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Recent Significant U.S. Chapter 15 Decisions

By Francisco Vazquez*

Many foreign businesses have a significant presence in the United States. Consequently, it is common for foreign debtors, trustees, liquidators and administrators, acting as "foreign representatives," to seek relief under Chapter 15 in the United States. This article focuses on some of the significant Chapter 15 decisions issued by the U.S. courts in 2021.

Chapter 15 of the U.S. Bankruptcy Code allows a U.S. bankruptcy court to grant recognition to an insolvency, liquidation, bankruptcy, or debt-restructuring proceeding pending in another nation (i.e., a foreign proceeding). With the globalization of the world's economy, many foreign businesses have a significant presence in the United States. Consequently, it is common for foreign debtors, trustees, liquidators, and administrators, acting as "foreign representatives," to seek relief under Chapter 15 in the United States, and request orders to, among other things, enjoin litigation against the debtor, preserve a debtor's assets, and pursue claims in the United States.

Mirroring the decrease in Chapter 11 filings, there were 171 new Chapter 15 cases filed in 2021 (compared to the 236 Chapter 15 cases filed in 2020). The Southern District of New York (i.e., New York City) was the preferred Chapter 15 venue with 56 filings, followed by the Southern District of Texas (i.e., Houston) with 48 filings. The Chapter 15 cases filed in 2021 were ancillary to foreign proceedings pending in Australia, Bermuda, Brazil, British Virgin Islands, Canada, Cayman Islands, Czech Republic, Dominica, Germany, Guernsey, Indonesia, Israel, Japan, Norway, People's Republic of China, Russia, Singapore, South Africa, Sweden, United Kingdom, and Uruguay.

This article focuses on some of the significant decisions issued by the U.S. courts in 2021. The first part begins with a discussion of a decision refusing to impose the Bankruptcy Code debtor-eligibility requirements in Chapter 15. The second part examines two decisions addressing requests to enforce a foreign debt restructuring in the United States. The third part discusses a foreign representative's capacity to obtain relief in a U.S. court prior to obtaining Chapter 15 recognition. The final part concludes with a discussion of discovery under Chapter 15.

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FLORIDA BANKRUPTCY COURT REFUSES TO IMPOSE SECTION 109 DEBTOR-ELIGIBILITY REQUIREMENT IN A CHAPTER 15 CASE

Section 1517 of the Bankruptcy Code generally provides that a foreign proceeding shall be recognized if three conditions are met. First, the proceeding must be a "foreign main proceeding" or "foreign nonmain proceeding" as defined by the Bankruptcy Code. Second, the foreign representative must be a person or body. Finally, certain procedural requirements must be satisfied.

Some courts, in particular the U.S. Court of Appeals for the Second Circuit (which includes New York), have concluded that a foreign debtor must also satisfy the general debtor-eligibility requirements set forth in the Bankruptcy Code.[1] Under Section 109(a) of the Bankruptcy Code, "only a person that resides or has a domicile, a place of business, or property in the United States . . . may be a debtor."[2] Accordingly, New York bankruptcy courts will recognize a foreign proceeding only if the foreign representative demonstrates that the debtor has a residence, domicile, place of business, or an asset in the United States.

A bankruptcy court in Florida came to a different conclusion. In the case of *In re Zawawi*, the trustees of a debtor filed a petition for recognition of a UK bankruptcy.[3] While the debtor conceded that the trustees had satisfied the requirements of Section 1517, he objected to recognition on the basis that he did not meet the debtor-eligibility requirements of Section 109(a). The Florida bankruptcy court rejected that argument, concluding that Section 109(a) does not apply to Chapter 15. According to the bankruptcy court, "the subject of a foreign proceeding is only a "debtor" as that term is used in chapter 15 and is not a debtor as that term is used in § 109."

Moreover, the court found that there is "clear evidence of legislative intent" that Section 109 does not apply in Chapter 15. In particular, the venue statute contemplates a Chapter 15 filing for an entity that does not have assets or a place of business in the Unites States. In addition, other sections would be "rendered duplicative and superfluous" if Section 109 applied to Chapter 15.

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[1] *See Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet*), 737 F.3d 238, 247 (2d Cir. 2013).

[2] 11 U.S.C. § 109(a).

[3] *See In re Al Zawawi,* 634 B.R. 11, 14 (Bankr. S.D. Fla. 2021).

On appeal, a Florida district court affirmed the bankruptcy court's decision earlier this year.[4] In its opinion, the district court predicted that the U.S. Court of Appeals for the Eleventh Circuit, which covers the districts located in Alabama, Florida and Georgia, would not follow the Second Circuit's rationale in *Barnet*. Should that occur, there would be a circuit split on the Chapter 15 recognition requirements that might then be resolved by the U.S. Supreme Court or Congress.

COURT MAY ENFORCE A FOREIGN RESTRUCTURING PLAN UNDER CHAPTER 15

Under Chapter 11 of the Bankruptcy Code, if a U.S. court confirms a plan of liquidation or reorganization, it is binding on all creditors regardless of their vote. Numerous foreign jurisdictions similarly authorize the implementation of a plan that also is purportedly binding on all creditors. However, a foreign court's order approving such a plan is not necessarily enforceable in the United States. Thus, a creditor may take actions against a debtor in the United States inconsistent with a foreign plan, unless the foreign court's order approving the plan is enforceable in the United States.

It is well established that a U.S. court may issue an order enforcing a debt adjustment, restructuring or liquidation plan, or similar arrangement, including a scheme of arrangement, in the United States under Chapter 15. In 2021, there were two significant decisions addressing such requests.

In the first, *In re Condor Flugdienst GmbH*,[5] an Illinois bankruptcy court entered an order under Chapter 15 recognizing the German liquidation proceeding of a commercial airline in the United States. The foreign representatives then requested an order enforcing a German liquidation plan in the United States. As an initial matter, the bankruptcy court concluded that it had the requisite authority to issue such an order under Chapter 15.

In particular, the court concluded that it had such authority under Section 1521(a) of the Bankruptcy Code, which provides that, upon recognition, a court may grant "any appropriate relief," including discovery and other relief available to a trustee with the exception of the ability to avoid certain transfers. Relief under Section 1521 is subject to Section 1522, which provides that a court may grant relief "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."

According to the court, Chapter 15 does not require that the relief requested or the foreign law would yield the same outcome as what would occur in a U.S.

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[4] *Zawawi v. Diss (In re Zawawi)*, No. 21-cv-894-GAP (M.D. Fla. Feb. 28, 2022).

[5] 627 B.R. 366 (Bankr. N.D. Ill. 2021).

bankruptcy case. Instead, the court was required to balance the interests of the creditors and debtor to ensure that one group was not unfairly favored over the other. In this instance, the court was satisfied that the German process was "just, unprejudiced and not unduly inconvenient." In particular, U.S. creditors were not treated differently than other creditors. Moreover, creditors, including U.S. creditors, were provided with the notice required under German law. In addition, U.S. creditors were given notice of the Chapter 15 case and had an additional opportunity to be heard.

The court further found that any purported hardship to creditors by enforcing the plan in the United States was outweighed by "the benefits and is necessary and appropriate in the interest of the public and international comity, is consistent with the public policy of the US and is available under the provisions of chapter 15." Accordingly, the court issued an order enforcing the German plan in the United States.

Unlike the *Condor* court, in the second case, a New York bankruptcy court refused to enter an order enforcing an Indonesian plan in the United States. *In re PT Bakrie Telecom Tbk*.[6] Following recognition of an Indonesian restructuring proceeding, the bankruptcy court considered the foreign representative's request for an order enforcing the plan in the United States.

According to the foreign representative, the Indonesian court order approving the plan discharged the debtor and certain nondebtors from obligations under certain notes. Hence, they requested an order from the U.S. court enforcing the plan that included a third-party nondebtor release of claims relating to the notes. A group of noteholders objected to the request, arguing that (1) the Indonesian plan lacked a third-party release and therefore it was inappropriate to include one in the bankruptcy court's order, and (2) they were not treated fairly in Indonesia as the Indonesian court authorized the issuer of the notes, an insider of the debtor, as opposed to the noteholders or the indenture trustee, to vote the notes.

Following its review of the plan and the Indonesian court's order approving the plan, the U.S. bankruptcy court appeared to be comfortable that the Indonesian order was sufficiently broad to release all of the obligations under the notes, including the nondebtors' obligations. The terms of the Indonesian order alone, however, was not a sufficient basis for the U.S. court to issue its order. The court concluded it had to analyze "whether such a third-party release is appropriate when viewed through the prism of comity."

According to the U.S. court, such an analysis would entail consideration of the Indonesian process and whether it satisfied "fundamental standards of

[6] 628 B.R. 859 (Bankr. S.D.N.Y. 2021).

procedural fairness as demonstrated by a clear and formal record." In this instance, however, there was no such clear and formal record. "Indeed, the record contained no information about how this third-party release was presented to the Indonesian court for consideration or whether any creditors were heard—or even had the ability to be heard—as to a third-party release." Moreover, the record lacked any justification by the Indonesian court for the release. Given the lack of an appropriate record, the court refused to issue an order enforcing the Indonesian plan in the United States.

The U.S. court further found that the reason for the Indonesian court's decision to allow an insider to vote the noteholders' claims was not clear. The U.S. court, however, refrained from ruling on the voting issue, noting that it was refusing to enforce the plan given its third-party release concerns.

CHAPTER 15 RECOGNITION MAY NOT BE A PREREQUISITE TO SEEK RELIEF IN U.S. LITIGATION

Before the enactment of Chapter 15, it was well established that a foreign representative or a debtor could ask a court to dismiss or stay a lawsuit pending before it in deference to a foreign proceeding under principles of comity. Following the enactment of Chapter 15, several courts concluded that Chapter 15 recognition is a prerequisite to seeking such relief, noting, among other things, that (1) Section 1509(b) of the Bankruptcy Code provides that a foreign representative may seek relief from a U.S. court after recognition, and (2) Chapter 15 is intended to be the "exclusive door to ancillary assistance to foreign proceedings." Other courts, however, concluded that Chapter 15 recognition is not necessarily a prerequisite to seeking relief from a U.S. court. The split continued in 2021.

Facing claims in an admiralty case before a U.S. district court sitting in Texas, a debtor in a German insolvency proceeding filed a motion for summary judgment.[7] The debtor argued that all claims against it should be asserted against the German insolvency administrator as required under German law. Hence, the admiralty claims against it should be dismissed under principles of comity. The district court, however, concluded that Chapter 15 recognition "is a prerequisite to obtaining comity from any U.S. court with respect to foreign insolvency proceedings." Thus, the court held it was "powerless" to grant the debtor any relief until the German insolvency was recognized under Chapter 15.

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[7] *HFOTCO, LLC v. Zenia Special Maritime Enterprise*, No. H-19-3595 (S.D. Tex. July 7, 2021).

Two other courts, however, came to a different conclusion last year. In *Moyal v. Münsterland Gruppe GmbH & Co. KG*,[8] the U.S. District Court for the Southern District of New York dismissed a breach of contract claim against a German debtor notwithstanding that the German insolvency proceeding had not been recognized under Chapter 15. According to the district court, comity requires dismissal of litigation in deference to a foreign bankruptcy so long as the foreign proceedings "are procedurally fair . . . and do not contravene the laws or public policy of the United States." Further, according to the court, the suggestion that a Chapter 15 case is a prerequisite to dismissal or stay of the litigation "is absurd and would fly in the face of comity principles."

Similarly, the U.S. District Court for the Eastern District of New York allowed the liquidator of a Lebanese banking institution that was in a receivership in Lebanon to intervene in litigation without requiring the liquidator to obtain Chapter 15 recognition.[9] According to the district court, Chapter 15 does not apply to all litigation in the United States. Instead, it is generally limited to situations where a foreign representative wants to enforce or administer an aspect of a foreign proceeding in the United States. In *Bartlett*, however, the liquidator was seeking to intervene in the U.S. litigation to assert certain defenses, not to administer the Lebanese bankruptcy. Consequently, the liquidator did not need to obtain Chapter 15 recognition before intervening. This decision is currently on appeal to the Second Circuit.

DISCOVERY DEVELOPMENTS

Chapter 15 authorizes a foreign representative to request orders compelling discovery from any person "concerning the debtor's assets, affairs, rights, obligations or liabilities."[10] Bankruptcy courts routinely authorize discovery under Chapter 15.

In 2021, a New York bankruptcy court allowed a foreign representative of a large regional commercial airline that was in South African business rescue proceedings to obtain discovery from an original equipment manufacturer ("OEM").[11] According to the airline's foreign representative, the airline had several causes of action against the OEM, but the publicly available information did not provide "a full picture" of such claims. The foreign representative filed

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[8] 539 F.Supp.3d 305 (S.D.N.Y. 2021).

[9] *Bartlett v. Societe Generale de Banque au Liban Sal*, No. 19-cv-00007 (E.D.N.Y. Aug. 6, 2021).

[10] *See* 11 U.S.C. § 1521(a)(4).

[11] *In re Comair Ltd.*, No. 21-10298 (Bankr. S.D.N.Y. Nov. 14, 2021).

a motion for an order for discovery from the OEM. The OEM opposed the request, arguing, among other things, that "(i) the requested discovery will not 'effectuate the purpose' of Chapter 15; (ii) the requested discovery is not necessary to protect [the airline's] assets; and" (iii) the OEM's interests are not sufficiently protected.

The bankruptcy court disagreed. A court may grant "appropriate relief," including discovery under Section 1521 of the Bankruptcy Code, if the foreign representative demonstrates that such relief is "necessary to effectuate the purpose of [Chapter 15] and to protect the assets of the debtor or the interests of the creditors." As mentioned above, relief under Section 1521 is subject to Section 1522, which provides that a court may grant relief only if the interests of interested entities "are sufficiently protected." In this instance, the bankruptcy court was satisfied that the requirements of Section 1521 and 1522 were met.

According to the bankruptcy court, the discovery would effectuate the purpose of Chapter 15. The court first determined that the foreign representative had a duty under South African law to "investigate the company's affairs, business, property, and financial situation." The discovery requested would allow the foreign representative to discharge his duties and evaluate the potential significant claims against the OEM. Second, the discovery was necessary to protect the airline's assets, particularly its claims against the OEM. The court noted that nothing in the rescue proceeding or the rescue plan barred the foreign representative from seeking discovery, which fell within the scope of the discovery available under Section 1521. Third, the court concluded that the OEM's interests were sufficiently protected. Accordingly, the court directed the parties to meet and confer to address OEM's concerns regarding the scope of the discovery request. To the extent the parties could not resolve any particular discovery dispute, the court was willing adjudicate it in the future as is the customary practice in the United States. The OEM has appealed this decision.

In the United States, discovery orders are generally not final and hence not subject to an appeal. The U.S. Court of Appeals for the Eleventh Circuit confirmed that general principle in the Chapter 15 context.[12] In a typical case before a court, an order is "final" when issued at the completion of the case (e.g., a judgment). In a U.S. bankruptcy case, there will likely be many "individual controversies." Hence, a bankruptcy court order is generally final only when it disposes of a discrete dispute or issue. In *Barnet*, mentioned above, the Second Circuit held that discovery orders under Chapter 15 are appealable.

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[12] *Fontana v. ACFB Administração (In re Transbrasil S.A. Linhas Aéreas)*, 860 Fed. Appx. 163 (11th Cir. 2021), *cert. denied* (2002).

In *Fontana*, however, the Eleventh Circuit disagreed with the *Barnet* decision. According to the Eleventh Circuit, a discovery order is generally "merely a preliminary step" and not a final order. Thus, the lower court's discovery order was not appealable and the foreign representative was allowed to proceed with its discovery. In dismissing the appeal, the U.S. Court of Appeals for the Eleventh Circuit, however, noted that there may be an exception to the general rule. "If a Chapter 15 case exists solely to obtain discovery for use in a foreign bankruptcy case, then the discovery might not be 'merely a preliminary step.' "In that instance, the discovery order may be final and subject to immediate appeal. One of the discovery targets petitioned the U.S. Supreme Court to hear an appeal of the Eleventh Circuit's decision, noting that it conflicted with the Second Circuit's ruling. The Supreme Court denied that petition.

CONCLUSION

Chapter 15 continues to be a resource for foreign representatives to obtain relief in the United States. Notwithstanding that the United States enacted Chapter 15 nearly two decades ago, the jurisprudence continues to develop and there are some significant differences among the courts in different circuits on several important issues.