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When is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy

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Michael A. Garza

Abstract

This Comment argues that the Public Policy Exception of Chapter 15 should be invoked only as a last resort and that, going forward, courts should engage in an analysis of §1506 only when no other provision in Chapter 15 supports a decision to deny relief. To promulgate this argument and to clarify the public policy exception under the Model Law and Chapter 15, this Comment proceeds in three parts. First, Part I examines various public policy exceptions found in the law, including Article 6 of UNCITRAL's Model Law on Cross-Border Insolvency, nations adopting Article 6 of the Model Law into their insolvency laws, §1506 of the US Bankruptcy Code, and other public policy exceptions found outside the context of bankruptcy law. Second, Part II explores the five instances in which US Bankruptcy Courts have invoked the Public Policy Exception of Chapter 15. Finally, Part III discusses the United States and other countries' use of similar public policy exceptions, and, extrapolating from these examples, contends that courts should rely on the Public Policy Exception only when no other provision of Chapter 15 applies. Using the analysis from Parts I and II, Part III establishes a framework for Chapter 15 that US courts should follow when they are determining whether to grant relief in a case arising under Chapter 15 of the US Bankruptcy Code.

KEYWORDS: Public Policy Exception, Article 6, Insolvency, Cross-Boarder, Section 1506, Chapter 15, Safeguard, International Law

COMMENT

WHEN IS CROSS-BORDER INSOLVENCY RECOGNITION MANIFESTLY CONTRARY TO PUBLIC POLICY?

*Michael A. Garza**

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INTRODUCTION

Section 1506 (the “Public Policy Exception” or “§ 1506”) under Title 11 of the United States Code (the “Bankruptcy Code”) allows US courts to refuse to take an action under Chapter 15 of the Bankruptcy Code if the action would be manifestly contrary to the public policy of the United States. A few US bankruptcy courts have invoked the Public Policy Exception even when there are other grounds for refusal, mainly under 11 U.S.C. § 1522 or 11 U.S.C. § 1507(b). These decisions should not be relied upon. They improperly dilute the intended narrowness of the Public Policy Exception and ignore the international context upon which it was drafted.

On May 30, 1997, the United Nations Commission on International Trade Law (“UNCITRAL”) adopted the Model Law on Cross-Border Insolvency (the “Model Law”) to assist States in their management of transnational insolvency cases in an efficient, fair, and cost-effective manner.¹ In 2005, the United States Congress

1. See United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Sales No. E.99.V.3, ¶ 22 (1997), enacted by G.A. Res.52/158, U.N. Doc. A/Res/52/158 (Jan 30, 1998) [hereinafter *Model Law*] (providing a guide to enactment with the UNCITRAL Model Law on Cross-

enacted Chapter 15 of the Bankruptcy Code (“Chapter 15”)—the United States’ version of the Model Law.² In enacting Chapter 15, Congress closely hewed to the text of the Model Law and, in doing so, sought to achieve international cooperation and greater legal certainty for trade and investment.³ For example, the language of the narrow Public Policy Exception contained in Chapter 15 mirrors the language of Article 6 of the Model Law—which allows courts to refuse to take action.⁴ Specifically, § 1506 states: “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.”⁵

The proper interpretation of the Public Policy Exception has been widely litigated.⁶ The majority of the resulting decisions have held that the relief requested by foreign representatives under a

Border Insolvency); *see also* LOOK CHAN HO, *CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 7* (Look Chan Ho et al. eds., 3d ed. 2012) [hereinafter *CROSS-BORDER INSOLVENCY*] (discussing the implementation of the UNCITRAL Model Law on Cross-Border Insolvency).

2. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23 (2005) [hereinafter *BAPCPA*].

3. *See* *Fogerty v. Petroquest Res., Inc.* (In re Condor Ins. Ltd.), 601 F.3d 319, 322 (5th Cir. 2010) (noting that Chapter 15 closely hewed to the text of the enactment and that any departures from the actual text of the Model Law were as narrow and limited as possible.) (internal quotations omitted); *see also* 11 U.S.C. § 1501 (discussing the purpose and scope of application of Chapter 15).

4. *See* H-R Rep. No. 109-31, at 109 (2005) [hereinafter *the “House Report”*] (stating that § 1506 “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 world.”); *compare* Model Law, *supra* note 1, at art. 15 (providing that “nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State”) with 11 U.S.C. § 1506 (providing that “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”).

5. 11 U.S.C. § 1506 (stating that “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”).

6. *See, e.g., In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1053-58 (5th Cir. 2012) (discussing the framework for Chapter 15 and when § 1506 should be invoked); *In re ABC Learning Centres Ltd.*, 445 B.R. 318, 334 (Bankr. D. Del. 2010) (holding that “recognition of the Liquidation Proceedings is not manifestly contrary to U.S. public policy and the Court will not deny recognition under the public policy exception of § 1506”); *In re Gold & Honey, Ltd.*, 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009) (holding that foreign representative’s offensive violation of the automatic stay would be manifestly contrary to the public policy of the United States); *In re Toft*, 453 B.R. 186, 201 (Bankr. S.D.N.Y. 2011) (holding that “this is one of the rare cases in which an order of recognition on the terms requested would be manifestly contrary to U.S. public policy . . .”).

Chapter 15 case was not “manifestly contrary to the public policy of the United States.”⁷ The few courts that have invoked the Public Policy Exception have construed § 1506 narrowly.⁸ However, in a majority of these cases, the court addressed public policy considerations prematurely and should have declined to grant relief based on other sections of Chapter 15.⁹

Consequently, US courts have invoked public policy considerations and engaged in an analysis under § 1506 more often than required.¹⁰ These courts have construed Chapter 15 so broadly that they reach an analysis under § 1506 instead of relying on other provisions of Chapter 15 to deny relief.¹¹ This approach produces unnecessary conclusions that the Public Policy Exception should be invoked, has undermined the narrow circumstances under which the Public Policy Exception should apply, and is inconsistent with the

7. See, e.g., *In re Ernst & Young*, 383 B.R. 773, 781 (Bankr. D. Colo. 2008) (finding no evidence to support a holding that recognition of the foreign proceeding would produce a result so drastically different to be manifestly contrary to public policy of the United States); *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685, 698 (Bankr. S.D.N.Y. 2010) (concluding that “§ 1506 does not preclude giving comity to the Canadian Orders in this case.”); *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 140 (2d Cir. 2013) (holding that there was no basis on which to hold that recognition of the foreign proceeding was manifestly contrary to US public policy); see also *infra* Part I.B (providing an overview of Chapter 15 and more specifically the relief that is available to a foreign representative in a Chapter 15 case).

8. See *In re Toft*, 453 B.R. at 189 (holding that this case was “one of the rare cases in which the relief sought by the Foreign Representative must be denied under § 1506 of the Bankruptcy Code as manifestly contrary to the public policy of the United States”).

9. See *Jaffe v. Samsung Elec. Co. (In re Qimonda)*, 737 F.3d 14 (4th Cir. 2013) (denying relief based on application of § 1522(a) rather than to invoke an unnecessary analysis of § 1506); see also *In re Vitro*, 701 F.3d at 1070 (affirming the bankruptcy court decision holding that, “because we conclude that relief is not warranted under § 1507, however, and would also not be available under § 1521, we do not reach whether the *Concurso* plan would be manifestly contrary to a fundamental public policy of the United States”).

10. See *In re Qimonda*, 737 F.3d at 31 (holding that the lower court’s analysis under the public policy exception was not necessary because it could have based its decision on the application of § 1522(a)); *In re Vitro*, 701 F.3d at 1070 (holding that an analysis of whether the relief requested was manifestly contrary to the public policy of the United States was not necessary because such relief was not warranted under § 1507 or under § 1521).

11. See *In re Qimonda*, 737 F.3d at 14 (holding that the lower court’s analysis under the public policy exception was not necessary because it could have based its decision on the application of § 1522(a)); *In re Vitro*, 701 F.3d at 1070 (holding that an analysis of whether the relief requested was manifestly contrary to the public policy of the United States was not necessary because such relief was not warranted under § 1507 or under § 1521); but see *In re Toft*, 453 B.R. at 195-96 (explaining that the public policy exception should ordinarily be resorted to only if another, more specific provision of chapter 15 does not govern the dispute).

intent the drafters of Chapter 15 had when implementing the Public Policy Exception.¹²

This Comment argues that the Public Policy Exception of Chapter 15 should be invoked only as a last resort and that, going forward, courts should engage in an analysis of § 1506 only when no other provision in Chapter 15 supports a decision to deny relief. To promulgate this argument and to clarify the public policy exception under the Model Law and Chapter 15, this Comment proceeds in three parts. First, Part I examines various public policy exceptions found in the law, including Article 6 of UNCITRAL's Model Law on Cross-Border Insolvency, nations adopting Article 6 of the Model Law into their insolvency laws, § 1506 of the US Bankruptcy Code, and other public policy exceptions found outside the context of bankruptcy law. Second, Part II explores the five instances in which US Bankruptcy Courts have invoked the Public Policy Exception of Chapter 15. Finally, Part III discusses the United States and other countries' use of similar public policy exceptions, and, extrapolating from these examples, contends that courts should rely on the Public Policy Exception only when no other provision of Chapter 15 applies. Using the analysis from Parts I and II, Part III establishes a framework for Chapter 15 that US courts should follow when they are determining whether to grant relief in a case arising under Chapter 15 of the US Bankruptcy Code.

I. PUBLIC POLICY EXCEPTIONS

Part I introduces public policy exceptions found in both bankruptcy and non-bankruptcy law. Part I.A reviews the UNCITRAL Model Law on Cross-Border Insolvency and provides an overview of the Model Law, the public policy exception found in Article 6 of the Model Law, and how other countries have adopted this provision. Part I.B discusses the United States' implementation of the Model Law in Chapter 15 of the Bankruptcy Code and, more specifically, the Public Policy Exception. Lastly, Part I.C will provide an overview of how courts have applied public policy exceptions that are found in laws outside of the bankruptcy context.

12. Model Law, *supra* note 1, at art. 6, ¶ 88 (noting that “international cooperation would be unduly hampered if public policy would be understood in an extensive manner”); House Report, *supra* note 4, at 109 (explaining that the language of § 1506 follows the Model Law Article 6 exactly, is standard in UNCITRAL texts, and has been narrowly interpreted on a consistent basis in courts around the world).

A. *The Model Law And Its Implementation*

First, this subpart provides an overview of the Model Law, including a discussion of the framework that it provides and the implications of it having been drafted. Second, this subpart reviews the public policy exception found in the Model Law and how non-US countries have implemented the Model Law's public policy exception. Ultimately, this subpart seeks to provide a better understanding of the context in which Congress was working when it enacted Chapter 15.

1. Overview

Since the Model Law is a voluntary framework that does not have the force of law, countries must enact legislation to give it legal effect.¹³ In doing so, countries may determine when and to what extent they wish to incorporate the terms of the Model Law in domestic legislation.¹⁴

The Model Law intends to facilitate cooperation between courts and insolvency representatives in different jurisdictions and also to enable insolvency representatives to seek and obtain recognition of their insolvency proceedings from other jurisdictions.¹⁵ It also

13. See Andre J. Berends, *The Uncitral Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 Tul. J. Int'l & Comp. L. 309, 320 (1998) (explaining that "the Model Law is merely a recommendation, and countries are free to enact it as they wish"); CHRISTOPHER MALLON & SHAI Y. WAISMAN, *THE LAW AND PRACTICE OF RESTRUCTURING IN THE UK AND US* 441 (Christopher Mallon et al. eds., 2011); UNCITRAL Secretariat, *The UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective*, Note by the Secretariat, ¶9, U.N. Doc. A/CN.9/778 (July 26, 2013) [hereinafter *Judicial Perspective*] (discussing the twenty States and territories, as of April 2013, that had enacted legislation based on the Model Law: Australia (2008), British Virgin Islands; overseas territory of the United Kingdom of Great Britain and Northern Ireland (2003), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), and the United States of America (2005)).

14. Berends, *supra* note 13, at 320 (noting that "The Model Law was meant to serve as an example for those countries that do not yet have legislation for the recognition of foreign insolvency proceedings and for the countries that do have some provisions in the field of cross-border insolvency, the Model Law can be used as an example of how to modify their legislation."); MALLON *supra* note 13, at 441 (discussing that the Model Law is voluntary and adopting nations may implement it as they choose).

15. See Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency-A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 Tul. J. Int'l & Comp. L. 307, 327 (2004) (explaining that "Chapter IV, a key section of the Model Code, addresses cross-border cooperation. As noted in the Guide to

governs insolvency proceedings that include most debtor entities in a number of situations.¹⁶ For example, it governs: (1) an inward-bound request for recognition of a foreign proceeding; (2) an outward-bound request from a court or an administrator in the State that has enacted the Model Law for recognition of an insolvency proceeding commenced under the laws of such State; (3) coordination of concurrent proceedings in two or more States; and (4) participation of foreign creditors in insolvency proceedings taking place in an enacting State.¹⁷

The Model Law also establishes criteria for determining whether a foreign proceeding will be recognized.¹⁸ Such a conclusion includes determining whether the foreign proceeding should be recognized as a main proceeding, a non-main proceeding, or neither.¹⁹ The effects of this determination vary depending on how the foreign proceeding is classified.²⁰ For example, Article 20 of the Model Law provides that upon recognition of a foreign main proceeding, certain automatic relief ensues.²¹ The first relief available stays actions of individual creditors against the debtor.²² The second relief available is a stay of

Enactment, the objective of the chapter is to enable courts and insolvency representatives ‘from two or more countries to be efficient and achieve optimal results.’”); Model Law, *supra* note 1, at arts. 25-27 (discussing cooperation with foreign courts and foreign representatives).

16. See Clift, *supra* note 15, at 319-31 (discussing the main features of the Model Law); see also 1-13 COLLIER ON BANKRUPTCY PART TWO ¶ IV.22 (16th ed. 2013) (giving an overview of the main provisions of the Model Law) [hereinafter *COLLIER*].

17. See *supra* note 16 and accompanying text.

18. See Model Law, *supra* note 1, at art. 15-17 (discussing the “application for recognition of a foreign proceeding,” “presumptions concerning recognition,” and the “decision to recognize a foreign proceeding”).

19. *Id.* at art. 17(2) (listing when a foreign proceeding shall be recognized: “(a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or (b) as a foreign non-main proceeding if the debtor has an establishment . . . in the foreign State.”). The determination of whether a foreign proceeding is a main-proceeding, non-main proceeding or neither, is a highly litigated matter and is beyond the scope of this note. For further discussion on the issue see, e.g., *Morning Mist Holdings Ltd. v. Kryz* (In re Fairfield Sentry Ltd.), 714 F.3d 127 (2d Cir. 2013); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff’d*, 389 B.R. 325 (S.D.N.Y. 2008); *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006).

20. Compare Model Law, *supra* note 1, at art. 20 (discussing the automatic effects of recognition of a foreign main proceeding), with Model Law, *supra* note 1, at art. 7, 21 (discussing the discretionary relief that is available after recognition of a foreign non-main proceeding).

21. See Model Law, *supra* note 1, at art. 20 (discussing the effects of recognition of a foreign main proceeding).

22. *Id.* (staying “commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities”).

execution against the debtor's assets.²³ The third relief available suspends the debtor's right to transfer or encumber its assets.²⁴

Additionally, Article 21 allows the court to grant discretionary relief to protect the debtor's assets or creditors' interests upon recognition of a foreign main proceeding or non-main proceeding.²⁵ Such discretionary relief may consist of staying proceedings or suspending the right to encumber assets, facilitating access to information concerning the assets of the debtor and its liabilities, appointing a person to administer all or part of those assets, as well as any other relief that may be available under the laws of the enacting State.²⁶

In granting or denying relief, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.²⁷ The court may subject the relief granted to conditions it considers appropriate and may modify or terminate such relief if requested by any person affected.²⁸ The Model Law further recommends that local courts and insolvency representatives cooperate with foreign courts or foreign representatives.²⁹

2. The Model Law's "Public Policy Exception" and Its Implementation

Article 6 of the Model Law provides that "nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."³⁰ The UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment ("Guide to Enactment") explains

23. *Id.* (staying execution against the debtor's assets).

24. *Id.* (suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor).

25. *Id.* at art. 21 (discussing the discretionary relief that may be granted upon recognition of a foreign proceeding).

26. *Id.*

27. *Id.* at art. 22 (requiring that the court must be satisfied that the "interests of the creditors and other interested persons, including the debtor, are adequately protected").

28. *Id.* (providing that "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").

29. *Id.* at art. 25 (requiring the court to cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or indirectly through a third party).

30. *Id.* at art. 6 (allowing the court to refuse to take an action governed by this Law if the action would be manifestly contrary to the public policy of the State).

that Article 6 does not attempt to define public policy because the notion of public policy is grounded in national law and may differ from State to State.³¹ The Guide to Enactment also distinguishes between two different concepts of public policy.³² It notes that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs and the notion of public policy as it is used in matters of international cooperation and recognition of foreign laws.³³ The Guide to Enactment notes that international public policy is understood more restrictively than domestic public policy, which reflects the understanding that broadly defining international public policy would hamper international cooperation.³⁴

Furthermore, the Guide to Enactment emphasizes that the purpose of the term “manifestly,” which is used in many other international legal texts as a qualifier of the expression “public policy,” is to emphasize that public policy exceptions should be interpreted restrictively and that Article 6 may be invoked only in exceptional circumstances concerning matters of fundamental importance to the enacting State.³⁵ States adopting the Model Law have implemented the public policy exception of Article 6 in three ways: (i) adopting the language of Article 6 of the Model Law, (ii) enacting a version of Article 6 that omitted the word “manifestly” in their public policy exception, or (iii) adopting a different, yet related, provision.³⁶

i. Nations adopting the language of Article 6 verbatim

Australia, Colombia, England, Mauritius, New Zealand, and South Africa have adopted Article 6 into their insolvency laws verbatim.³⁷ These nations rely on the term “manifestly” to emphasize

31. *Id.* at ¶ 86 (noting that no uniform definition of public policy exists because the notion of public policy is grounded in national law and may differ from State to State).

32. *Id.* at ¶ 88 (noting that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs and as it applies to international affairs—which is interpreted more restrictively than domestic public policy).

33. *Id.*

34. *Id.*

35. *Id.*

36. *See infra* Part I.A(2)(i) through Part I.A(2)(iii) (discussing the various ways nations have implemented Article 6 of the Model Law into their domestic legislation).

37. Cross-Border Insolvency Act 2008 (Cth) at art. 6 (allowing the court to refuse “to take an action governed by the present Law if the action would be manifestly contrary to the public policy of this State”); Cross-Border Insolvency Regulations 2006 at art. 6 (allowing

that the public policy exception should be interpreted narrowly.³⁸ It is also their intention that the public policy exception be invoked only under exceptional circumstances that concern matters of fundamental importance.³⁹

ii. Nations excluding the word “manifestly”

The British Virgin Islands, Canada, Greece, Mexico, Serbia, Montenegro, and South Korea have adopted legislation guided by Article 6 of the Model Law, but have omitted the word “manifestly.”⁴⁰ Omission of the word “manifestly” in these cases does not correspond to any intention on the part of the legislatures to depart from the Model Law; rather, it constitutes a semantic decision to

“the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of Great Britain or any part of it); Insolvency Act 2009 at Ninth Schedule, at art. 6(1) (permitting “the Supreme Court from refusing to take an action governed by this Schedule if the action would be manifestly contrary to the public policy of Mauritius”); Insolvency (Cross-Border) Act 2006 at art. 392(2) (allowing “the High Court from refusing to take an action governed by this Schedule if the action would be manifestly contrary to the public policy of New Zealand”); Cross-Border Insolvency Act (42/2000) at § 6 (permitting the court to refuse to “take an action governed by this Act if the action would be manifestly contrary to the public policy of the Republic”).

38. See CROSS-BORDER INSOLVENCY, *supra* note 1, at 25, 123, 177, 298, 352-53, 405 (discussing the implementation of the Article 6 of the Model law into various nations insolvency laws); see also, *supra* note 37 and accompanying text (discussing the nations adopting the Model Law verbatim and the language used by each nation when implementing Article 6 of the Model Law into their insolvency laws).

39. See *supra* note 38 and accompanying text.

40. Insolvency Act 2003 at § 439 (permitting “the Court [to refuse] to take an action governed by this Part if the action would be contrary to the public policy of the Virgin Islands”); Companies’ Creditors Arrangement Act (RSC 1985, C-35, as amended) at Part IV, Section 61(2) (allowing the court to refuse “to do something that would be contrary to public policy.”); Greek Law 3858/2010 at Chapter A, art. 6 (permitting the court to “refuse to take an action provided for in this law, if the action is contrary to the public policy”); Commercial Insolvency Laws at Title XII, art. 283 (providing that “nothing in this title shall be interpreted in a manner contrary to the provisions of Titles I through XIII, or in any manner that would be contrary to the fundamental principles of Mexican law. Consequently, the court, the [Federal Institute of Specialists in Commercial Insolvencies], the visitor, the conciliator and the receiver shall refuse to take any action that is contrary to the provisions of said titles or violates public policy.”); Official Gazette of the Republic of Serbia 104/2009 at Chapter XII, art.179 (allowing the court to refuse “to take an action governed by this law if the action would be contrary to the public policy of Serbia”); Debtor Rehabilitation and Bankruptcy Act at Chapter 5, art. 632(2)(3) (requiring the court to “dismiss the petition in the event . . . recognizing the foreign bankruptcy proceeding is contrary to the public policy of the Republic of Korea”); see also CROSS-BORDER INSOLVENCY, *supra* note 1, at 25, 123, 177, 298, 405 (discussing the implementation of the Article 6 of the Model law into various nations’ insolvency laws and each nations’ intent when doing so).

remove all adjectives and adverbs from legislation.⁴¹ These nations' laws distinguish between typical domestic public policy and less restrictive international public policy.⁴² As a result, they do not demand the same level of public policy compliance from a foreign proceeding as they would from a domestic proceeding.⁴³ In other words, a foreign contract that would normally be void in the interest of "domestic" public policy might be enforced out of international comity concerns.⁴⁴

iii. Nations adopting a similar provision

When the Cayman Islands overhauled its cross-border insolvency legislation in 2009 by inserting international cooperation provisions in Part XVII of its insolvency laws, it elected to adopt a public policy exception that differed from that of the Model Law.⁴⁵

41. Compare *supra* note 40 and accompanying text (discussing nations choosing Article 6 of the Model Law but removing all adjectives and adverbs from their legislation), with *supra* note 37 and accompanying text (discussing nations choosing Article 6 of the Model Law verbatim, with Model Law, *supra* note 1, Art. 6 (providing that "nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State"). See also, CROSS-BORDER INSOLVENCY, *supra* note 1, at 25, 123, 177, 298, 405 (discussing the implementation of the Article 6 of the Model law into various nations' insolvency laws and each nation's intent when doing so).

42. See Model Law, *supra* note 1, ¶ 88 (recognizing the trend of distinguishing domestic and international standards of public policy in a "growing number of jurisdictions"); see also Berends, *supra* note 13, at 336 (discussing the different standards between a nations domestic and international public policy).

43. See Berends, *supra* note 13, at 336 (discussing the different standards between a nations domestic and international public policy); see also Model Law, *supra* note 1, at ¶ 88 (noting that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs and as it is applies to international affairs—which is interpreted more restrictively than domestic public policy).

44. See *supra* note 43 and accompanying text.

45. See Cayman Islands, Companies Law, Part XVII, § 241 (providing that the Cayman Islands court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of: (a) recognizing the rights of foreign representative to act in the Cayman Islands on behalf of a foreign debtor; (b) granting a stay on commencement or continuation of legal proceedings and the enforcement of judgments against a debtor; (c) permitting the foreign representative to examine any person in possession of information relating to the debtor and requiring the production of documents to the foreign representative; (d) ordering the turnover to a foreign representative of any property belonging to a debtor); Cayman Islands, Companies Law, Part XVII, § 242 (providing that in deciding whether to make an ancillary order, the court will be guided by matters which will best assure an economic and expeditious administration of the debtor's estate consistent with: (a) the just treatment of all claimants in a debtor's estate wherever they may be domiciled; (b) the protection of Cayman Islands incorporated claimants against prejudice and inconvenience in the processing of claims in the foreign bankruptcy

Rather, § 242 of the Cayman Islands Companies Law sets out the factors that the Grand Court of the Cayman Islands will consider in determining whether to make ancillary orders upon application by a foreign representative, which mirrors the language used in the former § 304 of the US Bankruptcy Code.⁴⁶ US case law described § 304 as, fundamentally, a statutory mechanism to which US courts could defer when facilitating foreign insolvency proceedings and construing the enumerated considerations.⁴⁷ This mechanism is identical to those set out in § 242 of the Cayman Islands Companies Law as guidelines designed to give the court maximum flexibility in handling ancillary cases.⁴⁸ The language of § 242 and that of former § 304, emphasize comity and judicial flexibility.⁴⁹

Other nations, such as Japan and Poland, have adopted Article 6 of the Model Law by using the term “public order” or “public peace” rather than “public policy” to describe the limited circumstances under which actions might be circumscribed under this section.⁵⁰ The

proceeding; (c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor’s estate; (d) the distribution of the debtor’s estate amongst creditors substantially in accordance with the priorities set out in the Law; (e) the recognition and enforcement of the interests of secured creditors; (f) the non-enforcement of foreign taxes, fines and penalties; and (g) comity).

46. Compare *supra* note 45 and accompanying text (discussing Cayman Islands, Companies Law, Part XVII, which sets out express provisions dealing with international cooperation and the manner in which the Cayman Islands courts can give statutory assistance to foreign representatives), with 11 U.S.C. § 304 (2000) (*repealed by* Pub.L. 109–8, Title VIII, § 802(d)(3) (2005) (providing that “In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—(1) just treatment of all holders of claims against or interests in such estate; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of such estate; (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title; (5) comity; and (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.”).

47. See *In re Treco*, 240 F.3d 148, 156 (2d Cir. 2001) (describing § 304(c) as requiring a case-specific exercise of discretion in light of all of the circumstances); see also *In re Culmer*, 25 B.R. 621, 628 (Bankr. S.D.N.Y. 1982) (explaining that § 304 articulates the flexibility available to a court in applying these factors to the specific circumstances in each case in order to arrive at a fair result).

48. See *supra* note 47 and accompanying text.

49. See *In re Schimmelpennic*, 183 F.3d 347, 365 (5th Cir. 1999) (explaining that § 304 is intended to arm the courts with maximum flexibility in light of principles of international comity and respect for the laws of foreign nations and comparing § 304’s grant of judicial authority as tantamount to the power to mold relief in near blank check fashion).

50. Law on Recognition of and Assistance in Foreign Insolvency Proceedings at art. 21(3) (requiring a court to dismiss a petition for recognition of a foreign insolvency proceeding

term “public order” is commonly found in the domestic private international law of many States, most notably in civil law countries.⁵¹ In this context, the term refers to the many exceptions that enable a court to refuse to recognize or enforce a judgment, or apply foreign law to a pending proceeding, on the grounds that the judgment or law conflicts with a more fundamental policy of the forum court.⁵² Similarly, the French concept of “ordre public,” which parallels the idea of “public order” or “public policy” under United States common law, is one example of the rules enacted by States to protect the fundamental values of their society.⁵³ Although States vary in the breadth and depth of the limits of their “public order” rules, courts generally take a restrictive approach when reviewing these rules and typically find that only those rules that protect a State’s most fundamental values satisfy the standard of public order.⁵⁴

“if the assistance measures . . . are against public order and good public morals in Japan.”); Bankruptcy and Recovery Act at Chapter I, art. 392 (requiring that cross-border bankruptcy proceedings not be recognized if: “1) it concerns a case which does not belong to the exclusive jurisdiction of Polish courts; 2) the recognition is not contrary to the basic rules of the legal order in the Republic of Poland.”); Title III of Law 1116 at art. 91 (permitting the “competent Colombian authorities from denying adoption of a measure manifestly opposed to the public peace in the Republic of Colombia”) (official English translation of Law 1116 is available at <http://www.supersociedades.gov.co/superintendencia/normatividad/law-1116-of-2006-English/Documents/LAW%201116%20of%202006.pdf>).

51. See ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW* 190 (2009) (discussing the meaning of “public order” in private international law); see also Alex Mills, *The Dimensions of Public Policy in Private International Law*, 4 J. Private Int’l L. 201 (2008) (explaining the meaning of “public order” in private international law).

52. See Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into Inter-national Investment Agreements*, 49 COLUM. J. TRANSNAT’L L. 670, 690 (2011) (discussing the term public order and how it is commonly found in the domestic law of many states, most notably in civil law countries); see also THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW, *supra* note 51, at 190 (2009) (discussing the meaning of “public order” or public policy in civil law countries).

53. See Choudhury, *supra* note 52, at 690 (describing the concept of “ordre public,” under French law, which parallels the idea of “public order” or “public policy” under the common law and reflects the rules enacted by states to protect the fundamental values of their society); Catherine Kessedjian, *Public Order in European Law*, 1 ERASMUS L. REV. 26 (2007) (discussing the French expression “ordre public” which is translated into English as either “public policy” or “public order”).

54. See *Krombach v. Bamberski* (2000), ECR I-1935, Case C-7/98 at 32-3 (emphasizing that public policy must be subject to a restrictive interpretation); see also THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW, *supra* note 51, at 195 (discussing the restrictive approach courts use in regards to “public order”).

A number of Polish cases refer to the concept of a public policy exception.⁵⁵ In one ruling, the Polish Supreme Court held that examining whether the recognition of a foreign proceeding is contrary to the basic principles of legal order in Poland would not be understood as a requirement that foreign proceedings must be entirely consistent with all Polish and foreign legislation.⁵⁶ Instead, the court held that the concept of a public order exception requires only that foreign proceedings be consistent with the basic principles of legal order.⁵⁷ If, however, the recognition of a foreign proceeding is contrary to the basic principles of legal order, a Polish court may refuse to recognize the proceeding if the contradiction is obvious.⁵⁸ Polish case law additionally observes that the public order exception is not an opportunity to substantively review the foreign court's ruling because such review lies outside the scope of the Polish court's authority.⁵⁹

B. *Chapter 15 of the United States Bankruptcy Code*

Part I.B provides an overview of Chapter 15 of the US Bankruptcy Code and introduces the Public Policy Exception. First, this subpart provides an overview of the relief available under Chapter 15 and the framework for providing such relief. Next, it examines the Public Policy Exception of Chapter 15 and how some

55. CROSS-BORDER INSOLVENCY, *supra* note 1, at 353 (citing Polish Supreme Court in ruling dated April 21 1978, IV CR 65/78, OSNCP 1979, No 1, sec 12 and Polish Supreme Court in ruling dated February 16, 2011, II CSK 541/10, unpublished); Michael Barlowski, *French Reorganization Proceedings Recognized in Poland under the EU's Insolvency Regulation*, WORLD SERVICES GROUP (Aug. 2012), <http://www.worldservicesgroup.com/publications.asp?action=article&artid=4721> (noting that "such inconsistencies would have to strike at the foundations of Polish public policy and be obvious in nature (citing Supreme Court of Poland order of 21 April 1978, Case No. IV CR 65/78, published at OSNCP 1979, No. 1 item 12)").

56. *See supra* note 55 and accompanying text.

57. *See supra* note 55 and accompanying text.

58. *See* CROSS-BORDER INSOLVENCY, *supra* note 1, at 353 (citing Polish Supreme Court in ruling dated February 16, 2011, II CSK 406/10, unpublished); *see also* Barlowski, *supra* note 55. (noting that "such inconsistencies would have to strike at the foundations of Polish public policy and be obvious in nature (citing Supreme Court of Poland order of 21 April 1978, Case No. IV CR 65/78, published at OSNCP 1979, No. 1 item 12)").

59. *See* CROSS-BORDER INSOLVENCY, *supra* note 1, at 353 (citing Polish Supreme Court in ruling dated November 5, 1975, I CR 625/75, OSNCP 1976, No 10, § 215; Polish Supreme Court in ruling dated April 21, 1978, IV CR 65/78, OSNCP 1979, No 1, § 12; Supreme Court in ruling dated May 7, 1980, IV CR 116/80, OSNC 1980, No 11, § 220; and Polish Supreme Court in ruling dated February 16, 2011, II CSK 425/10, unpublished).

US courts have interpreted this section. Finally, it examines the framework of Chapter 15 and how § 1506 fits within that framework.

1. Overview

The US Congress listed five specific objectives when enacting Chapter 15.⁶⁰ The first was to encourage cooperation between US courts and other authorities of foreign countries involved in cross-border cases.⁶¹ The second was to increase “legal certainty for trade and investment.”⁶² The third was to promote the “fair and efficient administration of cross-border insolvencies” so as to “protect the interests of all creditors and other interested entities, including the debtor.”⁶³ The fourth objective was to protect and maximize the value of the debtor’s assets.⁶⁴ The final objective was to facilitate the rescue of financially troubled businesses.⁶⁵

Section 1508 provides that the provisions of Chapter 15 shall be interpreted by considering their international origin and the need to promote an application of Chapter 15 that is consistent with the application of similar statutes adopted by foreign jurisdictions.⁶⁶ Comity considerations are explicitly included in the introduction to §§ 1507 and 1509(b)(3), further indicating that a Chapter 15 court “shall grant comity or cooperation to the foreign representative” of a foreign proceeding.⁶⁷

60. *See* 11 U.S.C. § 1501 (discussing the purpose and scope of application of Chapter 15).

61. *See id.* at § 1501(a)(1)(B) (discussing the objective of cooperation between “the courts and other competent authorities of foreign countries involved in cross-border insolvency cases”).

62. *See id.* at § 1501(a)(2) (listing the objective of “greater legal certainty for trade and investment”).

63. *See id.* at § 1501(a)(3) (listing the objective of “fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor”).

64. *See id.* at § 1501(a)(4) (listing the objective of “protection and maximization of the value of the debtor’s assets”).

65. *See id.* at § 1501(a)(5) (listing the objective of “facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment”).

66. *See id.* at § 1508 (requiring the court, when interpreting chapter 15, to “consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions”).

67. *See id.* at § 1509(b)(3) (requiring that upon “recognition under section 1517 . . . a court in the United States shall grant comity or cooperation to the foreign representative”); *see also* 11 U.S.C. § 1507(b) (providing that “[i]n determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably

Chapter 15 authorizes foreign representatives to commence a case in a US bankruptcy court by filing a petition for recognition of the foreign proceeding.⁶⁸ If the petition meets the requirements embodied in § 1517, the court must enter an order granting recognition of the foreign proceeding.⁶⁹ If that foreign proceeding is pending in the country where the debtor has the center of its main interests, it is recognized as a “foreign main proceeding.”⁷⁰

Section 1519 of the Bankruptcy Code provides a vehicle for the entry of relief that may be necessary during the gap period between the filing of a petition for recognition and the court’s decision on the petition.⁷¹ Section 1519 is limited to relief that is urgently needed to protect the assets of the debtor or the interest of the creditors, and that is provisional or temporary in nature.⁷² The relief would terminate when the petition for recognition is granted, unless the court specifically extends it under § 1521(a)(6).⁷³ Upon the entry of an order recognizing a foreign main proceeding, § 1520 provides automatic relief, including an automatic stay and the ability to operate the debtor’s business within the United States.⁷⁴

assure . . . ”); *see also In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1044 (5th Cir. 2012) *cert. dismissed*, 133 S. Ct. 1862, 185 L. Ed. 2d 862 (2013) (holding that within the context of Chapter 15, comity is raised to a principal objective).

68. 11 U.S.C. §1509(a) (“A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.”); 11 U.S.C. § 101(24) (“The term ‘foreign representative’ means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding.”).

69. *See* 11 U.S.C. § 1517 (listing the requirements that must be satisfied for an order recognizing a foreign proceeding to be entered).

70. *See id.* at § 1517(b)(1) (requiring that a foreign proceeding be recognized “as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests”); 11 U.S.C. § 1502(4) (“‘Foreign main proceeding’ means a foreign proceeding pending in the country where the debtor has the center of its main interests.”).

71. *See id.* at § 1519(a) (permitting the court, “at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature”).

72. *See id.*

73. *See id.* at § 1519(b); 11 U.S.C. § 1521(a)(6) (providing that the court may grant “any appropriate relief, including . . . extending relief granted under section 1519(a)”).

74. *See* 11 U.S.C. § 1520(a)(1)-(4) (“Upon recognition of a foreign proceeding that is a foreign main proceeding—(1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States; (2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate; (3) unless the court orders otherwise, the foreign representative may operate the debtor’s business and may exercise the rights and powers of a trustee under and to

A bankruptcy court is also empowered under § 1521(a) to grant any appropriate relief necessary to effectuate the purpose of Chapter 15 and to protect the assets of the debtor or the interests of the creditors.⁷⁵ Section 1521(a)(1)-(7) provides a non-exhaustive list of the relief available under § 1521(a). Section 1521(a) allows the court to entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative.⁷⁶ The bankruptcy court, however, may only grant discretionary relief under § 1521 if it determines that the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.⁷⁷ Additionally, § 1507(a) gives a court authority to provide "additional assistance," subject to other limitations in Chapter 15 and § 1507(b).⁷⁸

Finally, all of the actions authorized in Chapter 15 are subject to § 1506.⁷⁹ This section provides that "[n]othing 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."⁸⁰

the extent provided by sections 363 and 552; and (4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States."); 11 U.S.C. § 1520(b) ("Subsection (a) does not affect the right to commence an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor.").

75. See 11 U.S.C. § 1521(a) (allowing the court, upon recognition of a foreign proceeding, to grant any appropriate relief).

76. See *id.* (stating that the court may grant "any appropriate relief," including, but not limited to, seven different specific types of relief).

77. 11 U.S.C. § 1522(a) ("The court may grant relief under section 1519 or 1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."); see 11 U.S.C. § 1521(b) (permitting the court to, "at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the 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").

78. See *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1045 (5th Cir. 2012) (discussing the limitations of 11 U.S.C. § 1507); 11 U.S.C. § 1507(b) provides that "in determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—(1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns").

79. See *Jaffe v. Samsung Elec. Co. (In re Qimonda)*, 737 F.3d 14 (4th Cir. 2013) (discussing the framework of Chapter 15 and how 11 U.S.C. § 1506 fits in).

80. See 11 U.S.C. § 1506 (implementing article 6 of the Model Law into Chapter 15).

2. Interpreting Section 1506

The starting point for statutory interpretation of the provisions of Chapter 15 is the plain meaning of its words.⁸¹ The House Committee Report guides this interpretation.⁸² The House Committee Report recognizes that the language of § 1506 follows exactly Article 6 of the Model Law, is standard in UNCITRAL texts, and has been narrowly interpreted on a consistent basis.⁸³ Additionally, the House Committee Report indicates that any use of the public policy exception is restricted to protect only the most fundamental policies.⁸⁴

Since the enactment of Chapter 15, US courts construing § 1506 have continued to emphasize the narrowness of the Public Policy Exception.⁸⁵ The Public Policy Exception is applied only under exceptional circumstances concerning matters of fundamental importance to the United States.⁸⁶ For example, one court has held that the inability to have a jury trial in Canada when one would have had the right to one in the United States does not invoke § 1506.⁸⁷ Additionally, the fact that certain US creditors received less in a foreign proceeding than what they could have received from a US court is not considered manifestly contrary to the public policy of the United States.⁸⁸ The recognition of an order or automatic stay, where

81. *In re Elpida Memory, Inc.*, No. 12-10947 CSS, 2012 WL 6090194, at *5 (Bankr. D. Del. Nov. 20, 2012) (“[when] interpreting a statute, the Court must start with an analysis of its plain meaning”).

82. *See* House Report, *supra* note 4, at 85 (2005) (providing legislative history of Chapter 15); *see also* Jay Lawrence Westbrook, *Chapter 15 At Last*, 79 AM. BANKR. L.J. 713, 719 (2005) (stating that “the most important source of authoritative interpretation of Chapter 15 is the House Committee Report”).

83. House Report, *supra* note 4, at 109 (stating that the language section 1506 “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 world”).

84. *See id.* (explaining that “the word ‘manifestly’ in international usage restricts the public policy exception to the most fundamental policies of the United States”).

85. *See, e.g., In re Ernst & Young, Inc.*, 383 B.R. 773, 781 (Bankr. D. Colo. 2008) (requiring that the public policy exception be applied narrowly).

86. *See id.* (stating that the public policy exception “should be invoked only when the most fundamental policies of the United States are at risk”).

87. *In re RSM Richter Inc. v. Aguilar* (In re Ephedra Prod. Liab. Litig.), 349 B.R. 333, 335-36 (S.D.N.Y. 2006) (holding that “neither section 1506 nor any other law prevents a United States court from giving recognition and enforcement of a foreign insolvency procedure for liquidating claims simply because the procedure alone does not include a right to a jury . . .”).

88. *In re Ernst & Young, Inc.*, 383 B.R. at 781 (finding the public policy argument unpersuasive because there was no evidence to support a finding that the foreign proceeding

the debtor may have received protections beyond what debtors in US bankruptcy proceedings would have received, is also not manifestly contrary to US public policy.⁸⁹

In addition, the sealing of court files by a foreign court that provided protection broader than would be permissible under US law is not manifestly contrary to US public policy.⁹⁰ Furthermore, although a US trustee in a bankruptcy proceeding would be required to be “disinterested” within the meaning of 11 U.S.C. § 327, a conflict of interest held by a foreign representative is not considered to be manifestly contrary to the public policies of the United States.⁹¹ Finally, one US bankruptcy court’s order of protection for non-debtor affiliates, in excess of what US law would have been authorized to grant, is not considered manifestly contrary to the public policies of the United States.⁹²

These decisions tend to support the contention that the fact that application of foreign law leads to a different result than US law, alone, is insufficient to support § 1506 protection.⁹³ Rather, in determining whether to apply § 1506 courts have focused on two factors.⁹⁴ The first is whether the foreign proceeding was procedurally unfair.⁹⁵ The second factor requires courts to examine whether the application of foreign law or the recognition of a foreign main proceeding under Chapter 15 would severely impinge the value and

would produce “a result so drastically different to be ‘manifestly contrary’ to United States public policy”).

89. *In re ABC Learning Ctr. Ltd.*, 445 B.R. 318, 336 (Bankr. D. Del 2010) (finding that “recognition of the Liquidation Proceedings is not manifestly contrary to U.S. public policy and the Court will not deny recognition under the public policy exception of § 1506”).

90. *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 140 (2d Cir. 2013) (holding that recognition of the British Virgin Islands (BVI) liquidation was not manifestly contrary to US public policy).

91. *In re British American Isle of Venice (BVI), Ltd.*, 441 B.R. 713, 718 (Bankr. S.D. Fla. 2010) (holding that provisions of chapter 15 other than section 1506, including section 1522, allow the court to tailor relief to protect everybody’s interests in the BVI Proceeding and that as a result section 1506 was not triggered).

92. *In re Cozumel Caribe, S.A. de C.V.*, 482 B.R. 96, 116-17 (Bankr. S.D.N.Y. 2012) (holding that the stay relief sought by the Foreign Representative is not manifestly contrary to public policy”).

93. *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 567 (E.D. Va. 2010) (noting that application of foreign law leading to a different result than application of US law is, without more, is insufficient to support § 1506 protection).

94. *Id.* (explaining that “in deciding whether to apply § 1506, courts have focused on two factors” (citing *In re Gold & Honey*, 410 B.R. at 372)).

95. *Id.* (stating that the first factor courts have focused on is whether the foreign proceeding was procedurally unfair).

import of a US statutory or constitutional right, and that granting comity would hinder the ability of US bankruptcy courts to carry out fundamental policies and purposes pursuant to these rights.⁹⁶

C. Courts' Interpretations of Public Policy Exceptions Outside of Bankruptcy Law

Part I.C examines various public policy exceptions found outside of bankruptcy law. Specifically, it examines (1) the public policy exception found in enforcement of judgment cases, (2) the public policy exception found in international arbitration, and (3) the public policy exception found in non-bankruptcy US common law. This subpart will provide further background and context in analyzing how the Model Law and Chapter 15 interact with public policy exceptions under Article 6 of the Model Law and § 1506 of the Bankruptcy Code.

1. The Public Policy Exception in Enforcement of Judgment Cases

The public policy exception in private international law has been described as a “safety valve” that allows courts to refuse recognition of a foreign judgment where enforcement conflicts with the forum State’s fundamental concepts of justice.⁹⁷ Article 27 of the European Communities Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (“Brussels Convention”) provides that each of the contracting States has the right to refuse recognition of a judgment if such recognition is contrary to public policy in the State in which recognition is sought.⁹⁸

96. *Id.* (stating that the second factor courts have focused on is “whether the application of foreign law or the recognition of a foreign main proceeding under Chapter 15 would severely impinge the value and import of a U.S. statutory or constitutional right, such that granting comity would severely hinder United States bankruptcy courts abilities to carry out the most fundamental policies and purposes” of these rights” (citing *In re Gold & Honey*, 410 B.R. at 372)) (internal quotations omitted).

97. See Felix D. Strebel, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 *Loy. L.A. Int'l & Comp. L. J.* 55, 66 (1999) (describing the public policy exception in private international law “as a ‘safety valve’ that allows courts to refuse recognition of a foreign judgment where enforcement conflicts with the forum state’s fundamental concepts of justice”); ROBERT J. SHARPE, *THE ENFORCEMENT OF FOREIGN JUDGMENTS, IN DEBTOR-CREDITOR LAW: PRACTICE AND DOCTRINE* 685 (M.S. Springman & E. Gertner eds., 1985) (describing the public policy exception in private international law as a “safety valve”).

98. European Communities Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, reprinted in

The European Court of Justice (“ECJ”) has consistently refused to apply this public policy exception in cases where: (i) objection to the enforcement of a foreign judgment is founded upon the original court’s exercise of jurisdiction, (ii) the original court has applied a law that differs from the law that the enforcing court would have applied, and (iii) there are defects in the substance of the original court’s judgment.⁹⁹ The ECJ has consistently applied the public policy exception to deny enforcement of foreign judgments where: (i) the foreign court’s decision would have led to a result or order that was incompatible or contrary to the Brussels Convention or (ii) the foreign court’s summons to the defendant did not constitute adequate notice under that nation’s law.¹⁰⁰ In sum, although the ECJ has relied on the Brussels Convention’s public policy exception to deny enforcement of foreign judgments, it has done so only in limited situations.

2. The Public Policy Exception in International Arbitration

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, was adopted by a United Nations diplomatic conference and requires courts of contracting States to give effect to private arbitration agreements and to recognize and enforce arbitration awards made in other contracting States, subject to a few exceptions.¹⁰¹ The most

8 I.L.M. 229, amended by Convention on Accession to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Oct. 9, 1978, 1978 O.J. (L304) 1, reprinted in 18 I.L.M. 21 [hereinafter *Brussels Convention*] (requiring that a judgment not be recognized if such recognition is contrary to public policy in the State in which recognition is sought).

99. Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis*, 18 LOY. L.A. INT’L & COMP. L.J. 795, 809-13 (1996) (stating that limited scope of the public policy exception ensures that enforcing court cannot invoke its public policy on grounds that judgment was erroneous on the merits, whether in the ascertainment of facts or determination or application of law and also discussing the holdings of various ECJ Decisions analyzing public policy exceptions); D. LASOK & P.A. STONE, *CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY* 299 (1987) (discussing the ECJ’s application of public policy exceptions).

100. See Minehan, *supra* note 99, at 813 (discussing ECJ Case 145/86, *Hoffman v. Krieg*, 1988 E.C.R. 645, (1989) 2 CEC (CCH) 494 (1988) and ECJ Case 228/81, *Pendy Plastic Products B.V. v. Pluspunkt Handelsgesellschaft mbH*, 1982 E.C.R. 2723, (1981-1983 Transfer Binder) Common Mkt. Rep. (CCH) ¶ 8853 (July 15, 1982)); ULRICH MAGNUS & PETER MANKOWSKI, *BRUSSELS I REGULATION* 596-98 (2007) (discussing ECJ Case 145/86, *Hoffman v. Krieg*, 1988 E.C.R. 645, (1989) 2 CEC (CCH) 494 (1988)).

101. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter *New York Convention*].

relevant exception is contained in Article V(2)(b), which provides that recognition and enforcement of an award may be refused if “the recognition or enforcement would be contrary to the public policy of that country.”¹⁰²

Although at first glance this provision would appear to grant courts wide latitude in protecting mandatory public law rules, courts all over the world have construed it narrowly, defining public policy as limited to “the forum State's most basic notions of morality and justice.”¹⁰³ In practice, courts rarely accept public policy as justification for refusing to recognize or enforce a judgment.¹⁰⁴ If the exception is to be applied, the public policy must be “well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”¹⁰⁵

The broad range of jurisprudence on the issue confirms that courts have abided by this narrow interpretation.¹⁰⁶ For example, an

102. New York Convention, *supra* note 101, at art. V(2)(b) (providing that recognition and enforcement of an award may be refused if “the recognition or enforcement would be contrary to the public policy of that country”); *see* *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 624, 638 (1985) (recognizing that under art. V(2)(b) the “Convention reserves to each signatory country the right to refuse enforcement of an award”).

103. *See* *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974) (citing RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 117, cmt. c, at 340 (1971); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198 (1918)).

104. *Loucks*, 224 N.Y. 99, at 111 (“To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of ‘public policy.’ Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.”); EMMANUEL GAILLARD & JOHN SAVAGE, *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* 1713 (1999) (discussing the limited application of the New York Convention's public policy exception).

105. *W.R. Grace & Co. v. Local Union*, 759, 461 U.S. 757, 766 (1983) (“If the contract as interpreted by Barrett violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”) (internal citations and quotations omitted).

106. *See* Andrew M. Campbell, *Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds*, 144 A.L.R. FED. 481 (2013) (providing an extensive review of cases in which confirmation of a foreign arbitral award was challenged as contrary to US public policy). *See also, e.g.*, *McDermott Intern., Inc. v. Underwriters at Lloyd's*, 1996 WL 291803, 144 A.L.R. Fed. 731 (E.D. La. 1996), *aff'd on other grounds*, 120 F.3d 583 (5th Cir. 1997) (confirming a foreign arbitration award in favor of an association of insurers despite the claim

error of law will not act as a bar to enforcement—a court will not review the decision as long as an arbitrator has acted within the scope of his authority.¹⁰⁷ In fact, awards have been enforced in the United States “even in circumstances in which enforcement of the award may violate federal or state law.”¹⁰⁸ For example, in the United States, non-US arbitral awards have been upheld and confirmed when enforcement of the award conflicted with US foreign policy, where the prevailing party committed fraud, and where the arbitrators did not follow agreed upon arbitral rules and standards.¹⁰⁹

that enforcement of the award violate the public policy of the United States in view of a state statute which declared invalid agreements to arbitrate insurance claims outside of the state).

107. See Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22(2) ARB. INT'L 179, at 199 (describing UK House of Lords decision, *Lesotho Highlands Development Authority v. Impreglio SpA*, [2005] UKHL 43, “Any error of law by the tribunal was an error within its power . . . Parties are aware of the risks they are taking with respect to arbitration awards with the law being applied correctly. There are few allegations that arbitrators have got it wrong, but even where they do, this is a risk that the parties undertake. It is not for the courts in England to intervene to review the arbitrators' powers or decisions on questions of law—whatever the national law applicable.”); *but see* Howard A. Ellins & Christopher H. Withers, *Judicial Deference to the Authority of Arbitrators to Interpret and Apply Federal Antitrust Laws*, 12 AM. REV. INT'L ARB. 387, 396 (2001) (quoting *United Paperworks Int'l v. AFL-CIO*, 484 U.S. 29, 38 (1987) (“As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”)).

108. Ellins, *supra* note 107, at 400 (quoting *United Paperworks Int'l v. AFL-CIO*, 484 U.S. 29, 38 (1987), “As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”); *see* *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980) (holding that enforcement of an arbitration award does not violate public policy despite contravening a Louisiana statute that prohibited insurance policies from divesting courts of actions against insurers).

109. See *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969, 978 (2d Cir. 1974) (confirming arbitration award in favor of Egyptian corporation against American company that failed fully to execute contract to construct a plant in Egypt when all Americans except those holding special visas were ordered to leave country after Six Days War and U.S. Agency for International Development withdrew financing for project); *Indocomex Fibres Pte., Ltd. v. Cotton Co. Int'l*, 916 F. Supp 721, 728-29 (W.D. Tenn. 1996) (confirming arbitration award in favor of purchaser despite fact that purchaser was guilty of fraud by failing to provide required letter of credit); *Waterside Ocean Navigation Co., v. Int'l Navigation Ltd.*, 737 F.2d 150, 152-53 (2d Cir. 1984) (confirming arbitration award where arbitrators considered improper testimony or evidence); *In re Matter of Andros Compania Maritima, S.A.*, 579 F.2d 691, 703-04 (2d Cir. 1978) (confirming arbitration award where arbitrators biased or prejudiced); *Saudi Iron & Steel Co. v. Stencor USA Inc.*, 1997 WL 642566 at *2-3 (S.D.N.Y. 1997) (confirming arbitration award where arbitrators improperly relied upon prior court arbitrations).

3. The Public Policy Exception in US Common Law

In 1895, the US Supreme Court held that a court may refuse to enforce a non-US judgment that violates a public policy of the United States.¹¹⁰ Although in theory this exception is broad, US courts have narrowly construed this common law public policy exception and exercised it only rarely.¹¹¹ A court may not decline enforcement merely because a non-US judgment differs from local public policy—rather, to justify its refusal to enforce a non-US judgment, a US court must find that the judgment “contravenes a crucial stated public policy affecting a fundamental interest of the forum.”¹¹²

Although no US court has enumerated a clear standard for the common law public policy exception, US courts have consistently refused to apply the public policy exception in enforcement cases for: (1) the loss of goodwill and attorney’s fees awards, even though US law generally does not allow these awards; (2) prejudgment interest, even where local law prohibits such awards; (3) non-US proceedings that invoke procedures inconsistent with the US Federal Rules of Civil Procedure; and (4) remedying injuries incurred during deportation.¹¹³ By contrast, US courts have consistently applied the

110. *Hilton v. Guyot*, 159 U.S. 113, 165 (1895) (describing comity as a “voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests”) (internal citation omitted).

111. *See Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 931 (D.C. Cir. 1984) (proffering that “[t]he standard for refusing to enforce judgments on public policy grounds is strict”).

112. *Compania Mexicana Rediodifusora Franteriza v. Spann*, 41 F. Supp. 907, 908-09 (N.D. Tex. 1941), *aff’d* 131 F.2d 609 (5th Cir. 1942).

113. *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) (holding that “the variance with Pennsylvania law is not such that the enforcement tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of law, or . . . undermines the sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel . . .”); *see also Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680, 692-93 (7th Cir. 1987) (holding that “the mere fact that Belgian law permits prejudgment interest while Illinois law might not is not fatal to the Belgian award”); *Tahan v. Hodgson*, 662 F.2d 862, 866 (D.C. Cir. 1981) (holding that although the Israeli default judgment would not have been awarded in the United States, the Israeli notice requirements were not “so repugnant to fundamental notions of what is decent and just that U.S. public policy requires non-enforcement of the [Israeli] judgment”) (internal quotations omitted); *Ricart v. Pan American World Airways, Inc.*, No. CIV.A.89-0768(HHG), 1990 WL 236080, at *1 (D.D.C. 1990) (upholding a Dominican Republic judgment for damages incurred when the defendant airline deported the plaintiff, even though the judgment was “in some conflict with . . . obligations of the United States”); *Browne v. Prentice Dry Goods, Inc.*, No. 84 CIV 8081(PKL), 1986 WL 6496 at *4 (S.D.N.Y. 1986) (enforcing an Argentinean judgment for attorney’s fees even though a New York statute proscribed the awarding of attorney’s fees as being contrary to

public policy exception to deny enforcement of non-US judgments where: (1) the wrongdoer, most often a fugitive from justice, seeks to enforce a judgment for damages occurring in the context of his wrongdoing; (2) the judgment is incompatible with the US Constitution; and (3) the judgment is penal in nature.¹¹⁴

In sum, US courts have only applied the common law public policy exception where an interest of the forum greater than protecting the litigant is at stake.¹¹⁵ For example, a violation of the US Constitution or the desire to prevent individuals from circumventing federal or state laws would likely invoke a public policy exception.¹¹⁶

public policy); *Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885, 900-01 (N.D. Tex. 1980) (holding that even though Texas law prohibited prejudgment interest, the distinction in laws did not violate “good morals and natural justice” as to fall within the public policy exception).

114. *See United States v. Eng.*, 951 F.2d 461, 462 (2d Cir. 1991) (stating that a fugitive from justice “cannot eat his cake and have it too”); *United States v. \$45,940 in Currency*, 739 F.2d 792, 798 (2d Cir. 1984) (denying enforcement of foreign judgments that would reward a wrongdoer for his or her malfeasance on the ground that to hold otherwise would result in the court’s effective approval of the claimant’s initial wrongdoing, a practice that would defy the very core of the US justice system); *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 5-6 (D.D.C. 1995) (holding that enforcement of British libel judgment would violate state public policy and deprive plaintiff of his constitutional right to free speech where there was no proof that defendant’s statements were made with actual malice); *United States v. One Lot of U.S. Currency totaling \$506,537*, 628 F. Supp. 1473, 1475 (S.D. Fla. 1986) (finding that fugitive from justice is not entitled to call upon judicial resources for assistance); *see also Abdullah v. Sheridan Square Press, Inc.*, No. 93 CIV.2525 (-LLS), 1994 L 419847, at *4 (S.D.N.Y. 1994) (refusing to enforce British libel judgment because “establishment of a claim for libel under the British law of defamation would be antithetical to the First Amendment protection accorded to defendants”); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 821 F. Supp. 292, 298 (D.N.J. 1993) (refusing to enforce judgment that included sanctions, which foreign court imposed to deter wanton acts “by way of example or correction for the public good” and not to compensate the plaintiff); *Huntington v. Attrill*, 146 U.S. 657, 673-74 (1892) (holding that if a judgment serves to “punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act” of the defendant, US courts will invoke the public policy exception).

115. *See Minehan*, *supra* note 99 at 808 (noting that “although U.S. courts have applied the public policy exception and refused to enforce judgments in specific types of cases, U.S. courts have narrowly interpreted the public policy exception and applied it on rare occasions”); Keri Bruce, *The Hague Convention on Choice-of-Court Agreements: Is the Public Policy Exception Helping Click-Away the Security of Non-Negotiated Agreements?*, 32 *Brooklyn J. Int’l L.* 1103, 1120 (2007) (explaining that “most cases in which courts find public policy violations, there is at stake some interest of the forum greater than protecting the litigant, such as a violation of the U.S. Constitution or the desire to prevent individuals from circumventing federal or state laws”).

116. *See Bruce*, *supra* note 115, at 1121 (explaining that “in most cases in which courts find public policy violations, there is at stake some interest of the forum greater than protecting the litigant, such as a violation of the U.S. Constitution or the desire to prevent individuals from circumventing federal or state laws”); Jonathan A. Pittman, Note, *The Public Policy*

In this context, US courts interpret the public policy exception narrowly and have “exhibited a profound tendency towards the liberal enforcement of foreign judgments that would not normally be awarded in US courts.”¹¹⁷

Part I introduced public policy exceptions both in and outside the context of bankruptcy law. Part I.A introduced the UNCITRAL Model Law on Cross-Border Insolvency providing an overview of the Model Law and introducing the public policy exception found in Article 6 of the Model Law. Part I.B provided an overview of Chapter 15 of the US Bankruptcy Code and more specifically it introduced 11 U.S.C. § 1506—Chapter 15’s public policy exception. Part I.C discussed public policy exceptions outside the context of bankruptcy, including (i) the public policy exception found in enforcement of judgment cases, (ii) the public policy exception found in international arbitration, and (iii) the public policy exception found in US common law.

II. *US COURTS DENYING RELIEF BASED UPON § 1506*

As discussed *infra*, courts uniformly construe § 1506 to apply only when fundamental policies of the United States are at risk.¹¹⁸ Only five decisions have invoked the Public Policy Exception.¹¹⁹

Exception to the Recognition of Foreign Judgments, 22 Vand. J. Transnat’l L. 969, 991 (1989) (explaining that “in most cases in which courts find public policy violations, there is at stake some interest of the forum greater than merely protecting the litigant”) (citing Von Mehren & Patterson, *Recognition and Enforcement of Foreign Country Judgments in the United States*, 6 Law & Pol’y Int’l Bus., 37, 63 (1974)).

117. See Minehan, *supra* note 99 at 804 (noting that “U.S. courts have enforced foreign judgments based on causes of action that either do not exist under or vary from U.S. law. U.S. courts have enforced foreign damage awards that would not be granted in the United States. U.S. courts have thus exhibited a profound tendency towards the liberal enforcement of foreign judgments that would not normally be awarded in U.S. courts.”); Bruce, *supra* note 115, at 1115 (explaining that “there are few cases in the U.S. that have denied recognition and enforcement on public policy reasons alone, despite the fact that every state has the right to refuse enforcement of a foreign judgment”).

118. See, e.g., *In re Ernst & Young, Inc.*, 383 B.R. 773, 781 (Bankr. D. Colo. 2008) (holding that “the public policy exception should be invoked only when the most fundamental policies of the United States are at risk”).

119. See *In re Qimonda AG*, 462 B.R. 165, 185 (Bankr. E.D. Va. 2011) (holding that “deferring to German law, to the extent it allows cancellation of the U.S. patent licenses, would be manifestly contrary to U.S. public policy.”); *In re Vitro S.A.B de CV*, 473 B.R. 117, 132 (Bankr. N.D. Tex. 2012) (concluding that a foreign reorganization plan that extinguishes, rather than modifies, the protection of third party claims in a bankruptcy case is manifestly contrary to the public policy of the United States); *In re Toft*, 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011) (denying relief because “[s]uch relief would impinge severely a U.S.

These five cases involved: (A) constitutional privacy rights—*In re Toft*; (B) constitutional due process rights—*In re Sivec*; (C) a foreign main proceeding pursued in violation of US court order—*In re Gold & Honey*; (D) the discharge of third-party guarantees—*In re Vitro*; and (E) the protection of US patent licenses—*In re Qimonda*.¹²⁰ This Part analyzes of these five cases. Note, however, that on appeal, the US Court of Appeals for the Fifth Circuit and the Fourth Circuit in *Vitro* and *Qimonda*, respectively, held that an analysis of § 1506 was unnecessary because foreign recognition could be denied under a different section of Chapter 15.¹²¹

A. Privacy Rights

In *In re Toft*, the Bankruptcy Court for the Southern District of New York refused to enforce a German court order that would have allowed the foreign representative unrestrained access to emails of the debtor that were being stored on Internet servers in the United States.¹²² The German court had granted the foreign representative a Mail Interception Order on an *ex parte* basis, which allowed the foreign representative to intercept the debtor's postal and electronic mail without giving notice to the debtor.¹²³

Chapter 15 permits a foreign representative to seek discovery concerning a debtor's assets, affairs, rights, obligations, or

constitutional or statutory right.”) (internal citation and quotations omitted); *In re Sivec* Srl, Case No. 11-80799-TRC, 2011 WL 3651250 at *3 (Bankr. E.D. Okla. 2011) (denying the foreign representatives request for relief because to “grant these requests would violate this country’s fundamental rights of notice and opportunity to be heard.”); *In re Gold & Honey, Ltd.*, 410 B.R. 357, 372-73 (Bankr. E.D.N.Y. 2009) (invoking the Public Policy Exception because recognition of the foreign proceeding would be “manifestly contrary to the public policy of the United States because such recognition would reward and legitimize the foreign representatives violation of both the automatic stay and this Court’s Orders regarding the stay”).

120. See *supra* note 119 and accompanying text.

121. See *In re Vitro*, 701 F.3d at 1070 (holding that “because we conclude that relief is not warranted under § 1507, however, and would also not be available under § 1521, we do not reach whether the Concurso plan would be manifestly contrary to a fundamental public policy of the United States”); *In re Qimonda*, 737 F.3d at 32 (affirming the bankruptcy court on its § 1522(a) analysis, rather than engaging in an analysis under § 1506).

122. *In re Toft*, 453 B.R. at 189 (explaining that the court order sought by the foreign representative requests that the court enter an order enforcing the Mail Interception Order in the United States by compelling the ISPs, AOL, Inc. and 1 & 1 Mail & Media, Inc., to disclose to all of the Debtor's e-mails currently stored on their servers and to deliver copies of all e-mails received by the Debtor in the future).

123. *Id.* at 188 (describing the “Mail Interception Order” entered by the German court that authorizes the foreign representative to intercept Toft's postal and electronic mail).

liabilities.¹²⁴ Chapter 15 specifically provides that this relief is discretionary.¹²⁵ In general, US courts have construed this provision to require that interests of allowing discovery of a debtor's personal financial information be balanced with the debtor's privacy interests.¹²⁶

Although the Bankruptcy Court for the Southern District of New York acknowledged that mail interception orders are common practice under German law, it refused to enforce the order in the United States because doing so would violate fundamental US public policies.¹²⁷ In particular, the court noted that the privacy of electronic communications is subject to comprehensive legislation in the United States, including through the Wiretap Act, the Privacy Act, and the Stored Communications Act.¹²⁸ Under these US laws, any individual intentionally intercepting electronic communications may be subject to criminal and civil penalties.¹²⁹ Such interceptions may be authorized only during the course of a criminal investigation and upon a "heightened showing of necessity."¹³⁰ Finding that recognition would be manifestly contrary to US public policy, the bankruptcy court denied the request for Chapter 15 recognition of the German proceeding.¹³¹

124. *See* 11 U.S.C. § 1521(a)(4) (permitting the court to, "at the request of the foreign representative, grant any appropriate relief, including providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities"); *see also In re Toft*, 453 B.R. at 193 (describing the relief available under § 1521(a)(4)).

125. *See In re Toft*, 453 B.R. at 193 (holding that 1521(a)(4) permits discovery after entry of an order of recognition and 1519(a)(3) provides such relief on an interim, emergency basis pending an order of recognition).

126. *See Id.* at 196 (holding that "a court should tailor relief balancing the interests of the foreign representative and those affected by the relief") (quoting *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006)).

127. *Id.* at 188, 201 (denying recognition of what is alleged to be common German practice, the German Court entered a Mail Interception Order).

128. *Id.* at 189 (discussing the relief sought by the foreign representative and criticizing inspection orders because of their impact on privacy rights and the protections of the Fourth Amendment to the U.S. Constitution).

129. *Id.* at 197 (describing the Wiretap Act and how "civil and criminal penalties can be imposed on any person who 'intentionally intercepts . . . any wire, oral, or electronic communication'") (internal citation omitted).

130. *Id.* (discussing the requirements needed to lawfully conduct a wiretap without the consent of one of the parties to the communication).

131. *Id.* at 201 (holding that "this is one of the rare cases in which an order of recognition on the terms requested would be manifestly contrary to U.S. public policy, reflected in rights that are based on fundamental principles of protecting the secrecy of

Rights protected by the Constitution of a State uniformly have been considered policy concerns validly triggering application of a public policy exception.¹³² The public policies at stake in *Toft* involved privacy rights protected under the US Constitution.¹³³ Thus, the court's holding that foreign recognition would be "manifestly contrary to the public policy of the United States" was consistent with other cases invoking a public policy exception.¹³⁴

B. *Due Process Rights*

Another fundamental feature of US law is that parties affected by a legal proceeding are entitled to due process and notice.¹³⁵ *In re Sivec SRL* illustrates that a bankruptcy court may deny recognition to a foreign proceeding if creditors are deprived of a right to receive notice or an opportunity to be heard.¹³⁶ In this case, Sivec entered into an Italian liquidation proceeding.¹³⁷ Zeeco, a creditor of Sivec, did not receive notice of the Italian proceeding.¹³⁸ As a result, Zeeco did not file a proof of claim against Sivec in the Italian proceeding.¹³⁹ Years later, Zeeco sued Sivec in the Eastern District of Oklahoma for breach

electronic communications, limiting the powers of an estate representative, and providing notice to parties whose rights are affected by a court order").

132. *See supra* notes 114-16 and accompanying text (discussing the public policy exception in US non-bankruptcy law in instances where constitutional rights are threatened).

133. *In re Toft*, 453 B.R. at 198 (holding that "the relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States. Such relief would impinge severely a U.S. constitutional or statutory right.") (internal citation and quotations omitted).

134. *See supra* notes 114-16 (discussing the public policy exception in US non-bankruptcy law in instances where constitutional rights are threatened).

135. *See In re Sivec Srl*, Case No. 11-80799-TRC, 2011 WL 3651250, at *3 (Bankr. E.D. Okla. 2011) (finding public policy grounds for denying Sivec's requested relief of continuing the stay of the Eastern District lawsuit and seeking an order from this Court directing Zeeco to turn over the disputed funds because such requests would violate this country's fundamental rights of notice and opportunity to be heard).

136. *Id.* (holding that such relief would violate the US's fundamental rights of notice and opportunity to be heard).

137. *Id.* at *1 (describing the Italian liquidation proceeding as a foreign main proceeding).

138. *Id.* at *3 (holding that the foreign representative's requested relief of continuing the stay of the Eastern District lawsuit and seeking an order from this Court directing Zeeco to turn over the disputed funds "would violate this country's fundamental rights of notice and opportunity to be heard").

139. *Id.* (determining that "Zeeco is not a secured creditor because it did not file a claim in the Italian Proceeding").

of contract.¹⁴⁰ Sivec consented to the court's jurisdiction and then filed a Chapter 15 petition asking the bankruptcy court to recognize the Italian liquidation proceeding and to stay the Zeeco breach of contract action.¹⁴¹ The bankruptcy court held that denying Zeeco the right to prosecute its contract claim “would violate this country's fundamental rights of notice and opportunity to be heard.”¹⁴² The court concluded that protection of Zeeco's fundamental due process rights required that the stay be lifted and the Oklahoma action proceed to judgment.¹⁴³

Rights protected by the Constitution uniformly have been considered a valid trigger for a public policy exception.¹⁴⁴ The public policy at stake in this case involved fundamental and constitutionally protected rights to notice and the opportunity to be heard.¹⁴⁵ Thus, the court holding that the foreign representative's request for relief should be denied based on § 1506 was consistent with other foreign courts invoking public policy exceptions.¹⁴⁶ However, to refuse recognition, the court did not need to reach a § 1506 analysis. The court held that Zeeco's interests had not been protected in the Italian proceeding.¹⁴⁷ Accordingly, the court could have solely relied on § 1522, which requires that “the interests of U.S. creditors, such as Zeeco, [be] protected.”¹⁴⁸

140. *Id.* at *1 (describing the procedural history of the case).

141. *Id.* (describing the procedural history of the case).

142. *Id.* at *3 (holding that the foreign representative's requested relief of continuing the stay of the Eastern District lawsuit and seeking an order from this Court directing Zeeco to turn over the disputed funds would violate this country's fundamental rights of notice and opportunity to be heard).

143. *Id.* at *4 (holding that Zeeco's interests were not protected in the Italian proceedings because it had received no notice of those proceedings and had no ability to recover from the Italian estate since it had not filed a claim).

144. *See supra* notes 114-16 and accompanying text (discussing the public policy exception in US non-bankruptcy law being invoked when constitutional rights are threatened).

145. *In re Sivec Srl*, Case No. 11-80799-TRC, 2011 WL 3651250, at *4 (Bankr. E.D. Okla. 2011), (holding that in order “to insure that Zeeco's fundamental rights of notice and opportunity to be heard are protected, and in an effort to protect its interests and mold relief appropriate in this particular case, the stay should be lifted and the parties should proceed to a resolution of their dispute through the Eastern District lawsuit”).

146. *See supra* notes 114-17 (discussing instances when public policy exceptions outside of bankruptcy have been invoked).

147. *In re Sivec Srl*, 2011 WL 3651250 at *3 (“Zeeco's interests do not appear to have been protected in the Italian proceeding.”).

148. *Id.* (interpreting and applying § 1522); *see also* 11 U.S.C. § 1522(a) (allowing the court to “grant relief under section 1519 or 1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected”).

C. *Foreign Main Proceeding Pursued in Violation of an Automatic Stay*

In *In re Gold & Honey*, the Bankruptcy Court for the Eastern District of New York invoked § 1506 to foreclose a foreign creditor from obtaining recognition, where the foreign proceedings were commenced in violation of the orders of the US court.¹⁴⁹ In 2008, Gold & Honey Ltd. and an affiliate filed voluntary Chapter 11 petitions in the Eastern District of New York.¹⁵⁰ At the same time, a creditor of the Gold & Honey debtors, the First International Bank of Israel (“FIBI”), was pursuing receivership proceedings in Israel.¹⁵¹ The US Bankruptcy Court warned FIBI that its actions in the receivership proceedings violated the automatic stay and were taken “at its own peril.”¹⁵² Nonetheless, FIBI pursued the Israeli receivership and subsequently filed for Chapter 15 recognition of those proceedings in the same court where the Chapter 11 case was pending.¹⁵³

The *Gold & Honey* court denied recognition of the Israeli receivership, finding that it would severely impinge US bankruptcy courts' abilities to carry out two of the most fundamental policies and purposes of the automatic stay.¹⁵⁴ The court thought that this result would invite parties to contravene US public policy while simultaneously invoking the benefits of a US court's jurisdiction.¹⁵⁵ While *In re Gold & Honey* did not implicate constitutional issues, courts uniformly have held that a public policy exception should be triggered where recognition is inconsistent with basic notions of

149. See *In re Gold & Honey*, 410 B.R. 357, 372-73 (Bankr. E.D.N.Y. 2009) (denying recognition of the foreign proceeding because of the ramifications that would ensue in derogation of fundamental United States policies).

150. *Id.* at 363 (describing the procedural history of the case).

151. *Id.* (explaining FIBI's application for the appointment of a temporary receiver before the Israeli Court was done in violation of the automatic stay).

152. *Id.* at 363 (describing the court's warning to FIBI “that if it proceeded before the Israeli Court in the Israeli Receivership Proceeding, it did so at its own peril”).

153. *Id.* at 364 (describing the actions of FIBI and the foreign court).

154. *Id.* at 372 (holding that “a foreign seizure of a debtor's assets postpetition would severely hinder United States bankruptcy courts' abilities to carry out two of the most fundamental policies and purposes of the automatic stay—namely, preventing one creditor from obtaining an advantage over other creditors, and providing for the efficient and orderly distribution of a debtor's assets to all creditors in accordance with their relative priorities”).

155. *Id.* at 372 (explaining that “condoning FIBI's conduct here would limit a federal court's jurisdiction over all of the debtors' property ‘wherever located and by whomever held,’ as any future creditor could follow FIBI's lead and violate the stay in order to procure assets that were outside the United States, yet still under the United States court's jurisdiction”).

justice.¹⁵⁶ For a US court to grant recognition of a foreign order sought in direct violation of the same US court's order granting an automatic stay would contravene basic notions of justice.¹⁵⁷ Granting recognition of a foreign order sought in violation of the same court's automatic stay order rewards the wrongdoer for his wrongdoing.¹⁵⁸ Thus, the court's holding that recognition would be "manifestly contrary to the public policy of the United States" is consistent with the application of public policy exception by foreign courts.¹⁵⁹

However, the *Gold & Honey* court did not need to reach a § 1506 analysis to refuse recognition.¹⁶⁰ The court held that the foreign proceeding was neither a foreign main proceeding nor a foreign nonmain proceeding.¹⁶¹ Thus, the court could have ended its analysis by denying recognition under § 1517.¹⁶² Instead, the court, in dicta, went on to hold that recognition of the foreign proceeding would be manifestly contrary to the public policy of the US.¹⁶³

D. *Discharge of Third-Party Guarantees*

Vitro, S.A.B. de C.V. ("Vitro"), a Mexican holding company conducting substantially all of its multinational operations through subsidiaries, filed a voluntary judicial reorganization proceeding in Mexico in 2010.¹⁶⁴ Its insolvency representative later sought recognition of a pre-packaged "concurso" or restructuring plan.¹⁶⁵ The approval order extinguished the guarantee obligation of Vitro's non-

156. See *supra* note 114 and accompanying text (discussing *U.S. v. \$45,940 in Currency*, 739 F.2d 792, and providing an example where a wrongdoer seeks to enforce a judgment for damages occurring in the context of his wrongdoing).

157. *Id.* (discussing basic notions of justice would be violated if a wrongdoer would be rewarded for damages occurring in the context of his wrongdoing).

158. *Supra* note 157 and accompanying text.

159. See *supra* notes 114-17 (discussing instances when public policy exceptions outside of bankruptcy have been invoked).

160. *In re Gold & Honey*, 410 B.R. at 367 ("The Israeli Receivership Proceeding is neither a foreign main proceeding nor a foreign nonmain proceeding.").

161. *Id.* (holding that the foreign proceeding was neither a foreign main proceeding nor a foreign nonmain proceeding).

162. See 11 U.S.C. § 1517(a)(1) (requiring that a foreign proceeding be a foreign main or nonmain proceeding).

163. See *In re Gold & Honey*, 410 B.R. at 372-73 (refusing to recognize the foreign proceeding because of the serious ramifications that would ensue in derogation of fundamental United States policies).

164. See *In re Vitro S.A.B. de CV*, 455 B.R. 571, 575 (Bankr. N.D. Tex. 2011) (describing the procedural history of the case).

165. *Id.* (describing the procedural history of the case).

debtor subsidiary guarantors, effectively discharging obligations to the note-holders.¹⁶⁶ In response, Vitro's note-holders brought action in a New York state court to collect debts owed under the guarantee obligations.¹⁶⁷ This prompted Vitro's foreign representative to file a motion in the United States Bankruptcy Court for the Northern District of Texas seeking recognition of the Mexican proceeding and a permanent injunction prohibiting the note-holders from bringing any actions in the United States against Vitro or its non-debtor subsidiary guarantors.¹⁶⁸ Citing to 11 U.S.C. § 524, the bankruptcy court concluded that the "protection of third-party claims in a bankruptcy case is a fundamental policy of the United States."¹⁶⁹ The court held that extinguishing the non-debtor guarantee liability was extreme, and that because these claims were neither recognized nor protected by the *Concurso* plan, such a plan was "manifestly contrary to such policy of the United States" and could not be enforced under § 1506.¹⁷⁰

On appeal, the Fifth Circuit sidestepped the Public Policy Exception.¹⁷¹ In doing so, the Fifth Circuit rejected the traditional comity-based approach used by previous courts and developed a new set of rules for statutory interpretation of Chapter 15.¹⁷² It segregated the sections of Chapter 15 containing specific terms and created a rule of hierarchy of these more specific provisions, §§ 1521 and 1522,

166. See *In re Vitro S.A.B. de CV*, 473 B.R. 117, 132 (Bankr. N.D. Tex. 2012) (finding that "the Concurso Approval Order does not simply modify such claims against non-debtors, they are extinguished").

167. See *In re Vitro*, 455 B.R. at 575 (describing the procedural history of the case).

168. See *In re Vitro*, 473 B.R. at 120 (discussing the relief requested by the foreign representatives).

169. *Id.* at 131-32 (describing the policy of the United States is regarding "discharge of claims for entities other than a debtor in an insolvency proceeding, absent extraordinary circumstances not present in this case") (citing *Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995)).

170. *Id.* at 132 (holding that the *Concurso* plan is manifestly contrary to the policy of the United States and cannot be enforced because it extinguishes claims against non-debtor guarantors).

171. *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1070 (5th Cir. 2012) (holding that "because we conclude that relief is not warranted under § 1507, however, and would also not be available under § 1521, we do not reach whether the *Concurso* plan would be manifestly contrary to a fundamental public policy of the United States.>").

172. See *id.* at 1054 (determining that although comity should be an important factor in determining whether relief will be granted a foreign representative may independently seek relief under either § 1521 or § 1507).

over the more general provisions as in § 1507.¹⁷³ Thus, the court concluded that relief was not warranted under § 1507 and would also not be available under § 1521, and as a result the court held that it did not need to determine “whether the *Concurso* plan would be manifestly contrary to a fundamental public policy of the United States.”¹⁷⁴

E. *Protection of US Patent Licenses*

The US Bankruptcy Court for the Eastern District of Virginia refused recognition in *Qimonda* because the requested relief would have severely impinged on an important statutory protection accorded to licensees of US patents, thereby undermining a fundamental US public policy of promoting technological innovation.¹⁷⁵ The court held that, on the whole, the hardship faced by foreign debtor by depriving it of opportunity to negotiate new licensing agreements at higher rates was outweighed by the substantial detriment that the US licensees would suffer.¹⁷⁶ Thus, even absent public policy considerations, foreign recognition was denied because the requirements of § 1522 had not been satisfied.¹⁷⁷ After already holding that the requirements of § 1522 had not been satisfied, the court went on to hold in dicta that the failure of German insolvency law to protect patent licensees was “manifestly contrary” to the public policy of the United States.¹⁷⁸

On appeal, the Fourth Circuit upheld the balance of interests employed by the lower court under § 1522(a) and “in reaching this conclusion [joined] the Fifth Circuit[’s]” interpretation of §§ 1521,

173. *Id.* at 1056 establishing the framework for Chapter 15 and holding that: First, because § 1521 lists specific forms of relief, a court should initially consider whether the relief requested falls under one of these explicit provisions (quoting *In re Read*, 692 F.3d 1185, 1191 (11th Cir. 2012) (holding that specific terms prevail over the general)) . . . Second, if § 1521(a)(1)-(7) and (b) does not list the requested relief, a court should decide whether it can be considered “appropriate relief” under § 1521(a) . . . Third, only if the requested relief appears to go beyond the relief previously available under § 304 or currently provided for under United States law [] should a court consider § 1507.

174. *Id.* at 1070.

175. *See In re Qimonda AG*, 462 B.R. 165, 183-85 (Bankr. E.D. Va. 2011) (holding that the public policy exception in section 1506 should be invoked to deny relief) *aff’d sub nom. Jaffe v. Samsung Elec. Co.* (In re *Qimonda*), 737 F.3d 14 (4th Cir. 2013).

176. *Id.* at 181-83 (discussing the application of § 1522).

177. *Id.* (discussing the framework of Chapter 15).

178. *Id.* at 185.

1522, and 1507.¹⁷⁹ The Fourth Circuit held that the bankruptcy court correctly interpreted the sufficient protection requirement of § 1522(a) to require a particularized balancing analysis that considers the “interests of the creditors and other interested entities, including the debtor.”¹⁸⁰ Because it affirmed the US Bankruptcy Court’s decision based on the application of § 1522(a)’s balancing of interests, the Fourth Circuit did not expressly address the US Bankruptcy Court’s alternative holding that depriving US patent licensees of § 365(n) protection would be manifestly contrary to the public policy of the United States.¹⁸¹

Part II introduced the five decisions that have invoked the Public Policy Exception.¹⁸² These five cases involved: (A) constitutional privacy rights—*In re Toft*; (B) constitutional due process rights—*In re Sivec*; (C) a foreign main proceeding pursued in violation of a US court order—*In re Gold & Honey*; (D) the discharge of third-party guarantees—*In re Vitro*; and (E) the protection of US patent licenses—*In re Qimonda*.¹⁸³ This Part provided an analysis of these five cases. Additionally, it discussed the framework established by the United States Court of Appeals for the Fifth Circuit and the Fourth Circuit in *In re Vitro* and *In re Qimonda*, respectively, who both held that the lower courts unnecessarily invoked the Public Policy Exception.¹⁸⁴

179. *Jaffe v. Samsung Elec. Co. (In re Qimonda)*, 737 F.3d 14, 29 (4th Cir. 2013) (holding “that the district court correctly interpreted § 1522(a)’s sufficient protection requirement . . . [and] in reaching this conclusion, we join the Fifth Circuit, which interpreted § 1522(a) similarly, based largely on the language in the Guide to Enactment”).

180. *Id.* at 18 (concluding “that the bankruptcy court properly recognized that Jaffé’s request for discretionary relief under § 1521(a) required it to consider the interests of the creditors and other interested entities, including the debtor under § 1522(a) and that it properly construed § 1522(a) as requiring the application of a balancing test”) (internal quotations omitted).

181. *See id.* at 31 (affirming the bankruptcy court, based on its application of § 1522(a) and declining to engage in an analysis under § 1506).

182. *See In re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011); *In re Sivec Srl*, Case No. 11-80799-TRC, 2011 WL 3651250 (Bankr. E.D. Okla. August 18, 2011); *In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009); *In re Vitro S.A.B de CV*, 701 F.3d 1031 (5th Cir. 2012); *In re Qimonda*, 737 F.3d at 14.

183. *See supra* note 182 and accompanying text.

184. *See In re Vitro*, 701 F.3d at 1070 (holding that because “relief is not warranted under § 1507, however, and would also not be available under § 1521, we do not reach whether the Concurso plan would be manifestly contrary to a fundamental public policy of the United States”); *In re Qimonda*, 737 F.3d at 32 (affirming the bankruptcy court on its § 1522(a) analysis, rather than engaging in an analysis under § 1506).

III. A PROPOSED FRAMEWORK FOR CHAPTER 15

Part III contends that courts should rely on the Public Policy Exception only when no other provision in Chapter 15 applies, arguing that a narrow construction and application of § 1506 should be favored. This approach is most consistent with the language and implementation of § 1506 and the framework of Chapter 15.¹⁸⁵ Moreover, it is consistent with legislative intent as Congress consciously chose to replicate the language of other public policy exceptions.¹⁸⁶ Additionally, a narrow interpretation of § 1506 best accomplishes the objectives of Chapter 15.¹⁸⁷ This approach minimizes unnecessary conclusions that the public policy exception has been satisfied and prevents courts from undermining the narrow circumstances under which the public policy exception applies.¹⁸⁸

A. *The Language and Implementation of § 1506 Requires a Narrow Interpretation*

The starting point for any interpretation of § 1506 is the plain meaning of its words with guidance from the House Committee Report that accompanied the passage of Chapter 15.¹⁸⁹ The word “manifestly” is used as a qualifier of the expression “public policy” and is intended to emphasize that § 1506 should be interpreted restrictively and “is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance.”¹⁹⁰ Congress’ decision to include the qualification that the request is “manifestly” contrary to the public policy of the United States is an

185. See *House Report*, *supra* note 4, at 109; see, e.g., *In re Ernst & Young, Inc.*, 383 B.R. 773, 781 (Bankr. D. Colo. 2008) and accompanying text (describing the legislative history of Chapter 15 and the implementation of § 1506).

186. See *supra* note 185 and accompanying text.

187. See 11 U.S.C. § 1501(2)-(5); 11 U.S.C. § 1507(b); 11 U.S.C. § 1508; 11 U.S.C. § 1509(b)(3); see also *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1044 (5th Cir. 2012) *cert. dismissed*, 133 S. Ct. 1862, 185 L. Ed. 2d 862 (2013) and accompanying text (describing the objectives of Chapter 15).

188. See *supra* notes 171-74, 179-81 and accompanying text (discussing the framework established by the United States Court of Appeals for the Fifth Circuit and the Fourth Circuit in *Vitro* and *Qimonda*, respectively, which both held that the lower courts unnecessarily invoked the Public Policy Exception).

189. See *House Report*, *supra* note 4, at 109; see, e.g., *In re Ernst & Young*, 383 B.R. at 781 (describing the starting point for interpreting any statute and discussing the legislative history of Chapter 15).

190. See *UNCITRAL supra* note 35 at ¶ 88-89 (describing the use of the expression “manifestly” and its intended interpretation).

explicit indication of its intent that § 1506 should be interpreted narrowly.¹⁹¹

Furthermore, when implementing § 1506, the House Report recognized that the language of § 1506 followed the text of Article 6 verbatim, and that this language has been “narrowly interpreted on a consistent basis in courts around the world.”¹⁹² The House Report also recognized that public policy, as relied upon in matters of international cooperation, is understood more restrictively than US public policy.¹⁹³ As a result, Congress’ knowledge that the language of § 1506 explicitly followed Article 6 of the Model Law further supports the fact that Congress intended § 1506 to be narrowly interpreted.¹⁹⁴

B. *The Framework of Chapter 15 Minimizes the Need to Invoke § 1506*

In the context of Chapter 15 as a whole, § 1506 is a “safety valve” that allows courts to refuse recognition of a foreign judgment or other requests made in the context of a recognized proceeding.¹⁹⁵ In other words, in cases where a foreign judgment would conflict with a matter of fundamental importance, § 1506 is the “safety valve” that should be invoked only if the court has no other option for refusing recognition.¹⁹⁶ Before turning to the public policy exception in § 1506, US courts should proceed through a *Vitro*-framed analysis that first relies on §§ 1522 and 1507(b) when refusing recognition of a foreign order.¹⁹⁷

191. *Id.*

192. *See* House Report, *supra* note 4, at 109 (noting that § 1506 follows Article 6 of the Model Law exactly, is standard in UNCITRAL texts, and has been narrowly interpreted on a consistent basis in courts around the world).

193. *Id.*

194. *Id.* (recognizing that § 1506 follows Article 5 of the Model Law exactly, is standard in UNCITRAL texts, and has been narrowly interpreted on a consistent basis in courts around the world).

195. *See In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 567 (E.D. Va. 2010) (discussing how courts have described the § 1506 public policy exception to be a “safety valve,”); Minehan, *supra* note 99 at 796, 800, 811-12 and accompanying text (describing public policy exceptions in private international law as a “safety valve”).

196. *See supra* note 195 and accompanying text (establishing a framework for determining whether a court should grant relief to a foreign representative).

197. *See supra* note 195 and accompanying text (establishing a framework for determining whether a court should grant relief to a foreign representative).

1. Overview of the Various “Safeguard” Provisions

In order to fully understand the protective scope of § 1522 it is helpful to review the relief available under §§ 1519, 1520, and 1521.¹⁹⁸ Section 1519 of the Bankruptcy Code provides a vehicle for the entry of relief that may be necessary during the gap period between the filing of a petition for recognition and court’s decision on the petition.¹⁹⁹ Section 1519 is limited to relief that is “urgently needed to protect the assets of the debtor or the interest of the creditors” and that is provisional or temporary in nature.²⁰⁰ The relief would terminate when the petition for recognition is granted, unless the court specifically extends it under § 1521(a)(6).²⁰¹

Under § 1520, recognition as a foreign main proceeding automatically entitles the bankruptcy estate to critical protections and rights provided under the Bankruptcy Code, including: (i) the automatic stay and other provisions of § 362; (ii) § 363, governing the sale of assets outside the ordinary course of business; and (iii) the post-filing effect of security interests, as set forth in § 552.²⁰² Additionally, § 1520 contains an exception to the automatic stay for the right to commence an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against a debtor.²⁰³

The relief available under § 1521 is broader than that provided automatically under § 1520, but all additional relief available under § 1521 is at the discretion of the bankruptcy court. Section 1521 specifies that any relief provided must be shown to be “necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors.”²⁰⁴ Additionally, § 1522(a) of the Bankruptcy Code provides that the court may grant relief under §§

198. *See supra* Part I.B(1) (providing an overview of Chapter 15 of the US Bankruptcy Code).

199. *See supra* notes 71-74 and accompanying text (providing an overview of 11 U.S.C. § 1519).

200. *See supra* notes 71-74 and accompanying text (providing an overview of 11 U.S.C. § 1519, and more specifically its limitations).

201. *See supra* notes 71-74 and accompanying text (providing an overview of 11 U.S.C. § 1519, and more specifically when the relief terminates).

202. *See supra* note 74 and accompanying text (providing an overview of 11 U.S.C. § 1520, specifically the automatic relief provided after recognition of a foreign main proceeding).

203. *See supra* note 74 and accompanying text (providing an overview of 11 U.S.C. § 1520, specifically an exception to the automatic stay).

204. *See supra* notes 75-77 and accompanying text (providing an overview of 11 U.S.C. § 1521(a), specifically the limitations of the discretionary relief available).

1519 and 1521 only if the interests of creditors and other interested entities, including the debtor, are sufficiently protected.²⁰⁵ The purpose of § 1522(a) is to ensure a balance between the relief that may be granted to the foreign representative and the interests of those potentially affected by such relief.²⁰⁶ Section 1522(a) complements the requirements of § 1521(b), which require that the court be satisfied that the interests of creditors in the United States are sufficiently protected in the context of entrusting assets for distribution.²⁰⁷

Section 1507(b) sets forth the factors that the court must consider when determining whether to provide additional assistance.²⁰⁸ These factors are nearly identical to those set forth in former § 304(c), subject to slight rearrangement to relocate “comity” from the listed factors to the introduction.²⁰⁹ Comity is raised to the introductory language to make it clear that it is the central concept to be addressed.²¹⁰

2. Structure of the “Safeguard” Provisions

A number of courts have concluded that the Public Policy Exception should be employed only when another provision of Chapter 15 does not resolve the dispute.²¹¹ Thus, courts should first determine whether relief is available under the explicit provisions of § 1521.²¹² If §§ 1521(a)(1)-(7) and 1521(b) does not list the requested relief, a court should next assess whether relief is available as

205. *See supra* notes 77, 126, 148, 171-74, 177-81 and accompanying text (describing the requirements and application of § 1522).

206. *See supra* note 27 and accompanying text (describing the purpose of Article 22 of the Model Law).

207. *See supra* note 77 (providing that § 1521(b) allows the court to entrust the distribution of all or part of the debtor’s assets, provided that the court is satisfied that the interests of creditors in the US are sufficiently protected).

208. *See supra* note 78 and accompanying text (listing the factors that a court must consider under § 1507(b)).

209. *Compare supra* note 79 and accompanying text (listing the factors that a court must consider under § 1507(b), *with supra* note 46 and accompanying text (listing the factors that a court considered when granting relief under former § 304(c)).

210. House Report, *supra* note 4, at 109 (indicating that congress intentionally raised comity to the introductory language).

211. *See supra* note 9 (discussing various cases that have held that that the Public Policy Exception should be invoked only when no other provision of Chapter 15 resolves the issue).

212. *See supra* note 172 (providing a framework for Chapter 15 where a court’s interpretation begins with the specific terms of Chapter 15 before general terms).

“appropriate relief” under § 1521(a).²¹³ In doing so, courts should determine whether the requirements of § 1522 are satisfied.²¹⁴ As a result, § 1522 is the first “safeguard” provision of Chapter 15 that comes into effect.²¹⁵

If relief is available under § 1521 and the court finds that the interests of the creditors and other interested entities, including the debtor, are sufficiently protected—therefore satisfying § 1522, the court should turn to § 1506 to determine whether the public policy exception should be triggered, thus making § 1506 the final “safeguard” or “safety valve.”²¹⁶ If, however, the court finds that relief is available under § 1521, but the interests of the creditors and other interested entities are not sufficiently protected, then the court has no need to decide whether § 1506 is triggered, because § 1522 would be the basis for not “granting appropriate relief.”²¹⁷

Additionally, if and only if the requested relief appears to exceed the “appropriate relief” available under § 1521(a), should a court consider § 1507, thus invoking Chapter 15’s safeguard in § 1507(b).²¹⁸ If the court determines that the interests provided in § 1507(b)(1)-(5) are satisfied and thus provides “additional assistance” to the foreign representative, the court should turn to § 1506 to determine whether the public policy exception should be triggered.²¹⁹ This would make § 1506 the final “safeguard” or “safety valve.”²²⁰ If, however, a Court determines that “additional assistance” should not

213. *See supra* note 172 (providing a framework for Chapter 15 where a court’s interpretation begins with the specific terms of Chapter 15 before general terms).

214. *See supra* notes 77, 126, 148, 171-74, 177-81 and accompanying text (providing an overview of the “safeguard” in § 1522).

215. *See supra* notes 171-74 (providing a framework for Chapter 15 where a court’s interpretation begins with the specific terms of Chapter 15 before general terms).

216. *See supra* notes 9, 171 and accompanying text (establishing that an analysis under § 1506 should not be reached when other provisions of Chapter 15 can serve as the basis to deny relief).

217. *See supra* notes 9, 171 and accompanying text (establishing that an analysis under § 1506 should not be reached when other provisions of Chapter 15 can serve as the basis to deny relief).

218. *See supra* notes 171-74 and accompanying text (providing a framework for Chapter 15 where a court’s interpretation begins with the specific terms of Chapter 15 before general terms).

219. *See supra* notes 9, 171 and accompanying text (establishing that an analysis under § 1506 should not be reached when other provisions of Chapter 15 can serve as the basis to deny relief).

220. *See supra* notes 9, 171 and accompanying text (establishing that an analysis under § 1506 should not be reached when other provisions of Chapter 15 can serve as the basis to deny relief).

be granted because the interests provided in § 1507(b)(1)-(5) are not satisfied, there is no need to decide whether § 1506 is triggered, because § 1507(b) would be the basis for not granting “additional assistance.”²²¹ Thus, the overall framework of Chapter 15 itself narrows the scope of § 1506.²²² The safeguards in §§ 1522 and 1507(b) present a “first line of defense,” thus minimizing the circumstances under which a court would need to invoke an analysis of § 1506.²²³

C. The Language of § 1506 Was Consciously Chosen to Replicate Other Public Policy Exceptions.

The language included in § 1506 is identical to language found in other public policy exceptions that have “been narrowly interpreted on a consistent basis in courts around the world.”²²⁴ The original drafters of the Model Law consciously chose to replicate these other public policy exceptions.²²⁵ As a result, by implementing Article 6 of the Model Law verbatim, Congress intended for § 1506 to be construed consistent with the public policy exceptions found in other contexts.²²⁶

Foreign courts consistently have noted the narrowness of a public policy exception and emphasized that the standard required to trigger it is high and infrequently met.²²⁷ For example, non-bankruptcy courts have applied the public policy exception outside of

221. *See supra* notes 9, 171 and accompanying text (establishing that an analysis under § 1506 should not be reached when other provisions of Chapter 15 can serve as the basis to deny relief).

222. *See supra* notes 9, 171 and accompanying text (establishing that an analysis under § 1506 should not be reached when other provisions of Chapter 15 can serve as the basis to deny relief).

223. *See supra* notes 9, 171 and accompanying text (establishing that an analysis under § 1506 should not be reached when other provisions of Chapter 15 can serve as the basis to deny relief).

224. *See supra* notes 82-86 and accompanying text (describing the legislative history of Chapter 15 and the implementation of § 1506).

225. *See supra* notes 33-35 and accompanying text (discussing the Guide to Enactment’s distinction between public policy as it applies to domestic affairs and public policy as it applies to international affairs and its interpretation of the language of Article 6).

226. *See supra* notes 82-86 and accompanying text (describing the legislative history of Chapter 15 and the implementation of § 1506).

227. *See supra* Part I.A(2)(iii) and accompanying text (providing an overview of how non-US nations adopting the Model Law interpret public policy exceptions); *see supra* Part I.C. (providing an overview of Courts’ interpretations of public policy exceptions outside of bankruptcy law).

the bankruptcy context to deny enforcement of foreign judgments where the judgment is incompatible with the Constitution of that State, or where the judgment is inconsistent with basic notions of morality and justice.²²⁸ It is clear from the rare occasions on which public policy exceptions have been triggered, along with the broad range of cases where courts have refused to invoke the public policy exceptions, that the Public Policy Exception is truly an anomaly.²²⁹

That Congress and the drafters of the Model Law chose to include identical language in § 1506 suggests that they recognized the consistent basis on which this phrase has received narrow interpretation in courts around the world.²³⁰ This usage clarifies the intent to follow this previous narrow interpretation that is invoked only in rare instances.²³¹ On this basis, § 1506 should be narrowly interpreted and only applied after careful consideration of the other applicable sections of Chapter 15.

*D. The General Purposes of Chapter 15 Similarly Require
Narrow Interpretation of § 1506*

When enacting legislation to implement the Model Law, Congress sought to provide an effective mechanism for dealing with cross-border insolvency cases that promoted cooperation between US and foreign courts, as well as greater legal certainty for trade and investment.²³² The purpose of Chapter 15 thus suggests that the Public Policy Exception should be narrowly construed.

A broad interpretation of the public policy exception would lead courts to regularly question the “fundamental” public policies of the United States and assess whether these policies deviated from the provisions of Chapter 15. This sort of balancing would, if conducted too frequently, render the goal of a harmonized and predictable

228. *See supra* Part I.C. (providing examples of when non-bankruptcy courts have denied foreign recognition outside of bankruptcy law).

229. *See supra* notes 114-17 (discussing the rare occasions when public policy exceptions have been invoked).

230. *See supra* notes 33-35, 82-86 and accompanying text (describing the Guide to Enactment’s interpretation of the language used in Article 6 and the legislative history of Chapter 15).

231. *See supra* notes 33-35, 82-86 and accompanying text (describing the Guide to Enactment’s interpretation of the language used in Article 6 and the legislative history of Chapter 15).

232. *See supra* note 60 and accompanying text (discussing the purpose and scope of application of Chapter 15).

framework impracticable.²³³ The framework provided in Part III.B minimizes this possibility. Thus, such a framework is more likely to produce results consistent with foreign courts' judgments.

CONCLUSION

Most US courts have invoked § 1506 only in exceptional circumstances concerning matters of fundamental importance.²³⁴ This narrow interpretation is consistent with the language of § 1506, the structure of Chapter 15 and its general purposes, as well as non-bankruptcy courts' construction of public policy exceptions found in other areas of the law. A few US bankruptcy courts have chosen to address public policy considerations when determining whether to refuse recognition even when there are other grounds for refusal, mainly under §§ 1522 or § 1507(b). These decisions should not be relied upon. Their holdings under § 1506 involve are largely dicta; moreover, these rulings improperly dilute the intended narrowness of the public policy exception found in this provision.

Courts should not only construe § 1506 narrowly, they should reach an analysis under § 1506 only if no other provision of Chapter 15 could be relied upon to deny relief. This approach is consistent with the intent of the drafters of Chapter 15 and the Model Law and minimizes the disruptive effect of more frequent invocations.

233. Model Law, *supra* note 1, art. 6 ¶ 88 (“international cooperation would be unduly hampered if public policy would be understood in an extensive manner”).