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Is There a Common-Law Alternative to Chapter 15?

A Response to Rochelle's Daily Wire and Prof. Jay Westbrook

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Earlier this year, ABI Editor-at-Large **Bill Rochelle** argued in *Rochelle's Daily Wire* that the Third Circuit's decision in *Vertiv Inc. v. Wayne Burt PTE Ltd.*[1] renders "chapter 15 either optional or irrelevant."[2] He cited Prof. **Jay L. Westbrook** of the University of Texas School of Law, who said that it "had an otherworldly feel" of an "alternative universe" where the court "crafted a wholly common law alternative to chapter 15."[3] We disagree and suggest that the Third Circuit's clarified test for adjudicative comity has a place alongside chapter 15 in civil litigation.

Background

In *Vertiv*, a Singaporean liquidator moved to dismiss a civil case pending in a nonbankruptcy court. The Third Circuit focused on "adjudicatory comity"[4] and its governing standard. The court referred to chapter 15 as favoring extending comity to foreign insolvency proceedings but did not analyze § 1509 or its impact on comity.

Instead, the court relied on U.S. Supreme Court and prior Third Circuit decisions that predate chapter 15, and clarified the test for whether to abstain from exercising jurisdiction in deference to a foreign bankruptcy. The Third Circuit remanded the case to the district court to apply that "refined" test.[5]

The Right of "Direct Access" as Proposed in the Model Law

Chapter 15 adopted the UNCITRAL Model Law on Cross-Border Insolvency. UNCITRAL member states had discussed a foreign representative's right of direct access, specifically whether a foreign representative would have to obtain recognition before asking a court for comity.

The main goal of Article 9 of the Model Law was to obviate such formal requirements as licenses or consular actions to obtain recognition.[6] Early discussions showed the delegates' view that "the maximum possible degree of flexibility should be encouraged and the minimum degree of obstacles should be involved in the process."[7]

As the UNCITRAL member states debated direct access, a view emerged that a foreign representative's right to intervene in local proceedings in the receiving state should only be available upon recognition.[8] Others contended that this right should not be conditioned on recognition.[9] At this stage, UNCITRAL suggested that it "might be necessary to include an option for enacting states, as some states might take a stricter view than others as to whether recognition should be a precondition to intervention by the foreign representative in various types of local proceedings."[10]

Given these differing views regarding direct access, the final version of the Model Law's

1 92 F.4th 169 (3d Cir. 2024).
2 "Third Circuit Creates a Common Law Alternative to Chapter 15," *Rochelle's Daily Wire* (Feb. 15, 2024), *available at* abi.org/newsroom/daily-wire.
3 *Id.*
4 The *Vertiv* court observed that adjudicatory comity arose in three contexts: (1) abstention; (2) enforcement of a judgment; and (3) preclusion of a claim or issue adjudicated by the foreign tribunal. The Third Circuit stated that the test only applies to abstention. *Vertiv*, 92 F.4th at 176, n.5.
5 *Id.* at 183.
6 Rep. of the UNCITRAL on the Work of Its Thirtieth Session, at 36, U.N. Doc. A/52/17 (July 4, 1997). Article 9 states, "A foreign representative is entitled to apply directly to a court in this State."
7 Rep. of the Working Group on Insolvency Law on the Works of Its Eighteenth Session, ¶ 77, U.N. Doc. A/CN.9/419 (Dec. 1, 1995).
8 Rep. of the Working Group on Insolvency Law on the Works of Its Nineteenth Session, ¶ 149, U.N. Doc. A/CN.9/422 (April 25, 1996).
9 *Id.*
10 *Id.*

Article 9 was limited to enshrining the principle of direct access to courts of the enacting state without specifying what courts would have comity, and leaving it to the enacting states to determine the competent court to provide relief under the Model Law.[11]

Section 1509's Legislative History

Congress adopted several provisions of the UNCITRAL Model Law word for word,[12] but Article 9, which became § 1509, is materially different.[13] The legislative history indicates that these changes to § 1509, while designed to "implement ... the purpose of [A]rticle 9 of the Model Law," varied "the language to fit [U.S.] procedural requirements and ... impose ... recognition of the foreign proceeding as a condition to further rights and duties of the foreign representative."[14]

The legislative history also provides that once recognition is granted, a foreign representative will have full capacity under U.S. law to seek relief in any state or federal court other than the bankruptcy court.[15] Congress stated that § 1509's purpose was to "make it clear that chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings" and "concentrate control of these questions in one court."[16]

Commentators that participated in UNCITRAL or advised Congress, including Prof. Westbrook, support the exclusive-access notion. Prof. Westbrook referred to § 1509 as a "structural change" designed to centralize the "recognition and comity-granting process," because the foreign representative "[n]ow must go through the chapter 15 process to get [an] action stayed" and "[d]eferral for comity reasons in other courts is not authorized without the Chapter 15 process."[17] Another stated that § 1509(b)(2), (b)(3) and (c) "make it clear that chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings," since the "goal is to concentrate control of these questions in one court."[18]

Section 1509 was viewed as the "new entry visa" for a foreign representative's access to any U.S. court, since it "cloaks the [U.S.] bankruptcy courts as the new 'gatekeepers' for such relief."[19] To be entitled to standing in nonbankruptcy courts, the foreign representative "must first obtain recognition of the foreign proceeding and his status by filing a petition under § 1515" of the Bankruptcy Code, because "a petition for recognition becomes a prerequisite to virtually all recourse by a foreign representative to courts in the [U.S.]."[20]

Section 103(l) of the Bankruptcy Code supports the argument that chapter 15 is exclusive. The Code states that § 1509 applies irrespective of whether a case is pending under title 11 and indicates that if a foreign representative has not filed a chapter 15 case, a court tasked with a request for comity must analyze that request under § 1509 anyway, but what do the courts say?

The Case Law

The first post-chapter 15 case to address direct access outside of recognition under chapter 15 determined that it had no power to dismiss or stay a pending case.[21] After examining the legislative history, that court held that "[i]n the absence of recognition under chapter 15, this Court has no authority to consider [the foreign representative's] request for a stay."[22] Although most subsequent decisions agree,[23] not all do.

In *Moyal v. Münsterland Gruppe GmbH & Co. KG*,[24] the court dismissed a civil litigation against a German company on the request of its administrator, which had not filed a chapter 15 case. *Moyal* did not discuss chapter 15, but another court recently noted that the issue remains "an unsettled question."[25]

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11 Cross-Border Insolvency, Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, ¶ 93, U.N. Doc. A/CN.9/442 (Dec. 19, 1997). Article 4 states, "The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by *[specify the court, courts, authority or authorities competent to perform those functions in the enacting state].*" *Id.* at 23.

12 *See* H.R. Rep. No. 109-31 (2005).

13 Section 1509 of the Bankruptcy Code provides:

> (a) A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.
>
> (b) If the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter —
>
> (1) the foreign representative has the capacity to sue and be sued in a court in the [U.S.];
>
> (2) the foreign representative may apply directly to a court in the [U.S.] for appropriate relief in that court; and
>
> (3) a court in the [U.S.] shall grant comity or cooperation to the foreign representative.
>
> (c) A request for comity or cooperation by a foreign representative in a court in the [U.S.] other than the court [that] granted recognition shall be accompanied by a certified copy of an order granting recognition under section 1517.
>
> (d) If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the [U.S.].
>
> (e) Whether or not the court grants recognition, and subject to sections 306 and 1510, a foreign representative is subject to applicable nonbankruptcy law.
>
> (f) Notwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the [U.S.] to collect [on] or recover a claim [that] is the property of the debtor.

14 H.R. Rep. No. 109-31, at 110 (2005).

15 *Id.*

16 *Id.*

17 Jay L. Westbrook, "Chapter 15 at Last," 79 *Am. Bankr. L.J.* 713, 726 (2005).

18 Hon. Burton Lifland, "Chapter 15 of the United States Bankruptcy Code: An Annotated Section-by-Section Analysis," in *Cross-Border Insolvency and Conflict of Jurisdictions: A U.S.-E.U. Experience*, 46 (Georges Affaki, ed., 2007).

19 Selinda A. Melnik, *United States in Cross-Border Insolvency: A Commentary on the UNICITRAL Model Law*, at 265, 290 (Look Chan Ho, ed., 2d ed. 2009).

20 Hon. Allan L. Gropper, "Current Developments in International Insolvency Law: A United States Perspective," ABI Views from the Bench Program (Nov. 30-Dec. 2, 2006), 061130 ABI-CLE 305.

21 *See U.S. v. J.A. Jones Constr. Grp. LLC*, 333 B.R. 637 (E.D.N.Y. 2005).

22 *Id.* at 639.

23 *See Coast-to-Coast Produce LLC v. Lakeside Produce USA Inc.*, No. 23-10408, 2023 WL 9018375, at *8-9 (E.D. Mich. Dec. 29, 2023); *FTC v. Educare Ctr. Servs. Inc.*, 611 B.R. 556, 562-63 (W.D. Tex. 2019); *Halo Creative & Design Ltd. v. Comptoir Des Indes Inc.*, No. 14 C 8196, 2018 WL 4742066, at *2 (N.D. Ill. Oct. 2, 2018); *Webb Mason Inc. v. Video Plus Print Sols. Inc.*, No. ELH-17-3016, 2018 WL 7892976, at *2 (D. Md. Dec. 7, 2018); *Orchard Enters. NY Inc. v. Megabop Records Ltd.*, No. 09 CIV 9607(GBD), 2011 WL 832881, at *2-3 (S.D.N.Y. 2011); *Rsrv. Int'l Liquidity Fund Ltd. v. Caxton Int'l Ltd.*, No. 09 CIV 9021(PGG), 2010 WL 1779282, at *4-6 (S.D.N.Y. April 29, 2010); *Econ. Premier Ass'n Co. v. CPI Plastics Grp. Ltd.*, No. 09-2008, 2010 WL 11561369, at *4 (W.D. Ark. June 7, 2010); *Andrus v. Digital Fairway Corp.*, No. 3:08-CV-119-O, 2009 WL 1849981, at *2-3 (N.D. Tex. June 26, 2009).

24 539 F. Supp. 3d 305 (S.D.N.Y. 2021).

25 *See In re Silicon Valley Bank (Cayman Islands Branch)*, 658 B.R. 75, 90, n.7 (Bankr. S.D.N.Y. 2024).

The Path Forward

Where does this leave us? Did the Third Circuit operate in an "alternative universe," or is "adjudicative comity" separate from "prescriptive comity"? Should § 1509 apply to the latter but not the former?[26]

First, in the Third Circuit's defense, other circuits have stayed or dismissed cases without requiring chapter 15 recognition. One year after chapter 15 was enacted, the Second Circuit said that it follows the "general practice of American courts of regularly deferring to foreign bankruptcy proceedings" — no mention of chapter 15.[27] The briefing in *Vertiv* also did not present the issue. The Third Circuit said that on remand, the district court is not constrained to resolve the motion on international comity grounds, which presumably means it can consider "any other issues it finds relevant" to the comity inquiry — perhaps inclusive of an argument under § 1509.[28]

Second, representatives of foreign proceedings excluded from chapter 15 may seek comity from U.S. courts, since §§ 1509(b)(2) and (3) would not apply.[29] While a court that denies recognition may enter an order preventing a foreign representative from accessing U.S. courts, absent an order denying such relief, the foreign representative should still have access to U.S. courts, including to seek comity.

Third, a foreign representative can sue in a U.S. court on a claim.[30] There appears to be no bar to other parties (non-foreign representatives) asserting principles of international comity based on a foreign insolvency proceeding in a U.S. civil case.[31] A leading treatise noted that "courts regularly rule that chapter 15 recognition is not a prerequisite to grant comity to foreign proceedings on the request of a party other than a foreign representative."[32]

Finally, the Supreme Court recently ruled in *MOAC Mall Holdings LLC v. Transform Holdco LLC*[33] that statutes should not be interpreted to restrict a court's jurisdiction in bankruptcy absent a clear statement that the provision is jurisdictional. The Court added that this

> clear-statement rule implements "Congress's likely intent" regarding whether noncompliance with a precondition "governs a court's adjudicatory capacity." We have reasoned that Congress ordinarily enacts preconditions to facilitate the fair and orderly disposition of litigation and would not heedlessly give those same rules an unusual character that threatens to upend that orderly progress.[34]

This suggests that future requests for comity may require a determination of whether § 1509 contains a clear jurisdictional statement that eliminates all but the bankruptcy court's jurisdiction over a foreign representative's request for international comity.

Conclusion

The points in *Rochelle's Daily Wire* are well made and are supported by the Model Law's drafting history and chapter 15's legislative history. However, *Vertiv* does not create an alternative universe; adjudicative comity has a long-established place in civil litigation in the U.S. Courts that apply it, and they should do so with chapter 15 in mind, and consider whether adjudicative comity or chapter 15 is more appropriate under the circumstances. Moreover, given the cost of chapter 15, it certainly is not "foolish" (as suggested in the *Rochelle's Daily Wire* piece) for courts to evaluate these requests using the proper framework and, if they conclude that a chapter 15 is necessary, to temporarily stay the litigation to allow a foreign representative time to pursue that path.[35] abi

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26 *See, e.g., In re Picard*, 917 F.3d 85, 100-02 (2d. Cir. 2019) (discussing "adjudicative comity" and "prescriptive comity"). Prescriptive comity is "the respect sovereign nations afford each other by limiting the reach of their laws." *Vertiv*, 92 F.4th at 176, n.4.

27 *See Royal & Sun All. Ins. Co. of Canada v. Century Int'l Arms Inc.*, 466 F.3d 88 (2d Cir. 2006); *see also In re Picard*, 917 F.3d at 100-02 (stating that "adjudicative comity" is a doctrine that asks "whether, where a statute might otherwise apply, a court should nonetheless abstain from exercising jurisdiction in deference to a foreign nation's courts that might be more appropriate forum for adjudicating the matter").

28 *Vertiv*, 92 F.4th at 182.

29 H.R. Rep. No. 109-31, at 106 (2005).

30 *See* 11 U.S.C. § 1509(f).

31 *See Barclays Bank plc v. Kemsley*, 992 N.Y.S.2d 602,605-09 (N.Y. Sup. Ct. 2014) (applying comity to foreign insolvency judgments after foreign representative's petition for recognition was denied); *but see Kumkang Valve Mfg. Co. Ltd. v. Enter. Prod. Op. LLC*, 442 S.W.3d 602 (Tex. App. 2014) (refusing to recognize Korean bankruptcy order as discharging liability because it was not recognized by bankruptcy court). The Second Circuit has also noted that "[e]ven assuming, *arguendo*, that the wind-up proceeding is the type of case that Chapter 15 would ordinarily cover, Chapter 15 does not apply when a court in the [U.S.] simply gives preclusive effect to factual findings from an otherwise unrelated foreign liquidation proceeding, as was done here." *Trikona Advisers Ltd. v. Chugh*, 846 F.3d 22, 31 (2d Cir. 2017).

32 8 *Collier on Bankruptcy* ¶ 1509.02 (2023).

33 598 U.S. 288, 298 (2023).

34 *Id.* (citations omitted).

35 *See Jones Constr.*, 333 B.R. at 639.