SELECTED TOPIC

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Impact of Cross-Border Court-to-Court Communications on U.S. Creditors' Rights

This article was inspired by "Singapore-Delaware Courts Adopt Cross-Border Insolvency Guidelines," which appeared in FCIB's Week in Review in February.

As U.S. businesses have gone global, so have their customers. U.S. companies selling abroad have been confronted with customers that have filed for relief under their country's insolvency law. If the customer has a business or assets here in the U.S., he or she might then file either a Chapter 11 or Chapter 15 case in a U.S. bankruptcy court.

Unlike a Chapter 11 case, a Chapter 15 case is not necessarily the "main event." Yet, even in Chapter 15 cases, U.S. judges still have critical roles to play with respect to, among other things, administering a foreign debtor's U.S. assets and ensuring U.S. creditors' rights are fairly and adequately protected. One way to protect the interests of U.S. creditors is pursuant to Section 1525 of the Bankruptcy Code, which encourages communication and cooperation among the courts involved in cross-border proceedings and authorizes U.S. courts to communicate directly with foreign courts.

Until recently, U.S. bankruptcy courts in Chapter 11 and Chapter 15 cases involved in cross-border proceedings have approved protocols—often on a case-by-case ad hoc manner—to communicate with foreign courts or foreign judges based on the broad authority provided to them by the Bankruptcy Code. However, beginning earlier this year, several influential U.S. bankruptcy courts and courts outside of the United States have adopted or followed the Judicial Insolvency Network's ("JIN") *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* (the "Guidelines"). Judges from Australia, Bermuda, the British Virgin Islands, Canada, the Cayman Islands, England and Wales, Singapore, Hong Kong, and the United States created the Guidelines following an October 2016 JIN conference (the "JIN Conference") held in Singapore. The Guidelines seek "to improve … the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction … by enhancing coordination and cooperation among courts under whose supervision such proceedings are being conducted."

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This article provides a summary of the Guidelines and two recent examples of cases in which U.S. bankruptcy judges presiding over cross-border Chapter 15 cases sought to utilize court-to-court communications—similar to the types of communications contemplated by the Guidelines—to help render decisions on certain pending legal issues.

Overview of Chapter 15

Chapter 15 contains the rules and procedures that a foreign debtor can utilize to facilitate a foreign insolvency proceeding in the United States. Chapter 15 cases are filed to protect a foreign debtor's assets and business in the United States from creditor enforcement actions and allow a foreign debtor to obtain bankruptcy court recognition and approval of, among other things, actions approved in the foreign proceeding and other relief.

A foreign debtor must obtain recognition of the foreign proceeding in order to obtain Chapter 15 relief. Such relief may include authorizing a bankruptcy court to "grant any appropriate relief" in order to protect the foreign debtor's U.S. assets and the interests of its creditors. In addition, once a bankruptcy court grants recognition, it may grant relief requested by a foreign debtor, provided there is reasonable assurance of the: 1) just treatment of

all holders of claims against or interests in the debtor's property; 2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; and 3) prevention of preferential or fraudulent dispositions of property of the debtor.

Section 1506 of the Bankruptcy Code further provides that "[n]othing in [Chapter 15] prevents the court from refusing to take an action governed by [Chapter 15] if the action would be manifestly contrary to the public policy of the United States." In deciding what action might be contrary to U.S. public policy, courts have focused on whether: (i) the foreign proceeding is procedurally unfair; and (ii) the application of the foreign law would "severely impinge the value and import" of a U.S. statutory or constitutional right so that granting relief would "severely hinder" the U.S. bankruptcy court's ability to protect those rights.

In order for a U.S. bankruptcy court to direct the transfer of a foreign debtor's U.S. assets outside the U.S. to a foreign debtor or grant recognition of a foreign proceeding, the court must be able to appropriately communicate and, in certain circumstances, grant relief in concert or following communications with the foreign court where the foreign insolvency proceeding is pending. Prior to granting certain Chapter 15 relief, whether granting recognition of a foreign proceeding, approving a reorganization plan in the foreign proceeding or approving a sale of the foreign debtor's U.S. assets, U.S. bankruptcy judges may first want to understand the procedures and rights of creditors that exist under the foreign law(s) where the insolvency proceeding is pending. The Guidelines help to facilitate this understanding.

Overview of the Guidelines

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Following the JIN Conference, a number of jurisdictions have formally adopted/incorporated the Guidelines into their court rules. In February 2017, (i) the Supreme Court of Singapore in Registrar's Circular No. 1 of 2017; (ii) the U.S. Bankruptcy Court for the District of Delaware in Delaware Bankruptcy Local Bankruptcy Rule 9029-2 and Part X; and (iii) the U.S. Bankruptcy Court for the Southern District of New York in General Order M-511 in New York adopted the Guidelines. The Supreme Court of Bermuda (March 9, 2017), the Chancery Division of the High Court of England and Wales (May 5, 2017) and the Eastern Caribbean Supreme Court in the British Virgin Islands (May 18, 2017) subsequently adopted the Guidelines.

The Guidelines consist of an introduction, 14 guidelines and an Annex related to joint hearings. The introduction states that the Guidelines are designed to establish a roadmap for cross-border communications and interactions among the various insolvency courts involved in the cross-border proceedings. The Guidelines should facilitate more consistent decisions in cross-border cases and minimize the risk of inconsistent decisions that could throw the cases into chaos. Guidelines 1 through 6, entitled "Adoption and Interpretation," contemplate the parties agreeing to or a court approving a protocol for implementing the Guidelines. Guidelines 7-9, entitled "Communication Between the Courts," provide that courts may receive and direct communication with other courts, including through sending or receiving orders, rulings or pleadings. Guidelines 10-11, entitled "Appearance in Court," provide that a court can authorize a party to appear in the foreign proceeding, and the court in the foreign proceeding may (subject to local law) authorize a party in the U.S. proceeding to appear before it without submitting to either court's jurisdiction. Guidelines 12-14, entitled "Consequential Provisions," provide that orders, statutes, regulation, and rules of court applicable to the foreign proceeding are deemed valid in the U.S. proceeding and vice versa (unless the court decides otherwise). Finally, Annex A to the Guidelines, entitled "Joint Hearings," provides for practices to be utilized for conducting joint hearings, including procedural and evidentiary issues relating to joint hearings conducted by multiple courts.

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Recent Cases Involving Cross-Border Communications

In two recent Chapter 15 cases, U.S. bankruptcy judges utilized cross-border communications with the foreign court presiding over the foreign insolvency proceeding. The U.S. courts were seeking to ascertain certain facts regarding the foreign proceeding to assist in making decisions in the Chapter 15 case.

In the *In re Hanjin Shipping Co. Ltd.* case, the foreign debtor, which had been one of the world's largest container shipping companies, filed for rehabilitation proceedings in the Republic of Korea. In September 2016, Hanjin commenced a Chapter 15 case in the U.S. Bankruptcy Court for the District of New Jersey. In December 2016, after the U.S. court granted recognition of the Korean proceeding, Hanjin sought to sell an equity interest it owned in several U.S. port facilities (and related assets). The Korean court preliminarily approved the sale contingent on the U.S. court authorizing the sale and the transfer of the proceeds from the sale to Hanjin in Korea.

U.S.-based creditors objected in the U.S. bankruptcy court, asserting that they held unpaid "common benefit claims" (akin to Chapter 11 administrative expense claims) that should be immediately paid from the sale proceeds. These creditors opposed the requirement set by the Korean court that made the sale approval contingent on the return of the sale proceeds to Hanjin in Korea to be distributed as directed by the Korean court.

U.S. Bankruptcy Judge John K. Sherwood, prior to rendering a decision on the sale, held a court-to-court conference call with the Korean court based on Section 1525 of the Bankruptcy Code, regarding the common benefit claims process in Korea, to ensure that the objecting creditors and other U.S. creditors would have the right to properly assert their common benefit claims in the Korean proceeding. The creditors argued that the Korean court could not be trusted to properly administer the claims process. Ultimately, following the joint conference call (which the creditors attended), Judge Sherwood approved the sale. The U.S. court determined that the Korean process preserved the creditors' ability to assert claims (including common benefit claims. Note that all claims had to be properly filed and asserted in Korea) and authorized the proceeds to be transferred from the United States to Korea.

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In the *In re Ocean Rig UDW Inc.* case, the foreign debtors, which provide offshore drilling capacity in ultra-deep water and harsh weather conditions, filed for Chapter 15 protection in the Bankruptcy Court for the Southern District of New York. The foreign debtors sought recognition of the foreign reorganization proceeding commenced in the Cayman Islands. The debtors had filed the Cayman Islands proceeding in order to facilitate a restructuring that would convert approximately $3.7 billion of debt to cash of $288 million, secured notes of $450 million and equity. Various creditor groups objected to recognition of the Cayman Islands proceeding. These creditors also objected to the treatment of their claims in the Cayman Islands proposed "schemes" (akin to a reorganization plan. Note that the schemes have not yet been approved in the Cayman Islands proceeding) and asserted that the debtors did not cooperate in providing requested due diligence and failed to negotiate in good faith. These creditor groups sought to file an involuntary Chapter 7 or Chapter 11 case against the debtors in the U.S. prior to the U.S. court granting recognition of the Cayman Islands proceeding. U.S. Bankruptcy Judge Martin Glenn ultimately denied the lifting of the interim stay imposed in the Chapter 15 case and rejected the creditors' attempt to interfere with the Cayman Islands proceedings by allowing an involuntary filing against the debtors in the U.S.

However, Judge Glenn complained that "[n]obody here has been able to tell me about that [Cayman Islands] proceeding." In order to decide how the U.S. case should proceed (including whether to grant recognition of the Cayman Islands case), Judge Glenn ordered the parties to meet and confer regarding a protocol for direct "court-to-court communication" with the judge presiding over the Cayman Islands proceeding. The U.S. court noted that the Cayman Islands courts have not agreed to the Guidelines (at this point), and the Cayman Islands judge apparently indicated that there was no precedent in the Cayman Islands for court-to-court communications with a U.S. or other foreign court. However, a protocol based on the Guidelines is still under consideration in the Cayman Islands proceeding (a hearing is scheduled in mid-June 2017). What the U.S. court learns about the foreign proceeding through the court-to-court communications might ultimately have an impact on whether the U.S. court recognizes the foreign proceeding, and whether it approves any schemes or plans approved in the Cayman Islands proceeding.

Conclusion

As cross-border cases become more prevalent with our ever-expanding global economy, court-to-court communication in cross-border insolvency proceedings becomes ever more important. The Guidelines (including protocols implemented by courts applying the Guidelines) and other court-to-court communications should foster cooperation among courts handling cross-border insolvency matters and encourage consistent court rulings by U.S. and foreign courts that may ultimately impact U.S. creditors' rights. Credit executives dealing with foreign customers that are subject to Chapter 15 proceedings should have a general understanding about how Chapter 15 works and how court-to-court communications could ultimately impact cross-border court decisions. Creditors typically have the ability to participate in any court-to-court joint hearings under the Guidelines and must be vigilant about protecting and preserving all rights, whether in the U.S. proceeding (through U.S. counsel) or in the foreign proceeding (through foreign counsel).

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