Baker McKenzie.

Client Alert

August 2022

International: Chapter 15 Bankruptcy Update — Broad relief may be available upon recognition without establishing COMI in the jurisdiction of the foreign proceeding

In brief

1. Companies that require recognition of an international insolvency proceeding in the US may have more latitude to seek rehabilitation in a foreign jurisdiction with well-respected insolvency laws than previously may have been thought.
2. Companies seeking recognition of foreign proceedings under Chapter 15 of the US Bankruptcy Code may find it easier to obtain broad relief, even if the foreign proceeding is not commenced in the jurisdiction in which the company has its center of main interests (COMI).
3. In a series of recent Chapter 15 cases, broad discretionary relief has been granted in aid of foreign nonmain proceedings — the same scope of relief as is available upon recognition as a foreign main proceeding. Unlike a foreign main proceeding, it is not necessary to recognition of a foreign nonmain proceeding that a debtor's COMI be located in the jurisdiction in which the proceeding was commenced.
4. In light of the relief granted in these cases, companies that directly or indirectly maintain an "establishment" in the foreign jurisdiction may be able to avoid the expensive and time-consuming process of "COMI-shifting" — establishing their COMI in that jurisdiction — as a prerequisite to obtaining the full measure of relief and additional assistance in a US Chapter 15 case.
5. However, where a debtor does not conduct nontransitory economic activity in the foreign jurisdiction in which it commences its plenary foreign proceeding, the necessity to establish COMI in order to obtain relief in its Chapter 15 case may be unavoidable.
6. Additionally, while Section 1521(c) may serve as a basis to limit relief afforded upon recognition of a foreign nonmain proceeding, it should not be viewed as constraining a foreign debtor from seeking, or a court from granting, the full measure of Section 1521 discretionary relief in respect of a plenary case that happens to be filed in a jurisdiction outside the company's COMI.

In this issue

In depth

Introduction

Companies that require recognition of an international insolvency proceeding in the US may have more latitude to seek rehabilitation in a foreign jurisdiction with well-respected insolvency laws than previously may have been thought.

In light of recent case law, companies seeking recognition of foreign proceedings[1] under Chapter 15 of the Bankruptcy Code may find it easier to obtain broad relief, even if the foreign proceeding is not commenced in the jurisdiction in which the company has its

[1] Under the Bankruptcy Code, a "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs

COMI.[2] In many instances, foreign debtors have engaged in the cumbersome and expensive process of "COMI-shifting" — taking steps to establish COMI in a jurisdiction with flexible and internationally respected insolvency laws — in order to obtain recognition of the foreign proceeding as a foreign main proceeding[3] in a subsequent or contemporaneous Chapter 15 case in the US. The difficulty of shifting COMI — establishing not just a physical presence but a "nerve center"[4] in the applicable jurisdiction — imposes an added burden on a company seeking to reorganize its affairs in an internationally respected jurisdiction with laws that are sufficiently flexible and "debtor-friendly," and obtain foreign main recognition and related relief in a case under Chapter 15.

While it remains the law that foreign main recognition can only be granted in respect of a foreign proceeding that is commenced in the jurisdiction where the debtor has its COMI, a foreign representative also may obtain foreign nonmain recognition of a proceeding commenced in a jurisdiction in which the debtor has an "establishment" at which it conducts "nontransitory economic activity"[5] — if not directly then through a subsidiary or joint venture. It similarly remains that the grant of foreign main recognition automatically triggers the grant of certain forms of relief provided in Section 1520 of the Bankruptcy Code, while no such relief is granted as of right upon foreign nonmain recognition.

In at least two recent cases, Chief Bankruptcy Judge Martin L. Glenn of the Southern District of New York has recognized that even where the foreign proceeding is entitled only to foreign nonmain recognition, the foreign representative may obtain the full range of discretionary relief available under Section 1521 of the Bankruptcy Code — the same scope of relief as is available upon recognition as a foreign main proceeding. However, in another recent case, Judge Glenn reaffirmed that establishing COMI may sometimes be crucial, particularly in cases where a debtor cannot show sufficient nontransitory economic activity in the foreign jurisdiction to support a finding that foreign nonmain recognition is appropriate. In this client alert, we examine these recent decisions and discuss how foreign companies can establish — directly and through subsidiaries and joint ventures by looking to the integrated corporate economic unit as a whole — sufficient nontransitory economic activity in a jurisdiction to satisfy the requirement of an "establishment" to obtain foreign nonmain recognition and the full array of relief under Section 1521, along with "additional assistance" under Section 1507. We also consider the situation where establishing COMI for purposes of foreign main recognition remains necessary in the absence of such an "establishment" in the foreign forum. Finally, we consider Section 1521(c), which may limit the relief afforded upon recognition of a "typical" foreign nonmain proceeding.

COMI shifting — the art and practice of "bankruptcy tourism"

In In re *Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017), Judge Glenn established a framework for distressed companies to engage in "COMI-shifting," suggesting that this practice might not only be acceptable but desirable if it was necessary to achieve the best results in a restructuring. At issue in *Ocean Rig* were debtors whose COMI was initially located in the Republic

---

of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. 11 U.S.C. § 101(23).

[2] "Center of main interests" is not defined in the Bankruptcy Code. The nonexclusive list of factors considered by US bankruptcy courts in determining a debtor's COMI include: the 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 that would be affected by the case; and/or the jurisdiction whose law would apply to most disputes. See *In re SPhinX, LTD.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006).

[3] Under the Bankruptcy Code, a "foreign main proceeding" means a foreign proceeding pending in the country where the debtor has its COMI. 11 U.S.C. § 1502(4).

[4] A court may consider a debtor's "nerve center" in determining a debtor's COMI. *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 138 n.10 (2d Cir. 2012). However, one recent case calls into question the necessity of any formal COMI shift in order for a foreign proceeding to qualify for foreign main recognition. See *In re Modern Land (China) Co., Ltd.*, 2022 Bankr. LEXIS 1972, at *38-*39 (Bankr. S.D.N.Y. July 18, 2022), discussed infra (recognizing Cayman Islands proceeding as foreign main proceeding for company based in People's Republic of China, in absence of COMI shift, based upon strategic decision to restructure indebtedness through Cayman Islands scheme).

[5] A foreign nonmain proceeding is "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." 11 U.S.C.§ 1502(5). An "establishment" is "any place of operations where the debtor carries out nontransitory economic activity." 11 U.S.C. § 1502(2). See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 338 (S.D.N.Y. 2018). To satisfy this definition, a debtor must have "a seat for local business activity in the foreign country" and this activity must have a "local effect on the marketplace." *In re Mood Media Corp.*, 569 B.R. 556, 561–62 (Bankr. S.D.N.Y. 2017).

of the Marshall Islands, a jurisdiction in which the insolvency laws provided only for dissolution and winding up, with no ability to reorganize. Seeking to maximize value for their creditors, protect the value of their assets and avoid liquidation, the Ocean Rig debtors sought to shift their COMI to the Cayman Islands, in order to restructure through schemes of arrangement under Cayman law. In light of this legitimate purpose, Judge Glenn found that the practice of "COMI-shifting" was not only acceptable but also prudent, given that it afforded the best opportunity for a successful restructuring.[6]

While upholding COMI-shifting as a legitimate process under the circumstances presented in *Ocean Rig*, Judge Glenn also stated that "more than good intentions are required before a U.S. bankruptcy court can recognize a foreign proceeding as either a foreign main or foreign nonmain proceeding."[7] The court then proceeded to engage in a lengthy, factor-based analysis to determine whether the debtors actually had migrated their COMI to the Cayman Islands in advance of the Chapter 15 filing.[8] While Judge Glenn ultimately found the migration to be legitimate, and accordingly that foreign main recognition of the Cayman Islands scheme proceeding was appropriate, the decision reflects the cumbersome process involved in a successful "COMI-shift."[9]

As described below, a series of more recent decisions from Judge Glenn suggest that — again, in appropriate circumstances — the practice of re-establishing COMI in a desirable jurisdiction may not be necessary to achieve the ultimate goal of gaining broad relief upon recognition of the foreign proceeding in a case under Chapter 15.

The Constellation Decisions

In two seminal cases, *In re Serviços de Petróleo Constellation S.A.*[10] ("**QGOG Constellation I**"), and *In re Serviços de Petróleo Constellation S.A.*[11] ("**QGOG Constellation II**") (collectively, the "**Constellation Decisions**"), Judge Glenn addressed key issues arising in Chapter 15 cases, including the scope of relief afforded to foreign proceedings upon recognition. At issue in QGOG Constellation I was whether a Brazilian recuperacao judicial (or RJ) restructuring proceeding for a debtor whose COMI was found to be in Luxembourg was entitled to recognition in the US.[12] Importantly, the debtor was the parent company of subsidiaries all located in Brazil. Ultimately, the court found that the operations of those subsidiaries in the corporate group were sufficient to create an "establishment" in Brazil, such that the parent's Brazilian RJ proceeding was entitled to recognition as a foreign nonmain proceeding. In granting foreign nonmain recognition, the court focused on the economic activity of the operating subsidiaries, noting that:

---

[6] Judge Glenn stated:

> The Foreign Debtors in these proceedings acted prudently in exploring their restructuring alternatives. The Court finds that the directors of the Foreign Debtors properly concluded that changing their COMI to the Cayman Islands, and, if necessary, commencing restructuring proceedings there, and also commencing Chapter 15 proceedings in the US, offered them the best opportunity for successful restructuring and survival under difficult financial conditions.

570 B.R. at 695.

[7] Id.

[8] In *Ocean Rig*, Judge Glenn reiterated the principle that the operative date for determining a debtor's COMI is the filing date of the Chapter 15 petition. Id. at 704. While neither Chapter 15 nor the UNCITRAL Model Law fixes the date on which COMI is to be determined, the majority of Chapter 15 cases that have considered the issue have used the date of the Chapter 15 filing. See, e.g., *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013); *In re Ascot Fund Ltd.*, 603 B.R. 271, 282 (Bankr. S.D.N.Y. 2019); *In re Pirogova*, 593 B.R. 402, 408 (Bankr. S.D.N.Y. 2018); but see *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 76 (Bankr. S.D.N.Y. 2011).

[9] The *Ocean Rig* decision is discussed in more detail in our prior Alert, Creating COMI – Are attitudes shifting towards COMI shifting?

[10] 600 B.R. 237.

[11] 613 B.R. 497.

[12] The court found that the parent's COMI was located in Luxembourg because: (1) the headquarters was located in Luxembourg; (2) those who managed the parent were located in Luxembourg; (3) Luxembourg law would apply to most of the parent's disputes; and (4) creditors should reasonably expect that the parent's COMI was Luxembourg.

> Although Parent/Constellation's COMI is in Luxembourg, all of its subsidiaries have substantial and ongoing business connections in Brazil. These nontransitory ties to Brazil are sufficient to recognize the Brazilian Proceeding as a foreign nonmain proceeding with respect to Parent/Constellation.[13]

In this analysis, Judge Glenn looked beyond the specific debtor in the Chapter 15 case and considered the integrated economic unit as a whole, in order to find sufficient activity in Brazil to grant foreign nonmain recognition. Importantly, in QGOG Constellation I, the court further noted that the relief available to a foreign representative upon recognition of a foreign nonmain proceeding is "nearly identical" to the relief available upon recognition of a foreign main proceeding.[14]

The broad relief available at the discretion of the court upon recognition of a foreign proceeding (whether foreign main or foreign nonmain) is enumerated in Section 1521(a)(1)-(7) of the Bankruptcy Code. That relief includes, among other things: (1) staying the commencement or continuation of actions or proceedings concerning the debtor's assets, rights, obligations or liabilities; (2) staying execution against the debtor's assets; (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor; (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the US to the foreign representative or another person, including an examiner, authorized by the court.

Judge Glenn had the opportunity to revisit these issues in QGOG Constellation II, which arose after an appellate court in Brazil reinstated the previously dismissed RJ proceeding of an additional entity in the corporate structure. As in QGOG Constellation I, Judge Glenn found that the second debtor — a special purpose holding and financing company that had issued certain guarantees related to the existing notes restructured in the RJ proceeding — had its COMI in Luxembourg. However, like the ultimate parent in QGOG Constellation I, the second debtor conducted nontransitory economic activity in Brazil through its minority equity stakes in certain joint ventures that were located and operated in Brazil. The joint ventures were also subject to various Brazilian regulatory regimes, and the grant of foreign nonmain recognition was deemed appropriate based on these factors.

The Constellation Decisions provide a framework under which a foreign representative can obtain substantially the same relief upon foreign nonmain recognition as arises under the grant of foreign main recognition, notwithstanding the unavailability of automatic relief under Section 1520. The key, of course, is that whether directly or through the activities of subsidiaries and joint ventures that are part of an integrated economic unit, the debtor must satisfy to the Chapter 15 court that it has an "establishment" in the foreign jurisdiction in which it — whether directly or indirectly through subsidiaries and joint ventures as part of an integrated economic unit — conducts "nontransitory economic activity."

In re PT Pan Brothers— a boost for Singapore restructurings?

Recently, Judge Glenn reaffirmed the principles espoused in the Constellation Decisions in *In re PT Pan Brothers Tbk*, Case No. 22-10136-mg (Bankr. S.D.N.Y. 2022). In so doing, Judge Glenn also gave added momentum to the development of Singapore as the preferred jurisdiction for restructuring cases in the Asia Pacific region.

In the *PT Pan Brothers* Chapter 15 case, the foreign debtor (the applicant in the Singapore proceeding) was an Indonesian company that was the ultimate parent and holding company of an integrated unit of companies (collectively, the "**Pan Brothers Group**") that operated throughout the Asia Pacific region, including a substantial presence in Singapore. Notably, the Pan Brothers Group's corporate headquarters, business and principal operations all were located in Indonesia, although Singapore served as the center of its export operations.

After a creditor initiated a PKPU insolvency proceeding against the applicant in Indonesia, the applicant commenced scheme proceedings in Singapore on the basis that this would be a more efficient and widely accepted vehicle to restructure three tranches of domestic and international debt. Among other things, the restructuring tools and options accorded to a debtor company under the Singapore Insolvency, Restructuring and Dissolution Act 2018, and supervision of the restructuring process by the globally respected Singapore courts, were factors in favor of a proceeding with a Singapore-based restructuring.

---

[13] QGOG Constellation I, 600 B.R. at 281-82.

[14] Id. at 293. See also *In re SPhinX, LTD.*, 351 B.R. 103, 114-15 (Bankr. S.D.N.Y. 2006) (noting that Chapter 15 "minimiz[es] the practical differences between the recognition of a foreign proceeding as 'main' or 'nonmain' . . . ").

The applicant and its subsidiaries[15] proceeded to apply for moratoria relief from the Singapore court as a prelude to proposing a pre-packaged scheme of arrangement (the "**Singapore Scheme**"),[16] and set about to solicit the support of four affected classes of creditors[17] prior to filing an application for court sanction of the Singapore Scheme (the "**Singapore Scheme Proceeding**").

A portion of the foreign debt to be restructured was a series of US dollar-denominated notes that were governed by New York law (the "**Notes**") and guaranteed by virtually all members of the corporate group. Accordingly, the terms of the Singapore Scheme provided for the issuance of a final Chapter 15 order as a condition precedent to the occurrence of the restructuring effective date.

After attaining the requisite level of support of the affected creditors in all four classes and sanction of the Singapore Scheme — including third-party releases for the affiliate members of the corporate group — in the Singapore court, the foreign representative appointed in the Singapore Scheme Proceeding sought recognition of that proceeding in the United States bankruptcy court for the Southern District of New York. The foreign representative sought only foreign nonmain recognition, along with the full array of Section 1521 relief and Section 1507 additional assistance necessary to implement the restructuring of the Notes under the Singapore Scheme — including the aforesaid third-party releases for the affiliates of the corporate group from their existing obligations.[18] Notably, there was no attempt by the applicant to establish COMI in Singapore, or to seek recognition of the Singapore Scheme Proceeding as a foreign main proceeding.

Relying on the Constellation Decisions as urged by the foreign representative, Judge Glenn found that the Singapore Scheme Proceeding was entitled to recognition as a foreign nonmain proceeding, noting that the business and operations of the Pan Brothers Group supported a finding that the applicant had nontransitory economic ties to Singapore.[19] As in the Constellation Decisions, Judge Glenn considered the applicant's entire integrated economic unit to find the existence of the requisite "establishment" in Singapore.

The court also reaffirmed the principle set forth in the Constellation Decisions that any relief and additional assistance to which a foreign representative may be entitled upon recognition of a foreign main proceeding may be granted on a discretionary basis upon recognition as a foreign nonmain proceeding. Notably, this discretionary relief can include enforcement of broad third-party releases as "additional assistance" pursuant to Section 1507 of the Bankruptcy Code.[20]

---

[15] The Pan Brothers Group operates via a vertically integrated business model, and moratoria relief in respect of the applicant and each of its subsidiaries was therefore necessary. To elaborate briefly, the applicant's garment manufacturing activities were supported by its subsidiaries which provided, among other things, embroidery services, printing services, product development, sourcing activities and retail support.

[16] The Singapore Scheme adjusted the terms of the Notes (defined below) and certain facilities.

[17] The holders of bilateral credit facilities were divided into two separate classes, for active and inactive facilities.

[18] Recognition of third-party releases in Chapter 15 is considered "additional assistance" under Section 1507. See *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010):

> . . . principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party nondebtor release and injunction provisions [appropriately granted in a foreign proceeding], even if those provisions could not be entered in a plenary chapter 11 case.

[19] As noted in the Motion for (I) Recognition of Foreign Nonmain Proceedings, (II) Recognition of Foreign Representative, (III) Recognition of Sanction Order and Related Scheme, and (IV) Related Relief and Additional Assistance Under Chapter 15 of the Bankruptcy Code (ECF Doc. # 2), the following facts supported the notion that the debtor had an establishment in Singapore: (1) the debtor held three subsidiaries that were incorporated and registered in Singapore; (2) the debtor, through its subsidiaries, engaged in business activities in Singapore; (3) the debtor's subsidiaries had three offices located in Singapore, which employed Singapore citizens; (4) the Singapore subsidiaries held various bank accounts locally; (5) the Singapore subsidiaries paid taxes in Singapore; (6) the Singapore subsidiaries were guarantors of the Notes, which were listed on the Singapore Stock Exchange; (7) disputes pertaining to certain credit facilities were required to be resolved in Singapore arbitration proceedings; (8) the debtor submitted to the jurisdiction of Singapore courts with regard to certain credit facilities; and (9) certain of the debtor's key lenders were located in Singapore.

[20] In granting such additional assistance in *PT Pan Brothers*, Judge Glenn agreed with counsel for the foreign representative that the ability to grant approval to such releases remains unaffected by the recent decision of the District Court in *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021). See *In re PT Pan Brothers*, Case No. 22-10136-mg, March 8, 2022, Trans re: Recognition Hearing, p. 30:2-6.

The end of COMI? Not by a long shot

While the recent decisions discussed above suggest that establishing COMI in the jurisdiction in which the plenary foreign proceeding is commenced is not always crucial to obtain broad relief, these decisions in no way suggest that COMI is rendered irrelevant to obtaining the full measure of relief and additional assistance under Chapter 15. First, it remains that much of the core relief that a foreign debtor will require in order to effectuate its reorganization plan or scheme arises automatically under Section 1520 only where foreign main recognition is granted, thus requiring a finding of COMI in the foreign jurisdiction. Where reasonably practical, it thus remains the far safer practice to situate the foreign proceeding in the jurisdiction in which the debtor has its COMI.

Second, and somewhat counterintuitively, there may be situations in which a multinational debtor does not conduct "nontransitory economic activity" — and accordingly lacks an "establishment" — in the jurisdiction in which it has its COMI. This principle was vividly illustrated in another recent decision from Judge Glenn in *In re Modern Land (China) Co., Ltd.*,[21] holding that a foreign proceeding was entitled to foreign main recognition while also finding that foreign nonmain recognition was not appropriate. In *Modern Land*, the Cayman Islands incorporated foreign debtor alternatively sought foreign main or foreign nonmain recognition of its Cayman restructuring proceeding.[22] The scheme of arrangement in that proceeding was approved without objection, with the overwhelming support of scheme creditors.[23]

Judge Glenn first found that foreign nonmain recognition was not appropriate because the debtor was unable to point to any sufficient connections to the Cayman Islands that might constitute nontransitory economic activity.[24] In particular, Judge Glenn found that maintaining a registered office in the Cayman Islands and initiating the restructuring proceeding in its country of incorporation were inadequate facts to establish a sufficient local economic impact for foreign nonmain recognition. Rather, the debtor conducted most of its business activity in the People's Republic of China.

While the court denied foreign nonmain recognition, Judge Glenn found that the debtor had sufficiently established that its COMI was located in the Cayman Islands and thus was entitled to foreign main recognition of the Cayman scheme.[25] Of particular importance to this analysis was that: (1) failure to recognize the Cayman proceeding may convert a mostly consensual scheme of arrangement into a liquidation, which would fail to maximize the value of the debtor's assets, contrary to the goals of Chapter 15; (2) the scheme creditors' expectations supported recognition of COMI in the Cayman Islands; (3) the scheme creditors overwhelmingly approved the scheme of arrangement in the Cayman restructuring proceeding; and (4) Cayman law would apply to most disputes among scheme creditors. Further, Judge Glenn found that the debtor had not engaged in COMI-shifting behavior, nor had it sought to deceive the bankruptcy court or the scheme creditors in its pursuit of the Cayman restructuring. Therefore, the bankruptcy court granted foreign main recognition to the Cayman proceeding.

Ultimately, *Modern Land* reaffirms the concept that establishing COMI is still highly relevant in the Chapter 15 context, and indeed may be necessary depending on the facts and circumstances of the foreign debtor at issue.

Caveat: the application of Section 1521(c) in a "typical" foreign nonmain proceeding

While the recent case law discussed above confirms that a foreign representative may obtain broad relief upon recognition of a foreign nonmain proceeding, the Constellation Decisions and *PT Pan Brothers* should not be viewed as providing a blank check for the grant of full relief under Section 1521 in all circumstances.[26] Rather, other considerations aside from the existence of an "establishment" in the foreign jurisdiction should be assessed in determining what, if any, relief may be afforded in aid of foreign nonmain proceedings upon recognition. One such consideration is Section 1521(c), which provides:

---

[21] 2022 Bankr. LEXIS 1972 (Bankr. S.D.N.Y. July 18, 2022).

[22] Id. at *1-*2.

[23] Id. at *45.

[24] Id. at *34-*38.

[25] Id. at *38-*55.

[26] Of course, the grant of any discretionary relief under Section 1521, whether upon foreign main or foreign nonmain recognition, is conditioned upon a showing of "sufficient protection" under Section 1522(a).

> In granting relief under this section to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief 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.[27]

The authority interpreting Section 1521(c) is limited,[28] and suggests that while the statute may be a potential impediment, it should not be viewed as a limitation on the ability to obtain the full measure of discretionary relief in respect of a plenary foreign proceeding that happens to be filed in a jurisdiction outside the company's COMI. The UNCITRAL Guide to Enactment of the Model Law offers some helpful commentary on Article 21 paragraph 3 — the basis for Section 1521(c) — noting that "[t]he interests and the authority of a representative of a foreign non-main proceeding are **typically** narrower than the interests and the authority of a representative of a foreign main proceeding, who **normally** seeks to gain control over all assets of the insolvent debtor."[29] Further, the objective of this section is "to advise the court that relief in favour of a foreign non-main proceeding should not give unnecessarily broad powers to the foreign representative and that such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding."[30][31]

Based on this analysis, Section 1521(c) could serve to limit the grant of discretionary relief to a foreign representative upon recognition of a "typical" foreign nonmain proceeding commenced to deal only with selected assets or liabilities located in a particular foreign jurisdiction. It is submitted that Section 1521(c) should not operate to limit the discretionary relief available to foreign representatives in cases like *PT Pan Brothers*, where: (1) the foreign court found that a substantial connection existed between the foreign debtor and the foreign jurisdiction; (2) the debtor was part of an integrated economic unit that had substantial assets in the forum jurisdiction; (3) the debtor made the strategic decision to restructure its indebtedness in a country outside of its COMI based on flexible and efficient restructuring laws and tools and a well-regarded, sophisticated legal system (Singapore), such that there was no possibility of a conflict with a foreign main proceeding in another jurisdiction; and (4) the creditors affected by the restructuring in the chosen jurisdiction approved the reorganization plan or scheme by the requisite majorities.

Key takeaways

Based on the Constellation Decisions and *PT Pan Brothers*, a company may be able to forego the expense, delay and disruption of attempting to establish COMI in a desirable jurisdiction, as in *Ocean Rig* and other COMI-shifting cases, and still obtain the broad relief commonly afforded upon recognition of a foreign main proceeding. As reflected in these recent decisions, where a foreign restructuring proceeding has the broad support of creditors, a US court in the ensuing Chapter 15 case may look to the economic activity of the entire integrated unit in the desired jurisdiction, and if that activity is sufficient to constitute an "establishment" the court may grant foreign nonmain recognition along with the broad relief more frequently granted upon foreign main recognition. As shown in *PT Pan Brothers*, that relief even may include the recognition of broad third-party releases to non-debtor affiliates as "additional assistance" under Section 1507.[32]

In the right circumstances as presented in the Constellation Decisions and *PT Pan Brothers*, a foreign company may not be required to adhere to the dogmatic view that establishing COMI in the jurisdiction of its foreign proceeding is necessary in order to

---

[27] 11 U.S.C. § 1521(c).

[28] See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 338-39 (S.D.N.Y. 2008), discussed infra; see also *British Am. Ins. Co. v. Fullerton (In re British Am. Ins. Co.)*, 488 B.R. 205, 236-37 (Bankr. S.D. Fla. 2013) (discussing Section 1521(c) in the context of standing of a foreign representative to assert a claim in an adversary proceeding).

[29] See UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (emphasis added).

[30] Id.

[31] Consistent with this approach, in affirming Judge Lifland's decision in Bear Stearns, the District Court cited Section 1521(c) as one reason why foreign nonmain recognition of a Cayman proceeding was inappropriate, as the foreign debtor had no assets in the Cayman Islands as of the petition date. In dicta, the Court further offered that Section 1521(c) limited the scope of relief available in a foreign nonmain proceeding to relief related to assets actually located in the nonmain jurisdiction "or closely connected thereto." 389 B.R. at 338-39.

[32] Factors that justified recognition of the broad third-party releases as additional assistance under Section 1507 included that: (1) the Singapore Scheme Proceeding provided for just treatment among all "Scheme Creditors" given the comprehensive procedures under Singapore bankruptcy law; (2) creditors in the US were not in any way prejudiced in the Singapore Scheme Proceeding; and (3) the Singapore Scheme provided for uniform treatment of all "Scheme Creditors."

obtain broad relief upon recognition in an ensuing Chapter 15 case. These decisions operate to afford foreign debtors significantly more options in seeking rehabilitation in a jurisdiction with user-friendly and attractive insolvency laws and respected courts, especially for companies that conduct business as an integrated economic unit through subsidiaries and joint ventures in the jurisdiction of choice. Importantly, in *PT Pan Brothers*, no objection was interposed to recognition of the Singapore Scheme Proceeding, nor to any of the relief and additional assistance sought in the Chapter 15 case. Thus, the *PT Pan Brothers* experience reflects that, where sufficient support exists for the scheme or foreign restructuring plan, creditors and key constituencies may be amenable to this approach as well.

Of course, as the grant of relief under Section 1521 (as well as additional assistance under Section 1507) remains discretionary with the Chapter 15 court, there can be no guarantee that other courts will adopt Judge Glenn's approach in the Constellation Decisions or *PT Pan Brothers*. It is notable, however, that in granting the full array of relief and additional assistance upon foreign nonmain recognition based on the existence of an "establishment" through the business operations of the wider group in *PT Pan Brothers*, Judge Glenn implicitly recognizes the emergence of Singapore as a restructuring hub for the Asia Pacific region. It also must be noted that the standard of "nontransitory economic activity" sufficient to constitute an "establishment" must be satisfied on a case-by-case examination of the facts, notwithstanding that broad, even unanimous, agreement may exist among the parties before the Chapter 15 court.[33]

As reflected in *Modern Land*, these same fact-based considerations may require a foreign debtor to establish COMI in the jurisdiction of its foreign proceeding, in the absence of an "establishment" sufficient to obtain foreign nonmain recognition. Proving the existence of such an "establishment" may be a fluid and elusive concept in some settings, particularly where the direct and indirect activities of the foreign debtor lack an economic impact in the subject jurisdiction. Additionally, practitioners must be mindful of other considerations that could limit the scope of discretionary relief upon recognition of a foreign nonmain proceeding, such as Section 1521(c).[34]

Taken collectively, in the view of the authors, the four recent decisions from Judge Glenn reflect a trend toward the adoption of a flexible approach as best suited to grant the recognition and relief necessary to realize legitimate business objectives of a foreign debtor where creditors support the terms of the restructuring and participate and approve the plan in the foreign proceeding — even where conducted outside the debtor's COMI. The effect of this flexible approach is to encourage multinational debtors to initiate their plenary restructuring proceedings in jurisdictions with internationally recognized insolvency laws and respected courts.

[33] See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. at 338-39 (S.D.N.Y. 2018) (upholding *sua sponte* denial of recognition based on absence of COMI or an establishment in the foreign jurisdiction).

[34] Another consideration that practitioners should be mindful of is whether the foreign jurisdiction in which the nonmain proceeding is located has well-respected insolvency laws — like Singapore, which was at issue in *PT Pan Brothers*. A court may be less inclined to grant full discretionary relief under Section 1521 if the foreign jurisdiction does not have sophisticated, respected insolvency laws.

Contact Us

Mark Bloom
Partner, Miami
mark.bloom
@bakermckenzie.com

Emmanuel Hadjidakis
Partner, Singapore
emmanuel.hadjidakis
@bakermckenzie.com

Emmanuel Chua
Partner, Singapore
emmanuel.chua
@bakermckenzie.com

Richard Solow
Senior Associate, New York
richard.solow
@bakermckenzie.com