



AMERICAN  
BANKRUPTCY  
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## 2022 Annual Spring Meeting

# **So We Own a Plane in Mexico: Asset Recovery and Cross- Border Insolvency**

Hosted by the International Committee

**Leyza F. Blanco**

Sequor Law; Miami

**Joseph R. Dunn**

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; San Diego

**Jane Kim**

Keller Benvenuti Kim LLP; San Francisco

**Stephen A. Spitzer**

AlixPartners, LLP; New York



**So We Own a Plane in Mexico:  
Asset Recovery and Cross-Border Insolvency**

Leyza F. Blanco, Sequor Law (Miami, FL)

Joseph R. Dunn, Mintz Levin Cohn Ferris Glovsky & Popeo, PC (San Diego, CA)

Jane Kim, Keller Benvenutti Kim LLP (San Francisco, CA)

Stephen A. Spitzer, AlixPartners, LLP (New York, NY)



### The Intersection of Cross-Border Insolvencies and Asset Recovery

- Outbound insolvency cases
  - Insolvency proceeding pending in the United States
  - Assets or targets in foreign jurisdictions
  - Bankruptcy Code and (possibly) foreign insolvency constructs available to assist estate and its creditors
- Inbound insolvency cases
  - Insolvency proceeding pending in foreign jurisdiction
  - Assets or other litigation interests in the United States
  - Chapter 15 potentially available



### Navigating Multijurisdictional Enforcement Proceedings

Each jurisdiction may have unique rules concerning:

- Recognition and enforcement
- Possibilities for conservatory or pre-recognition measures
- Protection of assets from dissipation pending judgment/recognition in the relevant jurisdiction
- Alter ego/veil-piercing doctrines may differ in availability and application
- Cost risks if attachments are deemed wrongful
- Discovery/disclosure possibilities
- Sovereign immunity doctrines



### Navigating Multijurisdictional Enforcement Proceedings (cont.)

Other factors to consider:

- Personal jurisdiction over the parties
- Enforceability of prior orders, likely defenses in jurisdiction
- Where the assets are located, and what hurdles you may encounter
- The legal entity and status of the target, whether and to what extent its assets are protected, and how to navigate around defenses
- The legal rules in the relevant jurisdictions regarding recognition and enforcement, freezing orders and discovery possibilities
- Timing in relation to taking recognition and enforcement measures in several jurisdictions at the same time to create settlement leverage



### Recovering Assets in the U.S.

- The Toolbox:
  - Automatic stay (11 U.S.C. 362)
  - Injunctive Relief (11 U.S.C. 105)
  - Turnover (11 U.S.C. 542, 543)
  - Avoidance Actions under Bankruptcy Law (11 U.S.C. 544 *et seq.*)
  - Avoidance Actions under State Law (UFTA/UVTA)
  - State Common Law Claims (*e.g.*, replevin)
  - State Law Attachment and Other Provisional Remedies



Enforcing Estate Rights outside the U.S.

- The Automatic Stay – Does it Work Beyond our Borders?
  - Section 541 makes clear the automatic stay applies to assets wherever located
  - Personal jurisdiction over those in possession of assets is key
  - Absence or delay of enforceability may threaten DIP operations, reorganization
- Practical Issues with Enforcing Bankruptcy Court Orders:
  - Personal Jurisdiction
  - Comity
  - Delay
- Operational “workarounds” to enforcement issues
  - *Ultrapetrol Bahamas Ltd.*: obtaining relief to stave off adverse action by foreign vendors in jurisdictions where enforcement of automatic stay and contractual rights may be difficult or impractical.



Enforcing Estate Rights outside the U.S.

- Impact of Enforceability Issues on Reorganization
- Considerations for Cross-Border DIP Lending
  - Will non-U.S. parties that hold the debtor’s assets or claims against the debtor respect the automatic stay and the protections granted to the DIP lender
  - Will non-U.S. courts enforce the automatic stay if required
- Examples of jurisdiction-conscious structuring
  - *In re LATAM Airlines Group SA*
  - *In re Hexion Inc.*

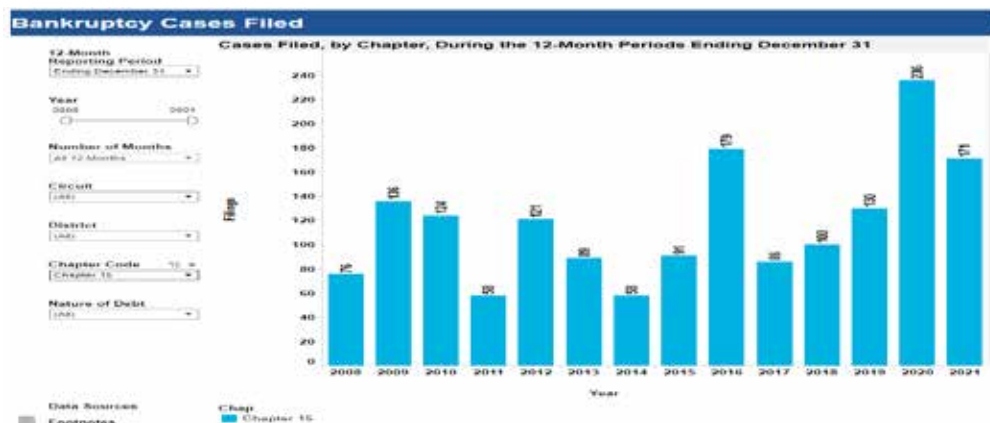


## Enforcing Estate Rights outside the U.S.

- Enforcing rights in litigation
  - Violations of discovery obligations/spoliation
  - Do sanctions matter?
- Obtaining recognition of estate (trustee) authority
  - Jurisdiction-specific challenges
- Freeze orders in foreign jurisdictions
- UNCITRAL Model Laws on Enforceability of Judgments



## Chapter 15 Cases



Source: United States Courts, *Bankruptcy Filing Statistics Data Visualizations*, available <https://www.uscourts.gov/statistics-reports/analysis-reports/bankruptcy-filings-statistics/bankruptcy-statistics-data>



### Chapter 15 Cases

- In 2020, the majority of chapter 15 filings were filed in three jurisdictions:
  - Southern District of New York (82)
  - Southern District of Texas (27), and
  - District of Delaware (85)
- In 2021, the majority of chapter 15 filings were filed in the same three jurisdictions:
  - Southern District of New York (56)
  - Southern District of Texas (48), and
  - District of Delaware (28)



### Chapter 15 Generally

- Generally the case is ancillary to a primary proceeding brought in the debtor's home country (foreign jurisdiction).
- But, the debtor or a creditor may commence a chapter 7 or 11 case in the United States if the assets in the United States are sufficiently complex to merit a full-blown domestic bankruptcy case. (11 U.S.C. § 1520(c))
- A U.S. court may authorize a trustee or other entity (including an examiner) to act in a foreign country on behalf of a U.S. bankruptcy estate. (11 U.S.C. § 1505)





Chapter 15 Benefits – 11 U.S.C. §§ 1520, 1521

- Upon recognition of the foreign proceeding:
  - Automatic stay (11 U.S.C. § 362) applies to the debtor and assets within the U.S. territorial jurisdiction
  - 11 U.S.C. §§ 363, 549 and 552 apply to transfers of property
  - Foreign representative has rights and powers under 11 U.S.C. § 363 to operate the debtor's business and dispose of property
- Court may grant additional relief:
  - Staying individual actions not automatically stayed
  - Authorizing discovery regarding the debtor's assets
  - Appointing an examiner
  - Granting "any additional relief that may be available to a trustee," with limitations



Limitations of Chapter 15

- Ancillary cases in the U.S. are generally limited to assets that are:
  - Located within the territorial jurisdiction of the United States, or
  - Within the scope of 11 U.S.C. § 541 and not subject to jurisdiction and control of a foreign proceeding that was recognized (e.g., the foreign main proceeding)
- Foreign representative does not have traditional avoidance powers under 11 U.S.C. § 544, 545, 547, 548, 550
  - However, foreign representative can utilize avoidance powers under nonbankruptcy law
  - Foreign representative may invoke bankruptcy avoidance powers by initiating a chapter 7 or 11 case





### Chapter 15 Recognition

- 11 U.S.C. § 109(a): “Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.”
- 11 U.S.C. § 1502(1): Defines a “debtor” under chapter 15 as “an entity that is the subject of a foreign [bankruptcy or insolvency] proceeding.”
- 11 U.S.C. § 1517: Provides a framework for a bankruptcy court to enter an order recognizing a debtor’s foreign insolvency proceeding.



### Chapter 15 Recognition Requirements

- Courts are divided as to whether a foreign debtor must satisfy the requirements of Section 109(a) to gain recognition under Section 1517
- *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013):
  - Debtor must have domicile, place of business or property within the territorial jurisdiction of the United States
  - Vacated order recognizing Australian liquidation proceeding
- *But see In re B.C.I. Fins. Pty Ltd.*, 583 B.R. 288, 293–96 (Bankr. S.D.N.Y. 2018):
  - Finding retainers deposited by foreign debtors with law firms in the U.S. for the sole purpose of satisfying § 109(a) to obtain discovery was sufficient to satisfy the “property” requirement under § 109



## Chapter 15 Recognition Requirements

Potential forthcoming Circuit split:

- *In re Zawawi*, Case No. 6:21-ap-00136 (Bankr. M.D. Fla.).
  - Trustee sought discovery related to assets held by debtor in M.D. Fla. and was successful in obtaining an order recognizing English bankruptcy proceeding.
  - Debtor appealed, arguing 11 USC § 109(a) imposes a threshold requirement for all Chapter 15 recognition proceedings.
- District Court disagreed with *Barnet* and held that 11 USC § 109(a) is not a prerequisite to obtaining recognition under Chapter 15:
  - Found that 11 U.S.C. 1517(a) provides the sole requirements for recognition.
- If appealed, would present issue of first impression for Eleventh Circuit, and if affirmed, would present Circuit split.



## Chapter 15 Recognition Requirements

- The debtor's motives – do they matter?
  - *In re Black Gold S.A.R.L.*, 2022 WL 488438 (B.A.P. 9th Cir. Feb. 17, 2022):
    - Evidence of misconduct, bad faith or illegitimate purpose is insufficient to deny recognition of a foreign proceeding.
    - A bankruptcy court's recognition determination is governed solely by the eligibility requirements set forth in Section 1517(a).
  - *In re Culligan Ltd.*, 2021 WL 2787926 (Bankr. S.D.N.Y. July 2, 2021)
    - Chapter 15 recognition granted notwithstanding allegations that Bermudan liquidators filed the chapter 15 solely as a litigation tactic to enjoin a lawsuit against the foreign debtor.
    - Court refused to apply a "public policy" exception to recognition.



Chapter 15 as a Discovery Tool

- Access to discovery expressly contemplated under Section 1521(a)(4)
  - *E.g., In re Comair Ltd.*, 2021 WL 5312988 (Bankr. S.D.N.Y. Nov. 15, 2021);  
*In re Platinum Partners Value Arbitrage Fund L.P.*, 583 B.R. 803 (Bankr. S.D.N.Y. 2018).
- Logistics of conducting discovery
  - Service of subpoenas on debtor's principals, former management with possession of information useful to the estate and creditors.
  - *In re Viacao Itapemirim, S.A.*, 608 B.R. 268 (Bankr. S.D. Fla. 2019).
  - *In re Procom Am., LLC*, 2022 WL 830927 (Bankr. M.D. Fla. Mar. 21, 2022).



Chapter 15 as a Discovery Tool (cont.)

- Service outside the United States
  - Impact of Hague Convention, international treaties
  - Federal Rule of Civil Procedure 4(f)
  - *In re Zawawi*, No. 6:21-ap-00136 (Bankr. M.D. Fla. Mar. 10, 2022)
    - Service on debtor in Oman under Rule 4(f)(2), (3)

# Faculty

**Leyza F. Blanco** is a shareholder with Sequor Law in Miami, where she focuses her practice on a wide range of litigation and insolvency matters, including out-of-court workouts, debt restructuring, and the representation of creditors, receivers, assignees, trustees and debtors in bankruptcy and general commercial litigation matters in state and federal courts. Her practice in the area of restructuring and creditors' rights is currently focused on complex business and cross-border bankruptcy and commercial litigation matters. Ms. Blanco has served in several roles, including examiner, receiver and special master in federal and state court proceedings, and has served as a neutral arbiter in an arbitration proceeding. She currently serves as chair of IWIRC and past chair of the Florida Bar's Business Law Section, and as Special Projects Director for ABI's Asset Sales Committee. Ms. Blanco is a Fellow of the American College of Bankruptcy and also served past chair of the IWIRC Florida Network and past-president of the Bankruptcy Bar of the Southern District of Florida. Her other notable activities include serving as lead adjunct professor at the Florida International University College of Law, for which she launched its bankruptcy clinical program. Ms. Blanco has been recognized in *Chambers and Partners U.S.A.* She received her B.A. from Miami College of Arts & Sciences and her J.D. *magna cum laude* from the University of Miami Law School, where she was articles and comments editor for the *Inter-American Law Review* and a member of the Order of the Coif.

**Joseph R. Dunn** is a member of the Bankruptcy & Restructuring group at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. in San Diego and co-chairs its Cross-Border Asset Recovery Practice. He focuses his practice on asset recovery, judgment enforcement and litigation in the insolvency arena. Mr. Dunn has experience in complex creditor rights litigation, bankruptcy litigation and other work in insolvency scenarios. He has represented institutional creditors, bankruptcy trustees, litigation trustees and other fiduciaries in investigating and pursuing complex asset-recovery matters, often through litigation focused on piercing fraudulent schemes and offshore asset-protection devices. He has represented institutional investors, hedge funds and large financial institutions, and regularly practices in courts around the country. Mr. Dunn has served various leadership roles in local and statewide bankruptcy organizations, including on the advisory board for ABI's Battleground West conference and on the Selection Committee for the Ninth Circuit's Lawyer Representative Program. He also serves on the board of a San Diego-based nonprofit organization focused on assisting victims of domestic violence and sexual assault. Mr. Dunn founded the Finance Association at California State University, Chico. He received his J.D. from Washington & Lee University, and while there was a member of Virginia Capital Case Clearinghouse, for which he assisted in representing capital murder defendants.

**Jane Kim** is a partner at Keller Benvenuti Kim LLP, a San Francisco-based corporate bankruptcy and restructuring boutique law firm, where she represents debtors in possession, distressed companies and other parties in both in-court and out-of-court situations. Her recent engagements include representing In-Shape Health Clubs, LLC, a premium regional fitness club chain in California, and Ravn Air Group, Inc., a regional airline in Alaska, in each of their chapter 11 cases filed in Delaware. She also serves as bankruptcy co-counsel for Pacific Gas & Electric Company in its chapter 11 case, the largest chapter 11 filing in the Northern District of California in over a decade. Before moving to California and joining Keller Benvenuti Kim in 2014, Ms. Kim practiced in New York at Cleary

Gottlieb for over a decade. She is a Fellow in the American College of Bankruptcy and has been recognized as a leading lawyer by publications and organizations including *Chambers USA*, *Super Lawyers*, *Benchmark Litigation California*, and *Lawdragon*'s inaugural list of the 500 Leading U.S. Bankruptcy and Restructuring Lawyers. She also was selected to serve as a lawyer representative for the Northern District of California. Ms. Kim received her B.A. from Columbia College at Columbia University in 1999 and her J.D. from Harvard Law School in 2002.

**Stephen A. Spitzer** is a director with AlixPartners LLP in New York and has more than 18 years of management and consulting experience, navigating both debtors and creditors through restructurings. He focuses on cross-border restructuring, contingency planning and crisis management, liquidity management, business planning and operational-cost reduction. Mr. Spitzer's operational experience includes acting as the senior financial executive for a division of a multibillion-dollar direct marketing and media company, interim treasurer for a publicly traded manufacturing company, and CFO for a private-equity-backed magazine publishing company. He is also experienced in establishing financial control policies and procedures, developing long-range business plans, designing management reporting tools and creating liquidity forecasts. Mr. Spitzer has spent the last 10 years as a consultant providing restructuring leadership and investment banking services for companies in the media, direct marketing, entertainment, manufacturing and telecommunications industries.