ALONE OR TOGETHER?
HOW U.S. COURTS ADDRESS STANDALONE LITIGATION IN CROSS-BORDER CASES

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The world has long understood that a company's financial crisis can cross borders. This short essay explores how U.S. bankruptcy law presents opportunities for both convergence and divergence in a time of financial crisis.

To address the problem of what to do when a company with assets in multiple countries files for bankruptcy in one of those countries, the United Nations Commission on International Trade Law (UNCITRAL) in 1997 announced the Model Law on Cross-Border Insolvency.[1] UNCITRAL created the Model Law with the goal of harmonizing the administration of insolvency cases involving parties from two or more countries.[2] Thus, the Model Law's overarching purpose is to authorize and encourage cooperation and coordination among different jurisdictions dealing with a company's insolvency.[3] It does not seek to make insolvency law uniform across jurisdictions.[4] The Model Law is thus a law of cooperation rather than a law of substantive harmonization.

The United States implemented the Model Law through Chapter 15 of the United States Bankruptcy Code. Chapter 15 provides a process through which a foreign representative may file a case in the U.S. that is ancillary to another, primary proceeding, brought in the debtor's home country or another foreign jurisdiction.[5] Broadly speaking, the debtor first commences a proceeding in another jurisdiction.[6] The debtor's foreign representative then commences an ancillary, Chapter 15 case in the U.S.[7] Using the processes outlined in Chapter 15, the U.S.

[1] *Chapter 15 of the U.S. Bankruptcy Code: Ancillary and Cross-Border Cases*, CONG. RES. SERV. at 8 (July 14, 2006), https://www.everycrsreport.com/files/20060714_RL33562_52b8a63bfefc3c2fb422f4feb750c04a9d072bca.pdf ("UNCITRAL approved and adopted the Model Law on May 30, 1997.").
[2] *Id*. (noting UNCITRAL's objective of "providing a prototype for procedural cooperation between national governments").
[3] *UNCITRAL Model Law on Cross-Border Insolvency (1997)*, U.N. COMMISSION ON INT'L TRADE L. (May 30, 1997), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.
[4] *Id.*
[5] *Chapter 15 – Bankruptcy Basics*, U.S. COURTS (n.d), https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics.
[6] *Id.*
[7] *Id*.

bankruptcy court may "recognize" the primary, foreign proceeding, thereby granting the foreign representative access to U.S. courts.[8]

Consistent with the goals of the Model Law, Chapter 15 contains several provisions promoting cooperation between U.S. and foreign courts and parties. For example, §1525 requires U.S. courts to cooperate with foreign courts and foreign representatives "to the maximum extent possible," either directly or through a trustee.[9] A debtor or trustee must similarly cooperate "to the maximum extent possible"[10] with foreign courts and foreign representatives; such cooperation may be implemented "by any appropriate means."[11] In this way, Chapter 15 both mandates and encourages cooperation among cross-border parties and courts, using multiple mechanisms, thereby fulfilling the Model Law's broader purpose of promoting cross-border cooperation and comity.[12]

A cross-border financial crisis thus creates opportunities for cooperation. But it may also create opportunities for manipulation. Specifically, parties may attempt to use a Chapter 15 case as a way to bootstrap U.S. court jurisdiction to address their own litigation objectives. One way to do this is to try to get a case heard in the U.S. rather than in a foreign jurisdiction. For example, in *In re Sibaham Ltd.*, a group of plaintiffs attempted to commence a class action adversary proceeding against a U.K. debtor in U.S. court, using the U.S. bankruptcy court's Chapter 15 recognition order (which granted recognition of the U.K. foreign proceeding) as the basis for U.S. jurisdiction.[13] The Bankruptcy Court for the Western District of North Carolina quickly caught on and dismissed this bootstrapping attempt, holding that the U.K. debtor and its creditors would be prejudiced if the plaintiffs proceeded with a class action in the U.S. rather than the U.K., where the debtor's main insolvency proceeding was pending.[14]

Similarly, in a case predating Chapter 15, the District Court for the Southern District of New York held in *In re Marconi PLC* that former §304, a predecessor of sorts to Chapter 15, does not permit domestic creditors to file an adversary proceeding in an ancillary proceeding in order to establish claims against a foreign debtor.[15] The court reasoned that the whole purpose of the statute was to centralize proceedings in one court.[16] In addition, in *JP Morgan Chase*

[8] *Id.*
[9] 11 U.S.C. §1525(a) (2005).
[10] 11 U.S.C. §1526(a) (2005).
[11] 11 U.S.C. §1527 (2005).
[12] *Chapter 15 – Bankruptcy Basics*, *supra* note 5.
[13] *In re* Sibaham Limited, Case No. 19-31537, 2020 WL 2731870 (Bankr. W.D.N.C. May 4, 2020).
[14] *Id.* at *2.
[15] *In re* Marconi PLC, 363 B.R. 361 (S.D.N.Y. 2007).
[16] *Id.* at 365.

Bank v. Altos Hornos de Mexico, S.A. de C.V., the Second Circuit articulated a general policy that "U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding."[17]

Not all attempts to centralize litigation in the U.S. receive the same treatment, however. In *In re British American Ins. Co. Ltd.*, the Bankruptcy Court for the Southern District of Florida held that a foreign debtor with a pending insolvency proceeding in Saint Vincent and the Grenadines had standing to bring a claim against its former directors for breach of fiduciary duty in U.S. court.[18] The court further held that it need not authorize the debtor or its representatives to file the action in the U.S., as the Bankruptcy Code already provided the debtor with this power.[19]

Other cases involve parties using Chapter 15 to transfer litigation from one U.S. court to another. In particular, a party may be trying to get its case heard in U.S. federal court, rather than U.S. state court. In *Firefighters' Retirement System v. Citgo Group Ltd.*, the Fifth Circuit held that a state court action by a group of pension funds was sufficiently related to the Cayman Islands debtor's Chapter 15 case, such that a U.S. district court, rather than a U.S. state court, had to hear the case.[20] The court reached this decision even though the debtor did not file for Chapter 15 until after the pension funds had attempted to remove the litigation to district court.[21]

Thus, the answer to the question of whether non-debtor parties are permitted to use Chapter 15 cases, which are generally ancillary to a primary proceeding in a different country, to pursue their own litigation strategies in the U.S. is, "it depends." Specifically, the question of whether ancillary proceedings should be allowed may hinge on both the plaintiff's identity and the type of action at issue.[22] Debtors, or their foreign representatives, seem to have better luck at pursuing U.S.-based litigation than creditors or others seeking to assert claims against the debtor.[23] This pattern seems to illustrate a deference to debtors, or at least a deference to the perception that the goal of the foreign main proceeding is to assist the debtor. Likewise, proceedings dealing with claims determinations and allowance are more likely to be directed to

[17] JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 424 (2d Cir. 2005).
[18] *In re* British American Ins. Co. Ltd., 488 B.R. 205 (Bankr. S.D. Fla. 2013).
[19] *Id.* at 235 (holding that plaintiffs could pursue the claim under §1509(f)).
[20] Firefighters' Retirement System v. Citco Group Ltd., 796 F.3d 520 (5th Cir. 2015).
[21] *Id.* at 523.
[22] George W. Shuster, Jr. & Benjamin W. Loveland, *Keeping Chapter 15 Ancillary*, 40-MAR AM. BANKR. INST. J. 32 (Mar. 2021).
[23] *Id.* at 50 ("U.S. courts are more likely to allow standalone actions filed by the foreign representatives for a chapter 15 foreign debtor than to allow stand-alone actions filed *against* a chapter 15 foreign debtor.") (emphasis in original).

the foreign main proceeding rather than being allowed to go forward as a standalone action in the U.S.[24] This trend seems to reflect the policy that claims determination is a central part of the bankruptcy process.

Taken as a whole, the decisions show that although U.S. courts do sometimes allow standalone litigation to proceed, the judges deciding these cases are generally taking both bankruptcy policy and Chapter 15's broader, cooperative purpose into account when doing so. The spirit of cooperation appears strongest—and a Chapter 15 case consequently appears most successful—when a foreign representative uses it as a tool in furtherance of the foreign main proceeding's goals.[25] By contrast, when a non-debtor uses Chapter 15 to pursue its own litigation advantage, Chapter 15's purposes may be thwarted.[26] Thus, a concern remains that if standalone cases are permitted, the procedural harmonization provided by Chapter 15 and the Model Law may be threatened.

Two additional points are worth making. First, even if Chapter 15 provides the necessary tools for cooperation, those tools are only available if debtors choose to use Chapter 15. Many of the Chapter 15 cases decided to date show courts carefully and diplomatically working through the issues at hand while keeping cooperative principles in mind.[27] However, the Bankruptcy Code's generous eligibility provisions could throw a wrench into the frequency of ancillary cases in the U.S.[28] Because it is very easy for a foreign company to be eligible for Chapters 7 or 11, foreign debtors may—and often do—choose to file a main (Chapter 7 or 11) proceeding in the U.S. instead of a Chapter 15 ancillary proceeding.[29] When a foreign debtor chooses to file for Chapter 7 or Chapter 11, it is necessarily choosing U.S. law and potentially lessening the likelihood of cooperation and comity. Of course, it is possible for judges in Chapter 7 and 11 cases to work across borders;[30] however, these chapters of the Bankruptcy

[24] *Id*.
[25] *Id.* ("Chapter 15 remains an ancillary tool most successfully used by foreign representatives in furtherance of a foreign main proceeding.").
[26] *Id*.
[27] *See, e.g.*, Bill Rochelle, *New York Judge Declines (for Now) to Enforce an Indonesian Plan in the U.S.*, ABI.ORG (Apr. 22, 2021), https://www.abi.org/newsroom/daily-wire/new-york-judge-declines-for-now-to-enforce-an-indonesian-plan-in-the-us (describing the judge's opinion in a Chapter 15 case as "highly diplomatic").
[28] Teadra Pugh, *Analysis: Whopping Ch. 15 Bankruptcy Filings May Be Misleading*, BLOOMBERG L. (Nov. 16, 2020), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-whopping-ch-15-bankruptcy-filings-may-be-misleading ("Any foreign company meeting...two simple requirements could simply file a petition seeking Chapter 7 or Chapter 11 relief with the applicable U.S. Bankruptcy Court.").
[29] *Id.* ("[A] number of foreign companies prefer to file their main bankruptcy proceeding in the United States.").
[30] *See, e.g.*, Michael McKiernan, *Focus: What can be learned from Nortel case?*, LAW TIMES (Mar. 27, 2017), https://www.lawtimesnews.com/news/legal-analysis/focus-what-can-be-learned-from-nortel-case/262474

Code do not provide a ready toolkit for cooperation and comity. By contrast, those principles are enshrined in the statutory text of Chapter 15, as discussed above.

A second issue relates to the scope and purpose of Chapter 15 itself and whether Chapter 15 is primarily about the administration of cross-border assets, or something more. If Chapter 15 is increasingly used by parties in the U.S. to pursue their own, ancillary litigation strategies, it is possible that over time, the Chapter 15 proceeding—and maybe even Chapter 15 itself--may become more U.S.-centric rather than cooperative.

In conclusion, Chapter 15 and the Model Law on which it is based provide a ready toolkit for cooperation, even though these laws do not require or expect substantive legal uniformity. However, ancillary litigation within a Chapter 15 case presents the threat of divergence in cases where more aspects of a cross-border case are decided in the ancillary jurisdiction, rather than in the jurisdiction of the main proceeding. As the world sees more cross-border cases, particularly in times of crisis, it will be important to be vigilant to ensure that the principles of cooperation and comity remain supreme in cross-border cases and are not eclipsed by parties seeking to capitalize on a pathway to U.S. court access.

(describing the *Nortel* Chapter 11 bankruptcy and noting that the "working relationship has become very good between Canadian and U.S. courts").