International Insolvency & Restructuring Report 2019/20

capital markets intelligence
cmi

Cross-border restructuring in the US: Chapter 15 approval of third-party releases granted in foreign proceedings

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Non-consensual third-party releases (i.e., where companies through a plan of reorganisation, plan of arrangement, scheme, or similar in-court restructuring transaction, seek to bind third-party creditors to a full release of the restructuring company, its reorganised company, its officers, directors, affiliates, employees, professionals, lenders and other parties that played a key role in the restructuring from claims relating in any way to the company)[2] are an often-sought form of relief pursued in connection with restructurings under the laws of the United States of America.

The benefits of obtaining such a broad release for non-debtor parties is clear, but its availability is limited. In fact, many foreign jurisdiction companies will choose to commence restructuring proceedings in the US or under an English law-based regime in order to secure the benefits of such a third-party release.

However, such third-party releases are often a source of controversy regardless of the jurisdiction where they are sought. This is the case in the US, where, notwithstanding its prevalence in chapter 11 plans, such provisions often draw objections and can be heavily litigated, specifically in the context of whether such releases can be granted absent the grantee's actual consent. Some courts in the US have flatly rejected the availability of non-consensual third-party releases. In contrast, it appears to have become less and less difficult to obtain recognition and enforcement of third-party releases granted in foreign jurisdictions in cases commenced under chapter 15 of the US Bankruptcy Code.[3]

In several recent cases, commencing with *Metcalfe* in 2010 and continuing through *Avanti* in 2018, recognition and enforcement in the US have been granted to third-party releases contained in foreign schemes and plans even where such releases might not have been granted in a plenary US case.

Third-party releases outside of chapter 15 cases

Favourable chapter 15 treatment of third-party releases must be viewed against the backdrop of the treatment of such releases in other contexts, such as chapter 11 plans and schemes and plans sanctioned in foreign jurisdictions.

There is no consensus as to the availability of third-party releases. The US circuit courts of appeals are split as to whether a bankruptcy court has the authority to approve, over an objection, chapter 11 plan provisions that release non-debtors from liability or enjoin dissenters from asserting claims against non-debtors.[4] Even those courts that believe that such authority exists would only approve such releases under limited circumstances, where (i) these releases are "essential" to the reorganisation; (ii) the parties being released are making a substantial financial contribution to the reorganisation; and (iii) the affected creditors overwhelmingly support the chapter 11 plan.[5]

Similar controversy has arisen in other jurisdictions. While third-party releases are generally allowed in UK schemes of arrangement and comparable regimes in other commonwealth countries, such as Canada and Australia,[6] each of France, Germany and Italy prohibit granting third-party releases in connection with schemes or similar arrangements under their respective insolvency laws.[7]

Favourable treatment in chapter 15 cases

In chapter 15 cases, however, with growing frequency third-party releases approved by foreign courts have been recognised and deemed enforceable by US courts, with little to no consideration of the concerns that have made them controversial in chapter 11 cases. These

decisions appear to follow a line of decisions by Judge Martin Glenn of the United States Bankruptcy Court for the Southern District of New York.

Avanti

The most recent example of this trend is the April 9, 2018 decision in *In re Avanti Communications Group PLC*,[8] where Judge Glenn held, among other things, that non-consensual third-party releases included in a UK scheme of arrangement were enforceable in the US under chapter 15 of the Bankruptcy Code.

In that case, Avanti Communications Group plc ("Avanti"), a satellite operator, undertook to restructure its senior secured debt consisting of more than US$890m in senior secured notes maturing in 2021 and 2023 (the "Notes") guaranteed by certain of Avanti's direct and indirect subsidiaries. Avanti and an *ad hoc* group of the holders of the Notes entered into a restructuring support agreement, which formed the basis for a scheme of arrangement under UK law (the "Scheme") that included releases of, among others, the Guarantors, which were to be granted without the consent on the dissenting noteholders (the "Third-Party Release").

Avanti initiated a proceeding before the High Court of Justice of England and Wales for approval of the Scheme, which, after convening a creditors' meeting at which 98.3% of the noteholders voted in favour of the Scheme, sanctioned the Scheme, finding jurisdictional, statutory and fairness requirements to be satisfied. Thereafter, Avanti's foreign representative commenced a chapter 15 case in the US court seeking, among other relief, the enforcement of the Scheme in the US, including the Third-Party Releases.

Judge Glenn granted the relief sought, concluding that the Scheme, including the Third-Party Releases, was entitled to recognition in the US because (i) it satisfied the requirement of chapter 15 of the Bankruptcy Code; (ii) it did not prejudice the rights of US citizens or violate US domestic public policy; and (iii) the Third-Party Releases were necessary to give practical effect to the Scheme.

While acknowledging the controversy with respect to approval of third-party releases by US bankruptcy and appellate courts, Judge Glenn decided he could grant recognition and enforcement of the Third-Party Releases authorised by the UK court. Judge Glenn held that it was unnecessary to analyse the US court's authority to approve third-party releases under chapter 11 as no chapter 11 case had been filed and, in a chapter 15 case, principles of comity and enforcement of foreign judgments were paramount, more pressing concerns (he also pointed out that only a small number of creditors impaired by the Scheme would be bound by the Third-Party Releases).

Judge Glenn pointed out that the issues presented by third-party releases in chapter 15 cases are different than those courts have to grapple with in chapter 11 cases, the focus being on whether the *foreign court* had the proper authority to grant the releases and, accordingly, whether to enforce the release approved by the foreign court was "appropriate relief" and "additional assistance" authorised by sections 1507 and 1521(a) of the Bankruptcy Code.

Judge Glenn distinguished *In re Vitro S.A.B. de C.V.*, 70 F.3d 1031 (5th Cir. 2012), the one reported case where a US court declined to recognise a third-party release approved by a foreign court. In *Vitro*, the Fifth Circuit declined to grant comity and enforce the Mexican court's order approving a *concurso* plan that released non-debtor affiliates' guarantees. In distinguishing *Vitro*, Judge Glenn noted both that third-party releases are generally not available in the Fifth Circuit, and, more importantly, that *Vitro* "had a number of very troubling facts," such as the fact that the creditor approval of the *concurso* plan was achieved only by counting insiders' votes, which would not have been counted to approve a chapter 11 plan pursuant to section 1129(a)(10) of the Bankruptcy Code. It was this misalignment of the *Vitro*'s *concurso* proceeding with fundamental US policy – which was not an issue in Avanti or any of the other cases discussed here – that was chiefly responsible for the *Vitro* court refusing to recognise the non-debtor releases approved by the Mexican court.

Metcalfe

Judge Glenn has reached a similar conclusion in *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010). In that chapter 15 case, the court agreed to provide "additional assistance" to

a Canadian debtor by enforcing a Canadian court's order confirming a restructuring plan that contained third-party releases, even though it was far from clear whether such releases would have been approved in a chapter 11 case.

The Metcalfe court took comfort in the following: (i) the third-party release provisions had been contested and fully litigated in the Canadian court; (ii) the Canadian court expressly found that it had jurisdiction to grant the releases; and (iii) the Canadian plan received a very high level of non-affiliate creditor support. *Id.* at 699-700.

In the end, Judge Glenn concluded, as he did in *Avanti*, that any uncertainty about the validity of third-party releases was of little significance in a chapter 15 case, and that "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 non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case." *Metcalfe*, 421 B.R. at 696.

Sino-Forest

In *In re Sino-Forest Corp.*, 501 B.R. 655 (Bankr. S.D.N.Y. 2013) – a third decision by Judge Glenn on this issue – the court employed the same rationale articulated in *Metcalfe*, recognising and enforcing, as a form of "additional assistance" under section 1507, a Canadian court-approved settlement containing a third-party release. Because the issue of the propriety of the third-party releases had been "fully and fairly" litigated in the Canadian courts, the court found that it could recognise and enforce
the releases in the United States under the comity principles set forth in section 1507. *Id.* at 664.

The court also noted that approving the release did not violate section 1506 of the Bankruptcy Code (which prohibits enforcement of a foreign judgement if doing so would be "manifestly contrary to the public policy of the United States") because comparable relief was available in the Second Circuit (albeit "rarely") and seven other judicial circuits. *Id.*

Unreported decisions

Taking their lead from Judge Glenn, a number of other courts have undertaken similar analyses in chapter 15 cases and approved third-party releases granted by foreign courts. *See, e.g. In re Emeco Holdings Ltd.*, No. 16-13080 (MKV), Transcript of March 8, 2017 Hearing, at 8:1-19 (Bankr. S.D.N.Y. Nov. 30, 2016) (Australian scheme releases recognised as "type of injunctive relief [that] has regularly been granted in Chapter 15 cases" and found enforceable); *In re Boart Longyear Ltd.*, No. 17-11156 (MEW), Verified Petition [Docket No. 2] (Bankr. S.D.N.Y. Aug. 30, 2017) (enforcing releases granted in Australian scheme because "'[t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganisation would fail'") (quoting *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987)); *In re Magyar Telecom B.V*, No. 13-13508 (SHL), Verified Petition ¶ 154 [ECF No. 26] (Bankr. S.D.N.Y. Dec. 11, 2013) (recognition of the third-party releases granted because "the Scheme cannot function without such releases").

Summary

Based on these cases, it appears that, in the absence of egregious facts like those in the *Vitro* case, foreign debtors should assume that they will be highly likely to obtain recognition and enforcement of the protections against dissenting stakeholders granted by their home jurisdictions from US courts in chapter 15 cases.

As a result, despite the prevalence of third-party releases in US chapter 11 cases, to the extent a third-party release is an integral component of a foreign company's restructuring, it may prove advantageous for foreign companies to avail themselves of another court's jurisdiction in obtaining approval of a third-party release and, thereafter, seek recognition of the plan or scheme approved by the foreign court under chapter 15.

Notes:

1. Abhilash M. Raval and Lauren C. Doyle are partners, and Dennis C. O'Donnell is of counsel, at Milbank LLP.
2. Third-party releases generally release a

specified set of claims against the "Released Parties," which typically include a broad array of debtor-related parties, including the debtor's directors, officers, professionals, lenders, and contract parties, *etc*. The parties providing such releases – the "Releasing Parties"– include a comparably broad group of debtor-related parties, including all of the foregoing, but, most relevantly, also include "(i) the holders of Impaired Claims who abstain from voting on the Plan or vote to reject the Plan but do not opt-out of these releases on the Ballots" (Second Amended Joint Chapter 11 Plan of Reorganisation of Tops Holding II Corp and Its Affiliated Debtors (with Technical Modifications), *In re Tops Holding II Corp., et al.*, Case No. 18-22279 (RDD) (Bankr. S.D.N.Y. Nov. 8, 2019), at 73.) The claims released run an equally broad gamut, absolving the Released Parties of liability for "any and all claims, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever (including contract claims, claims under ERISA and all other statutory claims, claims for contributions, withdrawal liability, reallocation liability, redetermination liability, interest on any amounts, liquidated damages, claims for attorneys' fees or any costs or expenses whatsoever), including any derivative claims, asserted or assertable on behalf of a Debtor, whether known or unknown, foreseen or unforeseen, liquidated or unliquidated, matured or unmatured, contingent or fixed, existing or hereinafter arising, in law, equity or otherwise, that such Entity would have been legally entitled to assert in its own right (whether individually or collectively) based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Estates, the Restructuring, the Chapter 11 Cases, the purchase, sale or rescission of the purchase or sale of any Security of the Debtors or the Reorganised Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party (other than assumed contracts or leases), the restructuring of Claims and Interests before or during the Chapter 11 Cases, the negotiation, formulation, preparation or consummation of the Plan (including the Plan Supplement), the Definitive Documents, or any related agreements, instruments or other documents, or the solicitation of votes with respect to the Plan, in all cases based upon any other act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date. (*Id.*)

[3] Chapter 15 of the US Bankruptcy Code, which is derived from the Model Law on Cross-Border Insolvency, (i) furnishes "effective mechanisms for dealing with cases of cross-border insolvency with the objectives of . . . cooperation between courts of the United States . . . and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases"; and (ii) is focused on rendering "assistance" to "foreign debtors" seeking to protect assets in the US. 11 U.S.C. § 1501(a)(1),(b)(1). Chapter 11, by contrast, addresses all aspects of a statutory regime for US and foreign debtors seeking to reorganise or liquidate in a plenary case in US bankruptcy court.

[4] The minority view, held by the Fifth, Ninth, and Tenth Circuits, bans such nonconsensual releases on the basis that section 524(e) of the Bankruptcy Code, which provides generally that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt," prohibits them. *See Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995); *In re W. Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1990). However, the majority of circuits to consider the issue – the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits – have found such releases and injunctions permissible under certain circumstances. *See In re Drexel Burnham Lambert Grp.*, 960 F.2d 285 (2d Cir. 1992); *In re Cont'l Airlines*, 203 F.3d 203, 214 (3d Cir. 2000); *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640 (7th Cir. 2008); *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070 (11th Cir. 2015); *see generally*

4 Collier on Bankruptcy ¶ 524.03(a) (outlining scope and basis for circuit split as to third-party releases).

[5] *See* 4 Collier on Bankruptcy ¶ 524.03(a) (outlining applicable standard). Also often litigated in this context is whether a third-party release can be approved that deems third-party creditors to have "opted into" a release by voting in favour of a plan, as opposed to having the affirmative right to "opt into"/"opt out of" the release regardless of whether they vote in favour of or against the plan. See Christy L. Rivera, *Consensual Third-Party Releases: What Constitutes "Consent"?* ZONE OF INSOLVENCY (Aug. 17, 2015) (enumerating consent requirements in plan voting context); *see, e.g. In re Aegean Marine Petroleum Network Inc.*, Case No. 18-13374 (MEW) (Bank. S.D.N.Y), Transcript of Feb. 14, 2019 Hearing, at 29 (rejecting "opt out" approach to third party releases because "[i]f we're going to seek consent, it ought to be real consent, and it should be on an opt-in basis, not an opt-out basis.")

[6] *See* C. Balmond & K. Crinson, *Getting the Deal Through:* England and Wales (Restructuring & Insolvency) ¶ 9.

[7] *See* F. Grillo, L. Mabilat, S. Corbiere, *Getting the Deal Through:* France (Restructuring & Insolvency) ¶ 9; Aleth & N. Derksen, *Getting the Deal Through:* Germany (Restructuring & Insolvency) ¶ 8; R. Lener, G. Rosato, *Getting the Deal Through:* Italy (Restructuring & Insolvency) ¶ 8.

[8] *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. Apr. 9, 2018).

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