INTERNATIONAL INSOLVENCY INSTITUTE

Foreign Restructuring Regimes and Chapter 15 of the Bankruptcy Code

Dan Moss (Jones Day)
Judge Anna Elisabeth de Vos (Amsterdam District Court)
Lord Richards (UK Supreme Court)
Luciana Celidonio (CSWAdvogados)
Smitha Menon (WongPartnership LLP)

Expanding Cross-Border Restructuring Opportunities

Expanding Options and Opportunities:
Healthy Chapter 11 Competition

INTERNATIONAL INSOLVENCY INSTITUTE

More jurisdictions. More tools. More value for debtors and creditors.

Primary Alternatives in Use Today

Increasing use of non-US restructuring regimes + Chapter 15 to restructure US-law governed debt

UK SCHEME

DUTCH WHOA

CHAPTER 15

Why it matters

- Significant cost savings vs. Chapter 11
- Faster timelines
- Greater flexibility and certainty
- Global coordination with Chapter 15

Other jurisdictions are advancing to compete for cross-border restructurings

BRAZIL

SINGAPORE

GERMANY

Are *YOU* Released?

Post-*Purdue*, where should we go?

American Approach: *Third Party Releases*

- “[N]othing in the law authorizes bankruptcy courts to extinguish claims against third parties . . . without . . . consent.” *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024).
- Foreign proceedings with third-party releases will be recognized:

In re Avanti Commc’ns Grp. PLC, 582 B.R. 603 (Bankr. S.D.N.Y. 2018).

In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R., No. 25-10208 (Bankr. D. Del. Apr. 1, 2025) [Dkt. 65].

- [Placeholder for notes from panelists on foreign considerations]

COMI, Nexus, Jurisdictional Access: How Much Pre-Planning is *too* much?


SUPER NEWCO
A Global Restructuring Platform
INTERNATIONAL INSOLVENCY INSTITUTE
UNITED KINGDOM
UK Scheme of Arrangement or Restructuring Plan.
SINGAPORE
Singapore Scheme.
NETHERLANDS
Dutch WHOA.
SUPER NEWCO
A single restructuring entity connecting across jurisdictions
GLOBAL REACH. LOCAL RECOGNITION.
Super NewCo serves as a hub and sole filing entity to implement a comprehensive balance sheet restructuring with recognition under chapter 15 and, likely, other jurisdictions where the Model Law has been implemented.

Good Forum Shopping?

INTERNATIONAL INSOLVENCY INSTITUTE

Case	Home Country	Foreign Regime	Jurisdictional Hook	Recognition
Syncreon	U.S.	U.K. Scheme	Existing UK entity + Amend governing law	Ch. 15, CCAA
Fossil Group	U.S.	UK Restructuring Plan	Amend governing law + New UK entity	Ch. 15
Mega NewCo Ltd.	Mexico, Singapore	U.K. Scheme	New UK entity	Ch. 15
New Fortress Energy (announced)	U.S.	UK Restructuring Plan	Existing UK entity	Ch. 15 (anticipated)

- [Placeholder for notes from panelists on foreign considerations]

INTERNATIONAL INSOLVENCY INSTITUTE

The Outer Limits: When Should Courts Say “NO”?

American Approach: Chapter 15 Limits

- Public Policy Exceptions

- Potential Overreach by Foreign Jurisdictions:

    - *In re Mega Newco, Ltd.*, 2025 WL 601463 (Bankr. S.D.N.Y. Feb. 24, 2025).

    - *In re Fossil (UK) Glob. Servs. Ltd.*, No. 25-90525 (Bankr. S.D. Tex. Nov. 12, 2025) [Dkt. 39].

- [Placeholder for notes from panelists on foreign considerations]

JONES DAY

VOL. 24 NO. 5
JULY–AUGUST
2018

BUSINESS RESTRUCTURING REVIEW

BANKRUPTCY COURT ENFORCES NONCONSENSUAL THIRD-PARTY RELEASES IN CHAPTER 15 CASE

Dan T. Moss, Ryan Sims, and **Mark G. Douglas**

In *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018), Judge Martin Glenn of the U.S. Bankruptcy Court for the Southern District of New York entered an order under chapter 15 of the Bankruptcy Code enforcing a scheme of arrangement sanctioned by a court in England that included nonconsensual third-party releases. Judge Glenn determined that such releases should be recognized and enforced consistent with principles of "comity" and cooperation with foreign courts inherent under chapter 15.

Nonconsensual third-party releases in a chapter 11 plan are generally problematic, and as discussed below, such releases are categorically prohibited in certain jurisdictions. *Avanti* is consistent with certain of Judge Glenn's prior decisions. It may also be a harbinger for future chapter 15 cases in which foreign representatives seek recognition of nonconsensual third-party releases.

PROCEDURES AND RECOGNITION UNDER CHAPTER 15

Under section 1515 of the Bankruptcy Code, the representative of a foreign debtor may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding." Section 101(24) of the Bankruptcy Code defines "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 foreign proceeding."

Section 109(a) of the Bankruptcy Code provides that, "[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under [the Bankruptcy Code]." In *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013), the U.S. Court of Appeals for the Second Circuit ruled that section 109(a) applies to cases under chapter 15 of the Bankruptcy Code.

"[P]roperty in the United States" for purposes of section 109(a) has been held to include an attorney retainer in a U.S. bank account; causes of action under U.S. law against parties in the U.S.; and contract rights governed by U.S. law, including those in connection with U.S. dollar-denominated debt issued under an indenture governed by New York law with a New York choice-of-forum clause. *See In re Cell C Proprietary Ltd.*, 571 B.R. 542 (Bankr. S.D.N.Y. 2017); *In re Berau Capital Resources Pte Ltd*, 540 B.R. 80 (Bankr. S.D.N.Y. 2015); *In re Octaviar Administration Pty Ltd*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014).

"Foreign proceeding" is defined in section 101(23) of the Bankruptcy Code as:

> [A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

More than one bankruptcy or insolvency proceeding may be pending with respect to the same foreign debtor in different countries. Chapter 15 therefore contemplates recognition in the U.S. of both a "foreign main proceeding"—a case pending in the country where the debtor's center of main interest ("COMI") is located (*see* 11 U.S.C. § 1502(4))—and "foreign nonmain proceedings," which may have been commenced in countries where the debtor merely has an "establishment" (*see* 11 U.S.C. § 1502(5)).

The Bankruptcy Code does not define "COMI." However, section 1516(c) provides 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 debtor's COMI.

An "establishment" is defined in section 1502(2) as "any place of operations where the debtor carries out a nontransitory economic activity." Unlike with the determination of COMI, there is no statutory presumption regarding the determination of whether a foreign debtor has an establishment in any particular location. *See In re British Am. Ins. Co.*, 425 B.R. 884 (Bankr. S.D. Fla. 2010). The debtor's foreign representative bears the burden of demonstrating that the debtor has an establishment in a particular jurisdiction. *Id.* at 915.

RELIEF THAT CAN BE GRANTED UPON RECOGNITION

Upon recognition of a "foreign main proceeding," section 1520(a) provides that certain provisions of the Bankruptcy Code automatically come into force, including section 361, which entitles any entity asserting an interest in the debtor's U.S. assets to "adequate protection" of that interest; section 362, which imposes an automatic stay preventing creditor collection efforts with respect to the debtor or its U.S. assets; section 363, which restricts the debtor's ability to use, sell, or lease its U.S. property outside the ordinary course of its business; section 549, which gives a trustee the power to avoid unauthorized postpetition asset transfers; and section 552, which provides that, with certain exceptions (e.g., pledged proceeds and rents), prepetition security interests do not encumber U.S. property acquired by the bankruptcy estate or by the debtor postpetition.

If the bankruptcy court recognizes a foreign proceeding as either a main or nonmain proceeding, section 1521(a) authorizes the court to grant a broad range of provisional and other relief designed to preserve the foreign debtor's assets or otherwise provide assistance to the court or other entity presiding over the debtor's foreign main proceeding. Under section 1521(a)(1), such relief can include "staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a)."

Under section 1521(a)(7), the court may also "grant[] any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)." These excepted sections authorize a bankruptcy trustee to, among other things, avoid and recover transfers that are fraudulent under the Bankruptcy Code and/or, under certain circumstances, "applicable" law (generally state law).

Section 1522 provides that the bankruptcy court may grant relief under section 1521 "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."

Section 1506 of the Bankruptcy Code sets forth a public policy exception to the relief otherwise authorized in chapter 15, providing that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."

Under section 1507 of the Bankruptcy Code, in determining whether a U.S. bankruptcy court should provide "additional assistance" to a foreign representative in a chapter 15 case, the court must consider whether such assistance, "consistent with the principles of comity," will reasonably ensure, among other things: (i) the just treatment of all creditors and interest holders; (ii) protection of U.S. creditors "against prejudice and inconvenience in the processing of claims in such foreign proceeding"; and (iii) "distribution of proceeds of the debtor's property substantially in accordance with the order prescribed" in the Bankruptcy Code.

Cooperation between U.S. and foreign courts—a form of "comity"—is an indispensable element of the chapter 15 paradigm. 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." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *accord Shen v. Leo A. Daly Co.*, 222 F.3d 472, 476 (8th Cir. 2000).

VALIDITY OF NONCONSENSUAL THIRD-PARTY RELEASES IN CHAPTER 11 PLANS UNDER U.S. LAW

The U.S. circuit courts of appeals are split as to whether a bankruptcy court has the authority to approve chapter 11 plan provisions that, over the objection of creditors or other stakeholders, release specified nondebtors from liability and/or enjoin dissenting stakeholders from asserting claims against such nondebtors. The minority view, held by the Fifth, Ninth, and Tenth Circuits, bans such nonconsensual releases on the basis that section 524(e) of the Bankruptcy Code, which provides generally that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt," prohibits them. *See Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995); *In re W. Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1990).

On the other hand, the majority of circuits to consider the issue—the Second, Fourth, Sixth, Seventh, and Eleventh Circuits—have found such releases and injunctions permissible under certain circumstances. *See In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285 (2d Cir. 1992); *In re A.H. Robins Co., Inc.*, 880 F.2d 694 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640 (7th Cir. 2008); *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070 (11th Cir. 2015). For authority, these courts generally rely on section 105(a) of the

Bankruptcy Code, which authorizes courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." Moreover, as the Seventh Circuit held in *Airadigm,* the majority view is that section 524(e) does not limit a bankruptcy court's authority to grant such releases.

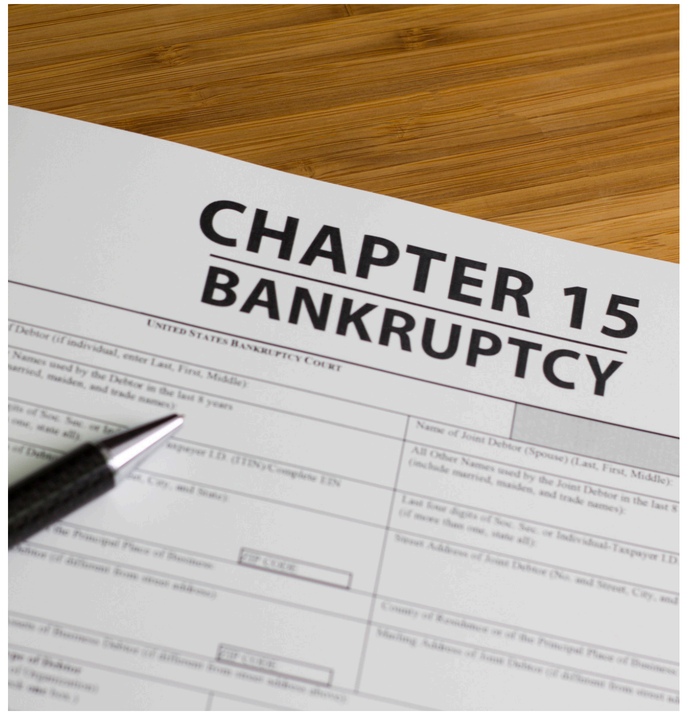
The First and D.C. Circuits have suggested that they agree with the "pro-release" majority. *See In re Monarch Life Ins. Co.*, 65 F.3d 973 (1st Cir. 1995) (a subsidiary was collaterally estopped by a plan confirmation order from belatedly challenging the jurisdiction of the bankruptcy court to permanently enjoin lawsuits against the debtor's attorneys and other nondebtors not contributing to the debtor's reorganization); *In re AOV Industries*, 792 F.2d 1140 (D.C. Cir. 1986) (a plan provision releasing liabilities of nondebtors was unfair because the plan did not provide additional compensation to a creditor whose claim against the nondebtor was being released; adequate consideration must be provided to a creditor forced to release claims against nondebtors). The Third Circuit declined to decide the issue in *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), ruling that a plan release provision did not pass muster under even the most flexible tests for the validity of nondebtor releases.

Although majority-view courts employ various tests to determine whether such releases are appropriate, courts generally approve third-party plan releases or injunctions when they are essential to the reorganization, the parties being released are making a substantial financial contribution to the reorganization, and the affected creditors overwhelmingly support the plan. *See Dow Corning Corp.*, 280 F.3d at 658 (listing factors).

RECOGNITION AND ENFORCEMENT OF NONDEBTOR RELEASES IN CHAPTER 15 CASES

In a chapter 15 case, unlike in a chapter 11 case, a U.S. bankruptcy court is not asked to confirm a plan of reorganization or liquidation. However, the court may be asked to recognize and enforce a plan, composition with creditors, scheme of arrangement, or court order sanctioned or issued by a foreign court presiding over a foreign debtor's main proceeding. Such a plan or order may enjoin creditors from suing or otherwise proceeding against parties other than the foreign debtor. In such a case, whether a release or injunction should be enforced by a U.S. bankruptcy court is a more nuanced issue.

For example, in *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010), bankruptcy judge Martin Glenn, to provide "additional assistance" in a chapter 15 case involving a Canadian debtor, enforced a Canadian court's order confirming a restructuring plan that contained nondebtor releases and injunctions, even though it was uncertain whether a U.S. court would have approved the releases and injunctions in a case under chapter 11 of the Bankruptcy Code. Judge Glenn reasoned that such uncertainty was of little consequence in the case



before it, which involved not the propriety of nondebtor injunctions and releases in a plenary bankruptcy case, but rather, a request to enforce a foreign judgment in a chapter 15 case. The court concluded that "principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case."

By contrast, in *Vitro S.A.B. de C.V. v. ACP Master, Ltd. (In re Vitro S.A.B. de C.V.)*, 473 B.R. 117 (Bankr. N.D. Tex.), *aff'd*, 701 F.3d 1031 (5th Cir. 2012), the bankruptcy court ruled that releases of nondebtor affiliates included in a Mexican debtor's reorganization plan were unenforceable as contrary to U.S. public policy. On appeal, the U.S. Court of Appeals for the Fifth Circuit ruled that the prohibition of such releases under Fifth Circuit precedent (citing *Pac. Lumber*) did not necessarily mean that a U.S. bankruptcy court could not enforce them under section 1507 as a permissible form of "additional assistance" not otherwise available under the Bankruptcy Code or U.S. law. However, the Fifth Circuit concluded that the bankruptcy court did not abuse its discretion in refusing to enforce the nonconsensual releases where affected creditors were not given any alternative means to recover and would receive only a tiny fraction of what was owed to them, and where the votes in favor of the Mexican debtor's reorganization plan comprised largely insider votes (which are not counted as acceptances under chapter 11 pursuant to section 1129(a)(10) of the Bankruptcy Code). Because it concluded that relief was not warranted under section 1507 and would not be available under section 1521, the Fifth Circuit did "not reach whether the [Mexican reorganization] plan would be manifestly contrary to a fundamental public policy of the United States" within the meaning of section 1506.

In *In re Sino-Forest Corp.*, 501 B.R. 655 (Bankr. S.D.N.Y. 2013), Judge Glenn employed his rationale in *Metcalfe* in recognizing as a form of "additional assistance" under section 1507 a Canadian court-approved settlement containing a global release provision. In addition, he noted that, in the Second Circuit, "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" within the meaning of section 1506 (*citing In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005)).

ENFORCEMENT OF THIRD-PARTY NONCONSENSUAL RELEASES IN *AVANTI*

Following his earlier precedent, Judge Glenn recently used similar reasoning in *Avanti*. Avanti Communications Group PLC ("Avanti"), a public limited company incorporated under the laws of England and Wales with subsidiaries throughout the world, was a satellite operator that provided services in Europe, the Middle East, and Africa. Avanti issued senior secured notes maturing in 2021 and 2023 that certain of Avanti's direct and indirect subsidiaries guaranteed. Because of operational setbacks and an overleveraged balance sheet, Avanti and an ad hoc group of its noteholders entered into a restructuring support agreement, which formed the basis for a scheme of arrangement under English law. Pursuant to the scheme, the parties agreed to equitize the 2023 notes, which, although originally governed by New York law, were amended to be governed by English law, and to amend the terms of the 2021 notes. The scheme also included the grant of releases to, among others, certain third-party guarantors, which prevented dissenting holders of the 2023 notes from pursuing claims against the guarantors.

In February 2018, Avanti initiated a proceeding under the U.K. Companies Act of 2006 before the High Court of Justice of England and Wales. Through this proceeding, the parties sought permission from the High Court to convene a meeting of creditors comprising holders of the 2023 notes—the only impaired creditors under the scheme—to vote on the scheme. The court approved the request, and creditors holding more than 98 percent of the value of the 2023 notes voted in favor of the scheme. Thereafter, the High Court approved the scheme of arrangement.

Later in February 2018, Avanti's foreign representative filed a petition in the U.S. Bankruptcy Court seeking recognition of the U.K. proceeding as a foreign main proceeding under chapter 15. Because Avanti's legal counsel held a retainer in a New York account and because the indenture for the 2023 notes was governed by New York law, Judge Glenn ruled that Avanti satisfied section 109(a)'s "property in the United States" requirement, and the court recognized Avanti's U.K. proceeding as a foreign main proceeding.

The recognition order also provided for enforcement of the scheme's nonconsensual third-party releases. Judge Glenn, after examining the requirements of sections 1507 and 1521 of the Bankruptcy Code, concluded, among other things, that: (i) affected creditors were afforded due process consistent with U.S. standards; (ii) third-party nondebtor releases, particularly for affiliate guarantors of debt adjusted by a scheme of arrangement, are common under English law (and are often enforced in the Second Circuit in chapter 15 proceedings); and (iii) if the scheme were not recognized and enforced in the chapter 15 case, creditors could be prejudiced and could "prevent the fair and efficient administration of the [r]estructuring."

Judge Glenn distinguished *Vitro*. In particular, he pointed out that the Mexican reorganization plan in *Vitro* was supported by a significant number of insider votes, in contrast to *Avanti*, where the scheme received essentially unanimous consent from all impaired creditors.

OUTLOOK

Avanti is welcome news for foreign debtors seeking to obtain enforcement of nonconsensual third-party releases approved by foreign courts as part of restructuring plans. Given this and prior precedents in the Southern District of New York, that venue may be preferred by foreign debtors wishing to grant such releases in their non-U.S. insolvency proceedings.

Under *Avanti* and some cases in other districts and circuits, the standard for approving nonconsensual third-party releases depends upon whether the debtor is in chapter 11 or chapter 15. As noted by Judge Glenn in *Avanti*, in chapter 15, the inquiry focuses on, among other things, whether the foreign forum provides:

> [A] full and fair trial . . . before a court of competent jurisdiction [that was] conduct[ed] upon regular proceedings . . . and under a system of jurisprudence likely to secure an impartial administration of justice . . . and there is nothing to show either prejudice in the court, or in the system of laws under which it [presides].

ONE FIRM WORLDWIDE℠

AMSTERDAM	CLEVELAND	HONG KONG	MEXICO CITY	PARIS	SHANGHAI
ATLANTA	COLUMBUS	HOUSTON	MIAMI	PERTH	SILICON VALLEY
BEIJING	DALLAS	IRVINE	MILAN	PITTSBURGH	SINGAPORE
BOSTON	DETROIT	LONDON	MINNEAPOLIS	SAN DIEGO	SYDNEY
BRISBANE	DUBAI	LOS ANGELES	MOSCOW	SAN FRANCISCO	TAIPEI
BRUSSELS	DÜSSELDORF	MADRID	MUNICH	SÃO PAULO	TOKYO
CHICAGO	FRANKFURT	MELBOURNE	NEW YORK	SAUDI ARABIA	WASHINGTON

JONES DAY | One Firm Worldwide®

WHITE PAPER

August 2024

Chapter 15 Recognition Is No Rubber Stamp: Recent Trends Regarding Foreign Main and Nonmain Recognition

The number of complex cross-border restructurings continues to rise as the various economies of the world become more integrated. A growing contingent of countries has enacted sophisticated restructuring regimes or refined existing statutory structures offering distressed companies and their lenders foreign restructuring alternatives other than, or in addition to, U.S. chapter 11 to effectuate a worldwide balance sheet restructuring. This trend has resulted in an uptick in filings under chapter 15 of the U.S. Bankruptcy Code to obtain recognition of foreign restructuring proceedings, plan confirmation orders, and additional relief applicable to assets located in the United States.

This *White Paper* highlights certain of the advantages of pairing a foreign restructuring proceeding with chapter 15 recognition while examining recent trends emphasizing that access to chapter 15 relief is far from a rubber stamp. Indeed, debtors seeking to obtain chapter 15 recognition for a foreign proceeding must carefully navigate the Bankruptcy Code's recognition provisions, in addition to the legal requirements in the "primary" foreign proceeding, in order to implement a comprehensive restructuring. These aspects are examined in the context of actual case examples illustrating the burden a foreign representative must satisfy to qualify for chapter 15 relief.

INTRODUCTION

The number of complex cross-border restructurings continues to rise as the various economies of the world become more integrated. A growing contingent of countries has enacted sophisticated restructuring regimes—including Germany and the Netherlands—or refined existing statutory structures—the United Kingdom and Singapore—with distressed companies and their lenders increasingly turning to such foreign restructuring alternatives other than or in addition to U.S. chapter 11 to effectuate a worldwide balance sheet restructuring. This trend has resulted in an uptick in U.S. chapter 15 filings to obtain recognition of foreign restructuring proceedings, plan confirmation orders, and additional relief applicable to assets located in the United States.

Indeed, pairing a foreign restructuring proceeding with chapter 15 recognition can achieve worldwide coverage and enforcement against actions seeking to disturb a debtor's U.S. assets while still typically resulting in fewer expenses than in a traditional chapter 11 restructuring. What's more, a foreign restructuring coupled with chapter 15 recognition can result in a one-two punch of benefits: Debtors can obtain relief that may not be as readily available in the United States, such as third-party releases, while preserving access to U.S. tools that may not be present in the foreign jurisdiction, such as robust discovery, free and clear asset sales, avoidance actions, and, in certain circumstances, debtor-in-possession financing and rejection or assumption of executory contracts.

Restructuring abroad supplemented with a chapter 15 filing can also avoid the need for certain chapter 11 procedural elements—such as the requirement under chapter 11 that each debtor entity be a debtor under chapter 11 individually, that an official creditors' committee be appointed, that professional retention and fee applications be filed, etc.—that result in additional complexity, duration, and expense. As indicated by recent chapter 15 cases, however, chapter 15 recognition is no rubber stamp. Debtors seeking to obtain recognition for a foreign proceeding must carefully navigate both the legal requirements in the "primary" foreign proceeding, whose standards may differ from U.S. standards for justification of the relief requested, along with the Bankruptcy Code's recognition provisions in order to implement a comprehensive restructuring.

CHAPTER 15 RECOGNITION REQUIREMENTS AND JUDICIAL LANDSCAPE

Requirements

Section 1515 of the Bankruptcy Code (11 U.S.C. § 1515) permits the debtor's foreign representative to file a petition in a U.S. bankruptcy court for recognition of a "foreign proceeding." In the context of chapter 15, a debtor is an entity that is the "subject of" a foreign proceeding. 11 U.S.C. § 1502. Importantly, section 1517(a) outlines that recognition under chapter 15 requires that the foreign proceeding must be "a foreign main proceeding or foreign nonmain proceeding" within the meaning of section 1502.

A proceeding qualifies as a foreign "main" proceeding if it is pending in the country in which the foreign debtor's center of main interests ("COMI") is located. 11 U.S.C. § 1502(4). Generally, a corporate debtor's COMI is presumed to be the location of its registered office. 11 U.S.C. § 1516(c). It is a rebuttable presumption, however, and if rebutted, a court may evaluate the location of the debtor's headquarters, actual managers, primary assets, creditors, and the jurisdiction whose law applies in most disputes, among other factors. *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007). A foreign "nonmain" proceeding, on the other hand, is one in which the debtor has only an "establishment" in the country in which its case is pending. 11 U.S.C. § 1502(5). A debtor has an establishment anywhere it "carries out a nontransitory economic activity." 11 U.S.C. § 1502(2). Courts have held that, for a debtor to have nontransitory economic activity, it must have "a seat for local business activity" in the relevant foreign country and engage in activity that has a "local effect on the marketplace," more than mere incorporation, recordkeeping, or maintenance of the property. *In re Creative Fin. Ltd.*, 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016).

As the statutes and relevant precedent make clear, determining whether foreign main or foreign nonmain recognition is warranted is a fact-specific exercise, and foreign representatives must closely analyze the operations of an entity to assess holistically whether chapter 15 recognition is a viable option. Although, as discussed below, somewhat disparate jurisprudence exists within certain U.S. restructuring venues, foreign representatives continue to seek creative use of chapter 15 recognition, and courts appear relatively united in requiring that a robust factual justification be present.

Once obtained, chapter 15 recognition of a foreign proceeding unlocks a host of protections under the U.S. Bankruptcy Code, and courts are increasingly scrutinizing requests for chapter 15 recognition to ensure these benefits are actually justified and warranted. *See*, *e.g.*, *In re Servicos de Petroleo Constellation S.A.*, 613 B.R. 497, 500 (Bankr. S.D.N.Y. 2020); *In re Servicos de Petroleo Constellation S.A.*, 600 B.R. 237, 293 (Bankr. S.D.N.Y. 2019).

Judicial Landscape Regarding Recognition of Foreign Proceedings

U.S. jurisdictions can vary in their willingness to recognize foreign proceedings for U.S. domiciled entities. In addition to examining the foreign proceeding itself, courts consider the assets, operations, and structure of companies to verify that a foreign proceeding merits chapter 15 recognition as to each entity. The following cases illustrate the recognition process in action and provide examples of how jurisdictions may differ in determining whether recognition of a foreign proceeding for a U.S. entity is permissible.

In *In re Mood Media Corp.*, the U.S. Bankruptcy Court for the Southern District of New York concluded that certain U.S. subsidiaries of a foreign company neither qualified as foreign debtors nor as having an "establishment" in the foreign jurisdiction for purposes of chapter 15. 569 B.R. 556 (Bankr. S.D.N.Y. 2017). Mood Media Corporation, a Canadian company, and its 14 U.S. subsidiaries sought chapter 15 recognition for a Canadian court proceeding commenced under Section 192 of the Canadian Business Corporations Act ("CBCA"). *Id.* at 558. The court accepted that the Canadian proceeding should be recognized as a foreign main proceeding as to the parent company, Mood Media, which, according to the court, had its COMI in Canada. *Id.* at 561. But the court refused recognition for the U.S. subsidiaries, even if construed as a foreign non-main proceeding. *Id.* at 563.

First, the court concluded that the U.S. subsidiaries were not debtors for purposes of chapter 15, i.e., such subsidiaries were not entities that were subject to the foreign proceeding. *Id.* at 561. The court held that a debtor under chapter 15 "is the company whose restructuring or liquidation is the subject of the foreign proceeding." *Id.* at 560–61. The court found that only the parent company had applied for the commencement of the Canadian proceeding and that the relevant court orders made only passing references to the subsidiaries. *Id.* at 559. On the contrary, the reorganization almost exclusively consisted of the parent company's restructuring and replacement of notes and common stock. The ultimate restructuring did not affect the assets or operations of the U.S. companies and required noteholders of Mood Media only to release guarantees against the subsidiaries. *Id.* The court found that the Canadian court "exercised no control, gave no directions and organized no procedures" requiring the U.S. companies to do anything. *Id.* at 559. In other words, the U.S. companies "were just there as beneficiaries of orders that related to the restructuring of the parent company's obligations." *Id.*

Second, the court concluded that, even if the U.S. subsidiaries were debtors, they did not have an establishment in Canada. The court noted that the U.S. subsidiaries lacked an office or physical presence of any kind in Canada. That is, there was not a "place of business in the foreign country from which market activities are conducted." *Id.* 562. That the company operated as an integrated enterprise to an extent—sharing management, human resources, and accounting, among other functions—was insufficient to show that the subsidiaries themselves had an establishment in Canada. *Id.* at 562. The court thus declined to grant foreign nonmain recognition of the proceedings even if the U.S. subsidiaries had been foreign debtors for purposes of chapter 15. *Id.* at 563.

In contrast, the U.S. Bankruptcy Court for the District of Delaware in *In re Catalyst Paper Corp.* granted foreign main recognition for certain U.S. affiliates of a Canadian company. No. 12-10221 (Bankr. D. Del. Mar. 5, 2012). Catalyst Paper and its affiliates, including eight U.S. entities, sought chapter 15 recognition for their proceeding under Canada's Companies' Creditors Arrangement Act (the "CCAA"). In concluding that even the U.S. debtors had their COMI in Canada, the court emphasized that "the number and activity of the Canadian debtors outweighs the number and activity of the U.S. debtors" and that "the shots that are called come out of Canada, not the United States." Transcript of Hearing at 28:16-19. The court characterized it as "a very conventional recognition." *Id*. at 28:19-20. Thus, unlike the court in *Mood Media*, the Delaware bankruptcy court in *Catalyst Paper* focused more on the integrated nature of the entire enterprise as opposed to a strict entity-by-entity analysis to determine that foreign main recognition for the U.S. entities was warranted.

Similarly, in *In re Mega Brands Inc.*, the Delaware bankruptcy court granted foreign nonmain recognition for certain U.S. subsidiaries of a Canadian company. No. 10-10485 (Bankr. D. Del. Mar. 19, 2010). Mega Brands sought chapter 15 recognition for its proceeding under the CBCA. And similar to Mood Media and Catalyst Paper, Mega Brands' Canadian entities received foreign main recognition. Transcript of Hearing at 22:6-13. But the court in *Mega Brands* nevertheless concluded that the Canadian proceeding was a foreign *nonmain* proceeding as to the U.S. subsidiaries. *Id.* at 21:23-24:25.

The *Mega Brands* court rejected the U.S. Trustee's argument that the Canadian proceeding could not be both a foreign main proceeding as to some entities and a foreign nonmain proceeding as to other entities. *Id.* at 22:20-22. The court analogized multiple foreign proceedings under chapter 15 to jointly administered cases under chapter 11 and "[did not] find it at all troubling that there could be a mix" of foreign main and foreign nonmain proceedings. *Id.* at 24:6-16. And in contrast to *Mood Media*, no party had contested that the U.S. subsidiaries both were debtors for purposes of chapter 15 and had an establishment in Canada. The court thus recognized the Canadian proceeding as a foreign nonmain proceeding with respect to the U.S. subsidiaries.

These cases demonstrate that courts may differ in their receptiveness to the fact-specific exercise of recognition, particularly as it relates to U.S. entities seeking chapter 15 foreign recognition. Key factors can include the location of assets, operations, and management, as well as an entity's degree of involvement in the foreign proceeding and the overall balance of the corporate structure, including the location of subsidiaries' operations.

RECENT CHAPTER 15 CASES

Two recent cases, *Black Press* and *Spark Networks*, illustrate, on the one hand, the challenges that a foreign representative can face when there are insufficient facts to support COMI or an "establishment" for foreign main or nonmain recognition and, on the other hand, that foreign nonmain recognition can be achieved for U.S. entities where the facts demonstrate sufficient "establishment" in a foreign jurisdiction. As noted, courts in the United States have shown a willingness to deny foreign nonmain recognition to entities that cannot satisfy the requirements for an establishment under section 1502.

In re Black Press Ltd., **No. 24-100044 (Bankr. D. Del.)**

Black Press Group Ltd., a Canadian commercial printer and newspaper editor with headquarters in Surrey, British Columbia, had Canadian subsidiaries operating in Canada as well as three U.S. incorporated subsidiaries that conducted business in Hawaii, Alaska, and Washington. Black Press had approximately 700 employees in Canada and 500 in the United States. Importantly, subsidiaries guaranteed Black Press's Canadian-issued funded debt.

Black Press initiated reorganization proceedings under the CCAA in Canada in 2024 after a financial decline due to growing competition from online news and advertisements. In addition to the Canadian proceedings and attendant debt collection moratorium, Black Press filed a chapter 15 petition in the Delaware bankruptcy court seeking recognition of the Canadian proceedings to protect both its Canadian and U.S. subsidiaries from actions to collect debts.

Black Press contended that the COMI and "nerve center" of the U.S. subsidiaries were in Canada, the location of Black Press's headquarters and registered offices as well as where its corporate officers directed the business of the U.S. subsidiaries. Moreover, Black Press described the business operations of its U.S. subsidiaries as being completely integrated with the rest of the company such that they could not operate independently of the services from the holding company.

The Pension Benefit Guaranty Corporation (the "PBGC") filed a limited objection to chapter 15 recognition for the U.S. subsidiaries. During the recognition hearing, counsel for the PBGC insisted "emphatically" that the subsidiaries "are not Canadian companies" and that "their COMI is not in Canada." Transcript of Feb. 14, 2024 Recognition Hearing at 78:23-24. Ultimately, Judge Mary Walrath granted foreign main recognition to the Canadian subsidiaries, but she refused to grant foreign main recognition to the U.S. subsidiaries, concluding that they did not have their COMI in Canada. *Id.* at 99:7-10.

Rather than consider the COMI of the entire enterprise, Judge Walrath concluded that she should look at each entity individually, describing each of the U.S. subsidiaries as "a local newspaper operating in the United States." *Id*. at 99:10-15. Even under the nerve center test, Judge Walrath concluded she should look at the nerve center of the business operations of the subsidiaries, not the holding company. The subsidiaries, she noted, were both incorporated in and operating throughout the United States. *Id.* at 100:5-7. Moreover, the U.S. subsidiaries had publishers on site, did their own printing, solicited ads, serviced their customers, and paid their vendors in the United States. *Id.* at 99-100:23-1. Ultimately, Judge Walrath concluded that each U.S. debtor "could function independently," had done so in the past, and had proposed doing so again. *Id.* at 100:9-12.

Judge Walrath explained that the opposite conclusion—i.e., the U.S. subsidiaries, incorporated and operating in the United States, having COMI in Canada because they are part of a group of subsidiaries held by a Canadian holding company—would effectively require piercing the corporate veil. *Id*. at 100:15-21.

Judge Walrath likewise noted that she was skeptical that the U.S. subsidiaries had sufficient relationships to Canada to demonstrate that they had an "establishment" for foreign nonmain recognition. *Id.* at 114:20-24. She noted that the subsidiaries' operations had little impact on the market in Canada and that she did not consider the U.S. subsidiaries' guarantee of Black Press debt sufficient for the economic impact needed for an establishment. *Id.* at 114-115:25-5.

***In re Spark Networks SE*, No. 23–11883 (Bankr. D. Del.)**

Spark Networks, a Germany-based social dating platform, confronted financial headwinds following the acquisition of another social dating platform, Zoosk, Inc., which it financed with a $100 million loan from a U.S.-based credit fund (the "lender"), as well as notes issued by Spark Networks and later acquired by the lender.

After a failed attempt for a sale or M&A process and a series of amendments and forbearances between the lender and Spark Networks SE and two of its U.S. subsidiaries incorporated in Delaware—Spark Networks, Inc. and Zoosk, Inc. (the "Delaware Entities")—Spark Networks SE initiated a proceeding under the recently enacted German restructuring law (a "StaRUG Proceeding") in the Berlin-based Local Court Charlottenburg–Restructuring Court. Subsequently, Spark Networks SE and the Delaware Entities filed chapter 15 petitions in the Delaware bankruptcy court and sought chapter 15 recognition of the StaRUG Proceeding.

Initiating the StaRUG Proceeding, as well as pairing it with chapter 15 recognition, was essential to preserve Spark Networks SE and its subsidiaries (the "Spark Group") as a going concern. Due to the particular requirements of German insolvency law, commencing U.S. chapter 11 cases would have triggered obligations to commence value-destructive German insolvency proceedings. And many of the Spark Group's shareholders and creditors were likely not subject to the U.S. court's jurisdiction. Through the StaRUG Proceeding, however, the Spark Group was able to secure liquidity to achieve its operational turnaround plan; deleverage its balance sheet without impairing its obligations to employees, customers, suppliers, and others; and avoid the commencement of any German insolvency proceedings.

To secure foreign main recognition for parent company Spark Networks SE, the company stressed to the Delaware bankruptcy court that Spark Networks SE's COMI was in Germany. In filings, it noted that 132 of the 154 full-time employees were based in Berlin, that members of the executive leadership team and a board member were based in Berlin, that board meetings had traditionally taken place in Germany (although they had been virtual since the COVID-19 pandemic), and that strategic decisions of the board and executive management were generally implemented by Berlin-based employees. (Doc. No. 7 at p. 6 (Declaration of Kristie Goodgion)).

To obtain foreign nonmain recognition for its Delaware Entities, the debtors established in filings that the subsidiaries were subjects of the StaRUG Proceeding notwithstanding the fact that only the parent company, Spark Networks SE, was formally the debtor before the German restructuring court. Indeed, one objector raised the point, although obliquely, that the Delaware Entities could not be debtors in a StaRUG Proceeding. (Doc. No. 23 at p. 3 (Objection of PM Service GmBH)). Spark Networks SE submitted a foreign law declaration describing the contours of German bankruptcy law. The declaration clarified that, although only Spark Networks SE initiated the StaRUG Proceeding and was the formal entity, its affiliates nevertheless were subject to the court's jurisdiction and would be bound by such court's orders and, as such, were subjects of the restructuring plan under German law. (Docket No. 6 at 7 (Declaration of Christoph Morgen)). And the declaration described how affiliates like the Delaware Entities could enjoy the same release from the liabilities for which Spark Networks SE and its affiliated entities were jointly and severally liable. *Id.*

Spark Networks also maintained that the Delaware Entities had establishments in Germany within the meaning of section 1502(2) of the Bankruptcy Code. It cited specifically to the shared management and employees of the Spark Group, which operated pursuant to intercompany agreements. (Doc. No. 4 at p. 34 (Motion for Recognition)). It also noted that Zoosk, Inc.'s key assets included German-registered patents and trademarks—intellectual property that was managed and maintained by the shared employees based in Berlin. *Id.* at 35.

The court recognized Spark's StaRUG Proceeding as a foreign main proceeding with regard to Spark Networks SE and as a foreign nonmain proceeding with regard to the two U.S. subsidiaries. The court subsequently entered an order recognizing and enforcing in the United States the restructuring plan and the German order confirming it.

LOOKING FORWARD

As corporations expand their operations across more jurisdictions, and as capital flows to more far-flung regions of the world, utilizing one or more proceedings to implement a cross-border restructuring may become both a more attractive and more necessary choice for borrowers and lenders. From a purely U.S. perspective, an ever-more connected world with a growing variety of foreign restructuring regimes means that chapter 15 proceedings are likely to become an increasingly robust and strategic tool. Corporations, and their restructuring advisors, have and will continue to develop and test measures to ensure chapter 15 recognition of their foreign proceedings, even for U.S. entities. These could include strategic efforts to shift a company's COMI, either through transferring the registered office or transferring sufficient administration (and such COMI migration may be viewed favorably in certain circumstances, as in *In re Ocean Rig UDW Inc.*, in which the debtors shifted their COMI from the Marshall Islands, where the law did not permit corporate restructurings, to the Cayman Islands (570 B.R. 687 (Bankr. S.D.N.Y. 2017)), or methods to tie a U.S. entity more closely to an integrated enterprise with a foreign COMI.

LAWYER CONTACTS

Heather Lennox
Practice Leader
Cleveland/New York
+1.216.586.7111/+1.212.326.3837
hlennox@jonesday.com

Corinne Ball
New York
+1.212.326.7844
cball@jonesday.com

Olaf Benning
Frankfurt
+49.69.9726.3939
obenning@jonesday.com

Dan T. Moss
Washington/New York
+1.202.879.3794/+1.212.326.3432
dtmoss@jonesday.com

Richard H. Howell and Ryan Sims, associates in the Washington Office, contributed to this White Paper.

VOL. 24 NO. 3
MAY–JUNE
2025

BUSINESS RESTRUCTURING REVIEW

NEW YORK BANKRUPTCY COURT RECOGNIZES ENGLISH SCHEME OF ARRANGEMENT PROCEEDING UNDER CHAPTER 15 DESPITE CONCERNS OF IMPROPER COMI MANIPULATION

Corinne Ball • Dan T. Moss • Ben Larkin • David Harding

Approaching its 20-year anniversary, chapter 15 of the Bankruptcy Code has proven to be an invaluable tool for facilitating cross-border bankruptcy and insolvency cases. As foreign debtors have increasingly relied on chapter 15 to obtain "recognition" and enforcement in the United States of foreign bankruptcy proceedings and related foreign court orders, some courts have expressed concerns about debtors improperly manufacturing venue for foreign bankruptcy proceedings in countries with which they have minimal contacts. This issue was remarked upon by Judge Michael E. Wiles of the U.S. Bankruptcy Court for the Southern District of New York in *In re Mega Newco, Ltd*., No. 24-12031 (MEW), 2025 WL 601463 (Bankr. S.D.N.Y. Feb. 24, 2025). In an unpublished ruling, the bankruptcy court granted chapter 15 recognition of a UK "scheme of arrangement" proceeding commenced by a newly formed English subsidiary of a Mexican company for the purpose of restructuring the Mexican company's U.S. law-governed debt. The court also recognized and enforced a UK court's order approving the debtor's scheme, which included releases and injunctions of litigation against non-debtor third parties. However, Judge Wiles noted that he would have had "serious questions" about recognizing the scheme if there had been evidence that the restructuring "structure" had been opposed, unfair, or thwarted creditor expectations.

RECOGNITION AND PROCEDURES UNDER CHAPTER 15

Enacted in 2005, chapter 15 governs cross-border bankruptcy and insolvency proceedings in the United States. It is patterned on the 1997 UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"), which has been adopted in some form by more than 50 countries.

Both chapter 15 and the Model Law are premised upon the principle of international comity, or "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." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Chapter 15's stated purpose is "to provide effective mechanisms for dealing with cases of cross-border insolvency" with the objective of, among other things, cooperation between U.S. and non-U.S. courts. 11 U.S.C. § 1501(a).

Under section 1515 of the Bankruptcy Code, the "foreign representative" of a non-U.S. debtor—defined in section 101(24) as the representative or person authorized to administer the reorganization or liquidation of the debtor's assets or affairs—may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding." 11 U.S.C. § 1515.

The basic requirements for recognition under chapter 15 are: (i) the proceeding must be "a foreign main proceeding or foreign nonmain proceeding" within the meaning of section 1502; (ii) the "foreign representative" applying for recognition must be a "person or body"; and (iii) the petition must satisfy the requirements of section 1515, including that it be supported by the documentary evidence specified in section 1515(b). 11 U.S.C. § 1517(a). If these requirements are satisfied, "an order recognizing a foreign proceeding shall be entered." *Id.*

"Foreign proceeding" is defined in section 101(23) of the Bankruptcy Code as:

> [A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

11 U.S.C. § 101(23).

More than one foreign proceeding may be pending with respect to the same foreign debtor in different countries. Chapter 15 therefore contemplates recognition in the United States of both a foreign "main" proceeding—a case pending in the country where the debtor's center of main interests ("COMI") is located (*see* 11 U.S.C. § 1502(4))—and foreign "nonmain" proceedings, which may be pending in countries where the debtor merely has an "establishment" (*see* 11 U.S.C. § 1502(5)).

A debtor's COMI is presumed to be the location of the debtor's registered office, or "habitual residence" in the case of an individual. *See* 11 U.S.C. § 1516(c). However, this presumption can be overcome. *See In re ABC Learning Centres Ltd.*, 445 B.R. 318, 328 (Bankr. D. Del. 2010) (stating that "the COMI presumption may be overcome particularly in the case of a 'letterbox' company not carrying out any business" in the country where its registered office is located), *aff'd*, 728 F.3d 301 (3d Cir. 2013). Various factors are relevant in determining a debtor's COMI, including:

- The location of each debtor entity's headquarters, managers, employees, investors, primary assets, and creditors, as well as the jurisdiction whose law would apply to most of the debtor's disputes, *In re SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007);
- The location of a debtor entity's liquidation or reorganization activities and administrative functions, *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. 2013);
- The situs of each debtor entity's "nerve center," including the location from which such entity's "activities are directed and controlled[,]" *id.* at 138;
- The regularity of a debtor entity's activities in the relevant location and the ascertainability of these activities by creditors, *id.*; *In re British Am. Ins. Co.*, 425 B.R. 884, 912 (Bankr. S.D. Fla. 2010); *In re Betcorp Ltd.*, 400 B.R. 266, 289 (Bankr. D. Nev. 2009); and
- Creditors' expectations regarding the location of a debtor's COMI, *In re Serviços de Petróleo Constellation S.A.*, 613 B.R. 497 (Bankr. S.D.N.Y. 2019); *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169, 228 (Bankr. S.D.N.Y. 2017).

COMI can sometimes be found to have shifted, or "migrated," from a foreign debtor's original principal place of business or habitual residence to a new location. *See Pirogova,* 593 B.R. at 410; *In re Creative Finance Ltd. (In Liquidation)*, 543 B.R. 498 (Bankr. S.D.N.Y. 2016). In *Fairfield Sentry*, the Second Circuit ruled that, due principally to the present verb tense of the language of section 1517, the relevant time for assessing COMI is the chapter 15 petition date, rather than the date a foreign insolvency proceeding is commenced with respect to the debtor. *See also In re Ran*, 607 F.3d 1017 (5th Cir. 2010) (same); *In re Brit. Am. Ins. Co. Ltd.*, 425 B.R. at 910 (same).

In *Fairfield Sentry*, the Second Circuit also expressed concern about possible COMI "manipulation," ruling that a court "may look at the period between the commencement of the foreign proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith." *Fairfield Sentry*, 714 F.3d at 138; *see also In re O'Reilly*, 598 B.R. 784 (Bankr. W.D. Pa. 2019) (denying the petition of a foreign bankruptcy trustee for recognition under chapter 15 of a debtor's Bahamian bankruptcy case and finding that, although the case was otherwise eligible for recognition, the debtor's COMI was no longer in the Bahamas when the trustee filed the chapter 15 petition, and the trustee failed to demonstrate that the debtor even had an "establishment" there); *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (ruling that scheme of adjustment proceedings pending in the Cayman Islands should be recognized as "foreign main proceedings" under chapter 15, even though the debtors' COMI had been shifted to the Caymans less than a year before the proceedings were commenced, because the country in which the debtors' COMI had previously been located did not have a law permitting corporate restructurings), *appeal dismissed*, 585 B.R. 31 (S.D.N.Y. 2018), *aff'd*, 2019 WL 1276205 (2d Cir. Mar. 19, 2019).

An “establishment” is defined by section 1502(2) as “any place of operations where the debtor carries out a nontransitory economic activity.” *See In re Mood Media Corp.*, 569 B.R. 556 (Bankr. S.D.N.Y. 2017) (concluding that an “establishment” must be an actual place from which economic market-facing activities are regularly conducted). Unlike with the determination of COMI, there is no statutory presumption regarding the determination of whether a foreign debtor has an establishment in any particular location. *See British American*, 425 B.R. at 915.

A foreign debtor’s restructuring activities alone are inadequate to support a finding that the debtor has an establishment for purposes of foreign nonmain proceeding recognition. *See Ran*, 607 F.3d at 1028 (holding that if a foreign “bankruptcy proceeding and associated debts, alone, could suffice to demonstrate an establishment, this would render the framework of Chapter 15 meaningless. There would be no reason to define establishment as engaging in a nontransitory economic activity.”); *see also In re Modern Land (China) Co.*, 641 B.R. 768, 785-86 (Bankr. S.D.N.Y. 2022) (same); *Rozhkov v. Pirogova (In re Pirogova)*, 612 B.R. 475, 484 (S.D.N.Y. 2020) (same).

Recognition under chapter 15 “is not to be rubber stamped by the courts,” and the bankruptcy court must independently determine whether a foreign proceeding qualifies as either a main or a nonmain proceeding under chapter 15. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 125 (Bankr. S.D.N.Y. 2007), *aff’d*, 389 B.R. 325 (S.D.N.Y. 2008); *accord In re Glob. Cord Blood Corp.*, 2022 WL 17478530, at *6 (Bankr. S.D.N.Y. Dec. 5, 2022) (“‘But recognition is not a rubber stamp exercise,’ and the burden rests on the foreign representative to prove each of the requirements of Section 1517.”) (quoting *Creative Finance*, 543 B.R. at 514).

MEGA NEWCO

Mega Newco Ltd. (the “debtor”) is a wholly owned subsidiary of Mexican financial services company Operadora de Servicios, S.A. De C.V., Sofom, E.R. (“ODS”). ODS is based and headquartered in Mexico.

Sometime during 2024, ODS and an ad hoc committee collectively holding more than 25% of New York law-governed notes (the “U.S. Notes”) issued by ODS reached agreement on the terms of a restructuring under which noteholders would receive partial cash payments or equity in ODS, or the right to buy new notes issued by ODS. ODS also negotiated arrangements to refinance and restructure other debt obligations contingent on the completion and enforcement of the U.S. Notes restructuring.

However, because the U.S. Notes could not be restructured in the United States outside of a case under chapter 11 of the Bankruptcy Code without the consent of 100% of the noteholders, ODS in September 2024 created a wholly owned subsidiary—the debtor—organized under English law with a registered office in London for the purpose of facilitating a restructuring of the U.S. Notes under a UK scheme of arrangement pursuant to the UK Companies Act 2006.

Deploying such a structure to implement a balance sheet restructuring is not uncommon in the United Kingdom, and UK courts have sanctioned many similar schemes of arrangement, since the structure was first used in *Re Codere Finance (UK) Ltd*, [2015] EWHC 3778 (Ch). In a related context, UK courts have also exercised jurisdiction over and sanctioned schemes of arrangement where the governing law in the subject debt documents changed to English immediately prior to the commencement of a UK scheme proceeding in order to secure a sufficient connection to the jurisdiction (*see Re Apcoa Parking Holdings GmbH & Ors*, [2014] EWHC 3849 (Ch); *Re Tele Columbus*, [2024] EWHC 181 (Ch)).

At the time of its formation, the debtor became a co-obligor on, and a guarantor of, the U.S. Notes, and agreed that ODS could seek contribution from the debtor for any payment made by ODS on the U.S. Notes.

UK law permits approval of a consensual scheme dealing with a single series of note obligations, as distinguished from the entirety of a debtor’s obligations, and is generally less costly and faster than a chapter 11 reorganization. For a scheme of arrangement to become effective, a simple majority in number representing at least 75% in value of claims held by voting creditors must vote in favor of the scheme.

ODS did not have a registered office in the United Kingdom and had no substantial business operations or facilities there. Therefore, ODS could not have proposed a scheme of arrangement on its own behalf due to the lack of a sufficient connection with the United Kingdom that would have given a UK court jurisdiction to approve such a scheme.

The debtor commenced a UK scheme proceeding on November 14, 2024 (“the UK Proceeding”). It proposed a scheme of arrangement (the “UK Scheme”) designed to implement the proposed restructuring of the U.S. Notes as well as certain other obligations of ODS and its other affiliates. The UK Scheme also provided, in accordance with UK law, for releases of, and an injunction of litigation against, the debtor, ODS, and various third parties for liabilities arising from the U.S. Notes, negotiation and implementation of the scheme, and the restructuring, except for claims for fraud or willful misconduct. The debtor expressly disclosed in the UK Proceeding that it was created to enable the English court to have jurisdiction over the UK Scheme.

On November 25, 2024, the debtor’s foreign representative (the “FR”) filed a petition in the U.S. Bankruptcy Court for the Southern District of New York seeking recognition of the UK Proceeding under chapter 15 as a foreign main proceeding. The FR also sought an order recognizing and enforcing the UK Scheme, including the scheme’s third-party release/injunction provisions.

The UK Scheme was approved at a meeting of creditors on February 3, 2025, with nearly 76% of creditors (by value) appearing at the meeting and voting unanimously in favor. The UK High Court of Justice (the "UK Court") sanctioned the UK Scheme on February 5, 2025, without objection.

On February 7, 2025, the bankruptcy court entered an order recognizing the UK Proceeding under chapter 15 as a foreign main proceeding, and recognizing and enforcing the UK Scheme. *See In re Mega Newco Limited*, No. 24-12031 (MEW) (Bankr. S.D.N.Y. Feb. 7, 2025) [Doc. No. 25]. Among other things, the court found that the debtor's COMI is in the United Kingdom. In its recognition order, the bankruptcy court also stated that the injunctive relief set forth in the order implementing the third-party releases in the UK Scheme was "appropriate and necessary to prevent the risk that the English Scheme Proceeding may be thwarted by the actions of particular creditors, a result inimical to the purposes of Chapter 15 of the Bankruptcy Code as set forth in section 1501(a) of the Bankruptcy Code." It further noted that "[s]uch actions could put in peril the Debtor's ability to successfully restructure."

On February 24, 2025, the U.S. bankruptcy court issued a written opinion on its ruling.

THE BANKRUPTCY COURT'S OPINION

In its written opinion, the bankruptcy court explained that, consistent with its previous ruling in *Mood Media* and the decisions in *Ran*, *Modern Land*, and *Pirogova*, the debtor's restructuring activities in the UK Proceeding alone were insufficient to demonstrate that the debtor had an "establishment" for purposes of chapter 15 recognition of the UK Proceeding as a foreign nonmain proceeding. According to Judge Wiles, because the debtor never engaged in any business or regular market-facing activities in the United Kingdom, its restructuring activities alone were inadequate. Otherwise, he wrote, "any proceeding in which a debtor sought relief would automatically qualify as a 'foreign main proceeding,' and the requirement of an 'establishment' would be deprived of any meaning." *Mega Newco*, 2025 WL 601463, at *2.

By contrast, Judge Wiles explained, the debtors' UK restructuring activities—"apparently . . . the only activities in which [the debtor] has ever engaged"—could be considered in determining whether the debtor's COMI is in the United Kingdom for purposes of chapter 15 recognition of the UK Proceeding as a foreign main proceeding. *Id.* at *3. Given the absence of any objections to recognition of the UK Proceeding under chapter 15 as a foreign main proceeding, or to enforcement of the UK Scheme in the United States, and without any evidence of unfairness to the holders of the U.S. Notes, the bankruptcy court concluded that chapter 15 recognition was warranted.

However, Judge Wiles expressed reservations regarding possible COMI manipulation:

> I nevertheless cannot help but see significant risks in the structure that has been used here. Chapter 15 is premised on the idea that a debtor who seeks to restructure an obligation is actually the subject of a foreign proceeding, and that the foreign proceeding is located in the country where that debtor has its COMI. Here, the whole structure admittedly was created for the purpose of restructuring the U.S. Notes issued by [ODS]. However, [ODS] is not a party to the [UK Proceeding], and [ODS's] COMI is in Mexico, not the U.K. [The debtor] was created, and then voluntarily subjected itself to [ODS's] liabilities under the U.S. Notes, just so that the U.S. Notes issued by [ODS] could be restructured in a jurisdiction that was not otherwise available. . . . If we were routinely to allow this structure in all cases, no matter what the circumstances, the ordinary predicates for Chapter 15 relief could be stripped of meaning. Any debtor company could restructure its obligations anywhere it chose without even subjecting itself to a foreign proceeding. All that a debtor would need to do is to form a new subsidiary in a jurisdiction of its choice and then cause that new subsidiary to assume the parent company's obligations. The parent company's COMI would no longer be relevant to the parent's restructuring of its debts. The laws of the chosen jurisdiction would govern a restructuring, no matter how those laws might affect the legitimate expectations of creditors and regardless of whether the debtor had chosen a particular jurisdiction for the purpose of favoring insiders or for other improper reasons.

Id.

The bankruptcy court then considered whether the "underlying structure" of the U.S. Notes restructuring was an "improper manipulation of COMI" such that the court should disregard the form of the transaction and instead examine whether ODS on its own had satisfied the conditions for chapter 15 recognition and relief.

The court emphasized that this structure "could be used in another case as a way of frustrating and thwarting the legitimate expectations of creditors." *Id.* at *4. Even so, Judge

Wiles concluded that the case before him did not involve "frustration or thwarting of creditor rights." Instead, he noted, the debtor was formed and the UK Proceeding was commenced "for laudable objectives." According to the bankruptcy court, those actions facilitated an efficient restructuring that would enhance all stakeholders' recoveries and maximize the value of the underlying businesses, and therefore, were "fully consistent with the stated purposes of Chapter 15." *Id*.

"Ironically," Judge Wiles noted, declining to enforce the UK Court's order approving the UK Scheme would itself "thwart creditor expectations" in this case. He wrote that it would be "absurd" to "thwart the creditors' constructive desires and expectations in the guise of supposedly protecting them." *Id*.

Finally, the bankruptcy court noted that, if there were evidence—or even a contention—that the reorganization structure of the U.S. Notes was unfair or thwarted third-party expectations, there would be "serious questions" as to whether it should be approved. Without any evidence of these things, and given the creditors' overwhelming support of the UK Scheme, the court saw "no cause in this particular case to look past the form of the transactions or to pursue theoretical issues that no affected party wishes to pursue." *Id*.

OUTLOOK

Although unpublished and therefore not precedential, the bankruptcy court's decision in *Mega Newco* is significant for a number of reasons.

First, in recognizing the UK Proceeding and enforcing the UK Court's order sanctioning the UK Scheme under principles of international comity, the bankruptcy court demonstrated the important role of chapter 15 and U.S. courts in providing assistance to foreign bankruptcy courts presiding over the bankruptcy and restructuring cases of foreign debtors. The bankruptcy court in *Mega Newco* not only recognized the debtor's UK Proceeding, thereby facilitating implementation of the UK Scheme in the United States, but also recognized and enforced the UK Court's order sanctioning the UK Scheme, including its provisions releasing claims and enjoining litigation against third parties arising from the restructuring and the U.S. Notes without the consent of all affected creditors.

Such nonconsensual third-party releases in non-full payment chapter 11 plans have been effectively banned in the United States after the U.S. Supreme Court's 2024 ruling in the Purdue Pharma chapter 11 cases. *See Harrington v. Purdue Pharma LP*, 603 US 204 (2024). However, as illustrated by *Mega Newco*, this does not mean that such releases in a foreign debtor's restructuring plan cannot be recognized and enforced in the United States in a chapter 15 case.

Despite the controversial nature of such releases—even before *Purdue Pharma*—many U.S. bankruptcy courts have recognized and enforced foreign restructuring plans providing for third-party releases in chapter 15 cases. *See, e.g., In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1062 (5th Cir. 2012) ("We conclude that, although our court has firmly pronounced its opposition to [non-debtor] releases, relief is not thereby precluded under § 1507, which was intended to provide relief not otherwise available under the Bankruptcy Code or United States law."); *In re Americanas S.A.*, 2024 WL 3506637 (Bankr. S.D.N.Y. July 22, 2024) (recognizing and enforcing under chapter 15 a Brazilian debtor's bankruptcy plan that permitted nonconsensual third-party releases, without, however, any legal analysis or mention of *Purdue Pharma*); *In re Agrokor d.d.,* 591 B.R. 163 (Bankr. S.D.N.Y. 2018); *In re Sino-Forest Corp.*, 501 B.R. 655 (Bankr. S.D.N.Y. 2013); *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

Further, at least one court in a post-*Purdue* chapter 15 case recognized a foreign restructuring plan approved in a Mexican *concurso mercantile* proceeding that included nonconsensual third-party releases over the objections of a major creditor, observing that: (i) *Purdue* is limited to the chapter 11 context; (ii) recognition of the restructuring plan was appropriate under the principles of comity; and (iii) nonconsensual third-party releases are not manifestly contrary to the public policy of the United States under section 1506 of the Bankruptcy Code, given that such releases are expressly authorized in the context of asbestos-related claims under section 524(g). *In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.*, Case No. 25-10208 (Bankr. D. Del. Mar. 11, 2025), ECF No. 51 (bench ruling; written decision forthcoming), *appeal docketed*, Case No. 25-00371 (D. Del. Mar. 26, 2025).

Second, there is a troubling aspect of Judge Wile's commentary in *Mega Newco*. Specifically, as noted, section 1517(a) of the Bankruptcy Code provides that a U.S. bankruptcy court "shall" enter an order recognizing a foreign proceeding if the statutory requirements specified for recognition are satisfied. This does not mean that a bankruptcy court cannot refuse to order such relief if the court determines that the very high bar of being "manifestly contrary to the public policy of the United States" has been surmounted. *See* 11 U.S.C. § 1506. However, section 1506 requires a "narrow reading" and "does not create an exception for any action under Chapter 15 that may conflict with public policy, but only an action that is 'manifestly contrary.'" *Fairfield Sentry*, 714 F.3d at 139); *accord ABC Learning*, 728 F.3d at 309 (the public policy exception should be invoked only under exceptional circumstances concerning matters of "fundamental importance" to the United States).

Judge Wiles appears to be second-guessing the UK Court's decision to take jurisdiction over the debtor's restructuring based on the UK Court's determination that a sufficient connection existed such that it could sanction the UK Scheme. As noted earlier, UK courts have sanctioned schemes based on similar "sufficient connections" to the United Kingdom. In the absence of any suggestion that recognition of the UK Proceeding violated section 1506—an issue that the bankruptcy court did not even address—the court appears to have stepped outside the statutory confines of chapter 15. It is inappropriate for a U.S. bankruptcy court to second-guess a foreign court's conclusion and, further, the motivations of the Mexican parent in creating the debtor for the purpose of seeking approval of a scheme of arrangement restructuring the U.S. Notes under UK law. It is an uncontroversial proposition that a chapter 15 court does not sit as an appellate court of the foreign proceeding. *Universal Cas. & Sur. Co. v. Gee (In re Gee)*, 53 B.R. 891, 902, 904 (Bankr. S.D.N.Y. 1985) (noting that if the bankruptcy court is satisfied with the procedural fairness of the foreign proceeding (e.g., because the foreign proceeding accords the interested parties' appropriate procedures to contest the entering into of the winding-up order and appeal the court's determination and allows for the equitable distribution of assets) and that the foreign proceeding is not repugnant to U.S. laws and policies, it "should not sit as an appellate court over the foreign proceedings."); *In re Oi S.A.*, 587 B.R. 253, 273 (Bankr. S.D.N.Y. 2018) ("It is simply not this Court's role to second guess the wisdom of the [foreign] courts or overrule their decisions, which would be fundamentally inconsistent with comity."); *In re Rede Energia S.A.*, 515 B.R. 69, 100 (Bankr. S.D.N.Y. 2014) ("[I]t is not appropriate for this Court to superimpose requirements of U.S. law on a case in [foreign jurisdiction] or to second-guess the findings of the foreign court."); *SNP Boat Serv. S.A. v. Hotel Le St. James*, 483 B.R. 776, 786 (S.D. Fla. 2012) ("To inquire into a specific foreign proceeding is not only inefficient and a waste of judicial resources, but more importantly, necessarily . . . transform[s] a domestic court into a foreign appellate court where creditors are always afforded the proverbial 'second bite at the apple.' Chapter 15's directive that courts be guided by principles of comity was intended to avoid such a result."); *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) ("The relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical. A U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court.").

Lastly, it has been well established that a foreign debtor's lack of good faith prior to filing a petition for recognition under chapter 15 is not alone a sufficient justification to deny recognition. *See In re Culligan Ltd.*, 2021 WL 2787926 (Bankr. S.D.N.Y. July 2, 2021); *In re Manley Toys Ltd*., 580 B.R. 632, 648 (Bankr. D.N.J. 2018), *aff'd*, 597 B.R. 578 (D.N.J. 2019); *In re Creative Fin. Ltd.*, 543 B.R. at 515 (Bankr. S.D.N.Y. 2016). Even if it were, "manipulating" or "manufacturing" COMI for the purpose of seeking approval of a restructuring under the laws of a forum whose bankruptcy laws are more favorable to a successful restructuring cannot, without more, be deemed improper. *See Ocean Rig*, 570 B.R. at 703.