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Balancing Principles of Cooperation and Public Policy in Applying Comity

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Introduction

Comity is a common law legal principle that allows U.S. courts to afford deference to foreign judgments.[1] Comity is utilized as a basis for granting extraterritorial effect to judgments of foreign courts.[2] This principle plays an integral role in a number of cross-border bankruptcy proceedings and has been adopted as a predominate legal principal in the Model Law on Cross-Border Insolvency (the "Model Law"), promulgated by the United Nation's Commission on International Trade, and Chapter 15 of title 11 of the United States Code (the "Bankruptcy Code"). [3]

Although American courts have long recognized the need to extend comity to foreign proceedings, they have not been uniform in the application. Early court decisions viewed reciprocity as a prerequisite for granting conclusive effect to foreign judgments.[4] When a foreign court refused to grant comity to a valid U.S. judgment that was sufficient for a U.S. court not to enforce an otherwise valid foreign judgment.[5] More recently, courts have moved away from the

[1] *See In re* Neves, 570 B.R. 420, 426 (Bankr. S.D. Fla. 2017).
[2] *See* Hilton v. Guyot, 159 U.S. 113, 170 (1895).
[3] *See* Model Law, 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, Art. 4¶ 15 (1999), enacted by G.A. Res.52/158, U.N. Doc. A/Res/52/158.
[4] *See* Hilton v. Guyot, 159 U.S. at 202–03.
[5] *See id.*

reciprocity requirement and approach issues of comity based on efficiency and fairness.[6] A court may also withhold comity when a foreign judgment "clearly undermine[s] the public interest, the public confidence in the administration of law, or security for individual rights of personal liberty or of private property . . ."[7] Congress intended courts to exercise restraint and limit the applicability of this public policy exception to situations involving fundamental notions of fairness.[8]

This article addresses comity's role in bankruptcy proceedings, with a focus on the different requirements as well as the circumstances under which a court would not extend comity to a foreign proceeding. Part I discusses the historical application of comity and how courts have moved away from the reciprocity requirement. Part II discusses the public policy exception through various court decisions indicating that Congress intended comity to be used sparingly. This article concludes by determining that a broad application of the public policy exception erodes comity's objective to provide for cooperation and deference to foreign proceedings.

I. Applying International Comity: Reciprocity or Cooperation?

When Congress enacted Chapter 15 of the Bankruptcy Code – the statutory provisions regulating cross-border proceedings – it did so with the overarching goal of facilitating mutual cooperation and coordination between nations.[9] Chapter 15 includes the word "comity" and instructs judges to promote comity but provides no guidance on how to do so.[10] Thus, judges are left to ascertain the appropriate role of comity in cross-border proceedings. In making that determination, courts consider the interests of the United States, the foreign state and the

[6] *See In re* Neves, 570 B.R. at 426.
[7] Corporación Mexicana De Mantenimiento Integral, S. De R.L. de C.V. v. Pemex–Exploración Y Producción, 832 F.3d 92, 106 (2d Cir. 2016).
[8] *See id*. (quoting Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986) (stating that "[t]he public policy exception does not swallow the rule: '[t]he standard is high, and infrequently met . . .'").
[9] *See* H.R. REP. NO. 109-31, pt. 1, at 105 (2005).
[10] *See In re* Artimm, SRL, 335 B.R. 149, 161 (Bankr. C.D.CA 2005) (discussing the broad discretion and flexibility afforded to a bankruptcy court); 11 U.S.C. § 1506 (2005).

efficiency of the law.[11] Precedent establishes that "comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect."[12]

Although questions of comity arise most frequently in Chapter 15 cases involving recognition of foreign insolvency proceedings that does not mean comity is limited to such proceedings.[13] For example, *In re Neves* involved a Chapter 7 proceeding in which the bankruptcy court granted comity to an Italian court order.[14] There, relying on principles of comity, the court found it proper to honor the judgment of the foreign court.[15] Additionally, where Australian bankruptcy law did not offer a creditor the same recourse as would be available in the U.S., the court had little trouble concluding that the structure of the Australian law was inconsistent with U.S. policy.[16]

A. *Granting Comity in the Absence of Reciprocity*

The leading case asserts that "[c]omity, in the legal sense, is neither a matter of absolute obligation . . . nor a mere courtesy and good will."[17] Rather "it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard to both international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its law."[18]

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[11] *See In re* Artiumm, SRL, 335 B.R. at 161.
[12] Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, 44 F.3d 187, 192 (3d Cir. 1994).
[13] *See* H.R. REP. NO. 109-31, pt. 1, at 110 (discussing the application of § 1520 (a)(2)).
[14] *See In re* Neves, 570 B.R. at 422.
[15] *See id*.
[16] *See* Interpool v. M/V Venture Star, 102 B.R. 373 (Bankr. D.N.J. 1988) (moving to dismiss competing bankruptcy proceedings filed under Chapter 7 against the debtor by U.S. creditors); *see also In re RHTC Liquidating Co.*, 424 B.R. 714, 726 (Bankr. W.D. Pa. 2010) (denying a motion to dismiss a Chapter 7 case because "the purpose of comity, or cooperation underlying Chapter 15, is not likely to be advanced by a dismissal of the [] case").
[17] *Hilton*, 159 U.S. at 163–64; *see In re Neves*, 570 B.R. at 426 (describing *Hilton* as "the seminal decision on comity").
[18] *Id*.

Following *Hilton*, courts have raised many criticisms over the Supreme Court's definition of comity, mainly that it is both incomplete and ambiguous.[19] Is there a duty of comity, or is it just a convenience? If so, when is it appropriate to extend comity out of goodwill rather than as an obligation? The *Hilton* court understood comity to be a principle of reciprocity. Thus, it determined because French courts would not grant comity to judgments rendered by U.S. courts against French citizens, the French "judgment is not entitled to be considered conclusive."[20]

The reciprocity requirement has been used to reject comity when a foreign court would not defer equally to a U.S. proceeding.[21] Courts that have denounced a reciprocity requirement have reasoned that such a prerequisite is contrary to our legal system's policy favoring the end of litigation.[22]

Notwithstanding the holding in *Hilton*, courts do not consider reciprocity to be a deciding factor, and most refuse to abide by the *Hilton* decision.[23] While reciprocity may be something a court considers, it should not be the deciding factor. To hold otherwise undermines its purpose to uphold "principles of international comity and respect for the judgments and laws of other nations."[24]

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[19] *See* Somportex Ltd. v. Phila. Chewing Gum Corp., 318 F. Supp. at 168 (discussing commentators' criticism of Hilton's reciprocity requirement).
[20] *Hilton,* 159 U.S. at 228.
[21] *See In re* Toga Mfg., Ltd., 28 BR 165, 169–170 (Bankr. E.D. Mich. 1983) (denying ancillary relief because the creditors would not be treated equally under U.S. and Canadian bankruptcy law).
[22] *See Somportex Ltd.*, 318 F. Supp. at 168; *see also In re* Colorado Corp., 531 F.2d 463, 469 (10th Cir. 1976) (stating that "[d]enying comity to the Netherlands Antilles order because of lack of reciprocity in Canada is such a misdirected use of the reciprocity consideration as to constitute an abuse of discretion").
[23] *See Somportex Ltd.*, 318 F. Supp. at 161, 168 (discussing how New York and California courts have expressly rejected a reciprocity requirement, and if they were confronted directly with the issue they would reject it as well).
[24] Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 455 (2d Cir. 1985) *quoting* H.R. REP. NO. 95-595, at 324–25 (1978).

B. Principles of Cooperation and Efficiency take Priority over Reciprocity

There have been many different tests and approaches used by courts when undertaking a comity analysis; in part because there is no set requirement for determining whether comity is appropriate. Congress intended that courts have "maximum flexibility" in fashioning appropriate orders.[25] Thus, while courts' approaches vary, they all encompass fundamental components of jurisdictional and procedural fairness.[26] In *In re Neves,* the court undertook a four-part test to determine whether it was appropriate to extend comity to a foreign proceeding.[27]

> To determine whether extending comity to judgment of foreign court is appropriate, a court must evaluate: (1) whether the foreign court was competent and used proceedings consistent with civilized jurisprudence, (2) whether the judgment was rendered by fraud, (3) whether the foreign judgment was prejudicial because it violated American public policy notions of what is decent and just, and (4) whether to respect the judgment of a foreign tribunal or to defer to parallel foreign proceedings.

[28] First, the party arguing for comity has the initial burden to show that the court was competent and the proceedings were consistent with civilized jurisprudence.[29] The party is required to describe the process, why it was not unfair, and why it does not offend the United States' notions of justice.[30] Second, the court must find no evidence of fraud in the foreign proceeding. In *In re Neves*, a Chapter 7 debtor sought recognition of an Italian court order. There, the court held that recognition of the order was proper and contained no indication of fraud.[31] Further, even in

[25] *See In re* Goerg, 844 F.2d 1562, 1567–68 (11th Cir. 1988) *quoting* H.R. REP. NO. 95-595, at 325.
[26] *See In re* Kmart Corp., 285 B.R. 679 (Bankr. N.D. Ill. 2002) (applying a six-part test); *In re* Elcoteq, Inc., 521 B.R. 189 (Bankr. N.D. Tex. 2014) (applying a five-part test).
[27] *See In re* Neves, 570 B.R. at 426 (providing an example of how to incorporate principles of cooperation and fairness in a comity analysis).
[28] *Id*.
[29] *See id.*
[30] *See id.* at 432 (determining the Italian court's competence and consistency with civilized jurisprudence)
[31] *See id*. at 431.

instances of fraud such an allegation regardless of whether it is true, is not enough to estop a court from granting comity.[32]

Once the competence of the foreign court is established, the burden shifts to the opposing party to show that the foreign proceeding violates notions of what is decent and just.[33] The *Neves* court rejected the objection that recognition of an *ex parte* order violated due process.[34] In *In re Neves*, the appointed judicial administrator was personally served and had the opportunity to be heard.[35] Even if that had not been the case, however, then the complete denial of due process and notice would have been held to be "manifestly contrary to public policy."[36] Further, principles of fairness do not require the foreign court to provide the same solution as a U.S. court.[37]

Lastly, deference to foreign proceedings is one of the pillars of comity.[38] If the process is sound and everything else is fair, the U.S. court should defer to the foreign proceeding and elect not to conduct a parallel proceeding.[39] When nothing indicates the prejudice of a foreign proceeding, and there has been an opportunity for a full and fair trial in front of a competent court, "the merits of the case should not, in an action brought in United States upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that

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[32] *See* Fleeger v. Clarkson Co. Ltd., 86 F.R.D. 388, 393 (N.D. Tex. 1980) (granting comity to a settlement effectuated by a Canadian receiver, where the settlement was approved by the Canadian court: "If, as Plaintiff alleges, Defendants have worked a fraud upon the Supreme Court of Ontario, that court is the appropriate forum to decide that allegation.").

[33] *See In re* Neves, 570 B.R. at 427; *see also* Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1409 (9th Cir. 1995).

[34] *In re* Neves, 570 B.R. at 429, 432 (concluding that *ex parte* orders are not per se violations of fairness and process); *see also In re* Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 116 (Bankr. S.D.N.Y. 2012) ("[d]ue process is not violated by the entry of *ex parte* orders, provided that notice and opportunity to appear and defend are promptly given").

[35] 570 B.R. at 432.

[36] *In re* Sivec SRL, 476 B.R. 310, 324 (E.D. Okla. 2012) (holding that the failure to give a U.S. creditor notice of Italian insolvency proceeds amounted to a denial of due process and notice under U.S. law).

[37] *See In re Metcalfe & Mansfield Alternative Invs*. 421 B.R. 685, 697–98 (S.D.N.Y. 2010) (stating that "[t]he relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical.").

[38] *See In re* Axona International Credit & Commerce, 88 B.R. 597, 608 (Bankr. S.D.N.Y. 1988).

[39] *In re* Neves, 570 B.R. at 428 (stating that "it is not the role of a U.S. Court to review the factual findings of a foreign court").

the judgment was erroneous in law or in fact."[40] The cases advocating for deference to the foreign proceeding do not hinge on the reciprocity requirement in *Hilton*. Instead, the concern is with the fairness and competence of the foreign judiciary, not whether an American judgment would be treated similarly by the foreign court.[41]

II. The Limitations of Comity through the Public Policy Exception

When Congress adopted the Model Law on Cross-Border Insolvency into Chapter 15 of the Bankruptcy Code, it included § 1506 which states: "[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."[42] The public policy exception allows a court to refuse to grant comity to a foreign proceeding when it would directly contravene U.S. laws and public policy.[43]

A. The Ambiguous "Manifestly Contrary" to Public Policy Standard: Determining when the Public Policy Exception Applies

Congress did not define public policy; however, they did express their intent to limit the exception to "the most fundamental [] policies of the United States."[44] Thus, it has been left to the courts to determine what exactly public policy entails.[45] Although Congress left the courts with broad discretion, few decisions address when a U.S. policy is so "fundamental" that the exception applies.[46] This is in part because Chapter 15 of the Bankruptcy Code was not enacted until 2005; thus, the scope of the public policy exception has not been clearly defined.[47] Courts

[40] *Hilton*, 159 U.S. at 203.
[41] *See* Tahan v. Hodgson, 662 F.2d 862, 867–868. (D.C. Cir. 1981).
[42] 11 U.S.C. §1506 (commonly known as the public policy exception).
[43] *See In re* Toft, 453 B.R. 186, 196 (Bankr. S.D.N.Y. 2011); *In re* Neves, 570 B.R at 426; *In re* Sino-Forest Corporation, 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013).
[44] H.R. REP. NO. 109-31, pt. 1, at 109.
[45] *See In re* Qimonda AG Bankr. Litig., 433 B.R. 547, 565 (E.D. Va. 2010).
[46] *Id*. at 568.
[47] *See In re* Vitro, S.A.B. de C.V., 473 BR 117, 123 (Bankr. N.D. Tex. 2012).

that have addressed the public policy exception maintain that Congress included the word "manifestly" as a qualifier to "public policy" in the statute to significantly limit the exception.[48]

(1) Circumstances not Manifestly Contrary to Public Policy.

The cases confronted with the public policy exception primarily have held that extending comity to a foreign proceeding would not be manifestly contrary to U.S. public policy.[49] Where U.S. creditors received less in a foreign proceeding than they could have obtained from a U.S. court that also was not considered manifestly contrary to U.S. public policy.[50] The court, reasoning that because the right to a jury trial in the bankruptcy context is relatively rare and many non-jury foreign proceedings are still "fair and impartial," held that nothing "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 . . ."[51]

Therefore, an examination of the cases that have considered the public policy exception reveal that it should be invoked in the rarest of circumstances.[52]

(2) Invoking the Exception: Policies Manifestly Contrary to Public Policy

Due to the understanding that the public policy exception should be applied narrowly, it has been successfully invoked on only a few occasions.[53] When determining whether to invoke the public policy exception courts have will consider three factors: (i) the procedural fairness of the foreign proceeding; (ii) whether the application of the foreign law "would impinge severely a

[48] *In re* Qimonda AG, 433 B.R. at 567.
[49] *See generally In re* Qimonda AG, 433 B.R. at 568 ("[T]he fact that application of foreign law leads to a different result than application of U.S. law is, without more, insufficient . . . .").
[50] *See In re* Ernst & Young, 383 B.R. 773, 781 (Bankr. D. Colo. 2008) (holding that the foreign proceeding would not produce "a result so drastically different"). Even the inability to have a jury trial in a Canadian proceeding did not warrant the application of the public policy exception. *See In re* Ephedra Prod. Liab. Litig., 349 B.R. 333, 335 (S.D.N.Y. 2006).
[51] *Id*. at 335–337.
[52] *See In re* Qimonda AG, 433 B.R. at 565 (discussing the limited circumstances and discretion of the court, upon evaluating all facts and circumstances to determine if a specific proceeding amounts to a fundamental violation of U.S. public policy).
[53] *See In re* Qimonda AG, 433 B.R. at 568 (providing an overview of the decisions discussing the exception).

U.S. constitutional or statutory right"; and (iii) if extending comity would "severely hinder [U.S.] bankruptcy courts' ability to carry out . . . the most fundamental policies and purposes" of these rights.[54]

The public policy exception applied when recognition of a foreign order would have violated privacy rights and U.S. criminal laws.[55] In *In re Toft* the court denied enforcement of a German court order because the German procedures were "manifestly contrary" to U.S. policy.[56] There, a German Mail Interception Order allowed the foreign representative to gain access to all of the Debtor's current and future e-mails without providing any notice.[57] Although such orders are common under German law, they are banned under U.S. law.[58]

Courts have also invoked the exception where a foreign proceeding deprived a creditor of fundamental rights of notice and opportunity to be heard, and when comity would be in opposition to U.S. standards of justice.[59] The *Sivec SRL* court determined that a creditor's interests were not protected in an Italian liquidation proceeding. The creditor neither received notice nor was given the opportunity to file a claim to initiate a resolution.[60] Therefore, the court denied the relief sought because the absence of notice and opportunity to be heard are fundamental violations of U.S. public policy.[61] In *In re Gold & Honey*, the public policy exception applied because the relief sought would otherwise contravene basic notions of

[54] *Id*. at 568–69; *see also In re* Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr. E.D.N.Y 2009).
[55] *See generally In re* Toft, 453 B.R. at 186.
[56] *Id*. at 196.
[57] *See id*. at 189.
[58] *See id*. at 198 (stating that "[t]he relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to all aliens, built on constitutional safeguards incorporated in the Fourth Amendment . . . .").
[59] *See In re* Sivec SRL, 476 B.R. at 322; *In re* Gold & Honey, Ltd., 410 B.R. at 371.
[60] *In re* Sivec SRL, 476 B.R. at 322.
[61] *See id.; see also In re* Neves, 570 B.R. at 432 (finding no violation of U.S. policy where there was notice and opportunity to be heard).

justice.[62] There, the court reasoned that recognition would "reward and legitimize" the foreign representative's "violation of both the automatic stay and this Court's Orders regarding the stay."[63] The court further stated that to hold otherwise "would severely hinder [U.S.] bankruptcy courts' abilities to carry out two of the most fundamental policies and purposes of the automatic stay. . . ."[64] Other cases that have refused recognition on public policy grounds have involved the discharge of third-party guarantees and the protection of U.S. patent licenses.[65]

The cases that found it appropriate to apply the public policy exception were extremely precise in their analysis and reiterated the narrowness of the circumstances in which it applied.[66]

B. Courts Have Increasingly Endorsed a Restrictive Approach to the Public Policy Exception

The cases that have invoked the public policy exception support a standard indicating that the doctrine should only be used in the narrowest of circumstances.[67] Additionally, courts' that have declined to apply the exception stress the limited circumstances in which it applies.[68] A narrow understanding of the exception is in harmony with comity's goals of international cooperation and efficiency.[69] Thus, in the absence of either irreconcilable procedural unfairness,

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[62] *See In re* Gold & Honey, Ltd., 410 B.R. at 371.
[63] *Id*.
[64] *Id*. at 372.
[65] *See In re* Vitro S.A.B de CV, 473 B.R. at 132 (determining that a foreign reorganization plan that extinguishes the protection of third-party claims is manifestly contrary to the public policy of the U.S.); *In re* Qimonda AG, 462 B.R. 165, 185 (Bankr. E.D. Va. 2011) (holding that deferring to German law, "would severely impinge an important statutory protection . . . and thereby undermine a fundamental U.S. public policy promoting technological innovation").
[66] *See In re* Toft, 453 B.R. at 201 (acknowledging that "this is one of the rare cases in which an order of recognition . . . would be manifestly contrary to U.S. public policy").
[67] *See generally, In re* Toft, 453 B.R. at 198; *In re* Sivec SRL, 476 B.R. at 322; *In re* Gold & Honey, 410 B.R. at 372–73; *In re* Vitro, 473 B.R. at 132; *In re* Qimonda, 462 B.R. at 185.
[68] *See In re* Ernst & Young, Inc., 383 B.R. at 781 (requiring that the exception is applied narrowly, and "should be invoked only when the most fundamental policies of the United States are at risk").
[69] *See* Model Law, 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, Art. 6 ¶ 88 (1999), enacted by G.A. Res.52/158, U.N. Doc. A/Res/52/158 (declaring that "international cooperation would be unduly hampered if public policy would be understood in an extensive manner").

a constitutional or statutory violation, or the inability of courts to carry out justice, comity would likely be granted.[70]

Conclusion

Congress intended comity to be a flexible and discretionary process. Whether comity should be extended should be determined on a case-by-case basis rather than through the rigid application of a uniform test. The underlying principles of cooperation do not require the same approach in every case. The public policy exception should be applied only in the narrowest of circumstances. To hold otherwise, would erode the predictability and efficiency that comity provides.

[70] *See In re* Qimonda AG, 433 B.R. at 570 (concluding that "[d]eference to a foreign proceeding should not be afforded . . . where the procedural fairness of the foreign proceeding. . . cannot be cured" and "where taking such action would frustrate a U.S. court's ability . . . and/or would impinge severely a U.S. constitutional or statutory right").