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CREDIT WHERE CREDIT'S DUE

19 September 2014



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Jones Day's Pedro Jimenez, Johanna Rousseaux and Jessica Mendoza take a closer look at a US court's recognition of Rede Energia's Brazilian reorganisation plan and ask what it means for other proceedings under civil law

The increasing cross-border nature of insolvency proceedings has steadily resulted in more and more countries adopting the UNCITRAL Model Law on Cross-Border Insolvency as a framework for recognising and enforcing plans of reorganisation or orders issued in foreign insolvency proceedings. In 2005, the United States adopted and codified the Model Law in the new chapter 15 of the United States Bankruptcy Code. Chapter 15 provides a foreign debtor with various tools to increase the likelihood of a successful reorganisation. One such tool is the ability to ask a US bankruptcy court to recognise and extend comity to the plan of reorganisation (and related orders) approved in the foreign insolvency proceeding as an avenue to ensure that the foreign company can proceed to execute on its reorganisation plan without the overhang of litigation from one or more creditors. Chapter 15 gives a foreign representative two avenues to obtain recognition of orders in the United States – sections 1521 and 1507 of the US Bankruptcy Code. Section 1521(a) gives the court discretion to "grant any appropriate relief" under the circumstances. Section 1507 allows a court to provide "additional assistance" to a foreign representative provided such request is "consistent with the principles of comity" and satisfies the five factors listed under section 1507(b).

The recent decision from the US Bankruptcy Court for the Southern District of New York, styled *In re Rede Energia SA*, Case No. 14-10078 (SCC) decided 27 August, exemplifies the assistance that foreign debtors often seek so as to give finality to their foreign insolvency proceeding. At issue in *Rede Energia* was whether the US bankruptcy court should recognise and extend comity to a plan of reorganisation that had been approved by a Brazilian bankruptcy court through the cram-down provisions of Brazilian bankruptcy law over the objection of certain US creditors. The foreign representative of Rede Energia asked the US bankruptcy court to recognise the Brazilian plan of reorganisation pursuant to sections 1507 and 1521. The opposing creditors, an ad hoc group of noteholders, argued that the US bankruptcy court should not enforce the Brazilian plan of reorganisation because the foreign representative was not entitled to relief under either section 1507 or 1521, or, alternatively,

that recognition under either section would run afoul of section 1506 because certain provisions of the Brazilian plan of reorganisation were manifestly contrary to US public policy.

The court granted the foreign representative's request and recognised the Brazilian plan of reorganisation under section 1521. In doing so, the court noted that, even though the relief requested is not specifically enumerated in section 1521, the court considered it to be the type of relief formerly available under section 304 and routinely granted under US law. The court also found that granting the relief requested was consistent with section 1522 because the rights of the noteholders had been, and continued to be, sufficiently protected through the appellate and other rights they maintained in the Brazilian insolvency proceeding. In reaching this conclusion, the bankruptcy court reasoned that denial of the relief requested would provide the noteholders with an additional opportunity to challenge the plan of reorganisation – effectively an end around the Brazilian insolvency proceeding.

Although the court determined relief should be granted under section 1521, it concluded recognition of the plan would also be proper as "additional assistance" under section 1507. The court found that all of the requirements of section 1507(b)(1)-(5) were met. The record indicated that creditors were given access to information and had a meaningful opportunity to be heard in the Brazilian insolvency proceeding. In addition, the court considered the distribution procedure in Brazil to be an equitable one. All noteholders who wished to appear at the creditor's meetings and vote were permitted to do so. The record failed to indicate evidence of fraudulent dispositions of property. Extending comity, the court found the proceeds to be distributed substantially in accordance with US law. With regards to the noteholders' contention that the Brazilian plan should not be recognised because certain of its provisions were inconsistent with US bankruptcy law, the court found that, despite the inconsistencies between the Brazilian cram-down provisions and the priority rules in the United States, relief could be afforded under these circumstances, noting that the foreign insolvency regime need not be identical.

The court also overruled the noteholders' contention that the Brazilian plan of reorganisation was manifestly contrary to US public policy. In doing so, the court noted that the public policy exception codified in section 1506 is to "be narrowly construed and applied 'sparingly.'" The court also gave deference to the findings of the Brazilian court and reiterated that the laws need not be identical to those of the US, finding that the procedures followed in Brazil were in compliance with fundamental standards of fairness and, thus, not contrary to US public policy.

The *Rede Energia* decision represents a significant development in the recognition by US courts of foreign proceedings under civil law, including those from Latin American countries such as Brazil. Chapter 15 jurisprudence routinely has recognised insolvency proceedings from common law jurisdictions such as Canada. The recognition of a Brazilian plan of reorganisation in this case sheds light on the willingness of US courts to find such proceedings sufficiently comparable to warrant comity in the United States, which should further assist in the efforts of Latin American debtors to successfully reorganise.