

Chapter 15: International Insolvency Law in the United States: Opportunities and Limits

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CHAPTER 15: OVERVIEW

▪ Purpose

- “[T]o provide effective mechanisms for dealing with cases of cross-border insolvency, ” including to
 - Facilitate cooperation between U.S. and foreign courts, debtors, creditors and trustees
 - Offer greater legal certainty for trade and investment;
 - Promote fair and efficient administration of cross-border insolvencies, protecting the interests of all interested parties (creditors and debtors alike);
 - Protect and maximize of the value of the debtor’s assets; and
 - Facilitate of the rescue of financially troubled businesses

▪ Potential Relief

- **Pre-Recognition** – upon a showing of urgent need, the Court may grant, among other relief,
 - Temporary stay of execution on assets (pending a determination on recognition)
- **Recognition** –upon recognition of the foreign proceeding, the Court may grant, among other relief
 - The stay of any actions against the debtor and of any attempt to execute on the debtor’s assets;
 - Entrustment of assets; and
 - Discovery

▪ Limits

- Chapter 15 is an ancillary proceeding, and the Chapter 15 Court will generally not contravene an order of the foreign tribunal handling the primary bankruptcy proceeding

ORO NEGRO: TESTING THE BOUNDARIES OF CHAPTER 15

▪ Oro Negro filed for insolvency protection in Mexico in September 2017

- By March 2018, there were proceedings in Mexico, Singapore, and the United States as bondholders used international venues in an effort to seize their asserted collateral
 - One such proceeding was an action in New York to cause turnover of “jack-up” rigs in the Gulf of Mexico based on United States maritime law.
- Oro Negro’s creditors were largely non-Mexican entities that were not obviously subject to the Mexican Courts’ jurisdiction

▪ Oro Negro filed for Chapter 15 protection in the Southern District of New York in 2018

- The Chapter 15 Court granted recognition, staying the pending litigation and preventing creditors from trying to execute on Oro Negro’s assets, including rights under “bareboat” charters governed by United States maritime law but concerning the “jack-up” rigs in Mexican waters in the Gulf of Mexico.
- The foreign representative also sought enforcement of existing Mexican *concurso* court orders and the right to take discovery under 11 U.S.C. § 1521
- The Chapter 15 Court initially granted discovery into (1) creditors’ potential interference with Oro Negro’s contracts with Pemex; and (2) competitors’ potential interference in the Oro Negro contracts
 - There have been numerous disputes requiring judicial intervention and the court has had to confront the limits of personal jurisdiction
- As the Mexican insolvency proceeding dragged on, asserted creditors went so far as to initiate several criminal proceedings in Mexico against Oro Negro and its principals, and even attempted to take the jack-up rigs by force under the apparent authority of a criminal court order subsequently rejected by both the Mexican bankruptcy and constitutional courts
 - At foreign representative’s request, the Chapter 15 Court (1) ordered an injunction against certain creditors and their advisors, prohibiting them from taking any steps to take over the jack-up rigs and (2) ordered creditors to produce discovery regarding the criminal proceedings

AVIANCA BRASIL (OCEANAIR LINHAS AEREAS)

■ Avianca Brasil filed for insolvency protection in Brazil in December 2018

- Within weeks, Avianca Brasil filed a Chapter 15 petition to ensure the uninterrupted operation of its U.S. flight routes, and, in particular, that: (1) its U.S.-service contracts would not be disrupted during the pendency of the Brazilian proceedings; (2) its U.S. based creditors could not seize its aircraft while those planes were in the U.S.; and (3) creditors could not initiate litigation against Avianca Brasil in the U.S.
 - The Chapter 15 Court granted a provisional stay six days after filing, and recognition approximately three weeks later, granting all of Avianca's requested relief
 - Avianca's U.S. front has been quiet since recognition, allowing the company to focus on the contentious Brazilian proceedings

■ Primacy of the home forum on questions of applicability of local and international law

- The Cape Town Convention governs aircraft finance in that it sets forth the rules under which aircraft owners may repossess aircraft subject to leases common in the industry
 - One of Avianca's creditors argued that it should not be prohibited from seizing the aircraft in the U.S. and that Brazilian bankruptcy court orders to the contrary should not be enforced in the U.S. because those orders violated the Cape Town Convention, and thus violated both United States law and Brazilian law
 - The Court refused the creditors' argument on the basis that the Brazilian court's interpretation of Brazil's implementation of the Cape Town Convention had to be litigated in Brazil
- The decision highlights that Chapter 15 does not allow creditors to bypass the local courts, nor provide an appellate forum for litigants dissatisfied with home court rulings.
 - The Chapter 15 Court's role is to assist in orderly reorganization; absent a compelling reason, it will not contradict orders issued in the foreign main proceeding