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Two Recent Chapter 15 Cases Clarify Just How Low the Bar Is for Recognition

By Laura E. Appleby and Kyle R. Kistinger*

The authors caution creditors wishing to object to actions taken by foreign debtors that the U.S. Bankruptcy Code provides bankruptcy court judges with little discretion in recognizing a foreign proceeding.

Two recent bankruptcy cases have further established the perfunctory nature of a petition to recognize a foreign bankruptcy petition in the United States under Chapter 15 of the U.S. Bankruptcy Code (the "Bankruptcy Code"). In these recent appellate decisions, both the U.S. Bankruptcy Appellate Panel for the Ninth Circuit and the U.S. District Court for the Middle District of Florida found that so long as a foreign debtor meets the minimal requirements for filing a Chapter 15 bankruptcy petition under the Bankruptcy Code, the Chapter 15 petition is a valid filing in U.S. bankruptcy courts.[1]

Based upon these recent cases, creditors wishing to object to actions taken by foreign debtors are cautioned that the Bankruptcy Code provides bankruptcy court judges with little discretion in recognizing a foreign proceeding. Every case is different, but concerned creditors may be required to focus on other tools available if a foreign debtor has acted in bad faith in seeking recognition of its proceeding in the United States or if those creditors believe it necessary for a court to dismiss the case.

CHAPTER 15

Chapter 15 of the Bankruptcy Code provides insolvent foreign debtors with a mechanism for dealing with U.S. assets, claimants and other parties of interest while their insolvency proceeds in their home country.[2] Pursuant to Chapter 15, a foreign creditor must seek recognition of its foreign insolvency proceeding in the United States before receiving the benefits of the Bankruptcy Code in the United States.

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[1] *Samba v. Int'l Petro. Prods. and Additives Co. (In re Black Gold S.A.R.L.),* 635 B.R. 517 (9th Cir. BAP 2022) ("*Black Gold*") and *Zawawi v. Diss (In re Zawawi)* (M.D. Fla. Feb. 28, 2022) ("*Zawawi*").

[2] All chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532.

The Bankruptcy Code, specifically Section 1517(a), is clear in its requirements for bankruptcy court approval of a recognition petition, and requires that for recognition in the United States:

- A foreign insolvency proceeding exists;
- The "foreign representative" applying for recognition is a person or body; and
- The petition meets perfunctory requirements of Section 1515 of the Bankruptcy Code.[3]

However, if a petition meets these three requirements, a U.S. bankruptcy court may refuse to recognize a proceeding if it would be manifestly contrary to U.S. public policy. Procedural and substantive differences between U.S. bankruptcy law and a foreign country's insolvency law are not sufficient to permit a bankruptcy court to reject a petition.

RECENT CASE LAW

In two recent cases, *Black Gold* and *Zawawi*, the courts continued in a long line of cases in finding that these Chapter 15 requirements are merely perfunctory and that, although a bankruptcy court may refuse to recognize a proceeding based on public policy, the public policy exception should be involved under only "exceptional circumstances concerning matters of fundamental importance for the United States."[4]

In fact, in *Black Gold*, the Bankruptcy Appellate Panel of the U.S. Court of Appeals for the Ninth Circuit found that misconduct or bad faith, standing alone, is insufficient to deny a Chapter 15 petition.[5] In *Black Gold*, the bankruptcy court had dismissed the underlying Chapter 15 petition, finding that the petition was not a "legitimate use" of Chapter 15, after noting its belief that the real purpose of the petition was to preclude a substantial creditor from recovering on a judgment that it had received base wrongful conduct by the principals of the debtor. Those principals allegedly had transferred assets out of the debtor to themselves to avoid the judgment.[6] The Ninth Circuit BAP found that the bankruptcy court erred in its analysis and should not have looked beyond the Chapter 15 recognition requirements in determining eligibility.

Similarly, in *Zawawi*, Al Zawawi, who had been adjudged a bankrupt in an English bankruptcy proceeding and objected to a Chapter 15 filing in the

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[3] 11 U.S.C. § 1517(a).

[4] *Black Gold*, 635 B.R. at 528.

[5] *Id.* at 529, 531.

[6] *Black Gold*, 635 B.R. at 522.

United States by a foreign representative, asserted that in addition to the other Chapter 15 requirements, a threshold requirement is that the debtor must also have property in the United States. The district court found that owning property in the United States is not a prerequisite to a Chapter 15 filing.[7]

In both *Black Gold* and *Zawawi*, the courts determined that so long as a foreign representative has met the filing requirements under Section 1517(a) of the Bankruptcy Code and no provisions in the foreign insolvency law are manifestly counter to U.S. public policy, the bankruptcy court should not look behind the Section 1517(a) filing requirements before recognizing a foreign proceeding.

CONCLUSION

While *Zawawi* and *Black Gold* reinforce the low bar to recognition, recognition is just the entry point to Chapter 15. To gain access to the tools that make Chapter 15 useful—for instance, imposition of the automatic stay under Section 362—the foreign debtor must satisfy the additional Chapter 15 requirements. Bankruptcy courts are not therefore devoid of mechanisms for dealing with bad actors, though the low bar to recognition makes it challenging to keep such actors out of U.S. courts entirely.

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[7] *Zawawi*, *supra.*