bit of the facts of *Fogerty*.

The *Fogerty* case dealt with an attempt by the foreign representative in the insolvency proceeding of Condor Insurance, an insurance company based in Nevis, to recover a lot of assets that had been fraudulently transferred from Condor Insurance to Condor Guaranty. The foreign representative wanted to apply Nevis law to the proceeding, as U.S. law under chapter 15 generally prohibits perpetration avoidance actions. The Fifth Circuit decided that it was going to apply Nevis avoidance action rules to the proceeding based on considerations of comity and statutory construction. Basically chapter 15's

stated purpose is promoting cooperation, and in that light, the court looked to that and decided to apply this law of the forum test.

I believe Ms. Hartley told me that one of her former partners actually handled part of this case. If you have any thoughts on that, would you mind discussing that?

MS. HARTLEY: Sure. Actually it's my current partner, David Parham, but he wasn't a partner with Akerman at the time. He was with Baker McKenzie when he argued this, but we spoke a little bit about it, and I know Jake will probably go into more detail, but interestingly the chapter 15 was filed in Mississippi. It's where they thought the targets were located, the bad guys, as well as the assets, the \$313 million. So that's how they selected their forum. I know that's some of the issues we're going to talk about.

As Jake may go into in more detail on the slides, the court held that while it is plain that relief under the listed sections, and then it's referring to § 1521(a), it's stating that while it is plain that relief under the listed sections is excluded, the statute is silent regarding proceedings that apply foreign law, including any rights of avoidance such law may offer. And of course that ultimately ended up being the holding in the case. Unfortunately it took so much time to have this decision go through the appellate process, that by the time it got ruled on and they were able to proceed, the \$313 million in assets had dissipated.

MR. RISENER: Thank you so much. It's always interesting to hear from someone who is related to these seminal cases.

Second, in particular §1521(a)(7) provides a long list of prohibited avenues of relief, including a foreign representative can't pursue avoidance actions under U.S. law. It does not, however, include a restriction on applying the avoidance action law of the foreign proceeding. So the court applied the canon of *expressio unius est exclusio alterius*, stating that where there are enumerated exceptions, additional exceptions are not to be implied in the absence of a contrary legislative intent. Combining that consideration of comity with statutory interpretation, the court applied Nevis law. So this is probably the biggest victory in favor of the law of the forum.

Now we're going to move to the center of gravity test, which is a little more popular in the courts. It's one of those nuanced legal balancing acts that everyone loves. Basically the court has to discern the center of gravity of the transaction the trustee or the foreign representative is seeking to avoid. Once that center of

gravity is determined, the court applies the law of that forum. Because it's less clear-cut, this test gets a few extra slides.

The center of gravity test has gotten a lot more attraction in bankruptcy courts. Multiple cases have used it to determine choice of law issues. There is a long list of cases, but the one we are going to discuss in the interest of time is *Maxwell Communication Corp. PLC*. It is an important case for chapter 15 choice of law generally, and it considers many of the issues that we are going to discuss.

The *Maxwell* case began when Maxwell Communication Corp. initiated an insolvency proceeding, and in the ninety days before Maxwell filed in the U.S., it repaid the principal on loans from three different London banks. Under U.S. law, the foreign representative would have easily been able to recover a substantial amount of money, but under UK law, that victory was not as clear. The court stated, among other things, that the traditional federal choice of law rule is to apply the law of the jurisdiction having the greatest interest in the controversy. The court went on to explain that a fact-intensive approach is required. You have to evaluate the relevant context and make a determination based on all of the evidence.

Actually, Professor Westbrook, the law of the forum proponent, was an expert witness in this case. He came in and testified that they should apply UK law. Actually, the bankruptcy court found that under either test, even what they called Professor Westbrook's more radical one, UK law would apply. The district court reached a similar conclusion and the circuit court affirmed. However, the circuit court placed much more of an emphasis on the question of connection to and interest in the proceeding. After seeing *Maxwell* label the law of the forum test as radical, it seems as though the center of gravity test is on the rise. It shows in the number of cases that choose to apply it. However, ironically, which test will be used depends on the law of the forum in which you choose to file.

I'm going to move on to some questions for our panelists, and I hope that it will be an edifying discussion. Let's start with the foreign representative, because this is a really central player in chapter 15. We've just heard a little about chapter 15, and I would like to know more about the main role of the foreign representative in avoidance actions.

I know that Ms. Hartley has said that she has worked with foreign representatives before. Do you have thoughts on that?

MS. HARTLEY: Sure. In general, you've got foreign representatives who are able to come to the U.S. and utilize U.S. discovery procedures which are very helpful, and are able to obtain information that they may not be able to obtain in their, what I will refer to as their home country. It depends, I guess, on what the foreign representative is doing. If it's representing the debtors who are trying to reorganize in their country, then certainly it has a different goal, and it may be coming here to protect assets that are located here in the U.S. to stop, to stay, have the automatic stay come into effect because there's pending litigation here that's disrupting their reorganization process, as well as they may want to bring actions here as well.

I'll mention another case that David was also involved in, which is *Mt. Gox*. That might ring a bell with some people. This was the bitcoin Japanese exchange. Interestingly enough, the backup servers were in Dallas, so they were able to establish jurisdiction here, and they commenced a chapter 15 ancillary proceeding. A large percentage of the depositors were U.S. citizens and located here. The debtors wanted to set up a claims process that would be fair for them here in the U.S. Unfortunately, the principal got indicted, and so in the Japanese proceeding it quickly turned from a reorganization process to a liquidation, and a trustee was appointed.

Once the trustee was appointed, they had no interest in being here in the U.S., and actually dismissed the chapter 15 proceeding. Under Japanese law, which I'm not familiar with or profess to know, but apparently you have to show up, actually show up and be present to assert your claim. And so of course now it was going to be very difficult for those in the U.S. to do that, which might have been beneficial to those in Japan. So that just gives you a practical sense of maybe what happens in some cases.

But you also have foreign representatives that act as chapter 7 trustees or liquidators and are coming here also to protect assets that are here, and also to pursue perhaps potential targets.

MR. RISENER: I'll give this up to any panelist. If you wanted to use U.S. avoidance law, what are the best ways to do that? And what are the financial considerations? I know you talked about the financial considerations of having to go to Japan and litigate there, but say you wanted to apply U.S. avoidance law. I know that part of that is actually having to file a U.S. bankruptcy case, a full chapter 11.

MS. HARTLEY: Right. Once a foreign representative files a chapter 15 ancillary proceeding and is designated as the proper foreign representative,

under chapter 15 that foreign representative could then commence a proceeding here under chapter 11 or chapter 7. So that would be the best way, able to fully utilize everything the Bankruptcy Code has to offer and proceed with a lot of the avoidance actions. In a chapter 11, as many of you know, it gets very expensive. And so certainly the debtor would have to have the financial wherewithal to sustain that process.

MR. RISENER: So somewhat relatedly, how do non-bankruptcy fraudulent conveyance laws factor into decisions about where to file? Or do they at all, do these provisions come into play?

MS. HARTLEY: I think it goes back to I guess the law of the forum or what the court is perhaps going to apply. Certainly in the *Condor* case they were able to use the Nevis laws for avoidance actions. Certainly again, if you know your jurisdiction or whether they look at the center of gravity test or the law of the forum test, might help you in where you decide to file if you want to utilize certain countries' laws and whether you'd be able to do so.

MR. RISENER: So let's turn to a discussion of the debtors in these chapter 15 cases. Ms. Bordi, can you tell us a little bit about representing debtors or what the debtors' interests are in these cases, and if they are aligned with any other parties in particular, and maybe some obstacles that they face?

MS. BORDI: Sure. I think one of the biggest things is as we were just talking about, where do you file and how do you make the decision about where you're going to file your main proceeding or your U.S. proceeding. When you're advising a company, that's really the biggest thing that you're going to spend the prepetition period talking about.

At Kirkland we do a lot of these big international cases. We're very lucky to have lawyers all over the world, but we spend a hundred hours with the client talking about do we need to do a U.S. chapter 11 because there is an avoidance action that we want to be able to pursue or not just an avoidance action, we want to be able to reject contracts or we want to be able to really have the automatic stay, whatever the benefit of the chapter 11 proceeding is that you want, versus are there assets in another country that we don't actually think are going to be protected unless we file a proceeding in that country. Now, do we have two? Do we have three? Do we have four? And I think as we start to get more and more multinational corporations, we are going to see more and more of these proceedings that are maybe being pursued on a parallel or even three tracks at the same time.

I was advising a secured lender, I know we have a debtor question, but I was advising a secured lender and they were a French company with a very big U.S. presence. And so typically what we would do in that situation, we would just file in the U.S. and maybe leave the foreign entity out of the filing. In this case, we needed the foreign parent, or they needed the foreign parent to be in the process because there was a lot of debt at that foreign parent level. So what they ended up doing was filing a French proceeding which was recognized in chapter 15 in the United States of the parent, and then a U.S. chapter 11 proceeding for all of the subsidiaries. So the 11 and the 15 were proceeding at the same time, and then there was a French proceeding that was going on itself.

So you have to think about those. And this is not specifically about avoidance actions, but it can be because one of the things that you might think about is I've really got a lot of litigation that I want to be able to bring, and so I want to bring it in the U.S., but maybe I'm not allowed to file this entity in the U.S. based on the other country's law, so you might have to combine things together.

MS. LEVINE: Can I make a pitch for thinking about foreign jurisdictions in this context? I think that as U.S. insolvency lawyers, we often think the automatic stay is worldwide, which I understand it is, but courts in other countries sometimes resent being told what to do by the U.S. Congress. So I think it's important to remember that you do sometimes need these foreign proceedings, either a recognition proceeding or a plenary proceeding for very simple things like enforcing the automatic stay and making sure that people don't go after the debtor's bank accounts, or even things like their stock.

I had a proceeding where we did a recognition proceeding in Canada, and we had a chapter 11 in the U.S. There was a shareholder that was trying to call a shareholders meeting and change the Board and stop the chapter 11 proceeding. And because we had a proceeding in Canada, we were able to go to the court and get the stay enforced. If we hadn't had that, I'm not confident that we would've been able to stop the corporate process in Canada. And so I think this is my plug to remember that foreign countries really do matter.

MR. RISENER: Thank you so much. It's always good to have a broader perspective, especially as we've said, as multinational companies grow and continue to seek this sort of relief.

Turning to the creditors. I know we started talking about secured creditors and noteholders. Scott, what are the major issues that creditors face in these types of actions?

MR. COUSINS: I wasn't prepared to answer that question. From our perspective and my role playing as noteholders is debtors are always trying to screw the noteholders, and not specifically Kirkland, but there's a lot of gamesmanship around this type of international drama. I'll give you a couple of examples.

You would think that there would be comity between England and America. I did not have a foreign proceeding. I represented a debtor in the U.S., so I'd have to go to the bankruptcy court to get an international TRO. Query whether that's even enforceable.

MS. LEVINE: But funny how foreign countries feel about being told what to do.

MR. COUSINS: Yeah, just a non-life-tenure bankruptcy judge. Sorry, Judge Diehl. That you are now enjoined and you can face sanctions, and it really presents, particularly if the company can't support all these proceedings all across the world, how to kind of rope in all these jurisdictions and telling judges in other countries that they have to respect U.S. law.

Where representing noteholders, where I think the hanky panky, to use the Latin, is I kind of veer towards the center of gravity test in the sense that coupled with maybe a modification of the creditor expectation test.

As some of you know, with ordinary course transactions, there's a horizontal and there's a vertical test. The vertical test is has the company done this in the past. The horizontal test is the creditor expectation test. So the way I view this is, and I'll give you an example, we had a debt, about \$650 million in debt issued from a Nova Scotia company. The interesting thing about the tax structure is, in order to get IRS not to recognize the income from Canadian bonds, it has to be an unlimited liability up in Canada.

So one of the interesting things in the *AbitibiBowater* case where I represented the bondholders, is fine, let the U.S. proceeding go. There's a Canadian cross-border protocol. The bankruptcy judge in Delaware in this instance basically signed a self-affirming order. I get to determine claims, nothing impinges upon my jurisdiction. Where it gets weird and particularly in this case is we had Canadian bonds issued by an unlimited liability Nova Scotian entity. So my bondholders, and by the way these are the folks that you would think. They're not retail mom and pops. They're the guys who buy on a secondary market from the mom and pops because there's a play, there's a vig associated with buying at a discount and then demanding par.

So getting beyond the altruism of buying on the secondary market, these guys were looking at the bonds like, okay, they're unlimited, they're under Canadian law, they're Nova Scotia. The guarantee is unlimited because in order for Bowater to get the IRS not to recognize income associated, it was a business acquisition, income as a result of Canadian operations, that had to be an unlimited liability in Canada. So what we said is, great, query whether this was a mistake, we don't care about the U.S. proceeding. We're just going to proceed in Canada and go after our bond. And it was actually two claims. It was the Wilmington Trust indentured trustee claim plus the U.S. guarantee claim. But where it gets weird is, even though that entity didn't file in the U.S., it wasn't a U.S. debtor, it was a Canadian debtor, is Judge Shannon in Delaware gets offended when you do stuff outside of the U.S.

MS. LEVINE: Funny how that works.

MR. COUSINS: And, Judge, you know exactly what I'm talking about. So we thought we had a hook because it wasn't a U.S. debtor, let's go to Canada. But then we had to file a claim. We had to come into the U.S. and file a claim against the guarantee. This is where, from my client's perspective, they're getting screwed by the debtors because they're using different jurisdictions to force you to come into the U.S. as opposed to staying in Canada. But that of course was a conscious decision. We knew that the leverage that we'd create by doing it in Canada would cause leverage on the guarantee. So a skeptical in litigation view is the U.S. debtors are looking for a reason to screw us, but it's also from people that buy on the secondary market, it's leverage.

MS. LEVINE: That ULC play has actually been used a couple of different times. For people who aren't familiar with this, a ULC is an unusual form of corporation that exists in certain jurisdictions in Canada. The bottom line of it is that the parent company is on the hook for all of the debts of the company. So any time that the ULC has claims it can't pay it can look to its parent and say you got to pay me so I can pay my creditors.

MR. COUSINS: The winding down claim. You've got to pay—

MS. LEVINE: Yes, the wind up claim. So it's a unique form of company. It was used a lot for tax purposes. I'm not a tax lawyer, but my understanding is that a lot of those benefits no longer exist. But it's been used a couple of times and used in restructuring proceedings, in the *Abitibi* proceedings. In the *General Motors* proceedings there was a similar claim made. Again, kind of trying to game the jurisdiction both times to mixed results.

MR. COUSINS: And the interesting thing is, on the M&A side, representing U.S. entities that want to do deals overseas, Canada, Spain, where-have-you, because of these international compacts and between states, you have to set up the foreign entities in a way that you wouldn't set them up in the U.S. In this instance, my altruistic clients who bought the Canadian bonds look at the ULC play and go, well, we don't care what happens in the stinking U.S. bankruptcy. It's far more complex, and I think after that case U.S. debtor representatives would often then remember to file, make the U.S. debtor also a Canadian debtor to avoid this kind of—

MS. LEVINE: Game playing on the—

MR. COUSINS: No, not game playing. Perfectly appropriate high level litigation strategy.

MS. LEVINE: You know what? I will say, given the side I was on in the *General Motors* case, it was perfectly appropriate.

MS. BORDI: Actually what we were just talking about reminded me of something I think is going to be a more prevalent thing coming up in cross-border proceedings, which is where is the COMI. Where is the choice of law, where is the center of gravity going to be? I think that as companies get more sophisticated, we may start to see a little bit of forum shopping, kind of the same way that Delaware became a huge haven for corporate bankruptcies. Query whether countries are going to try to become restructuring havens. The Marshall Islands maybe, the Cayman Islands. These are places that are starting to pitch to international companies, come here and you can do whatever you want to do to restructure. And there may be situations where the debtor relocates their center of main interest, relocates their COMI, in order to file a bankruptcy case in that jurisdiction. And you may have maybe a battle between the creditor who is now subject to laws that they did not expect to be subject to.

Maybe those are avoidance actions. Maybe a country says, we're going to put in the most aggressive avoidance actions you could possibly imagine where you can go out and get money from creditors, five, six, seven tiers down the line if you come and file here. And debtors say, well, that's great. I can go, I can get this protection of the code or whatever they put in place, and I can go and get a bunch of money into my estate. And the creditor goes, wait, wait, wait. When I lent you money, I lent into an American entity. I lent into a Greek entity, whatever it is, and now all of a sudden you're a Cayman Islands entity. I'm picking on Cayman Islands. And then you start to have these fights about, well, does COMI mean the COMI on the day that you filed for bankruptcy? Or is it a

more historical lookback over five, ten years, the creditor expectations test, stuff like that.

We were involved as creditors in a bankruptcy proceeding where that was potentially an issue, and we ended up settling with the debtor but that could have been a huge fight because they relocated exactly to the Cayman Islands which is why I'm using that example. I think it was something like six months before they filed, they started moving stuff. They had an office in the Cayman Islands, but it was just a rental that was shared by five or six other companies, so basically a P.O. box. The principal of the company had a cell phone in the Cayman Islands and he would rent a vacation home there, and they said that was their COMI. And we were about to fight with them and make that a big argument and say, no, that's not your COMI because Cayman Islands is much, much more friendly to cramming down on minority positions than the U.S. is.

MR. COUSINS: If I can, because of the tax play in international M&A, a prior company that I was with, we deliberately set up an entity in the Netherlands, and our office was a law firm's office who helped us set it up. But to kind of meet that threshold, this is a well-capitalized company so it's not an insolvent company, but one of us officers, once a year we had to fly—it wasn't actually bad other than you fly into the airport and you fly out, but that's a tough flight because the Netherlands' law required us to have a physical presence, and it just happened to be at the law firm. It wasn't a cell phone, it wasn't a P.O. box. And what you'll see, and I know you've seen this, too, is that when you peel back the layer of the onions and you're playing in this secondary market and you go, okay, now I own a position, I have a blocking position in this debt, this foreign debt. Let's look at—not that they don't do their due diligence and then after they buy start looking at the corporate structure, but no board meetings, no officers and directors, no physical presence, and you start to see this veil-piercing type—you guys are familiar with the veil piercing and instrumentality and fraud in the inducement type thing.

Putting aside the fact that if you buy after the supposed fraud occurred, whether that's fraud in the inducement, but you start to see these veil-piercing factors like whose interests are you working for? What are you doing to wind down the Canadian company to satisfy all the liabilities, to satisfy the ULA, and you start getting into these, what appear to be shams, and that's where the litigation and the leverage—and this stuff gets litigated all the time simply because people aren't following the formalities, or they move the assets within six months to the Cayman Islands. Well, what fraudulent transfer law applies? But let's go to the U.S. to make sure that we preserve that claim. And there's a

lot of the formalities are not filed. The company always says, oh, it's to preserve the tax benefits. But the more skeptical creditor might think otherwise.

MS. HARTLEY: Just to add on, foreign companies or foreign representatives are doing sort of a similar thing in reverse. You need assets here in the U.S. to establish the chapter 15 reps, and a bank account would be sufficient. But even if you don't have that, just sending a retainer and hiring a law firm here in the U.S. meets that requirement a lot of courts have held. So they're able to establish chapter 15 jurisdiction here by simply retaining counsel.

MR. COUSINS: That works both ways.

MS. HARTLEY: It does?

MR. COUSINS: Yes.

MS. LEVINE: Even chapter 11 jurisdiction, right?

MR. COUSINS: Yes. In chapter 11 I'll get calls saying, hey, can you open up a Wilmington Trust bank account for this company that has nothing other than a bank account? And it gets into a whole series of other issues as to—the Russian Gazprom tried that in Houston, and I believe the Houston judge bumped it out because it was a retainer, the law firm Vinson & Elkins retainer or something like that, and they said, ah, we're in the U.S., and the judge didn't buy that.

MS. LEVINE: I think that one of the important things to think about is, even if you're able to file your proceedings and get a judgment in one of these other jurisdictions that has the crazy laws that you're talking about, when you actually try to go enforce that judgment, you're going to have to deal with the laws of the jurisdiction where the assets are located. I think if you came to Canada and you tried to enforce a judgment on the basis of a law that was just bonkers, to use a legal term, I think you'd have a really hard time get that order enforced. Even if you have a recognition proceeding going, there are provisions that say the court doesn't have to recognize anything that's against public policy, and there's actually even decisions that say, if the order is going to be—I underlined the words; “Whether there is any material adverse interest to any Canadian interest.”

So if the Court thinks that what you're doing is really, particularly unfair to Canadians, you just may not get your judgment recognized.

MR. COUSINS: And it presents personal jurisdiction issues, discovery issues. Our default is always go back to mother. Mother may I, being the bankruptcy court in Delaware, and try to enforce this. But then, how the heck are you going

to get jurisdiction over somebody in Belgium? I got this order. Well, in Belgium you're not going to get approved. You're not going to get a Belgian court to enforce that.

And particularly in the fraud cases, Mark and—we were talking at dinner about fraud in the *L&H* case where people just disappear. Well, you can probably find them, but how do you get them arrested? You can't get worldwide injunctions. There's all kinds of limitations on the remedy. Congratulations, you got this great judgment, but now how do you enforce it?

MR. RISENER: We've talked a lot about some interesting facets of Canadian insolvency law. Ms. Levine, if you wouldn't mind just talking a little bit more about that, and just because it's so close, it's right there, can you talk a little bit more about the Canadian insolvency protocol and how it interacts with U.S. law?

MS. LEVINE: Sure. Here's my two-minute primer on Canadian insolvency law.

There are two main statutes that we use for restructurings in Canada. The first is called the Companies' Creditors Arrangement Act. That's what you use if you have a big company generally if you need to restructure. You need to have at least \$5 million in liabilities. The other statute is called the Bankruptcy and Insolvency Act. The Bankruptcy and Insolvency Act is also available for restructurings. Often we see it really just in a straight liquidation context. So if you're filing the equivalent of a chapter 7, you'd do it under the BIA.

There are chapter 15 provisions in both the BIA and the CCAA. I know of only two recognition proceedings that ever occurred under the BIA. There are probably more, but only two that I sort of know about off the top of my head. More often we see them under the CCAA.

The recognition provisions in the CCAA are called Part IV. They're very, very similar to chapter 15, but we don't have all that many of them these days. We did have quite a lot of them right after the provisions were added to the Act. I want to say it's 2009, but I should have checked that one before I started talking.

We did see a number of them right after that. We've seen fewer in the past couple of years. I think just because we're struggling with some of these issues about how do you make decisions that are going to affect large groups of people, decisions that may have really significant impacts on Canadian stakeholders, and whether or not it really is appropriate to have those decisions being made in a foreign jurisdiction.

So the quote that I read you before about whether there's a material adverse interest to a Canadian stakeholder, I think that's really been the guiding light for the court on a number of the recent cases. And so when you have big issues that involve things like labor unions or employees or even landlords who are often big creditor constituents, the question becomes, is it really fair to make those significant stakeholders subject to the rules in a foreign jurisdiction? Is it really fair to make people who thought that they were bargaining under one set of rules go to a court in a foreign country to seek the relief that they are entitled to?

We do still see these recognition proceedings, though I was actually just saying to Judge Diehl before, I actually think we may see more of the sort of dual plenary proceedings. That's what happened in *Toys 'R Us*. That's what happened in *Payless*. I think we may see more of those.

MS. BORDI: Then the courts typically set up a protocol where they'll communicate with each other and they'll kind of say, we will either sua sponte or according to some rule have a weekly check-in or a monthly check-in or send each other letters or something like that, and they just talk to each other.

MS. LEVINE: Or as needed. Perhaps the counsel are able to coordinate and there's never a need for a joint hearing. But it's usually something approved at the first day in both hearings, and sort of sets up a protocol from the beginning about how are we going to deal with issues where there's a conflict of law. And I was totally looking at your—

MS. HARTLEY: This was interesting. I had a case in Texas, so I get the notices from the court. And so this just came out January 31, 2019 from the United States Bankruptcy Court for the Southern District of Texas. It was an order, and it says, by unanimous vote, the court adopts as may be amended from time to time, the guidelines for communication and cooperation between courts in cross-border insolvency matters. And then it defines the guidelines, and then issued some guidelines.

MS. BORDI: I have to read those.

MS. LEVINE: I'm curious because there are new guidelines that were just adopted. I think these are the new ones. There are new guidelines that were just adopted by what's called the Judicial Insolvency Network. I know New York and Delaware have both adopted those guidelines and directed them to be attached to cross-border protocols.

The same thing is true in Ontario, not actually officially by a practice direction or anything, but there was a notice sent out to the insolvency community saying the court is expecting to see these new guidelines used.

MS. BORDI: And these can be really impactful on the process of a case. You might say, oh, this is just an informal communication between two courts, but they can really change the direction that a case is going or how the debtor or the creditors think they're going to be able to try to pull a fast one on one judge or the other. And when you have these communication protocols in place, the courts will talk to each other and they will ensure that it's not Mom and Dad being played against each other for the pony. And I've actually seen that happen where the court has either written a letter or called up and said, this creditor is trying to do something in my court. Is that in conflict with what you're doing there? Or are they coming to you and telling you about this as well? It can really be detrimental to the creditor that tries to play favorites with one court or the other.

MS. LEVINE: I also think cross-border protocols, not necessarily the JIN guidelines, but the order that would govern the JIN guidelines and the protocol that is usually developed in the case, can be really helpful at just establishing the ground rules. So on things like claims process, if you get in your protocol that we're going to work together and we're going to establish a joint claims process, it makes clear that one court is not going to get out ahead of the other one and start running a claims process where the other court then is left trying to catch up, and the creditors in that second jurisdiction are somehow prejudiced because they're not part of the claims process.

MR. COUSINS: In the U.S. that's a claims process.

MS. LEVINE: I was going to say I can translate for you if you need.

MR. RISENER: So as we get closer to the end of our time, I just wanted to ask, I know we discussed a little bit about how certain jurisdictions are changing their laws or changing their rules to incentivize companies to move their center of main interests, but is there other than just full-on venue reform, is there a way to incentivize chapter 15 filings in different jurisdictions than the main two? Or are we just stuck?

MS. BORDI: The main two being?

MR. RISENER: Delaware and New York. And then of course a little bit of the Fifth Circuit and Texas and Mississippi and Florida. What does the future of chapter 15 look like? Just a few thoughts on that would be interesting I think.

MS. BORDI: I think the reason that you see those cases filing in Delaware and New York is the experience of the judges on those matters because they've just seen more of them. And there are efforts by judges around the country to try to drive not chapter 15 but chapter 11's to those districts.

I don't know how many of you are familiar, but Texas has instituted basically these complex bankruptcy rules and they've elected two of the judges to serve as—basically if you file a big complex chapter 11 case you're going to get one of two bankruptcy judges in Texas who have a business background, they have a complex bankruptcy background, and so you kind of are guaranteed to have somebody who understands the needs of a complex chapter 11 large debtor case.

So that's an avenue. You could have courts around the country say we want more chapter 15 work and so we're going to establish one or two judges in this district who are going to be really knowledgeable about chapter 15 issues who are going to be ready to take chapter 15 cases. But I think the reason you probably don't see more of those is that these companies that are seeking to have chapter 15 recognized in the U.S. don't have a huge U.S. presence, so there's not really a reason where in the chapter 11 venue shopping issue, you have an issue where you have a Michigan company that's filing in New York, and the Michigan creditors are saying, well, why are we having to go to New York? If you're having a chapter 15, you already have the presumption of not having a U.S. presence. And so I don't know that there's as much of a need to have a development outside of New York where the financial markets are, so a lot of the creditors—if there's going to be international lending creditors are going to be there, and Delaware where you have the corporate center.

MS. LEVINE: I absolutely think there is a future for recognition proceedings. I think there is definitely going to be a need for them. I think that that need, to the point that you were just making, is perhaps more limited. That in an effort to save money and an effort to be efficient, maybe we had thought before we could use them for more, but I think that people are deciding there is sort of a specific use for recognition proceedings, and it's going to be where the center of main interest really is clear one way or the other.

MR. COUSINS: On venue, folks from Delaware don't talk about it much because we're often criticized about it. When advising debtors, this is kind of a market approach. I have filed debtors in Columbus, Middle District, and in Houston under the complex, and the judges have been fantastic. I think there is a business bias, and almost a reflexive, especially in chapter 15's, you've got to file in New York. And it's often hard to get boards or managers to get off that

bias because they've heard of those reputations. My personal experience is I've been in a lot of jurisdictions outside of Delaware, and the judges have always been very good.

MS. HARTLEY: I've seen several filings in Miami for chapter 15. They're not the restructuring type, but more the foreign representative is in a liquidation capacity, sort of chapter 7 Trustee, and is really filing here to get more discovery or to try and attack U.S. companies or U.S. citizens that are living here that they feel received fraudulent transfers. So there's two currently pending. From Brazil, I don't know if it's proximity, why they're selecting Miami but we're seeing a number of Brazilian chapter 15's.

MR. COUSINS: For boating. They do it so they can boat in Biscayne Bay.

MS. LEVINE: I did have one chapter 15 that we actually filed in Alaska because it was a Yukon company and we had some assets that were in Alaska, so the chapter 15 got filed in Alaska. The judge actually said at the beginning of the first day hearing that he had really hoped to retire before having to figure out chapter 15. So he was really annoyed with us for ruining that plan.

MR. RISENER: On that note, I am so thankful for our panelists today, and giving us insight on a complex and rare but growing area of the law. Thank you so much, and thank you, everyone, for being here at this Symposium. Thank you so much for coming. Thank you to Judge Diehl for an inspiring address. And thank you to our Consumer Panelists as well.

Thank you to everyone for coming. Let's give our panelists a round of applause.

MR. GENSBURG: With the conclusion of this absolutely fantastic panel, I'd like to invite each of you, and I hope you will join us, for a lunch out in the Atrium.

Before, however, we sprint out the door I do want to take one moment to thank Jake Risener, our Executive Symposium Editor, Maria Valderrama, our Symposium Editor, and Rhonda Heermans. Without these editors and the culmination of the planning and the months of work that they have put into this Symposium, we wouldn't be here today listening to the incredible things that we've heard. Without the tireless work of these editors it would have been impossible and so I want to take a moment to thank them. Thank you.