

August 2019

IN THIS ISSUE

MARK YOUR CALENDARS

FEATURED ARTICLES

Noteholders Beware: Contract Rights and Choice of Law Provisions in an Indenture are Property Rights for Purposes of Commencing a Chapter 15 Case By Ira L. Herman & Evan J. Zucker

USEFUL LINKS AND WEBSITES

SUBMISSIONS FOR UCC LAW JOURNAL

Dear Readers:

As the Editor in Chief of the Uniform Commercial Code Law Journal (UCC Law Journal), I am delighted to invite you to submit articles for consideration. The Journal, which is published quarterly by Thomson Reuters, has a proud and distinguished tradition. Professor Louis Del Duca, who was without a doubt one of the great minds in the field of commercial law and a mentor to so many, served as the Journal's first Editor in Chief, and it is truly a privilege to follow him.

Over its history, thus far, the Journal has published articles written by many of the leading academicians and practitioners in the field of commercial law, and Principal Attorney Editor Lisa Ovsiovitch and I are very interested in hearing from prospective authors in both groups. The Journal welcomes articles relating to various aspects of the Uniform Commercial Code that may include, but are in no way limited to, such topics as each of the UCC articles, contract law, commercial arbitration, damages, the Sarbanes Oxley Act, the Truth in Lending Act, alternative

Joint Report from the Chairs

Dear Members:

Please email either of us if you have any ideas for either of the Committees or wish to participate in any project, subcommittee or leadership role. The Committees have a number of projects underway. Our subcommittees and task forces are very active and always welcome input. Please do not hesitate to volunteer!

We hope you enjoy this issue, and invite you to get involved in your committee(s).

Jeremy S. Friedberg

Commercial Finance Committee Chair
jeremy@friedberg.legal

Candace M. Zierdt

UCC Committee Chair
czierdt@law.stetson.edu

EDITORIAL BOARD

Shadi Enos
Editor (ComFin)
Blank Rome LLP
Shadi@BlankRome.com
(424) 239-3459

Paul Hodnefield
Editor (UCC)
CSC
Paul.Hodnefield@cscglobal.com
(651) 494-1730

Celeste Pozo
Editor (UCC)
Inter-American Investment Corp.
Celestejd305@gmail.com
(202) 312-4479

Samuel R. Henninger
Editor (UCC)
U.S. Bankruptcy Court
Eastern District of Tennessee
Samuel_Henninger@tneb.uscourts.gov
(865) 414-7599

Peter V. Marchetti
Editor (UCC)
Thurgood Marshall School of Law
peter.marchetti@tmslaw.tsu.edu
(617) 270-3143

Kristoffer A. Gredsted
Editor (UCC)
Skadden
Kristoffer.Gredsted@skadden.com
(312) 407-0684

Khyshboo Patel
Editor (ComFin)
Holland & Knight LLP
Khyshboo.patel@hkllaw.com
(404) 817-8404

Featured Articles

Noteholders Beware: Contract Rights and Choice of Law Provisions in an Indenture are Property Rights for Purposes of Commencing a Chapter 15 Case

By: Ira L. Herman and Evan J. Zucker

payment systems in the modern era, commercial issues in gaming systems, issues related to prepaid accounts, issues related to the 2010 Article 9 Amendments, issues related to the UCC and bankruptcy, litigation, secured lending, issues related to trusts and trustees, searching and filing issues under Article 9, the CISG, etc.

The next deadline for submitting articles to be considered for publication is October 1, 2019. I would be glad to provide additional information, including Thomson Reuters' Submission Instructions and Specifications, to anyone who is interested in having an article published in the Journal. Articles should be submitted by e-mail if possible, and the preferred format is Microsoft Word.

Very truly yours,

Kristen Adams
Interim Dean and Professor of Law,
Stetson University College of Law
adams@law.stetson.edu

VIEW CURRENT REPORTS AND DEVELOPMENTS OF THE FOLLOWING COMMITTEES AND TASK FORCES:

COMFIN SUBCOMMITTEES AND TASK FORCES

- [Subcommittee on Agricultural and Agri-Business Financing](#)
- [Subcommittee on Aircraft Financing](#)
- [Subcommittee on Creditors' Rights](#)
- [Subcommittee on Cross-Border and Trade Financing](#)
- [Subcommittee on Intellectual Property Financing](#)
- [Subcommittee on Lender Liability](#)
- [Subcommittee on Loan Documentation](#)
- [Subcommittee on Loan Workouts](#)
- [Subcommittee on Maritime Financing](#)
- [Subcommittee on Past Chairs Advisory](#)
- [Subcommittee on Programs, Meetings and Communications](#)
- [Subcommittee on Real Estate Financing](#)
- [Subcommittee on Secured Lending](#)
- [Subcommittee on Syndications and Lender Relations](#)

The Bankruptcy Court for the Southern District of New York recently reaffirmed its view that it takes little to establish “property in the United States,” to qualify a foreign entity for ancillary relief under chapter 15 of the Bankruptcy Code. *See* 11 U.S.C. § 109(a). Specifically, in *In re PT Bakrie Telecom TBK*, the Court found that the New York governing law and forum selection clauses found in a trust indenture, constitute a contract right that is enough of a property interest to constitute - “property in the United States” for the purposes of Chapter 15. *In re PT Bakrie Telecom TBK*, 601 B.R. 707, 715-16 (Bankr. S.D.N.Y. 2019).

Background

PT Bakrie Telecom Tbk (“BTEL”), was in the business of providing a fixed digital radio cellular telecommunication national network and services. BTEL commenced the chapter 15 case to implement an Indonesian debt restructuring plan that would allow BTEL to avoid liquidation. The gravamen of BTEL’s financial distress – and the key issue in recognition – was its guarantee of certain 11.5% senior dues due 2015 senior notes issued by Bakrie Telecom Pte. Ltd. (the “Issuer”), a subsidiary of BTEL, in the principal amount of \$380 million, pursuant to a trust indenture governed by New York law.

Thereafter, the Issuer defaulted on the interest payments due November 2013 and May 2014. In September 2014, certain noteholders sued the Issuer for the unpaid past due interest and BTEL on its guarantee of that payment obligation, in New York. Subsequently the aggrieved holders delivered a notice of acceleration to BTEL, the Issuer and the Indenture Trustee demanding immediate payment of all of then outstanding principal and interest.

On October 23, 2014, one of BTEL’s creditors – not a noteholder - filed a PKPU application against BTEL in the Central Jakarta Commercial Court. A PKPU proceeding is a court-enforced suspension of payments process in Indonesia that is designed to provide a debtor a definite period of time to restructure its debt and reorganize its affairs pursuant to a composition plan with its creditors. While the PKPU proceeding was pending, BTEL engaged in restructuring negotiations with its noteholders, ultimately resulting in the Central Jakarta Commercial Court granting a Temporary Suspension of Payment and setting a schedule to vote on a composition plan. A number of the noteholders (the “Objecting Noteholders”), however, complained that they were being excluded from the PKPU process even though they filed claims. They were excluded because the administrator overseeing the PKPU proceeding denied their claims. Instead of each noteholder having a claim, BTEL listed the Issuer as its creditor owing the \$380 million. These noteholders also took issue with the restructuring process because they asserted that the Indenture Trustee did not consent to the Issuer voting the note debt instead of the noteholders and that the Issuer lacked standing to vote the debt. Despite these arguments, on December 8, 2014, the requisite majority of BTEL’s creditors voted to approve BTEL’s restructuring plan. Neither the Objecting Noteholders nor the Indenture Trustee appealed the decision approving the plan.

The same day that their claims were rejected in the PKPU Proceeding, the Objecting Noteholders commenced a second action in New York against BTEL for fraud, tortious conduct in connection with the offering, and a declaratory judgment that the PKPU Proceeding was invalid with respect to the Indenture. The New York court granted summary judgment on the Objecting Noteholders’ breach of contract claim and sustained their claims against the Issuer and subsidiary guarantors for fraud in connection with the offering. *See Universal Inv. Advisory SA v. Bakrie Telecom PTE, Ltd.*, 51 Misc.3d 1212(A) (Sup. Ct. N.Y. Cnty. 2016). On cross-appeals, the New York Appellate Division affirmed summary judgment in favor of the objecting noteholders. *See Universal Inv. Advisory SA v. Bakrie Telecom PTE, Ltd.*, 154 A.D.3d 171 (1st Dep’t 2017).

In January 2018, the foreign representative of BTEL commenced its chapter 15 case by filing a chapter 15 petition for recognition of a foreign proceeding. The Objecting Noteholders contested recognition, arguing, among other things, that BTEL was ineligible for chapter 15 relief, because it did not have “property in the United States” within the meaning of section 109(a) of the Bankruptcy Code. BTEL disagreed, contending it had “property in the United States,” consisting of contract rights under an Indenture governed by New York law and subject to a New York forum selection provision. In response, the Objecting Noteholders

- [ADR Task Force](#)
- [Model Intercreditor Agreement Task Force](#)

UCC SUBCOMMITTEES AND TASK FORCES

- [Subcommittee on Annual Survey](#)
- [Subcommittee on Article 7](#)
- [Subcommittee on Commercial Law Newsletter](#)
- [Consumer and Commercial Contracts](#)
- [Subcommittee on International Commercial Law](#)
- [Subcommittee on Investment Securities](#)
- [Subcommittee on Leasing](#)
- [Subcommittee on Letters of Credit](#)
- [Subcommittee on Payments](#)
- [Subcommittee on Recent Developments](#)
- [Subcommittee on Sale of Goods](#)
- [Subcommittee on Secured Transactions](#)
- [Forms Under Revised Article 9 Task Force](#)
- [Cleared Swaps Task Force](#)

COMFIN AND UCC JOINT TASK FORCES

- [Commercial Finance/UCC Online Discussion Forum](#)
- [Commercial Finance Terms Joint Task Force](#)
- [Deposit Account Control Agreements Joint Task Force](#)
- [Filing Office Operations and Search Logic Joint Task Force](#)
- [Legislative Enactment of Article 9](#)
- [Model IP Security Agreement Joint Task Force](#)
- [Security Interests in LLC and other Unincorporated Entity Interests Joint Task Force](#)
- [Survey of Commercial Lending Laws](#)

COMMITTEE LEADERSHIP ROSTERS

- [Uniform Commercial Code Committee](#)
- [Commercial Finance Committee](#)

argued that it would be inequitable for a foreign debtor to use an indenture as a sword and a shield – relying on the provisions of the Indenture as the sole basis for chapter 15 eligibility, after first freely and willfully ignoring the terms and obligations of the Indenture in its Indonesian PKPU Proceeding. The Bankruptcy Court, however, found that a debtor’s contracts rights are intangible property sufficient to satisfy the minimal property requirement under section 109 of the Bankruptcy Code and granted recognition.

Rationale

Chapter 15 of the Bankruptcy Code permits foreign debtors to obtain the protection of the United States bankruptcy courts in support of a foreign insolvency proceeding. In order to obtain such protection, the foreign debtor must be an eligible debtor within the meaning of the Bankruptcy Code. In *Drawbridge Special Opportunities Fund LP v. Barnet*, the Second Circuit held that section 109(a) of the Bankruptcy Code applies to chapter 15 cases and that all of the sections eligibility requirements, including the requirement that the entity “resides or has a domicile, a place of business, or property in the United States” must be met for a foreign entity to be eligible for chapter 15 relief. *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013).

Courts in the Southern District of New York have consistently construed the term “property” broadly to include intangible assets. For example, causes of action with a *situs* in New York owned by a foreign debtor is a sufficient property interest in the United States to satisfy the eligibility requirement. See *In re Berau Capital Res. Pte Ltd*, 540 B.R. 80, 82 (Bankr. S.D.N.Y. 2015) [hereinafter “*Berau*”]; *In re Octaviar Admin. Pty Ltd*, 511 B.R. 361, 372–74 (Bankr. S.D.N.Y. 2014).

Similarly, in *Berau*, the court found that while a retainer account is sufficient property in the United States, a United States dollar denominated debt indenture governed by New York law provided another “substantial basis” for satisfying the chapter 15 eligibility requirements. *In re Berau Capital Res. Pte Ltd*, 540 B.R. at 82. The court in *Berau* found that indentures are contracts that create property rights. These rights are intangible property. Under section 1502(8) of the Bankruptcy Code, the location of intangible property rights is to be determined under applicable nonbankruptcy law. Under New York law, contract counterparties can establish the *situs* of a contract, including the *situs* of the concomitant intangible property, by including New York governing law and a New York forum selection clause in a contract. The court noted that it “would be ironic if a foreign debtor’s creditors could sue to enforce the debt in New York, but in the event of a foreign insolvency proceeding, the foreign representative could not file and obtain protection under chapter 15 from a New York bankruptcy court.”

Relying on *Berau*, the Court in *PT Bakrie* found that the intangible property rights – contract rights – created by the Indenture alone satisfied the property requirement of section 109. In so finding, the Court rejected any attempt to add a subjective equitable component to the straight forward requirements of section 109. Specifically, the Court found that questions regarding whether BTEL and its affiliates had disregarded and repudiated its obligations under an agreement governed by New York law were not before the court, and, therefore, at the recognition stage, did not affect whether the debtor had an intangible property interest in New York at the time of the commencement of its chapter 15 case.

Conclusion

The importance of the *PT Bakrie* holding, and its underlying rationale should not be overlooked, even if the decision itself does not address a novel issue, as there are any number of foreign entities that have accessed and will continue to access the U.S. capital markets and have and will have U.S. dollar-denominated debt, subject to documentation that includes New York governing law and New York forum selection clauses. First, once again, it has been established that a foreign entity can readily access the U.S. bankruptcy court system to bind the entity’s U.S. creditors to the outcome of a foreign restructuring process. Second, such foreign outcomes may be at odds with the expectations of creditors who have relied on documents and the rights and remedies agreed to in such documents.