Foreign Debtor May Appoint Representative to Commence Chapter 15 Case

July/August 2012

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As the seventh anniversary of the enactment of chapter 15 of the Bankruptcy Code draws near, the volume of chapter 15 cases commenced in U.S. bankruptcy courts on behalf of foreign debtors has increased rapidly. During that period, there has also (understandably) been a marked uptick in litigation concerning various aspects of the comparatively new legislative regime governing cross-border bankruptcy cases patterned on the Model Law on Cross-Border Insolvency. One such issue was the subject of a ruling recently handed down by a Texas district court. In *In re Vitro, S.A.B. de C.V.*, 470 B.R. 408 (N.D. Tex. 2012), the district court affirmed a bankruptcy court's decision that an individual appointed by the foreign debtor could serve as the debtor's "foreign representative" under chapter 15 of the Bankruptcy Code and is thus authorized to commence a chapter 15 case on the foreign debtor's behalf.

Recognition Under Chapter 15

Under chapter 15, the "foreign representative" of a foreign debtor may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding." "Foreign representative" is defined in section 101(24) of the Bankruptcy Code as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such proceeding."

"Foreign proceeding" is defined by section 101(23) of the Bankruptcy Code as:

> a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

Because more than one bankruptcy or insolvency proceeding may be pending against the same foreign debtor in different countries, chapter 15 contemplates recognition in the U.S. of both a "main" proceeding—a case pending in the country that contains the debtor's "center of main interests"—and "nonmain" proceedings, which may have been commenced in countries where the debtor merely has an "establishment."

Once a foreign main proceeding has been recognized by the bankruptcy court, the foreign representative is authorized to operate the debtor's U.S. business in much the same way as a chapter 11 debtor in possession. The representative can also commence a full-fledged bankruptcy case under any other chapter of the Bankruptcy Code, so long as the foreign debtor is eligible to file for bankruptcy in the U.S. and the debtor has U.S. assets.

The foreign representative in a recognized chapter 15 case may intervene in any court proceeding in the U.S. in which the foreign debtor is a party, and it can sue and be sued in the U.S. on the foreign debtor's behalf. The representative is also conferred with some of the powers given to a bankruptcy trustee under the Bankruptcy Code, although those powers do not include the ability to invalidate most prebankruptcy preferential or fraudulent asset transfers or obligations, unless a case is pending with respect to the foreign debtor under another chapter of the Bankruptcy Code.

In *Vitro*, the district court carefully examined section 101(24)'s definition of "foreign representative" to ascertain the meaning of the phrase "authorized in a foreign proceeding."

Vitro

Vitro, S.A.B. de C.V. ("Vitro"), is a Mexican holding company whose subsidiaries jointly constitute one of the largest glass manufacturers in the world. At a board meeting in October 2010, Vitro appointed Alejandro Sanchez-Mujica as its "foreign representative" in connection with an anticipated bankruptcy filing. In December 2010, Vitro filed in Mexico a voluntary petition for reorganization pursuant to Mexico's *Ley de Concursos Mercantiles* (the "Mexican Business Reorganization Act"). Sanchez-Mujica later filed a petition in the U.S. bankruptcy court in New York seeking recognition of Vitro's Mexican bankruptcy proceeding under chapter 15 and an injunction preventing the continuation of litigation commenced in New York against Vitro's nondebtor guarantors and affiliates. The venue of Vitro's chapter 15 case was subsequently moved to Texas so that it could be administered with other related proceedings.

An ad hoc group of Vitro noteholders objected to Vitro's chapter 15 petition, primarily because Sanchez-Mujica could not be a "foreign representative" since he was not permitted to leave Mexico. Vitro responded by appointing Javier Arechavaleta Santos as its "co-foreign representative" in connection with the Mexican and U.S. bankruptcy proceedings. After the U.S. bankruptcy court entered an order on July 21, 2011, recognizing the Mexican bankruptcy proceeding under chapter 15 as a foreign main proceeding (and expressly ruling that Vitro could appoint its own "foreign representative" as a predicate to the application for recognition under section 1517 of the Bankruptcy Code), the noteholders appealed.

The District Court's Ruling

The noteholders argued that the U.S. bankruptcy court's recognition of the Mexican bankruptcy proceeding under chapter 15 was improper because, having never been formally appointed by the Mexican court, Sanchez-Mujica and Santos could not be Vitro's foreign representatives within the meaning of section 101(24) of the Bankruptcy Code.

The district court disagreed with the noteholders' characterization of the phrase "foreign proceeding" in section 101(24) as "express and unambiguous" in restricting qualified "foreign representatives" to individuals or entities that are directly authorized by a foreign court to act in that capacity. According to the court, "[I]t is reasonable to understand the phrase 'authorized in a foreign proceeding' more broadly, *i.e.*, to mean authorized *in the context of* a foreign bankruptcy proceeding."

Given the "apparent uncertainty" regarding the meaning of section 101(24), the district court looked to sources other than the statutory language, including relevant case law, to determine its meaning. The court acknowledged that case law on this issue is sparse, although, it wrote, "every case cited by the parties suggests that a debtor is allowed to appoint its own foreign representative." In fact, the court explained, U.S. bankruptcy courts have granted recognition of *concurso* proceedings "every single time they have been asked to do so by a petitioner who was appointed by the Mexican debtor, without exception."

In particular, the court found the reasoning articulated in an unpublished ruling, *In re Compania Mexicana de Aviacion, S.A. de C.V.*, No. 14182 (MG) (Bankr. S.D.N.Y. Nov. 8, 2010), to be persuasive. In *Compania Mexicana*, bankruptcy judge Martin Glenn ruled that the board of directors of a Mexican corporation could authorize a person to act as the corporation's foreign representative in a chapter 15 case. Judge Glenn based his decision on the fact that, under the Mexican Business Reorganization Act, the debtor is allowed to continue to manage its affairs during a bankruptcy proceeding, akin to a chapter 11 "debtor in possession" under U.S. bankruptcy law. Because the debtor in a Mexican bankruptcy proceeding is essentially a debtor in possession, Judge Glenn held that the debtor may authorize its own foreign representative under section 101(24).

The district court in *Vitro* agreed. According to the court, because: (i) section 101(24) refers to, among other things, persons or entities "authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs," and (ii) a debtor in a commercial Mexican bankruptcy proceeding is essentially a debtor in possession, Vitro's foreign representatives need not have been formally approved by the Mexican bankruptcy court to qualify in that capacity for purposes of recognition of Vitro's bankruptcy proceeding under chapter 15.

The district court rejected the noteholders' argument that the Mexican Business Reorganization Act prohibits a debtor in possession like Vitro from appointing its own foreign representative. Even if this were so (and the court expressed some doubt on this point in light of the evidence), the court explained, "the matter of whether Sanchez-Mujica and Arechavaleta are proper foreign representatives is a matter of United States—not Mexican—law." Finally, the district court concluded that any error that may have been committed by the bankruptcy court in taking judicial notice of materials from other bankruptcy cases was harmless.

Outlook

Vitro appears to be the first published ruling on whether a foreign debtor's representative must be court-appointed to qualify as a "foreign representative" under chapter 15. Even so, the decision is consistent with other rulings that have interpreted "foreign proceeding" to encompass extra-judicial winding-up or insolvency proceedings. It also reinforces the notion that chapter 15 was designed to be flexible in providing assistance to accredited representatives of foreign debtors with assets located in the U.S. That bedrock of chapter 15 jurisprudence is especially relevant here. If the position advanced by the noteholders had been accepted by the district court, the corresponding implication would be that a Mexican company could not seek chapter 15 relief until such time as the Mexican courts had accepted the bankruptcy petition and appointed a person to act as the foreign representative. Since that process normally takes months under the Mexican Business Reorganization Act, a Mexican debtor would be unable to protect its U.S.-based assets and interests during that time, a result that would undermine the prospects for a successful reorganization in Mexico and would be squarely at odds with the purpose behind the enactment of chapter 15.

Chapter 15 continues to evolve rapidly, and *Vitro* is far from the only notable chapter 15 ruling handed down thus far in 2012—even in the same chapter 15 case. Six weeks after the district court issued its decision in *Vitro*, the bankruptcy court overseeing Vitro's chapter 15 case ruled in *In re Vitro S.A.B. de C.V.*, 2012 WL 2138112 (Bankr. N.D. Tex. June 13, 2012), that releases of nondebtor affiliates included in Vitro's Mexican reorganization plan were unenforceable as being contrary to U.S. public policy, opening the door for bondholders seeking to collect on $1.2 billion in debt for which the nondebtors were jointly liable as guarantors or direct obligors.

The June 13 *Vitro* decision, which has been appealed directly to the Fifth Circuit, would appear to be contrary to a New York bankruptcy court's decision in *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2012). In *Metcalfe*, the court, by way of "additional assistance" in a chapter 15 case involving a Canadian debtor, enforced a Canadian court's order confirming a restructuring plan that contained nondebtor releases and injunctions, even though it was uncertain whether a U.S. court would have approved the releases and injunctions in a case under chapter 7 or 11 of the Bankruptcy Code. The bankruptcy court reasoned that such uncertainty was of little consequence in the case before it, which involved not the propriety of nondebtor injunctions and releases in a plenary bankruptcy case, but rather a request to enforce a foreign judgment in a chapter 15 case. The court concluded 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."

The June 13 *Vitro* decision is also at odds with the U.S. district court's ruling in *CT Investment v. Carbonell and Grupo Costamex*, 2012 WL 92359 (S.D.N.Y. Jan. 11, 2012), in which the court, in extending comity to an order issued by a Mexican court overseeing the *concurso* of Cozumel Caribe S.A. de C.V., rejected the argument that an order issued by the Mexican court staying all collection actions during the pendency of the Mexican bankruptcy proceeding, including any actions against nondebtor affiliates to enforce a guaranty, violated U.S. public policy. The court concluded that extension of the stay to a nondebtor guarantor under the terms of the order was not "manifestly contrary" to U.S. public policy, in light of, among other things, several U.S. bankruptcy-court rulings extending the bankruptcy stay, under appropriate circumstances, to nondebtor parties in order to assist in and maintain the integrity of the administration of a debtor's bankruptcy case.

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