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Recognition of a Foreign Insolvency Process and Enforcement of Insolvency-Related Judgments (United States)

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A Practice note providing a guide to the domestic processes and requirements for gaining legal recognition of a foreign insolvency process in the United States. This Note also details any separate considerations around the enforcement of insolvency-related judgments in the United States.

Many companies have assets and operations in multiple countries. To streamline the processes involved in cross-border global bankruptcies, many countries have adopted some system that replaces the absolute territorialism approach in which a debtor had to initiate a plenary insolvency case in multiple countries. Some of the goals behind an effective mechanism for dealing with cross-border insolvencies include:

- Co-operation among courts in different jurisdictions.
- Greater legal certainty for trade and investment.
- Fair and efficient administration that protects the interests of creditors and facilitates the rescue of troubled companies, thereby protecting investment and employment.

To aid in adopting a single-process approach, some countries have adopted the Model Law on Cross-Border Insolvency (Model Law) enacted by the United Nations Commission on International Trade Law (UNCITRAL). The United States (US) has adopted the Model Law in the form of chapter 15 of the US Bankruptcy Code (Bankruptcy Code).

This Note:

- Provides a practical guide for commencing and prosecuting a chapter 15 case, including an overview of applicable rules and procedures, the types of relief available, the documents typically filed, and the contents of those documents.
- Analyzes the framework for recognition of orders of foreign courts related to insolvency or reorganization, under chapter 15 and otherwise. That analysis focuses on foreign court orders approving foreign plans of reorganization or liquidation, as this is the relief most relevant to the subject matter of this Note.
- Assesses upcoming developments that will likely shape the topics discussed in this Note during the next 12 months.

Parties should consult local counsel in the US for questions around this framework and procedure.

Legal Framework for Recognition of a Foreign Insolvency Process in the United States

Chapter 15 of the US Bankruptcy Code is the bedrock framework for recognition of cross-border insolvency proceedings within the US (11 U.S.C. §§ 1501 et seq.). The goal of chapter 15 is to streamline the legal framework applicable to cross-border insolvency cases. Accordingly, the purpose and scope of chapter 15 is to:

- Increase cooperation among:
  - courts, public authorities, estate representatives, debtors, and debtors-in-possession in the US, on the one hand; and
  - the courts and other competent authorities of foreign countries involved in cross-border insolvency cases, on the other hand.
- Provide greater legal certainty for trade and investment.
- Fairly and efficiently administer cross-border insolvency cases in a way that protects the interests of all creditors and other interested parties, including the debtor.
- Protect and maximize the value of the debtor's assets.
- Facilitate the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

(§ 1501(a), Bankruptcy Code.)

UNCITRAL Model Law on Cross-Border Insolvency

Chapter 15 is a product of the adoption of the Model Law promulgated by UNCITRAL. The Model Law is "often described as an attempt to create modified universalism, which essentially entails allowing courts outside of the debtor's home country to open and maintain secondary cases supplemental to the company's main insolvency proceedings" (Donald S. Bernstein, Preface to the Tenth Edition of the Insolvency Review (2022) (internal citations omitted) (Bernstein, *Preface*)). Fifty-one states (including the US and the United Kingdom (UK)) have enacted legislation based on the Model Law (see 25 Years of the UNCITRAL Model Law on Cross-Border Insolvency). Chapter 15 expanded on and replaced its predecessor, section 304 of the Bankruptcy Code.

Summary of Procedure and Documents Required to Commence a Chapter 15 Case

Chapter 15 Petition and Accompanying Information

To commence a chapter 15 case, the foreign representative (see Foreign Representative) must file with the court:

- Official Bankruptcy Form B401: Chapter 15 Petition for Recognition of a Foreign Proceeding (Form B401). Form B401 is a three-page fill-in-the-blank document that requests basic information regarding the debtor and the foreign proceeding. Form B401 should include:
  - federal employee ID number or similar ID number of the debtor;
  - name and address of the foreign representative;
  - country of the debtor's center of main interests (COMI) (see COMI) and address of the debtor's registered office;
  - the debtor's website; and
  - a filing fee in the amount of USD1,738 (subject to adjustment from time to time).
- One of the following documents, translated into English:
  - a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative (§ 1515(b)(1), Bankruptcy Code); or
  - a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative (§ 1515(b)(2), Bankruptcy Code).

  In the absence of either of these documents, any other evidence acceptable to the court affirming the existence of the foreign proceeding (§ 1515(b)(3), Bankruptcy Code).
- A statement identifying all foreign proceedings regarding the debtor that are known to the foreign representative, as required under § 1515(c) of the Bankruptcy Code.
- Disclosure required under Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure (Fed. R. Bankr. P.), including the names and addresses of:
  - all persons authorized to administer foreign proceedings of the debtor;
  - all parties to litigation pending in the US to which the debtor is a party at the time of filing the petition; and
  - all entities against whom the foreign representative is seeking provisional relief, if any, under section 1519 of the Bankruptcy Code (see Provisional Relief).
- A corporate ownership statement identifying any entity that directly or indirectly owns 10% or more of the equity in the debtor (Fed. R. Bankr. P. 7007.1).
- A motion for an order scheduling the recognition hearing. Among other things, the motion should attach a proposed form of order as an exhibit, specifying:
  - the proposed date for the hearing on the relief sought in the petition, which must be set at least 21 days after the petition and all other relevant notice documents have been properly served on the requisite notice parties according to Fed. R. Bankr. P. 2002(q)(1); and
  - the objection deadline by which any responses to the petition must be received, which must be at least seven days before the date of the recognition hearing (Fed. R. Bankr. P. 1004.2).

  The motion should also include:
  - the proposed manner of service of the hearing notice; and
  - a form of notice of the recognition hearing and objection deadline attached as an exhibit, which the draft order should refer to and approve.
- A document titled the Verified Petition or Motion for Recognition. The Verified Petition or Motion for Recognition details the relief requested and the legal and factual basis for this relief.
- Supporting declarations (see Declarations).

Declarations

The factual basis for the relief requested in the chapter 15 petition is typically set out in declarations that accompany and support the Form B401 and the Verified Petition / Motion for Recognition. For a corporate debtor, these declarations typically fall into two categories:

- The declaration of the foreign representative (see Foreign Representative Declaration).
- The declaration of the foreign law expert (see Foreign Law Expert Declaration).

Foreign Representative Declaration

This declaration typically includes a description of:

- The events leading up to the filing of the foreign proceeding.
- The debtor's history, the nature of its business, and its existing capital structure.
- Negotiations and agreements with creditors, including any restructuring support agreement, lock-up agreement, or similar agreement in which the debtor's stakeholders have agreed to support the foreign proceeding.
- Any contacts with the US that form the basis for eligibility and venue (see Eligibility and Venue), which may include property located in the US or debt instruments or other contracts:
  - governed by US law; or
  - with US forum selection clauses.
- The jurisdiction of the debtor's incorporation and the location of the debtor's corporate governance activities (such as meetings of the board of directors and other key management activities), which is relevant, among other things, to determine the debtor's COMI (see COMI).
- Facts establishing the following points, which are relevant, among other things and as applicable, to determine the debtor's establishment (see Foreign Nonmain Proceedings):
  - the economic impact of the debtor's operations on the market (which can be evidenced by engagement of local counsel and commitment of capital to local banks);
  - the maintenance of a minimum level of organization within a jurisdiction for a period of time (such as a registered office and a local board of directors); and
  - the objective appearance to creditors that the debtor has a local presence within this jurisdiction (such as by disclosure of location of registered office and local board of directors to creditors in an offering memorandum).

Foreign Law Expert Declaration

This declaration typically includes an overview of the applicable insolvency law of the foreign jurisdiction, including:

- An overview of the local insolvency regime and law governing the foreign proceeding.
- Procedural requirements on how to conduct the foreign proceeding, including notice to creditors and other stakeholders of the relief sought in the foreign proceeding, and opportunity to object to this relief. These facts are often relevant to demonstrate that stakeholders have been afforded due process in the foreign jurisdiction, such that recognition under chapter 15 does not violate US public policy (see Public Policy Exception to Relief Requested in a Chapter 15 Case).
- If applicable, requirements to approve the foreign plan of reorganization or liquidation, including any applicable voting thresholds.

Local Rules

Procedural requirements for a chapter 15 case vary based on the district in which the bankruptcy court sits, and the judge assigned. Each district of the US Bankruptcy Court can promulgate its own local rules, which govern practice and procedure in all bankruptcy cases in that district. The local rules are publicly available on the court website for the applicable court. For example, see the Local Bankruptcy Court Rules of the US Bankruptcy Court for the Southern District of New York (SDNY) and Practice Note, Chapter 15: Overview: US Bankruptcy Cases Ancillary to Foreign Proceedings, Box: Local Bankruptcy Rules: Chapter 15.

Chambers Rules

Chapter 15 filers should also be mindful of the preferences of a particular judge's chambers. By way of example, below are select chambers rules from the website of Judge Martin Glenn, Chief Judge of the US Bankruptcy Court for the SDNY:

- A moving party or applicant must contact chambers to obtain a hearing date before filing and serving a motion, cross-motion, application, or any other request for relief requiring a hearing.
- Unless ordered otherwise, parties must submit briefs and motions with embedded argument and citations in text searchable format and include a table of contents, headings, and a table of authorities.

- Except as permitted by the court, moving and responsive briefs must be no more than 25 pages in length and reply briefs must typically be no more than ten pages exclusive of the table of contents and table of authorities.
- Parties must provide two copies of every pleading, with exhibits, to chambers at the time of filing and service.
- Parties must register with chambers to appear telephonically or by video participation and should consult the relevant chambers' website for details.

To date, many bankruptcy courts in the US conduct hearings virtually or with hybrid virtual and in-person participation. Parties should review hearing notices and court and chambers rules and procedures regarding the format and registration requirements for hearings. Some courts and judges require registration electronically on the day before the hearing to participate.

Recognition Requirements Under Chapter 15

Eligibility

Courts disagree regarding the standard for eligibility to file a chapter 15 petition. The US Court of Appeals for the Second Circuit (Second Circuit) is the Circuit Court with appellate jurisdiction over the SDNY, which is where debtors file many of the largest chapter 15 cases. Accordingly, this Note focuses on the standard articulated in the Second Circuit.

In the Second Circuit, a debtor must satisfy the requirements of section 109(a) of the Bankruptcy Code to be eligible to file a chapter 15 petition. Under this section, a foreign debtor must reside or have a domicile, a place of business, or property in the US to be eligible to file a chapter 15 petition (see *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013) and Legal Update, In re Barnet: Second Circuit Applies Debtor Eligibility Requirements to Chapter 15 Cases). Because a foreign debtor presumably has its COMI outside of the US, subsequent decisions have typically focused on the property element of section 109.

Following *Barnet*, bankruptcy courts in the SDNY have pointed out that section 109(a) of the Bankruptcy Code does not require a specific amount or dollar value of property in the US, or a minimum time period for how long this property must have a situs in the US, though the property must presumably exist in the US at least as of the date of filing (see *In re Berau Cap. Res. Pte Ltd.*, 540 B.R. 80, 82 (Bankr. S.D.N.Y. 2015)).

In bankruptcy courts in the SDNY, funds in a New York bank account (including funds held as a retainer for the debtor's attorney), or rights under contracts with New York governing law and forum selection clauses (standard provisions in many US law-governed indentures and loan agreements) typically constitute property in the United States for purposes of conferring eligibility to file a chapter 15 case (see *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603, 610-11 (Bankr. S.D.N.Y. 2018) (holding that the debtor's indenture "is governed by New York law, which separately satisfies the 'property in the United States' requirement for eligibility to file a chapter 15 case under section 109(a) of the Bankruptcy Code.")).

Venue

Venue of a chapter 15 case is proper in the district in which the debtor has its principal place of business or principal assets in the US (28 U.S.C. § 1410(1)). Bankruptcy courts in the SDNY have held that funds in a bank account located in New York can constitute a foreign debtor's principal asset in the US for establishing venue to commence a chapter 15 case (see *In re Suntech Power Holdings Co.*, 520 B.R. 399, 416 (Bankr. S.D.N.Y. 2014) (holding that establishing a deposit account in New York "had the effect of establishing a basis for venue in [the Southern District of New York] under 28 U.S.C. § 1410(1)") and Legal Update, Suntech Power Holdings Co.: SDNY Bankruptcy Court Liberally Interprets Chapter 15 Eligibility, Venue and COMI Determinations).

If the debtor does not have a place of business or assets in the US, venue is proper in the district in which there is litigation pending against the debtor in federal or state court (28 U.S.C. § 1410(2)). Further, if petitions commencing cases under the Bankruptcy Code are filed in different districts by or against the same debtor, "the court in the district in which the first-filed petition is pending may determine, in the interest of justice or for the convenience of the parties, the district or districts in which any of the cases should proceed" (Fed. R. Bankr. P. 1014(b); see *In re FTX Trading Ltd.*, No. 22-11068 (JTD) ECF No. 131 (Bankr. D. Del. Nov. 22, 2022) (transferring the FTX chapter 15 case from the SDNY to the District of Delaware, to be heard by the same court presiding over chapter 11 cases separately filed by certain FTX entities)).

Foreign Proceeding

After a duly appointed foreign representative files a valid petition for recognition, and notice and a hearing on the petition occurs, the court must enter the order recognizing the foreign proceeding, if doing so would not be manifestly contrary to the public policy of the US (§§ 1506, 1517(a), Bankruptcy Code; see Public Policy Exception to Relief Requested in a Chapter 15 Case). To qualify as a foreign proceeding capable of

recognition under chapter 15 of the Bankruptcy Code, a foreign insolvency process must fulfil the following requirements:

- The debtor must be subject to a collective judicial or administrative proceeding, which may include an interim proceeding. *Collective* refers to a proceeding that administers claims of all creditors whose claims are being restructured, as opposed to a proceeding for the benefit of a single creditor (see *Armada (Sing.) Ptd. Ltd. v. Shah. (In re Ashapura Minechem Ltd.)*, 480 B.R. 129, 140 (S.D.N.Y. 2012)).

In addition, this proceeding must be:

- in a foreign country;
- governed under a law relating to insolvency or adjustment of debt; and
- subject the assets and affairs of the debtor to control or supervision by a foreign court or other competent authority, for the purpose of reorganization or liquidation.

(§ 101(23), Bankruptcy Code; see also *In re Glob. Cord Blood Corp.*, No. 22-11347 (DSJ), 2022 WL 17478530 at *9, *13 (Bankr. S.D.N.Y. Dec. 5, 2022) (order denying recognition without prejudice on the grounds that the Cayman proceeding at issue was neither collective nor for the purpose of reorganization or liquidation, and therefore the debtor was not subject to a foreign proceeding).)

Foreign Representative

A foreign representative must also file the petition to recognize the foreign proceeding (§ 1517(a)(2), Bankruptcy Code). A foreign representative is a person or body "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" (§ 101(24), Bankruptcy Code). The Bankruptcy Code does not require that the foreign court appoint the foreign representative. Instead, a debtor (including a debtor-in-possession) may appoint a foreign representative under corporate authorizations passed in accordance with applicable corporate laws (see *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169, 183 (Bankr. S.D.N.Y. 2017) (recognizing appointment of foreign representative "pursuant to resolutions and powers of attorney signed by authorized representatives of each [foreign debtor]")).

If the foreign court appoints an officeholder to oversee the foreign proceeding, then this person may be the foreign representative. Examples include a liquidator, restructuring officer, joint provisional liquidators, administrator, receiver, or other similar officeholders. However, while court-appointed officeholders administer foreign proceedings of certain types and in certain jurisdictions (particularly administration and liquidation proceedings that arise in many Commonwealth jurisdictions), it is not required that an insolvency officer administer the foreign proceeding. Rather, the foreign proceeding may contemplate a process whereby the debtor-in-possession remains in control (see *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. at 183). Reflecting this, the foreign representative may also be:

- The general counsel.
- The chief financial officer.
- The chief restructuring officer.
- The chief executive officer.
- Other officer or director of the debtor with personal knowledge of the facts underlying the petition for recognition.

Relief Available in a Chapter 15 Case

Chapter 15 generally provides for:

- Certain automatic relief upon recognition of a foreign main proceeding (see Recognition as Foreign Main Proceeding or Foreign Nonmain Proceeding).
- Certain discretionary relief upon recognition of either a foreign main proceeding or foreign nonmain proceeding (see Enforcement of Foreign Insolvency-Related Orders Outside of a Chapter 15 Case).
- Provisional relief during the interim period between when the chapter 15 petition is filed and when the bankruptcy court recognizes the foreign proceeding (see Provisional Relief).

Recognition as Foreign Main Proceeding or Foreign Nonmain Proceeding

An order recognizing a foreign proceeding may recognize it as either:

- A foreign main proceeding (see Foreign Main Proceedings).
- A foreign nonmain proceeding (see Foreign Nonmain Proceedings).

(§ 1517(a)(1), Bankruptcy Code.)

Foreign Main Proceedings

A foreign main proceeding is one that takes place in an entity's center of main interests, or COMI (§ 1502(4), Bankruptcy Code). Although the Bankruptcy Code does not define COMI, the Bankruptcy Code does create

a rebuttable presumption that "[i]n the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests" (§ 1516(c), Bankruptcy Code) (see COMI).

Upon recognition of a foreign main proceeding, certain provisions of the Bankruptcy Code automatically apply concerning the debtor and its property within the territorial jurisdiction of the US:

- Section 362, which invokes a broad automatic stay and enjoins most actions against the debtor or its property concerning prepetition claims, applies to the debtor and its property within the territorial jurisdiction of the US. Unlike the stay applicable to chapter 11 cases, the stay in chapter 15 proceedings does not carry worldwide effect (see Practice Note, Automatic Stay: Overview). Importantly, the section 362 stay is subject to notable limitations, including that parties in interest:
  - may seek relief from the automatic stay, for cause; and
  - are not enjoined from commencing an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor.
- Section 363, which provides for, among other things, the use and sale of property outside of the ordinary course of business (see Practice Note, Buying Assets in a Section 363 Sale: Overview).
- Section 361, which governs adequate protection of secured creditors' interest in their collateral (see Practice Note, Adequate Protection: Overview).
- Section 549, which governs avoidance of postpetition transfers (see Practice Note, Avoiding Unauthorized Postpetition Transfers).
- Section 552, which addresses certain rights related to security interests in collateral (see Practice Note, Treatment of Prepetition Liens in Postpetition Property).

(§ 1520, Bankruptcy Code.)

Foreign Nonmain Proceedings

Unlike a foreign main proceeding, all relief granted by the bankruptcy court upon recognition of a foreign nonmain proceeding (including the grant of a stay) is discretionary (§ 1521, Bankruptcy Code). That distinction aside, the relief a court may grant in a foreign nonmain proceeding is *nearly identical* to the relief provided to a foreign main proceeding (*In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 272 (Bankr. S.D.N.Y. 2019) (*Constellation I*)).

A court may recognize a foreign proceeding as nonmain if it occurs in a jurisdiction where the debtor has an establishment. An establishment is defined as "any place of operations where the debtor carries out a nontransitory economic activity" (§ 1502(2), (5), Bankruptcy Code). A foreign proceeding on its own does not suffice as nontransitory economic activity constituting the presence of an establishment (see *In re Modern Land (China) Co., Ltd.*, 641 B.R. 768, 786 (Bankr. S.D.N.Y. 2022)). Nontransitory economic activity can be evidenced by engagement of "local counsel and commitment of capital to local banks" (*In re Modern Land (China) Co., Ltd.*, 641 B.R. at 784).

Factors that contribute to identifying an establishment include:

- The economic impact of the debtor's operations on the market.
- The maintenance of a minimum level of organization for a period of time (such as a registered office and a local board of directors).
- The objective appearance to creditors whether the debtor has a local presence (such as disclosure of location of registered office and local board of directors to creditors in an offering memorandum).

(*In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 85 (Bankr. S.D.N.Y. 2011) (quotation omitted).)

By contrast, one court recently found that the fact that a debtor was incorporated in the Cayman Islands and maintains books and records there was insufficient to render the Cayman Islands an establishment of the debtor (see *In re Modern Land (China) Co., Ltd.*, 641 B.R. at 786 ("The failure to engage the local economy excludes the Debtor from a foreign nonmain classification.")). Notably, it is possible for a debtor to have COMI in a jurisdiction even if it does not have an establishment there (see *In re Modern Land (China) Co., Ltd.*, 641 B.R. at 786).

COMI

There is a rebuttable presumption that a corporate debtor's COMI is the location of the debtor's registered office (§ 1516(c), Bankruptcy Code). Where any "evidence to the contrary" is presented, courts "must examine all of the evidence to determine where [a debtor's] center of main interest lies" (*Collins v. Oilsands Quest Inc.*, 484 B.R. 593, 595 (Bankr. S.D.N.Y. 2012)). In assessing whether the statutory presumption withstands scrutiny, courts have developed a list of non-exclusive factors which, while not to be applied mechanically, are helpful in assessing an entity's COMI (see *In re ABC Learning*

Ctrs. Ltd., 445 B.R. 318, 333 (Bankr. D. Del. 2010), *aff'd*, 728 F.3d 301 (3d Cir. 2013)). These factors include:

- The location of the debtor's headquarters.
- The location of those who actually manage the debtor (which could conceivably be the headquarters of a holding company).
- The location of the debtor's primary assets.
- The location of most of the debtor's creditors or most of the creditors who would be affected by the case.
- The jurisdiction whose law would apply to most disputes.

(see *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 137 (2d Cir. 2013) (adopting the factors (the "*SPhinX* factors") from *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006))). In addition to these *SPhinX* factors, courts have considered the expectations of creditors and third parties in determining COMI including whether there is any objective evidence that could provide interested parties with notice that a debtor's COMI was in a particular jurisdiction other than the place of its registered office and the degree of support from a debtor's creditors for a finding of COMI in a particular jurisdiction (see *In re Olinda Star Ltd.*, 614 B.R. 28, 44 (Bankr. S.D.N.Y. 2020) (quoting *Constellation I*, 600 B.R. at 274); see also *In re Serviços de Petróleo Constellation S.A.*, 613 B.R. 497, 508 (Bankr. S.D.N.Y. 2020) ("*Constellation II*") ("Courts in the Second Circuit also look to the expectations of creditors with regard to the location of a debtor's COMI.").)

Courts typically examine a debtor's COMI as of the date of the chapter 15 petition, rather than the date of the commencement of the foreign proceeding (see *In re Fairfield Sentry Ltd.*, 714 F.3d at 133; *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1025 (5th Cir. 2010); *Beveridge v. Vidunas (In re O'Reilly)*, 598 B.R. 784, 80003 (Bankr. W.D. Pa. 2019)). However, courts "may also look at the time period between the initiation of the [foreign proceeding] and the filing of the chapter 15 petition" (*In re Fairfield Sentry Ltd.*, 714 F.3d at 133). Applying this analysis, courts have rejected attempts by debtors and creditors to shift the debtor's COMI based on findings of manipulation and bad faith (see *In re Creative Fin. Ltd.*, 543 B.R. 498, 513, 523 (Bankr. S.D.N.Y. 2016) (finding debtors guilty of bad faith for, among other things, filing voluntary insolvency proceedings in the British Virgin Islands to thwart an impending UK judgment)).

Bankruptcy courts in the SDNY have held that the existence of ongoing judicial restructuring proceedings is an important factor supporting COMI in the country where those proceedings are occurring, even if a debtor previously conducted all activities elsewhere (see *In re Suntech Power Holdings Co.*, 520 B.R. at 417 (finding COMI shifted to Cayman Islands from China as a result of Cayman scheme restructuring proceeding); *In re Culligan Ltd.*, 2021 WL 2787926, at *13 (Bankr. S.D.N.Y. July 2, 2021) (finding Bermuda COMI because Bermuda restructuring proceeding made Bermuda law "applicable with respect to any disputes arising with respect to [that proceeding]")). Notably, Chief Judge Glenn recently concluded that the absence of a court-supervised fiduciary (and its accompanying supervision of the foreign proceeding in the jurisdiction of the asserted COMI) does not preclude a finding of COMI in the jurisdiction of the foreign proceeding (see *In re Modern Land (China) Co., Ltd.*, 641 B.R. at 783, 789 ("While this would be an easier case if JPLs had been appointed . . . the Cayman court's supervision of the [scheme proceeding], in light of the other factors present here, is enough for the Court to conclude that the Debtor's COMI for the proceeding . . . was in the Cayman Islands.")).

Provisional Relief

A US bankruptcy court may enter an order recognizing a foreign proceeding only after notice and a hearing (§ 1517(a), Bankruptcy Code). The notice period must be at least 21 days (Fed. R. Bankr. P. 2002(q)). By default, there is no stay applicable in the US under chapter 15 during the period between filing the chapter 15 petition and entry of the recognition order.

Accordingly, debtors often seek interim relief or provisional relief, to protect the debtor and its assets within the US from, among other things, destruction of value caused by collection or enforcement efforts of creditors before the entry of the recognition order. The Bankruptcy Code authorizes a bankruptcy court to grant certain relief on a provisional basis where this relief is urgently needed to protect the assets of the debtor or the interests of the creditors. This relief includes:

- Staying execution against the debtor's assets.
- Entrusting the administration of all or part of the debtor's assets within the territorial jurisdiction of the US to a foreign representative or other court-authorized person, such as an examiner, to protect and preserve the value of assets that are perishable, susceptible to devaluation, or otherwise in jeopardy.
- Any relief available under, among other provisions, certain subsections of section 1521(a) of the Bankruptcy Code, including section (a)(4), which provides for the examination of witnesses and taking of evidence.

(§ 1519(a), Bankruptcy Code.)

A provisional stay is appropriate where the foreign representative can satisfy the standard for injunctive relief (§ 1519(e), Bankruptcy Code). Specifically, this

standard is met where the foreign representative demonstrates that:

- There is a likelihood of success on the merits (for example, the request for recognition).
- There is an imminent [threat of] irreparable harm to the debtor if the preliminary injunction is not issued.
- The balance of harms tips in favor of the moving party.
- The public interest weighs in favor of an injunction.

(*In re Andrade Gutierrez Engenharia S.A.*, 645 B.R. 175, 181 (Bankr. S.D.N.Y. 2022) (citing *In re Lyondell Chem. Co.*, 402 B.R. 571, 58889 (Bankr. S.D.N.Y. 2009)).)

Unless extended under section 1521(a)(6) of the Bankruptcy Code, provisional relief terminates when the court grants the petition for recognition. Accordingly, in addition to meeting the standard set out in section 1519 of the Bankruptcy Code, a foreign representative often seeks to demonstrate that provisional relief meets the standard for discretionary relief set out under section 1521 (see Discretionary Relief Under Section 1521).

Enforcement of Foreign Insolvency Plans and Other Foreign Insolvency-Related Judgments in a Chapter 15 Case

In general, upon recognition of a foreign proceeding, a foreign representative may request additional relief, including recognition and enforcement of a foreign plan or other foreign insolvency-related order, under sections 1521 and 1507 of the Bankruptcy Code (see *In re PT Bakrie Telecom Tbk*, 628 B.R. 859, 876 (Bankr. S.D.N.Y. 2021)).

Discretionary Relief Under Section 1521

Section 1521 of the Bankruptcy Code allows the court, "where necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors," to "grant any appropriate relief," including a non-exhaustive list of seven forms of relief (§ 1521(a), Bankruptcy Code). Relief under section 1521 may be granted "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected" (§ 1522(a), Bankruptcy Code). Sufficient protection embodies three basic principles:

- The just treatment of all holders of claims against the bankruptcy estate.
- The protection of US claimants against prejudice and inconvenience in the processing of claims in the foreign proceeding.
- The distribution of proceeds of the foreign estate substantially in accordance with the order prescribed by U.S. law.

(see *In re PT Bakrie Telecom Tbk*, 628 B.R. at 876 (internal citations omitted).)

The court's discretion to award discretionary relief under section 1521 is "exceedingly broad, since a court may grant any appropriate relief that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors" (*In re Avanti Commc'ns Grp. PLC*, 582 B.R. at 612). Section 1521(a) sets out a non-exclusive list of this relief, which may include, among other things:

- Staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations, or liabilities to the extent not already stayed under section 1520(a).
- 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 US to the foreign representative or another person authorized by the court.
- Extending of any provisional relief granted under section 1519(a).
- Granting any additional relief that may be available to a trustee, subject to certain exceptions.

Additional Assistance Under Section 1507

Section 1507 of the Bankruptcy Code allows the court to "provide additional assistance to a foreign representative" (§ 1507(a), Bankruptcy Code). Before providing additional assistance, the court must consider whether this assistance will reasonably assure:

- Just treatment of all holders of claims against or interests in the debtor's property.
- Protection of claim holders in the US against prejudice and inconvenience in the processing of claims in such foreign proceeding.
- Prevention of preferential or fraudulent dispositions of property of the debtor.
- Distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by the Bankruptcy Code.
- If appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

(§ 1507(b), Bankruptcy Code.)

Courts have routinely held that they may grant recognition and enforcement of an order approving a plan in a foreign proceeding under either section 1521 or section 1507 of the Bankruptcy Code (see *In re Rede Energia S.A.*, 515 B.R. 69, 93 (Bankr. S.D.N.Y. 2014); see also *In re Agrokor d.d.*, 591 B.R. 163, 189 (Bankr. S.D.N.Y. 2018) ("As with section 1521, relief under section 1507 may include recognition and enforcement of a plan approved by a foreign court.")). And US bankruptcy courts routinely extend comity to foreign court orders endorsing plans of reorganization, declining to do so only when enforcement would "prejudice the rights of United States citizens or violate domestic public policy," (*In re Oi S.A.*, 587 B.R. 253, 264 (Bankr. S.D.N.Y. 2018) and see Public Policy Exception to Relief Requested in a Chapter 15 Case).

Procedure for Enforcing Foreign Plans or Other Discretionary Relief in a Chapter 15 Case

A foreign representative seeking discretionary relief upon recognition of a foreign proceeding (including recognition and enforcement of a foreign plan or foreign insolvency-related order) must file a motion seeking the relief. The motion or accompanying declaration should attach certified copies of all applicable orders in the foreign proceeding, such as the order of the foreign court approving the foreign plan. A declaration of the foreign law expert generally accompanies the motion (see Foreign Law Expert's Declaration). If the foreign representative is seeking recognition and enforcement of a foreign plan, this declaration will typically describe any meetings of creditors, voting results, and proceedings in the foreign court regarding approval of the plan. A foreign representative may seek to enforce an approved foreign plan concurrently with the petition seeking recognition of a foreign proceeding or may instead seek this relief separately.

Enforcement of Foreign Insolvency-Related Orders Outside of a Chapter 15 Case

Courts vary across jurisdictions within the US regarding the applicable standard for recognition and enforcement of insolvency-related orders of foreign courts. The majority rule requires the pendency of a chapter 15 proceeding before extending comity to a foreign insolvency-related decision or proceeding (see *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 334 (Bankr. S.D.N.Y. 2008) ("Requiring recognition as a precondition to nearly all court access and consequently as a condition to granting comity distinguishes chapter 15 from its predecessor section 304."); see also *HFOTCO LLC v. Zenia Special Mar. Enter.*, 2021 WL 2834687, at *4 (S.D. Tex. July 7, 2021) ("It is clear from the structure of chapter 15 that recognition is a prerequisite to obtaining comity from any U.S. court with respect to foreign insolvency proceedings."); *United States v. J.A. Jones Constr. Grp.*, 333 B.R. 637, 639 (E.D.N.Y. 2005) ("In the absence of recognition under chapter 15, this Court has no authority to consider Mr. Breton's request for a stay.")).

However, some courts have departed from this majority rule, recognizing foreign insolvency-related orders even without a pending chapter 15 proceeding (see *Moyal v. Münsterland Gruppe GmbH & Co.*, 539 F. Supp. 3d 305, 309 n.1 (S.D.N.Y. 2021) ("Plaintiff's suggestion that the insolvency trustee appointed under German law should have commenced a proceeding in U.S. bankruptcy court under chapter 15 of the Bankruptcy Code to seek a stay of this action in the District Court is absurd and would fly in the face of comity principles."); *EMA GARP Fund v. Banro Corp.*, 2019 WL 773988, at *5 (S.D.N.Y. Feb. 21, 2019) (describing as "irrelevant to this Court's comity determination" the fact that defendants in a federal securities lawsuit, and debtors in a CCAA proceeding, "did not file a recognition proceeding in U.S. court"); 8 Collier on Bankruptcy ¶ 1509.02 (16th ed. 2022) (explaining that "courts regularly rule that chapter 15 recognition is not a prerequisite to grant comity to foreign proceedings on the request of a party other than a foreign representative")). More generally, 28 U.S.C. § 1782 authorizes the district court "of the district in which a person resides or is found" to order such person to give testimony or produce a document for use in a foreign proceeding, irrespective of whether a chapter 15 proceeding is pending.

In 2018, UNCITRAL published the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (IRJ Model Law) (see UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)). The IRJ Model Law is meant to complement the existing Model Law by creating a framework for recognition and enforcement of insolvency-related judgments in foreign insolvency proceedings. To date, the US has not adopted the IRJ Model Law, nor does the US have a uniform federal statute governing the enforcement of foreign judgments more generally.

Public Policy Exception to Relief Requested in a Chapter 15 Case

A public policy exception under section 1506 of the Bankruptcy Code applies not only to the recognition and enforcement of plans approved by foreign courts,

but to all relief granted in a chapter 15 case. Courts narrowly construe the public policy exception. For the exception to apply, the relief requested must be "manifestly contrary to the public policy of the United States," and the legislative history accompanying the enactment of chapter 15 emphasized that "the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States" (*In re PT Bakrie Telecom*, 628 B.R. at 890 (emphasis in original)). Even the "absence of certain procedural or constitutional rights will not itself" trigger application of the exception, as the "relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical" (*In re PT Bakrie Telecom*, 628 B.R. at 891; see also *Muscletech Rsch. & Dev. Inc. v. Aguilar (In re Ephedra Prods. Liab. Litig.)*, 349 B.R. 333, 335-37 (S.D.N.Y. 2006) (recognizing and enforcing a Canadian claims resolution procedure even though it arguably denied US citizens their constitutional right to a jury trial)).

Moreover, courts view the exception in light of one of the fundamental goals of the Bankruptcy Code: the centralization of disputes involving the debtor (see *In re Atlas Shipping A/S*, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009) ("American courts have long recognized the need to extend comity to foreign bankruptcy proceedings, because the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganization would fail" (internal citations omitted); see also *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005) ("We have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding.")).

Upcoming Developments

Several developments over the course of the year ahead may impact recognition of foreign proceedings and related relief under chapter 15. This year's developments reflect tensions that inflation, supply chain disruption, and other looming economic factors, coupled with recent legal reforms, could exert on the modified universalist approach to recognition and enforcement of insolvency-related judgments in foreign insolvency proceedings (see Bernstein, Preface).

Relative Priority

The introduction of the European Restructuring Directive (EU Directive) was a step towards harmonization of cross border insolvency regimes in the European Union (EU) (see Bernstein, Preface (internal citations omitted)).

Each EU member state was required, by July 2021, to implement the EU Directive, which was largely inspired by chapter 11 of the Bankruptcy Code (see Bernstein, Preface). However, while the EU Directive provides for cross-class cramdown concerning dissenting classes of creditors, in its final form it did not mandate adoption of the absolute priority rule, a hallmark creditor protection afforded in a US chapter 11 case (Article 11, EU Directive).

The absolute priority rule requires that dissenting voting classes be satisfied in full before a junior class can receive any consideration under a chapter 11 plan of reorganization (§ 1129(b)(2), Bankruptcy Code). The EU Directive, on the other hand, permits the adoption of an alternative "relative priority rule." The relative priority rule requires only that a dissenting class be treated at least as favorably as any other class of the same rank and more favorably than any junior class (see Letter from Prof. dr. R.J. de Weijs, University of Amsterdam, Department of Private Law, to the Legal Affairs Committee of the European Parliament (March 20, 2019)); see also Article 11, EU Council Directive 2019/1023, 2019 O.J. (L 172) 18, 45 (Member States must ensure a restructuring plan is not approved unless "it ensures that dissenting voting classes of affected creditors are treated at least as favorably as any other class of the same rank and more favorably than any junior class")).

European jurisdictions have implemented the cross-class cramdown provisions of the EU directive in a variety of ways that reflect relative rather than absolute priority. Law reforms permitting cross-class cramdown that arguably depart from the absolute priority rule have also been adopted in the UK and Singapore (see Corporate Insolvency and Governance Act 2020, c. 12, § 901, sch. 9 (Eng.); Insolvency, Restructuring and Dissolution Act 2018, § 70 (Sing.)).

Under the cross-class cramdown concept adopted in the EU Directive, a restructuring plan may, under some circumstances, provide junior classes (including existing equity) with value, even when a dissenting senior class or classes are not being paid in full (in money or money's worth) under the plan.

This result could be viewed as a departure from US public policy as reflected in the priority of distribution of the debtor's estate in a reorganization under chapter 11. It also could call into question whether creditors are being sufficiently protected in the foreign proceedings within the meaning of chapter 15 (§§ 1506, 1507(b)(4), 1522(a), Bankruptcy Code). It remains to be seen how US courts will react to plans that allow for this treatment when recognition and enforcement is sought, especially if US creditors object to cross-class cramdowns involving material departures from the absolute priority rule.

The *Gibbs* Rule vs. Modified Universalism

Chief Judge Glenn's decision in the *In re Modern Land (China) Co., Ltd.* chapter 15 case, which was published in July of 2022, is also noteworthy. The court held that, if a foreign court "properly exercises jurisdiction over the foreign debtor in an insolvency proceeding, and the foreign court's procedures comport with broadly accepted due process principles, a decision of the foreign court approving a scheme or plan that modifies or discharges New York law governed debt is enforceable" (*In re Modern Land (China) Co., Ltd.*, 641 B.R. at 776). This holding is in distinct contrast to England's *Gibbs* rule. The *Gibbs* rule is based on an 1890 decision of England's Court of Appeal in *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Metaux* (1890) 25 QBD 399 and was recently reaffirmed by England's Court of Appeal in *Gunel Bakhshiyeva (in her capacity as the Foreign Representative of The OJSC Int'l Bank of Azer.) v. Sberbank of Russ. & 6 Ors* [2018] EWHC 59 (Ch).

Under the *Gibbs* rule, UK courts will not recognize or enforce "a discharge or modification of English law governed debt approved by a court outside of England" (*In re Modern Land (China) Co., Ltd.*, 641 B.R. at 777 n.4). The rule would appear to reject the ability of English courts, under England's version of the UNCITRAL Model Law, to recognize the binding effect of restructurings approved in foreign main proceedings under the insolvency laws of other jurisdictions (for example, in a chapter 11 case in the US) concerning debt of the foreign debtor governed by English law. This result threatens the modified universalist approach of the UNCITRAL Model Law, which, as a general matter, strongly favors recognition and enforcement of foreign main proceedings.

Chief Judge Glenn's decision in *In re Modern Land (China) Co., Ltd.* was a response to a decision of the High Court of the Hong Kong Special Administrative Region Court of First Instance (HK High Court).

Like UK courts, Hong Kong courts also follow the *Gibbs* rule. The HK High Court stated in dicta that, following the *Gibbs* rule, it is "reasonable to assume" under US law that recognition under chapter 15 of a foreign restructuring of New York law governed debt does not discharge that debt (see *Re Rare Earth Magnesium Tech. Grp. Holdings Ltd.* [2022] HKCFI 1686). Notably, in contrast to Hong Kong, the commercial court in Singapore has rejected application of the *Gibbs* rule (see *Pac. Andes Res. Dev. Ltd.* [2016] SGHC 210).

It remains to be seen whether England and other jurisdictions that currently follow the *Gibbs* rule will shift course in response to the criticism of *Gibbs*. This criticism includes that the rule is anachronistic and contrary to the intent of the parties to 21st-century contracts, the assumption being that these parties want the modified universalist approach of the UNCITRAL Model Law to govern the recognition of insolvency proceedings and judgments.

In the interim, holders of debt governed by the law of *Gibbs jurisdictions* may try to take advantage of *Gibbs* by holding out in restructurings approved in foreign main proceedings, thereby forcing the commencement of costly confirmatory proceedings in jurisdictions that continue to follow *Gibbs*.

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