

1 F O R P U B L I C A T I O N

2 [Published at 349 B.R. 627]

3
4 UNITED STATES BANKRUPTCY COURT
5 EASTERN DISTRICT OF CALIFORNIA

6
7 In re:) Case No. 06-22652-C-15
8 TRI-CONTINENTAL EXCHANGE LTD.,)
9 an International Business)
10 Company formed under laws of St.)
11 Vincent and the Grenadines)
12)
13 COMBINED SERVICES LTD., an) Case No. 06-22655-C-15
14 International Business Company)
15 formed under laws of St. Vincent)
16 and the Grenadines)
17)
18 ALTERNATIVE MARKET EXCHANGE) Case No. 06-22657-C-15
19 LTD., an International Business)
20 Company formed under laws of St.)
21 Vincent and the Grenadines)
22 Debtors in a Foreign Proceeding.)
23)
24 PETITION OF MALCOLM BUTTERFIELD,)
25 BRIAN GLASGOW AND SIMON WHICKER)
26 AS FOREIGN REPRESENTATIVES OF)
27 THE ST. VINCENT AND THE)
28 GRENADINES FOREIGN PROCEEDING)
RESPECTING THE ST. VINCENT AND)
THE GRENADINES INTERNATIONAL)
BUSINESS COMPANIES KNOWN AS)
TRI-CONTINENTAL EXCHANGE LTD.,)
COMBINED SERVICES LTD., and)
ALTERNATIVE MARKET EXCHANGE LTD.)
_____)

29 MEMORANDUM DECISION REGARDING
30 RECOGNITION OF FOREIGN MAIN PROCEEDING

31 Forrest B. Lammiman, Lord Bissell & Brook LLP, Chicago, Illinois,
32 and Joshua D. Wayser, Lord Bissell & Brook LLP, Los Angeles,
33 California, for foreign representatives.
34
35 Thomas R. Phinney, Parkinson Phinney, Sacramento, California, for
36 Bennett Truck Transport, LLC.

1 KLEIN, Bankruptcy Judge:

2 This memorandum decision supplements and revises this
3 court's rulings that were made orally on the record at the time
4 of hearing.

5 A creditor contends these joint liquidations under the laws
6 of St. Vincent and the Grenadines ("SVG") should be recognized as
7 foreign "nonmain," as opposed to "main," proceedings under 11
8 U.S.C. §§ 1502(4)-(5). The answer turns on the situs of the
9 chapter 15 debtors' "center of main interests," which term is not
10 defined and requires a fact-based inquiry in which the default
11 position focuses on the registered office.

12 Here, the chapter 15 debtors conducted regular business
13 operations at their registered offices in Kingstown, St. Vincent,
14 in a manner that equates with a "principal place of business"
15 under concepts of United States law. This suffices to qualify
16 SVG as the "center of main interests" even though the enterprise
17 perpetrated an insurance scam primarily in the United States and
18 Canada. Hence, the three winding-up proceedings in SVG will be
19 recognized in the United States as "foreign main proceedings."

20 The second issue presented is whether, in the name of
21 "protecting" United States creditors, to impose restrictions
22 beyond those prescribed in chapter 15 on the ability of the
23 foreign representatives, and of the foreign court, to administer
24 or realize the debtor's assets within the territorial
25 jurisdiction of the United States. The answer is in the negative
26 because all creditors in this instance will be better served by,
27 as contemplated by 11 U.S.C. § 1521(a)(5), entrusting
28 administration and realization of assets to the foreign

1 representatives without imposing a superfluous, and potentially
2 inconsistent, tranche of judicial supervision.

3
4 Facts

5 The debtors, Tri-Continental Exchange Ltd. ("TCE"), Combined
6 Services Ltd. ("CSL"), and Alternative Exchange Ltd. ("AME"), are
7 insurance companies organized as international business companies
8 under the laws of the nation of St. Vincent and the Grenadines
9 ("SVG") and are the subject of winding-up proceedings in the
10 Eastern Caribbean Supreme Court, High Court of Justice, under the
11 SVG Companies Act, No. 8 of 1994 and related statutes, that were
12 filed by the International Financial Services Authority ("IFSA")
13 of SVG as claim nos. 541-543 of 2004. The Eastern Caribbean
14 Supreme Court appointed Malcolm Butterfield, Brian Glasgow, and
15 Simon Whicker as joint provisional liquidators on December 14,
16 2004, and as joint liquidators on June 14, 2005.

17 The debtors' only offices were located at Marcole Plaza,
18 Halifax Street, Kingstown, St. Vincent, where there were
19 approximately twenty employees. There presently are no employees
20 and no business being conducted.

21 Between 1995 and 2004, the debtors sold approximately 5,800
22 insurance policies in the United States and Canada, with
23 estimated gross premiums of about \$45,000,000. The liquidators
24 speculate (the books and records are not yet in their hands) that
25 liabilities on the policies could be 130-140% of premiums.

26 The debtors, who lacked required insurance licenses and who
27 falsely represented that their coverage was backed by licensed
28 and rated insurers, advertised greatly reduced rates to

1 industries that are difficult to insure, such as taxi drivers,
2 truckers, roofers, bars, restaurants, and clubs.

3 The debtors' lead underwriter, Lloyd Thomson, worked in the
4 debtors' registered offices in Kingstown, SVG. He typically
5 received completed applications via facsimile transmission from
6 customers or "consultants." He would prepare and fax a quote for
7 the insurance from the offices in SVG. If the client accepted,
8 he would send confirmation of the security and policy number, and
9 other information, from those offices.

10 Checks for premium payments were mailed to drop boxes in the
11 United States, then forwarded in bundles to the debtors' office
12 in SVG, where they were endorsed for deposit and then sent back
13 to the United States and deposited into accounts maintained by
14 the debtors, from which wire transfers were made to accounts in
15 Jersey (Channel Islands), Ireland, Gibraltar, and elsewhere.

16 Although some small claims were paid, most claims went
17 unpaid, often on theories of large deductibles and restrictive
18 conditions barring coverage.

19 The impresario of this insurance scam was an individual who
20 assumed the identity "Robert Lewis Brown" (and obtained a United
21 States passport) in 1994 but who was really Matthew Wallace
22 Schachter, a United States citizen who relocated from New
23 Hampshire to Nevada in 1984 when New Hampshire authorities issued
24 a warrant for his arrest on check-kiting charges. He worked in
25 the barter industry and eventually was indicted in Nevada for
26 federal tax evasion, which indictment was dismissed in 1996
27 because he had not been found. As "Brown," he had relocated to
28 SVG by late 1994 and was establishing TCE, CSL, and AME.

1 The debtors' activities attracted the attention of various
2 insurance regulators in the United States and Canada, resulting
3 in cease and desist orders in at least nine jurisdictions against
4 one or more of the debtors and "Brown." In 2001, "Brown" was
5 twice convicted in absentia in Canada for violating cease and
6 desist orders. In 2003, a Canadian arrest warrant was issued for
7 "Brown's" arrest for insurance fraud relating to TCE.

8 In March 2004, as a result of pressure from SVG's IFSA to
9 require the debtors to comply with SVG's International Insurance
10 Act of 1998, the IFSA issued a statutory insurance manager's
11 license to TCE to act as insurance manager for CSL and a Class II
12 insurance license to CSL, which provided the IFSA with a \$100,000
13 deposit for the benefit of policyholders. Another condition of
14 the licenses was that "Brown" relinquish control of the debtors,
15 with which he complied only in form (and complied with an order
16 to leave SVG for immigration violations, relocating to Barbados).

17 On August 9, 2004, a criminal complaint alleging mail fraud,
18 money laundering, and related crimes was filed against "Brown" in
19 the United States District Court for the Eastern District of
20 California. The record indicates that the federal investigation
21 was assisted by the California Commissioner of Insurance.

22 "Brown" was arrested in Canada on September 3, 2004, six
23 days before the debtors' offices in Kingstown were searched by
24 SVG law enforcement agents, accompanied by United States
25 counterparts, pursuant to a request under the Mutual Legal
26 Assistance Treaty between the United States and SVG. Most of the
27 debtors' books and records were seized, inventoried as evidence,
28 and turned over to United States law enforcement authorities.

1 The United States seized a total of \$1,603,653.95 from two
2 bank accounts and a law firm during September 2004 and filed an
3 in rem civil forfeiture action in 2005. United States v. Approx.
4 \$1,200,000.00 in U.S. Currency Seized from First Cal. Bank Acct.
5 No. 2005638, et al., No. Civ. 05-149-DFL-KJM.

6 “Brown” died while in pretrial custody. His spouse has
7 since entered into a cooperation agreement with the United States
8 Department of Justice (“USDOJ”) undertaking to assist USDOJ and
9 the joint liquidators in the recovery and transfer of “Brown’s”
10 estate to the joint liquidators, whose SVG winding-up proceeding
11 has been, in effect, stayed in deference to the coordinated
12 international criminal law enforcement effort.

13 The joint liquidators believe that they have identified up
14 to \$7,000,000 in assets that could be collected from various
15 international locations and distributed to creditors. In
16 addition to \$75,000 in SVG, they have identified cash assets of
17 at least \$3,500,000 at the Allied Irish Bank, which have been
18 frozen by Irish authorities. There is also real property in
19 Ireland, Barbados, and (possibly) Spain. In the United States,
20 \$1,603,653.95 is tied up in the asset forfeiture proceeding, a
21 portion of which funds USDOJ is stipulating to release to the
22 joint liquidators if this court recognizes a foreign proceeding.

23 At the hearing on recognition of the proceeding as a foreign
24 proceeding, creditor Bennett Truck Transport LLC (“Bennett
25 Truck”), which has a judgment against the debtors, contended that
26 the “center of main interests” should be regarded as the United
27 States because most of the creditors are insureds located in the
28 United States. In addition, claiming lien status, Bennett Truck

1 opposed permitting any funds from a United States source to be
2 used to pay such items as professional fees and expenses without
3 approval from this court pursuant to the Bankruptcy Code.

4
5 Jurisdiction

6 Federal subject-matter jurisdiction over a case under
7 chapter 15 of title 11 is founded upon 28 U.S.C. § 1334(a). The
8 recognition of foreign proceedings and other matters under
9 chapter 15 of title 11 are core proceedings that a bankruptcy
10 judge may hear and determine, entering appropriate orders and
11 judgments. 28 U.S.C. § 157(b)(2)(P).

12
13 Discussion

14 Since this is the sole instance in which the Bankruptcy Code
15 can be used to liquidate an insurance company, a brief review of
16 basics is warranted before turning to the issues of "center of
17 main interests" and of whether to impose restrictions on the
18 foreign representatives.

19
20 I

21 Chapter 15 of the Bankruptcy Code was enacted in 2005 as an
22 implementation of the Model Law on Cross-Border Insolvency
23 promulgated by the United Nations Commission on International
24 Trade Law ("UNCITRAL" and "Model Law") in 1997 based on a process
25 in which the United States was an active participant. H.R. Rep.
26 No. 109-31, at 105-07 (2005); Jay Lawrence Westbrook, Chapter 15
27 at Last, 79 AM. BANKR. L.J. 713, 719-20 (2005) ("Westbrook"); see
28 generally SAMUEL L. BUFFORD ET AL., INT'L INSOLVENCY (Fed. Judicial

1 Ctr. 2001) at 55-68 ("FJC INT'L INSOLVENCY").

2 The language of chapter 15 tracks the Model Law, with
3 adaptations designed to mesh with United States law. H.R. Rep.
4 No. 109-31, at 105-07; Westbrook, 79 AM. BANKR. L.J. at 719.
5 Congress prescribed a rule of interpretation that expressly
6 requires United States courts to take into account the statute's
7 international origin and to promote applications of chapter 15
8 that are consistent with versions of the Model Law adopted in
9 other jurisdictions. 11 U.S.C. § 1508; H.R. Rep. No. 109-31, at
10 109-10.¹

11
12 II

13 The SVG winding-up proceeding is a "foreign proceeding," as
14 defined by 11 U.S.C. § 101(23), because it is a collective
15 judicial or administrative proceeding in a foreign country under
16 a law relating to insolvency in which the assets and affairs of
17

18

¹The House Report elaborates:

19 Interpretation of this chapter on a uniform basis will be
20 aided by reference to the Guide [to Enactment of the
21 UNCITRAL Model Law on on Cross-Border Insolvency, U.N. Doc.
22 A/CN.9/442 (1997)] and the Reports cited therein, which
23 explain the reasons for the terms used and often cite their
24 origins as well. Uniform interpretation will also be aided
25 by reference to CLOUT, the UNCITRAL Case Law On Uniform
26 Texts, which is a service of UNCITRAL. CLOUT receives
27 reports from national reporters all over the world
concerning court decisions interpreting treaties, model
laws, and other text promulgated by UNCITRAL. Not only are
these sources persuasive, but they advance the crucial goal
of uniformity of interpretation. To the extent that the
United States courts rely on these sources, their decisions
will more likely be regarded as persuasive elsewhere.

28 H.R. Rep. No. 109-31, at 109-10.

1 the debtors are subject to control or supervision by a foreign
2 court for the purpose of liquidation. SVG's Companies Act is
3 modeled on the English Companies Act of 1948 and provides for
4 insolvency proceedings in which the assets and affairs of debtors
5 control by the Eastern Caribbean Supreme Court.

6 Similarly, the joint liquidators have been authorized by the
7 Eastern Caribbean Supreme Court to administer the liquidation of
8 the debtors' assets and affairs in the SVG proceeding and, thus,
9 are "foreign representatives," within the meaning of 11 U.S.C.
10 § 101(24).

11 The status of a debtor in this case as a foreign insurance
12 company that is ineligible to be a debtor under the Bankruptcy
13 Code by virtue of 11 U.S.C. § 109(b)(3) does not affect the
14 availability of chapter 15 relief. Foreign insurance companies
15 are eligible for chapter 15 relief because § 1501(c)(1) provides
16 that chapter 15 does not apply to "a proceeding concerning an
17 entity, other than a foreign insurance company, identified by
18 exclusion in section 109(b)." 11 U.S.C. § 1501(c)(1).

19 The possibility that an entity that is ineligible to be a
20 debtor under the Bankruptcy Code could be the subject of a
21 chapter 15 proceeding necessitated a special definition of
22 "debtor": "For the purposes of this chapter [15], ... 'debtor'
23 means an entity that is the subject of a foreign proceeding." 11
24 U.S.C. § 1502(1).

1 III

2 As to the objection by creditor Bennett Truck that the case
3 should only be recognized as a "foreign nonmain proceeding," the
4 battle is over whether the foreign representatives will have the
5 benefits of the effects of recognition of a "foreign main
6 proceeding," as detailed at 11 U.S.C. § 1520, including the
7 triggering of the automatic stay and the authorization to operate
8 the debtors' business and exercise trustee rights and powers
9 under 11 U.S.C. §§ 363 and 552.

10 A "foreign main proceeding" is a foreign proceeding that is
11 pending in the country in which the debtor has its "center of
12 main interests." 11 U.S.C. § 1502(4).

13 The term "center of main interests" is taken from the
14 UNCITRAL Model Law and is not further defined. It is a term that
15 has not heretofore been used in United States jurisprudence but
16 is described as a "critically important new concept." FJC INT'L
17 INSOLVENCY at 58.

18 Professor Westbrook has explained that the adoption of the
19 term in chapter 15 was intentionally designed to promote
20 international uniformity:

21 Chapter 15 was drafted to follow the Model Law as
22 closely as possible, with the idea of encouraging other
23 countries to do the same. One example is use of the phrase
24 "center of main interests," which could have been replaced
25 by "principal place of business" as a phrase more familiar
26 to American judges and lawyers. The drafters of Chapter 15
27 believed, however, that such a crucial jurisdictional test
28 should be uniform around the world and hoped that its
adoption by the United States would encourage other
countries to use it as well.

Westbrook, 79 AM. BANKR. L.J. at 719-20.

Although not defined, several other chapter 15 provisions

1 inform the analysis of what constitutes a "center of main
2 interests," as does an examination of the source from which the
3 drafters of the Model Law borrowed the concept.

4 First, the rule of interpretation prescribed ("the court
5 shall consider") by § 1508 requires that the term "center of main
6 interests" be interpreted in a manner consistent with the
7 application of similar statutes adopted by foreign jurisdictions.
8 11 U.S.C. § 1508.² In furtherance of what it described in the
9 previously-quoted passage as "the crucial goal of uniformity of
10 interpretation," Congress also focused the attention of United
11 States courts to various international sources when construing
12 chapter 15, which sources Congress described as "persuasive."
13 House Rep. No. 109-31 at 109-10.

14 One of the sources that a United States court is obliged to
15 treat as persuasive is the Guide to Enactment of the UNCITRAL
16 Model Law Insolvency that was promulgated in connection with the
17 approval of the Model Law. GUIDE TO ENACTMENT OF THE UNCITRAL MODEL
18 LAW ON CROSS-BORDER INSOLVENCY, U.N. Gen. Ass., UNCITRAL 30th Sess.,
19 U.N. Doc. A/CN.9/442 (1997) ("Guide")

20 The Guide explains that the use of the concept "where the
21 debtor has the centre of its main interests" as the determinant
22 that a foreign proceeding is a "main" proceeding was modeled on

23
24 ²The statute provides:

25 In interpreting this chapter, the court shall consider
26 its international origin, and the need to promote an
27 application of this chapter that is consistent with the
28 application of similar statutes adopted by foreign
jurisdictions.

11 U.S.C. § 1508.

1 the use of that concept in the European Union Convention on
2 Insolvency Proceedings ("EU Convention") that was already in the
3 process of being adopted when UNCITRAL drafted the Model Law.³

4 In the European Union, the broadest grant of jurisdiction is
5 to the courts of the Member State where "the centre of a debtor's
6 main interests is situated."⁴ In the regulation adopting the EU
7 Convention, the concept is elaborated upon as "the place where
8 the debtor conducts the administration of his interests on a
9 regular basis and is therefore ascertainable by third parties."
10 Council Reg. (EC) No. 1346/2000, ¶ 13.⁵ This generally equates

11
12 ³The Guide addresses this point twice:

13 31. A foreign proceeding is deemed to be the "main"
14 proceeding if it has been commenced in the State where "the
15 debtor has the centre of its main interests". This
16 corresponds to the formulation in article 3 of the European
17 Union Convention on Insolvency Proceedings, thus building on
18 the emerging harmonization as regards the notion of a "main"
19 proceeding.

20 GUIDE at ¶ 31.

21 72. The expression "centre of ... main interests", used
22 in subparagraph (b) to define a foreign main proceeding, is
23 used also in the [EU] Convention on Insolvency Proceedings.

24 Id., at ¶ 72 (ellipsis in original).

25 ⁴The first sentence of the first paragraph of Article 3 is:

26 The courts of the Member State within the territory of which
27 the centre of a debtor's main interests is situated shall
28 have jurisdiction to open insolvency proceedings.

EU Convention on Insolvency, art. 3, ¶ 1, O.J. L 160/1 (June 30,
2000).

⁵The preambular portion of the regulation explains:

(13) The "centre of main interests" should correspond to the
place where the debtor conducts the administration of his

1 with the concept of a "principal place of business" in United
2 States law.

3 The statutory presumption created by § 1516(3), on close
4 examination, confirms that an entity's "principal place of
5 business" in United States jurisprudence is that entity's "center
6 of main interests" for purposes of § 1502(4):

7 In the absence of evidence to the contrary, the debtor's
8 registered office, or habitual residence in the case of an
9 individual, is presumed to be the center of the debtor's
10 main interests.

11 U.S.C. § 1516(3) (emphasis supplied).

12 In contrast to "evidence to the contrary," both the Model
13 Law and the EU convention use the phrase "in the absence of proof
14 to the contrary."⁶ The Guide, however, explains that the concept
15 is one of a default rule to be applied in the absence of evidence
16 that the debtor's main interests are centered in some place

17 interests on a regular basis and is therefore ascertainable
18 by third parties.

19 Council Reg. (EC) No. 1346/2000 of 29 May 2000 on insolvency
20 proceedings, ¶ 13.

21 ⁶The Model Law provides:

22 In the absence of proof to the contrary, the debtor's
23 registered office, or habitual residence in the case of an
24 individual, is presumed to be the centre of the debtor's
25 main interests.

26 Model Law, art. 16(3) (emphasis supplied).

27 The EU Convention provides, in the second sentence of the
28 first paragraph of article 3:

In the case of a company or legal person, the place of the
registered office shall be presumed to be the centre of its
main interests in the absence of proof to the contrary.

EU Convention, art. 3 (emphasis supplied).

1 different from the registered office. GUIDE ¶ 122.⁷ Similarly,
2 under the EU Convention, the key question is the situs of the
3 conduct of the administration of the debtor's business on a
4 regular basis that is known to third parties. Council Reg. (EC)
5 No. 1346/2000, ¶ 13.

6 Congress chose to substitute "evidence" for "proof" and
7 otherwise to adopt the Model Law provision word-for-word. The
8 explanation was that the substitution conformed to United States
9 terminology and made clear that the burden of proof of "center of
10 main interests" is on the foreign representative who is applying
11 for recognition of a foreign proceeding as a main proceeding.⁸

12
13 ⁷The Guide explains:

14 Article 16 establishes presumptions that allow the court to
15 expedite the evidentiary process; at the same time they do
16 not prevent, in accordance with the applicable procedural
17 law, calling for or assessing other evidence if the
18 conclusion suggested by the presumption is called into
19 question by the court or an interested party.

20 GUIDE ¶ 122.

21 ⁸The explained:

22 Although sections 1515 and 1516 are designed to make
23 recognition as simple and expedient as possible, the court
24 may hear proof on any element stated. The ultimate burden
25 as to each element is on the foreign representative,
26 although the court is entitled to shift the burden to the
27 extent indicated in section 1516. The word "proof" in
28 subsection (3) has been changed to "evidence" to make it
clearer using United States terminology that the ultimate
burden is on the foreign representative. "Registered
office" is the term used in the Model Law to refer to the
place of incorporation or the equivalent for an entity that
is not a natural person. The presumption that the place of
the registered office is also the center of the debtor's
main interest is included for speed and convenience of proof
where there is no serious controversy.

1 This comports with the concept of a rebuttable presumption for
2 purposes of Federal Rule of Evidence 301. FED. R. EVID. 301.⁹

3 In effect, the registered office (or place of incorporation)
4 is evidence that is probative of, and that may in the absence of
5 other evidence be accepted as a proxy for, "center of main
6 interests." The registered office, however, does not otherwise
7 have special evidentiary value and does not shift the risk of
8 nonpersuasion, i.e. the burden of proof, away from the foreign
9 representative seeking recognition as a main proceeding.

10 Thus, if the foreign proceeding is not in the country of the
11 registered office, then the foreign representative has the burden
12 of proof on the question of "center of main interests."

13 Correlatively, if the foreign proceeding is in the country of the
14 registered office, and if there is evidence that the center of
15 main interests might be elsewhere, then the foreign
16 representative must prove that the center of main interests is in
17 the same country as the registered office.

18 It follows that the burden of proof as to the "center of
19

20 H.R. Rep. No. 109-31, at 112-13.

21 ⁹That rule provides:

22 Presumptions in General in Civil Actions and Proceedings.

23 In all civil actions and proceedings not otherwise provided
24 for by Act of Congress or by these rules, a presumption
25 imposes on the party against whom it is directed the burden
26 of going forward with evidence to rebut or meet the
27 presumption, but does not shift to such party the burden of
proof in the sense of the risk of nonpersuasion, which
remains throughout the trial upon the party on whom it was
originally cast.

28 FED. R. EVID. 301.

1 main interests" is never on the party opposing "main" status and
2 that such an opponent has only a burden of going forward to
3 adduce some evidence inconsistent with the registered office
4 warranting a conclusion of "main" status. FED. R. EVID. 301.

5
6 IV

7 Finally, Bennett Truck, which claims to have a lien on all
8 of the funds tied up in the in rem proceeding, urges that this
9 court exercise its discretion under 11 U.S.C. § 1522(b) to impose
10 additional conditions on the release of the portion of the seized
11 \$1,603,653.95 that USDOJ is prepared to dismiss from the in rem
12 proceeding and turn over to the foreign representatives once the
13 foreign proceeding is recognized. Bennett Truck is particularly
14 concerned that the funds entrusted to the foreign representatives
15 might be used to pay expenses of administration.

16 There are two distinct forms of entrustment in § 1521. The
17 foreign representatives ask that, under § 1521(a)(5), they be
18 entrusted with "the administration or realization of" the
19 debtors' assets within the territorial jurisdiction of the United
20 States. 11 U.S.C. § 1521(a)(5). They do not ask that, under
21 § 1521(b), they be entrusted with "the distribution of all or
22 part of the debtor's assets located in the United States." 11
23 U.S.C. § 1521(b).

24 Although this court indicated at the time of the hearing
25 that it was prepared to require that its specific permission be
26 obtained for any use of the funds, more mature reflection upon
27 the structure of chapter 15 and of the record reveals that the
28 statutory structure is adequate to the task without the confusion

1 of imposition of other provisions. Indeed, the additional level
2 of judicial scrutiny could place this court in the position of
3 having to review the rulings of the foreign court in a manner
4 that might be dysfunctional and operate to diminish the overall
5 value of recovery for all creditors.

6
7 A

8 To be sure, chapter 15 provides ample authority for this
9 court to impose restrictions so as to protect United States
10 creditors to a greater extent than otherwise provided in chapter
11 15 and in other applicable provisions of the Bankruptcy Code.

12 As noted, for the moment, all that is requested is a
13 § 1521(a)(5) entrustment of administration and realization of
14 assets without any entrustment of distribution.

15 If and when it comes to distribution, § 1521(b) authorizes
16 the court, in its discretion, to entrust the distribution of
17 assets located in the United States to the foreign
18 representatives on the condition that the court be satisfied that
19 the interests of creditors in the United States are "sufficiently
20 protected." 11 U.S.C. § 1521(b).¹⁰ This provision is based on

21
22 ¹⁰The text of the provision is:

23 (b) Upon recognition of a foreign proceeding, whether main
24 or nonmain, the court may, at the request of the foreign
25 representative, entrust the distribution of all or part of
26 the debtor's assets located in the United States to the
27 foreign representative or another person, including an
examiner, authorized by the court, provided that the court
is satisfied that the interests of creditors in the United
States are sufficiently protected.

28 11 U.S.C. § 1521(b) (emphasis supplied).

1 Model Law article 21, with the substitution of "sufficiently
2 protected" in lieu of the Model Law's "adequately protected" in
3 order to avoid confusion with the Bankruptcy Code's defined term
4 of art "adequate protection." H.R. Rep. No. 109-31, at 115.¹¹

5 In addition, § 1522 authorizes the court to assure that
6 interests of creditors and interested parties are "sufficiently
7 protected," to impose conditions on any discretionary relief,
8 including both forms of entrustment under § 1521, and to modify
9 or terminate discretionary relief.¹² Congress explained that the

10
11 ¹¹The House Report explains:

12 This section follows article 21 of the Model Law, with
13 detailed changes to conform to United States law. ... The
14 word "adequately" in the Model Law, articles 21(2) and
15 22(1), has been changed to "sufficiently" in sections
16 1521(b) and 1522(a) to avoid confusion with a very
17 specialized legal term in United States bankruptcy,
18 "adequate protection."

19 H.R. Rep. No. 109-31, at 115.

20
21 ¹²The text of the statute is:

22 (a) The court may grant relief under section 1519 or 1521,
23 or may modify or terminate relief under subsection (c), only
24 if the interests of the creditors and other interested
25 entities, including the debtor, are sufficiently protected.

26 (b) The court may subject relief granted under section 1519
27 or 1521, or the operation of the debtor's business under
28 section 1520(a)(3), to conditions it considers appropriate,
including the giving of security or the filing of a bond.

(c) The court may, at the request of the foreign
representative or an entity affected by relief granted under
section 1519 or 1521, or at its own motion, modify or
terminate such relief.

(d) Section 1104(d) shall apply to the appointment of an
examiner under this chapter. Any examiner shall comply with
the qualification requirements imposed on a trustee by
section 322.

1 section was based on Model Law article 22 and that the bankruptcy
2 court was being given "broad latitude to mold relief to meet
3 specific circumstances." H.R. Rep. No. 109-31, at 116.¹³

4 _____
5 11 U.S.C. § 1522.

6 ¹³1. The House Report explains:

7 This section follows article 22 of the Model Law
8 with changes for United States usage and references to
9 relevant Bankruptcy Code sections. [Footnote citing
10 GUIDE at 47.] It gives the bankruptcy court broad
11 latitude to mold relief to meet specific circumstances,
12 including appropriate responses if it is shown that the
13 foreign proceeding is seriously and unjustifiably
14 injuring United States creditors. For a response to a
15 showing that the conditions necessary to recognition
16 did not actually exist or have ceased to exist, see
17 section 1517. Concerning the change of "adequately" in
18 the Model Law to "sufficiently" in this section, see
19 section 1521. Subsection (d) is new and simply makes
20 clear that Bankruptcy Code section 1104(d) shall apply
21 to the appointment of an examiner appointed in a case
22 under chapter 15 and such examiner shall be subject to
23 certain duties and bonding requirements based on those
24 imposed on trustees and examiners under other chapters
25 of this title.

26 H.R. Rep. No. 109-31, at 116.

27 The Model Law version of article 22 is:

28 1. In granting or denying relief under article 19
or 21, or in modifying or terminating relief under
paragraph 3 of this article, the court must be
satisfied that the interests of the creditors and other
interested persons, including the debtor, are
adequately protected.

2. The court may subject relief granted under
article 19 or 21 to conditions it considers
appropriate.

3. The court may, at the request of the foreign
representative or a person affected by relief granted
under article 19 or 21, or at its own motion, modify or
terminate such relief.

1 Section 1522(a) conditions any discretionary relief under
2 § 1521 or § 1519 (pre-recognition relief) upon the interests of
3 creditors and other interested entities, including the debtor,
4 being "sufficiently protected." 11 U.S.C. § 1522(a).

5 Section 1522(b) permits the court to impose conditions on
6 any discretionary relief that it grants, which permits it to
7 achieve an appropriate balance. 11 U.S.C. § 1522(b).

8 If it later appears that conditions should be either imposed
9 or relaxed, § 1522(c) authorizes a court, on its own motion or
10 upon request, to modify or terminate any discretionary relief it
11 has granted. 11 U.S.C. § 1522(c).

12 Standards that inform the analysis of § 1522 protective
13 measures in connection with discretionary relief emphasize the
14 need to tailor relief and conditions so as to balance the relief
15 granted to the foreign representative and the interests of those
16 affected by such relief, without unduly favoring one group of
17 creditors over another. GUIDE at ¶¶ 161-63.¹⁴

18 _____
19 Model Law, art. 22.

20 ¹⁴The Guide elaborates:

21 161. The idea underlying article 22 is that there should be
22 a balance between relief that may be granted to the foreign
23 representative and the interests of the persons that may be
24 affected by such relief. This balance is essential to
achieve the objectives of cross-border insolvency
legislation.

25 162. The reference to the interests of creditors, the
26 debtor and other interested parties in article 22, paragraph
27 1, provides useful elements to guide the court in exercising
28 its powers under article 19 or 21. In order to allow the
court to tailor the relief better, the court is clearly
authorized to subject the relief to conditions (paragraph 2)
and to modify or terminate the relief granted (paragraph 3).

1 Additional protection is embodied in the § 1506 public
2 policy exception, which permits the court to refuse to take an
3 action governed by chapter 15 if the action would be manifestly
4 contrary to the public policy of the United States. 11 U.S.C.
5 § 1506.¹⁵ Congress has indicated, with its use of the phrase
6 "manifestly contrary," that this exception is to be narrowly
7 construed, which view is consistent with the explication in the
8 Guide. H.R. Rep. No. 109-31, at 109; GUIDE, ¶¶ 88-89.¹⁶

9
10 An additional feature of paragraph 3 is that it expressly
11 gives standing to the parties who may be affected by the
12 consequences of articles 19 and 21 to petition the court to
13 modify and terminate those consequences. Apart from that,
14 article 22 is intended to operate in the context of the
15 procedural system of the enacting State.

16 163. In many cases the affected creditors will be "local"
17 creditors. Nevertheless, in enacting article 22, it is not
18 advisable to attempt to limit it to local creditors. Any
19 express reference to local creditors in paragraph 1 would
20 require a definition of those creditors. An attempt to
21 draft such a definition (and to establish criteria according
22 to which a particular category of creditors might receive
23 special treatment) would not only show the difficulty of
24 crafting such a definition but would also reveal that there
25 is no justification for discriminating creditors on the
26 basis of criteria such as place of business or nationality.

27 GUIDE, ¶¶ 161-63 (emphasis supplied).

28 ¹⁵The text of the statute is:

Nothing in this chapter prevents the court from refusing to
take an action governed by this chapter if the action would
be manifestly contrary to the public policy of the United
States.

11 U.S.C. § 1506.

¹⁶The House Report explains:

This provision follows the Model Law article 5 exactly,
is standard in UNCITRAL texts, and has been narrowly
interpreted on a consistent basis in courts around the

1 Nevertheless, the public policy exception could be invoked as a
2 rationale for imposing specific protections.

3 In short, the court has ample tools for dealing with the
4 manner in which a chapter 15 case is administered.

6 B

7 The question becomes whether to impose additional
8 restrictions in this instance at the request of a creditor who
9 claims that it has a lien on all of the seized funds in the im
10 rem proceeding.

12 world. The word "manifestly" in international usage
13 restricts the public policy exception to the most
14 fundamental policies of the United States.

15 H.R. Rep. No. 109-31, at 109 (citing GUIDE in omitted footnote).

16 The Guide elaborates:

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

29 89. The purpose of the expression "manifestly", used also
30 in many other international legal texts as a qualifier of
31 the expression "public policy", is to emphasize that public
32 policy exceptions should be interpreted restrictively and
33 that article 6 is only intended to be invoked under
34 exceptional circumstances concerning matters of fundamental
35 importance for the enacting State.

36 GUIDE, ¶¶ 88-89.

1 There is no controversy that the funds to be released by
2 agreement of USDOJ from the in rem proceeding would be maintained
3 in a deposit account within the jurisdiction of this court. The
4 foreign representatives do not ask to be entrusted with
5 distribution of assets under § 1521(b), rather they merely ask to
6 be entrusted to administer and realize assets under § 1521(a) (5).

7 Neither USDOJ, nor the California Commissioner of Insurance,
8 nor any party in interest other than Bennett Truck has expressed
9 any difficulty with the sufficiency of the protections inherent
10 in requiring that funds delivered to the foreign representatives
11 as a form of realization of assets under § 1521(a) (5) be
12 maintained within the jurisdiction of the court.

13 It is not necessary to place an additional restriction on
14 disbursements when the foreign representatives are not being
15 entrusted to distribute assets that are being maintained within
16 the jurisdiction of the court.

17 An automatic consequence of recognition of a foreign main
18 proceeding is that § 363 applies. 11 U.S.C. § 1520(a) (2). As a
19 consequence, cash collateral cannot be used without permission.
20 11 U.S.C. § 363(c) (2).

21 The gravamen of Bennett Truck's position is that it contends
22 that it has a lien on all the funds to be released by USDOJ from
23 the in rem proceeding such that it is entitled to all of the
24 seized funds. Whether Bennett Truck actually has an enforceable
25 lien has been neither conceded nor definitively determined. If
26 it does have an enforceable lien, then the funds are cash
27 collateral that are subject to the protection of § 363(c) (2) that
28 is already in effect by virtue of recognition of the foreign main

1 proceeding. If Bennett Truck, however, does not have an
2 enforceable lien, then it should not enjoy the quasi-lien status
3 that would result from a specific restriction on the entrustment
4 of administration and realization of assets to the foreign
5 representatives.

6 Nor is the proposed restriction entirely innocuous.
7 Although the foreign representatives are confident that they can
8 realize up to \$7,000,000 in assets from foreign sources, most of
9 which would eventually be distributed to United States creditors,
10 the use of some of the released funds may be required in order to
11 achieve that result. Depriving the foreign representatives of
12 resources needed to recover the \$7,000,000 could frustrate the
13 goal of chapter 15 to maximize the value of the cross-border
14 estate that is available for distribution to creditors.

15 The fact that most of the creditors are United States
16 entities means that shortfalls in recoveries necessarily will
17 operate to their detriment regardless of whether one takes a
18 "universalist" or a "territorialist" approach to cross-border
19 insolvencies. See Westbrook, 79 AM. BANKR. L.J. at 715-16.

20 The court is mindful that reliance on the protections of
21 § 363(c)(2) restricting the use of cash collateral exposes the
22 estate to the credit risk of the foreign representatives in the
23 event they act contrary to the Bankruptcy Code. In the
24 circumstances of this case, where there has been substantial
25 cross-border law enforcement cooperation and where the law
26 governing the foreign proceeding is structured to protect an
27 estate from depredation by professionals, this court predicts
28 that the foreign representatives will be punctilious in their

1 beyond that required by applicable bankruptcy law, for use of
2 funds. An appropriate order shall issue.

3 Dated: September 11, 2006.

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UNITED STATES BANKRUPTCY JUDGE

1 **CERTIFICATE OF SERVICE**

2 On the date indicated below, I served a true and correct
3 copy(ies) of the attached document by placing said copy(ies) in a
4 postage paid envelope addressed to the person(s) hereinafter
5 listed and by depositing said envelope in the United States mail
6 or by placing said copy(ies) into an interoffice delivery
7 receptacle located in the Clerk's Office.

8 Jonathan F. Bank
9 Joshua D. Wayser
10 Lord Bissell & Brook LLP
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12 Los Angeles, CA 90071

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Dated:

DEPUTY CLERK