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Trending: Special Deference to Foreign Insolvency Proceedings Both In and Out of Chapter 15

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Several cases this year have demonstrated the continuing trend of U.S. courts' respect toward foreign insolvency proceedings. Recent decisions from the Third and Eleventh Circuits, Southern District of New York and other courts — each addressing various contours of chapter 15 of the U.S. Bankruptcy Code and U.S. courts' interactions with foreign insolvency generally — demonstrate openness to novel approaches to evaluating foreign proceedings in the U.S. These decisions are underpinned by a philosophical alignment of deference toward foreign insolvency proceedings.

Chapter 15 Requirements in the Code

Unlike the other Bankruptcy Code chapters, which a debtor can enter into independent of any other insolvency proceeding (assuming that it meets the applicable requirements), a debtor can only enter chapter 15 in recognition of an extant foreign insolvency proceeding. To obtain recognition of a "foreign main proceeding," and thus gain access to the full array of tools provided by chapter 15, a debtor must show that the proceeding is "a foreign proceeding pending in the country where the debtor has the center of its main interests."[2]

Courts have broken down "foreign proceeding" into several elements: "(i) 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."[3] As for the "center of main interests" (COMI) analysis, the Code creates a presumption that a corporate debtor's "registered office" is its COMI.[4] This presumption is rebuttable, however, and a significant body of law grappling with the COMI analysis has developed over the years.

These requirements stand in stark contrast to the filing restrictions for chapters 7 and 11, which require only that a corporate debtor has "a domicile, a place of business, or property" in the U.S., subject to certain exceptions that are irrelevant here.[5] A foreign debtor may well have no "domicile, place of business, or property" in the U.S., and would thus be facially ineligible to file for chapter 7 or 11. Whether this requirement, found in § 109(a) of the Bankruptcy Code, applies to prospective chapter 15 debtors has recently come into focus, with the Eleventh Circuit creating a split against the Second Circuit.

Eleventh Circuit Forecloses Application of § 109(a) to Chapter 15 Eligibility in *Al Zawawi*

As previously mentioned, § 109(a) states that "only a person that resides or has a domicile, a place of business, or property in the [U.S.], or a municipality, may be a debtor under this title."[6] Certainly, it is well established that this requirement applies to debtors under chapter 7 or 11, but on its face, this language would appear to apply to any debtor — including a chapter 15 debtor — that files under the Bankruptcy Code. In *Barnet*, the Second Circuit undertook a straightforward statutory interpretation analysis, observing that by its terms, § 109(a) applies to all debtors under the Code, and that there is no language anywhere in the Code that excludes chapter 15 debtors from § 109(a)'s requirements. The court concluded that § 109(a) does indeed apply to chapter 15 debtors.[7]

In April 2024, the Eleventh Circuit disagreed. It acknowledged that the Second Circuit's statutory interpretation was "straightforward" but, drawing on Eleventh Circuit precedent analyzing prior versions of the relevant statutory sections, found an "anomaly" within the text that creates ambiguity as to whether § 109(a) applies in chapter 15 cases.[8] Specifically, the Eleventh Circuit found tension between the use of the term "debtor" in the Bankruptcy Code's definition of "foreign proceeding," as the former implies

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2 11 U.S.C. §§ 1502(4), 1517(b)(1).
3 *In re ABC Learning Ctrs. Ltd.*, 728 F.3d 301, 308 (3d Cir. 2013).
4 11 U.S.C. § 1516(c).
5 11 U.S.C. § 109(a).
6 *Id.*
7 *In re Barnet*, 737 F.3d 238, 250 (2d Cir. 2013).
8 *In re Al Zawawi*, 97 F.4th 1244, 1253 (11th Cir. 2024).

that the debtor-eligibility requirement of § 109(a) would apply in chapter 15 proceedings, whereas the latter is *not* limited to only bankruptcy proceedings.[9]

When faced with a similar "anomaly" in interpreting the prior version of the statute, the Eleventh Circuit had already concluded that it should be resolved according to the statute's "purpose," which was, among other things, "to help further the efficiency of foreign insolvency proceedings involving worldwide assets." Thus, it "would make eminent sense for Congress to define expansively the class of foreign insolvency proceedings for which ancillary assistance is available."[10]

In *Al Zawawi*, the Eleventh Circuit imported its prior analysis and again concluded that § 109(a) does not apply in chapter 15 cases, reinforcing notions of openness to foreign proceedings in U.S. bankruptcy courts. In a lengthy concurrence, Hon. Gerald Bard Tjoflat took an even firmer position, providing a thorough discussion of the distinction between the creation of an estate under chapter 7 or 11 of the Bankruptcy Code and the consequences flowing therefrom, as opposed to the mere recognition of a foreign proceeding under chapter 15, which does not create an estate and serves only to assist in that foreign proceeding, noting that § 1502(1) provides its own definition of "debtor" that does not implicate § 109(a).[11]

SDNY Court Defers to the Location of the Foreign Insolvency Proceeding in Determining COMI in *Sunac*

The question of a multinational corporation's COMI for chapter 15 purposes has become increasingly common. The U.S. Bankruptcy Court for the Southern District of New York (SDNY) recently confronted the issue in *Sunac*.

Sunac is one of several large Chinese property developers that found itself in financial distress in recent years, leading it to file for a restructuring proceeding in the Hong Kong High Court in late 2023, and for chapter 15 recognition shortly thereafter.[12] Although Sunac is incorporated under Cayman law, creating a presumption that its COMI is the Cayman Islands under § 1516(c) of the Bankruptcy Code, the court swiftly rejected that presumption, finding that Sunac otherwise has no connections there.[13]

Instead, noting that "center of main interests" is not defined in the Code, the court looked to a nonexhaustive list of factors used by other courts: "[T]he location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); 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."[14] Having rejected the Cayman Islands, the court was left to decide between two remaining options: China and Hong Kong.

On the aforementioned factors, the court found that Sunac is nominally headquartered in Hong Kong but has no real headquarters; that its senior management predominantly lives and works in China; that its assets are intangibles owed from subsidiaries with property in China; that its creditors are distributed worldwide; and that its debt is governed by the laws of various jurisdictions, with the majority by amount governed by New York law.[15] Although these factors would appear to weigh at least slightly in favor of China as Sunac's COMI, the court found a "mechanical tallying" unhelpful and instead turned to "an approach that focuses on the location of the Debtor's business activities and decision-making" to conclude that Hong Kong is Sunac's COMI.[16]

The court's finding that Hong Kong is Sunac's COMI turned largely on the company's restructuring activities there. First, the court noted that Sunac's primary business activity for the prior year-and-a-half had been restructuring negotiations taking place either virtually or in Hong Kong.[17] Next, the court looked to where creditors would have expected an insolvency proceeding to take place and concluded that although creditors would most likely have expected an insolvency proceeding in the Cayman Islands, they would have *least* expected an insolvency proceeding in China for a number of reasons — chief among them a perception that Chinese law and courts would create an adverse environment for a restructuring; the court thus concluded that creditors would view Hong Kong as the next best venue based on Sunac's financial disclosures.[18] Finally, the court observed a trend of courts deferring to creditors' approval of a foreign proceeding and noted that Sunac's creditors were overwhelmingly in favor of the Hong Kong restructuring proceeding.[19]

The court discounted the "traditional" factors in favor of a COMI analysis focused on the location of the debtor's restructuring activities and proceedings. While *Sunac* should not be taken to mean that a debtor can "force fit" its choice of COMI simply by initiating an insolvency proceeding in a given location, it adds to the trend of U.S. courts' deference to foreign insolvency proceedings.

SDNY Court Provisionally Recognizes Brazilian Mediation Process in *InterCement*

In what appears to be a matter of first impression, the SDNY bankruptcy court provisionally recognized an "interim mediation" proceeding added to Brazil's bankruptcy law in 2021 as a foreign main proceeding.[20] *InterCement* demonstrates that even unusual proceedings short of a formal in-court insolvency proceeding may be eligible for chapter 15 recognition in U.S. bankruptcy courts.

The recognition is provisional and appears for the time being to have the full support of creditors, so it is at least possible that a different factual scenario could bring about a dif-

9 *Id.*; *see also* George W. Shuster, Jr. & Benjamin W. Loveland, "*Al Zawawi* and § 109(a): Parsing What It Means to Be a 'Debtor' Under Chapter 15," XLI *ABI Journal* 5, 30-31, 86-87, May 2022, *available at* abi.org/abi-journal (exploring bankruptcy court decision in *Al Zawawi*).
10 *Al Zawawi*, 97 F.4th at 1253.
11 *See id.* at 1273.
12 *In re Sunac China Holdings Ltd.*, 656 B.R. 715, 722 (Bankr. S.D.N.Y. 2024).
13 *Id.* at 725.
14 *Id.* at 724.
15 *Id.* at 726-29.
16 *Id.* at 729.
17 *Id.* at 730.
18 *Id.* at 731-32.
19 *Id.* at 732.
20 *See* Order Granting Provisional Relief, *In re InterCement Brasil S.A., et al.*, Case No. 24-11226 (July 18, 2024), ECF No. 22.

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ferent result. In the interim, *InterCement* adds to the growing deference of U.S. courts to foreign insolvency proceedings, and the fact that they may take unfamiliar forms.

Third Circuit Provides for Recognition of Foreign Insolvency Proceedings Even Outside of Chapter 15 in *Wayne Burt*

Even outside of the U.S. bankruptcy context, chapter 15 principles have come to inform U.S. courts' treatment of foreign insolvency proceedings. In *Wayne Burt*, the Third Circuit updated its guidance on when U.S. courts should extend comity to foreign insolvency proceedings, drawing heavily on chapter 15 and the Bankruptcy Code in so doing.[21] *Wayne Burt* began as a breach-of-contract action initiated in a U.S. district court, initially concluding in a pair of consent judgments.[22]

The defendant later moved to vacate the judgments, revealing that it had been the subject of insolvency proceedings in Singapore prior to the initiation of the lawsuit and contending that only the duly appointed liquidator had authority to bind the defendant to a consent judgment, which the officers who directed the defendant to enter the consent judgment lacked.[23] The liquidator then moved to dismiss the action on comity grounds, citing the Singapore proceeding, which the district court granted. The plaintiff appealed to the Third Circuit.[24]

Although the Third Circuit appears to have agreed with the district court's ultimate conclusion, it found that Third Circuit precedent on the issue was outdated and elected to provide new guidance, vacating and remanding to the district court. First, the Third Circuit addressed the threshold matter of whether a proceeding is "parallel" for the purpose of adjudicatory comity. It rejected the typical view of a "parallel" proceeding being one that "involve[s] the same parties and claims," as such a standard is "inapposite when addressing foreign bankruptcy matters that may bear little resemblance to a standard civil action in the [U.S.]."[25] Instead, the Third Circuit drew on the concept of "related to" bankruptcy jurisdiction to clarify that the standard is whether "(1) the foreign bankruptcy proceeding is ongoing in a duly authorized tribunal while the civil action is pending before the [U.S.] court ... and (2) the outcome of the [U.S.] civil action may affect the debtor's estate."[26]

Next, the Third Circuit discussed its existing four-factor test for the comity analysis: "whether (1) the foreign bankruptcy proceeding is taking place in a duly authorized tribunal; (2) the foreign bankruptcy court provides for equal treatment of creditors; (3) extending comity would be 'in some manner inimical to this country's policy of equality'; and (4) the party opposing comity would be prejudiced."[27] Focusing on the third factor, the court listed certain "indicia of procedural fairness" that would qualify, but "emphasize[d] that foreign bankruptcy proceedings need not function identically to similar proceedings in this country in order to be consistent with the [U.S.'s] policy of equality."[28]

Taken as a whole, *Wayne Burt* demonstrates a special deference by U.S. courts to foreign insolvency proceedings, with the Third Circuit observing that the U.S. Supreme Court "has held that foreign bankruptcy proceedings are particularly deserving of adjudicatory comity."[29] Indeed, commentators have expressed a spectrum of opinions on whether and to what extent *Wayne Burt* stretches the boundaries of U.S. courts' deference to foreign insolvency proceedings.[30]

Conclusion

Taken together, these decisions press on the edges of deference to foreign insolvency proceedings by U.S. courts. They indicate that where questions arise regarding whether U.S. courts should take a more universalist approach to international insolvency, they are increasingly likely to do so, giving deference especially to proceedings in foreign jurisdictions with credible judiciaries. abi

21 *Vertiv Inc. v. Wayne Burt PTE Ltd.*, 92 F.4th 169 (3d Cir. 2024).
22 *Id.* at 174.
23 *Id.*
24 *Id.*
25 *Id.* at 179.
26 *Id.* at 179-80.
27 *Id.* at 180.
28 *Id.* at 181.
29 *Id.* at 177.
30 *Compare* Bill Rochelle, "Third Circuit Creates a Common Law Alternative to Chapter 15," *Rochelle's Daily Wire* (Feb. 15, 2024), *available at* abi.org/newsroom/daily-wire (arguing that *Vertiv* decision could go as far as making chapter 15 superfluous), *with* R. Craig Martin, Rachel Ehrlich Albanese & Erik Stier, "Is There a Common-Law Alternative to Chapter 15? A Response to Rochelle's Daily Wire and Prof. Jay Westbrook," XLIII *ABI Journal* 8, 22-23, 61, August 2024, *available at* abi.org/abi-journal (arguing that *Vertiv* decision is generally consistent with precedent on comity and does not undermine purpose of chapter 15).