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OCEAN RIG: CHARTING A COURSE THROUGH CHAPTER 15 PROVISIONAL RELIEF, RECOGNITION, AND APPEALS

The Ocean Rig *chapter 15 proceedings produced precedent setting rulings regarding the scope of provisional relief available prior to a recognition hearing, the steps necessary to establish a debtor's COMI prior to the commencement of a foreign proceeding, and the applicability of appellate standing and equitable mootness doctrines to appeals from recognition orders. The authors discuss these issues and provide useful insights for parties involved in cross-border restructurings.*

By Evan C. Hollander and Emmanuel B. Fua *

The recent chapter 15 bankruptcy proceedings of offshore drilling contractor Ocean Rig UDW Inc. ("UDW") and three of its subsidiaries generated several precedent setting decisions under chapter 15 of title 11 of the United States Code (the "Bankruptcy Code").[1] These decisions may serve as a useful guide for distressed corporations that wish to avail themselves of foreign restructuring regimes, but face threats of hostile creditor or shareholder action in United States. The topics covered in this article include: (1) provisional relief available under chapter 15 including the automatic stay under section 362; (2) recognition, with particular emphasis on the pre-petition establishment of a debtor's center of main interests ("COMI"); and (3) appellate defense of a recognition order on prudential standing and equitable mootness grounds.

BACKGROUND

UDW is the holding company of the Ocean Rig Group, an international offshore oil drilling contractor and owner and operator of drilling rigs. UDW is also the direct parent company of Drill Rigs Holdings Inc. ("DRH"), Drillships Financing Holding Inc. ("DFH"), and Drillships Ocean Ventures Inc. ("DOV"). We refer to DOV collectively with DRH and DFH, as the "Subsidiary Debtors," and the Subsidiary Debtors collectively with UDW, as the "Debtors" or the "Ocean Rig Debtors." Prompted by a severe and prolonged oil and gas industry downturn, and substantial debt payments coming due in 2017, these four companies began considering restructuring alternatives.

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Historically, each of the Debtors was registered as a non-resident corporation in the Republic of the Marshall Islands (the "RMI"), though none ever conducted operations or directed their affairs from the RMI. In early 2017, the Subsidiary Debtors registered as foreign companies in the Cayman Islands, but remained registered as non-resident corporations in the RMI. For reasons unrelated to the restructuring, UDW redomiciled to the Cayman Islands in April 2016, where it registered as an exempted company. The Debtors opened offices and bank accounts, and conducted management operations, board meetings, and other activities in the Cayman Islands.

Over the course of several months, the Debtors negotiated the terms of a consensual restructuring with their major stakeholders. These negotiations culminated in the execution of a restructuring agreement on Thursday, March 23, 2017. The restructuring agreement contemplated that the four companies would undergo a substantial deleveraging pursuant to which more than $3.7 billion of existing financial indebtedness would be exchanged for new equity, $450 million in new secured debt, and approximately $288 million in cash. This deleveraging was to be implemented via four interrelated plans, referred to as schemes of arrangement (the "Schemes") under Cayman law.

On Friday March 24, 2017, the Debtors began the formal restructuring process by filing winding-up petitions in the Grand Court of the Cayman Islands and issuing summonses for the appointment of joint provisional liquidators (the "JPLs"). The JPLs were appointed by order of the Cayman Court on Monday, March 27, 2017. The issuance of the appointment orders triggered formal insolvency proceedings in the Cayman Islands, which in turn made it possible to file ancillary proceedings in the United States pursuant to chapter 15 of the Bankruptcy Code.

The filing of the winding-up petition in the Cayman Islands exposed the Debtors to involuntary proceedings in the United States by certain non-consenting creditors that had threatened to derail the restructuring. Therefore, immediately upon the receipt of the appointment orders on March 27, 2017, the JPLs commenced ancillary proceedings under chapter 15 in the U.S. Bankruptcy Court for the Southern District of New York and obtained a temporary restraining order from the Bankruptcy Court. The TRO prohibited creditors from, among other things, "commencing or continuing any actions against the Debtors or their property within the territorial jurisdiction of the United States" pending an *inter partes* hearing to consider extending the provisional relief to the date of a hearing scheduled for the purpose of considering whether the Bankruptcy Court should recognize the Cayman proceedings.[2]

PROVISIONAL RELIEF

Legal Background

Chapter 15 is the chapter of the Bankruptcy Code that deals with cross-border insolvencies. While chapter 15 is implicated in various other contexts, its most frequent application is in connection with the commencement in the United States of a proceeding ancillary to a plenary proceeding in a foreign jurisdiction. Unlike all of the other types of proceedings available under the Bankruptcy Code, no form of relief automatically arises upon the filing of a petition commencing an ancillary proceeding under chapter 15. In fact, unless and until the Bankruptcy Court enters an order under section 1520 of the Bankruptcy Code "recognizing" the foreign plenary proceeding as a "foreign main proceeding," no automatic, non-discretionary relief, including a stay pursuant to section 362, issues in a chapter 15 case.[3] Prior to the recognition hearing, the bankruptcy court may exercise discretionary authority in accordance with section 1519 of the Bankruptcy Code to issue a range of provisional relief "where relief is urgently needed to protect the assets of the debtor or the interests of the creditors."[4]

To obtain provisional relief under section 1519, a petitioner must satisfy "the standards, procedures, and limitations applicable to an injunction."[5] Specifically, a

[2] Technically, a chapter 15 petition is called a "petition for recognition."

[3] A bankruptcy court may also recognize a foreign proceeding as a foreign "non-main" proceeding, in which case all relief granted in the proceeding will remain discretionary.

[4] 11 U.S.C. § 1519(a).

[5] 11 U.S.C. § 1519(e).

petitioner must demonstrate (1) a likelihood that the foreign proceeding will be recognized as a foreign main or foreign non-main proceeding; (2) an imminent irreparable harm to the debtors' assets in the absence of an injunction; (3) the balance of harms tips in favor of the moving party; and (4) the public interest weighs in favor of an injunction.[6]

Provisional Relief in Ocean Rig

As noted, on the day that the Ocean Rig Debtors filed their petition for recognition in the Bankruptcy Court, the court granted a temporary restraining order and scheduled an *inter partes* hearing regarding whether to extend the provisional relief pursuant to sections 1519, 1521(a)(7), and 362 of the Bankruptcy Code through the date of the recognition hearing.[7]

In extending the provisional relief at the *inter partes* hearing, the Bankruptcy Court rejected an argument framed by the dissenting creditors as one "of first impression and of great importance to the interpretation of creditors' rights in a chapter 15 proceeding."[8] The dissenting creditors argued that bankruptcy courts lack the power and authority under chapter 15 to restrain creditors from filing involuntary petitions against debtors during the period between the commencement of a chapter 15 proceeding and the entry of a recognition order.[9] Although the Bankruptcy Court stated that the issue was not "easy," it concluded that it did have such power and authority, relying upon several out-of-circuit cases and the text of section 1519(a) itself.[10] The Bankruptcy Court reasoned that the relief enumerated in section 1519(a)(1)-(3) is not exhaustive on its face, given the use of the term "including" prior to the enumerated relief in the statute, and that such relief includes application of a stay under section 362. The Bankruptcy Court also noted that the dissenting creditors had not put forth any case law indicating that a bankruptcy court lacked such authority under section 1519(a).

Separately, the Bankruptcy Court held that the dissenting creditors had not established cause for lifting the stay, as their plain intention in filing an involuntary petition was to "stop the Cayman proceeding dead in its tracks," something the Bankruptcy Court was "not anxious to do."[11] Accordingly, the provisional relief granted by the Bankruptcy Court remained effective through the court's grant of recognition.

Insight

The provisional relief orders entered by the Bankruptcy Court clarify that the automatic stay

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[6] *In re Lyondell Chem. Co.*, 402 B.R. 571, 588-89 (Bankr. S.D.N.Y. 2009) (citation omitted); *see also In re Innua Canada Ltd.*, No. 09-16362 (DHS), 2009 WL 1020588, at *3 (Bankr. D.N.J. Mar. 25, 2009).

[7] Section 1519(a) provides:

> From the time of filing a petition for recognition until the court rules on the petition, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including — (1) staying execution against the debtors' assets; (2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative . . . ; and (3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a).

Section 1521(a)(7) provides:

> Upon recognition of a foreign proceeding, whether main or non-main, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief including — . . . (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

[8] *In re Ocean Rig UDW Inc.*, No. 17-10736-MG (Bankr. S.D.N.Y.) ("ORIG Bankruptcy Docket"), ECF No. 46 at 2.

[9] Section 1520(c) provides: "Subsection (a) does not affect the right of a foreign representative or an entity to file a petition commencing a case under this title or the right of any party to file claims or take other proper actions in such a case." Section 1520(a), in turn, lists certain relief available to a debtor upon recognition of a foreign proceeding as a "foreign main proceeding," including the application of sections 361 and 362 "with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States."

[10] ORIG Bankruptcy Court Docket, ECF No. 55 at 5-8, 14-15, 43-47, 50 (citing *In re Ran*, 607 F.3d 1017 (5th Cir. 2010); *In re Vitro, S.A.B. de C.V.*, 455 B.R. 571 (Bankr. N.D. Tex. 2011); *In re Pro-Fit Holdings Ltd.*, 391 B.R. 850 (Bankr. C.D. Cal. 2008)).

[11] ORIG Bankruptcy Court Docket, ECF No. 55 at 15 (the Bankruptcy Court stating that it was clear that the unsecured creditors were attempting to "stop the Cayman proceeding dead in its tracks by saying [they] filed a chapter 11 involuntary case, the automatic stay applies worldwide, and too bad, Cayman judge, you're stuck"); *see also id.* at 45-47 (the Bankruptcy Court reiterating its "real concern that the effect of lifting the stay and having an involuntary is to try and bollix up the Cayman proceeding, which [the Court] is not anxious to do").

pursuant to section 362 of the Bankruptcy Code is a permissible form of relief under section 1519(a), available immediately upon the filing of a chapter 15 petition to fend off a hostile creditor action, including the filing of an involuntary bankruptcy petition, within the United States. As the Bankruptcy Court ruled on the record at a hearing and "so-ordered" the transcript, a written opinion was not generated in connection with this decision (unlike the two decisions discussed below). The Bankruptcy Court's provisional relief orders, however, are available on the ORIG Bankruptcy Docket at ECF Nos. 12 (TRO) and 41 (Order Granting Provisional Relief).

RECOGNITION

Legal Background

A bankruptcy court's decision to grant recognition of a foreign insolvency proceeding as a "foreign main proceeding" or "foreign non-main proceeding" has significant implications for a foreign debtor. If the foreign proceeding is recognized as a "foreign main proceeding" under section 1520 of the Bankruptcy Code, then "certain automatic, non-discretionary relief" applies, including the imposition of the automatic stay under section 362 to protect the debtor and its property within the territorial jurisdiction of the United States.[12] Other forms of available relief may be issued at the discretion of the court as well. All of the relief available with respect to a foreign main proceeding is also available if the bankruptcy court recognizes the foreign proceeding as a "foreign non-main proceeding" under section 1521 of the Bankruptcy Code.[13] In the case of a proceeding ancillary to a foreign non-main proceeding, however, no form of automatic relief shall issue upon recognition.[14]

To obtain a recognition order in the Second Circuit, a foreign debtor must satisfy the debtor eligibility requirements set forth in section 109(a) of the Bankruptcy Code, as well as the recognition requirements set forth in section 1517(a).[15] Section 109(a) provides that "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." Section 1517(a), in turn, requires that: (1) the foreign proceeding[16] either be a foreign main or foreign non-main proceeding; (2) "the foreign representative applying for recognition is a person or body"; and (3) "the petition meets the requirements of section 1515." Although the Bankruptcy Court made detailed findings that each of these requirements was met, this article focuses on one of the more heavily litigated recognition requirements: whether a foreign insolvency proceeding qualifies as a "foreign main proceeding."

A "foreign main proceeding" is a "foreign proceeding pending in the country where the debtor has the center of its main interests."[17] COMI is not defined in the Bankruptcy Code. Section 1516(c), however, provides that, "[i]n the absence of evidence to the contrary, the debtor's registered office . . . is presumed to be the center of the debtor's main interests." Moreover, courts have identified certain factors that may be considered in analyzing a debtors' COMI, including:

> the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the

[12] 11 U.S.C. § 1520(a); *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 133 (2d Cir. 2013).

[13] A "foreign non-main proceeding" is a foreign proceeding in any jurisdiction where the debtor maintains an "establishment" (*i.e.*, a jurisdiction where the debtor conducts "non-transitory economic activity"). 11 U.S.C. §§ 1502(2), 1502(5).

[14] 11 U.S.C. § 1521(a).

[15] *In re Ocean Rig UDW Inc.*, 570 B.R. 687, 698 (Bankr. S.D.N.Y. 2017); *In re Barnet*, 737 F.3d 238, 247-51 (2d Cir. 2013); *see also In re Forge Group Power Pty Ltd.*, No. 17-cv-02045-PJH, 2018 WL 827913, at *11 (N.D. Cal. Feb. 12, 2018) (following *Barnet*). Not all courts, however, have ruled that compliance with section 109(a) is a prerequisite for recognition. *See, e.g., In re Bemarmara Consulting A.S.*, No. 13-13037-KG, ECF No. 38, at 8-9 (Bankr. D. Del. Dec. 13, 2017) (disagreeing with *Barnet* and predicting that the Third Circuit would disagree as well). Commentators have similarly disagreed with the Second Circuit on this point. *See, e.g.*, COLLIER ON BANKRUPTCY ¶ 1501.03 (16th ed. 2017).

[16] A "foreign proceeding" refers to "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." 11 U.S.C. § 101(23).

[17] 11 U.S.C. § 1502(4); *see also* 11 U.S.C. § 1517(b)(1).

> jurisdiction whose law would apply to most disputes.[18]

As the Bankruptcy Court recognized, these factors merely constitute a "helpful guide" in a COMI analysis. They are not exhaustive, and none is required or dispositive. Finally, courts consider whether the debtors' alleged COMI "would have been ascertainable to third parties."[19]

In assessing the various COMI factors, courts generally look to the factors as they existed on the date that the chapter 15 petition was filed, "without regard to the debtor's historic operational activity."[20] If a debtor has shifted its COMI prior to filing its chapter 15 petition, however, "courts may engage in a more holistic analysis to ensure that the debtor has not manipulated COMI in bad faith."[21]

Recognition in Ocean Rig

Although the dissenting creditors ultimately dropped their objection to recognition and refocused their efforts on attacking the Schemes in the Cayman Court, a purported shareholder of UDW subsequently objected to recognition on numerous grounds. The purported shareholder argued that venue was improper in the Southern District of New York, that the Debtors failed to meet their burden of proving that their COMI was in the Cayman Islands, that the Debtors improperly manipulated their COMI, and that granting recognition would violate the public policy objectives of chapter 15.[22]

Accordingly, an evidentiary hearing on the issue of recognition was held. The hearing lasted one day and included direct testimony by declaration, live cross-examination, and the admission of numerous documents into evidence. Following the hearing, the Bankruptcy Court issued a memorandum opinion overruling each of the asserted objections and granting recognition of the Debtors' Cayman proceedings as "foreign main proceedings."

Upon consideration of the evidence in the record, the Bankruptcy Court found that the Ocean Rig Debtors' COMI "was clearly the Cayman Islands before and on the Petition Date (March 27, 2017)" and "remains there today."[23] In so finding, the Bankruptcy Court determined that the Debtors had proven by a preponderance of the evidence that they:

> (i) conduct their management operations in the Cayman Islands, (ii) have offices in the Cayman Islands, (iii) hold their board meetings in the Cayman Islands, (iv) have officers with residences in the Cayman Islands, (v) have bank accounts in the Cayman Islands, (vi) maintain their books and records in the Cayman Islands, (vii) conducted restructuring activities from the Cayman Islands, (viii) provided notices of relocation to the Cayman Islands to paying agents, indenture trustees, administrative and collateral agents, and investment service providers, and (ix) filed a Form 6-K with the SEC showing that their office was in the Cayman Islands.[24]

The Bankruptcy Court further observed that only one Debtor, UDW, was registered in the Cayman Islands (having obtained such registration in April 2016, approximately a year before the Petition Date). As discussed above, the other Debtors were registered as non-resident corporations in the RMI, the country in which UDW was registered prior to April 2016. These considerations did not, however, sway the Bankruptcy Court's opinion. First, the Bankruptcy Court concluded that each of the Debtors had "engaged in various activities supporting their COMI in the Cayman Islands for almost a year," and found that such activity, over that one-year timeframe, was sufficient to establish COMI as of the Petition Date.[25] Second, the Bankruptcy Court held that it did not matter that the Subsidiary Debtors were RMI corporations given their Cayman Islands

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[18] *In re Ocean Rig*, 570 B.R. at 703 (citations omitted).

[19] *Id.*

[20] *Id.* at 704.

[21] *Id.*

[22] This article refers to the objecting party as a "purported shareholder" because the Bankruptcy Court found that the objecting party "offered no evidence at trial to support [the] contention" that she was in fact a shareholder, and therefore "failed to establish that she is a party-in-interest with standing to contest recognition." *In re Ocean Rig*, 570 B.R. at 691-92. The Bankruptcy Court nonetheless treated the purported shareholder's objection as if she had established standing, and ruled on the merits of her arguments, given the Bankruptcy Court's obligation to find that recognition was warranted. *Id.* at 692.

[23] *In re Ocean Rig*, 570 B.R. at 705.

[24] *Id.* at 704.

[25] *Id.*

activity; it noted that the presumption that COMI lies at the situs of the debtor's registered office is both "rebuttable and should only be invoked '[i]n the absence of evidence to the contrary.'"[26] The Bankruptcy Court further noted that the Subsidiary Debtors were also registered as foreign companies in the Cayman Islands and that their business was managed from the Cayman Islands. Finally, the Bankruptcy Court held that there was no evidence of any other potential location for the Debtors' COMI.[27]

The Bankruptcy Court next considered whether the Ocean Rig Debtors had manipulated their COMI to the Cayman Islands in bad faith. Despite finding that the Debtors had "purposefully" established their COMI in the Cayman Islands, the Bankruptcy Court found that their actions were taken in good faith and for legitimate reasons. In particular, the Bankruptcy Court observed that, as stipulated by the parties, the RMI "does not have a statute or any procedures permitting reorganization," and that the only provisions under RMI law addressing financially distressed corporations "contemplate dissolution and, therefore, any insolvency process in the RMI would invariably result in a value-destroying liquidation process."[28] The Cayman Islands, on the other hand, "does have statutory laws and procedures permitting restructuring."[29] Specifically, Cayman law permits restructuring of financial debt through schemes of arrangement, which share similarities to chapter 11 plans under the Bankruptcy Code. For example, a Cayman scheme classifies creditor claims with other similarly situated claims, and then certain approval thresholds are applied to determine whether a class has approved that scheme.

Accordingly, the Bankruptcy Court held that the Debtors' intentional establishment of their COMI in the Cayman Islands "was done for proper purposes to facilitate a value-maximizing restructuring of the [Ocean Rig] Debtors' financial debt," which was intended "to maximize value for [the Debtors'] creditors and preserve [the Debtors'] assets."[30] Additionally, the Bankruptcy Court noted that the Debtors "acted prudently in exploring their restructuring alternatives" and that their directors "properly concluded that changing their COMI to the Cayman Islands, and, if necessary, commencing restructuring proceedings there, and also commencing chapter 15 proceedings in the U.S., offered them the best opportunity for successful restructuring and survival under difficult financial conditions."[31]

Insight

This holding is significant for at least two reasons. First, all prior COMI-shifting opinions involved situations in which the chapter 15 proceedings were commenced well after the foreign plenary proceedings were commenced. In those cases, the courts' COMI determinations were based upon the administration of the foreign plenary proceedings in the foreign jurisdiction prior to filing the chapter 15 proceedings.[32] In *Ocean Rig*, however, the court's finding of COMI in the Cayman Islands was premised upon the activities undertaken by the *debtors* in the Cayman Islands prior to the commencement of the foreign plenary proceedings in that jurisdiction. Thus, *Ocean Rig* is important precedent for situations in which the chapter 15 case must be filed simultaneously with the foreign plenary proceeding in order to obtain injunctive relief in the United States to stay hostile creditor action intended to derail the foreign restructuring. Second, *Ocean Rig* is significant in that it found that the establishment of a debtor's COMI in a jurisdiction with a value-preserving restructuring regime constitutes a good-faith basis for shifting a debtor's COMI.

DISMISSAL OF APPEAL OF RECOGNITION ORDER

After the Bankruptcy Court issued its recognition order, the purported shareholder noticed an appeal to the U.S. District Court of the Southern District of New York. In an April 2018 memorandum opinion and order,

[26] *Id.* at 705; *see also In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 335 (S.D.N.Y. 2008) ("However, section 1516(c) creates no more than a rebuttable evidentiary presumption, which may be rebutted notwithstanding a lack of party opposition. . . . Such a rebuttable presumption at no time relieves a petitioner of its burden of proof/risk of non-persuasion."); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48-49 (Bankr. S.D.N.Y. 2008) (declining to presume that the debtor's COMI is where its registered office is located because there was enough "evidence to the contrary" to rebut section 1516(c)).

[27] At one point, UDW had maintained an office in Cyprus (which had closed) and conducted board meetings from that jurisdiction. The Subsidiary Debtors had not previously maintained an office but had historically conducted their board meetings from the Bailiwick of Jersey.

[28] *In re Ocean Rig*, 570 B.R. at 694, 707.

[29] *Id.* at 694.

[30] *Id.* at 703, 707.

[31] *Id.* at 695.

[32] *See, e.g.*, *In re Creative Finance Ltd.*, 543 B.R. 498, 519-20 (Bankr. S.D.N.Y. 2016); *In re Suntech Power Holdings Co.*, 520 B.R. 399, 417-18 (Bankr. S.D.N.Y. 2014).

U.S. District Judge John G. Koeltl dismissed the appeal, holding that the appellant lacked standing and that the appeal was equitably moot.[33]

Significantly, although the appellant noticed an appeal of the recognition order, she did not seek a stay of that order. Thus, the Debtors moved forward with their restructuring via the Schemes. Under the Schemes, existing shareholders of UDW retained a nominal amount of equity in the reorganized UDW (0.02%), but this token amount was provided, *inter alia*, to facilitate UDW's ability to maintain its NASDAQ listing and was not an indication of UDW's solvency; in fact, the indicative value of the consideration distributed to the scheme creditors was significantly less than the face amount of their claims.

Appellant did not object to the provisional liquidation proceedings or the Schemes, which were later sanctioned (*i.e.*, approved) by the Cayman Court, and did not object to the request in the chapter 15 proceedings for entry of an order giving full force and effect to the Schemes in the United States (the "Enforcement Order"). Promptly upon the Bankruptcy Court's issuance of the Enforcement Order, the Debtors consummated the restructuring in accordance with the Schemes.

Thereafter, the Debtors and their authorized foreign representative moved to dismiss the appeal, arguing that the appellant's purported shareholder status was insufficient to convey appellate standing, and that in any event, the appeal had been rendered equitably moot by the consummation of the restructuring. The District Court granted the motion on both grounds.

Standing

As to standing, the District Court reiterated the two-pronged standard that the appellant in a bankruptcy case (1) must be an "aggrieved person" whose pecuniary interests are directly affected by the order at issue and (2) must have "prudential standing," in that he or she is asserting his or her "own legal rights and interests and not those of third parties." In discussing the latter prong, the District Court observed that "[p]rudential standing is particularly important in a bankruptcy context where one party may seek to challenge the plan based on the rights of third parties who favor the plan."[34]

The District Court held that the appellant, a purported shareholder, was not an "aggrieved person" because she "did not stand to lose anything" from UDW's restructuring. The District Court reasoned that UDW was insolvent prior to initiating restructuring proceedings in the Cayman Islands, and that UDW's Cayman Scheme had the effect of sending the "total value of UDW, represented by the new equity" to "UDW's creditors pro rata, with no value left for its pre-restructuring shareholders." Thus, the appellant lacked the requisite pecuniary interest.[35]

Additionally, the District Court rejected the appellant's argument that she had a pecuniary interest in the restructuring because UDW's Scheme enabled UDW's pre-restructuring shareholders to retain 0.02% of the company's restructured equity. Upon observing that UDW's Scheme was constructed in that manner "in an effort to avoid having to re-register UDW's shares on the NASDAQ, which would have 'adversely affected' the newly issued shares" — rather than because the pre-restructuring shareholders were actually entitled retain a portion of the company's equity based upon an economic interest in the company — the District Court held that the shares were merely "gifts" from UDW's creditors. The District Court then concluded that the nominal distribution of new equity to pre-existing shareholders did not suggest that the Debtors were solvent, and did "not change the fact that the appellant was not entitled to receive anything as part of the debtors' restructuring because the debtors' creditors had not received the full portion of their claims."[36]

The District Court further observed that while under the Second Circuit's decision in *In re DBSD N. Am., Inc.*,[37] a dissenting class of unsecured creditors in a chapter 11 case "may have standing to challenge such 'gifts' to shareholders," appellant had provided no authority for the contention that the receipt of such a gift "provide[d] the recipient shareholders with standing to contest the restructuring."[38]

Equitable Mootness

The District Court also held that dismissal was warranted on equitable mootness grounds, which it considered an independent and "additional reason" for dismissal. Although the District Court recognized that

[33] *In re Ocean Rig UDW Inc.*, No. 17-cv-7222 (JGK), --- B.R. ----, 2018 WL 1725223 (S.D.N.Y. Apr. 6, 2018).

[34] *Id.* at *3.

[35] *Id*.

[36] *Id.* at *4.

[37] 634 F.3d 79, 95 (2d Cir. 2011).

[38] *Ocean Rig*, 2018 WL 1725223, at *4.

the doctrine of equitable mootness originated in chapter 11 of the Bankruptcy Code, it noted that the doctrine had since been imported and applied in cases under chapters 7, 9, and 13, as well as in a case involving former Bankruptcy Code section 304, the predecessor statute to Chapter 15.[39] The District Court found "unpersuasive" appellant's argument that equitable mootness cases under chapter 11 and former Bankruptcy Code section 304 have no force in the chapter 15 context, reasoning that the same "principles of finality and fairness" that pertain to "domestic reorganizations" and the same "concerns of comity" that animated former section 304 apply in the chapter 15 context.[40]

The District Court thus applied the Second Circuit's equitable mootness standard established under *In re Chateaugay, Corp.* to this chapter 15 appeal. Under that standard, "when a reorganization has been substantially consummated, there is a 'strong presumption' that an appeal of an unstayed order is moot."[41] Such presumption may only be overcome if five circumstances are present:

> (a) the court can still order some effective relief; (b) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity; (c) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court; (d) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; and (e) the appellant pursue with diligence all available remedies to obtain a stay of execution of the objectionable order . . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.[42]

In setting forth the *Chateaugay* standard, the District Court emphasized the importance of the appellant seeking a stay of the order at issue, citing "fairness concerns" that arise from attempts to undo a reorganization that has already been substantially completed.

In applying this standard, the District Court first observed that the appellant did not seek a stay of the Bankruptcy Court's recognition order. It then found that appellees had "argue[d] persuasively" that, on their restructuring effective date, their positions had "comprehensively changed" and their "Cayman reorganization ha[d] been substantially completed." In particular, the District Court noted that the Debtors had "issued new equity and made cash distributions to creditors and entered into a new secured debt facility, as well as a long-term management services agreement." Given this change of circumstances, the District Court held there was a "strong presumption" that the appeal was moot on the ground that "the debtors' reorganization ha[d] already been substantially completed." As the appellant failed to persuade the District Court that this "strong presumption" was overcome, the District Court dismissed her appeal as equitably moot.[43]

Insight

The District Court's opinion is the first to apply the doctrine of equitable mootness in the chapter 15 context. Moreover, it re-emphasizes the importance of seeking a stay in prosecuting an appeal of a bankruptcy order. The opinion is also unique in that it recognizes that the receipt of a token gift by shareholders through a foreign restructuring of an insolvent debtor does not convey standing on the shareholders to appeal chapter 15 relief.

CONCLUSION

The decisions issued in the *Ocean Rig* chapter 15 proceedings serve as useful guidance for distressed corporations with assets and creditors in the United States, that wish to avail themselves of a foreign restructuring regime. The provisional relief decision illustrates that an automatic stay may be imposed immediately upon the filing of a chapter 15 petition (and may enjoin a creditor-initiated involuntary filing), which may be of particular importance to debtors wishing to fend off hostile creditor action within the United States while undergoing a foreign restructuring. The recognition decision demonstrates that a conscious pre-filing establishment of a debtor's COMI may be acceptable where the chosen jurisdiction embraces a value-maximizing restructuring regime. And finally, the recognition appeal decision confirms that traditional equitable mootness principles apply in the chapter 15 context and that a shareholder of an insolvent company will lack standing to pursue an appeal even if provided with some token gift as part of a restructuring. ■

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[39] *Id.* (citing, *e.g.*, *Allstate Ins. Co. v. Hughes*, 174 B.R. 884 (S.D.N.Y. 1994) (Sotomayor, J.)).

[40] *Id.* at *6.

[41] *Id.* at *5 (collecting cases).

[42] *Id.* (quoting Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay, Corp.), 10 F.3d 944, 952-53 (2d Cir. 1993)).

[43] *Id.*