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# Whether Foreign Avoidance Claims May Be Asserted Under Chapter 15

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## Introduction

Chapter 15 was added to title 11 of the Bankruptcy Code in 2005, replacing former Section 304 as the Bankruptcy Code's operative provision for dealing with cross-border insolvencies.[1] Chapter 15 may be utilized by a foreign representative seeking assistance in U.S. courts in connection with a foreign proceeding.[2] A foreign representative commences a chapter 15 case by filing a petition for recognition of the foreign proceeding in which the representative has been appointed.[3]

After obtaining recognition, a foreign representative has the right to sue and be sued in the United States and may apply directly to a U.S. court for appropriate relief.[4] A foreign representative may be entitled to mandatory relief under section 1520 and may also implore the

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[1] United States v. J.A. Jones Constr. Grp., LLC, 333 B.R. 637, 638 (E.D.N.Y. 2005); *In re* Atlas
[2] *See* 11 U.S.C. § 1501(b)(1) (2012). Assistance may also be sought by foreign courts, foreign creditors, and other interested foreign parties.
[3] *Id.* §§ 1504, 1515; *see also In re* Atlas Shipping A/S, 404 B.R. at 738 (noting that recognition of a foreign proceeding turns on the "objective criteria" in § 1517).
[4] *See* 11 U.S.C. § 1509(b)(1), (b)(2); *see also* 11 U.S.C. § 1501(b)(3) (noting that the court "shall grant comity and cooperation" to foreign representatives who are granted recognition of foreign proceedings pursuant to § 1517).

court for discretionary relief under section 1521.[5] Importantly for the purposes of this article, the latter provision allows foreign representatives to pursue a wide range of litigation in the U.S., stating, "the court may, at the request of the foreign representative, grant any appropriate relief."[6]

Foreign representatives may assert foreign avoidance claims under section 1521 due to the fact that courts were empowered to grant such relief under chapter 15's predecessor, former section 304.[7] Additionally, a foreign representative may also be able to assert a foreign avoidance claim under section 1521.[8] However, this would likely be a rare situation for cases where relief is not available under section 1521 or under other applicable U.S. law.[9]

This article discusses chapter 15 law in the context of a 2015 decision by the Bankruptcy Court for the Southern District of New York, which held that foreign representatives may use chapter 15 to assert foreign avoidance claims under U.K. law.[10] To that effect, Part I will discuss how a foreign representative may use chapter 15 to pursue claims in U.S. courts. Part II will discuss how such a representative might pursue a foreign avoidance claim under the discretionary relief provision of section 1521. Part III will examine the as yet undeveloped potential for foreign avoidance claims to proceed under the additional assistance provision of section 1507. Part IV will then examine the result reached in 2015 by the court in the case of *In re Hellas*.[11]

## I. Chapter 15 Allows Foreign Representatives to Pursue Claims in U.S. Courts

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[5] *In re* Atlas Shipping A/S, 404 B.R. at 739.
[6] *See* 11 U.S.C. § 1521(a).
[7] Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB De CV (*In re* Vitro SAB De CV), 701 F.3d 1031, 1056-57 (5th Cir. 2012).
[8] *Id.*
[9] *Id.*
[10] Hosking v. TPG Capital Mgmt., L.P. (*In re Hellas Telecomms. (Lux.) II SCA*), 535 B.R. 543, 568-569 (Bankr. S.D.N.Y. 2015).
[11] *Id.* at 543.

Chapter 15 is an implementation of the Model Law on Cross-Border Insolvency that was propagated by the United Nations Commission on International Trade Law ("UNCITRAL").[12] The propagation of the UNCITRAL Model Law is part of an effort by the United States and other countries to create a uniform, global insolvency system that facilitates judicial cooperation and commercial predictability.[13] Accordingly, chapter 15 provides courts with broad, flexible rules to fashion relief in accordance with the chapter's stated goals of promoting certainty and the effective resolution of cross-border insolvencies.[14]

To assert a foreign avoidance claim in the U.S., a foreign representative must first commence an ancillary proceeding before the Bankruptcy Court seeking recognition of the foreign proceeding in which the representative has been appointed.[15] Following recognition, wide relief is available to the foreign representative, consistent with chapter 15, as noted in section 1509.[16] Post-recognition, a foreign representative is authorized under section 1509 to sue or be sued in a U.S. court.[17]

Significantly, a foreign representative may apply directly to a U.S. court for appropriate relief and is entitled under section 1509(b) to receive comity and cooperation from that court.[18] Analytically, a foreign representative seeking to assert a foreign avoidance claim may apply for such relief under section 1521(a)(7) as was held in the subsequently discussed decisions of *In re*

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[12] *See* Tacon v. Petroquest Res. Inc. (*In re Condor Ins. Ltd.*), 601 F.3d 319, 321 (5th Cir. 2010).
[13] *Id.* at 321-22; *see also* § 1501(a)(1), (2).
[14] *In re* Rede Energia S.A., 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014); *see also* 11 U.S.C. § 1501(a)(1)—(5).
[15] 11 U.S.C. §§ 1504, 1515.
[16] *See generally* § 1509(b).
[17] *Id.*; *see also In re* Atlas Shipping A/S, 404 B.R. at 738.
[18] *See* § 1509(b); *In re* Atlas Shipping A/S, at 738 (noting that "comity and cooperation" language in § 1509(b) is also mentioned in § 1507).

*Hellas* and *In re Condor*.[19] Additionally, when not available under section 1521, such relief might alternatively be available under section 1507.[20] However, no court has yet utilized section 1507 to grant relief to a foreign avoidance claim made by a foreign representative.[21]

## II. A Foreign Representative May Pursue Foreign Avoidance Claims Under Section 1521

Because foreign representatives could assert foreign avoidance claims under former Section 304, such claims may be asserted under section 1521.[22] This is because when interpreting chapter 15, courts presume that Congress intended no changes by virtue of its amendments to the Bankruptcy Code and will interpret chapter 15 consistent with former Section 304 unless the text of the chapter specifically contradicts such a reading.[23] This was the approach utilized by the 5th Circuit in the 2010 case of *In re Condor*, the first decision to hold that foreign representatives may assert foreign avoidance claims under chapter 15.[24]

### A. In re Condor: Allowing Foreign Avoidance Claims Under Section 1521

In *In re Condor,* the court determined whether section 1521 authorizes a court to grant relief to a foreign representative who brings a foreign avoidance claim in a chapter 15 ancillary proceeding.[25] Specifically, the court addressed the language of section 1521(a)(7), which further

[19] *In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. at 586-87; *In re Condor Ins. Ltd.*, 601 F.3d at 329.
[20] *In re* Rede Energia S.A., 515 B.R. at 90-91.
[21] *See In re* Condor Ins. Ltd., 601 F.3d at 325; *In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. at 586 n.34 (mentioning, in both cases, the relief available under § 1507, though not using that section to grant relief in the case at hand).
[22] *In re* Hellas, 535 B.R. at 586-87; *In re* Condor Ins. Ltd., 601 F.3d at 329 (holding, in both cases, that foreign avoidance claims may be asserted by foreign representatives under §1521(a)(7).
[23] *See supra* note 10.
[24] *See generally In re* Condor Ins. Ltd., 601 F.3d at 320; *see also In re* Fairfield Sentry, Ltd., 458 B.R. 665, 681–82 (Bankr. S.D.N.Y. 2011).
[25] *Id.* at 321. As far as one's research indicates, the 5th Circuit was the first Appellate court to consider this question. *See In re* Atlas Shipping A/S, 404 B.R. at 743; *In re* Fairfield Sentry, Ltd.,

defines "appropriate [post-recognition] relief" to include "any additional relief that may be available to a trustee, except for relief available under certain stated sections of title 11.[26] Because all the excepted sections involved avoidance claims that may be brought under U.S. law, the court concluded that Congress did not also intend to except avoidance claims brought under foreign law.[27] After all, *expressio unius est exclusio alterius* (the expression of the one is the exclusion of the other).[28]

Moreover, the court in *In re Condor Ins. Ltd.* found that its statutory construction result was supported by case law under former section 304.[29] In the 1987 case *In re Metzeler*, the Bankruptcy Court for the Southern District of New York held that foreign avoidance claims could be asserted by foreign representatives in ancillary proceedings under former Section 304.[30] The *Metzeler* court also rejected previous authority that had held that avoidance claims under U.S. law were permissible in Section 304 ancillary proceedings.[31] According to the *Condor* court, Congress's enactment of chapter 15, then, essentially codified the view expressed in *Metzeler*[32] by specifically excluding foreign representatives from bringing U.S. avoidance claims in chapter 15 ancillary proceedings, while not specifically excluding representatives from bringing avoidance claims based on applicable foreign law.[33] Thus, the 5th Circuit concluded

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458 B.R. at 681 (noting that *In re Condor* is the first reported case to deal with the application of foreign avoidance law to a chapter 15 ancillary proceeding).
[26] *In re* Condor Ins. Ltd., 601 F.3d at 322-23; *see also* 11 U.S.C. § 1521(a), (7).
[27] *Id.* at 323-24.
[28] *Id.* at 324.
[29] *Id.* at 328.
[30] *In re* Metzeler, 78 B.R. 674, 677 (Bankr. S.D.N.Y. 1987).
[31] *Id.; c.f. In re* Axona Int'l Credit & Commerce, Ltd., 88 B.R. 597, 607 n.17 (Bankr. S.D.N.Y. 1988)(citing holdings inimical to *Metzeler* such as *In re* Trakman, 33 B.R. 780, 783 (Bankr. S.D.N.Y. 1983); *In re* Egeria Societa Per Azioni Di Navigazione, 26 B.R. 494, 497 (Bankr. E.D. Va. 1983); *In re* Comstat Consulting Services Ltd., 10 B.R. 134, 135 (Bankr. S.D. Fla. 1981)).
[32] *See In re* Condor Ins. Ltd., 601 F.3d at 324, 329.
[33] *See id.*

that because Congress had not specifically contradicted and had in fact specifically reaffirmed *Metzeler* by virtue of the wording of section 1521(a)(7), it could not be said that a foreign representative is barred from bringing a foreign avoidance claim in a chapter 15 ancillary proceeding.[34]

B. In re Fairfield Sentry: Requiring U.S. Based Assets for Foreign Avoidance Claims

A year after *In re Condor* was decided, the District Court for the Southern District of New York, in *In re Fairfield Sentry,* held that consistent with case law under former section 304, foreign avoidance claims may be made under section 1521(a)(7) when the assets sought are located within the jurisdiction of the United States.[35] According to the court, because chapter 15 ancillary proceedings are fundamentally *in rem* proceedings, foreign avoidance claims seeking assets not located in the United States are pointless and will fail for lack of jurisdiction.[36]

## III. A Foreign Representative May Also Pursue Foreign Avoidance Claims Under Section 1507

The provisions of section 1507, though potentially applicable to foreign avoidance claims made by foreign representatives, must not be treated as interchangeable with section 1521.[37] Only if a court concludes that relief is not available to a foreign representative under a section 1521, an inquiry determined by reference to whether such relief was available under former Section 304, should the court consider determining whether relief is proper under the "additional

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[34] *Id.* at 328-29; *see also In re* Aerovias Nacionales De Columbia S.A. Avianca, 303 B.R. 1, 16 (Bankr. S.D.N.Y. 2003); *In re* Griffin Trading Co., 270 B.R. 883, 893 (Bankr. N.D. Ill. 2001) (favorably citing *Metzeler*); Petition of Kojima, 177 B.R. 696, 703 n.35 (Bankr. D. Colo. 1995) (permitting avoidance action under Japanese law pursuant to Section 304); *In re* Lines, 81 B.R. 267, 270 (Bankr. S.D.N.Y. 1988); *In re* Tarricone, Inc., 80 B.R. 21, 23-24 (Bankr. S.D.N.Y. 1987).

[35] *In re* Fairfield Sentry, Ltd., 458 B.R. at 681-82 (noting, *inter alia,* that the 5th Circuit case of *In re Condor Ins. Ltd.* is the only reported case dealing with the application of foreign avoidance law in a chapter 15 ancillary proceeding).

[36] *Id.* at 682.

[37] *See In re* Vitro SAB De CV, 701 F.3d at 1054.

assistance" provision of section 1507.[38] Even so, after determining relief is unavailable to a foreign representative, a court should first consider whether the requested relief would be otherwise available under U.S. law.[39] Only if relief is unavailable under both section 1521 and other applicable U.S. law, should a court consider section 1507.[40]

The relief available under section 1507 is, by nature, more extraordinary than that relief available under section 1521, and thus requires a more stringent test for it to be made available.[41] Though the relief provided for in section 1507 is a "catch-all" to fill gaps which may appear in a court's equitable remedy-making, it should not be used by courts as a substitute for or end-run around the provisions of section 1521.[42] However, whether courts will engage in such behavior remains an unsettled matter.[43] Notably, the aforementioned case of *In re Condor* and the subsequently discussed case of *In re Hellas* did not use section 1507 as a basis to permit the suit at hand could proceed.[44]

## IV. In re Hellas: Chapter 15 Allows for Claims Under U.K. Insolvency Law

In *In re Hellas,* the Bankruptcy Court for the Southern District of New York was the second to issue a decision holding that foreign representatives may bring foreign avoidance claims under chapter 15.[45] In *In re Hellas*, the plaintiff-debtor's foreign representatives commenced their chapter 15 ancillary proceeding by filing a petition for recognition of a foreign

[38] *Id.*
[39] *Id.* at 1057 (citing *In re* Artimm, 335 B.R. at 160 n. 11).
[40] *See In* re Vitro SAB De CV, 701 F.3d at 1057.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *See In re* Condor Ins. Ltd., 601 F.3d at 325; *In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. at 586 n.34.
[45] *See In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. at 555-56, 567, 568.

main proceeding, which was granted by the court in 2012.[46] The plaintiff's complaint sought to avoid a series of transfers involving up to 1.57 billion euros, which were ultimately made to the original defendants.[47]

Subsequently, in 2015, the plaintiff attempted to amend its original complaint to include, *inter alia,* a fraudulent transfer claim grounded in Section 423 of the U.K. Insolvency Act of 1986 (the "UK Insolvency Act").[48] In analyzing this claim, the court adopted the 5th Circuit's holding in *In re Condor* that section 1521(a)(7) does not preclude foreign representatives from asserting foreign avoidance claims.[49] It should be noted that in 2009 in *In re Atlas Shipping*, Hon. Martin Glenn (the presiding judge in *In re Hellas*) considered but did not decide the question of whether section 1521(a)(7) precludes avoidance claims made under foreign law.[50] Moreover, in *Atlas Shipping*, Judge Glenn criticized a holding of the Southern District of Mississippi that was overturned one year later by the 5th Circuit in 2010.[51]

Thus, it is hardly surprising that Judge Glenn ruled in *In re Hellas* that the court was not precluded by chapter 15 from adjudicating foreign avoidance claims such as the one made by the plaintiff pursuant to Section 423 of the UK Insolvency Act.[52] Bereft of this defense, the defendants were forced to claim that the court lacked subject matter jurisdiction to grant relief under the instant claim, a type of argument that successfully raised by the defendants in *In re Fairfield Sentry Ltd*.[53] To that effect, defendants pointed to a 2008 decision by the Northern

[46] *Id.* at 555-56
[47] *Id.* at 556.
[48] *Id.* at 552-53.
[49] *Id.* at 568
[50] *See In re* Atlas Shipping A/S, 404 B.R. at 744.
[51] *Id.* at 743-44.
[52] *See In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. at 568.
[53] *Id.* at 552, 562; *see also In re* Fairfield Sentry, Ltd., 458 B.R. at 682.

District of California which held that only the High Court of England and Wales is empowered to grant relief under Section 423, a result apparently commanded by the language of 423(4).[54]

However, the *In re Hellas* court found that Section 423(4) of the UK Insolvency Act was merely a procedural venue provision governing where a 423 claim may be brought in the U.K., a conclusion, which the Northern District's decision had not addressed.[55] While U.S. courts are bound to follow U.K. substantive law when adjudicating matters such as the plaintiff's 423 claims, they are not bound to follow U.K. procedural law such as 423(4).[56] Nevertheless, even if 423(4) is exclusively a jurisdictional provision as defendants' claimed, the court would still not be bound to enforce such a provision.[57]

Indeed, even if Section 423(4) of the UK Insolvency Act was an exclusive jurisdiction provision, it would conflict with the UNCITRAL Model Law, as codified by the United States and the U.K.[58] In relevant part, the U.K. version of the Model Law provides that "[a] British insolvency officeholder is authorized to act in a foreign State on behalf of a proceeding under

[54] *See In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. at 564 (discussing defendants' reliance on Sunnyside Development Company LLC v. Cambridge Display Technology Limited, 2008 U.S. Dist. LEXIS 74850, 2008 WL 4450328 (N.D. Cal. 2008)).
[55] *See In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. at 565, 566.
[56] *Id.* at 566 (citing, e.g., Bournias v. Atl. Mar. Co., 220 F.2d 152, 154 (2d Cir. 1955)(noting "In actions where the rights of the parties are grounded upon the law of jurisdictions other than the forum, it is a well-settled conflict-of-laws rule that the forum will apply the foreign substantive law, but will follow its own rules of procedure.")).
[57] *In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. at 567 (citing, e.g., Randall v. Arabian Am. Oil Co., 778 F.2d 1146, 1152-53 (5th Cir. 1985) (refusing to enforce exclusive jurisdiction provision of Saudi Arabian labor law statute); Seismic Reservoir 2020, Inc. v. Paulsson, 785 F.3d 330, 334 (9th Cir. 2015) (holding that exclusive jurisdiction provision of Canadian statute did not divest the district court of jurisdiction to adjudicate claim alleged under such statute); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 91 ("A state may entertain an action even though the state of the applicable law has provided that action on the particular claim shall not be brought outside its territory.").
[58] *See In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. at 567-68.

British insolvency law, as permitted by the applicable foreign law."[59] Such an interpretation also conflicts with chapter 15, which must be applied consistent with the application of similar statutes adopted by foreign jurisdictions, such as the CBIR.[60]

Accordingly, the court in *In re Hellas* concluded that the defendants' jurisdictional claim must fail.[61] If the defendants were to succeed, the plaintiffs would have no other means to avoid the allegedly fraudulently transfers made to the defendants other than filing suit in the U.K. and hoping that personal jurisdiction of the defendants might be obtained in that forum.[62] Such a result would be one that the implementation of the UNCITRAL Model Law in the U.S. and U.K. was expressly intended to avoid.[63]

However, had the plaintiffs been forced to litigate in the U.K. and were able to overcome any personal jurisdiction issues, the result in the instant case would hardly change. Indeed, the applicable law would still be the same, that is, the U.K. Insolvency Act of 1986. Rather, the court in *In re Hellas* was concerned with promoting the stated goals of chapter 15 – legal certainty, fairness, and the effective resolution of cross-border insolvencies.[64] Chapter 15 was not passed to preclude plaintiffs from having to litigate in the U.K. because the United States doubts the fairness of the U.K. justice system, but rather so that U.K. and other foreign plaintiffs do not have to risk being unable to obtain legal redress for their claims because personal jurisdiction of an American defendant does not attach in their home country.[65]

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[59] *Id.*
[60] *See* 11 U.S.C. § 1508.
[61] *See In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. at 569.
[62] *Id.*
[63] *Id.; see also* 11 U.S.C. § 1501 (noting that the Model Law was implemented in order to promote, inter alia, greater cooperation and efficient administration of cross-border insolvencies, such as that present in *In re Hellas*.).
[64] *See In re* Vitro SAB De CV, 701 F.3d at 1043 (quoting § 1501(a)).
[65] *See id.; see also In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. at 569

## Conclusion

In sum, chapter 15 grants courts broad latitude and has been interpreted by several courts to permit foreign representatives to bring foreign avoidance claims. The courts that have allowed such claims have done so pursuant to section 1521(a), the portion of chapter 15 that authorizes courts to grant discretionary relief. It appears likely that this jurisprudential interpretation, which has only been addressed so far by the Fifth and Second Circuits, will continue to permeate into the rulings of other circuits. At the same time, it is possible that some courts may decide to grant relief to foreign avoidance claims under section 1507, which allows courts to grant assistance in addition to that which they may grant under section 1521. However, such a grant of relief is not likely to be a common occurrence.