This article first appeared in the October 2009 issue of the Newsletter of the Asia Pacific Regional Forum of the International Bar Association (Vol 16, No 2), and is reproduced by kind permission of the International Bar Association, London, UK. *© International Bar Association.*

Overview

The 15 September 2008 bankruptcy filing of Lehman Brothers was the singular cataclysmic event in last autumn's worldwide financial meltdown. At the time of its filing, Lehman's US holding company posted a balance sheet of US$691 billion in assets and US$613 billion in liabilities, approximately seven times the size of what was then the largest bankruptcy in history, the 2002 Worldcom filing. Moreover, unlike Worldcom, the impact of the 158-year old investment bank's demise was felt worldwide, particularly in Asia where, for example, investors in Hong Kong were left holding US$1.62 billion in Lehman minibonds and South Korean regulators tallied its financial system's Lehman exposure at US$720 million. [1]

The financial collapse created a legal tangle of equal enormity and complexity. Until its filing, Lehman operated internationally through some 7,000 different legal entities in more than 40 countries. As a consequence, there are currently at least 75 separate Lehman insolvency, administration, liquidation, rehabilitation, receivership and like proceedings pending in courts throughout the world, each run as a debtor-in-possession, or by a court-appointed liquidator, administrator, trustee, custodians, supervisor or curator. [2]

In an unprecedented attempt to untangle Lehman's corporate web, on 26 May 2009 representatives of bankrupt Lehman entities in the United States, Hong Kong, Singapore, Australia, Germany, the Netherlands and Luxembourg signed what has been billed as 'the first ever multilateral cross-border insolvency protocol', the Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies. The Lehman Protocol is not a legally binding document, but rather 'a statement of intentions and guidelines'. It is designed to facilitate the coordination of the various Lehman proceedings, and to enable the cooperation in the administration of those proceedings 'in the interest of ... all of Lehman's creditors worldwide'.[3]

Despite its proclaimed intentions, the Lehman Protocol operates more to assist the various court administrators than to further the cause of Lehman's hapless creditors. Nowhere is that more apparent than in Article 8 of the Protocol, entitled 'Claims', which concerns itself only with ensuring that no Lehman creditor obtain a duplicate recovery through multiple filings in different jurisdictions. The skewed perspective of the Protocol authors reveals itself mostly in what the Protocol omits, namely, any attempt to allow Lehman creditors who also happen to be Lehman debtors to offset their Lehman claims against their Lehman debts, where the requisite 'mutuality of obligations' does not exist.

By any measure of equity or justice, a party which owes one Lehman entity US$1 million and is owed US$1 million by another Lehman entity should be free to offset the two amounts (a so-called 'triangular setoff') and declare all accounts settled. Instead, the current regime requires such party to pay the creditor Lehman entity the full US$1 million *now*, and then wait in line for years to receive a payoff on its US$1 million claim, most likely at mere pennies on the dollar.

In this article, we address the problem faced by creditors caught in the Lehman corporate web, we summarise the existing legal hurdles to the setting off of Lehman debts and claims, and we propose a means by which the new Lehman Protocol could form the basis for a solution.

Setoffs under US bankruptcy law

Setoff is a right of equitable origin designed to facilitate the adjustment of mutual obligations. Its central premise is well-grounded in practical logic: If A is indebted to B, and B is likewise indebted to A, it makes sense simply to apply one debt in satisfaction of the other rather than require A and B to satisfy their mutual liabilities separately. In general, setoff is favoured under US law to avoid a multiplicity of suits, added expense, inconvenience, injustice and inefficient use of judicial resources.[4]

Several provisions of the US Bankruptcy Code operate in tandem to preserve, protect and limit rights of setoff in bankruptcy cases. Most significant of these is 11 USC s 553, which provides that:

> 'Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case. . .'.[5]

In addition, Bankruptcy Code, s 506(a) provides that a creditor holding a valid right of setoff is to be treated as the holder of a secured claim to the extent of the setoff right.

Section 553 does not create a right of setoff, but reserves whatever right of setoff exists under relevant, non-bankruptcy law, so long as four conditions are met:

(1) The creditor holds a 'claim' against the debtor that arose before the commencement of the case;
(2) The creditor owes a 'debt' to the debtor that also arose before the commencement of the case;
(3) The claim and debt are '*mutual*'; and
(4) The claim and debt are each valid and enforceable.[6]

In the case of the Lehman bankruptcy, it is the third of these four conditions – mutuality of claim and debt – which is most problematic. The basic requirement of 'mutuality' is that the same parties each owe the other something in the same capacity.[7] Debts do not have to arise from the same transaction, however, in order to be deemed 'mutual'.[8]

Ordinarily, 'under federal bankruptcy law, a subsidiary's debt may not be set off against the credit of a parent'.[9] Nor does the fact that the parent might be the guarantor of the subsidiary's debts (much as Lehman Brothers Holdings guaranteed the debts of its many subsidiaries) ordinarily lead to a different result with respect to mutuality.[10]

As the debtor's own counsel now admits, the thousands of Lehman entities operated an 'integrated' business and 'continuously worked together and shared information in unison'.[11] In other words, to the outside world, these entities presented themselves as a single entity: 'Lehman Brothers'. Now that the bill has come due, however, the once-integrated Lehman operation has separated back into its component parts, with each entity insisting on its individual right to collect its claims in full, without setoff against the debts of its far-off and sundry foreign affiliates.

That outcome could not have been made clearer than in the recent ruling of Judge James M Peck, the judge who presides over *Lehman Brothers* bankruptcy cases in the United States, in the first of many setoff disputes which will likely make their way to that Court.[12]

At issue was a transfer of funds pending over the weekend before Lehman Brothers Holdings, Inc (LBHI) filed for bankruptcy, where the transfer did not become final until after the filing. Specifically, the intrabank transfer was initiated after the close of business on 12 September 2008, but not completed until the morning of 15 September 2008, just hours after the commencement of LBHI's bankruptcy case. The funds were on deposit at DnB NOR Bank ASA on the Friday before the Monday bankruptcy filing in an account maintained by Lehman Brothers Commercial Corporation (LBCC). LBCC issued separate instructions late in the day on Friday to transfer certain funds to an account maintained by LBHI at the Bank. The instructions were given prepetition, but the funds were not credited to LBHI's account until Monday morning, after LBHI had already filed for bankruptcy.[13]

Based on these facts, Judge Peck found that: 'The funds that were in transit when LBHI filed its chapter 11 case did not become property of LBHI and did not become available for setoff purposes until after the commencement of LBHI's case. Consequently, the prerequisites for exercise of the right of setoff are not met as to these funds...'.[14]

The reason the funds were not available for setoff was lack of mutuality. Namely, because the funds were technically still controlled by LBCC at the moment LBHI filed for bankruptcy, DnB NOR owed the money to LBCC and not LBHI, and thus could not use that debt to setoff the amounts owed to it by LBHI. As Judge Peck explained in his decision: 'DnB NOR has the burden to establish mutuality'. And DnB NOR missed its mutuality by a few hours.[15]

While Judge Peck's decision appears correct under governing US law, the decision demonstrates the inequity of applying those principles to the creditors in the distinct and unprecedented Lehman bankruptcy. In the balance of this article, we discuss four exceptions to the mutuality requirement potentially available under existing law, and then propose a new, more sensible solution under the new Lehman Protocol.

Mutuality Exception #1 – piercing the corporate veil

As noted above, the United States Bankruptcy Code recognises the state law defence of setoff in clear and broad terms: 'this title does not affect any right of a creditor to offset a mutual debt...'.[16] Under state common law, a creditor has a right of setoff against a debtor.[17]

For purposes of determining setoff under state common law, it is well established that a separate corporate existence may 'be disregarded in a case where a corporation is so organised and controlled and its affairs are so conducted as to make it merely an adjunct or instrumentality of another corporation'.[18]

In *Gay v Hudson River Electric Power Co*, for example, the United States Court of Appeals for the Second Circuit held that:

> 'There would be much ground for holding that the [subsidiary] comes within the second exception to the rule of distinct corporate existence. *The record clearly indicates that it was organized and controlled as a subsidiary corporation, and that its affairs were so conducted as to make it, practically, an adjunct of the managing corporation – the* [*managing corporation*]. It would seem that we would not be departing from established principles if we should regard this book credit of the [subsidiary] as really existing in favor of the managing corporation, the [holding company], against which, without special agreement, this demand against the managing corporation might properly be offset. It would be equitable so to hold. ... *The offset could hardly be regarded as unfair to the* [*subsidiary*]*, while it would be grossly unfair to the* [*plaintiff*] *to compel it to pay its indebtedness to one of the companies and to look to an insolvent associate for the payment of its own account*.[19]

Because LBHI is a Delaware corporation, the law of the State of Delaware would govern whether its veil should be pierced. 'Delaware law permits a court to pierce the corporate veil of a company "where there is fraud or where [it] is in fact a mere instrumentality or alter ego of its owner".'[20] An alter ego relationship is found when injustice or fairness are present, and when a 'single economic entity' is found to exist based on a consideration of the following factors:

- the adequacy of the affiliate's capitalisation;
- the solvency of the affiliate;
- the existence of paid dividends;
- the keeping of corporate records;
- the appropriate functioning of officers and directors;
- the observance of corporate formalities;
- the siphoning of funds by the dominant shareholder or parent; and
- the general functioning of corporation as a facade for the dominant shareholder (the parent).[21]

Determining mutuality generally is 'flexible and fact-specific'.[22] In the alter ego context, the absence of any one factor is not dispositive on the issue of whether the corporate veil should be pierced.[23] *Upon proving the*

alter ego relationships, applying the setoff defence across parent and subsidiary is entirely appropriate. Setoff is appropriate in such a situation because 'alter egos are treated as one entity' for the purpose of enforcing claims.[24]

While some Bankruptcy Courts have held companies to be alter egos of one another in certain circumstances,[25] the examples of piercing the corporate veil are few and far between. In rejecting DnB NOR's setoff claim, for example, the Court appeared never even to consider whether LBHI and LBCC should be treated as separate entities. That, notwithstanding the various admissions made by the debtor's own counsel in seeking approval of the Lehman Protocol, as to the 'integrated' nature of Lehman's businesses.

Indeed, there is some question as to whether a creditor even has standing to seek to pierce Lehman's corporate veil. This issue came to bear in the *Enron* bankruptcy, which was in the same court – the United States Bankruptcy Court for the Southern District of New York – but before a different judge – Judge Gonzalez. Enron was much like Lehman in that it operated through many different affiliates. In the wake of Enron's Chapter 11 bankruptcy filings in 2001, many parties were left both *owing* moneys to certain Enron entities and *owed* moneys by other Enron entities. This led to more than 50 similar 'Trading Case' adversary proceedings brought in the Bankruptcy Court before Judge Gonzalez, many of which similarly involved claims for corporate veil-piercing and setoffs.

One of those cases was brought by Duke Energy against Enron Corp and its various subsidiaries.[26] In the adversary proceeding, Duke Energy sought to pierce the corporate veil of Enron Corp and treat the various Enron debtors as a single enterprise, allowing setoffs against the Enron debtors as a whole, without regard to the particular parties involved in each transaction. Judge Gonzalez granted the debtors' motion to dismiss the claim based on a lack of standing, finding that a claim to pierce the corporate veil of the purportedly looted debtor estates belonged to those estates, and therefore could only be asserted by either a debtor-in-possession or trustee. Unless a creditor can show particularised harm different from that suffered by other creditors, Judge Gonzalez held, a creditor lacks standing to bring a claim to pierce the debtors' corporate veil.[27]

The adversary proceeding before Judge Gonzalez was settled before it reached appeal, and thus it is unclear whether the ruling constitutes prevailing law.[28] But it is fair to say that any litigant seeking to pierce the corporate veil of a US debtor will face considerable legal and evidentiary hurdles – all to obtain what is fundamentally a fair and equitable result.

Mutuality Exception #2 – contractual setoff rights

For certain creditors, contractual setoff claims may be a better option. For example, certain iterations of the ISDA Master Agreement, used in many Lehman derivatives transactions, provide for rights of setoff not merely as between the contracting parties but also their 'affiliates'. In other words, parties can contract around mutuality.

Or at least this is how US bankruptcy law was generally perceived, until recently. For example, the noted bankruptcy law treatise, *Collier on Bankruptcy*, states that: 'A narrow exception exists with respect to certain setoffs that are contractually based. If the parties all agree in a prepetition contract that a setoff may be taken between A, B and C, then the agreement may be enforced in bankruptcy to the extent that it is enforceable under applicable non-bankruptcy law.'[29] The Courts have generally followed this precept.[30]

The rule has not been universal, however. The United States Bankruptcy Court for the District of Delaware, in its decision in *SemCrude, LP*,[31] recently differed from the majority view, holding that: 'setoff is appropriate in bankruptcy only when a creditor both enjoys an independent right of setoff under applicable non-bankruptcy law, and meets the further Code-imposed requirements and limitations set forth in section 533'.[32] In other words, mutuality controls over the will of the contracting parties.

For now, at least, even those parties with a contractual right to set off Lehman debts against amounts owed to other Lehman affiliates may be denied that right in the US bankruptcy courts.

Mutuality Exception #3 – right of recoupment

Recoupment is probably the cleanest of the possible exceptions to mutuality, in that recoupment is not a setoff at all – it is a distinct legal concept with its own rules.

Recoupment is 'an equitable remedy that allows the offset of mutual debts when the respective obligations originate from the same transaction or occurrence'.[33] In bankruptcy, the distinction between a setoff and recoupment is very important because: (a) recoupment is not subject to the automatic stay; and (b) *recoupment has no mutuality requirement*.

As the United States Court of Appeals for the Third Circuit has explained, the rationale for this distinction is that recoupment 'is essentially a defence to the debtor's claim against the creditor rather than a mutual obligation, and application of the limitations on setoff in bankruptcy would be inequitable'.[34] The substantive hurdle for a party in this situation would be the 'same transaction' requirement. '[R]ecoupment is an equitable doctrine, and courts have considered the standard for recoupment as requiring "that there be such a close, necessary relationship between the events that gave rise to the debtor's postpetition claim and the events that gave rise to the creditor's prepetition claim that the amount of the former cannot be fairly determined without accounting for the latter".'[35]

As noted by one bankruptcy court, it is far from clear 'what constitutes the "same transaction". While it is typically true... that a single contract is the source of both claims, that the claims arise under the same contract is not dispositive of the "same transaction" requirement'.[36] Rather, in order to make that determination, courts have utilised a 'logical relationship' test to examine whether 'the obligations [are] sufficiently interconnected so that it would be unjust to insist that one party fulfill its obligation without requiring the same of the other party'.[37] 'The logical relationship test defines [the] transaction broadly. The term may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.'[38]

Depending on the nature of the transaction, the doctrine of recoupment may have particular applicability to the Lehman bankruptcy. Lehman representatives were particularly adept at selling so-called 'hedging' transactions, whereby one investment (eg, a currency swap or derivative transaction) was promoted as a way to hedge against the risk of another (eg, a bond sale). Indeed, it is conceivable that Lehman creditors entered into multiple dealings with different Lehman counterparties, all through the same Lehman representative.

Obviously, recoupment entails a highly fact-specific inquiry, and will only be available in limited circumstances.

Mutuality Exception #4 – purchasing mutuality

Lastly, a party might seek to buy its way out of mutuality by purchasing, at cut-rates, the debt of the particular Lehman entity to which it owes money. This will not work in the United States, as neither federal bankruptcy law nor state common law allows a party to create setoff rights by purchasing obligations after the fact.[39]

However, many Lehman transactions are governed by the laws of other nations with more forgiving rules. Ironically, it was Lehman itself – in its pre-bankruptcy years – which was able to create a triangular setoff by reverting to Thai law.

In *Finance One Public Company Limited v Lehman Brothers Special Financing, Inc*,[40] Lehman Brothers Special Financing (LBSF) found itself in much the same situation as many entities holding Lehman debt do now. In 1995–96, LBSF and Finance One, a Thai company, entered into four derivatives transactions under

ISDA. In 1997, a different Lehman entity, LB Thailand (LBT), bought negotiable debt instruments issued by Finance One with a total face value of 130,000,000 Thai baht.[41]

Subsequently, the Asian financial crisis hit the Thai finance community, and in June 1997, the Thai Government suspended business operations of Finance One. LBT immediately transferred ownership of the debt instruments to LBSF. Thereafter, in July 1997, LBSF notified Finance One that it was setting off the value of the bills (US$9,651,899) against what it owed Finance One under the derivative transactions (US$9,664,204), leaving a balance of US$12,305. In September 2000, Finance One brought suit in federal court in New York, arguing that no setoff should be allowed under these transactions because, inter alia, 'LBSF admits that the transfer of the bills from LBT to LBSF was motivated, at least in part, by the desire to create setoff rights against its derivative obligations to Finance One, and that at the time of transfer it was aware that Finance One had begun defaulting on its debts'.[42]

After a lengthy and rather convoluted litigation process, the case finally found its way to the Court of Appeals, which granted LBSF a right of setoff, on the ground that *Thai* law applied to the non-contractual portion of LBSF's setoff defence, and Thai law did not prohibit such after-the-fact assignment of debts for the purpose of creating mutuality.[43]

In short, if the laws of a nation with a nexus to the transaction would allow for the creation of setoff rights through *post-petition* acquisition of debt, then a party owing money to Lehman may wish to consider purchasing debt issued by that Lehman entity on a secondary market for a hopefully nominal value and then seeking to setoff the face value of the notes against the amount owed to Bankhaus. Among other things, the fact that Lehman itself has previously benefited from this type of setoff might make a court of law more favourably disposed to such an argument.

A better Lehman protocol?

However, one would hope that such legal and fiscal gymnastics would be unnecessary. Lehman, by its own admission, ran an 'integrated' global business, for which its thousands of entities were mere legal artifices. The collapse of Lehman was a singular financial event. The current legal regime, which penalises those creditors who lack the requisite mutuality, while creating a windfall for those who (through luck or happenstance) have it, is fundamentally unjust. There is no policy or other valid reason for preserving such an inequitable system. A cross-border, inter-company mechanism should be established to allow all Lehman creditors caught in its corporate web to offset any amounts they owe to anyone Lehman entity against any amounts they are owed by any other Lehman entity. Fair treatment for all Lehman creditors should take priority over Lehman's tattered corporate veil.

The Lehman Protocol could offer just such a mechanism. Of the major Lehman entities, only the UK subsidiary, Lehman Brothers International Europe (LBIE), has so far declined to sign onto the Protocol.[44] While the current iteration of the Protocol, born of the tunnel vision of its authors, does not address the inequities of the current setoff rules, it could easily be revised to do so. As the authors of the Protocol explain therein:

> '[T]he world currently lacks any clear legislative or regulatory guidance on the administration of a global corporate group insolvency. Lacking this, the parties to the Protocol have had to forge their own privately negotiated treaty. The Protocol is not a binding agreement that one party can seek to enforce against another. It is neither a sword nor a shield. It is an aspirational document that has been created for the benefit of those who choose to participate.[45]

The Lehman bankruptcy administrators should aspire to a more equitable treatment of Lehman creditors seeking the right of setoff. US law, while unfavourable on this issue in many respects, does provide one model for how to do so – substantive consolidation.

Substantive consolidation is the combination of the assets and liabilities of two or more entities resulting in the consolidation of the entities into one for bankruptcy purposes, and can be sought by debtors and creditors alike. Substantive consolidation is the bankruptcy equivalent of the state law remedy of piercing the corporate veil, based on an observation that substantively consolidated entities are often the alter egos of a parent or affiliated entity. Several federal Circuit Courts have opined on the doctrine of substantive consolidation.[46]

The most prominent of these cases is *Union Sav Bank v Augie/Restivo Baking Go (Augie/ Restivo Baking Go*.[47] In *Augie/Restivo*, the United States Court of Appeals for the Second Circuit held that substantive consolidation would be appropriate if *either*: (i) creditors dealt with the entities to be consolidated as a single economic unit and did not rely on their separate identity in extending credit; *or* (ii) the affairs of the entities are so entangled that consolidation would benefit all creditors. Both factors are present here, in spades.

And thus, a proposal – that the various court-appointed administrators, liquidators, curators, etc, put aside the protections of mutuality, and update the Lehman Protocol to acknowledge the commercial reality of the transactions of their respective debtors. Lehman, in its dealings with counterparties throughout the world, presented the face of a consolidated operation, and in fact it was exactly that. Creditors should now be accorded whatever post-petition benefits such pre-petition activity would entitle them, including the right to setoff non-mutual debts. The Lehman Protocol should be amended accordingly, and this inequity resolved once and for all.

Notes

1 Press Release, Alvarez & Marsal and KPMG, Lehman Group of Companies Signs Cross-Border Insolvency Protocol: Alvarez & Marsal, KPMG and Others Formalize Working Group (May 26, 2009) (on file with author).

2 *Ibid*.

3 Debtors' Motion Pursuant to Sections 105 and 363 of The Bankruptcy Code for Approval of a Cross-Border Insolvency Protocol dated 26 May 2009, In re *Lehman Brothers Holdings Inc, et al,* Case No 08-13555 (JMP).

4 See 5-553 *Collier on Bankruptcy* – 15th Edition Rev P 553.01; *Citizens Bank of Maryland v Strumpf*, 516 US 16, 18 (1995) (holding that the purpose of setoff is to avoid 'the absurdity of making A pay B when B owes A').

5 11 USC § 553.

6 See 5-553 *Collier on Bankruptcy* – 15th Edition Rev P 553.01.

7 *Ibid*; *Grady v AH Robins Co (*In re *AH Robins Co),* 839 F.2d 198, 201 (4th Cir 1988).

8 See In re *Westchester Structures, Inc,* 181 BR 730, 730 (Bankr SDNY 1995).

9 *MNC Commercial Corp v Joseph T Ryerson & Son, Inc,* 882 F.2d 615, 618 n 2 (2d Cir 1989); accord, eg, In re *Elcona Homes Corp*, 863 F.2d 483, 486-87 (7th Cir 1988) (holding that, sometimes in 'triangular' setoff cases, 'a subsidiary or other affiliate of the creditor owes money to the bankrupt and the two affiliates ask that they be treated as a single entity', but that '[t]his is rebuffed by pointing out that, save in exceptional circumstances, corporate and commercial law treat affiliated corporations as separate enterprises').

10 See In re *Ingersoll*, 90 BR 168, 171 (Bankr WDNC 1987).

11 *Ibid*, footnote 3.

12 See Memorandum decision, dated 12 May 2009. In re*: Lehman Brothers Holding Inc, et al*, Case No 08-1355 JMP.

13 *Ibid*, at 4–6.

14 *Ibid*, at 3.

15 *Ibid*, at 9.

16 See n 5 above; see also *Official Comm of Unsecured*

*Creditors v Mfrs & Traders (*In re *Bennett Funding Group)*, 146 F.3d 136, 138-139 (2d Cir 1998).

17 See, eg, NY Debtor & Creditor Law § 151 (McKinney 1997); In re *Bennett Funding Group*, 146 F.3d 136 (2d Cir 1998).

18 *Gay v Hudson River Electric Power Co*, 187 F. 12, 15 (2d Cir 1911); accord *Norton Steel Co v Melson Inc*, No 93-CV-661, 1995 US Dist Lexis 8369, *13 (NDNY 15 June 1995) (holding that '[t]he ownership structure and financial relationships of [the holding company] and its subsidiaries could support piercing the corporate veil in this action').

19 *Gay*, 187 F at 15 (emphasis added); accord, eg, *Apex Oil Co v DiMauro*, 744 F. Supp 53, 58 (SDNY 1990) (holding that 'the proper inquiry is whether [the parent holding corporation] exercised day-to-day control of its subsidiaries').

20 *Fletcher*, 68 F.3d at 1457 (quoting *Geyer v Ingersoll Publ'ns Co*, 621 A.2d 784, 793 (Del Ch 1992)).

21 *Ibid.*

22 *McCall Stock Farms, Inc v United States*, 14 F.3d 1562, 1568 (DC Cir 1993).

23 *See Irwin & Leighton, Inc v WM Anderson Co*, 532 A.2d 983, 989 (Del Ch 1987) ('The legal test for determining when a corporate form should be ignored in equity cannot be reduced to a single formula that is neither over- nor underinclusive.').

24 *Wm Passalacqua Builders, Inc v Resnick Developers South, Inc,* 933 F.2d 131, 143 (2d Cir 1991).

25 See, eg, *Goscienski v Larosa (*In re *Montclair Homes)*, 200 BR 84, 100 (EDNY 1996) (piercing the corporate veil to find that debtor's owners were alter egos); In re *Laitasalo*, 196 BR 913, 923–924 (Bankr SDNY 1996) (piercing the corporate veil as a means to compel non-signatory defendant debtor to arbitrate plaintiff creditor's claim); *Butler Mach Inc v Haugen (*In re *Haugen Constr Servs, Inc)*, 104 BR 1013, 1020–21 (Bankr ND 1989) (permitting recovery against non-debtor third parties who were alter egos of the debtor); *United States v Charnock (*In re *Charnock)*, 97 BR 619, 629 (Bankr MD Fla 1989) (piercing the corporate veil to attach assets of non-debtors and use them to satisfy plaintiff creditor's claims); *Kaiser v Wise (*In re *Telemark Mngmt*), 47 BR 1013, 1018–19 (Bankr WD Wis 1985) (affirming the lower court's piercing of corporate veil to declare certain assets to be part of debtors' estate and available to offset debts owed by debtor) *Lumara Foods of America Inc v Union Savs and Trust (*In re *Lumara Foods of America Inc*), 74 BR 95, 102–103 (Bankr ND Ohio 1985) (finding for defendant bank on debtors' claim for lost funds where it was clear that loss likely resulted from debtors' tendency to commingle funds and behave as 'one large business enterprise' rather than separate entities).

26 See In re *Enron*, Case No 01 B 16034 (AJG), 2003 Bankr Lexis 330 (Bankr SDNY Apr 17, 2003).

27 *Ibid*, at **20–21.

28 See *Amerada Hess Corp v Enron Corp (*In re *Enron Corp*), 03 Civ 5288 (DC), 2004 US Dist Lexis 19123, at 1–3 (SDNY Sept 24, 2004).

29 See 5-553 *Collier on Bankruptcy* – 15th Edition Rev P 553.01.

30 See In re *Fasano/Harriss Pie Co*, 43 BR 864, 871 (Bankr WD Mich 1984) ('Courts have carved out an exception to this general rule [to the mutuality rule] ... as a matter of contract law, where there was an express agreement clearly evidencing the intent of the parties to treat the related corporations as a single entity.')

31 In re *SemCrude, LP*, 399 BR 388 (Bankr D Del Jan 9, 2009).

32 *Ibid* at 393.

33 In re *Communication Dynamics, Inc*, 300 BR 220, 226 (Bankr D Del 2003).

34 *Lee v Schweiker*, 739 F.2d 870, 875 (3d Cir 1984); see also *Aetna US Healthcare, Inc v Madigan* (In re *Madigan*), 270 BR 749, 754 (BAP 9th Cir 2001).

35 *Georgetown Steel Co, LLC v Capital City Ins Co (*In re *Georgetown Steel Co, LLC)*, 318 BR 313, 334 (Bankr DSC 2004).

36 *Sacramento Mun Util Dist v Mirant Americas Energy Mktg, LP (In re Mirant Corp),* 318 BR 377, 380 (Bankr ND Tex 2004).

37 *City of Ft Collins v Gonzales (*In re *Gonzales),* 298 BR 771, 774 (Bankr D Colo 2003).

38 *Tavenner v United States (*In re *Vance),* 298 BR 262, 268 (Bankr ED Va 2003).

39 See Bankruptcy Code § 553(a); *Modern Settings, Inc v Prudential-Bache Secur*, 936 F.2d 640, 648 (2d Cir 1991).

40 414 F.3d 325 (2d Cir 2005).

41 Ibid at 328.

42 Ibid at 342.

43 Ibid at 344.

44 Emily Chasan, *Lehman gets court OK for cross-border protocol*, Reuters India, 18 June 2009, available at **http://in.reuters.com/ articleId=INN1735611120090617**.

45 Press Release, *supra* note 2.

46 See, eg, *Drabkin v Midland-Ross Corp (*In re *Auto-Train Corp*), 810 F.2d 270 (DC Cir 1987); *In re Owens Corning*, 419 F.3d 195 (3d Cir 2005), amended by No 04-4080, 2005 US App LEXIS 18043 (3d Cir Aug 23, 2005).

47 860 F.2d 515 (2d Cir 1988).