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US Bankruptcy Court Refuses to Defer to Law of Foreign Main Proceeding

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In our last article for *International Corporate Rescue*,[1] we focused on an opinion addressing section 1520[2] of the US Bankruptcy Code,[3] which concerns relief that arises automatically upon a US bankruptcy court's recognition of a proceeding as a foreign main proceeding. In this article, we examine an opinion addressing section 1521 of the US Bankruptcy Code,[4] which concerns relief that *may* be granted by a US bankruptcy court upon recognition of either a foreign main or nonmain proceeding. In *In re Qimonda AG*,[5] the US bankruptcy court denied a request by an insolvency administrator in a German foreign main proceeding to grant relief in deference to German insolvency law on the basis that such relief would be 'manifestly contrary to the public policy of the United States'. Specifically, the *Qimonda* court declined to allow the insolvency administrator's rejection of US patent licences to be treated as a termination of the licensees' rights, the result that the administrator believed would obtain under German law. The court also held that the relief requested failed to meet a US statutory prerequisite for granting discretionary relief under section 1521, viz, that the interests of those affected – in this instance, the licensees – be 'sufficiently protected'. As a result, the court permitted the licensees to retain their rights under the licences notwithstanding the rejection by the administrator in the German proceeding – essentially the same protection that would be afforded the licencees in plenary cases[6] under the US Bankruptcy Code. Although the US bankruptcy court's decision included a refusal to take action on the basis of the 'public policy' exception, the opinion provides less clarity for practitioners in future cases than one might expect.

The debtor and its licensees

Dr. Michael Jaffé is the German insolvency administrator of Qimonda AG ('Qimonda'), a German company formerly in the business of manufacturing semiconductor memory devices that has been in insolvency administration in Germany since 2009.[7] Jaffé intends to monetise Qimonda's assets, the most valuable of which are thousands of patents Qimonda holds throughout the world, including the United States.[8] For many of the patents, however, Qimonda or its predecessor entities, Infineon Technologies AG ('Infineon') (from which Qimonda was spun-off) and Siemens AG (from which Infineon was spun-off), granted licences to certain licensees (including Infineon).[9] Typically, the licences at issue were

1. Evan C. Hollander & Richard A. Graham, 'US Bankruptcy Court Rules on Extraterritorial Scope of Automatic Stay Arising upon Recognition of Foreign Main Proceeding', 8 *International Corporate Rescue* 368 (2011).
2. 11 USC § 1520.
3. 11 USC §§ 101-1532.
4. 11 USC § 1521.
5. __B.R.___, No. 09-14766-SSM, 2011 WL 5149831 (Bankr. E.D. Va. Oct. 28, 2011) (hereinafter, '*Qimonda II*'), *appeal filed* Nov. 11, 2011.
6. In this article, 'plenary' cases refer to full bankruptcy cases in US bankruptcy courts as opposed to 'ancillary' cases brought before such courts only in support of non-US insolvency proceedings.
7. *Qimonda II*, at *1.
8. *Id.*, at *1-2.
9. *Id.*, at *2.
10. *Id.*, at *2-5.

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nonexclusive, reciprocal, perpetual, fully paid and irrevocable, and arose under worldwide portfolio cross-licence agreements, which are designed to prevent infringement litigation by covering entire blocks of patents between the parties in order to relieve them from having to identify particular patented technologies that might be used in the design, manufacture or sale of any given semiconductor device.[10] Despite such terms, Jaffé asserts that an administrator in a German insolvency proceeding can terminate intellectual property licences pursuant to Section 103 of the German Insolvency Code by simply electing not to perform under the contracts that created them.[11] Jaffé moved in the US ancillary proceeding for an order essentially finding that the impact under German law of his decision not to perform be given effect in the United States, notwithstanding that in a plenary case in the United States, a licensee of intellectual property may, pursuant to section 365(n) of the US Bankruptcy Code,[12] retain its rights under the applicable licence notwithstanding a rejection of the licence by the debtor-licensor. The order denying the relief has been appealed.[13]

How the question of applicability of German insolvency law to licences of US patents arose

A somewhat unusual procedural posture gave rise to Jaffé's request for relief. He commenced an ancillary proceeding in the US bankruptcy court under chapter 15 of the US Bankruptcy Code,[14] and sought and was granted recognition of the German insolvency administration as a 'foreign main' proceeding[15] and himself as its 'foreign representative'.[16] Such recognition, among other things, gives a foreign representative standing to seek relief in courts in the United States in support of the foreign main proceeding.[17] Certain sections of the US Bankruptcy Code are automatically applicable in chapter 15 cases ancillary to foreign main proceedings, such as (with certain modifications) section 362,[18] which creates an automatic stay against creditor action against the debtor and its property in the United States.[19] In addition, with certain exceptions not relevant here,[20] a recognised foreign representative may seek other relief from the bankruptcy court pursuant to section 1521(a) of the US Bankruptcy Code,[21] and a bankruptcy court may grant such relief in its discretion, though such discretion is informed by a legislative command to 'grant comity or cooperation to the foreign representative' in accordance with the policies articulated in chapter 15 of the US Bankruptcy Code,[22] which are:[23]

> 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;

11. Whether Jaffé is correct that an election not to perform would result in the termination of the licences is apparently not a completely settled question of German insolvency law, but for purposes of its decision, the bankruptcy court assumed that Jaffé's analysis of German law was correct. *Qimonda II*, at *10.
12. 11 USC 365(n).
13. As noted below, the motion on which the order is based had been appealed once already and remanded. In the US bankruptcy appellate system, there are two instances of appeal as of right: first from a bankruptcy court to a district court (or in some instances, to a bankruptcy appellate panel), and second to a circuit court of appeals, which in this case would be the Court of Appeals for the Fourth Circuit. 28 USC § 158. As a matter of discretion, the US Supreme Court may consider the decisions of circuit courts of appeal, normally by way of issuing a writ of certiorari. 28 USC § 1254(1). Thus, it could be some time before the parties in *Qimonda* have a definitive decision.
14. 11 USC §§ 1501-1532. Chapter 15 was enacted in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 801, 119 Stat. 23 (2005), to incorporate the UNCITRAL Model Law on Cross-Border Insolvency, UN GAOR, 52d Sess., Annex I UN Doc. A/52/17 (1997), into the US Bankruptcy Code. 11 USC § 1501(a).
15. 'The term "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country [ie, a country other than the United States], including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.' 11 USC § 101(23). A 'foreign main proceeding' means 'a foreign proceeding pending in the country where the debtor has the center of its main interests', 11 USC § 1502(4), and is normally entitled to more deference than a 'foreign nonmain proceeding'.
16. *Qimonda II*, at *1. 'The term "foreign representative" means a person or body, including a person or body 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 such foreign proceeding.' 11 USC § 101(24).
17. 11 USC §§ 1507, 1509, 1511-12, 1521, 1524.
18. 11 USC § 362.
19. *See* 11 USC § 1520(a).
20. *See, e.g.*, 11 USC §§ 103(a), 1521(a)(7), (d), (f), 1523.
21. 11 USC § 1521(a).
22. 11 USC § 1509(b)(3).
23. 11 USC § 1501(a) (setting forth the policy objectives quoted in the text, which correspond to those set forth in the Preamble of the Model Law).

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(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.

Discretionary relief under section 1521 is constrained by two further limitations: (i) that 'the interests of creditors and other interested parties, including the debtor, are sufficiently protected,'[24] and (ii) that granting the relief would not be 'manifestly contrary to the public policy of the United States.'[25]

Jaffé took advantage of the opportunity for discretionary relief by asking the bankruptcy court to make certain provisions of the US Bankruptcy Code which apply in plenary US bankruptcy cases applicable to the *Qimonda* ancillary proceeding. The bankruptcy court issued a supplemental order (the 'Supplemental Order') granting the request. Among the provisions was section 365 of the US Bankruptcy Code,[26] which serves the same functions in plenary US bankruptcy cases as Section 103 of the German Insolvency Code serves in German insolvency cases, namely, to regulate treatment of executory contracts of the debtor.

Executory contracts are contracts in which the contractual obligations of the parties have not yet been completely performed. Under section 365(a), a debtor may reject or, subject to certain exceptions, assume an executory contract or unexpired lease.[27] Generally, a rejection is treated as a breach of the contract, no further performance by the debtor is rendered (and that of the other party is excused by the debtor's breach), and claims for contractual damages are generally treated the same as any other pre-bankruptcy claim, i.e., normally by a pro rata distribution.[28] Although US bankruptcy law, like German insolvency law, treats nonexclusive, perpetual, royalty-free patent licences as executory contracts (because they amount to an on-going promise not to sue for infringement), section 365(n) of the US Bankruptcy Code provides special treatment for licensees of intellectual property[29] licences subsequent to a rejection by a debtor-licensor, in that the licensee may:[30]

> 'retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property … as such rights existed immediately before the case commenced …'

If the licensee elects to retain its rights, it must continue to pay any royalties and waive rights to setoff or administrative claims against the bankruptcy estate in respect of the contract, but the debtor may generally not interfere the licensee's intellectual property rights under the contract.[31]

When Jaffé exercised his Section 103 election not to perform and made clear that he believed the licensees' licence rights had been terminated, several licensees asserted that their rights were protected under section 365(n).[32] Jaffé then filed a motion for further discretionary relief under section 1521(a) in the bankruptcy court to modify the Supplemental Order to *remove* section 365 from its list of provisions applicable in the *Qimonda* chapter 15 case or to provide that section 365 would be applicable *only if Jaffé invoked it* to assume or reject a particular contract such that, otherwise, Section 103 of the German Insolvency Code would apply.[33] The bankruptcy court granted the second form of relief, holding that inclusion of section 365 in the Supplemental Order was improvident and that its mandate to cooperate with the foreign representative and that the desirability of uniformity of results across all patenting countries meant that the German rule should be followed.[34] Several licensees appealed to the district court, which affirmed in part but remanded to the bankruptcy court the questions of '(a) whether the failure of German insolvency law to afford patent licensees the protections they would enjoy under § 365(n) of the Bankruptcy

24. 11 USC § 1522(a).
25. 11 USC § 1506.
26. 11 USC § 365.
27. 11 USC § 365(a)-(b).
28. 11 USC §§ 365(g), 502(g).
29. Note, however, that the US Bankruptcy Code definition of 'intellectual property' does not include trademarks. 11 USC § 101(35A).
30. 11 USC § 365(n)(1)(B).
31. 11 USC § 365(n).
32. *Qimonda II*, at *6.
33. *Qimonda II*, at *1.
34. *In re Qimonda AG*, No. 09-147660-RGM, 2009 WL 4060083, at *1-3 (Bankr. E.D. Va. Nov. 19, 2009) (hereinafter '*Qimonda I*'), *aff 'd in part and remanded*, 433 B.R. 547 (E.D. Va. 2010).

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Code is "manifestly contrary" to the public policy of the United States; and (b) whether the licensees of the debtor's United States patents are "sufficiently protected" if they are not accorded those protections.'[35] When the remanded motion reached the bankruptcy court, other licensees intervened, and Bankruptcy Judge Mayer recused himself owing to a conflict of interest between himself and one of the intervening licensees.[36] Thus, Bankruptcy Judge Mitchell decided the questions.

The parties' arguments

Because (i) in some cases the parties had exchanged reciprocal licences, at no cost to either party, Qimonda had no need for licences granted to it by the counterparty because Qimonda had ceased doing business, and (ii) in other cases the counterparty had fully paid for the licences in an up-front fee, Jaffé maintains that the estate would receive no value for performing on the reciprocal licences. Jaffé argues that termination is the best result, for it allows him to relicense the patents (apparently a more lucrative option than assigning the patents) to raise money to provide a dividend to creditors. Moreover, he believes that honouring the licences would violate the principle of equality among creditors, a principle which animates both US and German insolvency law.[37]

The licensees have explained that the licences of the type at issue play a large role in semiconductor industry, which has been characterised as a 'patent thicket',[38] because a semiconductor device may incorporate technologies covered by many patents owned by others, and it is 'not always possible to identify which ones might cover a new product, and in any event it would be all but impossible to design around each and every patented technology'.[39] Manufacturers must therefore obtain licences to many different patents to protect against potential infringement claims or so-called 'hold-up premiums', a term of art for the difference in royalties that must be paid if negotiated in advance of the investment of the enormous sums of money required to build manufacturing facilities in a given country and royalties that must be paid if negotiated afterward, when the sunk costs make such protection essential.[40] Some of the licensees have already built manufacturing plants in the United States and cannot now 'design around the patents'; they would thus be in danger of not only paying unanticipated royalties, but royalties that might include a hold-up premium.[41] To mitigate this risk, Jaffé proposes to determine royalties under an arbitration system that the industry uses to determine 'reasonable and non-discriminatory' ('RAND') terms, in essence a system designed by the industry to avoid the hold-up premium.[42]

There was also testimony to the effect that reliance on patent licensing drives innovation through collaborative research and development, though the experts disagreed on the significance of such reliance in the semiconductor industry. Jaffé's expert testified that no more than 3.6% of the industry's annual research and development spending would be diverted to paying new royalties on US patents held by Qimonda if RAND pricing were used.[43] The cost to the Qimonda estate in lost royalties (under RAND terms) if the licensors are not required to relicense was estimated to be USD 47 million.[44] (The estate would still have other opportunities to generate revenue through its non-US patents (assuming other jurisdictions followed German law)[45] or by granting licences on its US patents to new players, though the number of potential licensees in the industry is limited.)

The bankruptcy court's analysis

The bankruptcy court first examined the issue of whether termination of the licences (with the possibility of relicensing under RAND terms) 'sufficiently protected' the interests of the licensees under section 1522(a). Judge Mitchell employed the test that the district court adopted from the court in *In re Tri-Continental Exchange, Ltd.*,[46] that section 1522(a) requires a court 'to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another.'[47] The court found that although the licensees were unable to identify the

35. *Qimonda II*, at *2 (citing *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547 (E.D. Va. 2010) (hereinafter, '*Qimonda Appeal*')).
36. *Qimonda II*, at *2 n. 4.
37. *Id.*, at *6.
38. *Id.*, at *7.
39. *Id.*
40. *Id.*
41. *Qimonda II*, at *7-9.
42. *Qimonda II*, at *9.
43. *Id.*
44. *Id.*
45. *Qimonda II*, at *12.
46. 349 B.R. 627 (Bankr. E.D. Cal. 2006).
47. *Id.*, at *12 (citing *Qimonda Appeal*, 433 B.R. at 558 (citing *Tri-Continental Exch.*)).

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particular patents that they might be using, there was a substantial risk of infringement litigation and liability over some patent, which was why portfolio cross-licensing agreements were employed and why Jaffé sought to ensure that section 365(n) would not apply to them.[48] Although the court took note of Jaffé's offer to use RAND terms to relicense and found that it lessened the 'hold-up' risk associated with relicensing, it also recognised that the licensees generally no longer had the option to 'design around' the patents.[49] Though it would result in the loss of an estimated USD 47 million to the Qimonda estate, the court observed that application of section 365(n) would impose no affirmative burden on the estate.[50] 'By contrast,' according to the court, 'the risk to the very substantial investment the [licensees] have collectively made in research and manufacturing facilities in the United States in reliance on the design freedom provided by the cross-licence agreements, though not easily quantifiable, is nevertheless very real.'[51] For that reason, the court determined 'that Dr. Jaffé's right to administer the debtor's U.S. patents should be subject to the constraints imposed by §365(n).'[52]

The court's second holding, that deference to German law in the circumstances presented it would be 'manifestly contrary to the public policy of the United States', initially appears more sweeping. As both the bankruptcy court and the district court noted, the word 'manifestly' in section 1506 limits the public policy exception 'to the most fundamental policies of the United States'.[53] The mere fact that non-US law leads to a different result is insufficient grounds to invoke it.[54] Proper focus is on the procedural fairness of the foreign proceeding and whether application of non-US law would 'severely impinge the value and import of a U.S. statutory or constitutional right, such that granting comity would severely hinder United States bankruptcy courts' abilities to carry out … the most fundamental policies and purposes' of these rights.'[55]

There was no issue as to the procedural fairness of German law or the German insolvency proceeding in respect of Qimonda.[56] The court also easily concluded that section 365(n) embodied an *important* legislative policy, having been relatively speedily added to the US Bankruptcy Code in 1988[57] in the wake of the holding of the Court of Appeal for the Fourth Circuit in *Lubrizol Enterprises, Inc. v Richmond Metal Finishers, Inc.*,[58] that a rejected contract including a nonexclusive intellectual property licence stripped the licensee of its licence, on the basis that the *Lubrizol* rule would 'have imposed a burden on American technological development that was never intended by Congress in enacting Section 365.'[59]

On the other hand, the court observed, if section 365(n) fostered a *fundamental* policy of the United States, it is curious that it was not included among the provisions that automatically apply in an ancillary case upon recognition of the foreign proceeding as a foreign main proceeding,[60] such as the automatic stay.[61]

The licensees focused on their argument that without the protection of section 365(n), companies would, at the margin, be less likely to invest the enormous sums of money necessary to fund the construction of manufacturing plants in the United States for fear of having to pay 'hold-up' premiums if a non-US licensor became insolvent, but the court held that the national interest that drove Congress to pass section 365(n) was that of fostering American technological research and development rather than US manufacturing.[62] While finding that even application section 365(n)

48. *Qimonda II*, at *12.
49. *Qimonda II*, at *13. Infineon is particularly at risk, because in many cases it has licence to use patented technology it developed itself before Qimonda was spun-off and had indemnified some of the other licensees for the licences it had granted at that time, which are now in the hands Qimonda and Dr. Jaffé. As the court observed, however, Infineon, a German company, was better positioned to anticipate the results of a German insolvency of Qimonda than the non-German licensees. *Id.* n.15.
50. *Qimonda II*, at *14.
51. *Id.*
52. *Id.*
53. *Id.* (citing *Qimonda Appeal*, 433 B.R. at 568). This meaning stems from international usage as reported in the legislative history of chapter 15. H. Rep. No. 109-31, 19th Cong., 1st Sess 109 (2005); *see also* UN GA, United Nations Commission on International Trade Law, 30th Session, Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (1997), at ¶ 89 ('manifestly' intended to modify 'contrary' to reduce the scope of the 'public policy' exception to 'matters of fundamental importance for the enacting state').
54. *Qimonda II*, at *14 (citing *Qimonda Appeal*, 433 B.R. at 568 (citing cases)).
55. *Qimonda II*, at *14 (citing *Qimonda Appeal*, 433 B.R. at 568-69) (citing cases)) (internal quotation marks omitted).
56. *Qimonda II*, at *15.
57. Intellectual Property Bankruptcy Protection Act of 1988, Pub. L No. 100-506, 102 Stat. 2538 (1988).
58. 756 F.2d 1043 (4th Cir. 1985).
59. *Id.*, at *11, *15 (citing S.Rep. No. 100-505, 1988 USCCAN 3211).
60. *Quionda II*, at * 16.
61. 11 USC § 1520(a)(1) (incorporating section 362 (governing the automatic stay) into ancillary proceedings in respect of recognised foreign main proceedings). The district court has rejected the licensees' argument that section 365(n) automatically applies to chapter 15 cases. *Qimonda Appeal*, 433 B.R. at 559-64.
62. *Quionda II*, at *16.

could not provide perfect 'patent peace', the court held that the provision was enacted to foster a policy of encouraging technological development in the United States and agreed with the licensees' expert that the pace of such development would be slowed if the requested relief were granted to Jaffé, to the detriment of the US economy. That finding sufficed, in the view of the court, to trigger the public policy exception to the mandate of cooperating with courts in which foreign main proceedings are pending by allowing the insolvency laws of such courts, in this case Section 103 of the German Insolvency Code, to determine the outcome in courts in the United States.[63] Although the court did not attempt to quantify the damage to the US economy that application of Section 103 might have, it did hold that in 'the circumstances of this case and this industry,' there would be a 'severe impingement' on the protection accorded licensees of US patents, which would 'thereby undermine a fundamental U.S. public policy promoting technological innovation.'[64]

Conclusions

An initial observation is in order. Normally one would not expect these issues to arise as they have in the *Qimonda* case. Typically, a foreign representative of a foreign main proceeding in chapter 15 case is faced with a decision about whether to either affirmatively seek an injunction in the chapter 15 court enforcing some or all of the insolvency law of the foreign main jurisdiction (e.g., in respect of the effect of the confirmation of a restructuring plan, composition, arrangement, discharge, etc.) or to passively take the position that such law is entitled to recognition, enforcement or/and comity in the United States, and to seek to defend that position whenever, and in whatever forum, the issue might arise.[65] Each course of action has its risks. A decision by the bankruptcy court that no injunction should issue because such law is not entitled to deference will likely have some *res judicata* effects in other courts, though the precise fallout may be difficult to predict. If, on the other hand, no action is taken in the bankruptcy court to obtain recognition or enforcement of the effects of the non-US insolvency law in the United States, a reorganised debtor or others claiming rights under such law may have little choice about the forum in which the litigation occurs, and such forum may lack the insolvency law expertise and sophistication of the bankruptcy court. There may even be questions about whether federal or state law should apply to the question of whether to grant comity. [66] In the unusual procedural circumstances of the *Qimonda* case, the foreign representative's hands were arguably bound by the Supplemental Order, which improvidently made section 365 expressly applicable to the ancillary proceeding, forcing him to seek affirmative relief in the bankruptcy court.

As to the merits, one sympathises with the court for having to sort through such nebulous concepts as 'sufficient protection' and 'manifestly contrary to public policy'. The concept of 'sufficient protection' seems to call for an analysis of the particular facts of the case at hand, and reasonable minds might come to differing conclusions on the correctness of the court's determination that the licensees' interests would not have been 'sufficiently protected' if the relief Jaffé requested had been granted.

The court's application of the public policy exception is somewhat more difficult to understand. There can perhaps be little argument that promoting technological innovation and the national economy are fundamental public policies in most countries, but it is also true that very many laws, foreign or domestic, impact these areas in some way. As an initial matter, therefore, it seems unlikely that the public policy exception was meant to be applied in respect of something as broad as the need to promote technological innovation. Indeed, the district court noted that 'the analysis must focus sharply on whether § 365(n) embodies the fundamental public policy of the United States …'.[67] Accordingly, it seems to us that the public policy at issue is the inviolability of intellectual property licences rather than the broader policy of promoting technological innovation,[68] though one may, of course, look to the effects of the narrower policy on such wider national interests as technological

63. *Id.*

64. *Id.*

65. One might also request that a chapter 15 case be opened or reopened to seek an injunction, *e.g., In re Petition of Ho Seok Lee*, 348 B.R. 799 (Bankr. WD Wash. 2006), though it is unclear that this may be achieved after the foreign proceeding is no longer pending.

66. *Compare Canada S. Ry. Co. v Gebhard*, 109 U.S. 527 (1883) (holding that payment on pre-restructuring bonds payable in New York issued by Canadian debtor but replaced by restructured bonds by an act of the Canadian parliament could not be enforced but rather that a Canadian restructuring of Canadian debtor's obligations had effect in United States) *with Bank of Buffalo v Vesterfelt*, 36 Misc. 2d 381; 232 N.Y.S.2d 783 (County Court, Erie County 1962) (holding under New York law that a Canadian discharge of a Canadian debtor did not bind New York creditors suing the debtor on New York contract in New York).

67. 433 BR at 565.

68. One may also quibble with both the district and bankruptcy courts in casting the question in terms of protecting a 'statutory right'. The district court itself determined that section 365(n) did not apply by its own force in chapter 15 cases. *Qimonda Appeal*, 433 BR 558-64. How then could a statutory right be at play? What is at issue is a contractual licence.

innovation and economic growth when considering whether the policy is so fundamental as to override the mandate to cooperate with, and extend comity to the effects of the law of, the foreign main proceeding on the contracts of a foreign debtor.

The next issue that faced the court was whether to invoke the public policy exception only as to the particular licensees before it or rather to treat the inviolability of intellectual property licences as a categorical matter applicable in every instance. While the section 1522 proviso requiring 'sufficient protection' refers to quantity or degree, the 'manifestly contrary' language of the public policy exception would appear to require a bright-line, categorical rule.[69] The *Qimonda* court, however, took the case-by-case approach to 'determine[] that the 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.'[70] This holding leaves other licensees or potential licensees in the dark as to whether the domestic law applicable to a foreign main proceeding will (i) strip them of their licences to use intellectual property protected by US law or, (ii) under the particular circumstances of their cases, also be deemed 'manifestly' contrary to the public policy of the United States protecting such licences. The Opinion is thus of little value for practitioners who wish to advise licensees as to the best way to obtain an enduring legal right to use intellectual property.

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69. *Cf. In re Ephedra Prods. Liab. Litig.*, 349 BR 333, 335-36 (SDNY 2006) (holding that section 1506 does not prevent a United States court from giving recognition and enforcement to a foreign insolvency procedure for liquidating claims simply because the procedure does not include a right to jury).

70. *Qimonda*, at *16 (emphasis added).