Hon. Martin Glenn
United States Bankruptcy Judge
Southern District of New York

A. The Role of the Judge in Recognizing French Insolvency Proceedings and Enforcing a Plan Approved by a French Court

In 2005, the U.S. adopted Chapter 15 of the Bankruptcy Code, incorporating the UNCITRAL Model Law on Cross Border Insolvency, with changes in language and substance in some of the sections of Chapter 15. Even before the U.S. adopted the Model Law, however, U.S. courts frequently recognized and enforced many foreign court insolvency proceedings and foreign court orders in those proceedings.

It is important to note that, unlike in some other countries, Chapter 15 recognition and enforcement does not depend on whether courts in foreign countries in which insolvency proceedings provide reciprocity to U.S. insolvency proceedings and insolvency-related orders and judgments. U.S. courts examine the foreign proceeding and applicable foreign law to satisfy the court that the foreign proceedings are procedural fair and that U.S. and Foreign creditors receive similar treatment.

While French insolvency proceedings have been recognized in a number of chapter 15 cases in the past, I believe the CGG SA case is the first French Safeguard Plan that was recognized and enforced by a U.S. bankruptcy court as a foreign main proceeding in a written opinion. *See In re CGG S.A.*, 579 B.R. 716 (Bankr. S.D.N.Y. 2017).

B. Requirements for Recognition of a Foreign Main Proceeding

Section 1517(a) of the Bankruptcy Code provides that the court shall, after notice and a hearing, enter an order recognizing a foreign main proceeding if:

> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding . . . within the meaning of section 1502;
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> (2) the foreign representative applying for recognition is a person or body; and
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> (3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a). The foreign proceeding and the foreign representative must meet the definitional requirements set out in sections 101(23) and 101(24) of the Code.

1. Requirements of a Foreign Proceeding and Foreign Main Proceeding

A foreign proceeding is 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). The foreign representative must satisfy seven criteria to establish that a proceeding is a foreign proceeding:

> (i) [the existence of] a proceeding; (ii) that is either judicial or administrative; (iii) that is collective in nature; (iv) that is in a foreign country; (v) that is authorized or conducted under a law related to insolvency or the adjustment of debts; (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and (vii) which proceeding is for the purpose of reorganization or liquidation.

In re Ashapura Minechem Ltd., 480 B.R. 129, 136 (S.D.N.Y. 2012) (footnote omitted).

A foreign main proceeding is defined as "a foreign proceeding in the country where the debtor has the center of its main interest," 11 U.S.C § 1502(4), and "shall be recognized . . . if it is pending in the country where the debtor has the center of its main interests." *Id.* § 1517(b)(1). Although the term "center of main interests" ("COMI") is not defined in the Bankruptcy Code, "[i]n the absence of evidence to the contrary, the debtor's registered office . . . is presumed to be the center of the debtor's main interests." *Id.* § 1516(c).

To determine a debtor's COMI, courts look to a nonexclusive list of factors, including "the location of the debtor's headquarters; the location of those who actually manage the debtor . . . ; the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013) (quoting *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006)).

2. Requirements of a Foreign Representative

A foreign representative is "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." 11 U.S.C. § 101(24). "Person" is defined under section 101(41) of the Bankruptcy Code to include an individual, partnership, or corporation. 11 U.S.C. § 101(41).

In *In re Vitro S.A.B. de CV*, the Fifth Circuit concluded that section 101(24) does not require that a foreign representative be appointed by a foreign tribunal. The court looked to the "plain meaning" of the statute and noted that "[s]ection 101(24)—defining the term 'foreign representative'—is wholly devoid of any statement that a foreign representative must be judicially appointed." *Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de CV (In re Vitro S.A.B. de CV)*, 701 F.3d 1031, 1047 (5th Cir. 2012). The court also looked to the history of Model Law Article 2(d), containing language which is closely followed by section 101(24), which "expressly rejected the requirement that a foreign representative be '[specifically] authorized by statute or other order of court (administrative body) to act in connection with a foreign proceeding.'" *Id*. (citation omitted). The court held that a governing body of an entity

may authorize a person to act as that entity's foreign representative in a chapter 15 proceeding. *Id*. In most cases, the foreign court expressly designates the individual authorized to serve as the foreign representative.

3. Requirements of Section 1515

The requirements provided by section 1515 include that a petition for recognition be filed and accompanied by:

> (1) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;
>
> (2) a certificate from the foreign court affirming the existence of the proceeding and appointment of the representative; or
>
> (3) in the absence of (1) or (2), evidence which the court deems sufficient to confirm the existence of the foreign proceeding and appointment of the foreign representative.

11 U.S.C. § 1515(a)–(b). The petition must also be accompanied by a statement identifying all known foreign proceedings with respect to the debtor, *id*. § 1515(c), and if applicable, a translation of the evidentiary materials into English. *Id.* § 1515(d).

C. The Interplay of Section 109(a) and Chapter 15 of the Bankruptcy Code

Section 109(a) of the 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 this title." *Id*. § 109(a). The Second Circuit has applied the requirements enumerated in section 109(a) of the Code to foreign debtors under chapter 15. *See Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 247 (2d Cir. 2013). Accordingly, under section 109(a) and in accordance with *Barnet*, a foreign representative must show that the debtor has either (i) a domicile, (ii) a place of business, or (iii) *property* in the United States, as a condition precedent to eligibility under 11 U.S.C. § 1517 (emphasis added).

Some courts, including my Court, have held that a professional retainer deposited in a United States bank account constitutes property in the United States. Courts have also held that debt containing New York governing law and New York forum selection clauses satisfy the property in the United States requirement. *See, e.g.*, *In re Inversora Eléctrica de Buenos Aires S.A.*, 560 B.R. 650, 655 (Bankr. S.D.N.Y. 2016) ("[D]ollar-denominated debt subject to New York governing law and a New York forum selection clause is independently sufficient to form the basis for jurisdiction.") (citation omitted); *In re Berau Cap. Res. Pte Ltd*, 540 B.R. 80, 84 (Bankr. S.D.N.Y. 2015) ("[D]ollar-denominated debt subject to New York governing law and a New York forum selection clause is independently sufficient to form the basis for jurisdiction.") (citation omitted).

D. Standards for Recognition and Enforcement

Upon recognition of a foreign proceeding, at the request of the foreign representative, the court may grant, with certain express exceptions, "any appropriate relief," including "any additional relief that may be available to a trustee" that the court determines is necessary to effectuate the purpose of chapter 15 and to protect the assets of the debtor or the interests of the creditors. 11 U.S.C. § 1521(a)(7). Appropriate relief under section 1521 includes enforcing a foreign confirmation order. *See In re Rede Energia S.A.*, 515 B.R. 69, 89 (Bankr. S.D.N.Y. 2014). Relief under section 1521 will be granted "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." *Id*. at 90; 11 U.S.C. § 1522(a).

In addition to the types of relief enumerated in section 1521, section 1507(a) of the Bankruptcy Code provides that "[s]ubject to the specific limitations stated elsewhere in this chapter[,] the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States." *Id*. § 1507(a). "Pursuant to section 1507, the court is authorized to grant any 'additional assistance' available under the Bankruptcy Code or under 'other laws of the United States,' provided that such assistance is consistent with the principles of comity and satisfies the fairness considerations set forth in section 1507(b)." *In re Rede Energia S.A.*, 515 B.R. at 90. As with section 1521, relief under section 1507 may include recognition and enforcement of a plan approved by a foreign court. *Id.* at 94–95.

E. Standards for Recognition and Enforcement

In my opinion recognizing CGG SA's Safeguard Plan, I found that all of the requirements for recognition of the French proceeding as a foreign main proceeding were satisfied and that it was appropriate to recognize and enforce the safeguard Plan in the U.S.

After reviewing the background of the French proceedings, and the creditors' overwhelming support for the Safeguard Plan (93.5%), surpassing the two-thirds in amount threshold required within each committee/meeting under French law, and particularly the Sanctioning Order entered by the French court on December 1, 2017, I recognized and enforced the Safeguard Plan in the U.S.

F. US Bankruptcy Judges Take an Active Role in Overseeing Chapter Cases

U.S. bankruptcy judges generally play an active role in overseeing cases on their docket to assure that cases proceed expeditiously and that all parties in interest have an opportunity to be heard on matters affecting their interest in the case. But bankruptcy judges do not interfere with management decisions unless the matter is one expressly requiring court approval.

In chapter 15 cases, before and after recognition, U.S. bankruptcy judges also take seriously the Model Law's direction for coordination and cooperation between courts. Chapter 15 expressly recognizes as one of its objectives cooperation between courts, 11 U.S.C. § 1501(a)(1), including when appropriate direct communication with a foreign court, *id.* § 1525(b). Sometimes these objectives are furthered by entering a cross-border protocol, approved by both

courts, *id.* § 1527(4), and, sometimes, concurrent proceedings in more than one court can be held, *id.* §§ 1527(5), 1529, 1530, most often if there are contested issues that both courts must resolve. For example, in one case, a Canadian judge and I held simultaneous court hearings, with live video displayed in each court, because both courts had to rule on a pending issue. After the evidence and argument of counsel were completed, the two courts took a recess, the judges conferred by telephone, and then resumed the concurrent hearings and ruled on the issue on the record. (We reached the same decision in resolving the issue.)

In connection with the CGG cases in France and the U.S., no formal written protocol was approved, but counsel kept the U.S. court regularly advised of the status of the proceedings in France, and there were no contested issues that both courts were required to decide.

M.G.
April 18, 2018