IN RE QIMONDA AG: THE CONFLICT BETWEEN COMITY AND THE PUBLIC POLICY EXCEPTION IN CHAPTER 15 OF THE BANKRUPTCY CODE

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ABSTRACT

A case named In re Qimonda AG generated an appeal in the Fourth Circuit, which raised an important issue concerning Chapter 15 of the Bankruptcy Code. The issue was whether the administrator of a foreign insolvency proceeding may circumvent U.S. public policy by invoking "comity" under Chapter 15, or whether the public policy exception in

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Chapter 15 prevents such a result. The specific question presented was whether Chapter 15 permits a foreign administrator to avoid the application of Section 365(n) of the Bankruptcy Code, which was enacted by Congress with the explicit goal of furthering the public policy of supporting the high tech industry by providing protection for intellectual property license agreements. In a 2007 article, and without any knowledge of Qimonda AG, I described a hypothetical situation in which the battle over the public policy exception might be triggered by a theoretical corporation filing for bankruptcy. In that hypothetical, the company owned and operated factories in the United States and Germany, and had thousands of creditors and employees in both countries. The hypothetical further contemplated that the company was incorporated in Germany, had its headquarters in Munich, owned and operated factories in Bavaria, and had half of its employees and creditors in Germany. The hypothetical concluded by finding that if the company filed for bankruptcy protection, it would be almost certain that Germany would be deemed to be the center of its main interests. Consequently, application of the pure universalist ideal would result in the German court taking control of the case and applying German bankruptcy law to the disposition of all of the assets and claims.

This hypothetical has now become a reality. Qimonda AG is a company incorporated in Germany, and has its headquarters in Munich. The public policy exception has been directly triggered by this case. The purpose of this paper is to support the Bankruptcy Court's decision. After completion of this paper, the Fourth Circuit affirmed the Bankruptcy Court's decision and held that Chapter 15 does not permit the circumvention of Section 365(n).

I. INTRODUCTION

In my three prior articles on Chapter 15 of the U.S. Bankruptcy Code, I warned against the overbroad interpretation of Chapter 15 advanced by those who support the "universalist" approach to transnational bankruptcies.[1] Universalists argue that the insolvency law of the debtor's

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[1] *E.g.* John J. Chung, *Chapter 15 of the Bankruptcy Code and Its Implicit Assumptions Regarding the Foreign Exchange Market*, 76 TENN. L. REV. 67 (2008); John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89 (2006) [hereinafter *The New Chapter 15*]; John J. Chung, *The Retrogressive Flaw of Chapter 15 of the Bankruptcy Code: A Lesson from Maritime Law*, 17 DUKE J. COMP. & INT'L L. 253 (2007) [hereinafter *The Retrogressive Flaw of Chapter 15*].

Chapter 15 of the Bankruptcy Code was enacted in 2005 and tracks the Model Law on Cross–Border Insolvency promulgated by the United Nations Commission on International Trade Law ("UNCITRAL" and "Model Law") in 1997. *See* H.R. REP. NO. 109–31, at 21-35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 105-07; *see also In re* Vitro S.A.B. de CV, 701 F.3d 1031, 1043 (5th Cir. 2012).

home country should apply to all of the matters and relationships of the debtor around the world, even if such matters and relationships have no connection to the debtor's home country, the relationships were formed under the laws of another country, or the law of the home country undermines the policies of the other country.[2] Under universalism, a corporation takes the bankruptcy laws of its home country wherever it goes and into every country in which it does business.[3] The bankruptcy laws of its home country displace and override the bankruptcy laws of all other countries, even if the laws of the debtor's home country are in direct conflict with the laws of the other country.[4]

The universalist approach to transnational bankruptcies is based on the concept of "one law, one court." Frederick Tung, *Is International Bankruptcy Possible?* 23 MICH. J. INT'L L. 31, 40 (2001). This approach envisions a single bankruptcy proceeding in the debtor's "home country" where a single court applies the bankruptcy law of its country and makes a unified worldwide distribution to creditors through liquidation or reorganization. Jay L. Westbrook, *Universalism and Choice of Law*, 23 PENN. ST. INT'L L. REV. 625, 625-26 (2005). That court would have global jurisdiction over all of the debtor's assets and creditors, wherever located. Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L L. REV. 555, 561 (2001). Universalism requires a country to defer to a foreign legal proceeding, even with respect to property within its own territory and legal relationships formed and wholly conducted within its own borders. *Id.* at 569.

> In its purest conceptual form, universalism aspires to the harmonization of one worldwide, substantive law of bankruptcy. The most common model of universalism, however, follows a pluralist route. Sidestepping the issue of which substantive provisions the ideal bankruptcy law would possess, it simply selects from one of the pre-existing bankruptcy regimes ex post.

John A.E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. 935, 948 (2005).

In contrast, territorialism is the traditional practice of nations exercising exclusive jurisdiction over assets and parties within their borders. Lynn LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2218-21 (2000). "It is the default rule in every substantive area of law, including . . . bankruptcy." *Id.* at 2218. It rests upon traditional notions of national sovereignty, which means that the law of the sovereign is imposed on all people and property within its territorial reach. Jay L. Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 5 (2002). To its detractors, territorialism is referred to pejoratively as the "grab rule" because each nation's court grabs the assets within its jurisdiction for distribution under its own laws. Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2179 (2000). In a transnational bankruptcy conducted under the principles of territorialism, each country decides under its own laws how the debtor's assets within its territory will be treated in the face of creditor claims, without deferring to any foreign proceeding involving the same debtor. Lynn M. LoPucki, *The Case for Cooperative Territoriality*, *supra*, at 2218.

[2] *See* Tung, *Is International Bankruptcy Possible?, supra* note 1, at 40-41.

[3] *See id.*

[4] I have previously described universalism in a previous article:

Fortunately, Chapter 15 contains a public policy exception, which 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] Universalists insist on an extremely narrow interpretation and application of the public policy exception.[6] In my

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> [A]t its heart, universalism is about the displacement of national law in favor of foreign law. The intended effect and ultimate goal is to remove entire classes of people and transactions from the protection of their national law and subject them to foreign law. Under universalism, an American citizen whose transactions are exclusively within the United States will be forced into a foreign court applying foreign law in the event of bankruptcy by a foreign counterparty — even if the parties expected local law to apply.

The New Chapter 15, *supra* note 1, at 90.

> In the universalist's world view, an American citizen should give up the protection of U.S. law and become subject to the exclusive jurisdiction of foreign law in the event of bankruptcy if she: (i) sold goods or services on credit to a foreign corporation, (ii) was an employee of a foreign company, or (iii) was injured by a foreign corporation. In effect, a foreign corporation brings to the United States all of its domestic bankruptcy law and supplants American law in its entirety. The bankruptcy of a major multinational company would thus result in thousands of employees and creditors, and thousands of transactions losing the protection of American laws. An entire social and commercial stratum would be carved out of the country's sovereignty and subjected to foreign law.

Id. at 105-106.

[5] 11 U.S.C. § 1506 (2006).

[6] In interpreting and applying Chapter 15, U.S. courts are called upon to look to the Guide to Enactment of the UNCITRAL Model Law Insolvency ("the Guide") that was promulgated in connection with the approval of the Model Law. U.N. Comm'n on Int'l Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, U.N. Doc. A/CN.9/442 (Dec. 19, 1997); *see In re* Tri-Continental Exch. Ltd., 349 B.R. 627, 633 (Bankr. E.D. Cal. 2006). By using the phrase "manifestly contrary" in § 1506, Congress intended that the public policy exception be narrowly construed, which is consistent with the explication in the Guide. H. COMM. ON THE JUDICIARY, BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, H.R. REP. No. 109–31, at 109 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 172 (citing the Guide in omitted footnote). The House Report explains:

> [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. The word "manifestly" in international usage restricts the public policy exception to the most fundamental policies of the United States.

Id. at 109.

The Guide elaborates:

> 88. For the applicability of the public policy exception in the context of the Model Law it is important to note that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, as

prior articles, however, I argued for the broadest interpretation and application.

I predicted that, at some point, U.S. courts would be confronted with the issue of the scope of the public policy exception and that a foreign debtor would argue for the application of a foreign law that directly contravenes strong U.S. policy concerns as expressed by Congress.[7] In an article published in 2007, I described a hypothetical situation in which the battle over the public policy exception might be triggered:

> To illustrate, suppose a company owns and operates factories in the United States and Germany, and has thousands of creditors and employees in both countries. Suppose further that the company was incorporated in Germany, has its headquarters in Munich, owns and

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> well as the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if public policy would be understood in an extensive manner.
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> 89. The purpose of the expression "manifestly", used also 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 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

Id. at ¶¶ 88–89.

[7] For example, I wrote:

> At this time, the scope and contours of the new law are still untested and unknown. Its first few years will likely generate a struggle between those with a more traditional view of bankruptcy law versus those whose goal is to internationalize it, with the two sides seeking to narrow or expand the meaning and application of Chapter 15. This struggle will be a continuation of the debate between the two competing and polar models of transnational bankruptcy law – territorialism and universalism.

The Retrogressive Flaw of Chapter 15, supra note 1, at 253.

I went on to add:

> [T]he new Chapter 15 will likely generate debate regarding the extent to which it promotes or achieves the goals of universalism. The battleground for this debate will likely be Section 1506, the public policy exception. Because many of the operative provisions of Chapter 15 are mandatory, the primary means to avoid their application will be to raise and prevail on the threshold issue of whether the requested rulings violate public policy. The proponents of universalism will argue that the public policy exception is designed to be an extremely narrow exception to be applied in the rare case. They need to advance this position because a broad application of Section 1506 would frustrate the basic purpose of universalism. Those with an opposing view will argue for a wide and liberal application of the exception, to the point where it literally becomes the exception that swallows the rule.

Id. at 260-61.

> operates factories in Bavaria, and has half of its employees and creditors in Germany. If this company filed for bankruptcy protection, it is almost certain that Germany would be deemed to be the center of its main interests. Consequently, application of the pure universalist ideal would result in the German court taking control of the case and applying German bankruptcy law to the disposition of all of the assets and claims. Thus, unpaid creditors in the United States would be required to seek repayment in the German court, and their rights would be determined by German bankruptcy law. This would be the situation even if the American creditors had engaged in transactions exclusively within the boundaries of the United States.[8]

Although it was clear to me that the courts would ultimately have to rule on the public policy exception, I did not know that the specific facts of this hypothetical would be so close to reality.

On appeal to the United States Court of Appeals for the Fourth Circuit is an issue generated by the bankruptcy case of *In re Qimonda AG*. The appeal is styled *Jaffe v. Samsung Electronics Co., Ltd.*[9] Qimonda AG ("Qimonda") is a German company with its headquarters in Munich.[10] At one time, Qimonda was a major producer of dynamic random access memory ("DRAM") chips and, as a result, claims to hold approximately 12,000 patents, including at least 4000 U.S. patents.[11] Between 1995 and 2008, Qimonda entered into joint venture and patent cross-licensing agreements with numerous corporations, including Elpida Memory, Inc., Infineon Technologies, Micron Technology, Nanya Technology Corporation, and Samsung Electronics Co., Ltd. (collectively, the "Counter-Parties").[12] Pursuant to these agreements, Qimonda and the Counter-Parties perpetually and irrevocably cross-licensed tens of thousands of patents.[13]

In January 2009, Qimonda commenced insolvency proceedings in Munich, and a German insolvency expert was appointed to administer the Qimonda estate.[14]After his appointment, the Administrator, Michael Jaffe ("The Administrator" or "Qimonda Administrator"), appeared in U.S. Bankruptcy Court and filed a petition pursuant to Chapter 15 of the U.S.

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8 *The Retrogressive Flaw of Chapter 15*, *supra* note 1, at 254.

9 The appellant, Michael Jaffe, is the administrator of the estate of Qimonda AG. *See In re* Qimonda AG, 433 B.R. 547, 552 (E.D. Va. 2010). The Record Number of the appeal is 12-1802. Jaffe v. Samsung Electronics Co., No. 12-1802 (4th Cir. Filed June 28, 2012), *available at* http://dockets.justia.com/docket/circuit-courts/ca4/12-1802/.

10 *In re* Qimonda AG, 433 B.R. at 551-52.

11 *Id.* at 552.

12 *Id.* at 553.

13 *Id.* at 552.

14 *Id.*

Bankruptcy Code for recognition of the German insolvency proceeding.[15] In July 2009, the U.S. Bankruptcy Court issued an order recognizing the German proceeding as a "foreign main proceeding" under 11 U.S.C. § 1517.[16]

After Chapter 15 recognition, the Administrator sent letters to several of the Counter-Parties electing nonperformance of the patent cross-licensing agreements; in doing so, the Administrator invoked German Insolvency Code § 103.[17] The Counter-Parties objected and argued that 11 U.S.C. § 365(n) prohibited the Administrator's action.[18] On appeal to the U.S. District Court for the Eastern District of Virginia, the issue presented was whether the Administrator could terminate the parties' cross-licensing agreements without the Counter-Parties' consent, as allegedly permitted by the German Insolvency Code,[19] or whether § 365(n) precludes such an action.[20] The District Court remanded the matter back to the Bankruptcy Court "so that it may, in the first instance, determine whether the relief granted violates fundamental U.S. public policies under § 1506 and principles discussed here."[21] After remand, the Bankruptcy Court issued the following ruling:

> Thus, the court determines that failure to apply § 365(n) under the circumstances of this case and this industry would "severely impinge" an important statutory protection accorded licensees of U.S. patents and thereby undermine a fundamental U.S. public policy promoting technological innovation. For that reason, the court holds 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.[22]

As outlined in my earlier articles on Chapter 15,[23] I believe that the Bankruptcy Court's decision in *Qimonda* is correct, and, accordingly, the Fourth Circuit should affirm. A final, judicial resolution of *Qimonda* will set the tone for the future of Chapter 15. This is why the *Qimonda* case is important. In 2007, I wrote:

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[15] *Id.*

[16] *Id.*

[17] *Id.* at 553.

[18] *Id.* at 559-60.

[19] *Id.* at 554.

[20] *Id*. at 555-56.

[21] *Id*. at 571.

[22] *In re* Qimonda AG, 462 B.R. 165, 185 (Bankr. E.D. Va. 2011).

[23] *See* Chung*, Chapter 15 of the Bankruptcy Code and Its Implicit Assumptions*, *supra* note 1; *see also The New Chapter 15*, *supra* note 1; *see also The Retrogressive Flaw of Chapter 15*, *supra* note 1.

> At this time, the scope and contours of the new law are still untested and unknown. Its first few years will likely generate a struggle between those who have a more traditional view of bankruptcy law and those whose goal is to internationalize it, with the two sides seeking to narrow or expand the meaning and application of Chapter 15. This struggle will be a continuation of the debate between the two competing and polar models of transnational bankruptcy law – territorialism and universalism.[24]

This struggle is now squarely before the Court of Appeals.

Part II of this Article discusses the public policy concerns that resulted in § 365(n). Section 365(n) governs the treatment of intellectual property licenses in bankruptcy proceedings.[25] It was enacted by Congress in order to overturn a decision by the Fourth Circuit in a case called *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*[26] The purpose of § 365(n) is to protect licensees of intellectual property.[27] As expressly stated in the legislative history, Congress enacted it to promote technological innovation, and designed it to prevent the type of action taken by the Qimonda Administrator.[28] However, the Qimonda Administrator argues that German law permits him to cancel Qimonda's patent licenses with the Counter-Parties, that Chapter 15 recognition of the foreign main proceeding means the U.S. courts must defer to the German proceeding under the principle of international comity, and, consequently, that German law applies.[29] The Counter-Parties, in turn, argue that the public policy exception in § 1506 protects them from the application of German law and that U.S. law applies to the treatment of the licenses.[30] Specifically, they argue that § 365(n) prevents the Administrator from canceling the licenses.[31]

Parts III, IV, and V discuss the comity argument and summarize the judicial attempts to define comity. This Article points out the problems with relying on comity in *Qimonda* or any other case. The scholarly literature explains that comity is an amorphous concept, so much so that it

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[24] *The Retrogressive Flaw of Chapter 15*, *supra* note 1, at 253.

[25] 11 U.S.C. § 365 addresses and governs the treatment of executory contracts in bankruptcy. 11 U.S.C. § 365(a) (2006). In general, a bankruptcy trustee has the right to "assume" or "reject" an executory contract. *Id.* Section 365(n) applies specifically to executory contracts in the form of intellectual property licenses. *Id.* at § 365(n).

[26] Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986).

[27] S. REP. No. 100-505, at 7-11 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3204-08.

[28] *Id.*

[29] *Lubrizol Enters*, 756 F.2d at 1043-44.

[30] *Id.*

[31] *Id.*

is almost meaningless.[32] Courts have attempted to define it for more than a century, but have never formed a workable definition.[33] The courts have been tasked with the duty to apply the concept, even though there is no definition to guide them. Given the ambiguities inherent in a concept like comity, it was inevitable that a foreign administrator would attempt to use it to evade otherwise applicable U.S. law. This Article argues, however, that comity cannot support the weight placed on it by the Administrator's argument. Whatever comity may mean, it does not permit a party to circumvent or undermine U.S. public policy. If anything, the case law holds that comity should not be accorded deference if, in doing so, substantive harm is imposed on U.S. interests.

Part VI discusses the structure and text of Chapter 15 to explain that considerations of comity must necessarily be subordinate to public policy. The original purpose of Chapter 15 was to promote administrative convenience in cross-border insolvency cases. Nonetheless, cases like *Qimonda* present situations where a party is attempting to stretch Chapter 15 beyond its administrative goals. This Article argues that Chapter 15 was not designed to inflict substantive harm (especially in sensitive areas of public policy), and that the public policy exception should apply in cases like this in order to prevent such harm.

II. THE PUBLIC POLICY EMBODIED IN 11 U.S.C. § 365(N)

Section 365(n) was added to the Bankruptcy Code as part of the Intellectual Property Act.[34] The enactment of § 365(n) was a direct response to the Fourth Circuit's opinion in *Lubrizol*.[35] In that case, Richmond Metal Finishers ("RMF") entered into a contract in 1982 with Lubrizol that granted Lubrizol a nonexclusive license to use a metal coating process technology owned by RMF.[36] In 1983, RMF filed a Chapter 11 bankruptcy petition.[37] Pursuant to 11 U.S.C. § 365(a), RMF sought to reject the licensing contract with Lubrizol (which was found to be an executory contract) in order to facilitate the sale or licensing of the technology unhindered by the provisions of the Lubrizol contract.[38] The bankruptcy court approved the rejection of the contract, and the Fourth

32 *See* Janis, *infra* note 53, at 338-41

33 *See id.*

34 Intellectual Property Bankruptcy Act of 1987, Pub. L. No. 100-506, 102 Stat. 2538 (1988) (codified as amended in 11 U.S.C. §§ 101(52)-(53), 365(n) (1994)) (the "Intellectual Property Act").

35 S. REP. No. 100-505 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200.

36 *Lubrizol Enters.*, 756 F.2d at 1045.

37 *Id.*

38 *Id.*

Circuit ordered entry of judgment in conformity with the bankruptcy court's decision.[39]

High-technology industry groups viewed the *Lubrizol* decision as a grave threat to their way of business and quickly mobilized a successful effort to have Congress overturn the Fourth Circuit's decision.[40] In 1987, the Intellectual Property Protection Act was introduced in Congress and enacted in 1988.[41] The legislative history provides insight into the purpose of the bill:

> The purpose of the bill is to amend Section 365 of the Bankruptcy Code to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to Section 365 in the event of the licensor's bankruptcy. Certain recent court decisions interpreting Section 365 have imposed a burden on American technological development that was never intended by Congress in enacting Section 365. The adoption of this bill will immediately remove that burden and its attendant threat to the development of American Technology and will further clarify that Congress never intended for Section 365 to be so applied.[42]

The legislative history goes on to provide:

> Several recent court decisions, including Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 765 F.2d 1043 (4th Cir. 1985), cert. denied 106 S.Ct. 1285 (1986), have interpreted Section 365 of the Bankruptcy Code (the 'Code') as providing a basis for permitting a licensor of intellectual property to strip its licensee of any continuing right to use the licensed intellectual property under the auspices of rejecting the license as an executory contract. Under the Code, a trustee or debtor in possession may be permitted to reject - that is, to breach - an executory contract when, in its business judgment as reviewed by the court, it concludes that affirmative ongoing performance of the contract would not be beneficial to the estate. These cases, however,

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39 *Id.*

40 *See* WILLIAM D. WARREN, DANIEL J. BUSSEL & DAVID A. SKEEL, JR., BANKRUPTCY 236 (9th ed. 2012).

41 *Id.* "[The Act's] sponsors were an industry coalition of the largest high-technology companies. This Act overturns *Lubrizol* with respect to intellectual property by adding subsection (n) to § 365, which allows licensees to retain rights in intellectual property conveyed to them before the licensor's bankruptcy." *Id.*

42 S. REP. No. 100-505, at 1-2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3200.

> have relieved the debtor not simply of its ongoing affirmative performance obligations under the executory license agreement, but also of its passive obligation to permit the licensee to use the intellectual property as provided in the license. Under this view, since rejection results in valuable rights apparently reverting to the bankruptcy estate-rights which the bankruptcy estate otherwise would have to share with the licensee-rejection will nearly always be arguably beneficial to the bankruptcy estate and any exercise of business judgment, however reviewed by the court, will lead to rejection.
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> This view, which several courts have not modified under their powers in equity, leaves licensees in a precarious position and thus threaten the very flexible and beneficial system of intellectual property licensing which has developed in the United States. Congress never anticipated that the presence of executor obligations in an intellectual property license would subject the licensee to the risk that, upon bankruptcy of the licensor, the licensee would lose not only any future affirmative performance required of the licensor under the license, but also any right of the licensee to continue to use the intellectual property as originally agreed in the license agreement.
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> The court decisions on Section 365 that have stripped intellectual property licensees of their right to continue to use the licensed property have gained wide notice. They threaten an end to the system of licensing of intellectual property (discussed below) that has evolved over many years to the mutual benefit of both the licensor and the licensee and to the country's indirect benefits. Because of the instability that Section 365 has introduced into the licensing relations, parties who would have formerly accepted licenses – the right to use another's intellectual property – are now forced to demand assignments-outright transfer of ownership of the intellectual property. This change in basic format is wasteful and cumbersome and is especially chilling to small business technologists. It is not an overstatement to say that the change is a fundamental threat to the creative process that has nurtured innovation in the United States.[43]

Further, the meaning of § 365(n) was immediately apparent to practitioners.

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[43] *Id.* at 2-3, 1998 U.S.C.C.A.N. at 3201-02 (emphasis added).

> Congress enacted Bankruptcy Code Section 365(n) in 1988 to protect licensees and assignees of copyrights and other forms of intellectual property. This amendment was a reaction to the Fourth Circuit's holding in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, that a technology licensor could unilaterally reject its license agreement under Section 365 and eliminate the right of the licensee to use the intellectual property. . . . By implementing Section 365(n) Congress sought to reverse the potentially chilling effect on the licensing of intellectual property as a result of the *Lubrizol* decision.[44]

The legislative history of § 365(n) clearly states the purpose of the subsection: to thwart the "fundamental threat" to technological innovation.[45] In turn, § 1506 was designed to make sure that public policy concerns such as those embodied in § 365(n) would not be undermined as a result of Chapter 15.[46] The Qimonda Administrator, however, argues that congressional concern and the public policy underlying § 365(n) should be disregarded.[47] Did Congress intend Chapter 15 to override all other public policies in the Code? This is the question at stake.

III. THE INTRODUCTION OF COMITY INTO CHAPTER 15

The concept of international comity appears in Chapter 15 in 11 U.S.C. §§ 1507[48] and 1509.[49] The Fifth Circuit has noted:

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[44] David S. Kupetz, *Intellectual Property Issues in Chapter 11 Bankruptcy Reorganization Cases*, 42, J. COPYRIGHT SOC'Y U.S.A. 68, 73-74 (1994).

[45] S. REP. No. 100-505, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3202.

[46] H.R. REP. No. 109–31(I), at 109, 309 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88.

[47] *See In re* Qimonda AG, 433 B.R. at 553.

[48] Subsection (b) provides in its entirety:

> 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 –
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> (1) just treatment of all holders of claims against or interests in the debtor's property;
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> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
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> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
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> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
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> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns."

11 U.S.C. § 1507(b) (2006).

[49] Section 1509(b)(3) provides: "If the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter . . . (3) a court in the United States shall grant comity or cooperation to the foreign

> Central to Chapter 15 is comity . . . . Within the context of Chapter 15, however, it is raised to a principal objective. Section 1501(a) begins by listing, as one of Chapter 15's goals, the furtherance of cooperation between domestic and foreign courts in cross-border insolvency cases. Section 1508 goes on to provide that Chapter 15's provisions shall be interpreted by considering "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."[50]

Understandably, the Administrator argues that "comity" requires the U.S. courts to permit him to cancel the licenses. The problem, however, is that "comity" requires no such result.

A. A Summary of the Attempts to Define Comity by U.S. Courts

International comity may be generally understood as "the respect that U.S. courts give to the laws, acts, and decisions of foreign countries."[51] The U.S. Supreme Court provided the classic definition of comity more than a century ago:

> 'Comity,' in the legal sense, is neither a matter of absolute obligation,

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representative." 11 U.S.C. §1509(b)(3) (2006).

[50] *In re* Vitro S.A.B. de CV, 701 F.3d 1031, 1043-44 (5th Cir. 2012). In *In re Vitro*, the Fifth Circuit reviewed the Bankruptcy Court's decision denying enforcement of a Mexican reorganization plan. *Id.* The Bankruptcy Court denied enforcement because the plan would extinguish the obligations of non-debtor guarantors. *Id.* at 1036. The appeal was filed by Vitro's foreign representative pursuant to his authority under Chapter 15. *Id.* at 1040-41. On appeal, the appellees invoked § 1506 and argued that enforcement of the plan would violate public policy. *Id.* at 1053. In its decision to affirm the Bankruptcy Court's order, the Fifth Circuit expressly declined to rule on § 1506 issue:

> As already discussed, this court holds that the Bankruptcy Code precludes non-consensual, non-debtor releases. . . . Nevertheless, not all our sister circuits agree, and we recognize that the relief potentially available under § 1507 was intended to be expansive. At the same time, § 1506 was intended to be read narrowly, a fact that does not sit well with the bankruptcy court's broad description of the fundamental policy at stake as 'the protection of third party claims in a bankruptcy case' . . . . 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.

Id. at 1069-70 (citations omitted). The court also declined to address the arguments that the Mexican reorganization plan violates a fundamental public policy for infringing on the absolute priority rule, the Contract Clause of the U.S. Constitution, the Trust Indenture Act of 1939, or the interests of the United States in protecting creditors from so called "bad faith schemes." *Id*. at 1070.

[51] CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 133 (4th ed. 2011).

> on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[52]

Issues of comity typically arise in cases involving the enforceability of foreign judgments.[53] *Hilton v. Guyot* was one such case.[54] The issue in *Hilton* was whether a judgment issued in France should have conclusive effect in the United States.[55] The Court addressed enforcement as an issue of comity:[56]

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[52] Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

[53] *See* MARK W. JANIS, INTERNATIONAL LAW 337 (5th ed. 2008); HENRY J. STEINER & DETLEV F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 19-23 (3d ed. 1986).

[54] Hilton, 159 U.S at 114.

[55] *Id.* at 162.

[56] In *Hilton*, the plaintiffs sought recovery of unpaid debts allegedly owed by defendants (who were U.S. citizens) arising out of commercial purchases of gloves by a business operated by the defendants. *Id.* at 114-15. The transactions occurred in Paris. *Id.* at 114. The plaintiffs obtained judgment against the defendants in a French court, and then commenced an action in U.S. district court pursuant to the French judgment. *Id.* The defendants attempted to introduce evidence that the French judgment had been obtained by fraud. *Id.* at 117-18. The district court refused to admit the evidence, and the plaintiffs prevailed in the district court. *Id.* at 122. The Supreme Court framed the issue as:

> [T]he effect to which a judgment, purely executory, rendered in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, may be entitled in an action thereon against the latter in his own country - as is the case now before us – presents a more difficult question, upon which there has been some diversity of opinion.

Id. at 170-1.The Supreme Court reversed the judgment and remanded the case back to the trial court. *Id.* at 229. The Court ruled that the defendants should have been permitted to introduce their evidence because evidence of fraud is admissible to impeach a foreign judgment. *Id*. at 210. The Court also ruled that comity did not support the plaintiffs because France would not treat an American judgment with reciprocity. *Id.*

> When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least of the merits of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own

> No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticized, no satisfactory substitute has been suggested.[57]

The *Hilton* opinion devoted numerous pages to an examination of prior cases that attempted to provide a workable definition of comity. At one point, the Court looked to the Supreme Court of Louisiana's view of comity:

> They have attempted to go too far, to define and fix that which cannot, in the nature of things, be defined and fixed. They seem to have forgotten that they wrote on a question which touched the comity of nations, *and that that comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule*; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions; that in the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the court, which decides, will prefer the laws of its own country to that of the stranger.[58]

Even though the Supreme Court acknowledges the role of comity in international law, the Court has been unable to provide a workable definition of the concept. The most one can discern from the Court is that

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> country, it should not be given full credit and effect.
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> There is no doubt that both in this country, as appears by the authorities already cited, and in England, a foreign judgment may be impeached for fraud.

Id. at 205-6. The Court added:

> The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiffs' claim.

Id. at 227.

[57] *Id.* at 163.

[58] *Id.* at 164-65 (emphasis added).

comity exists and, at times, is a doctrine that should apply. However, the Court is unable to provide any useful clarity as to its definition and meaning. The problem is that the Bankruptcy Code now includes the word "comity" in Chapter 15, and judges are under the burden of making rulings based on a word that has eluded definition for over a century.

IV. WITHOUT A WORKABLE DEFINITION OF COMITY, JUDGES AND LAWYERS HAVE NO MEANINGFUL GUIDE REGARDING ITS DEFINITION AND APPLICABILITY

How, then, are judges supposed to decide issues of comity? What authority is there to guide an analysis of comity? In one widely cited article, one scholar observed: "Nevertheless, the meaning of international comity remains uncertain. Comity has been defined variously as the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns. . . ."[59]

In another widely cited article, a scholar wrote: "First, there is no coherent generalized doctrine of 'comity' that informs how and when foreign acts are to be given effect in federal court."[60] He added:

> '[I]nternational comity' is . . . an unfortunate phrase best dismissed from the discourse. It is an expression of unexplained authority, imprecise meaning and uncertain application. Its use confuses inquiries that ought to be clear and distinct, and submerges issues that should be carefully and forthrightly considered. Its invocation has produced a series of international cases explicable only by reference to ill-defined judicial intuitions. Abandoning appeals to 'international comity' in favor of more precise terminology would go a fair way toward rectifying the confusion that prevails in this area.[61]

Other scholars question whether "comity" is even a principle of international law, remarking:

> The principle of comity has sometimes been treated as a principle of

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[59] Joel R. Paul, *Comity in International Law,* 32 HARV. INT'L L.J. 1, 3 (1991). One court echoed this view by stating: "Although courts in this country have long recognized the principles of international comity and have advocated them in order to promote cooperation and reciprocity with foreign lands, comity remains a rule of 'practice, convenience, and expediency' rather than of law." Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997).

[60] Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 895 (1998).

[61] *Id*. at 893.

> international law, but more often has been regarded as something short of a legal limitation, more like an act of altruistic deference or an acknowledgment of superior foreign interest (or lesser U.S. interest) in the matter at hand.[62]

Despite the amorphous and ambiguous nature of comity, a few conclusions may be drawn. "Comity" is not a magic word that requires a particular result. The only thing clear about its meaning is that it is fuzzy and blurry. Courts have been unable to arrive at a settled meaning. Unfortunately, the allure of international aspirations championed by Chapter 15's proponents has led to the introduction of the word "comity" into the Bankruptcy Code. Bankruptcy judges now have the task of attempting to find meaning in a term that defies definition. Chapter 15 instructs judges to promote comity, but provides no guidance on how to do so. This is why the concept of "comity" makes it so easy for parties to request that courts flout the clear text of other chapters of the Bankruptcy Code. Since it is so ill-defined, there are no boundaries on the resort to comity. The availability of the "comity" argument permits any foreign representative to ask U.S. courts to disregard plain text and congressional intent. It is unlikely that this was Congress's intent behind passing Chapter 15.

V. WHATEVER COMITY MAY MEAN, IT DOES NOT SUPPORT THE QIMONDA ADMINISTRATOR'S ACTIONS

The weight of opinion on the issue of comity leads to the conclusion that comity is not a principle or goal that is to be pursued or exalted for its own sake. A fair summary of the U.S. judicial opinions discussing comity is that it should be accorded to another country's laws or proceedings only if there is no material prejudice to U.S. interests. A basic view is that in deciding issues of comity, "each state must evaluate the conflicting interests and should defer to the state with the greatest interest."[63] The Second Circuit stated that U.S. "courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States."[64] In another Second Circuit case, the court observed, "[t]he principle of comity has never meant categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States."[65]

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[62] BARRY E. CARTER, PHILLIP R. TRIMBLE & CURTIS A. BRADLEY, INTERNATIONAL LAW 659 (4th ed. 2003).

[63] Paul, *supra* note 59, at 46.

[64] *Pravin Banker*, 109 F.3d at 854.

[65] *In re* Treco, 240 F.3d 148, 157 (2d Cir. 2001).

In *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, the D.C. Circuit described comity in this way:

> "*Comity" summarizes in a brief word a complex and elusive concept* – the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum. *Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain*. However, the central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced – the foreign court because its laws and policies have been vindicated; the domestic country because international cooperation and ties have been strengthened. The rule of law is also encouraged, which benefits all nations.
>
> Comity is a necessary outgrowth of our international system of politically independent, socio-economically interdependent nation states. As surely as people, products and problems move freely among adjoining countries, so national interests cross territorial borders. But no nation can expect its laws to reach further than its jurisdiction to prescribe, adjudicate, and enforce. Every nation must often rely on other countries to help it achieve its regulatory expectations. Thus, comity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations.
>
> *However, there are limitations to the application of comity*. When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. *No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act*.[66]

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[66] Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (1984) (emphasis added) (footnotes omitted). *See also* Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713 (2d Cir. 1987) ("Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy."); *In re* Schimmelpenninck, 183

This view of comity was expressed in *Hilton*.[67] The *Hilton* decision quoted a prior case in which Chief Justice Taney described 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."[68] Therefore, if the Fourth Circuit were to rule in favor of the Qimonda Administrator, it would depart from a long and consistent line of case law.

A. *The Qimonda Administrator's Reliance on Can. S. Ry. v. Gebhard is Misplaced and Does Not Establish that Comity Trumps Public Policy*

To support his position, the Administrator relies on *Can. S. Ry. Co. v. Gebhard*.[69] He quotes the following sentence from that case: "[E]very person who deals with a foreign corporation . . . impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes."[70] Relying on this sentence, the Administrator argues that the Counter-Parties subjected themselves to German law by entering into contracts with a German corporation.[71]

The Administrator's argument is wrong for at least three reasons: (1) the facts show that at least two of the Counter-Parties expressly contracted out of German law; (2) the facts of *Gebhard* are materially distinguishable; and (3) *Gebhard*'s statement on contract and corporation law is not valid today.

First, at least two of Qimonda's contracts specified the choice of American law. The contract at issue with Nanya Technology Corp. explicitly chose the law of New York as the governing law.[72] The contract

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F.3d 347, 365 (5th Cir. 1999) ("[F]oreign laws . . . must not be repugnant to our laws and policies.").

67 *See* Hilton v. Guyot, 159 U.S. 113 (1895).

68 *Id.* at 135.

69 Can. S. Ry. Co. v. Gebhard, 109 U.S. 527 (1883).

70 Brief for Appellant at 35, Jaffe v. Samsung Elecs. Co., No. 12-1802 (4th Cir. filed Sept. 26, 2012).

71 If the Adminstrator prevails, this would be the result:

> In effect, a foreign corporation brings to the United States all of its domestic bankruptcy law and supplants American law in its entirety. The bankruptcy of a major multinational corporation would thus result in thousands of employees and creditors, and thousands of transactions losing the protection of American laws. An entire social and commercial stratum would be carved out of the country's sovereignty and subjected to foreign law.

Chung, *The New Chapter 15*, *supra* note 1, at 105-6. However, as discussed below, the Supreme Court issued a decision less than ten years ago that precludes this result.

72 *In re* Qimonda AG, 462 B.R. 165, 171 (Bankr. E.D. Va. 2011).

at issue with Intel explicitly chose the law of Delaware as the governing law.[73] Thus, it is incorrect to conclude that the Counter-Parties voluntarily subjected themselves to German law because at least two of the parties expressly contracted out of German law and chose American law instead.

Second, the facts of *Gebhard* are materially distinguishable and bear little resemblance to the *Qimonda* case. *Gebhard* involved the insolvency of a quasi-public Canadian corporation whose operations were entirely in Canada.[74] The court concluded:

> The obligor of the bonds and coupons here sued on was a corporation created for a public purpose; that is to say, to build, maintain, and work a railway in Canada. It had its corporate home in Canada, and was subject to the exclusive legislative authority of the Dominion parliament. It had no power to borrow money or incur debts except for completing, maintaining, and working its railway. The bonds taken by the defendants in error showed on their face that they were part of a series amounting in the aggregate to a very large sum of money, and that they were secured by a trust mortgage on the railway of the company, its lands, tolls, revenues, etc. In this way the defendants in error, when they bought their bonds, were, in legal effect, informed that they were entering into contract relations, not only with a foreign corporation created for a public purpose, and carrying on its business within a foreign jurisdiction, but with the holders of other bonds of the same series, who were relying equally with themselves for their ultimate security on a mortgage of property devoted to a public use, situated entirely within the territory of a foreign government.[75]

The *Gebhard* opinion emphasized the point again:

> This corporation was created in Canada to build and work a railway in that dominion. Its principal business was to be done in Canada, and the bulk of its corporate property was permanently fixed there. All its powers to contract were derived from the Canadian government, and all the contracts it could make were such as related directly or indirectly to its business in Canada. That business affected the public interests, and the keeping of the railway open for traffic was of the utmost importance to the people of the dominion.[76]

Gebhard was about a Canadian corporation operating exclusively in

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[73] *Id*. at 173.

[74] The description of Canada Southern Railway as a "quasi-public" corporation is found in the dissent. *See* Can. S. Ry. Co. v. Gebhard, 109 U.S. at 548 (Harlan, J., dissenting).

[75] *Id.* at 536-37.

[76] *Id*. at 538.

Canada, backed by the Canadian government. In contrast, the contracts at issue in *Qimonda* have little to do with Germany. For example, Qimonda and Micron entered into a world-wide, royalty-free cross-license agreement, which recited that a "significant goal" of the agreement was to provide each of the parties "with worldwide freedom to make, use, import, offer to sell, sell, lease, license and/or otherwise transfer" products "without concern for suits claiming infringement of the Patents . . . licensed hereunder."[77] Micron has no manufacturing operations in Germany.[78] Qimonda's contract with IBM concerns what is known as "trench" technology, which IBM incorporates in semiconductor manufacturing.[79] IBM manufactures all of its semiconductors in the United States.[80] Qimonda's contract with Intel concerns patents applicable to semiconductor chips manufactured by Intel in the United States, Israel, and Ireland.[81] Thus, Germany has little relationship to the activities addressed in the patent license agreements. The only connection to Germany is that Qimonda is incorporated there. Qimonda asserts, however, that this fact by itself is enough to require the application of German law, and cites *Gebhard* as support. It is easy to see that there is little similarity in the facts of the two cases.

While *Gebhard* may have been "good" law in 1883, that is no longer the case today.[82] A recent Supreme Court case, *Spector v. Norwegian Cruise Line Ltd*,[83] emphatically proves this point. In *Spector,* the Court's decision made clear that a U.S.-based party does not agree to be governed by non-U.S. law when it enters into a contract with a non-U.S. counter-party.[84] In *Spector*, the Supreme Court addressed whether Title III of the Americans with Disabilities Act of 1990[85] ("ADA") applied to foreign-flag cruise ships in United States waters.[86] The Petitioners, disabled individuals and their companions, were U.S. citizens or residents who purchased tickets in 1998 or 1999 for round-trip cruises on two ships that departed from Houston.[87] The ships were operated by Norwegian Cruise Line Ltd., a Bermuda corporation with its principal place of business in the United States. The

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[77] *Qimonda*, 462 B.R. at 172.

[78] *Id*.

[79] *Id.* at 173.

[80] *Id*. at 172.

[81] *Id*. at 173.

[82] To start, it is questionable whether a federal court opinion from 1883 addressing a substantive issue of contract and corporations law is "good" law today given that it was decided before *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[83] *See* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005).

[84] *Id.*

[85] 42 U.S.C. §12181 (1990).

[86] *Spector*, 545 U.S. at 119.

[87] *Id.* at 126.

ships at issue flew the flag of the Bahamas.[88] The petitioners were plaintiffs in a class action filed in the U.S. District Court for the Southern District of Texas.[89] Their complaint alleged that the respondent, Norwegian Cruise Line, unlawfully discriminated against disabled passengers and failed to provide accommodations, as required by the ADA.[90] The cruise line moved to dismiss the claims, arguing that it was not required to comply with the ADA because the ships were flagged under the laws of the Bahamas, and, consequently, Bahamian law applied to the ships. Since the law of the Bahamas controlled, the laws of the United States, including the ADA, did not apply.[91]

In response to a motion to dismiss the claims, the district court ruled that Title III generally applied to the cruise ships and allowed the claims to proceed, only dismissing the claim based on physical barriers.[92] The Fifth Circuit affirmed in part and reversed in part. It held that general statutes do not apply to foreign-flag vessels in U.S. territory absent a clear statement of congressional intent.[93] Because Title III does not contain a specific provision mandating its application to foreign-flag vessels, the Court of Appeals sustained the district court's dismissal of the petitioners' barrier-removal claims and reversed the rulings on the remaining Title III claims.[94] In other words, the cruise line won at the appellate level.[95]

The Supreme Court reversed the Fifth Circuit's ruling.[96] The Court's decision was noteworthy, in one respect, because of the splintered nature of its ruling. Justice Kennedy announced the Court's judgment, but his opinion is the opinion of the Court only with respect to Parts I, II.A.1, and II.B.2, which four other Justices joined.[97] The other parts of his opinion were not supported by a majority. The line-up of the votes might seem to suggest wide disagreement and, perhaps, confusion, over the applicability of the ADA to foreign-flag vessels. However, six Justices explicitly rejected the argument that foreign-flag vessels are beyond the reach of the ADA.[98]

Justice Kennedy's opinion noted the strong policies underlying the ADA,

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[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 127.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 127-28.
[95] *Id.* at 141.
[96] *Id.* at 142.
[97] *Id.* at 124.
[98] *Id.*

explored the conflict between its policies, and the asserted protection of the law of the foreign-flag ships. He remarked:

> Cruise ships flying foreign flags of convenience offer public accommodations and transportation services to over 7 million United States residents annually, departing from and returning to ports located in the United States. Large numbers of disabled individuals, many of whom have mobility impairments that make other kinds of vacation travel difficult, take advantage of these cruises or would like to do so. To hold there is no Title III protection for disabled persons who seek to use the amenities of foreign cruise ships would be a harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled. § 12101. The clear statement rule adopted by the Court of Appeals for the Fifth Circuit, moreover, would imply that other general federal statutes—including, for example, Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U. S. C. § 2000a *et seq*. – would not apply aboard foreign cruise ships in United States waters. A clear statement rule with this sweeping application is unlikely to reflect congressional intent.[99]

The Court could not have been clearer in pronouncing that there are limits to the "law of the flag." In light of the Court's holding, any force that the doctrine may have must give way to more compelling policy considerations. Given the important policies and aims of the ADA, it is not surprising that the Court rejected the notion that a foreign flag is a shield against the ADA's requirements. It is also clear that a majority of the Court was not prepared to permit entire swathes of the U.S. population to lose the protection of U.S. laws by a choice of flag. Thus, *Spector* stands for the proposition that a U.S. based party does not agree to foreign law merely by entering into a contract with a foreign corporation. *Spector* also stands for the proposition that foreign corporations may not automatically evade U.S. public policies by invoking the law of their home countries.

VI. THE STRUCTURE AND TEXT OF CHAPTER 15 EMPHASIZES THAT PUBLIC POLICY CONCERNS MUST TRUMP COMITY

"In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."[100] With Chapter 15, Congress made clear its object and policy. Section 1501 is titled "Purpose and Scope of

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[99] *Id*. at 132.

[100] Crandon v. United States, 494 U.S. 152, 158 (1990) (citing K Mart Corp. v. Cartier, 486 U.S. 281, 291 (1988); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)).

Application," and provides in part:

> The purpose of this chapter 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 the objectives of – (1) cooperation between – (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases; (2) greater legal certainty for trade and investment; (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor; (4) protection and maximization of the value of the debtor's assets; and (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[101]

These enumerated factors show that the object and policy of Chapter 15 focuses on the procedure and administration of insolvency cases. The emphasis is not on imposing substantive uniformity of law across borders. Section 1501(a) begins by stating that Chapter 15 is designed to "provide effective mechanisms for dealing with cases . . . ."[102] The word "mechanisms" makes sense with reference to procedural and administrative mechanisms. The first factor, subparagraph (1), begins with the word "cooperation."[103] Again, "cooperation" suggests procedural and administrative concerns. Subparagraph (3) states the objective and policy as "fair and efficient administration."[104] Here, the emphasis on administration is explicit.

Subchapter IV of Chapter 15 is exclusively focused on cross-border "cooperation."[105] Section 1527, entitled "Forms of Cooperation," provides:

> Cooperation referred to in sections 1525 and 1526 may be implemented by any appropriate means, including – (1) appointment of a person or body, including an examiner, to act at the direction of the court; (2) communications of information by any means considered appropriate by the court; (3) coordination of the administration and supervision of the debtor's assets and affairs; (4) approval or implementation of agreements concerning the coordination of proceedings; and (5) coordination of concurrent

101 11 U.S.C.A. § 1501(a) (West 2005).
102 *Id.*
103 *Id.*
104 *Id.*
105 11 U.S.C.A. §§ 1525-27 (West 2005).

proceedings regarding the same debtor.[106]

These provisions, which commence Chapter 15 and recur throughout, emphasize the administrative coordination of transnational cases. Chapter 15 was designed as a mechanism to enable courts to coordinate their proceedings across borders.[107] The Qimonda Administrator and universalists attempt to distort Chapter 15's humble aims by expanding it to impose the notion of "one court, one law" – regardless of a country's substantive policy choices. There is nothing in the language of Chapter 15 stating that its goal is to create a global system of "one court, one law."

In order to understand the object and policy of Chapter 15, it is helpful to examine the motivations for the creation of the Model Law and Chapter 15. The Model Law and Chapter 15 were designed to address the state of transnational bankruptcy law in the twentieth century. One commentator described it as follows:

> A survey made of the present status of international bankruptcy law shows that a trustee in bankruptcy, even if appointed by the court of the debtor's commercial domicile, has but a slight chance to recover by legal proceedings assets that are located abroad. Only a few countries recognize the foreign trustee's title to property of the debtor. Often the trustee is not admitted at all by the courts as the creditors' or the estate's legal representative with power to claim the assets. If admitted, his rights are rarely sustained against local creditors attaching local assets. In some countries the trustee can qualify as the legal representative of the foreign bankruptcy in submitting himself to an exequatur proceeding, but liens secured by attachment before his qualification are sustained. Almost nowhere does a foreign bankruptcy, even when declared by the court of the commercial domicile of the debtor, preclude another bankruptcy declaration by a local court having bankruptcy jurisdiction. No collaboration is guaranteed between the several administrations in the case of concurrent bankruptcies. As each bankruptcy court follows its own law, the same claim can be void in one proceeding and valid in another.[108]

This was the state of the world that the drafters of the Model Law sought to improve. Before the promulgation of the Model Law, some courts attempted to address the problems of cross-border cooperation and coordination on a case-by-case basis.[109]

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[106] 11 U.S.C.A. § 1527 (West 2005).

[107] *See id.*

[108] Kurt H. Nadelmann, *Bankruptcy Treaties*, 93 U. PA. L. REV. 58, 59-60 (1944).

[109] *See, e.g., In re* Maxwell Commc'n Corp., 93 F.3d 1036 (2d Cir. 1996).

The Model Law was an attempt to establish a formal and regular system of cooperation and coordination.[110] This was a modest and largely unobjectionable goal. There is little reason to quibble with efforts to further administrative cooperation. On its face, Chapter 15 does not impose a global, substantive bankruptcy law. Instead, it looks rather benign with its emphasis on cooperation across borders. Limiting Chapter 15 to this extent would be uncontroversial, however, a case like *Qimonda* was bound to arise. It was inevitable that a party would attempt to use Chapter 15 as a sword to undercut substantive provisions of the Bankruptcy Code. Chapter 15's proponents introduced it into American law by casting it as an aid to administrative convenience. In an earlier article, however, I put forth a different view:

> Unable to obtain the whole loaf of universalism, perhaps [Chapter 15's proponents] are happy with the half loaf of Chapter 15, knowing that it represents a significant step toward the ultimate goal of universalism. This interpretation finds support in the expert and matter-of-fact scholarship of universalism's proponents. The proponents openly acknowledge that it was too much of a challenge to move the United States and other nations to full universalism. The delegates who agreed upon the Model Law knew they had to operate within practical constraints. For example, the reason why a model law was generated (rather than a treaty, for example) was because it would have been too difficult to achieve consensus over anything more substantial than a model law. This explains why the Model Law does not attempt to substantively unify the different bankruptcy laws around the world; there never would have been agreement.
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> Appreciating the historic resistance to universalism, its proponents set more modest goals for the Model Law. Thus, the purpose of the Model Law is to advance universalism incrementally, by gradually introducing the acceptance of outcome differences in transnational insolvencies. The gradual process permits "acclimation" to universalism.[111]

A. U.S. Courts Should Uphold the Primacy of the Public Policy Exception over Comity

Qimonda is important because a circuit court must now squarely address the issue of the scope of the public policy exception and its relationship to comity.[112] Does Chapter 15 permit the Qimonda Administrator to

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[110] Chung, *The New Chapter 15*, *supra* note 1, at 100.

[111] *Id.* at 101.

[112] The Fifth Circuit recently had the opportunity to rule on this issue in *In re Vitro,* 701

F.3d 1031 (5th Cir. 2012), but it structured its opinion to avoid the issue. *See id*. The appeal in *In re Vitro* was the result of the consolidation of three cases relating to the Mexican reorganization proceeding of Vitro S.A.B. de C.V. ("Vitro"), a corporation organized under the laws of Mexico. *Id.* at 1036. The Ad Hoc Group of Vitro Noteholders (the "Noteholders"), a group of creditors holding a substantial amount of Vitro's debt, appealed the district court's decision affirming the bankruptcy court's recognition, under Chapter 15, of the Mexican reorganization proceeding. *Id.* Vitro and one of its largest third-party creditors, Fintech Investments, Ltd., filed separate appeals directly to the circuit court seeking a reversal of the bankruptcy court's decision denying enforcement of the Mexican reorganization plan because the plan would extinguish the obligations of non-debtor guarantors. *Id*. The Fifth Circuit affirmed the district court's judgment recognizing the Mexican reorganization proceeding and the appointment of the foreign representatives. *Id.* More importantly, for purposes of this Article, the court also affirmed the bankruptcy court's order denying enforcement of the Mexican reorganization plan. *Id.*

To sum up the relevant portion of the appeal presented to the Fifth Circuit, the bankruptcy court denied the Enforcement Motion on the ground that granting the motion would violate public policy and that comity would not be observed. *Id.* at 1043. Vitro appealed this order. *Id.* Thus, the Fifth Circuit was asked to rule directly on whether the public policy exception prevented the granting of the Enforcement Motion. *Id.* at 1053. However, the Fifth Circuit sidestepped the § 1506 issue by ruling that it had other grounds to affirm the denial of the Enforcement Motion and that it was unnecessary to rule whether public policy would be violated or not. *Id.* at 1069.

The opinion makes clear that the Fifth Circuit was reluctant to order the granting of the Enforcement Motion because the result of that motion would mean that the non-debtors would be released from their guaranties. *Id.* at 1061-62. The Fifth Circuit emphasized that it had previously ruled in another case that the Bankruptcy Code precludes non-consensual, non-debtor releases. *Id*. at 1069. Thus, if the Fifth Circuit had reversed the denial of the Enforcement Motion, it would have undermined the precedent already established in the circuit. Despite the fact that such releases were not permitted in the Fifth Circuit, the court was unable to assert that honoring such releases would be a violation of public policy. The court was unable to do so because it noted that other circuits were of the view that such releases were permitted under the Bankruptcy Code. *Id*. It would be unsupportable to assert that such releases violated public policy in the United States when other circuits permit them.

Thus, the panel deciding *Vitro* found itself in a narrow spot. The circuit's own precedent called for denial of the Enforcement Motion. However, due to the circuit split, the public policy exception was not available as a basis for affirming the denial. *Id.* Nonetheless, the Fifth Circuit achieved the result of affirming the denial of the motion by examining the relationship between and grounds for relief available under §§ 1507 and 1521. "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." *Id*. at 1070. The court declared:

> To that end, we observe that many of the factors that might sway us in favor of granting comity and reversing the bankruptcy court to that end are absent here. Vitro has not shown that there existed truly unusual circumstances necessitating the release. To the contrary, the evidence shows that equity retained substantial value. The creditors also did not receive a distribution close to what they were originally owed.

circumvent the explicit goal of Congress as embodied in Section 365(n)? Does the commencement of a German insolvency proceeding mean that German law applies to every transaction of the German debtor around the world, even though the transactions have little connection to Germany? According to universalists, the answer is "yes." Again, this stance was predictable. In 2006, I wrote in response:

> It is also possible that universalism's supporters will argue that Chapter 15 achieves the goal of 'one court, one law.' Now that Chapter 15 is law, they may argue that it fully embodies universalism and will likely urge the courts to apply Chapter 15 as broadly as possible (to the point, for example, where the public policy exception is rarely applied). . . . This likely development underscores the point that the enactment of Chapter 15 does not end the debate, but rather gives it more urgency because substantive outcomes will depend on how much of the universalist ideal will be read into it.[113]

B. Concerns Relating to Comity are Secondary to the Protection of Public Policy

If there is any doubt that considerations of comity are given a subordinate role to public policy in Chapter 15, examining the structure and text of the Code removes such doubt. Section 1506 carries the title "Public Policy Exception," and reads: "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."[114] This direct statement of the need to protect public policy stands alone and

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> Moreover, the affected creditors did not consent to the Plan, but were grouped together into a class with insider voters who only existed by virtue of Vitro reshuffling its financial obligations between it and its subsidiaries. It is also not the case that the majority of the impacted group of creditors, consisting predominantly of the Objecting Creditors, voted in favor of the Plan. Nor were non-consenting creditors given an alternative to recover what they were owed in full.

Id. at 1067.

The essential legal issue in *Vitro* was the enforceability of non-consensual, non-debtor releases. The law of the Fifth Circuit holds that such releases are not permitted under the Bankruptcy Code, but other circuits take the opposite view. For this reason, the *Vitro* court could not invoke the public policy exception against the enforcement of such releases. *Qimonda*, on the other hand, presents a clear case of public policy. 433 B.R. 547 (Bankr. E.D. Va. 2011). The public policy embodied in § 365(n) is explicit and uniform across the country because it is in the plain text of the Code. The point is *Vitro* presented high barriers to the application of § 1506. *Qimonda* presents a much easier case. 433 B.R. 547.

[113] Chung, *The New Chapter 15*, *supra* note 1, at 103.

[114] 11 U.S.C.A. § 1506 (West 2005).

emphasizes its importance by its isolation from other Code sections and from other language unrelated to public policy in the section.

Chapter 15's reference to "comity," on the other hand, is treated quite differently. As discussed above, the references to comity are found in §§ 1507(b) and 1509(b)(3).[115] The word "comity" does not appear in the titles of the sections that mention it. A couple of points stand out. First, comity is not the exclusive focus of the sections in which it is mentioned, indicating that judges should view it as a concept of lower importance than public policy. More importantly, § 1509(b) states: "If the court grants recognition under 1517, *and subject to any limitations that the court may impose consistent with the policy of this chapter* . . . ."[116] This phrase means one thing: considerations of comity are subject to limitations imposed by public policy. In other words, the court may act in deference to considerations of comity if, and only if, it acts consistently with public policy. Comity does not trump public policy; public policy trumps comity.

On a different, but related, point, the notion of comity is, at best, "soft" law.[117] Public policy is also often a "soft" law concept. However, public policy regarding the treatment of intellectual property licenses became "hard" law when § 365(n) was added to the Bankruptcy Code. If the

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[115] 11 U.S.C.A. §§ 1507(b), 1509(b)(3) (West 2005).

[116] 11 U.S.C.A. § 1509(b)(3) (West 2005).

[117] The distinction between "hard" law and "soft" law is a well-recognized feature of international law. One scholar explained:

> Some international lawyers distinguish between 'hard' and 'soft' international law, a distinction with at least two meanings. First, the distinction may refer to the difference between rules of law meant to be followed and norms meant merely to set out preferred outcomes. . . . Second, the distinction between hard and soft law may refer to the difference between formal sources of law (such as treaties) and instruments that are not formally legal sources (such as mutual declarations of government leaders issued at the end of a diplomatic conference).

MARK W. JANIS & JOHN NOYES, INTERNATIONAL LAW, CASES AND COMMENTARY 49 (4th ed. 2011).

Other scholars have noted the blurry and amorphous nature of comity is a reflection of the similar nature of international law in general:

> In international law, the identification of legal rules is quite different than it is in most municipal legal systems. The reason for this is directly linked to international law's very nature. Given the international political system of nation-states and the idea of state sovereignty, the sources of international law cannot be equivalent to those of most domestic laws . . .
>
> Given the rarity of effective formal international legislative, executive, and judicial organs, some have said quite simply that international law does not or cannot exist and that the only real rules of law are those generated by sovereign states for their own internal consumption.

MARK W. JANIS, INTERNATIONAL LAW 4 (5th ed. 2008).

Qimonda Administrator prevailed on his argument that considerations of comity are more important than the public policy embodied in § 365(n), it would mark a rare event – the elevation of "soft" law over "hard" law. Such a result would be illogical and unsound.

VII. CONCLUSION

A reflexive or wooden deference to comity in Chapter 15 cases would undermine the reason for including § 1506 as part of Chapter 15. The public policy exception exists for a reason − to prevent substantive harm to U.S. interests and goals and to protect public policy goals. In 2007, I wrote:

> [Section] 1506 is a safety valve that was deliberately inserted by Congress into Chapter 15 to prevent mechanical applications of foreign law. Despite the repeated expressions of support for global cooperation and harmony, Congress was concerned about how the application of foreign law might affect domestic parties and interests, and wanted to ensure that there would be a mechanism to prevent unacceptable harm.[118]

The concept of a "safety valve" is crucial, especially in a case like *Qimonda* where comity is being wielded to evade such a clear expression of public policy as contained in § 365(n). Recognizing the limitations of its forward vision, Congress included the public policy exception in its own separate section, apart from all other sections of Chapter 15, so that U.S.-based interests would have protection from substantive results contrary to U.S. public policy.

Section 365(n) was added to the Bankruptcy Code to protect vital American interests and public policy concerns. It is difficult to believe that Congress enacted § 365(n) intending for it to be so easily frustrated under the guise of something as ill-defined as comity. Comity poses little problem when it is used to promote administrative convenience and when there is no resulting substantive harm. The courts should not permit comity to achieve a result that inflicts substantive harm on U.S. interests, especially when the harm directly undermines the public policy explicitly promoted by Congress.

Postscript: On December 3, 2013, the Fourth Circuit issued its opinion in the Qimonda matter under the caption styled Jaffe v. Samsung Electronics Co., Ltd., *No. 12-1802, WL 26478864 (4th Cir. Dec. 3, 2013). The Fourth Circuit affirmed the bankruptcy court's decision, and held that Chapter 15 does not permit the Qimonda administrator to escape the application of 11*

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[118] Chung, *The Retrogressive Flaw of Chapter 15*, *supra* note 1, at 297.

U.S.C. sec. 365(n) and the public policy embedded in that section.