

U.S. Courts Should Continue to Grant Recognition to Schemes of Arrangement of Solvent Insurance Companies

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In a recent article that appeared in this journal, the author argued that schemes of arrangement implemented under English law by solvent insurance companies should not be recognized under Chapter 15 of the U.S. Bankruptcy Code¹ or that such recognition should be “severely conditioned.”² Schemes, however, including solvent schemes, are exactly the type of “foreign proceeding” that Congress intended to be recognized under Chapter 15. Much like a plan under Chapter 11 of the Bankruptcy Code, a scheme is a mechanism pursuant to which claims are established against a debtor and dividends are paid to creditors. A per se rule prohibiting or conditioning recognition of schemes of solvent insurance companies would undermine the purpose of Chapter 15 and fundamental U.S. public policies.

A scheme is a binding arrangement made under section 425 of the Companies Act 1985 of Great Britain (the Companies Act) between a company and its creditors or any class of creditors to restructure their rights and liabilities. Under English law, any “company” may be the subject of a scheme.³ The definition of “company” under section 425 of the Companies Act includes any insurance company that is registered in England, as well as any unregistered insurance company that has a “sufficient connection with England.”⁴

A scheme will only become effective and binding on a company and on its creditors addressed under the scheme, which are generally referred to as “scheme creditors,” if (i) a majority in number representing not less

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than 75% in value of each class of scheme creditors present and voting, in person or by proxy, vote in favor of the scheme at a meeting or meetings of scheme creditors convened in accordance with orders of the High Court; (ii) the High Court, after a hearing, issues an order sanctioning the scheme; and (iii) a copy of the order sanctioning the scheme is lodged with the Registrar of Companies of England and Wales (the Registrar).⁵ If a scheme becomes effective, it will be binding on all scheme creditors regardless of their vote. Accordingly, a company cannot implement a scheme without approval from creditors and sanction by the High Court.

Historically, schemes have been used as a means to liquidate insolvent insurance companies.⁶ In addition, some solvent insurance companies have used schemes to run off their business.⁷ A run-off occurs when an insurance company decides that it no longer wishes to write new business and seeks to determine, settle, and pay all liquidated claims of its insureds. A run-off of an insurance company can take 20 or more years to complete. In order to shorten the period of time to run off the business, insurance companies have used cut-off schemes. Under a cut-off scheme, a deadline is set for the filing of claims. By doing so, a solvent insurance company can drastically shorten the duration of a run-off. By accelerating the claims determination process, administrative costs are reduced, and dividends may be paid to creditors earlier than would ordinarily be the case.

For a scheme that has been approved by the High Court to be truly effective, a means must be found to make it binding on creditors based in the U.S. That is where Chapter 15 comes in. A scheme proponent will generally request an order granting recognition to the scheme in the U.S. under Chapter 15 of the Bankruptcy Code.

Despite the advantages to all parties of implementing a run-off through a scheme, some U.S.-based insureds have complained about solvent schemes and advocated that they should not be recognized in the U.S. These critics, however, fail to recognize that schemes are similar to Chapter 11 plans, provide a fair and efficient method to address claims, and cannot be implemented without creditor approval and sanction by the High Court. Any creditor concerns regarding the terms of a particular scheme can be raised with the High Court. If the objections are meritorious, the High Court will refuse to sanction the scheme. Ultimately, however, if the High Court sanctions a scheme, U.S. courts should not second guess the High Court's determination and should enforce the scheme.

CHAPTER 15 OF THE U.S. BANKRUPTCY CODE

On April 20, 2005, the U.S. Bankruptcy Code was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 (the

2005 Reform Act). One of the key features of the 2005 Reform Act was the addition of Chapter 15 to the Bankruptcy Code. Chapter 15, which replaced former Bankruptcy Code section 304 and applies to cases filed on or after October 17, 2005, is based upon the Model Law on Cross-Border Insolvencies (the Model Law) proposed by the United Nations Commission on International Trade Law.⁸ Cases under Chapter 15, like proceedings under former section 304, are “intended to be ancillary to cases brought in a debtor’s home country.”⁹

RECOGNITION UNDER CHAPTER 15

An ancillary case under Chapter 15 is commenced by the filing of a petition for recognition of a foreign proceeding.¹⁰ “Recognition” is a prerequisite to relief (with the exception of interim relief under section 1519) under Chapter 15.¹¹ The statute provides that a foreign proceeding should be recognized so long as: (1) it is a foreign “main” proceeding or a foreign “nonmain” proceeding; (2) the petition is brought by a “foreign representative”; and (3) the petition meets the requirements of section 1515.¹² Those three criteria, which incorporate the definitions in sections 101(23), 101(24), and 1502, are all that must be fulfilled to attain recognition.¹³ A court’s analysis of a request for recognition is designed to be straightforward and indeed has been characterized as “formulaic.”¹⁴ As discussed below, the only other reason to deny recognition would be if recognition would be “manifestly contrary to the public policy of the United States.”¹⁵

SOLVENT SCHEMES SHOULD BE RECOGNIZED UNDER CHAPTER 15

A scheme will only become effective and binding on the company and its creditors if the requisite majorities of each class vote in favor of the scheme and the High Court, after a hearing, issues an order sanctioning the scheme. Given these features, over a dozen solvent schemes were recognized under former Bankruptcy Code section 304.¹⁶ Chapter 15 was expressly designed to ensure the continued recognition of solvent schemes in the U.S.

CONGRESS INTENDED SOLVENT SCHEMES TO BE RECOGNIZED UNDER CHAPTER 15

The Bankruptcy Act of 1994 established the National Bankruptcy Review Commission (the Commission). As stated in the Commission’s Final Report dated October 20, 1997, upon which Congress based the 2005 Reform Act, “adoption of the Model Law [which became Chapter

15] will result in relatively minor substantive changes in the U.S. Bankruptcy Law.”¹⁷

While under former section 304, solvent schemes for insurance companies were routinely recognized in the U.S., the legislation that was originally proposed to incorporate the Model Law into the Bankruptcy Code would have precluded the continuation of that precedent. The Bankruptcy Reform Act of 1998,¹⁸ which was approved by both the House of Representatives and the Senate in 1998 but which never became law, specifically excluded foreign insurance companies from the ambit of Chapter 15. In addition, in the proposed legislation, the definition of “foreign proceeding” required that the foreign proceeding be “pursuant to a law relating to insolvency,” which was a dramatic change from the definition of “foreign proceeding” for purposes of section 304. Under the prior definition, recognition would be granted to a foreign proceeding “whether or not under bankruptcy law.”¹⁹

A number of the leading licensed insolvency practitioners in the U.K. were concerned that the proposed legislation would have inadvertently precluded recognition of schemes for solvent companies and undertook, through counsel, to contact members of the Commission and, in particular, Daniel M. Glosband. Mr. Glosband assisted the Commission and is regarded as one of “the authors of the Model Law and Chapter 15 of the Bankruptcy Code.”²⁰ In their communications to Mr. Glosband, the insolvency practitioners expressed concern that Chapter 15, as then drafted, would (i) preclude the recognition of solvent schemes and (ii) bar insurance companies that were subject to foreign proceedings from obtaining ancillary relief in the U.S.²¹

In response, Mr. Glosband assured counsel for the insolvency practitioners that the definition of foreign proceedings was not intended to exclude solvent proceedings. Indeed, according to Mr. Glosband, the drafters of the Model Law used the term “law relating to insolvency” because it was broader than “an insolvency law” and would include solvent proceedings, such as suspension of payment proceedings and solvent schemes.²² Nevertheless, to avoid any doubt, he agreed to revise the definition of foreign proceeding to include the phrase “or adjustment of debt” immediately after “a law relating to insolvency” to ensure that solvent debtors could be the subject of foreign proceedings.²³

The earlier version of Chapter 15 also provided that it did not apply to a “proceeding concerning an entity identified in subsection 109(b).” This provision would have denied recognition of foreign proceedings concerning foreign insurance companies, which are not eligible to be debtors in plenary cases under the Bankruptcy Code. In response to the request of the insolvency practitioners, Mr. Glosband agreed to revise

Chapter 15 to expressly make eligible a foreign insurance company.²⁴ The legislative history is clear. “Section 1501 contains an exception to the section 109(b) exclusions so that foreign proceedings of foreign insurance companies are eligible for recognition and relief under Chapter 15 as they had been under section 304.”²⁵ While Chapter 15 is based on the Model Law, Congress expressly altered its language so that foreign proceedings involving foreign insurance companies, including solvent schemes, would continue to be entitled to recognition and relief under Chapter 15.

In enacting Chapter 15, Congress included a statement of purpose.²⁶ “The purpose of [Chapter 15] is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with [certain] objectives,” including fostering cooperation between U.S. and foreign courts, fair and efficient administration of cross-border matters, and maximization of the value of the debtor’s assets.²⁷ Recognition of solvent schemes is consistent with those purposes. First, recognition of a scheme would foster cooperation between the High Court and U.S. courts because a bankruptcy court would be cooperating with the High Court in the implementation of a scheme. Second, recognition of a scheme would promote the fair and efficient administration of a cross-border claims resolution procedure that protects the interests of all creditors and interested entities. The process of resolving claims against an insurance company would be centralized, and any disputes would be subject to the uniform jurisdiction of one tribunal, the High Court. Finally, recognition of a scheme protects an insurance company’s assets. Absent relief under Chapter 15, an insurance company’s assets would be expended unnecessarily to defend collection and other actions brought in the U.S. in contravention of the scheme.

A SOLVENT SCHEME IS A FOREIGN PROCEEDING

It is with that background regarding the enactment of Chapter 15 that one should consider whether solvent schemes meet the statutory requirements for recognition. To qualify under the Bankruptcy Code, a foreign proceeding must be: (i) a collective judicial proceeding in a foreign country; (ii) in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; (iii) for the purpose of reorganization or liquidation; and (iv) under a law relating to insolvency or adjustment of debt.²⁸ Any proceeding that satisfies those four elements would qualify as a foreign proceeding. Does a solvent scheme satisfy those four elements?

COLLECTIVE JUDICIAL PROCEEDINGS

“The ‘collective proceeding’ requirement is intended to limit access to Chapter 15 proceedings which benefit creditors generally and to exclude proceedings which are for the benefit of a single creditor.”²⁹ A scheme affects creditors generally. Upon becoming effective, a scheme is binding on all scheme creditors; as such, a scheme is a “collective proceeding.”³⁰

A scheme also qualifies as a “judicial” proceeding. As noted by the court in *In re Board of Directors of Hopewell International Insurance Ltd.*, “[t]here is significant judicial involvement in this scheme process.”³¹ The court went on to note that the similarities between a scheme and a prepackaged Chapter 11 case were “striking.”³²

The process for sanctioning a scheme begins with the filing of an application for leave to convene a meeting of scheme creditors. Creditors have the right to raise objections, particularly as to the constitution of creditor classes, at the hearing to consider the application.³³ Once the requisite majorities of scheme creditors have voted in favor of a scheme, the company may request an order from the High Court sanctioning the scheme. The scheme does not become effective until, following a second hearing, the High Court issues an order sanctioning the scheme. The High Court is not bound by the creditors’ vote³⁴ and has “unfettered discretion to refuse to sanction the scheme.” It does not merely act as a rubber stamp.³⁵ In general, the High Court will sanction a scheme if “the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.”³⁶

In addition, scheme creditors have several opportunities to voice objections, a feature that the court in *Hopewell* recognized was a common characteristic of judicial proceedings.³⁷ As an initial matter, creditors may raise issues regarding class composition with the High Court at the hearing to consider the application for leave to convene meetings of creditors.³⁸ Further, scheme creditors can appear at the meeting of their class of creditors and ask questions and raise concerns regarding, and ultimately vote against, a scheme.

Furthermore, during the hearing to consider sanction of a scheme, scheme creditors can raise objections to the scheme. They may object to the classes as constituted or to the valuation of the vote. They may also object to the actual terms of the scheme, as occurred at the hearing to consider sanction of the scheme of British Aviation Insurance Company Limited (BAIC). In that case, certain creditors raised a number of objections regarding the fairness of the scheme. A number of the objections were upheld by the High Court. The suggestion that the High Court will rubber stamp a scheme and sanction it in the face of valid

objections was belied by what transpired in the BAIC case.³⁹ The High Court considers all objections and takes steps to ensure that creditors are treated fairly.⁴⁰

ASSETS AND AFFAIRS ARE SUBJECT TO JUDICIAL SUPERVISION

The second criterion for qualifying as a foreign proceeding is also met. A scheme will typically provide for the valuation and payment of claims and address the run-off of an insurance company's business. Schemes typically provide that the High Court has exclusive jurisdiction to hear and determine any suit, action, claim, or proceeding and to settle any dispute that may arise out of the administration of the scheme. By virtue of the High Court's involvement, the insurance company's assets and affairs are subject to judicial supervision.

There are commentators that have suggested that those schemes that only address a line or lines of business of the insurance company, but not its entire business, do not meet this criterion. However, there is nothing in Chapter 15 that limits "foreign proceedings" to proceedings that address all of a company's business. Under both section 304 and Chapter 15 numerous schemes for particular lines of business have been recognized.⁴¹ Moreover, recognition of a scheme that addresses only a portion of an insurance company's business would not be inconsistent with practice under the Bankruptcy Code. Chapter 11 plans routinely provide that certain contracts are assumed unaltered, and the rights of certain creditors are not impaired.⁴²

FOR THE PURPOSE OF REORGANIZATION

To be a foreign proceeding, a scheme must also be considered to be for the purpose of reorganization. Much like a Chapter 11 plan, a scheme provides for the determination, adjustment, liquidation, and satisfaction of claims.

Critics of schemes have referred to the case of *In re Rose*⁴³ as support for the argument that schemes are not for the purpose of reorganization.⁴⁴ That case, however, did not involve recognition of a scheme of arrangement. Rather, the bankruptcy court was asked to grant recognition under former section 304 to a *scheme of transfer* under Part VII of the Financial Services and Market Act 2000. In *Rose*, under the scheme of transfer, the businesses of 12 insurance companies were consolidated in one company. The foreign representative unsuccessfully argued to the bankruptcy court that a scheme of transfer qualified as a foreign proceeding given that it effected a "reorganization."⁴⁵ The bankruptcy court held that a scheme of transfer was akin to a merger and not a debt

adjustment proceeding, and therefore did not qualify as a foreign proceeding entitled to ancillary relief under section 304.⁴⁶

A scheme of arrangement, however, is significantly different than a scheme of transfer. Indeed, at the hearing to consider the request for recognition of the schemes of transfer, the bankruptcy court in *Rose* noted the difference: “Okay, I am not familiar with any solvent 304, okay. I have never had a solvent 304. I read those cases [including *Hopewell*] and I do not think any of them were *remotely* of the order of this case [Rose] in terms of what was being done you know.”⁴⁷ *Rose* does not support an argument against recognition of schemes of arrangement.

LAW RELATING TO INSOLVENCY OR DEBT ADJUSTMENT

The final criterion contained in the definition of foreign proceeding is that it must be under a law relating to insolvency or debt adjustment. Under section 425 of the Companies Act, which governs schemes, a company, insolvent or solvent, may wind up all, or a portion, of its business. Historically, insolvent insurance companies were the subject of schemes proposed under section 425 of the Companies Act to terminate their wind-up under English law. Solvent insurance companies have proposed schemes under section 425 of the Companies Act to terminate or go through a run-off. Under either scenario, a scheme generally provides for the estimation, valuation, and payment of debt. The Companies Act is a law related to insolvency and adjustment of debt.⁴⁸

OBJECTIONS TO RECOGNITION

Many of the objections that have been raised at ancillary proceedings for recognition of solvent schemes are of a type that can be, and should be, heard in the foreign proceeding. Generally, U.S. courts have refused to be drawn into a battle that is properly fought elsewhere.

COURT’S ROLE IS LIMITED

Chapter 15 is designed to permit U.S. bankruptcy courts to assist in the administration of a foreign proceeding. As such, the bankruptcy court limits its analysis to the requirements of Chapter 15 and does not consider objections that could have been raised before the High Court. Indeed, the doctrines of *res judicata*, waiver, and estoppel would preclude creditors from raising objections in a Chapter 15 case that could have been presented in the foreign proceeding.⁴⁹

Although decided under former section 304 of the Bankruptcy Code, the bankruptcy court’s decision in *Hopewell* illustrates the court’s role in an ancillary proceeding.⁵⁰ In that case, the board of directors of

Hopewell, a foreign reinsurance company, filed a petition under section 304 for recognition of a scheme sanctioned by the Supreme Court of Bermuda.⁵¹ A creditor who had failed to object in Bermuda objected to recognition in the U.S. In considering the objections, the bankruptcy court noted that once a scheme is sanctioned, it has preclusive effect, and a party-in-interest who failed to object prior to sanction is barred from doing so thereafter.⁵² “The time to raise an objection to the scheme is either when the scheme is under consideration or, at the latest, at the sanction hearing itself.”⁵³ The bankruptcy court further noted that the creditor was seeking to “collaterally attack the scheme” and that it was “not the proper forum for a belated and disguised appeal.”⁵⁴ Therefore, the bankruptcy court refused to permit the objecting creditor “[t]o dodge the consequences of its obvious default to point out to the Bermuda Court just what it now claims was wrong with the scheme, or to appeal from the order of sanction.”⁵⁵ Ultimately, the bankruptcy court overruled the objections and recognized the Hopewell scheme under section 304.

Similarly, U.S. courts should not permit creditors to obtain a de novo review of the High Court’s order sanctioning a scheme under Chapter 15. The bankruptcy court denied such a request in the recent Chapter 15 cases filed by solvent members of the WFUM Pools for recognition of their schemes. Certain insureds filed an objection and requested that the bankruptcy court conduct “a full and fair inquiry into the protections that the schemes would have for all policyholder claimants.”⁵⁶ The bankruptcy court overruled the objection and noted that:

I would inquire as to how the objection related to the standards that the court needs to apply in a recognition hearing inasmuch as either the objection is going to the substance of what happened in the U.K., which I don’t consider to be a part of my—an appropriate part of responsibilities in determining whether to grant recognition to cases as either main cases or nonmain cases under Chapter 15.⁵⁷

Therefore, in considering a request for recognition of a scheme, a U.S. court should not consider objections that could have been raised before the High Court but limit its analysis to determine whether the petition satisfies the requirements of sections 1515 and 1517.

SCHEMES ARE CONSISTENT WITH U.S. PUBLIC POLICY

Other than an allegation that the Chapter 15 petition does not satisfy the requirements of sections 1515 or 1517, the only ground to object to recognition under Chapter 15 of a solvent scheme would be on the basis that to do so would be “manifestly contrary” to U.S. public policy.⁵⁸ As

the legislative history explains, the “word ‘manifestly’... restricts the public policy exception to the most fundamental public policies of the United States.”⁵⁹ It, however, remains for the courts to determine what circumstances would rise to the level of being manifestly contrary to U.S. public policy.⁶⁰

In considering whether recognizing a solvent scheme would be manifestly contrary to U.S. public policy, courts need to take into account that England is a “sister common law jurisdiction,” and its laws have many features similar to those of the U.S.⁶¹ Moreover, the High Court would not sanction a scheme unless it is one that an “intelligent and honest man may reasonably approve”⁶² and would not be “manifestly unfair.”⁶³ Nevertheless, a U.S. court should not grant recognition to orders of foreign courts without its own independent analysis of the public policy issue.⁶⁴

SCHEMES ARE SIMILAR TO U.S. PROCEEDINGS

Schemes are strikingly similar to plans under Chapter 11 of the Bankruptcy Code. It would be difficult to argue that recognition of a foreign proceeding that bears many of the same characteristics of a U.S. proceeding is manifestly contrary to U.S. public policy. In *Hopewell*, the court went so far as to observe that:

The similarities between Hopewell’s [solvent] Scheme and a pre-packaged Chapter 11 case are striking, sufficiently so that no argument can be made that qualifying Hopewell’s Scheme as a foreign proceeding under the Bankruptcy Code would offend any of our notions of fairness or due process, particularly since the Scheme process involved more, rather than less, judicial oversight and at the inception of the proceeding than does a pre-packaged Chapter 11 case.⁶⁵

Moreover, some states have considered, and at least one state has adopted, legislation based upon section 425 of the Companies Act to permit insurance companies to propose solvent schemes. In 2002, Rhode Island adopted a statute that permits solvent insurance companies to implement a scheme under state law.⁶⁶ Under section 27-14.5 of the General Laws of Rhode Island, “[a]ny commercial run-off reinsurer may apply to the court for an order implementing a commutation plan.” Such a commutation plan will be approved if 50% in number and 75% in value of all creditors vote in favor of the plan. The Rhode Island statute was modeled after the Companies Act.⁶⁷ The fact that at least one state permits the adoption of a similar mechanism strongly suggests that a solvent scheme does not offend U.S. public policy considerations.

HIGH COURT WILL CONSIDER CLASS AND VOTING ISSUES

Critics of schemes have asserted that solvent schemes as proposed by insurance companies improperly classify claims “into one voting class, regardless of their divergent rights.”⁶⁸ In support of their argument, the critics typically cite to the High Court’s decision in the cases of *BAIC* and *WFUM Pools*. However, what these cases actually demonstrate is the high degree of scrutiny that the English courts apply to scheme proceedings to ensure that the classes are properly constituted and that creditors’ rights are protected.

In the *BAIC* case, for example, certain American insureds with large incurred-but-not-reported claims (IBNR claims), at the hearing to consider sanction of the scheme, contested the High Court’s jurisdiction based upon an improper class.⁶⁹ Notwithstanding that (i) the High Court granted leave to convene one meeting of a single class of scheme creditors and (ii) *BAIC*’s scheme had been approved by the scheme creditors, the High Court refused to sanction *BAIC*’s scheme. In its decision, the High Court noted that *BAIC*’s scheme creditors could not be treated as a single class but should have been divided into separate classes.

Subsequent to the High Court’s decision in *BAIC*, a group of 16 insurance companies (the *WFUM Companies*) made an application for leave to convene a meeting of scheme creditors of each of the *WFUM Companies* to consider schemes to address the run-off of business written through certain pooling arrangements (the *WFUM Pools*).⁷⁰ Several U.S.-based policyholders objected to the solvent *WFUM Companies*’ application, asserting that “a single class meeting for each of the Solvent Companies would not be proper.”⁷¹ Indeed, they argued that there were at least two, if not more, classes entitled to meet separately to consider and vote on the schemes of the solvent *WFUM Companies*.

Upon considering the substantial evidence produced by the solvent *WFUM Companies* and the opposing creditors, the High Court held that “the uncertainties in estimating IBNR claims exceed and are materially different from those arising in the valuation of other claims.”⁷² Accordingly, the High Court required that those claims be placed in a separate class.

Some critics have further argued that scheme proponents will improperly devalue votes to ensure that a scheme is sanctioned.⁷³ In the *BAIC* case, for example, certain creditors with IBNR claims that had voted against the scheme asserted that the voting protocol designed to value the votes of scheme creditors with disputed claims improperly devalued their claims.⁷⁴ The High Court noted that:

In the case of a disputed claim the Chairman was required by the terms of the order [convening meeting of creditors] to place a value on the claim. The notion of the Chairman valuing a claim means, to my mind, that the Chairman was required to ascribe a genuine value to the claim. Under the procedure embodied in the court's order he was not given the luxury of saying that he did not know what its value was and placing an arbitrary \$1 on the claim. Effectively to disallow IBNR claims (by valuing them at a nominal \$1) on the basis that they were uncertain or unreliable is not, to my mind, valuing them at all.⁷⁵

Under the circumstances, the High Court concluded that the valuation of the creditor's vote was not truly representative of their interests and should not be endorsed.

Although cited by critics as support for not recognizing solvent schemes in the U.S., cases like *WFUM Pools* and *BAIC* actually support a contrary result. They demonstrate that the High Court will carefully consider the fairness of a scheme, including class issues and voting procedures, in determining whether to sanction a scheme.⁷⁶ U.S. courts should take great comfort in the diligence exercised by the High Court in ensuring the fairness of the scheme approval process.⁷⁷ That diligence is consistent with U.S. public policy.

RECOGNITION OF A SOLVENT SCHEME DOES NOT VIOLATE PUBLIC POLICY MERELY BECAUSE THE COMPANY IS SOLVENT

Some critics have suggested that if a company is solvent, its Chapter 15 filing should be dismissed as having been filed in bad faith,⁷⁸ citing cases such as *In re SGL Carbon Corp.* and *In re Integrated Telecom Express Inc.* Those cases, however, do not stand for a per se rule requiring dismissal of a bankruptcy case as a bad faith filing if the debtor happens to be solvent. Rather, they confirm a court's ability to dismiss a Chapter 11 case upon a showing of bad faith. "Whether the good faith requirement has been satisfied is a 'fact intensive inquiry' in which the court must examine 'the totality of facts and circumstances' and determine where a 'petition falls along the spectrum ranging from the clearly acceptable to the patently abusive.'⁷⁹

Indeed, it is well established that nothing in the Bankruptcy Code limits relief to insolvent debtors.⁸⁰ There are numerous examples of solvent companies taking advantage of the benefits of Chapter 11.⁸¹ More-

over, Chapter 15 contemplates recognition of proceedings concerning solvent debtors, as was the case under section 304.⁸²

MODIFICATION OF CONTRACTUAL RIGHTS UNDER A SCHEME DOES NOT VIOLATE PUBLIC POLICY

Critics of schemes also complain that schemes impermissibly invalidate contracts or contractual provisions by altering the manner by which claims are valued.⁸³ Given that, under section 365 of the Bankruptcy Code, a debtor can reject executory contracts, it is hard to imagine that a court could conclude that the implementation of a fair claims adjudication process sanctioned by the High Court after approval by creditors would be manifestly contrary to U.S. public policy. Indeed, U.S. courts have acknowledged that contractual rights are not absolute and can be altered upon a bankruptcy filing.⁸⁴

Finally, critics have also complained of the claims adjudication process and the estimation methodology to be used in valuing claims under a scheme. Again, scheme creditors are free to raise these concerns before the High Court. The High Court will not endorse the claims adjudication process set forth under a scheme unless it is fair.⁸⁵ Indeed, that is exactly what happened in the *BAIC* case, where the High Court acknowledged the “dangers” reflected by adopting a “flexible” estimation methodology.⁸⁶

CONCLUSION

Under English law, a solvent insurance company may propose a scheme to implement an orderly and expeditious run-off. Under a scheme, claims against an insurance company are determined, and dividends paid to scheme creditors. A scheme, however, can only be implemented if the requisite majorities of scheme creditors vote in favor of it and if the High Court sanctions it. As such, a scheme is strikingly similar to Chapter 11 plan and is exactly the type of proceeding that Congress envisioned being recognized under Chapter 15.

Under Chapter 15, so long as the statutory criteria have been met, a bankruptcy court should grant recognition to a scheme unless manifestly contrary to U.S. policy. The complaints of U.S.-based insureds do not implicate public policy but rather reflect commercial concerns that are more appropriately addressed in negotiations with the insurance company or by objection to the High Court. The High Court is quite diligent in protecting the rights of scheme creditors. U.S. courts should assist in the implementation of the High Court’s orders by granting recognition to solvent schemes approved by the requisite majorities of creditors and sanctioned by the High Court.

RESEARCH REFERENCES:

Bankr. Serv., L Ed § 50A:73; Norton Bankr. L. & Prac. 3d § 17:7, 154:3, 154:4; Norton Bankr. L. & Prac. 3d 11 U.S.C. §§ 1525 to 1527

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NOTES

1. 11 U.S.C.A. §§ 101 et seq.
2. Susan Power Johnston, Why U.S. Courts Should Deny or Severely Condition Recognition to Schemes of Arrangement for Solvent Insurance Companies, 16 Norton J. Bankr. L. & Prac. 953 (December 2007).
3. “Traditionally, section 425 schemes have been used outside the insurance industry to reorganize and restructure a company or group of companies.” Nigel Montgomery, Gabriel Moss Q.C. and Tom Smith, “England” in Cross-Frontier Insolvency of Insurance Companies 26 (Sweet & Maxwell 2001) (discussing solvent schemes under section 425 of the Companies Act). Schemes have “been used by as diverse and widely publicized companies as Amstrad plc, Virgin Group, Lloyds Bank and TSB and Reuters Holding plc.” Montgomery, Moss, and Smith, Cross-Frontier Insolvency of Insurance Companies 26.
4. In the Matters of Sovereign Marine & General Insurance Company Limited and Others, [2006] EWHC 1335 and [2007] 1 BCLC 228, ¶ 28 [Sovereign Marine & General Insurance Co Ltd, Re, 2006 WL 1666896 (U.K. Ch D Md. 2006)].
5. The process for obtaining sanction of a scheme can be divided into three parts. In re Hawk Insurance Co. Ltd., [2002] B.C.C. 300, ¶ 11 (CA (Civ Div 2001)) [Hawk Insurance Co Ltd, Re, 2001 WL 98213 (CA (Civ Div 2001))]. First, the scheme proponent must make an application to the High Court for an order granting leave to convene a meeting or meetings of scheme creditors. Hawk Insurance, [2002] B.C.C. 300, ¶ 11 [Hawk Insurance, 2001 WL 98213]. Second, the proponent must convene the meeting or meetings in accordance with the High Court’s order granting leave to convene meeting(s) of creditors. Finally, the proponent must make an application to the High Court for an order sanctioning the scheme. Hawk Insurance, [2002] B.C.C. 300, ¶ 11 [Hawk Insurance, 2001 WL 98213]. Scheme creditors and the High Court are involved throughout the process, and absent creditor approval and sanction by the High Court, a scheme cannot be implemented.
6. Peter Totty & Gabriel Moss, 2 Insolvency, 16-98 (Sweet & Maxwell 2002) (“[t]he peculiar difficulties of winding up the business of an insolvent insurance company have led insolvency practitioners to use the scheme of arrangement process as an alternative to liquidation”); Montgomery, Moss, and Smith, Cross-Frontier Insolvency of Insurance Companies at 10 (“[t]he difficulties of winding up an insurance company... has led insolvency practitioners, lawyers and judges to develop, as an alternative to liquidation, schemes of arrangement under Section 425 of the [Companies Act] as *de facto* insolvency proceedings”).
7. In general there are two types of schemes: (i) “cut-off” or “estimation” schemes and (ii) “reserving” or “run-off” schemes. A cut-off scheme will generally provide a deadline to file claims (a Bar Date) (including contingent and individual claims) against the company and payment to creditors as soon as possible. Montgomery, Moss, and Smith, Cross-Frontier Insolvency of Insurance Companies at 12-13 (discussing types of schemes). A reserving scheme will generally provide for the company to “run-off” over a period of time with claims being established when presented and interim dividends being made throughout the period.
8. 11 U.S.C.A. § 1501. “The language of chapter 15 tracks the Model Law, with some modifications that are designed to conform the Model Law with existing United States law.” In re Basis Yield Alpha Fund (Master), 381 B.R. 37, 43-44, 49 Bankr. Ct. Dec. (CRR) 89, 59 Collier Bankr. Cas. 2d (MB) 20 (Bankr. S.D. N.Y. 2008) (footnote omitted).

9. H. R. Rep. No. 109-31, Pt. 1, 109th Cong., 1st Sess. (2005). Chapter 15 applies where “assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding.” 11 U.S.C.A. § 1501(b).

10. 11 U.S.C.A. § 1504.

11. In re SPhinX, Ltd., 351 B.R. 103, 115, 47 Bankr. Ct. Dec. (CRR) 17, 56 Collier Bankr. Cas. 2d (MB) 1176 (Bankr. S.D. N.Y. 2006), *aff’d*, 371 B.R. 10 (S.D. N.Y. 2007).

12. 11 U.S.C.A. § 1517.

13. H. R. Rep. No. 109-31, Pt. 1, 109th Cong., 1st Sess. (2005). “[A]s long as the three requirements of this section are met, the court is obligated to grant recognition.” 8 Collier on Bankruptcy ¶ 1517.01, 1517-2 (15th ed. rev. 2005).

14. “[T]he process of recognition of a foreign proceeding is a simple single step process... [t]he determination is a formulaic one.” In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 126, 48 Bankr. Ct. Dec. (CRR) 216 (Bankr. S.D. N.Y. 2007), *aff’d*, 2008 WL 2198272 (S.D. N.Y. 2008). “By establishing a simple, objective eligibility requirement for recognition, Chapter 15 promotes predictability and reliability.” In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., No. 07-8730, at 19 (S.D.N.Y. May 22, 2008).

15. 11 U.S.C.A. § 1506.

16. See, e.g., In re DAP Holding N.V., 05-18816 (Bankr. S.D.N.Y. Oct. 27, 2005); In re Mercantile & General Reinsurance Co. Ltd., 05-14076 (Bankr. S.D.N.Y. Sept. 7, 2005); In re Unione Italiana (UK) Reinsurance Co. Ltd., 04-17989 (Bankr. S.D.N.Y. June 8, 2005); In re The Prudential Assurance Co. Ltd. 4-14884 (Bankr. S.D.N.Y. Sept. 9, 2004); In re Aviation & General Insurance Co. Ltd., 04-13499 (Bankr. S.D.N.Y. Aug. 5, 2004); In re Ludgate Insurance Co. Ltd., 04-10590 (Bankr. S.D.N.Y. Apr. 8, 2004); In re Arig Insurance Co., Ltd., 03-17057 (Bankr. S.D.N.Y. Dec. 9, 2003); In re Marlon Insurance Co. Ltd., 03-42343 (Bankr. S.D.N.Y. Nov. 6, 2003); In re Assurantiemaatschappij “De Zeven Provinciën” NV, 02-16430 (Bankr. S.D.N.Y. Mar. 28, 2003); In re The Nichido Fire & Marine Insurance Co. Ltd., 01-15987 (Bankr. S.D.N.Y. Feb. 13, 2002); In re Ramus Insurance Ltd, 01-12160 (Bankr. S.D.N.Y. June 7, 2001); In re Osiris Insurance Limited, 98-45518 (Bankr. S.D.N.Y. Nov. 16, 1998); In re Board of Directors of Hopewell Intern. Ins. Ltd., 238 B.R. 25, 34 Bankr. Ct. Dec. (CRR) 1273 (Bankr. S.D. N.Y. 1999), *order aff’d*, 275 B.R. 699, 48 Collier Bankr. Cas. 2d (MB) 362 (S.D. N.Y. 2002).

17. National Bankruptcy Review Commission, Bankruptcy: The Next 20 Years, National Bankruptcy Review Commission Final Report (1997); 151 Cong. Rec. H2066 (daily ed. April 14, 2005) (statement of Representative Moran). See In re Iida, 377 B.R. 243, 256, 49 Bankr. Ct. Dec. (CRR) 24, 58 Collier Bankr. Cas. 2d (MB) 1448 (B.A.P. 9th Cir. 2007) (“Chapter 15 is fundamentally procedural in nature and does not constitute a change in the basic approach of United States law”).

18. H.R. 3150, 105th Cong. (1998).

19. A “foreign proceeding” for purposes of section 304 of the Bankruptcy Code was defined as follows:

A proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor’s domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

11 U.S.C.A. § 101(24), amended by 11 U.S.C.A. § 101(24) (2005).

20. Bear Stearns, 374 B.R. at 127 n.3.

21. Letter from Howard Seife, Esq., Chadbourne & Parke LLP, to Daniel M. Glosband, Esq., Goodwin, Procter & Hoar LLP (Mar. 9, 1999) (on file with authors).

22. Letter from Daniel M. Glosband, Esq., Goodwin, Procter & Hoar LLP, to Howard Seife, Esq., Chadbourne & Parke LLP (Mar. 11, 1999) (on file with authors).

23. Letter from Daniel M. Glosband, Esq., Goodwin, Procter & Hoar LLP, to Susan Jensen-Conklin, Esq., Judiciary Subcommittee on Commercial and Administrative Law; Matt

Tanielian, Esq., Judiciary Subcommittee on Administrative Oversight and the Courts; David Lachmann, Esq., Committee on the Judiciary; and John McMickle Esq., Judiciary Subcommittee on Administrative Oversight and the Courts (Jan. 31, 2000) (on file with authors).

24. Letter from Daniel M. Glosband, Esq., Goodwin, Procter & Hoar LLP, to Howard Seife, Esq., Chadbourne & Parke LLP (Mar. 11, 1999) (on file with authors). See *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 632, 47 Bankr. Ct. Dec. (CRR) 31 (Bankr. E.D. Cal. 2006) (“[f]oreign insurance companies are eligible for Chapter 15 relief because § 1501(c)(i) provides that Chapter 15 does not apply to ‘a proceeding concerning an entity, other than an insurance company, identified by exclusion in section 109(b)’”).

25. 146 Cong. Rec. S11716-11717 (daily ed. Dec. 7, 2000).

26. Chapter 15 of the Bankruptcy Code is unique in that it contains a statement of purpose. See *Bear Stearns*, 374 B.R. at 126.

27. 11 U.S.C.A. § 1501.

28. 11 U.S.C.A. § 101(23). Section 101(23) of the Bankruptcy Code defines a “foreign proceeding” as:

a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

29. 8 *Collier on Bankruptcy* ¶ 1501.03[1], 1501-7 (15th ed. rev. 2005).

30. In general, section 425 of the Companies Act requires a meeting, which under an “ordinary meaning” requires “a coming of two or more persons.” *In re Altitude Scaffolding Ltd.*, [2006] EWHC 1401, ¶ 18 [*Altitude Scaffolding Ltd, Re*, 2006 WL 1666924 (U.K. Ch D Md. 2006)].

31. *Hopewell*, 238 B.R. at 25, 52.

32. *Hopewell*, 238 B.R. at 25, 52.

33. The primary purpose for the hearing to consider the application is to determine whether there should be one or more classes of scheme creditors and how the meeting or meetings shall be convened. *Hawk Insurance*, [2002] B.C.C. 300, ¶ 11 [*Hawk Insurance*, 2001 WL 98213]. Under English law, a class “must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.” *Hawk Insurance*, [2002] B.C.C. 300, ¶ 26 [*Hawk Insurance*, 2001 WL 98213]. Notice of the application and hearing to consider the application will be given to all scheme creditors. Moreover, actual notice is generally supplemented by publication in different periodicals.

34. In the *Matter of British Aviation Insurance Company, Limited*, [2005] EWHC 1621 and [2006] 1 BCLC 665, ¶ 73 [*British Aviation Insurance Co Ltd, Re*, 2005 WL 1801219 (U.K. Ch D Md. 2005)] (“[i]f the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the court can be”).

35. *BAIC*, [2006] 1 BCLC 665, ¶ 69 [*BAIC*, 2005 WL 1801219] (noting that “cases emphasize that the court is not a rubber stamp”).

36. *BAIC*, [2006] 1 BCLC 665, ¶ 74 [*BAIC*, 2005 WL 1801219] (citation omitted).

37. *Hopewell*, 238 B.R. at 52 (noting that “creditors and members had a plethora of opportunities to object to the scheme before it was sanctioned and continue to have avenues available to them to make their voices heard in opposition to actions taken by Hopewell”).

38. The Court of Appeal in the case of *Hawk Insurance* noted that issues related to class should be addressed as early as possible to minimize the risk of costs and delays associated with the class issues being raised for the first time at the sanction hearing. In light of the concerns raised by the Court of Appeal, the Vice Chancellor (deputy head of the Chancery Division of the High Court of Justice) issued a practice statement. Sir Andrew Morritt V-C, Practice Statements: (Chancery Division: Schemes of Arrangements with Creditors) (2002), L.T.L. 15/4/2002: (2002), 1 WLR 1345: (2002), 3 All ER 96 [Practice Statement (Ch D: Schemes of Arrangements with Creditors), 2002 WL 347191 (Ch D 2002)] (available online at: <http://>

www.lawtel.com) (the Practice Statement). The Practice Statement provides, in pertinent part, as follows:

[U]nless there are good reasons for not doing so the applicant should take all steps reasonably open to it to notify any person affected by the scheme that is being promoted, the purpose which the scheme is designed to achieve, the meetings of creditors which the applicant considers will be required and their composition.

Accordingly, it has become common practice for a scheme proponent to circulate a “practice statement letter” to creditors in advance of its application. It is also common practice to publish the information contained in the practice statement letter in different periodicals. Creditors will therefore have an opportunity to raise concerns regarding class issues prior to the High Court’s involvement. “Any concerns raised by policyholders will be brought to the attention of the court when the company applies for permission to hold meetings of creditors at which policyholders will be entitled to vote on the scheme.” “Guide to Run-Off,” a Special Supplement to 14 Run Off Business Magazine (Autumn 2006) at 9.

39. Insurance companies that have proposed schemes subsequent to the *BAIC* decision have taken the High Court’s comments to heart. The WFUM Companies’ schemes (i) provide for 180 days to file a proof of claim as opposed to 120 days and (ii) do not include a right to revert to run-off if the WFUM Companies conclude that their schemes are no longer beneficial to them.

40. In the case of *Compagnie Européenne D’Assurances Industrielles S.A.* (CEAI), certain creditors raised their concerns regarding CEAI’s scheme in letters written directly to CEAI and its advisors. Although these creditors did not file a formal objection to the CEAI scheme with the High Court, CEAI forwarded the letters to the High Court. Cognizant of the creditors’ concerns, the High Court adjourned the sanction hearing to permit the creditors an opportunity to properly raise objections. Order dated July 31, 2007, In the Matter of *Compagnie Européenne D’Assurances Industrielles S.A.* and In the Matter of the Companies Act 1985, High Court of Justice, Chancery Division, Companies Court, No. 1086 (Ch. entered July 31, 2007).

41. See, e.g., In re Greyfriars Insurance Company Limited, Case No. 07-12934 to 07-12944 (Bankr. S.D.N.Y. Oct. 23, 2007); In re *Compagnie Européenne d’Assurances Industrielles S.A.* Case No. 07-B-12009 (Bankr. S.D.N.Y. Sept. 26, 2007); In re Oslo Reinsurance Company (UK) Limited, Case No. 07-12211 (Bankr. S.D.N.Y. Aug. 29, 2007); In re AXA Insurance UK PLC, et al., Case No. 07-12110 to 07-12113 (Bankr. S.D.N.Y. Aug. 15, 2007), In re Europäische Rückversicherungs-Gesellschaft in Zurich, Case No. 06-13061 (Bankr. S.D.N.Y. Jan. 22, 2007); In re Gordion Run-off Private Ltd., Case No. 06-11563 (Bankr. S.D.N.Y. Aug. 29, 2006); *La Mutuelle du Mans*, Assurance IARD, Case No. 05-60100, 2005 WL 3764946 (Bankr. S.D.N.Y. Dec. 7, 2005).

42. In general, a claim is not impaired if a Chapter 11 plan “leaves unaltered the legal, equitable and contractual rights to which such claim or interest entitles the holder of such claim or interest.” 11 U.S.C.A. § 1124. “Congress obviously intended that the proponent of a plan have the flexibility to separately classify certain general unsecured claims, and thereby leave such claims unimpaired if such treatment was advantageous to the debtor.” 7 Collier on Bankruptcy ¶ 1122.03[1][a], 1122-7 (15th ed. rev. 2006).

43. In re *Rose*, 318 B.R. 771, 44 Bankr. Ct. Dec. (CRR) 19, 53 Collier Bankr. Cas. 2d (MB) 900 (Bankr. S.D. N.Y. 2004).

44. Johnston, 16 Norton J. Bankr. L. & Prac. at 964-965.

45. *Rose*, 318 B.R. at 775-776.

46. *Rose*, 318 B.R. at 775-776.

47. Transcript of June 4, 2004 hearing (in the *Rose* case) at p. 104, In re Petition of David Rose, as foreign representative of In re London and Scottish Assurance Corp. Ltd., No. 04-11829 (Bankr. S.D.N.Y. June 4, 2004) (emphasis added).

48. See Jennifer D. Morton, Note, Recognition of Cross-Border Insolvency Proceedings: An Evaluation of Solvent Schemes of Arrangement and Part VII Transfer under U.S. Chapter 15, 29 Fordham Int’l L.J. 1312, 1349-1350 (2006):

A scheme of arrangement is related to insolvency because it involves debtors reducing, and eventually eliminating, all debt owed to creditors, events that are within the scope of insolvency. The opportunity for a company to enter into a scheme of arrangement is not predicated on its solvency. As a result, even solvent schemes of arrangement should arise under a law “related to insolvency,” and most likely qualify as a mechanism that adjusts debt.

49. Waiver principles may be applied where “a party voluntarily or intentionally relinquishes a known claim right.” *In re Varat Enterprises, Inc.*, 81 F.3d 1310, 1317, 28 Bankr. Ct. Dec. (CRR) 1262 (4th Cir. 1996). This principle applies with full force in the bankruptcy context, see *Varat*, 81 F.3d at 1317, and is often applied to the confirmation process of a Chapter 11 plan of reorganization. When a party fails to object to a Chapter 11 plan and that plan is confirmed, “courts routinely hold that... that party cannot later attack... the debtor’s confirmed plan.” *In re AMF Bowling Worldwide, Inc.*, 278 B.R. 96, 101 (Bankr. E.D. Va. 2002). Failing to object to the sanction of a scheme is closely analogous to failing to object to confirmation of a plan, particularly in view of the similarities between a scheme and a Chapter 11 plan. *Hopewell*, 238 B.R. at 59 (a scheme’s binding effect is very similar to the effect of confirmation of a plan). Equitable estoppel applies in the bankruptcy context as well. See *Varat*, 81 F.3d at 1317. “The doctrine of equitable estoppel allows ‘a person’s act, conduct or silence when it is his duty to speak’ to preclude him from asserting a right he otherwise would have had against another who relied on that voluntary action.” *Varat*, 81 F.3d at 1317. Moreover, *res judicata* will bar a party from relitigating issues when that party had “full and fair opportunity” to litigate the issue in a prior proceeding. See, e.g., *Bank Of India v. Trendi Sportswear, Inc.*, 239 F.3d 428, 439 (2d Cir. 2000). See *In re Bd of Directors of Telecom Argentina, S.A.*, 2006 WL 3378687, at *2 (S.D. N.Y. 2006), judgment aff’d, 528 F.3d 162, 50 Bankr. Ct. Dec. (CRR) 12 (2d Cir. 2008) (noting that *res judicata* applies in the context of recognition of a foreign proceeding).

50. *Hopewell*, 238 B.R. 25.

51. The *Hopewell* scheme was implemented under Bermuda law, which is substantively similar to section 425 of the Companies Act. See *Hopewell*, 238 B.R. at 51.

52. *Hopewell*, 238 B.R. at 59 (“[t]he scheme’s binding effect is very similar to the effect of confirmation of a plan”).

53. *Hopewell*, 238 B.R. at 52.

54. *Hopewell*, 238 B.R. at 58.

55. *Hopewell*, 238 B.R. at 31.

56. Objections to Petitions dated October 16, 2007, *In re* Petition of PRO Insurance Solutions Limited, as foreign representative of Greyfriars Ins. Co. Ltd., et al., Nos. 07-B-12934 through 07-B-12944 (Bankr. S.D.N.Y. October 23, 2007) (Chapter 15 cases of solvent members of *WFUM Pools*).

57. Transcript dated October 23, 2007, at p. 6. *In re* Petition of PRO Insurance Solutions Limited, as foreign representative of Greyfriars Ins. Co. Ltd., et al., Nos. 07-B-12934 through 07-B-12944 (Bankr. S.D.N.Y. October 23, 2007). In the Chapter 15 case of *Schefenacker PLC*, the bankruptcy court similarly noted in overruling a creditor’s objection to recognition of an English company voluntary arrangement that certain objections should have been raised in England.

I get the impression... that you thought that maybe you could raise these same issues here that, in essence, there was a second bite at the apple. But that’s not the way the model law works, and that’s not the way Section 304 worked before the model law. And that’s contrary to the principles of comity and finality and cooperation, which are fundamental parts of Section 1507.

Transcript dated June 14, 2007, at p. 36, *In re* *Schefenacker PLC*, No. 07-11482 (Bankr. S.D.N.Y. June 14, 2007). Transcript dated June 14, 2007, at p. 33-34 (“[t]hose are really objections which you could have and should have raised in the UK Court”).

58. Section 1506 of the Bankruptcy Code provides that “[n]othing in [Chapter 15] prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.” 11 U.S.C.A. § 1506.

59. H.R. Rep. No. 109-31, Pt. 1, 109th Cong., 1st Sess. (2005). See *Iida v. Kitahara*, 377 B.R. at 259 (“[t]his public policy exception is narrow and, by virtue of the qualifier ‘manifestly,’ is limited only to the most fundamental policies of the United States”). The public policy exception should be interpreted “restrictively and... is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.” In re *Ephedra Products Liability Litigation*, 349 B.R. 333, 336, 56 Collier Bankr. Cas. 2d (MB) 734 (S.D. N.Y. 2006) (citing the Official Guide to the Enactment of the Model Law on Cross-Border Insolvency).

60. According to at least one court, the U.S. District Court for the Southern District of New York, the lack of the right to a jury trial in a foreign proceeding is not manifestly contrary to U.S. public policy. *Ephedra Products*, 349 B.R. at 336.

61. See *Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624, 629-30 (2d Cir. 1976).

62. BAIC, [2006] 1 BCLC 665, ¶ 74 [BAIC, 2005 WL 1801219] (citation omitted).

63. *Sovereign Marine*, [2006] EWHC 1335 and [2007] 1 BCLC 228, ¶ 58 [*Sovereign Marine*, 2006 WL 1666896].

64. See *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48, 49 Bankr. Ct. Dec. (CRR) 89, 59 Collier Bankr. Cas. 2d (MB) 20 (Bankr. S.D. N.Y. 2008) (noting “the Court’s power to examine the facts underlying a request for recognition under section 1517, and to inquire under Fed. R. Evid. 614, cannot be sidestepped or eliminated by elections to not plead or introduce the relevant facts”); *Bear Stearns*, 374 B.R. at 125-26.

65. *Hopewell*, 238 B.R. at 52.

66. In 2005, the Connecticut Senate’s Insurance and Real Estate Committee unanimously approved a bill that would permit certain insurance companies, including solvent insurance companies, to wind up their business. That bill was very similar to the Rhode Island statute and Section 425 of the Companies Act. The Connecticut bill, however, has not been enacted. James R. Murray and Julie L. Hammerman, *A Unilateral Novation by Any Other Name? The Status of Solvent ‘Schemes’ and ‘Portfolio Transfers’ in the United States*, *Mealey’s Solvent Schemes and Part VII Transfers Conference 3-6* (January 2008).

67. Murray and Hammerman, *Mealey’s Solvent Schemes and Part VII Transfers Conference 3-6*.

68. *Johnston*, 16 Norton J. Bankr. L. & Prac. at 958.

69. IBNR claims generally refer to “losses for which the company would be liable to indemnify the claimant under a contract of insurance or reinsurance and which at the ascertainment date had been incurred by the claimant’s insured or re-insured but which had not, at that date, been reported to the claimant.” *Hawk Ins.*, [2002] B.C.C. 300, ¶ 35 [2001 WL 98213].

70. All of the WFUM Companies underwrote insurance and reinsurance business in the WFUM Pools. “A pool is not, itself, a legal entity, nor is it a partnership.” Philip Hertz and David Steinberg, *Waving or Drowning? Problems Arising When Pool Participants Go Under The UK Perspective*, *Mealey’s Insurance Insolvency & Reinsurance Roundtable 2001* 323 (2001):

In the early 1970s underwriting pools were a well-recognised feature of the insurance market both in London and elsewhere. Their principal characteristic lay in the acceptance and administration of business by a pool manager on behalf of a group of insurers all of whom participated in the business in agreed shares and who acted as a single underwriting unit.

(quoting *Kingscroft Insurance Co. Ltd. v. Nissan Fire & Marine Ins. Co. Ltd.*, [1999] C.L.C. 1875 (Queens Bench Division 1999)). In 1991, the WFUM Pools ceased accepting new business and went into run-off. With the exception of *Sovereign Marine & General Insurance Company Limited*, all of the WFUM Companies were solvent. *Sovereign Marine*, [2006] EWHC 1335 and [2007] 1 BCLC 228, ¶ 3 [*Sovereign Marine*, 2006 WL 1666896].

71. *Sovereign Marine*, [2006] EWHC 1335 and [2007] 1 BCLC 228, ¶ 8 [*Sovereign Marine*, 2006 WL 1666896].

72. *Sovereign Marine*, [2006] EWHC 1335 and [2007] 1 BCLC 228, ¶ 141 [*Sovereign Marine*, 2006 WL 1666896].

73. Johnston, 16 Norton J. Bankr. L. & Prac. at 958.
74. BAIC, [2006] 1 BCLC 665, ¶ 102 [BAIC, 2005 WL 1801219]. In the *WFUM Pools* case, certain creditors indicated that they would challenge the valuation of the votes and requested an adjournment of the hearing to consider sanction of the solvent WFUM Companies and schemes scheduled for July 2007. The High Court noted that “the opposing creditors are entitled to be put into a position to substantiate, if the evidence can do so, their objections to the vote.” In the *Matters of Sovereign Marine & General Insurance Company Limited and Others*, [2007] EWHC 1331, ¶ 60 [Sovereign Marine & General Insurance Co Ltd, Re., 2007 WL 1591035 (U.K. Ch D Md. 2007)]. Accordingly, the High Court adjourned the hearing to September 2007 to allow the opposing creditors and the solvent WFUM Companies additional time to prepare evidence regarding the vote calculation issues. *Sovereign Marine*, [2007] EWHC 1331, ¶ 70 [Sovereign Marine, 2007 WL 1591035]. Ultimately, the opposing creditors and the solvent WFUM Companies resolved their dispute and the opposing creditors did not raise any objections at the sanction hearing. Transcript of Proceeding dated September 27, 2007, at p. 2. In the *Matter of Sovereign Marine & General Ins. Co. Ltd. and Others*, High Court of Justice, Chancery Division, Companies Court, Claim Nos. 1611, 1618, 1621-22, 1624-26, 1628-30, 1632-35, 1647 and 1648 (Ch. argued September 27, 2007).
75. BAIC, [2006] 1 BCLC 665, ¶ 107 [BAIC, 2005 WL 1801219].
76. “The BAIC decision created a cottage industry in case commentary. But a consensus is emerging that BAIC was a bump in the road and may have provided only a much-needed wake up call to scheme designers and administrators to road-test their arrangements more thoroughly and, where necessary, address the needs of competing classes of creditors.” James Veach, *Intersecting Alternatives to the Current U.S. Insurer (Reinsurer) Insolvency Model: A Peek into the “Rough and Tumble World of the Reinsurance Business within the Liquidation Setting,”* 8712 PLI/Comm 679, 691 (June 2006) (citations omitted).
77. See Joseph J. Schiavone and Jeffrey S. Leonard, *Beware Solvent Scheme Procedures, Business Insurance* (March 24, 2006), at 10 (“[Recent] cases are a call for fairness and transparency in the conduct of solvent schemes of arrangement. The decisions should help policyholders and reinsureds recognize that they remain passive in the face of a pending scheme at their peril and that there may be grounds to challenge solvent schemes”).
78. Johnston, 16 Norton J. Bankr. L. & Prac. at 967.
79. *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 118, 43 Bankr. Ct. Dec. (CRR) 175, Bankr. L. Rep. (CCH) P 80168 (3d Cir. 2004) (citations omitted).
80. *In re SGL Carbon Corp.*, 200 F.3d 154, 163, 35 Bankr. Ct. Dec. (CRR) 116, 43 Collier Bankr. Cas. 2d (MB) 668, Bankr. L. Rep. (CCH) P 78084, 1999-2 Trade Cas. (CCH) ¶ 72739 (3d Cir. 1999) (“[i]t is well established that a debtor need not be insolvent before filing for bankruptcy protection”).
81. See, e.g., *In re Century/ML Cable Venture*, 294 B.R. 9 (Bankr. S.D. N.Y. 2003); *In re Texaco Inc.*, 84 B.R. 893, 17 Bankr. Ct. Dec. (CRR) 483, Bankr. L. Rep. (CCH) P 72235 (Bankr. S.D. N.Y. 1988); *In re Liberate Technologies*, 314 B.R. 206, 43 Bankr. Ct. Dec. (CRR) 170, 52 Collier Bankr. Cas. 2d (MB) 1451 (Bankr. N.D. Cal. 2004); *In re Horan*, 304 B.R. 42, 51 Collier Bankr. Cas. 2d (MB) 1859 (Bankr. D. Conn. 2004); *In re Marshall*, 300 B.R. 507 (Bankr. C.D. Cal. 2003); *In re Central Jersey Airport Services, LLC*, 282 B.R. 176, 49 Collier Bankr. Cas. 2d (MB) 209 (Bankr. D. N.J. 2002).
82. See, e.g., *Hopewell*, 238 B.R. 25.
83. Johnston, 16 Norton J. Bankr. L. & Prac. at 969.
84. *Hopewell*, 238 B.R. at 63 (“[b]ankruptcy sometimes causes changes in contractual rights necessary to benefit the estate as a whole”); see *Matter of Pease*, 195 B.R. 431, 35 Collier Bankr. Cas. 2d (MB) 1408 (Bankr. D. Neb. 1996) (“[t]he Bankruptcy Code substantively alters the rights and remedies of both debtors and creditors in a most fundamental way”).
85. See BAIC, [2006] 1 BCLC 665, ¶ 133 [BAIC, 2005 WL 1801219].
86. BAIC, [2006] 1 BCLC 665, ¶ 128 [BAIC, 2005 WL 1801219] (“there is a real danger that the claims of different creditors will be estimated on different bases; and that, following on from this, there is a real danger that creditors will be unequally treated”).