Fairfield UNIVERSITY

North East Journal of Legal Studies

Volume 33 *Spring 2015* Article 2

3-20-2015

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by

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INTRODUCTION

The Yukos Oil Company (Yukos) and its president, Mikhail Khodorkovsky (Khodorkovsky) became the poster company and star entrepreneur of the Russian Federation which emerged from the breakup of the former Union of Soviet Socialist Republics

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on December 26, 1991. In the highly publicized government takeover of Yukos and the arrest and initial long-term imprisonment of Khodorkovsky for alleged fraud, embezzlement, and evasion of personal income taxes in October, 2003, it was alleged that the company had underpaid prior years' taxes of approximately $27.5 billion. The Russian Federation Ministry of Taxation (Taxation Ministry) then confiscated Yukos' primary assets. The company suffered enormous losses and sought bankruptcy protection. This paper discusses the Yukos Oil Company takeover and the international regime for dealing with bankruptcies, particularly, in the form of insolvency reorganizations on a multi-national basis. It concludes that the UNCITRAL Model Law on Cross-Border Insolvency, adopted by the United States, offers principles to foster cooperation among the countries affected by the insolvency.

YUKOS TAKEOVER IN RUSSIA

Yukos, a Moscow-based joint stock company organized under the laws of the Russian Federation, issued shares tendered on the Russian stock exchange. Yukos was a holding company that had some 200 subsidiaries organized under the diverse laws of the Russian Federation, Cyprus, and the United Kingdom, among others. Its shares were traded on various European exchanges and on over-the-counter exchanges in the United States in the form of American Depository Receipts. Khodorkovsky was its president, chief executive officer, and largest shareholder. Bruce

K. Misamore (Misamore) was the chief financial and principal accounting officer. The Taxation Ministry determined that Yukos grossly underpaid its taxes for 2000 to 2003 tax years by taking advantage of Russia's preferential tax treatment through sales of oil to 17 affiliated trading companies within remote Federation regions known as ZATOs (Zakrytye Adminsitrativno Territorial'nye Obrazovaniia). The profits from the sales were then returned to Yukos thereby taking advantage of the substantially lower tax market-prices sales. The companies were allegedly sham companies used to avoid legitimate taxes on its sales and profits. Yukos then reported earnings of $1.3 billion and net profit of $850 million for the third quarter of 2002 and a net profit of $988 million for the fourth quarter of 2002. It reported earnings of $3,058 billion for the year allegedly using the United States *Generally Accepted Accounting Principles (GAAP).* Due to the government's claim of false and fraudulent tax filings, Yukos was assessed with underpayments of $27.5 billion that resulted in the Russian Federation's confiscation of Yukos' primary assets and the company's financial downfall.[1]

The Political Background

It was alleged by plaintiffs in the securities fraud action against Yukos that, although Yukos stated in a press release that the company did not engage in financing political parties, its CEO, Khodorkovsky, had secretly met with Russian Federation president

Vladimir Putin who promised not to prosecute Yukos for alleged wrongdoing provided it and its principal officers refrained from opposing Putin. When, in fact, Khodorkovsky did oppose Putin and sought to have his government dismissed, together with financing opposition parties, the result therefrom was to cause the demise of Yukos. Thus, Khodorkovsky was arrested in October, 2003 for alleged fraud, embezzlement, and evasion of personal income taxes. He was sentenced to nine years in prison on May 20, 2005 but was pardoned by President Putin on December 30, 2012. The government then seized his 44% interest in Yukos as security toward the $1 billion he allegedly personally owed in taxes. It further claimed that, as a result of the use of preferential tax treatment by Yukos through its sham companies which received preferential tax treatment, the sum of $3.4 billion was owed for the tax year 2000 and $27.537 billion for the years 2001-2003. Yukos then defaulted on a $1 billion loan from private investors after the seizure of company's assets, including its main production facility and its bank accounts containing billions of dollars.[2]

U.S. BANKRUPTCY COURT PROCEEDINGS

The Texas Filing

On December 14, 2004, Yukos commenced a voluntary Chapter 11 bankruptcy proceeding in federal court in Houston, Texas through its attorney and by Bruce K. Misamore, its chief financial officer.[3] The management

of Yukos authorized the filing of the petition. It requested an injunction to stop the sale of company assets by the Russian Federation. Although Yukos, the debtor in the within proceeding, was an "open joint stock company" organized under the laws of the Russian Federation, it alleged that the Houston federal court had jurisdiction based on the fact that its subsidiary, Yukos USA, Inc., was a U.S. corporation having been incorporated one day prior to the filing of the bankruptcy petition, and which had $2 million in funds in Texas. Its sole director was the said Bruce K. Misamore. Additional grounds for the assertion of jurisdiction were the holding of $6 million in trust by its attorneys, and that its chief financial officer had a home in Houston, Texas as well as in Moscow, Russian Federation. Almost all of the affiliates and subsidiaries of Yukos are Russian companies and almost all of the assets thereof are in Russia. Nearly all of the some 100,000 employees resided in Russia. Investors, both individual and institutional, included U.S. persons.

The company alleged that the tax assessment was wrongfully assessed in violation of Russian law. It sought to have the Texas court halt the Russian government's actions to enforce its tax claims, have the financial flexibility to obtain loans superior to claims of the Russian government, as well as to finance operations, restructure tax debt and create a surviving entity to seek redress against the Russian Federation and other entities on behalf of shareholders, employees,

and creditors.[4] The court did grant a temporary injunction finding that there was substantial evidence of irreparable injury to the plaintiff.[5] Although the court found substantial evidence that the agencies of the Russian government acted in a manner that would be considered confiscatory under U.S. law by assessing retroactive taxes in excess of Yukos' total revenue for the years 2001-2002, the court had to determine whether the U.S. bankruptcy courts are the proper and suitable forum for determining the needs of the debtor and its creditors and equity security holders.[6]

In the proceeding, one of the creditors of Yukos moved to dismiss the bankruptcy filing. Although the court had initially granted the restraining order, the motion was granted. The court addressed the following issues in making its determination:

Jurisdiction:

The court, after discussing the constitutional and statutory bases for the assertion of jurisdiction, noted that the court may only determine actual cases or controversies under U.S. Constitution, Art. III, §2. The said provision requires that parties initiating cases must have standing to sue. Title 11, U.S.C. §109(a) of the Bankruptcy Code states that "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor." The court determined that Yukos had no standing inasmuch as it has no place of business or property in the U.S.

The court acknowledged that having nominal amounts of property in the U.S. as herein may confer jurisdiction and, in fact, did so confer standing to be a debtor under the Bankruptcy Code and subject matter jurisdiction.[7]

Forum non conveniens:
The court refused to decline jurisdiction based on the doctrine inasmuch as Congress has statutorily granted jurisdiction and venue upon the court in bankruptcy cases and has the inherent power to control the administration of the litigation that is before the court.[8]

Comity:
The court defined "comity" as 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.[9] The court declined to dismiss the petition on this ground, having found no precedent for doing so but stated it may be considered in connection with a determination of whether cause exists for dismissal.[10]

Act of State Doctrine:
Under the act of state doctrine, a U.S. court should not adjudicate the legality of an action of a sovereign state within its own jurisdiction on the theory that every sovereign state should respect the independence of every other sovereign state and not judge actions done

therein. Grievances resulting from such actions should be addressed diplomatically between the affected states. The court noted that, although as described below, Congress has provided for a mechanism of coordinating the insolvency laws of the U.S. and other jurisdictions, nevertheless, no such mechanism for dispute resolution has been provided where the foreign proceeding is not an insolvency proceeding. In the within action, the Russian government in fact has refused to accept service of process and its actions may have risen to the level of foreign policy that is left to the province of the President of the U.S. Nevertheless, the court concluded that the act of state doctrine did not form an independent basis requiring dismissal of the bankruptcy filing so as to prevent the court from evaluating the efforts of Yukos to reorganize itself financially.

U.S Bankruptcy Code:

The court did conclude the petition should be dismissed based on Section 1112(b) of the Bankruptcy Code that provides a court may dismiss a petition or convert it to a Chapter 7 liquidation proceeding for cause based on a number of factors including inability to effectuate substantial consummation of a confirmed plan. The court determined that the Yukos reorganization plan is not a financial reorganization inasmuch as most of its assets are oil and gas within Russia. Without cooperation of the Russian government, reorganization would be extremely limited. The funds formulating the basis for the claim of jurisdiction were deposited in

U.S. banks less than a week prior to the filing of the petition and were transferred to confer jurisdiction. Yukos has attempted to substitute U.S. law as well as European Convention law, arbitration, proceedings before the European Court of Human Rights, and other jurisdictions in place of Russian law. The court held that no evidence has been presented that makes the U.S. court uniquely qualified or more able to effectuate relief than the other forums. Almost all of the financial and business activity of Yukos occurred and continues to do so in Russia which required participation of the Russian government. Due to the size of its production of oil and gas within Russia, the appropriate forum would be one in which the Russian government participates therein.[11]

The New York Filing

In this federal court action, *In re Yukos Oil Company Securities Litigation*,[12] the plaintiffs, who had purchased securities between January 22, 2003 and October 25, 2003, commenced a securities fraud action under §10(b) of the Securities Exchange Act of 1934 against Yukos alleging that its outside auditor and certain of its executives and controlling stockholders, including Khodorkovsky, concealed the risk that the Russian Federation would take adverse action against the company by its failure to disclose its unlawful tax evasion scheme and Khodorkovsky' political activity that exposed the company to retribution by the government. The specific allegations were the unlawful

taking advantage of ZATO's preferential tax treatment by the sale of booked oil sales well below market prices to 17 trading companies registered within ZATOs and resold to customers at market prices claiming tax benefits with the profits funneled to Yukos and Khodorkovsky's secret meetings with President Putin with other oligarchs and his later denunciation of Putin.

Interestingly, the defendants who defended against the motion to dismiss the reorganization proceeding in Texas, now utilized similar arguments made against to thwart the New York proceeding. Thus, the defendants requested in their motion to dismiss the lawsuit against them and requested the court to abstain from holding them potentially liable based on three theories: (1) the Act of State doctrine; (2) subject matter jurisdiction was lacking as to two of the three defendants; and (3) a failure to state a claim for either primary violations of the securities laws or control person liability.

Act of State Doctrine:

The defendants alleged that by adjudicating the dispute it would require the court to inquire into the actions and motives of the Russian government by its imposition of confiscatory tax levies, penalties and interest on Yukos. Using similar reasoning of the Texas court, the New York court determined that the act of state doctrine does not preclude it from deciding a case that implicates the motives or justifications of a foreign

state's officials but rather applies when the outcome of the case turns upon on the official action by a foreign sovereign.[13] The central question in the within dispute is whether the defendants acted with fraudulent intent in withholding information from potential investors. The validity of the actions of the Russian Federation would not be affected.

Subject Matter Jurisdiction:
The question herein is whether the U.S. courts may be used concerning transactions that are essentially foreign in nature. To make a determination, the court has to consider whether the wrongful conduct occurred in the U.S., i.e., when substantial acts in furtherance of the fraud were committed in the U.S., and whether the wrongful conduct had a substantial effect in the U.S. or upon a U.S. citizen. The court found that all of the defendants' alleged misrepresentations emanated from abroad. Although Yukos filed its 2002 Annual Report with the SEC, its preparation was made abroad and such single filing was not a substantial act in furtherance of the alleged fraud. Additional alleged conduct concerned a singular email to the plaintiff's sole shareholder to inform him of the release of Yukos' financial results and personal appearances of Yukos' executives but no showing of any misrepresentations made at such appearances. Thus, the plaintiffs failed to meet the conduct test. With respect to the effects test, i.e., conduct abroad that caused a substantial effect upon the U.S., there was no evidence of a sufficient

nexus connecting the alleged fraud to U.S. exchanges and investors. Thus, the court lacked subject matter jurisdiction over claims on behalf of foreign bondholders.[14]

Failure to State a Claim:
Under §10(b) of the Exchange Act and Rule 10b-5, it is unlawful to "use or employ, in connection with the purchase or sale of any security…any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may proscribe." To state a claim, the plaintiff must plead that the defendant: "1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which the plaintiff relied; and (5) that plaintiffs' reliance was the proximate cause of their injury." In addition, under the Private Securities Litigation Reform Act (PSLRA),[15] there are heightened requirements of pleading as found in Rule 9(b) which requires that the circumstances constituting fraud must be stated with particularity, i.e., the allegations must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent."[16] In essence, the court, after reviewing the detailed allegations of the alleged false statements and omissions, concluded that the plaintiffs failed to meet the pleading standards of Rule 9(b).

The Yukos case leads us to a discussion of UNCITRAL.s Model Law on Cross-Border Insolvency and its U.S. adoption under the provisions of Article 15 of the Bankruptcy Code.

UNCITRAL AND ARTICLE 15 OF THE BANKRUPTCY CODE

Introduction

Most large business enterprises are multinational in scope, often becoming anational through use of subsidiaries and employing senior executives from diverse areas of the globe. This is true even of newly emerging economies such as China which has undergone unparalleled expansion especially in its quest for energy and mineral resources. As in all such enterprises, companies may expand beyond their ability to attract investors, capital, and customers thus leading to insolvencies requiring reorganization or outright liquidation. The problem arises, however, that with the multiplicity of jurisdictions, accompanied by often conflicting national rules and regulations, how to resolve the inevitable dissolution of failing enterprises. The United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Cross-Border Insolvency with Guide to Enactment[17] and the developments in this regard in U.S. law and that of the European Union are pertinent to this situation.

In the U.S., a new Chapter 15, "Ancillary and Other Cross Border Cases" was added to the Bankruptcy Code on April 20, 2005 by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[18] It is the U.S. domestic adoption of the Model Law on Cross-Border Insolvency promulgated by UNCITRAL in 1997. It replaced § 304 of the Bankruptcy Code.[19] Similar to a Chapter 11 proceeding, it seeks to facilitate the rescue of financially troubled businesses in order to protect investments and employees. It applies where assistance is sought by a foreign court or a foreign representative in a foreign proceeding. Thus, a Chapter 15 case is ancillary to the foreign proceeding. Where the primary or complex assets are located in the U.S., the proceeding may be one under Chapter 7 (liquidation) or Chapter 11 (reorganization).

The European Union's regulation[20] on cross-border insolvency adopted the provisions of UNCITRAL under Article15. As amended, the Regulation established a European framework for the member states of the E.U. Its emphasis is on the center of main interests conveying jurisdiction on the courts of the member state that has primary jurisdiction which the other member states are to grant recognition in secondary proceedings initiated therein.

UNCITRAL Model Law

The Model Law recognizes that confusion often arises among states (countries) concerning how to resolve issues arising out of insolvencies of companies that are multinational in scope. Accordingly, the Model Law's main objective, while not creating substantive law, is to provide effective mechanisms for states to deal with cross-border insolvencies. Among the countries that have adopted the Model Law in whole or substantial part are the United States, Japan, and the United Kingdom.[21]

Purpose of the Model Law:
The purpose of the Model Law as repeated almost verbatim in §1501(a)(1-5) of the U.S. Bankruptcy Code is to provide effective mechanisms in cross-border insolvency actions to promote the following objectives:

- Cooperation between the courts and other competent authorities of this State and foreign States involved in cross-border insolvency. (§1501(a)(1)(B) repeats the Model Code language and adds "(A) cooperation between courts of the United States, United States trustees, examiners, debtors, and debtors in possession";
- Greater legal certainty for trade and investment;
- Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

- Protection and maximization of the value of the debtor's assets; and
- Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[22]

The Model Law recognizes that there are differences in national procedural laws and does not attempt to promote substantive unification of insolvency laws nor to critique judicial decisions or to instruct judges on how to determine applications for recognition and relief under State law. It modestly seeks to offer a general guidance by pointing out procedural and substantive issues a judge may wish to consider in making a ruling. [23] While recognizing the differences among national laws, it provides "foreign representatives"[24] (persons administering a foreign insolvency proceeding) with access to the courts of states that have enacted the Model Law; determination of whether a foreign insolvency proceeding should be accorded recognition; provide a transparent regime for foreign creditors to commence or participate in an insolvency proceeding within that state, permit cooperation among courts of the different jurisdictions; and establish rules for coordination of relief.[25]

Basic Principles of the Model Law:
The Model Law is based on four basic principles as set forth in Articles 25-29.[26]
Access principle: Article 25 of the Model Law provides that the state court shall cooperate to the maximum extent possible with the foreign court or foreign representative.

The foreign representative is entitled commence a proceeding under state law if the conditions of state law are met.[27] It further provides that the court is entitled to communicate directly with, or to request information or assistance directly from foreign courts or foreign representatives. §1511 of the Bankruptcy Code permits a recognized foreign representative to commence either an involuntary or voluntary proceeding under §§301-303 if the foreign proceeding is a foreign main proceeding. The petition is to be accompanied by a certified order granting recognition and that the court be advised of the foreign representative's intent to commence a case under this section. §1525 states that the U.S. court is to cooperate either directly or through the trustee and communicate with the foreign court or representative subject to the rights of a party in interest to notice and participation.

The issue arises whether the said foreign representative is entitled to act under state law. It is left to the reviewing court to make the determination based possibly on expert evidence. UNCITRAL's judicial interpretation indicates that a judge may have to be satisfied that there is a foreign proceeding in which recognition is sought, is collective in nature, arose out of a law relating to insolvency, is under the supervision of a foreign court, and the applicant is authorized to administer the reorganization or liquidation of the debtor's assets or affairs.[28]

Recognition principle: Article 17 of the Model Law states that a foreign proceeding shall be recognized in a state court if it is a "foreign proceeding" as defined under

Article 2(a);[29] the foreign representative as defined applies for recognition; the application meets Article 15(2) requirements, i.e., (a) either a certified copy of the decision commencing the foreign proceeding and appointment of the foreign representative, (b) a certificate affirming such proceeding and appointment of representative, or (c) other evidence so establishing such proceeding and representative; and the application is properly submitted. The foreign proceeding may be recognized either as a "foreign main proceeding" (if it takes place in a state where the debtor has the center of its main interests); or a "foreign non-main proceeding" (where the debtor's has economic activity operations outside its main center of interests).

Chapter 15, §§ 1515-1517 of the Bankruptcy Code, sets forth the conditions for recognition of the foreign representative's petition which repeats the above requirements; provides that the court may presume recognition when a decision, certificate, or other documents from the foreign proceeding so indicates; and grants an order of recognition after notice and hearing.

Relief principle: UNCITRAL Model Law Art. 21§ provides for a variety of forms of relief once recognition of a foreign proceeding has been granted: (1) interim (urgent) relief consisting of a stay of the commencement or continuation of individual actions or proceedings or execution concerning the debtor's assets, rights, obligations, or liabilities as well as suspension of the right to transfer, encumber, or otherwise dispose of the said

assets; (2) provide for the examination of witnesses, taking of evidence, or delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities; (3) entrust the administration of all or part of the debtor's assets located within the state to the foreign representative or other designated person; and/or (4) grant such other relief available under state law. §§1519 and 1521 of the Bankruptcy Code are in accord.

Cooperation and coordination principle: Article 25 of the Model Code obligates the courts of the host and foreign states and foreign representatives to communicate and cooperate with each other to the maximum extent possible so as to ensure that the debtor's insolvency is resolved fairly and efficiently with maximum benefits to creditors. Cooperation consists of appointment of a person or body to act as the court directs; communication of information by appropriate means; coordination of the administration and supervision of the debtor's assets and affairs; approval or implementation of agreements concerning coordination of proceedings as well as the concurrent proceedings of the debtor.[30] Bankruptcy Code §§1525-1527 repeat the said forms of cooperation.

Scope of Application: The Model Law Chapter 1, Article 1, and Bankruptcy Code §1501(b)(1-4) state that cross-border insolvency applies where assistance is sought in the state (U.S.) by a foreign court or a foreign representative in connection with a foreign proceeding; by a foreign country in connection with a cross-border insolvency; a concurrent proceeding foreign proceeding

and the state where assistance is sought respecting the same debtor; or by creditors or other interested persons in a foreign country having an interest in commencing a case or proceeding in the country where assistance is sought. The Model Law leaves it to the host country to decide which exclusions apply. Thus, the U.S. Code excludes moneys or other securities required or permitted under state insurance laws for the benefit of U.S. claim holders; an entity subject to proceedings under the Securities Investor Protection Act of 1970;[31] and certain other proceedings.

Public Policy Exception: The Model Law provides that "nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."[32] The Bankruptcy Code repeats the provision in §1506 of the Code and further provides that its provisions may not conflict with an obligation of the U.S. arising out of any treaty or other agreement.[33]

Commencement and Recognition of Foreign Proceedings: The ancillary proceeding commences by the filing of a petition for recognition of a foreign proceeding.[34] The petition may be made by an appointed foreign representative which petition is accompanied by a certified copy of the decision of the foreign proceeding appointing the representative, a certificate or other evidence of the foreign court affirming the existence of such foreign proceeding, and the identification of all foreign proceedings respecting the debtor.[35] After notice

and hearing, an order recognizing a foreign proceeding is to be entered as a foreign main proceeding if it is taking place where the debtor has the center of its interests or as a foreign non-main proceeding if the debtor has an establishment in the foreign state.[36] Once recognition is given by the U.S. court, there is an automatic stay and the foreign representative may continue to operate the debtor's business in the ordinary course. The U.S. court may authorize preliminary relief as permitted by the Code.[37] If the foreign representative initiates a full bankruptcy proceeding, then relief may be made respecting only the debtor's assets within the United States.[38]

Center of Main Interest (COMI): Recognition of the foreign proceeding raises the question of whether the foreign proceeding is a "foreign main proceeding" as defined in Article 2(b) of the Model Law, "a foreign proceeding taking place in the State where the debtor has the centre of its main interest." It is a crucial issue that underlies the refusal of U.S. courts to give recognition to Russian Federation proceedings in the Yukos actions in the United States.

Cooperation with Foreign Courts and Representatives: There are extensive provisions concerning cooperation between the domestic court and the foreign court. The provisions include cooperation with the foreign representative or court (in the U.S. through the appointed trustee) and communication directly with, or to request information or assistance from, a foreign court or foreign

representative, subject to the rights of a party in interest to notice and participation.[39] The forms of cooperation may be implemented by any appropriate means including: appointment of a person or body, including an examiner, to act at the direction of the court; Communication of information by any means considered appropriate by the court; coordination of the administration and supervision of the debtor's assets and affairs; approval or implementation of agreements concerning the coordination of proceedings; and coordination of concurrent proceedings regarding the same debtor.[40]

Relief upon Recognition: Both the Model Code and the Bankruptcy Code provide the following relief upon recognition of a foreign proceeding: staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent that they have not been stayed; staying execution against the debtor's assets to the extent they had not been previously stayed; suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent that they had not been previously suspended; providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the (United States) to the foreign representative or another person , including an examiner authorized by the court extending

relief granted; and granting any additional relief that may be available to a trustee.[41]

The grant of recognition by a domestic court to a foreign main proceeding is binding upon all persons within its jurisdiction. In *In re Tembec Industries,*[42] the U.S. District Court, in its Order Granting Jurisdiction, permanently enjoined all old bondholders taking or continuing any act to obtain possession of, or exercise control over, the Debtor or any of its property that is located within the territorial jurisdiction of the U.S. or any proceeds thereof; (ii) transferring, relinquishing or disposing of any property of the Debtor; and/or (iii) commencing or continuing any action or legal proceeding.[43]

CONCLUSION

The Yukos case highlights the difficulties presented in today's global environment whereby companies that experience financial difficulties are compelled to engage in a multitude of legal proceedings commencing in one country where it center of main interest lies to other countries which are affected by the companies and their subsidiaries. Often, in the past, each country was concerned with its sovereignty which thus precluded it from cooperating with other countries affected by a particular company's insolvency proceeding. Thus, the United Nations in adopting the Model Code has provided the bases and principles to foster cooperation among the countries affected by the

insolvency. The United States, in particular, has adopted the Model Code almost in its entirety and has put into place the mechanisms to assist other nations adopting the Code to conduct and conclude such proceedings.

ENDNOTES

From the Amended Memorandum and Order, *In re Yukos Oil Company Securities Litigation*, 04 Civ. 5243 (WHP) (S.D.N.Y. Oct. 225, 2006).
[2] *Id.*
[3] *In re Yukos Oil Co.*, 320 B.R. 130 (Bankruptcy Ct., S.D. TX, 2004).
[4] *In re Yukos Oil Co.*, 321 B.R. 396, 403.
[5] Adversary No. 04-3952.
[6] *In re Yukos Oil Co.* 321 B.R. 396, 403.
[7] *In re Yukos Oil Co.*, 321 B.R. 396, 408.
[8] *Id.*
[9] *Id.* citing *Hilton v. Guyot,* 159 U.S. 113 (1895).
[10] *In re Yukos Oil Co.*, 321 B.R. 396, 408.
[11] *In re Yukos Oil Co.*, 321 B.R. 396, 410-411.
[12] 04 Civ. 5243 (WHP)(S.D.N.Y. Oct. 25, 2006.
[13] *Id.* citing *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l,* 493 U.S. 400, 401,409 (1990).
[14] *Id.*
[15] Pub. L 104-67, 109 Stat. 737.
[16] *Id.* citing *Novak v. Kasaks*, 216 F.3d 300, 306 (2000).
[17]G.A. Res. 52/158 (Dec. 15, 1997), U.N. UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with*

Guide to Enactment, (hereinafter referred to as the "Model Law"), www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

[18] 11 U.S.C. §101 et seq.

[19] § 304 of the Bankruptcy Code stated as follows:

§ 304. Cases ancillary to foreign proceedings:

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may-

(1) enjoin the commencement or continuation of-

(A) any action against-

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with-

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;
(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
(5) comity; and
(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

[20] Council Regulation (EC) No. 1346 (2000) as amended on Dec. 12, 2012, COM (2012) 744 final, 2012/0360 (COD).

[21] The countries that have adopted the Model Law and dates of enactment are the following:
Australia (2008); Canada (2005); Chile (2014); Columbia (2006); Eritrea (1998); Greece (1998); Japan (2000); Mauritius (2009); Mexico (2000); Montenegro (2002); New Zealand (2006); Poland (2003); Republic of Korea (2006); Romania (2002); Serbia (2004); Slovenia (2007); South Africa (2000); Uganda (2011); United Kingdom (2000); (British) Virgin Islands (2003); United States (2005). UNCITRAL, *Status*, https://www.uncitral/en/uncitral.texts/insolvency/1997/Model_status.html.

[22] Preamble of the Model Law.

Op. cit. No. 2, Guide Part two (I)(1-3) and *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective,* p. 1, www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2011_Judicial_Perspective.html.

[24] Defined in Model Law, Art. 2(d) as "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

[25] Model Law Guide, Part Two (I)(3).

[26] Model Law, Ch. IV. *Cooperation with foreign courts and foreign representatives.*

[27] UNCITRAL. Art. 11.
[28] UNCITRAL, *Judicial Perspective*, III(A).
[29] UNCITRAL Article 2(a) defines a "foreign proceeding" as a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, relating to insolvency wherein the assets and affairs of the debtor are subject to the control or supervision of the foreign court for the purpose of reorganization or liquidation.
[30] Model Code, Article 27.
[31] 15 U.S.C. § 78aaa through 15 U.S.C. § 78lll,
[32] Article 6 of the Model Code.
[33] §1503 of the Bankruptcy Code.
[34] Model Code, Article 15 and Bankruptcy Code, §1504.
[35] Bankruptcy Code, §1515, and Article 15 of the Model Code.
[36] Bankruptcy Code §1517 and Model Code, Article 17.
[37] Bankruptcy Code §1520 and Model Code Article 19.
[38] Bankruptcy Code §1528
[39] *Model Code, Article 26 and Bankruptcy Code §1525.*
[40] Model Code, Article 27 and Bankruptcy Code §1527.
[41] Model Code, Article 21 and Bankruptcy Code, §1521
[42] Case No. 08-13535 (S.D.N.Y., Oct. 31, 208), http://www.insolvency.ca/en/iicresources/resources/Tembecc.15RecognitionOrder.pdf.
[43] For a discussion of the Tembec litigation, see Bruce Nathan and Eric Horn, *Demystifying Chapter 15 of the Bankruptcy Code,* BUSINESS CREDIT (June, 2009).