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Introduction

In our increasingly globalized world, cross-border insolvency proceedings brought under chapter 15 (herein “Chapter 15”) of title 11 of the United States Code (the “Bankruptcy Code”) are on the rise – with over 100 additional filings in 2020 alone.¹ Third-party releases are provisions in bankruptcy plans intended to release non-debtors (including shareholders, directors, officers, and affiliates) from claims creditors hold against other members of their class.² A third-party release can “act as a complete release, waiver, and discharge of that party . . . arising out of or in connection with the debtor and its plan of reorganization.”³ While the Bankruptcy Code does not expressly define or authorize third-party releases from foreign bankruptcies, Chapter 15 “is the exclusive door to ancillary assistance to foreign proceedings” seeking recognition and enforcement of foreign orders in the U.S.⁴

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⁴ See generally COLLIER ON BANKRUPTCY ¶ 1509.03 (16th ed. 2018) (quoting H.R. Rep. No. 109031(I), 110 (2005)).
As U.S. bankruptcy courts shape the parameters for enforcing foreign third-party releases with every Chapter 15 petition, one question arises: under what circumstances are these releases enforceable under Chapter 15? This memorandum examines this question in three parts. Part I analyzes the legal requirements to recognize, and criteria to enforce, foreign bankruptcy court orders under Chapter 15 and its subsumed principles of comity. Part II examines how bankruptcy courts construe these criteria through key cases involving the enforcement or refusal of foreign non-debtor third-party releases. Finally, Part III examines the public policy exception limiting the court’s level of discretion in these matters under section 1506 of the Bankruptcy Code.

I. Recognition and Enforcement of a Foreign Proceeding Under Chapter 15

a. Foreign Main and Nonmain Status

Under Section 1515 of the Bankruptcy Code, a Foreign Representative may petition a U.S. bankruptcy court to recognize and enforce a foreign proceeding on behalf of the debtor.\(^5\) The court may then review the petition and recognize the proceeding either as a (1) foreign main or (2) foreign nonmain case. Section 1502 defines a “foreign main proceeding” as “a proceeding pending in a country where the debtor has the center of its main interests” and a “foreign nonmain proceeding” as a “foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.”\(^6\) The Foreign Representative bears the burden to prove the proceeding meets the following Section 1517 requirements for recognition: (1) the proceeding fits the definition of foreign main or nonmain proceeding under Section 1502, (2) the Foreign Representative is a person or body, and (3) the petition follows the requirements under

\(^5\) See 11 U.S.C. §1515; 11 U.S.C. § 101(24) (defining “Foreign Representative” 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 a foreign proceeding”).

\(^6\) 11 U.S.C. §§ 1502 (4), (5).
Section 1515. While debtors in foreign main proceedings receive certain automatic protections unlike non-main proceedings, this difference “may not be material because the court has discretion to grant similar relief” either way.

b. Comity and Criteria to Enforce Foreign Third-Party Releases

While “recognition of foreign proceedings turns on the objective criteria under Section 1517, ‘relief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity.’” In fact, Section 1521(a) empowers the court to grant “any appropriate relief . . . where necessary to effectuate the purpose of [Chapter 15].” When such appropriate relief involves the enforcement of foreign bankruptcy orders, Section 1507(b) instructs the court to consider the following factors: (1) that all stakeholders are treated fairly, (2) that creditors are not prejudiced in recognizing and enforcing the foreign proceeding, (3) that the debtor’s assets are given no preference or fraudulent transfer, (4) that the debtor’s proceeds are distributed accordingly, and (5) that the debtor has the opportunity for a fresh start if circumstances permit. While no factor alone is dispositive, this criterion altogether gives the court “broad latitude to mold relief” on a case-by-case basis.

Central to enforcing foreign bankruptcy proceedings is the principle of international comity. 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, or of other persons who are under the protection of its laws.”  Chapter 15 was modeled after the Model Law promulgated by the United Nations Commission on International Trade Law (“UNCITRAL”) to better address cross-border insolvencies. Thus, Chapter 15 “provides courts with broad, flexible rules to fashion relief appropriate for effectuating its objectives”, i.e., relief that may include enforcing foreign third-party releases.

II. Enforcing Foreign Third-Party Releases Through Case Law

   a. Fair, Just, and Unprejudiced Treatment of Claimholders

   It is well established that the first and second factors of Section 1507(b), emphasizing (1) “just treatment of all holders of claims against or interests in the debtor’s property” and (2) their protection “against prejudice and inconvenience,” are essential to enforcing third-party releases from foreign bankruptcy proceedings. The first factor of “just treatment” is “generally satisfied upon a showing that the applicable [foreign] law ‘provides . . . a comprehensive procedure for the orderly and equitable distribution of [the debtor]’s assets among all of its creditors.’”

   For example, a Canadian proceeding affording its creditors “a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process” supported the enforceability of non-debtor releases that “treated all claimants . . . similarly” under Section 1507(b).

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14 In re Ran, 607 F.3d 1017, 1020 (5th Cir. 2010) (noting the Model Law’s purpose to encourage cooperation between foreign countries and the U.S.)
15 In re Vitro S.A.B. de CV, 701 F.3d 1031, 1053 (5th Cir. 2012).
16 11 U.S.C. §§1507(b)(1), (2); see In re Rede Energia S.A., 515 B.R. 69, 95 (Bankr. S.D.N.Y. 2014) (“Section 1507(b)(1) requires that additional relief only be granted if the just treatment of creditors is ensured.”)
17 In re Rede Energia S.A., 515 B.R. at 95 (citing In re Bd. of Dirs. of Telecom Arg., S.A., 528 F.3d 162, 170 (2d Cir. 2008)).
However, “a nonconsensual discharge of non-debtor guarantors” in a Mexican reorganization plan approved over the objection of creditors who were forcibly grouped “with insider voters” was found unenforceable by the Fifth Circuit Court of Appeals.\textsuperscript{19}

The second factor protecting claimholders from prejudice and inconvenience is satisfied when they “are given adequate notice of the timing and procedures for filing claims, and such procedures do not create additional burdens for a foreign creditor seeking to file a claim.”\textsuperscript{20} For example, the Southern District of New York Bankruptcy Court found no basis to “second-guess the decisions” of the Ontario Court of Appeals’ “fully litigated” and “carefully reasoned” approval of the third-party non-debtor release in \textit{Metcalfe}.\textsuperscript{21} However, an Indonesian proceeding failed to satisfy this factor where the record “contain[ed] no information about how [the] 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 the third-party release.”\textsuperscript{22}

\textbf{b. Valid and Reasonable Distribution of Debtor’s Property and Proceeds}

The third factor of Section 1507(b), protecting and preventing “preferential or fraudulent dispositions of property of the debtor,” is satisfied when legal representatives have the opportunity to challenge and avoid third-party transfers that threaten the status of creditors or the debtor’s estate.\textsuperscript{23}

Under the fourth factor of Section 1507(b), the bankruptcy court must consider whether the “distribution of proceeds of the debtor’s property” in the foreign proceeding is comparable

\textsuperscript{19} \textit{Vitro}, 701 F.3d at 1067.
\textsuperscript{20} \textit{In re Oi S.A.}, 587 B.R. 253, 268 (Bankr. S.D.N.Y. 2018) (enforcing a Brazilian reorganization plan where foreign creditors had the same status, rights, protections, and procedures for filing claims as they would under U.S. law).
\textsuperscript{21} 421 B.R. at 700.
\textsuperscript{22} \textit{PT Bakrie Telecom Tbk}, 628 B.R. at 884.
\textsuperscript{23} 11 U.S.C. §1507(b)(3); see also \textit{In re Oi S.A.}, 587 B.R. at 268; \textit{Metcalfe}, 421 B.R. at 693 (finding the Canadian bankruptcy plan’s “exception from the releases” in cases where a noteholder suffered damages from reliance on “express fraudulent misrepresentations by [the releasable] party” satisfied Section 1507(b)(3)).
“to that available under the Bankruptcy Code.”24 While the Second Circuit requires the foreign distribution scheme to be “substantially in accordance,” it need not mirror U.S. bankruptcy rules.25

Unlike the other factors, litigation surrounding the fifth factor of Section 1507(b), concerning the debtor’s “opportunity for a fresh start” by enforcement, is far less abundant.26 However, courts like the Southern District of New York Bankruptcy Court, have nodded to this factor when recognizing and enforcing court orders like third-party releases in foreign reorganization plans.27

III. The Public Policy Exception Under 11 U.S.C. §1506

Notwithstanding the Section 1507 criteria for extending comity to a foreign bankruptcy proceeding in the U.S., Section 1506 places a limitation on court recognition and enforcement “if the action would be manifestly contrary to the public policy of the United States.”28 Both the legislative history of Chapter 15 and the UNCITRAL Guide to Enactment of the Model Law emphasize that “manifestly contrary to public policy” should be “restrict[ed] to the most fundamental policies of the [U.S.].”29 Accordingly, Section 1506 “follows the Model Law [ ] exactly . . . and has been narrowly interpreted on a consistent basis in courts around the world.”30

24 11 U.S.C. §1507(b)(4); see Vitro, 701 F.3d at 1060 (finding a Mexican plan’s payments toobjecting creditors that were “inescapably dependent on the discharge of non-debtor [g]uarantors” to adversely affect the distribution of proceeds and “preclude[ ] relief by §1507(b)(4)”; compare to In re Agrokor d.d., 591 B.R. 163, 190 (Bankr. S.D.N.Y. 2018) (finding the “creditor distributions approved in the [settlement [a]greement closely follow[ed] the waterfall provisions of the U.S. Bankruptcy Code” in compliance with this factor).
25 Avanti, 582 B.R. at 618 (enforcing a U.K. proceeding’s third-party releases even though “U.K. law authorizing schemes of arrangement do[ ] not provide a mechanism for ‘cramming down’ dissenting classes of creditors” like the U.S. Bankruptcy Code).
27 See Sino-Forest, 501 B.R. at 660 (“extending comity here does not affect . . . (5) the opportunity for a fresh start.”).
Many U.S. bankruptcy courts have limited the exception to find recognition and enforcement of foreign proceedings would not be “manifestly contrary” under Section 1506.\(^{31}\) Even foreign judgements absent certain constitutional rights will not necessarily itself be a bar under 1506.”\(^{32}\) However, the Fifth Circuit and the Southern District of New York upheld this exception where Foreign Representatives failed to “provide any justification for the release” or “demonstrate[ ] circumstances comparable to those that would make possible such a release in the United States” under Section 1507.\(^{33}\)

**Conclusion**

While recognition of a foreign bankruptcy proceeding is generally formulaic under Chapter 15, enforcement – and of any third-party releases therein – by U.S. courts is far more discretionary under the Section 1507 criteria subsuming principles of comity. The fact-intensive inquiries to measure foreign proceedings against these factors have yielded different conclusions among bankruptcy courts. Second Circuit cases like *Avanti*, *Metcalfe*, and *Sino-Forest* display a trend of growing frequency in recognizing and enforcing the third-party releases approved in foreign proceedings. However, the narrow Section 1506 public policy exception can still protect creditors in cases where foreign third-party releases fail to satisfy Section 1507 criteria and fundamental standards of fairness in the U.S.

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\(^{31}\) See *Metcalfe*, 421 B.R. at 700 (where the Canadian statute was interpreted “to grant jurisdiction to [Canadian] courts to approve such relief in appropriate circumstances,” no public policy exception to enforcement applied); *Sino-Forest*, 501 B.R. at 665 (“where the third-party releases are not categorically prohibited, it cannot be argued that the issuance of such releases is manifestly contrary to public policy” in the Second Circuit); *In re Fairfield Sentry*, 714 F.3d 127, 140 (2d. Cir. 2013) (finding a B.V.I. bankruptcy proceeding that kept various applications and orders “under seal” was enforceable and not manifestly contrary to public policy under § 1506).

\(^{32}\) See *In re Ephedra Products Liability Litigation*, 329 B.R. 333, 336 (Bankr. S.D.N.Y 2006) (“Federal courts have enforced against U.S. citizens foreign judgments rendered by foreign courts for whom the very idea of a jury trial is foreign.”).

\(^{33}\) See *PT Bakrie Telecom Tbk*, 628 B.R. at 882 (inviting foreign representatives to further develop the record supporting enforcement of third-party releases in the Second Circuit); *Vitro*, 701 F.3d at 1060 (finding a non-consensual release unenforceable in the Fifth Circuit but acknowledging the discharge “could be available in other circuits”).