2022

Chapter 15 Recognition is Necessary for Efficient and Consistent Cross-Border Proceedings

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2022 Volume XIV No. 6

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Cite as: *Chapter 15 Recognition is Necessary for Efficient and Consistent Cross-Border Proceedings*, 14 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 6 (2022).

Introduction

When Chapter 15 of title 11 of the United States Code (the "Bankruptcy Code") was adopted in 2005, it repealed the former section 304, which had often led to ad-hoc and inconsistent rulings for foreign debtors seeking assistance in U.S. bankruptcy courts.[1] The new Chapter was passed to achieve greater efficiency on a domestic scale, as well as the "fair and efficient administration of cross-border insolvencies" by promoting greater cooperation between U.S. and foreign courts.[2] For a foreign debtor to reap the benefits of this cooperation, a representative of the foreign bankruptcy proceeding must petition a U.S. bankruptcy court for an order of recognition.[3] While it has been understood by the overwhelming majority of courts that Chapter 15 recognition is the sole gateway for foreign debtors to initiate proceedings in the United States, some courts have recently held that recognition is not required.[4] This

[1] *See* Peter M. Gilhuly et al., *Bankruptcy Without Borders: A Comprehensive Guide to the First Decade of Chapter 15*, 24 AM. BANKR. INST. L. REV. 47, 48 (2016).
[2] 11 U.S.C. § 1501.
[3] *See* 11 U.S.C. § 1509.
[4] *See, eg.*, HFOTCO LLC v. Zenia Special Maritime Enterprise, No. H-19-3595, 2021 WL 2834687, at *4 (S.D. Tex. Jul. 7, 2021); *but see* Moyal v. Munsterland Gruppe GmbH & Co. KG, 539 F.Supp.3d 305, 309 (S.D.N.Y. May 17, 2021).

memorandum focuses on the divide among courts in interpreting Chapter 15. Part I describes the statutory background of Chapter 15 and the principle of comity. Part II examines the varying interpretations of Chapter 15 in relation to the statute's text and purposes.

Discussion

I. Chapter 15 Requirements for International Comity

Chapter 15 of the Bankruptcy Code applies whenever assistance from a U.S. bankruptcy court is sought in connection with a foreign insolvency proceeding.[5] Under section 1509, a foreign representative commences a Chapter 15 case by filing a petition for recognition of a foreign proceeding in accordance with section 1515's procedural requirements.[6] Once an order of recognition is granted, other sections of the Bankruptcy Code are triggered, including section 362, which imposes an automatic stay on all other actions pending against the debtor.[7]

Most notably, when a petition for recognition is granted, Chapter 15 states that the U.S. court "shall grant comity or cooperation to the foreign representative."[8] Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens."[9] Put simply, comity serves as a means for U.S. courts to defer to the orders of foreign bankruptcy courts and gives foreign debtors relief—provided the laws of the other country comport with the values of the U.S. legal system.[10] Although minor exceptions apply, it is generally understood that when foreign bankruptcy litigants are seeking relief on

[5] 11 U.S.C. 1501(b).
[6] 11 U.S.C. §1509.
[7] 11 U.S.C. § 1520(a)(1).
[8] 11 U.S.C. § 1509(b)(3).
[9] Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).
[10] *See* Allstate Life Ins. Co. v. Linter Crp. Ltd., 994 F.2d 996, 999 (2d Cir. 1993) (listing eight factors of procedural fairness to determine if a foreign bankruptcy proceeding aligns with U.S. bankruptcy objectives).

comity grounds (*i.e.*, seeking enforcement of an automatic stay from a foreign country), recognition is required.[11]

II. The Varying Interpretations of Chapter 15 Recognition

a. *The Vast Majority of Courts Have Interpreted Chapter 15 as Intending to Require Recognition Before Comity can be Granted*

Courts requiring recognition as a prerequisite to relief in the United States have relied upon the text as well as the purpose of Chapter 15 in order to support this interpretation.

First, the majority of courts reason that Chapter 15 unequivocally requires recognition, based on the statute itself. Section 1515 lays out the required, objective elements of an application for recognition, such as a certificate from the foreign court affirming the existence of such proceeding.[12] If recognition were not a prerequisite to comity, courts have noted, there would be no need for these requirements to be met from the outset.[13] For example, in *In re Ran*, Israeli debtor Lavie was denied comity because the court found that he did not have sufficient pre-petition economic presence in Israel, one of the requirements of an application for recognition under section 1515.[14] The court explained that the factual determination is the first step in a chain of mandatory steps that must be met for comity to be granted.[15] The court reasoned that this is due to the rigid structure of Chapter 15 that was intentional in its creation in order to remedy the problems of section 304.[16] Whereas section 304 relied heavily on judicial discretion to determine if comity was appropriate, Chapter 15 is based on objective criteria that

[11] *See* 1 COLLIER ON BANKRUPTCY ¶ 13.05 (16th 2021).
[12] 11 U.S.C. § 1515(b)(1).
[13] *See In re* Ran, 390 B.R. 257, 292 (Bankr. S.D. Tex. June 12, 2008) ("The plain language of Chapter 15 requires a factual determination with respect to recognition before principles of comity come into play.").
[14] *Id*. at 301–02.
[15] *See Id.* at 291.
[16] *Id.*

leads to more uniform results.[17] Therefore, the court concluded, "[b]y arguing comity without first satisfying the conditions for recognition, Lavie urges this court to ignore the statutory requirements of Chapter 15."[18] A recent decision from the Southern District of Texas, *HFOTCO LLC v. Zenia Special Maritime Enterprise*, similarly denied comity to a German company that failed to file an order of recognition, based on the construction of Chapter 15.[19] The Texas Court explained, "[i]t 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."[20]

Second, courts holding that recognition is a prerequisite to comity point to the purpose of Chapter 15: not only was it created to increase consistency in decisions, it was also intended to be the only way to commence a foreign insolvency proceeding in the U.S.[21] As one House Report from 2005 reads, "Congress intended that Chapter 15 be the 'exclusive door to ancillary assistance to foreign proceedings' with the goal of controlling such cases in one court. Requiring evidence of recognition assures adherence to the rule."[22] Chapter 15's predecessor, section 304, was not the exclusive means by which foreign representatives could commence a cross-border case, and did not require a singular venue.[23] As a result, foreign representatives were free to try their luck in a variety of U.S. courts to get their desired result.[24] As such, most courts have reasoned that at least one of the purposes of Chapter 15 is to prevent forum shopping through requiring the filing of a singular petition for recognition.[25] Otherwise,

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[17] *Id.*
[18] *Id.* at 292.
[19] *See* 2021 WL 2834687, at *4.
[20] *Id.*
[21] *In re* Loy, 380 B.R. 154, 165 (Bankr. E.D.Va. 2007) citing H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 110 (2005).
[22] *Id.*
[23] 8 COLLIER ON BANKRUPTCY ¶ 1509.02 (16th 2021).
[24] *Id.*
[25] *See, e.g.*, *In re* Bear Sterns, 389 B.R. 325, 333 (Bankr. S.D.N.Y. 2008) (noting that requiring Chapter 15 recognition as a precondition to comity is what "distinguishes Chapter 15 from its predecessor section 304").

> [p]arties would be free to avoid . . . the expert scrutiny of the bankruptcy court by applying directly to a state or Federal court unfamiliar with the statutory requirements. This section concentrates the recognition and deference process in one United States court, ensures against abuse, and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor.[26]

Accordingly, skipping over the recognition requirement would be directly at odds with both the text and purpose of Chapter 15.[27]

b. *A Select Number of Courts Have Relied on Common Law Principles of Comity and the Text of Chapter 15 to Grant Comity Without Recognition*

Despite the statutory text and purpose indicating that recognition is a prerequisite to comity, a small number of courts have interpreted Chapter 15 recognition as discretionary. Rather than decide if comity should be granted based on whether the debtor has met the objective requirements of section 1515, these courts have held that the comity determination should rest on principals of fairness.[28] In *Moyal*, when a German company sought to have its automatic stay honored by a U.S. bankruptcy court without first applying for recognition, the Southern District of New York granted comity, finding that such a ruling was appropriate because "the foreign proceedings [were] procedurally fair and . . . d[id] not contravene the laws or public policy of the United States."[29] The court agreed with the company that Chapter 15 does not preempt common law principles of comity, writing that requiring recognition first "is absurd and would fly in the face of comity principles."[30]

[26] H.R. Rep. No. 109-31(I), 110 (2005).
[27] *See In re* Ran, 390 B.R. at 292.
[28] *See, e.g.*, *Moyal*, 539 F.Supp.3d at 309.
[29] *Id.* (quoting JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 424 (2d Cir. 2005)).
[30] *Moyal*, 539 F.Supp.3d. at n.1.

Yet such an analysis seems to be directly at odds with the intent of Chapter 15. Procedural fairness was the main analysis used prior to the enactment of the statute (indeed, the only cases cited to in the *Moyal* opinion were pre-Chapter 15 cases) and requires the court to weigh several factors, such as whether creditors of the same class are treated equally in asset distribution and whether a foreign country's insolvency laws favor its own citizens.[31] This analysis is fact specific and much less structured than the rigid requirements of Chapter 15.[32] As a result, judges who rely on these factors rather than Chapter 15 to determine whether comity is appropriate are granted a wide amount of discretion.[33] The danger is that this wide amount of discretion can lead to inefficient and inconsistent rulings in foreign insolvency cases, reminiscent of section 304.[34]

Courts holding that recognition is not a prerequisite to comity have also pointed to the text of Chapter 15 for support. Under section 1509, Chapter 15 filings can only be made by someone who is a foreign representative—defined in section 101(24) of the Bankruptcy Code as "a person or body, including a person or body appointed on an interim basis, 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."[35] In *Trikona Advisers Ltd. v. Chugh*, for example, the Second Circuit Court of Appeals affirmed the decision to give collateral estoppel effect to the findings of a Cayman Islands court, even though recognition was never

[31] *See Allstate* 994 F.2d at 999.
[32] *See In re* Ran, 390 B.R. at 291.
[33] *See* EMA GARP Fund v. Banro Corp., No. 18 CIV. 1986, 2019 WL 773988, at *5 (S.D.N.Y. Feb. 2019) (writing that the court was "comforted" in its decision not to require an order of recognition because the foreign proceedings "satisf[ied] fundamental standards of procedural fairness").
[34] *See* Anthony Casey & Joshua Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 Emory Bankr. Dev. J. 463, 483 (noting that without recognition, conflicting proceedings might occur between or within countries and lead to inefficiency and forum shopping).
[35] 11 U.S.C. §1509; 11 U.S.C. § 101(24).

sought.[36] The court held that "no party to the district court proceeding is a 'representative' of a 'foreign proceeding,' as those terms are defined in 11 U.S.C. §101(24) and (23)," and that, therefore, recognition was unnecessary.[37] The *Moyal* court likewise relied on a similar argument, finding that MGKG's administrator, who was not named in the state suit against it, didn't qualify as a "foreign representative" so recognition wasn't necessary.[38] While a narrow reading of the statute may support this interpretation, the administrator in *Moyal* was appointed by a German bankruptcy court to handle the company's assets and claims against it—seemingly as much a foreign representative as any.[39] Therefore, some courts interpret Chapter 15 definitions narrowly in order to support granting comity without first ordering recognition.

Conclusion

There is ample evidence of legislative intent and textual support indicating that recognition under Chapter 15 is a mandatory prerequisite to comity; to hold otherwise would seem to defeat the very purpose of repealing section 304 in place of the more cohesive and structured Chapter 15. While questions of fairness regarding the laws of the foreign country should still be considered before comity is granted, this inquiry should be in combination with and not in place of, a debtor meeting the criteria for recognition. Otherwise, there is potential for degradation of Chapter 15 and its authority should this trend continue. Although courts finding that recognition is not necessary are in the clear minority, those that do so risk returning to the days of section 304 where foreign debtors could forum shop, bankruptcy rulings were inconsistent, and comity analyses were ad-hoc.

[36] 846 F.3d 22, 32 (2d Cir. 2017).
[37] *Id.* at 31.
[38] *See* Moyal F.Supp.3d at n.1.
[39] *Id.* at 307.