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Chapter 15 and Cross-Border Insolvency

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Manufacturing • Customers • Vendors • Supply Chain Insolvency • Litigation • Commercial and Financial Contracts • Cross-Border

BACKGROUND

One by-product of the "globalization" of business is the homogenization of business practices. Businesses naturally seek and promote an environment and "rules" that are predictable, which allow for effective risk management. For example, international sales contracts and international dispute resolution have become somewhat "internationalized" through the course of dealing among companies and the use of international treaties.

A growing business practice that has not become "internationalized" is companies using insolvency laws to restructure their businesses. The U.S.'s insolvency law, Chapter 11, is one of the world's most highly-developed re-structuring tools. Over the last 10 years, many countries have adopted insolvency laws with many similarities to Chapter 11. Like their U.S. counterparts, companies in foreign countries have increasingly used their country's insolvency laws to restructure their businesses.

It is reasonable to predict that U.S. companies will encounter a business insolvency of a customer, a vendor, or a counter-party to a contract, that occurs in a foreign country.

WHAT LAW APPLIES

- There is no uniform global insolvency law. Every one of the 196 world countries has its own insolvency law. These laws vary greatly, leading to unpredictable or unfamiliar outcomes, depending on the country.

- Many, perhaps most, companies have assets, customers, vendors, or obligations in multiple countries, which may require restructuring or protection in multiple jurisdictions. Realizing this scenario would cause different likely inequitable outcomes for stakeholders, in 1997 UNCITRAL ("United Nations Commission on International Trade Law") published its Model Law on Cross-Border Insolvency.

- To date, 41 countries have adopted the Model Law, including the U.S., which adopted the Model Law in 2005 as Chapter 15.

KEY CHAPTER 15 CONCEPTS

A. Chapter 15 is an ancillary proceeding. By contrast, Chapter 11 is a plenary or comprehensive restructuring proceeding.

   - Chapter 15 exists only when a company has filed a plenary insolvency proceeding in another country.

   - The point of Chapter 15 is comity, to respect and recognize an insolvency proceeding occurring in another country, and provide assistance in the administration of the debtor's foreign proceeding for needs in the U.S.

   - Chapter 15 allows foreign debtors to benefit from some, but not all, of the provisions of Chapter 11.

   - For example, Vitro Glass filed for insolvency under the laws of Mexico but had assets located in the U.S. that needed protection from the claims of creditors. While a full-blown Chapter 11 case in the U.S. was not warranted, Vitro initially filed a Chapter 15 case to invoke the automatic stay of the U.S. Bankruptcy Code, to enjoin litigation filed against Vitro in the U.S.

B. Chapter 15: A sword and a shield.

   - Since Chapter 15 is not intended to be a comprehensive restructuring tool for companies, Chapter 15 has been used by foreign debtors primarily as a sword, or as a shield. E.g. Bear Sterns/Fairfield Sentry.

   - As a sword, foreign debtors routinely seek to file claims against U.S. companies, and to obtain discovery in support of asserting such claims in a debtor-friendly forum.

   - As a shield, foreign debtors often seek to use the automatic stay to enjoin litigation filed against it. Once the automatic stay is invoked, it is normally game-over for creditors who seek to recover against the Chapter 15

debtor's U.S. assets.

- Whether seeking to sue the foreign debtor in the U.S. or defending claims asserted by foreign debtors, parties adverse to the foreign debtors often challenge the Chapter 15 filing in the first instance, as a procedural defense in hopes of precluding the foreign debtor's use of Chapter 15.

C. Chapter 15 Procedure

- To file a Chapter 15 petition, the foreign debtor must establish that it is the subject of a "foreign main" or "foreign non-main" proceeding in another country.

- Chapter 15 debtors strongly prefer the U.S. Bankruptcy to recognize their foreign proceeding as a "foreign main" proceeding, because certain relief, including the imposition of the automatic stay, occurs automatically.

- To be a "foreign main proceeding", the foreign debtor's insolvency proceeding must occur in the country where its "center of main interests" (COMI) is located. COMI is analogous to the U.S. notion of principal place of business, as opposed to where a company is incorporated.

- If the foreign insolvency proceeding is filed where a company has an "establishment" including is incorporated, organized or registered, but not where its primary business operations are located, the proceeding is deemed a "foreign non-main" proceeding.

- Foreign non-main proceedings are not favored because the benefits of U.S. bankruptcy law are not automatic, are more limited, and subject to objection by counter-parties.

D. Chapter 15 Debtors: The Likely Scenario.

- The most likely profile of a Chapter 15 debtor will be a company with its primary business operations in a single foreign jurisdiction, with a presence in the U.S. market.

- A multinational company with major subsidiaries or affiliates in a substantial number of global markets is not a likely Chapter 15 debtor. As in the 2008 Lehman Brothers insolvency, the magnitude of the company group would undoubtedly require plenary insolvency proceedings in multiple jurisdictions, including a Chapter 11 in the U.S.

E. Chapter 15 Tool Kit.

- Avoidance Powers (Preferences and Fraudulent Conveyances)

  ♦ Chapter 15 debtors may not utilize the avoidance powers set forth in Chapter 11, including specifically: Section 547 (preferences) and Section 548 (fraudulent transfers).

    ◊ However, the 5th Circuit U.S. Court of Appeals in In re Condor Insurance Limited held that a foreign representative could pursue "avoidance" remedies using the *avoidance laws of the foreign jurisdiction* (in Condor , the laws of Nevis). In re Condor Ins. Ltd., 601 F.3d 319 (5th Cir. 2010).

    ◊ Note that: Upon recognition of the Chapter 15 petition, a foreign representative may commence a plenary Chapter 11 or Chapter 7 case (§ 1520(c)), which would provide to pursue avoidance actions, including preferences and fraudulent transfers to recover assets within the U.S. that are not subject to the jurisdiction and control of the foreign main proceeding. See, In re British American Ins. Co., Ltd., 488 B.R. 205, 236 (Bankr. S.D. Fla. 2013); In re Fairfield Sentry Ltd. Litig., 458 B.R. 665, 681 (S.D.N.Y. 2011).

  ♦ In re Fairfield Sentry Ltd., 458 B.R. 665, 672 (S.D.N.Y. 2011). Before Chapter 15 recognition, creditors filed an involuntary insolvency proceeding against Fairfield Sentry in the British Virgin Islands. In response, the BVI liquidators (for Fairfield Sentry) filed actions in New York state court against investors to recover payments (totaling $6 billion) as "unfair preferences" and "undervalue transactions" pursuant to BVI law. The defendants had no assets in the U.S.

    The Court held that the BVI liquidators could not bring claims in Chapter 15 to recover assets located outside of the U.S.

  ♦ In re British Am. Ins. Co. Ltd., 488 B.R. 205, 236 (Bankr. S.D. Fla. 2013) did not involve avoidance claims, rather breach of fiduciary duty claims

against former directors of the foreign debtor (in BVI). The Bankruptcy Court for the Southern District of Florida ruled that the BVI liquidators could maintain claims, seeking recover of or against assets outside the U.S. Future Chapter 15 debtors can assert that claims relating to assets outside the U.S. should include avoidance actions under the laws of the foreign jurisdiction.

- ♦ In re Hellas Telecommunications (Luxembourg) II SCA, 524 B.R. 488, 495 (Bankr. S.D.N.Y.) *adhered to*, 526 B.R. 499 (Bankr. S.D.N.Y. 2015) (Hosking I). The plaintiff liquidators of a Greek company in a recognized foreign main proceeding (in the U.K.) were seeking to avoid and recover alleged fraudulent transfers based only on the New York Debtor and Creditor Law since the avoidance powers of Chapter 5 were unavailable in the Chapter 15 case. Sixteen of the 27 defendants had businesses or residences in the U.S., but not in New York.

  The parties agreed that the foreign representatives did not have standing to assert the NY fraudulent conveyance under Bankruptcy Code § 544 because Chapter 15 does not permit a foreign representative to utilize § 544.

- Filing of Claims

  - ♦ Section 501 of the Bankruptcy Code governing the filing of proofs of claim in bankruptcy cases does not apply to Chapter 15 case. (See, 11 U.S.C. § 103(a)). Instead, Chapter 15 contemplates communication and cooperation between the bankruptcy court and the foreign court overseeing the foreign proceeding and thus the claims process may vary from case to case and creditors need to pay close attention to both proceedings and any notices regarding the time and method for filing claims.

  - ♦ In Chapter 11 cases, U.S. bankruptcy courts generally require foreign creditors to file and assert claims in bankruptcy court to be entitled to a distribution from a U.S. debtor's estate. A creditor with a claim against a foreign debtor will likely be required to assert its claim in the foreign proceeding in order to be entitled to a distribution, including from proceeds relating to the debtor's U.S. assets. See, In re Artimm, S.r.L., 335 B.R. 149, 164-65 (Bankr. C.D. Cal. 2005).

  - ♦ As a general rule, creditors should assume that the will need to timely file their claims in the foreign main proceeding and that filing with the U.S. Bankruptcy Court will not be sufficient to guarantee participation in any distribution.

  - ♦ Chapter 15 gives foreign creditors the right to participate in U.S. bankruptcy cases and it prohibits discrimination against foreign creditors (except certain foreign government and tax claims, which may be governed by treaty). 11 U.S.C. § 1513. It also requires notice to foreign creditors concerning a U.S. bankruptcy case, including notice of the right to file claims.

- Discovery by Foreign Debtors against U.S. Companies

  One reason foreign representatives commence Chapter 15 cases is to utilize the discovery provisions of the U.S. Federal and Bankruptcy Rules of Civil Procedure. Upon the filing of a Chapter 15 case, and before an order for recognition is entered, a foreign representative may request provisional relief, including an order from the Court authorizing the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities "to the extent such relief is urgently needed to protect the assets of the debtor or the interests of creditors" (§ 1519(a)(3)). Upon recognition of the Chapter 15 petition, such relief may be granted in the absence of any urgent need (§ 1521(a)(4)).

  A foreign representative's discovery requests do not have to relate to the preservation or recovery of property after recognition, and can be granted whether or not the debtor has assets in the U.S. In re Millennium Global Emerging Credit Master Fund Ltd., 471 B.R. 342, 347 (Bankr. S.D.N.Y. 2012); In re Fairfield Sentry Ltd. Litigation, 458 B.R. 665, 679 n. 5 (S.D.N.Y.2011).

  However, "[w]hen a foreign representative seeks the assistance of a United States court and seeks to utilize U.S. discovery processes, the foreign representative must "play by our rules," which include the statutes, the Federal Rules of Civil Procedure, the Federal Rules of Bankruptcy Procedure, and th[e] Court's Local Rules." In re Petroforte Brasileiro de Petroleo Ltda., 530 B.R. 503, 516-17 (Bankr. S.D. Fla. 2015) [denying foreign representative's request for gag order prohibiting subpoe-

naed parties from disclosing the contents of the subpoena to parties that are targets of the investigation.] Similarly, if granting the discovery request would require violation of federal criminal law, it may be denied as manifestly contrary to public policy. In re Toft, 453 B.R. 186 (Bankr. S.D.N.Y. 2011) [Denying request by foreign representative of debtor who was the subject of insolvency proceedings in Germany, for order allowing him access to existing e-mails of debtor which were stored on servers of two internet service providers (ISPs) located in the United States, and for order in effect granting him a wire tap on debtor's future e-mails without notice to the debtor in violation of the Wiretap and Privacy Act.] Also, U.S. law governing attorney-client privilege and work product doctrine will apply instead of the foreign jurisdiction's law where the U.S. has the predominant interest. See In re China Med. Technologies, Inc., 522 B.R. 28, 36 (Bankr. S.D.N.Y. 2014) [U.S. law trumped Cayman Islands law because the attorney-client relationship was entered into in the U.S. and the relationship was centered in the U.S. where the communications were sent concerning legal proceedings in the U.S. and involved U.S. law.]

A foreign representative will be not entitled to utilize the broad "fishing expedition" discovery available under Bankruptcy Rule 2004 to conduct discovery related to matters unrelated to the Chapter 15 case but in connection with proceedings pending in the foreign country. In re Bd. of Directors of Hopewell Int'l Ins. Ltd., 258 B.R. 580 (Bankr. S.D.N.Y. 2001) [decided under former Bankruptcy Code § 304 prior to enactment of Chapter 15]; but see In re Millennium Global Emerging Credit Master Fund Ltd., 471 B.R. 342, 347 (Bankr. S.D.N.Y. 2012) [questioning whether the "pending proceeding" in Hopewell applies to discovery under § 1521(a)(4).].

- Executory Contracts

  Bankruptcy courts have the power grant debtor's in Chapter 15 cases relief in the form of rights generally available to debtors in plenary Chapter 11 cases including the right to assume or reject executory contracts. See, e.g., In re Qimonda AG, 482 B.R. 879, 884 (Bankr. E.D. Va. 2012).

  - In re Qimonda AG Bankruptcy Litigation, 433 B.R. 547 (E.D.Va.2010). German company, Qimonda, had assets including approximately 10,000 patents. The foreign representative of Qimonda's German insolvency case sought termination of license agreements to sell the patents free of the licenses. Licensees of such patents, including Samsung, asserted rights under § 365(n) of the Bankruptcy Code, which allows licensees of intellectual property to retain their rights for the duration of the license as long as they continue making royalty payments.

    The Bankruptcy Court ruled that the licenses could be rejected based on German law.

    On appeal, the U.S. 4th Circuit Court of Appeals ruled that Qimonda could not reject the licenses under German law. Rather, the licensees were protected by Section 365 of the U.S. Bankruptcy Code allowing them to retain their licenses as long as royalties were paid.

    On remand, the Bankruptcy Court ruled that it would be manifestly contrary to public policy to allow the German trustee to reject the patent licenses without complying with § 365(n), which protects the interests of licensees.

- Asset Sales

  - Upon recognition of a foreign main proceeding, Section 363 of the Bankruptcy Code (regarding sales of assets) applies "to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the section would apply to property of the estate." This means that as in a Chapter 11 case, any non-ordinary course sale of the debtor's assets located in the U.S. is subject to the Chapter 15 bankruptcy court's approval.

  - Until recently, it was not clear whether deference should be given to a foreign court that has previously approved or rejected a transaction involving any of the debtor's U.S. assets, in the foreign insolvency proceeding.

  - In Elpida Memory, Inc., No. 12-10947 CSS, 2012 WL 6090194 (Bankr. D. Del. Nov. 20, 2012), the Chapter 15 court considered whether Section 363 governs sales of assets in Chapter 15 cases. Chapter 11 requires proof that the non-ordinary course transaction is based on sound business judgment. The

court in Elpida held that the same standard applies in Chapter 15 even when the transaction has been previously approved by an order of the foreign court (in this case in Japan), where the foreign main proceeding is pending. It concluded that the principles of comity either do not apply or must defer to the plain meaning and legislative history of § 1509(b)(3), which states that the bankruptcy court is to grant comity or cooperation to the *foreign representative,* not the *foreign court*.

- ♦ In In re Fairfield Sentry Ltd., 768 F.3d 239, 246 (2d Cir. 2014), the Second Circuit Court of Appeals reached the same conclusion as the Delaware Bankruptcy Court in Elpida. In Fairfield Sentry, the BVI liquidators sold a SIPA claim the debtor had filed in the Madoff SIPA proceedings. The foreign representative agreed to sell the claim for 35% of its face value ($230m) just three days before a multibillion dollar settlement in the Madoff SIPA case caused the value of SIPA claims to increase dramatically. The BVI court set aside the sale of the claim.

  The U.S. Court of Appeals ruled that the sale of the SIPA Claim was a "transfer of an interest of the debtor in property within the territorial jurisdiction of the United States" within the meaning of 11 U.S.C. § 1520(a)(2) and that the statute makes it plain that the bankruptcy court was required to review the merits of the sale without giving deference to the BVI court's earlier judgment. It remanded the case to the bankruptcy court with instructions to conduct the Section 363 review of the sale applying the same business judgment standard applied in 363 sales in Chapter 11 cases.

- ♦ Thus, in Chapter 15 cases, bankruptcy courts must apply Section 363 (sale of assets) to non-ordinary course transactions involving assets of the debtor located in the U.S., applying the business judgment rule, and without regard to a prior decision of the foreign court regarding the transaction.

- Turnover of Foreign Debtor's Property

  Application of the turnover provisions contained in §§ 542 and 543 of the Bankruptcy Code -

- ♦ It is unclear whether Chapter 15 allows a foreign representative to utilize the turnover provisions of §§ 542 and 543 to compel turnover of property. Section 543 requires that a custodian (a receiver, trustee or assignee under an assignment for the benefit of creditors) turn over property of the debtor to the bankruptcy trustee upon learning of the bankruptcy filing. Section 542 allows the bankruptcy trustee to seek turnover of property of the debtor from other entities and also requires payment of any debts owed to the foreign debtor, subject to any valid right of setoff under § 553.

- ♦ In re Atlas Shipping A/S, 404 B.R. 726, 746 (Bankr. S.D.N.Y. 2009) Section 543 of the Bankruptcy Code mandates that a "custodian" turn over possession of property of the debtor to the bankruptcy trustee immediately upon learning of the bankruptcy filing. This mandatory turnover provision does not apply in Chapter 15 cases even though Chapter 15 is silent on the subject.

- ♦ The Delaware Bankruptcy Court allowed a foreign representative to utilize the turnover provision of sections 542 and 543. In re ABC Learning Centres Ltd., 445 B.R. 318, 341 (Bankr. D. Del. 2010), *on reconsideration in part* (Jan. 21, 2011), *subsequently aff'd*, 728 F.3d 301 (3d Cir. 2013).

- ♦ The Bankruptcy Court for the Eastern District of New York held differently in In re AJW Offshore, Ltd., 488 B.R. 551, 560 (Bankr. E.D.N.Y. 2013). It construed the statute, case law under prior § 304, and weighed the interests of international comity and held that turnover may be sought via §§ 542 and 543, but only so long as appropriate conditions are imposed sufficiently protecting the interest of the creditors and other entities including the debtor as required under § 1522(a).

- Enforcement of Foreign Court's Orders in the U.S.

- ♦ Section 1506 allows a court to refuse to take an action governed by Chapter 15 if it would be "manifestly contrary to the public policy of the United States.

- ♦ Courts Generally Avoid the Issue.

- ♦ In re ABC Learning Centres Ltd., 728 F.3d 301 (3d

Cir. 2013) *cert. denied sub nom*. RCS Capital Dev., LLC v. ABC Learning Centres Ltd., 134 S. Ct. 1283, 188 L. Ed. 2d 300 (2014).

◊ The public policy exception has been narrowly construed, because the word "manifestly" in international usage restricts the public policy exception to the most fundamental policies of the United States.

◊ The public policy exception applies "where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections" or where recognition "would impinge severely a U.S. constitutional or statutory right." [quoting Qimonda, 433 B.R. 547, 470 (E.D. Va. 2010).

◊ Held that Australian law that allowed secured creditors to realize full value of their debts, and tender excess to debtor, did not manifestly contravene public policy of United States, and thus public policy exception did not apply to recognition of liquidation proceeding which was pending against foreign corporation in Australia as foreign main proceeding that would trigger automatic stay; although secured creditors in United States generally had to turn over assets and seek distribution from bankruptcy estate, Australian law established different way to achieve similar goals.

♦ Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), 714 F.3d 127 (2d Cir. 2013).

◊ Morning mist argued that_the BVI proceedings violated § 1506 because there was no unfettered public access to court records in the BVI. The court held that the principle of public access to court records is not so fundamental that recognition of the BVI liquidation constituted the type of exceptional circumstance contemplated in § 1506.

♦ In re Vitro S.A.B. de C.V., 701 F.3d 1031 (5th Cir. 2012), *cert dismissed*, 133 S. Ct. 1862, 185 L. Ed. 2d 862 (2013).

◊ The Bankruptcy Court for the Northern District of Texas refused to enforce the third party release provision a plan of reorganization (known as a "*concurso*") approved by a Mexican Court based on the votes of the debtor's non-debtor affiliates holding more than 50% of all voting claims. Those affiliates of the debtor originally owed the debtor approximately $1.2 billion, but through a series of undisclosed restructuring transactions, had been transformed into creditors of the debtor who were owed $1.5 billion. Those same affiliates had previously guaranteed the debtor's obligations to three groups of noteholders (mainly U.S. entities). The *concurso* plan approved by the Mexican court provided for the release of the non-debtor affiliates obligations under the guarantees. The Bankruptcy Court found that the release provision was unenforceable under the public policy exception of § 1506 because such provisions had been "largely foreclosed" in the Fifth Circuit and "[g]enerally speaking" violated the policy of the U.S., which is against discharge of non-debtor entities "absent extraordinary circumstances." It also found the *concurso* approval order violated Bankruptcy Code §§ 1507 and 1521.

On appeal, the Fifth Circuit declined to decide the issue of whether the third-party release of the debtor's affiliates under the *concurso* plan approved by the Mexican court was manifestly contrary to public policy within the meaning of § 1506. Instead it affirmed the Bankruptcy Court's based on §§ 1507 and 1521 thus making it unnecessary to decide the public policy issue under § 1506.

◊ A foreign (Canadian) plan of reorganization was granted comity under § 1507, in Metcalfe & Mansfield Alternative Investments, 421 B.R. 685 (Bankr. S.D.N.Y. 2010). Creditors challenged the third party release in the restructuring plan in Metcalfe, but the Court concluded that principles of comity dictated that the plan should be enforced, noting that third party non-debtor releases are "not entirely precluded" in the Second Circuit (the U.S.). Unlike Vitro, the third party releases in Metcalfe were key to the success of the plan approved by the majority of creditors who were not insiders of the debtor.

- Setoff

  Section 553 of the Bankruptcy Code expressly recognizes (with certain limitations) a creditor's rights under state law to offset mutual prepetition debts between the debtor and the creditor.

  As Section 553 is not specifically listed as a provision of the Bankruptcy Code applicable in Chapter 15 cases, it is unclear whether creditors can assert setoff rights in Chapter 15 cases.

  In In re Sivec SRL, 476 B.R. 310 (Bankr. E.D. Okla. 2012) the Bankruptcy Court permitted the creditor to exercise its setoff rights. The debtor Sivec, an Italian corporation, and U.S. creditor Zeeco, entered into a parts contract on a project in Qatar. Under the contract, Zeeco retained 10% of the contract price as retainage to cover any warranty claims. In March 2008, Sivec commenced a reorganization proceeding in Italy, and after expiration of the warranty period, made demand on Zeeco for return of the retainage. Zeeco refused and commenced litigation in U.S. District Court in Oklahoma seeking damages for breach of contract and declaratory judgment allowing it to setoff the retainage in satisfaction of damages incurred.

  Sivec filed a Chapter 15 petition to stay the litigation, and for turnover of the retainage. In the litigation, Zeeco obtained a judgment against Sivec for $1,744,043.00, Sivec obtained a judgment against Zeeco for $952,840.

  In the Chapter 15 case, Zeeco filed a motion for relief from stay to allow recoupment/setoff in accordance with § 553. In considering the issue, the Bankruptcy Court noted

  > Chapter 15 provides little guidance to courts to determine whether it is appropriate to grant a request to turnover local assets to a foreign representative to distribute in the main foreign proceeding, although it does expressly grant secured creditors the same protections afforded by the U.S. Bankruptcy Code by triggering the applicability of §§ 361 and 363 upon recognition of the foreign proceeding. In enacting Chapter 15, Congress intended to give courts "broad latitude to mold relief to meet specific circumstances." The fact that priority rules and treatment of claims may not be identical is insufficient to deny a request for comity. What this Court must consider is the effect of that difference on the creditor in light of the existing facts.

  The Chapter 15 court ruled that setoff of mutual, prepetition debts was appropriate and that Zeeco was entitled to set off the retainage against the amounts owed to Sivec. The Court also ruled that setoff was also appropriate under the doctrine of recoupment. The Chapter 15 Court denied the Italian insolvency court's Requests for Comity and Sivec's request for turnover of funds "because it does not believe Zeeco's interests will be sufficiently protected if it is ordered to turn over the funds and file a claim in Italy, and because the equities and law support recoupment and setoff." Sivec, 476 B.R. at 328.

  Thus, while Chapter 15 does not expressly incorporate § 553(a) preserving creditors' setoff rights, Bankruptcy Court's may nevertheless allow a creditor to exercise a right of setoff, particularly in cases where foreign law may not grant creditors setoff rights.

  In another recent case involving a debtor's right to avoid a prepetition setoff under Section 553(b) in the Bankruptcy Court for the Southern District of NewYork, the Court held that a foreign representative in a Chapter 15 case may bring an action to avoid and recover an amount setoff by a creditor during the 90 day preference period under § 553(b) using the Chapter 15 filing date to calculate the look back period. In re Awal Bank, BSC, 455 B.R. 73, 90 (Bankr. S.D.N.Y. 2011). The Court concluded that while § 1521(a)(7) precludes certain other Chapter 5 avoidance actions in Chapter 15 cases (e.g., §§ 547 and 548), it does not mention § 553(b). Thus, the Court held § 553(b) relief was available to a foreign representative.

We hope you found this useful and informative, and feel free to share this with others in your company. Please contact us if you have any questions about this, or any other matter.

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