

Below is an abstract of an article published by the NBL (New Business Law), a Japanese law journal, written by Timothy Graulich, Giorgio Bovenzi, James I. McClammy and Hiroshi Sugiyama of Davis Polk & Wardwell LLP.

U.S. Chapter 15: a Tool for Implementing Foreign Reorganization Plans in the United States – the Elpida Experience, New Business Law (Japan), Issue No. 1020 (March 1, 2014)

The Chapter 15 case of Elpida, which was filed in the U.S. in connection with Elpida's debtor-in-possession proceeding pending in Tokyo, Japan under the Japanese Corporate Reorganization Act (the "JCRA"), has attracted broad attention in Japan and elsewhere. Although not sought in most Chapter 15 cases, and successfully obtained in even fewer cases, U.S. recognition of a foreign plan of reorganization is an important tool available to a Chapter 15 debtor, as such recognition implements the foreign plan in the U.S. and prevents U.S. actions that are inconsistent with the foreign plan.

Chapter 15 recognition of a foreign plan is not expressly contemplated in the U.S. bankruptcy code and there is limited precedent for it. Notably, in two recent Chapter 15 cases in which plan recognition was sought, In re Japan Airlines Corp. and In re Vitro, S.A.B. de C.V., the court denied recognition of the foreign plan, even though in the former case the request was unopposed. However, various legal bases for obtaining U.S. recognition of a foreign plan can be found in the U.S. bankruptcy code. Importantly, because differences between U.S. and foreign bankruptcy reorganization law (especially if the foreign law appears to restrict creditors' rights) are likely to be exploited by any party interested in opposing plan recognition, case preparation through an exhaustive comparative law analysis, albeit complex, is critically important.

A key aspect in any request for U.S. recognition of a foreign plan is to establish that such relief is necessary to facilitate the orderly reorganization of the debtor, to protect the debtor's assets and to provide value to the creditors' interest. With the goal of establishing a strong legal basis upon which the U.S. court could grant comity to the Japanese court's order approving the Japanese reorganization plan, Elpida's foreign representatives and their counsel identified analogies and differences between the JCRA and U.S. bankruptcy law to demonstrate how, in spite of the obvious differences, the creditor distribution scheme in Japan was substantially comparable to distributions in reorganization plans confirmed in the U.S., and that Japanese law afforded creditors substantial rights and sufficient protections in JCRA proceedings.

The result of months of productive review, comparative law analyses, and close collaboration among Elpida's foreign representatives and both Japanese and U.S. counsel, U.S. recognition enabled the implementation of Elpida's plan in both countries and the combination of the businesses of Elpida and Micron Technologies, Inc. (Elpida's sponsor and, after consummation of the Japanese plan, Elpida's sole shareholder), making them the second largest semiconductor memory company in the world. Especially in the face of the opposition by Elpida's bondholders throughout the Chapter 15 case, this case was meaningful as plan recognition was used as an innovative tool to protect a Japanese reorganization plan involving businesses in both U.S. and Japan and ultimately to contribute to maximizing creditor recoveries. As businesses globalize, and as a consequence, insolvency proceedings globalize as well, plan recognition under Chapter 15 can offer a powerful option to enhance the likelihood of success of a foreign reorganization.