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Heads I Win, Tails You Lose

Asymmetric Discovery in Chapter 15

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More than 14 years on, chapter 15 remains relatively underutilized, with only 86 cases filed in 2017 and 28 in the first half of 2018.[1] Practitioners might find the option more attractive with a better understanding that chapter 15 can be a powerful — but underexploited — tool that international debtors can leverage to conduct discovery.

Overview

Congress enacted chapter 15 to promote the fair and efficient administration of international bankruptcies, as well as to protect and maximize of the foreign debtor's assets.[2] The availability of broad discovery under § 1521 of the Bankruptcy Code enhances these goals but might be overlooked by practitioners.

Recognition as Foreign Main or Non-Main Proceeding

Without repeating the chapter 15 procedure in full, some overview of the process will set the scene. The petitioned court must grant recognition if the petition meets the requirements set out in § 1515.[3] Where possible, debtors should seek recognition as a foreign main proceeding, not only because of the automatic relief provided to a debtor in a foreign main proceeding, but because of the limitations that a non-main proceeding imposes on the discovery available to a debtor.[4]

Relief

Provisional Relief: A chapter 15 petition does not impose an automatic stay, but a foreign debtor may petition the court for temporary relief under § 1519[5] pending a decision on recognition.[6] The most critical of the available remedies is a stay of execution against the debtor's assets, but § 1519 also includes pre-recognition discovery.

Courts can grant pre-recognition relief, including pre-recognition discovery, only if the foreign debtor satisfies the requirements of a preliminary injunction — namely, the likelihood of success on the merits[7] and threat of irreparable harm.[8] This exacting standard does not apply to post-recognition discovery.[9]

Few foreign debtors use pre-recognition discovery. Because decisions on recognition are made quickly (courts are instructed to decide recognition "at the earliest possible time"[10]), usually relatively little harm ensues from waiting for recognition. Thus, while pre-recognition discovery is, in theory, as broad as post-recognition discovery, pre-recognition discovery more often focuses on issues directly relevant to recognition rather than discovery of assets, misconduct or potential claims.[11]

Post-Recognition Relief: Whether a proceeding is main or non-main significantly impacts the availability of the "appropriate relief" provided by § 1521.[12] This relief encompasses much of what is automatically available to a debtor in a foreign main proceeding, as well as discretionary relief, including discovery.[13]

For example, chapter 15 limits the scope of discretionary relief when the underlying proceeding is non-main. Debtors must show that any discretionary relief relates to either (1) assets that should be administered in a non-main proceeding, or (2) information required in the non-main proceeding.[14] In the discovery world, these conditions

1 *See* "Chapter 15 Quarterly Filings (2005-Present)," *available at* s3.amazonaws.com/abi-org/Newsroom/Bankruptcy_Statistics/Chapter_15_Filings.pdf (last visited June 29, 2019).
2 11 U.S.C. § 1501, *et seq.*
3 The petition must establish (1) the foreign proceeding as main or non-main; (2) the foreign representative as a person or body; (3) the authority of the petitioner to act as the foreign representative; and (4) the existence of the foreign proceeding. 11 U.S.C. § 1515. The foreign debtor must establish that it has business or property — however minimal — in the U.S. in order to qualify as a debtor under 11 U.S.C § 109. *See, e.g., In re B.C.I. Finances Pty. Ltd.*, 583 B.R. 288, 296 (Bankr. S.D.N.Y. 2018) (finding that small retainer deposit in U.S. account and potential breach-of-fiduciary-duty claims in New York each independently satisfied requirement).
4 11 U.S.C. § 1521(c); *In re Ran*, 607 F.3d 1017, 1026 (5th Cir. 2010) (noting that "[w]hile recognition of a foreign proceeding as a foreign non-main proceeding [might] provide the same relief as recognition as a foreign main proceeding, the relief is not automatic").
5 Other pre-recognition relief that a debtor can seek includes (1) an authorization for the foreign representative to administer the debtors' assets located in the U.S.; (2) prohibition on the transfer, encumbrance or any other disposition of the debtor's assets; and (3) "any other [appropriate] relief." 11 U.S.C. § 1519.
6 11 U.S.C. § 1519.
7 *See In re Innua Canada Ltd.*, No. 09-16362 (DHS), 2009 WL 1025088, at *4 (Bankr. D.N.J. March 25, 2009) (granting provisional relief after hearing where debtor showed high likelihood that Canadian proceeding would be recognized, and irreparable harm if warehouse in U.S. proceeded to sell inventory).
8 11 U.S.C. § 1519(e). *See In re Worldwide Educ. Servs. Inc.*, 494 B.R. 494, 499 (Bankr. C.D. Cal. 2013) (concluding that "the standard of proof for preliminary injunctive relief should apply [to a request for preliminary relief under § 1519]" and explaining that plaintiff must establish that (1) "he is likely to succeed on the merits"; (2) "he is likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in his favor"; and (4) "an injunction is in the public interest") (citations and quotations omitted); *In re Vitro, S.A.B. de C.V.*, 455 B.R. at 579-84 (applying preliminary injunction-relief standards to motion to enjoin litigation against nondebtor parties pursuant to 11 U.S.C. § 1519).
9 11 U.S.C. § 1521(e) (identifying the subsections of 11 U.S.C. § 1521(a) to which preliminary injunction standard applies, and not including subsection (a)(4), which governs post-recognition discovery).
10 11 U.S.C. § 1517(c).
11 *See, e.g., In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 69, n.7 (Bankr. S.D.N.Y. 2011) (noting that preliminary relief was denied); *id.*, Mem. of Law at 29 [ECF 6] (seeking discovery under §§ 1519 and 1521).
12 11 U.S.C. § 1521(a), (c) (listing relief available in main and non-main proceedings, and expressly limiting relied available in non-main proceedings to relief that "relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding").
13 Other available relief includes (1) the entrustment of the realization and distribution of administration of the estate's assets located within the U.S.; (2) extension of pre-recognition relief; and (3) additional relief. 11 U.S.C. § 1521.
14 11 U.S.C. § 1521(c) (setting forth these limitations).

significantly limit the scope of discovery that a foreign representative can seek under § 1521.

Discovery Under § 1521(a) vs. Rule 2004

Discovery in a chapter 11 case proceeds under Bankruptcy Rule 2004,[15] but discovery in a chapter 15 foreign main proceeding falls under § 1521(a)(4). Section 1521 allows the court to authorize examination of witnesses and production of documents. This aspect of chapter 15 provides a unique avenue for foreign debtors to investigate potential claims of the estate.

Asymmetric Discovery

Chapter 15 discovery, like all discretionary relief under § 1521, remains one-sided, as it can only be granted *at the request of the foreign representative*.[16] The few courts that have been presented with the issue have denied requests to take discovery made by parties other than the foreign representative.

For example, in *In re China Medical Technologies*,[17] the court denied a shareholder's request to take discovery from the foreign representative[18] and explained that "the authority under 1521 and 1507 gives benefits to foreign representatives that, by their terms, don't extend to other parties-in-interest."[19] In *In re Perforadora Oro Negro, S. de R.L. de CV*, the court also denied a request by the foreign debtors' bondholders to take affirmative discovery from the foreign representative, although without elaborating on its reasoning.[20]

Only in cases concerning adequate-protection challenges have courts authorized discovery from the foreign debtor. For example, in *In re SNP Boat Serv. SA*, the court authorized discovery of the foreign debtor on the narrow issue of whether entrustment of maritime assets could be provided with "sufficient protection" of a creditor, and whether the foreign proceeding even provided due process.[21]

Scope of Chapter 15 Discovery

Courts interpret Bankruptcy Rule 2004 to authorize extremely "broad and unfettered" discovery, "in the nature of a fishing expedition" into the "nature and extent of the bankruptcy estate" and to "discover ... assets, examin[e] transactions, and determin[e] when wrongdoing has occurred."[22] Section 1521 defines the scope of discovery in chapter 15 slightly differently than Rule 2004, allowing discovery of "information concerning the debtor's assets, affairs, rights, obligations or liabilities."[23] In practice, these nuanced interpretations prove to be a distinction without a difference, with most courts applying the broad scope of Rule 2004 to § 1521,[24] liberally interpreting § 1521(a)(4) to include all manner of topics that relate, in some way, to the debtor's assets or affairs.[25]

For example, courts consider potential causes of action that a debtor might have against U.S. parties, or for U.S.-based causes of action, to be "contingent property interests of the estate" subject to discovery.[26] Further, some courts even hold that "[r]equests for discovery in chapter 15 need not concern assets in the U.S. to be permissible" because the purpose of chapter 15 is to "assist a foreign representative in administering the foreign estate."[27] Notably, chapter 15 discovery can often exceed what a debtor might obtain in the foreign proceeding absent some indication that the foreign court would be actively hostile to the U.S. discovery process.[28]

In the case of non-main proceedings, however, discovery must either relate to assets that "should be administered in the foreign non-main proceeding" or "concern ... information required" in the non-main proceeding.[29] Although the ability to seek "additional assistance" under § 1507 suggests a possible workaround, at least some courts interpret § 1507 to apply only if the specific relief requested is not contemplated elsewhere in chapter 15.[30] Thus, discovery under § 1521 remains limited in non-main cases.

Section 1782 Alternative

Outside of the insolvency context, U.S. law aids litigants in foreign proceedings through 28 U.S.C. § 1782, allowing litigants to seek discovery from U.S. targets for use in already-pending proceedings elsewhere. Chapter 15 provides an alternative to § 1782 that foreign debtors should consider.

15 Fed. R. Bank. P. 2004.

16 11 U.S.C. § 1521(a).

17 No. 12-13736 (Bankr. S.D.N.Y.).

18 No. 12-13736, Order, ECF 91 (Bankr. S.D.N.Y. March 29, 2013); *see also* First Mot. to Allow Rule 2004 Discovery from the Foreign Representative, ECF 75 (Bankr. S.D.N.Y. Feb. 28, 2013).

19 *See id.* March 21, 2013, Hr'g Tr. at 17, ECF 111 (Bankr. S.D.N.Y. June 19, 2013) (explaining reasons for denial).

20 *In re Perforadora Oro Negro, S. de R.L. de C.V.*, No. 18-11094 (Bankr. S.D.N.Y.), June 27, 2018, Hr'g. Tr. at 157-58 (arguing that chapter 15 does not allow parties other than foreign representative to seek discovery) and 214 (denying request of debtors' bondholder for affirmative discovery), ECF 87; *see also In re Irish Bank Res. Corp. Ltd. (in Special Liquidation)*, No. 13-12159-CSS, Aug. 28, 2018, Hr'g. Tr. at 86 (denying request by creditor in foreign proceeding to take discovery from the foreign representative on basis of pending proceeding rule, noting that "Chapter 15 is an ancillary proceeding" suited to addressing "actual property in the United States, [and] actual issues aris[ing] in the United States").

21 *In re SNP Boat Serv. SA*, 453 B.R. 446, 449 (Bankr. S.D. Fla. 2011), *aff'd in part, rev'd in part and remanded sub nom., SNP Boat Serv. SA v. Hotel Le St. James*, 483 B.R. 776 (S.D. Fla. 2012); *id.* Opp., ECF 54 (urging that requested relief did not provide sufficient protection); *see also In re Perforadora Oro Negro, S. de R.L. de C.V.*, No. 18-11094 (Bankr. S.D.N.Y.) June 27, 2018, Hr'g. Tr. at 211-12, ECF 87 (denying discovery into debtors generally, but requiring foreign representative to provide proof of insurance to its creditors as part of ensuring sufficient protection).

22 *In re Enron Corp.*, 281 B.R. 836, 840 (Bank. S.D.N.Y. 2002); *In re Roman Catholic Church of Diocese of Gallup*, 513 B.R. 761, 764 (Bankr. D.N.M. 2014) (describing broad scope of Rule 2004 and collecting cases).

23 *Compare* Fed. R. Bank. P. 2004 (allowing discovery "relate[d] only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge ... [or] to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan") *with* 11 U.S.C. § 1521 (allowing discovery of "information concerning the debtor's assets, affairs, rights, obligations or liabilities").

24 *See In re Petroforte Brasileiro de Petroleo Ltda.*, 542 B.R. 899 (Bankr. S.D. Fla. 2015) (concluding that Rule 2004 is applicable in chapter 15 case); *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 471 B.R. 342 (Bankr. S.D.N.Y. 2012) (similar); *In re Platinum Partners Value Arbitrage Fund LP*, 583 B.R. 803, 810 (Bankr. S.D.N.Y. 2018) (stating that relief sought pursuant to Bankruptcy Rule 2004 might also be available pursuant to §§ 1507, 1521(a)(4) or 1521(a)(7) because "one of the main purposes of chapter 15 is to assist a foreign representative in the administration of the foreign estate, and Rule 2004 proceedings are one of the mechanisms by which bankruptcy courts provide such assistance") (citations omitted).

25 *See, e.g., In re British Am. Ins. Co. Ltd.*, 488 B.R. 205, 225, n.16 (Bankr. S.D. Fla. 2013) (noting that "broad-based inquiry into the debtor's assets and affairs is available under [Rule] 2004 without the need to pursue a separate adversary proceeding or contested matter").

26 *See In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 471 B.R. 342, 346 (Bankr. S.D.N.Y. 2012) (discovery into potential causes of action against U.S. entity related to assets of estate in chapter 15 proceeding); *In re Petroforte Brasileiro de Petroleo Ltda.*, 542 B.R. 899, 902 (Bankr. S.D. Fla. 2015) (authorizing discovery "for the purposes of investigating 'suspected misappropriated assets of [the debtor]'").

27 *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 471 B.R. 342, 346 (Bankr. S.D.N.Y. 2012); *see also In re Fairfield Sentry Ltd. Litig.*, 458 B.R. 665, 679 n.5 (S.D.N.Y. 2011) (for example, § 1521(a)(4) "allows for discovery in the United States whether or not a debtor has assets here"); *In re Platinum Partners Value Arbitrage Fund LP*, 583 B.R. 803, 822 (Bankr. S.D.N.Y. 2018) (authorizing discovery of documents from debtors' former auditor that debtor sought in order to investigate potential claims of wrongdoing).

28 *In re Platinum Partners Value Arbitrage Fund LP*, 583 B.R. 803, 822 (Bankr. S.D.N.Y. 2018) (determining that Cayman law was unsettled as to whether documents were all work product not subject to disclosure, but noting that even if they were, foreign law does not supplant U.S. discovery law absent showing that foreign court would be "hostile" to U.S. discovery process).

29 11 U.S.C. §§ 1507, 1521(e).

30 *See In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1057 (5th Cir. 2012) (discussing in detail interplay between §§ 1507 and 1521).

continued on page 61

from page 27

First, a § 1782 application *must* be brought where the target of the discovery is domiciled.[31] If a foreign debtor seeks discovery from multiple targets in different jurisdictions in the U.S., it needs to submit separate petitions in each. On the other hand, chapter 15 enjoys the Bankruptcy Code's nationwide jurisdiction, allowing the foreign debtor to streamline its efforts by bringing all of its requests to the same court.

Second, the discovery available under chapter 15 is broader than that available under § 1782. Discovery requests under § 1782 must be "narrowly tailored, [and not] request confidential information [nor] appear to be a broad 'fishing expedition' for irrelevant information."[32] Courts apply a contrastingly liberal standard to chapter 15 requests, specifically sanctioning the proverbial "fishing expedition" and encouraging debtors to use chapter 15 as an investigative tool of the estate. Rather than seek limited discovery for an already-identified dispute, international debtors can flip the tables, using broad discovery to investigate and identify potential disputes and potentially develop valuable claims for the estate.[33]

31 28 U.S.C. § 1782.

32 *Baxalta Inc. v. Genentech Inc.*, No. 16-MC-80087-EDL, 2016 WL 11529803, at *8 (N.D. Cal. Aug. 9, 2016).

Conclusion

Chapter 15's discovery features — especially its asymmetry and breadth — offer foreign debtors a unique chance to take advantage of U.S. discovery to investigate potential claims of the estate (1) with minimal cost and burden to the debtor; (2) without being bound, generally, by their home jurisdiction's discovery restraints; and (3) into broad and exploratory topics. The law on this topic continues to develop, but foreign debtors can — and should — leverage the discovery available to them under § 1521 to investigate valuable litigation claims or defenses, whether in the U.S. or elsewhere, in order to increase the value of the estate for the benefit of all constituencies. abi

33 For example, in *In re Perforadora Oro Negro*, the foreign representative obtained chapter 15 discovery into potential claims of tortious interference by its bondholders. Just over a year after the initial petition, the foreign representative filed an extensive complaint seeking hundreds of millions in recovery. *See Gil-White v. Ercil, et al.*, Adv. Proc. No. 19-01294 (*In re Perforadora Oro Negro, S. de R.L. de C.V., et al.*, 18-11094 (scc) (Jointly Administered)), Compl. [ECF 4-1], at 66-67 (Bankr. S.D.N.Y.). In *In re Platinum Partners*, the joint liquidators brought suit against a U.S. executive for recovery of approximately $3.3 million in stock-purchase warrants, citing in their complaint discovery sought from the defendants in the course of the chapter 15 proceeding. *Platinum Partners Value Arbitrage Fund LP v. Goldberg*, Adv. Proc. No. 18-01650 (*In re Platinum Partners Value Arbitrage Fund LP*, No. 16-12925 (SCC) (Jointly Administered)), Compl. [ECF 1], at 6-7 (Bankr. S.D.N.Y.). Both cases are pending.