

**Comity Extended to Order Entered in Foreign Insolvency  
Proceeding Enjoining Actions Against Affiliates of Foreign Debtor**

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Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York held in *CT Investment v. Carbonell and Grupo Costamex*, 2012 WL 92359 (S.D.N.Y. Jan. 11, 2012), that comity should be extended to an order issued by a Mexican district court overseeing the Mexican bankruptcy proceeding (*concurso mercantil*) of Cozumel Caribe S.A. de C.V. (“Cozumel Caribe”) under Mexico’s Ley de Concursos Mercantiles (the “Mexican Business Bankruptcy Act”). In so holding, Judge Sweet stayed the U.S. district-court action commenced by Cozumel Caribe’s secured creditor, CT Investment Management, LLC (“CT Investment”), wherein CT Investment sought to recover against certain nondebtor affiliates of Cozumel Caribe on guaranties issued in connection with Cozumel Caribe’s prepetition debt.

**Background**

Cozumel Caribe, along with its seven affiliates, provides hostelry and tourism services through the operation of luxury hotels and timeshare resort properties in Mexico. Each of Cozumel Caribe and its affiliates owns and operates its own resort property, but the properties collectively are part of and offered as a timeshare arrangement to prospective timeshare owners.

In October 2006, Cozumel Caribe and certain affiliates executed promissory notes evidencing first-priority secured loans extended by CT Investment in the amount of \$103 million. As further security, Cozumel Caribe affiliates Pablo González Carbonell and Grupo Costamex, S.A. de C.V., guarantied the debt (the “Guaranty”). On April 27, 2010, Cozumel Caribe filed a voluntary

insolvency proceeding under the Mexican Business Bankruptcy Act. In connection with the proceeding, Cozumel Caribe asked the Mexican court to approve certain provisional relief, including a stay, to protect Cozumel Caribe as well as its nondebtor affiliates, with whom Cozumel Caribe's business affairs were closely intertwined. The Mexican court granted that request on May 27, 2010 (the "May 27 Order"), directing, among other things, that all collection actions be stayed during the pendency of the Mexican bankruptcy proceeding, including any actions against nondebtor affiliates to enforce the Guaranty. CT Investment unsuccessfully attempted to appeal or vacate the May 27 Order (as well as a September 30, 2012, order granting Cozumel Caribe's bankruptcy petition).

On July 20, 2010, Nemias Esteban Martinez Martinez, as *conciliador* in Cozumel Caribe's Mexican bankruptcy proceeding (the "foreign representative"), filed a petition on behalf of Cozumel Caribe under chapter 15 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of New York. On October 20, 2010, the court entered an order recognizing Cozumel Caribe's Mexican bankruptcy proceeding as a "foreign main proceeding" under chapter 15.

Despite the May 27 Order, CT Investment commenced litigation on September 13, 2010, in the U.S. District Court for the Southern District of New York seeking to recover on the Guaranty. Nearly a year afterward, the foreign representative filed a motion in the U.S. district court for an order extending comity to the Mexican court's order staying any action to collect on the Guaranty pending completion of Cozumel Caribe's Mexican bankruptcy proceeding. CT Investment objected, arguing, among other things, that the foreign representative lacked standing

because he was not a party to the district-court litigation and that the court should refuse to recognize the May 27 Order under principles of comity because the order was contrary to U.S. law and public policy.

### **The District Court's Ruling**

Judge Sweet held that the foreign representative had standing to seek comity and a stay pursuant to section 1509(b) of the Bankruptcy Code, which provides that, upon the granting of recognition to a foreign bankruptcy proceeding:

(1) the foreign representative has the capacity to sue and be sued in a court in the United States; . . . (2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and . . . (3) a court in the United States shall grant comity or cooperation to the foreign representative.

Judge Sweet explained that section 1509(b)'s clear mandate that foreign representatives in recognized proceedings under chapter 15 be granted access to courts in the U.S. is not "limited to cases in which the Chapter 15 debtor is a party."

Judge Sweet rejected CT Investment's argument that, pursuant to section 1509(e) of the Bankruptcy Code, which provides that "[w]hether or not the court grants recognition, . . . a foreign representative is subject to applicable nonbankruptcy law," a foreign representative must intervene in accordance with Rule 24 of the Federal Rules of Civil Procedure. Judge Sweet held that section 1509(e) does not limit the effect of section 1509(b)(2), which, by its plain terms, permits foreign representatives direct access to courts in the U.S. for appropriate relief.

Judge Sweet also rejected CT Investment's argument that the May 27 Order violated U.S. public policy. The mandate to extend comity under section 1509(b)(3), the judge acknowledged, is

subject to section 1506, which states that “[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.”

Even so, Judge Sweet concluded that extension of the stay to a nondebtor guarantor under the terms of the May 27 Order was not “manifestly contrary” to U.S. public policy. Several U.S. bankruptcy courts, the judge reasoned, have determined, in appropriate circumstances, that the bankruptcy stay is properly extended to nondebtor parties in order to assist in and maintain the integrity of the administration of a debtor’s bankruptcy case. Judge Sweet also relied on other decisions holding that the laws of the foreign jurisdiction and the laws of the U.S. need not be identical to warrant an extension of comity.

Before Judge Sweet handed down his ruling in *CT Investment v. Carbonell and Grupo Costamex*, CT Investment filed an adversary proceeding in Cozumel Caribe’s chapter 15 case seeking a declaratory judgment that certain funds held in the U.S. do not belong to Cozumel Caribe and should therefore be subject to levy by CT Investment. The foreign representative responded with a motion to extend comity to the May 27 Order, arguing that the order expressly precludes any collection actions against the U.S. account in question. The adversary proceeding is currently pending before bankruptcy judge Martin Glenn.

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Jones Day acted as counsel for the foreign representative in connection with *CT Investment v. Carbonell and Grupo Costamex*.