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# Drawing the Borders On Chapter 15 Bankruptcy

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April 2018 was a very busy month for the interpretation and application of Chapter 15 in the U.S. Bankruptcy Court for the Southern District of New York. During those four weeks, three Bankruptcy Judges issued opinions focusing on various aspects of Chapter 15 of the U.S. Bankruptcy Code. Chapter 15 was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, pub. L. 109-8, 119 Stat. 23 (April 20, 2005), which repealed prior §304 of the Bankruptcy Code governing the manner in which Bankruptcy Courts in the United States give recognition to foreign insolvency proceedings for purposes of advancing the doctrine of international comity. Chapter 15 was the United States adoption of the Model Law on Cross Border Insolvency promulgated by the United Nations Commission on International Trade Law (UNCITRAL) in 1997. Not surprisingly, each of these cases focuses on the key underpinnings of Chapter 15; as such they each highlight the fundamental objectives of the statute.

In the case of *In re Avanti Communications Group PLC*, 18-10458, decided by Judge Martin Glenn on April 9, 2018, the court determined that the principle of comity justified enforcing a scheme of arrangement sanctioned by the UK courts that released non-filed affiliates from their guarantees. This decision actually deviates from decisions rendered in the Fifth, Ninth, Tenth and District of Columbia Circuits which prohibit non-debtor releases in Chapter 11 in their entirety; whereas the Second, Fourth, Sixth, Seventh and Eleventh Circuits may allow for non-debtor releases but only in limited circumstances and require consent. However, the

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court noted that when reviewing third-party releases in the context of a Chapter 15 case, the analysis should be different and should focus on whether the foreign court had the authority to grant such a release.

In this case, the debtor had filed in the UK initially and had put forth a scheme of arrangement which effectively released non-debtor affiliates, located around the world (including in the United States) from their guarantees. The Scheme of Arrangement was voted on and approved by the creditors of the UK entities. The debtor's foreign representative had filed a Chapter 15 in the United States to address claims against the debtor's direct and indirect subsidiaries that had guaranteed certain obligations of the parent company. The debtor's foreign representative asked Judge Glenn to recognize the UK proceeding as a foreign main proceeding and enforce the Scheme of Arrangement as a means to resolving the Chapter 15 proceeding in the United States (While the debtor did not have a place of business in the United States, it did have assets in the United States in the form of a retainer for U.S. counsel, and the primary Indenture sought to be impacted by the scheme of arrangement was governed by New York law). The court found that these ties to the United States satisfied §109(a)'s requirements outlining when an entity can be considered to be a debtor under the Bankruptcy Code.

Next, Judge Glenn found that §1521(a) of the Bankruptcy Code vested the court with the right to grant "appropriate relief" where necessary to carry out the underlying purpose of Chapter 15 and protect the debtor's assets. Relying upon §1507 (a) of the Bankruptcy Code, which serves to guide a Bankruptcy Court in determining whether to grant assistance to foreign courts, Judge Glenn found that assistance should be granted when it is "consistent with the principles of comity." Thus, although third-party releases may be controversial in Chapter 11 cases, the focus needed to be on the law of the UK and the process followed therein.

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Judge Glenn determined that the law of the UK had afforded the creditors a full and fair opportunity to be heard in respect of the matter, which was consistent with the law of the U.S. due process. Further, he found that third-party non-debtor releases were common in Schemes of Arrangements for releases of affiliate guarantees of debt that were being adjusted by that scheme. The court concluded that the "[p]rinciples of comity permit a U.S. bankruptcy court to recognize and enforce" a UK scheme that included the releases of third-party guarantors, even if they were not debtors in the case.

In the case of *Platinum Partners Valve Arbitrate Fund LP*, 16-12925 (April 17, 2018) decided about a week later, Judge Shelley Chapman considered requests by foreign liquidators to pursue discovery against U.S.-based entities through a Chapter 15 proceeding for purposes of advancing the foreign liquidation proceedings of the assets of the debtor in the Cayman Islands. In response to the requests of the liquidators, the court allowed discovery to move forward and required compliance by U.S.-based accountants even though under the foreign law such discovery might not have been allowed.

In this case, there were a series of related funds being liquidated in the Cayman Islands, however the funds had previously been managed in New York and the U.S. attorney had indicted the managers for investment advisor fraud in New York. The liquidators filed a Chapter 15 petition in New York and, in furtherance of the foreign liquidation process, sought to obtain work papers from the company's prior accountants. The accountants opposed the request and noted that under Cayman law there was no authority to compel such turnover. Judge Chapman found that while Cayman law on the turnover of these types of documents was not settled, it neither prohibited

nor was adverse to such discovery demands. Moreover, she further found that the scope of discovery under a foreign jurisdiction should not serve as the basis to oppose a request for discovery.

Instead, the court determined that it had the power to grant a foreign representative relief similar to that which a bankruptcy trustee might obtain from the U.S. courts. Specifically, the court recognized that §5429(e) of the Bankruptcy Code (and/or Rule 2004 of the Federal Rules of Bankruptcy Procedure) directly allows the court to order an accountant (or other professional) who is in the possession of books, records and information relating to a debtor's financial affairs, to turn them over to a trustee. The court recognized that other courts had held that such relief is available to a foreign representative. Notably, the court recognized that a key objective of Chapter 15 is to provide foreign representatives with the assistance they need in order carry out their independent duties. Based upon the foregoing, the court granted the request of the foreign liquidators to secure this discovery.

The third case was decided during the last week of April by Judge Sean Lane in *B.C.I. Finances PTY. Ltd.*, 17-11266 (April 24, 2018). In this case, the court focused on whether a debtor that was the subject of a Chapter 15 filed in the United States was actually eligible for relief under Chapter 15. The Chapter 15 proceeding had been filed by foreign representatives of an Australian liquidation proceeding who were seeking relief in the United States to obtain discovery and other relief from certain insiders of the liquidating entities. The liquidators were on the cusp of obtaining a $15 million judgment against insiders for breach of fiduciary duty, when they had moved to New York and appeared to have no plans to return to Australia. It was these same insiders who objected and sought to dismiss the Chapter 15 proceeding contending it had been filed in bad faith. Specifically, the objectors claimed that there were no real assets in the United States and that the liquidators had manufactured a foothold in New York in bad faith.

In order for a Chapter 15 case to be viable, the entity in question has to be eligible to be a debtor under §109(a) of the Bankruptcy Code. (Section 109(a) provides that only a "person that resides or has a domicile, a place of business, *or property* in the United States … may be a debtor under this title." (emphasis added). Here the foreign liquidators had mailed a $1,250 retainer check to New York lawyers and asserted there were claims against insiders of the foreign debtor located in New York. (This is similar to the facts of the *Avanti* case discussed above).

The question was whether the debtor had "property in the United States." Pointing to substantial case law in this area, the court determined that the retainer account constituted property of the debtor entity sufficient to satisfy §109 of the Bankruptcy Code. Judge Lane further found that the fiduciary duty claims advanced by the liquidators also constituted property in the United States sufficient to satisfy §109's requirement. The court needed to determine where those claims were located and in so doing relied upon New York choice of law rules. First, the court found that the law of the jurisdiction with the greatest interest in the litigation should be applied, i.e., Australia, as the acts giving rise to the breach of fiduciary duty claims arose there and any recovery would be distributed to creditors most likely located in Australia. Next, Judge Lane found that a debt under Australian law is generally found to be situated where the obligor resides—so here, given that the defendants were now in New York, New York would be the appropriate forum for determining those claims. Just like the other two cases, the court was guided in its decision-making process by the goal of Chapter 15 to assist foreign representatives. In particular, the court noted that "[preventing a 'foreign debtor from establishing eligibility to support needed chapter 15 relief [would] contravene the purpose of the statute to provide legal certainty, maximize value, protect creditors and other parties in interest and rescue financially troubled businesses.'"