

New York Bankruptcy Court Rejects Comity Based on Public Policy Exception to the Grant of Comity to Non-U.S. Orders

March 5, 2012 by [Louis M. Solomon](#)

[In re Dr. Jurgen Toft](#), Case No. 11-1049 (ALG) (S.D.N.Y. Bank. Ct. 2011), a typically sound and erudite decision by the Bankruptcy Court in the Southern District of New York, is something of a close-to-must read for the practitioner or reader interested in international practice. The Court addressed a case where the foreign representative, or the insolvency administrator, in a proceeding in an insolvency proceeding in Germany sought to enforce orders from Germany and the U.K. The orders permitted access to the debtor Toft's email accounts stored on the servers of two internet service providers. The courts in Germany and the U.K. issued ex parte orders permitting access. The foreign representative came to the U.S. to enforce those orders, seeking to do so ex parte as well.

The noteworthy rulings in the case include:

First, the Court got the U.S. trustee involved in the proceeding. The U.S. Trustee opposed the motion.

Second, the Court determined that the access being sought would violate federal law, specifically the Electronic Communications Privacy Act, 18 U.S.C. secs. 2701, et seq. The Court also believed that granting the access might also constitute an unlawful interception of electronic communications under the Wiretap Act, 18 U.S.C. sec. 2511, et seq.

Third, the Court was faced with the argument that courts in the U.S. must grant comity to duly issued orders of non-U.S. jurisdictions. The argument was based on general notions of comity and on specific comity-recognizing provisions of the Bankruptcy Act. The Court cited, among other cases, *In re Multicanal*, 307 B.R. 384 (S.D.N.Y. 2004), in which the author was lead counsel.

Fourth, the Court rejected the blind reliance on comity. There is always a public policy exception to the grant of comity, and the Court found that this was one of the rare cases to reject reliance on comity, since here, "the relief sought by the Foreign Representative is banned under U.S. law".

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