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Using **Chapter 15** to Implement **Foreign Reorganization Plans** in the U.S.

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As restructurings become increasingly cross border, Chapter 15 recognitions of foreign proceedings have become increasingly common. Although not sought in most Chapter 15 cases (and successfully obtained in even fewer cases), recognition of a foreign plan of reorganization is an important tool available to a Chapter 15 debtor. Recognition of the foreign plan itself can be a critical step in foreign plan implementation with respect to assets located in the United States and in protecting the foreign debtor from collateral attacks in the United States, as recently demonstrated in the Chapter 15 case of Elpida Memory (Elpida).[1]

Background

Passed as part of the 2005 amendments to title 11 of the United States Code (the Bankruptcy Code), Chapter 15 implements the UNCITRAL Model Law on Cross-Border Insolvency. Its objectives include facilitating cooperation between U.S. and foreign courts, and promoting the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor." 11 U.S.C. §1501. After a foreign insolvency case is recognized in the United States as a foreign proceeding, and its trustees or representatives recognized as "foreign representatives," Chapter 15 requires that the U.S. court grant comity to the foreign representative and cooperate with the foreign court or the foreign representative to the maximum extent possible. 11 U.S.C. §§1509(b)(3), 1525(a).

Upon Chapter 15 recognition of a foreign proceeding, among other things, the auto-

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matic stay provisions of the Bankruptcy Code apply to the foreign debtor and the property of the foreign debtor that is within the territorial jurisdiction of the United States; the use, sale, or lease of such property is subject to restrictions and approval by the Chapter 15 court; and the foreign representative may operate the foreign debtor's business in the United States and exercise the rights and powers of a trustee under the Bankruptcy Code in connection with the use, sale, or lease of U.S. property. While Chapter 15 does not explicitly provide for the recognition of a foreign plan, it provides ample support for plan recognition in appropriate circumstances.

Chapter 15 Bases for Plan Recognition

Chapter 15 provides various legal bases for plan recognition even in the absence of express statutory language. For example, §1521 of the Bankruptcy Code provides the court with the ability to grant any "appropriate relief" where necessary to effectuate the purpose of Chapter 15 and to protect the assets of the debtor or the interests of creditors, and to entrust the distribution of all or part of the debtor's U.S. assets to the foreign representative, provided in each case that the interests of U.S. creditors (and, in some cases, all creditors) are sufficiently protected.

The Chapter 15 court also has the ability to provide "additional assistance" to a foreign representative under the Bankruptcy Code or other U.S. law pursuant to §1507(a). Under §1507(b), such additional assistance can be afforded consistent with principles of comity and to the extent it will reasonably assure just treatment of all claim holders, protection of U.S. claim holders against prejudice and inconvenience, and distribution of proceeds of the debtor's property substantially in accordance with the Bankruptcy Code.

Both of these provisions have been relied upon by Chapter 15 courts for the authority to recognize a foreign plan.

Precedent Analysis and Comparative Review

There is limited precedent concerning U.S. recognition of foreign plans. Indeed, Chapter 15 filings are typically pursued to protect the foreign debtor's U.S. assets from creditors' attacks, to facilitate sales of U.S. assets and discovery, and/or to provide the foreign representative with standing to file a Chapter 11 case to pursue avoidance actions. None of these objectives relates to foreign plan recognition. Further, unless there is a specific need for the implementation of the foreign plan in the United States, there may not be an actual controversy for the U.S. court to resolve. And even when a Chapter 15 debtor does seek plan recognition, success is not assured.

Notably, in two recent Chapter 15 cases in which plan recognition was sought, *In re Japan Airlines*[2] and *In re Vitro S.A.B. de C.V.*,[3] the court denied recognition (even, in the case of *Japan Airlines*, in the absence of objection).[4] Given the close scrutiny to which the request for plan recognition will undergo, U.S. counsel may consider alternative relief (e.g., a limited permanent injunction) depending on the circumstances.

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On the other hand, the Bankruptcy Court for the District of Delaware recently recognized Elpida's Japanese plan of reorganization. Unlike in many other Chapter 15 cases, U.S. plan recognition was critical to Elpida's Japanese case; in fact, it was a condition to the effectiveness of Elpida's plan and a condition to Elpida's acquisition by Micron Technology. Moreover, Elpida submitted significant evidence to demonstrate that its plan was approved pursuant to procedures sufficiently similar to U.S. procedures and provided for a reorganization that was consistent with U.S. law.

When plan recognition is sought, counsel should carefully review and analyze prior instances of U.S. enforcement provided to a plan approved in the foreign jurisdiction in question, either under the Chapter 15 regime or the prior regime under §304 of the Bankruptcy Code. Such comparative review and the evaluation of differences between U.S. and foreign bankruptcy law (e.g., the foreign trustee's ability to limit creditor involvement; limited appellate rights; general lack of U.S.-style notice obligations; and the inability of creditors to comment on or object to a plan of reorganization before its approval) can be complex but is critical.

Roadmap to Plan Recognition

Creditor Participation. Lack of creditor participation in the foreign proceeding may cause the Chapter 15 court to deny plan recognition. It is long-standing U.S. jurisprudence that "a foreign judgment should generally be accorded comity if 'its proceedings are according to the course of a civilized jurisprudence,' i.e., fair and impartial."[5] Creditor participation is generally considered a measuring stick for the fairness of the foreign proceeding.[6]

The foreign statute may provide for a number of tools and procedures which could be deemed by the U.S. court to ensure a sufficient level of creditor participation in the foreign proceedings (e.g., the right to organize creditors' committees with the ability to appear in the foreign proceeding; the right to file objections against claims that have been allowed by the trustee; and the right to submit a competing reorganization plan). Counsel should examine such tools and procedures and assist the Chapter 15 court in the proper evaluation of the role that each plays in the foreign proceeding.

Actual creditor participation is an important factor in the U.S. court's review. In one recent case, *In re Ashapura Minechem*, the district court looked at what actually happened in practice in the foreign proceeding and did not simply consider the terms of the foreign insolvency statute.[7] Thus, the district court affirmed the Chapter 15 bankruptcy court's recognition of an Indian proceeding as a foreign main proceeding because the creditors had been able to file court submissions in the Indian proceeding and to participate, even though Indian law did not formally afford those creditors any such participation rights.[8] If creditors have the ability to file court submissions and can appeal any adverse determination—including, ultimately, the order approving the plan—a Chapter 15 court should be more likely to find that the creditors did have a sufficient opportunity to be heard and that the foreign court considered the interests of all creditors.[9]

For example, in the Elpida Chapter 15 case,

the foreign representatives showed that creditors in the Japanese proceeding were afforded many of the procedural participation rights common to U.S. bankruptcy cases (including, for example, the right to file a competing plan) and identified analogies and differences between Japanese and U.S. bankruptcy law—with the ultimate goal of explaining how, in spite of the obvious systemic differences, the Japanese proceeding nevertheless afforded creditors substantial rights.

Notice. Lack of notice to creditors is also an aspect that will be scrutinized when seeking plan recognition. Even though "the standard for notice is not a demanding one," at least some notice in the foreign proceeding is required to meet U.S. requirements.[10] If the foreign reorganization statue does not afford creditors the right to receive notice of specific court applications, trustees' actions, or court decisions, such lack of notice will likely be attacked as a violation of a fundamental policy of the United States, which could trigger the public policy exception under §1506 of the Bankruptcy Code. This provision enables the U.S. court to refuse to grant relief that would be "manifestly contrary to the public policy of the United States." Courts have interpreted this provision narrowly to restrict the exception to only the fundamental policies of the United States.

In seeking plan recognition under Chapter 15, counsel should analyze the foreign reorganization laws to determine, at a minimum, whether the foreign law provides for sufficient creditor safeguards and protections, and whether proper notice of the plan of reorganization was provided to all creditors against whom recognition is sought. In doing so, counsel must develop an understanding of the role of the legal actors in the foreign proceeding and how much access creditors in fact had to the foreign court, any examiner appointed in the case, and the trustee.

Foreign Plan Compatibility. As discussed above, a U.S. court will likely predicate plan recognition upon either §1521 or §1507 of the Bankruptcy Code, or both. Moreover, because U.S. plan recognition is a fairly novel remedy, Chapter 15 courts can be expected to review the foreign plan carefully. Thus, U.S. counsel should ensure that both the foreign plan and the process by which it is approved in the foreign proceeding comport with standards applicable to recognition under U.S. law.

Particularly if plan recognition is contested, the Chapter 15 court should ensure that the interests of U.S. creditors are sufficiently protected under §1521(b). Furthermore, the court could decide to apply the more stringent "additional assistance" test under §1507(b). Indeed, under certain circumstances, the court may apply both the §1521 and §1507(b) tests, in light of the recent Fifth Circuit decision in *In re Vitro S.A.B. de C.V.*[11] There, the court devised an analytical framework for evaluating requests for Chapter 15 plan recognition, concluding that a court should first consider the relief specifically enumerated in §§1521(a) and (b). If a court determines that recognition cannot be afforded under any of the options listed in §1521, it should consider whether the requested relief can still be granted as "appropriate relief" under §1521(a) on the basis that it was previously available under former §304. The Fifth Circuit took the view that a court should only consider whether relief could be granted as "additional assistance" under §1507 if it determines that the requested relief cannot be granted as "appropriate relief" under §1521(a).

The test under §1507(b)(4) (distribution of proceeds of the debtor's property substantially in accordance with the Bankruptcy Code) should be of particular interest to the Chapter 15 court. Although the court will likely not require that the result achieved in the foreign proceeding be identical to the result that would be had under the Bankruptcy Code, the Chapter 15 court will likely examine if the two results are comparable.[12] For example, the court may well consider that the plan meets a test analogous to the "best interests of creditors" test and absolute priority.

Additionally, the court will likely review the plan's classification scheme. A classification scheme where all general unsecured claims are grouped together in one class, receiving identical treatment, should not be considered substantially incompatible with U.S. bankruptcy law. To the extent that there are no differing or conflicting interests between the constituencies of creditors that have been grouped together and no gerrymandering of classes, the classification scheme should pass muster. The U.S. court should give comity to a foreign distribution scheme that is unusual in the United States but not inconsistent with U.S. bankruptcy law. However, a plan that includes elements that substantially diverge from those typical of U.S. reorganizations may create issues or result in denial of recognition.

Conclusion

Even though many Chapter 15 cases do not involve the recognition of a foreign plan, the benefits deriving from such U.S. recognition should not be underestimated insofar as the foreign plan affects U.S. assets, involves U.S. creditors, and/or is necessary to implement the foreign reorganization on a cross border, multi-jurisdictional basis.

Differences in legal tools and procedures in the foreign proceeding are not necessarily a bar against U.S. recognition, and the results obtained in the foreign reorganization do not need to be identical to the results in a U.S. plenary case. However, substantive deviations from fundamental U.S. law requirements will receive scrutiny.

The concerted efforts of counsel from the plenary and ancillary jurisdictions in showing how U.S. recognition of the foreign plan is critical to its multi-jurisdictional implementation and counsel's comparative legal analysis of substantive and procedural rules in the legal systems involved are instrumental to maximizing the chances of success for plan recognition.

1. Elpida's landmark Chapter 15 case saw the first ever full recognition of a Japanese reorganization plan under Chapter 15 of the Bankruptcy Code, which enabled the cross-border implementation of Elpida's plan and the multi-jurisdictional combination of Elpida's and Micron Technology's global businesses, making them the second largest memory company in the world. See Order, *In re Elpida Memory*, No. 12-10947 (CSS) (Bankr. D. Del. June 25, 2013), ECF No. 446.
2. See Order, *In re Japan Airlines*, No. 10-10198 (JMP) (Bankr. S.D.N.Y. March 3, 2011), ECF No. 131.
3. *In re Vitro S.A.B. de C.V.*, 473 B.R. 117 (Bankr. N.D. Tex. 2012), aff'd, 701 F.3d 1031 (5th Cir. 2012).
4. See Transcript of Hearing, *Japan Airlines*, No. 10-10198 (JMP) (Bankr. S.D.N.Y. March 1, 2011), ECF No. 132.
5. *In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006) (quoting *Hilton v. Guyot*, 159 U.S. 113, 205-06 (1895)).
6. See id.
7. See *Armada (Singapore) Pte v. Shah* (*In re Ashapura Minechem*), 480 B.R. 129 (S.D.N.Y. 2012).
8. Id. at 141-42.
9. See generally id.
10. Id. at 137, 141-42 (citing *In re British Am. Ins.*, 425 B.R. 884, 902 (Bankr. S.D. Fla. 2010)).
11. *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031 (5th Cir. 2012).
12. Id. at 1044, 1053.