COMI Chameleon[1]: Is "COMI Manipulation" in Chapter 15 a Ballooning Problem?

By Steven W. Golden and Brooke E. Wilson

Chapter 15 of the Bankruptcy Code was adopted in 2005 and implemented by the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency in the U.S. "'so as to provide effective mechanisms for dealing with cases of cross-border insolvency,' while promoting international cooperation, legal certainty, fair and efficient administration of cross-border insolvencies, protection and maximization of debtors' assets, and the rescue of financially troubled businesses."[2] Under chapter 15, a bankruptcy court is obligated (subject to the other requirements set forth in chapter 15) to enter an order recognizing a foreign proceeding as a "foreign main proceeding" where the foreign proceeding is pending in the country where the foreign debtor has its center of main interests (COMI).[3]

As a result of such recognition, certain powerful relief is automatically available to the foreign debtor (such as the imposition of the automatic stay within the territorial jurisdiction of the U.S.).[4] The bankruptcy court has the discretion to grant "any appropriate relief" that is "necessary to effectuate the purpose [of chapter 15] and to protect the assets of the debtor or the interests of the creditors."[5]

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Although chapter 11 of the Bankruptcy Code has long been viewed as the "gold standard for resolving financial distress,"[6] insolvency laws in other countries — including the U.K., the Netherlands, Germany and Singapore — have implemented alternative regimes that offer some tools not available to chapter 11 debtors. For example, an English scheme of arrangement, which only needs to involve directly affected creditors, allows for a speedy restructuring of contractual arrangements (*e.g.*, funded debt) by allowing for 75 percent of holders to bind the minority holders to a change in contractual terms — something not permitted in the U.S.[7] Moreover, English schemes of arrangement permit third-party releases "where such a compromise is 'necessary in order to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors.'"[8]

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As a result, both courts[9] and commentators[10] have expressed increasing concern that a company could manipulate its COMI to manufacture a foreign main proceeding in a specific country, thereby availing itself of the unique tools of a specific country's insolvency regime and circumventing perceived restrictions of the Bankruptcy Code.[11] In *In re Mega Newco*,[12] the U.S. Bankruptcy Court for the Southern District of New York recently faced such a case of COMI manipulation.[13]

Mega Newco: "Laudable" COMI Manipulation

Mega Newco Ltd., the foreign debtor, was a wholly owned subsidiary of parent Mexican financial services company Operator de Services Mega, S.A. de C.V., Sofom, E.R. The parent and other subsidiaries of the parent were based and headquartered in Mexico with branches across Mexico and one additional office in San Diego. Thus, for all intents and purposes, the enterprise group was a Mexican business operating almost entirely within Mexico.[14]

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In 2020, the parent issued a set of notes (the "U.S. notes") under an indenture that was governed by New York law. In 2024, the parent needed to restructure its obligations under the U.S. notes and negotiated terms of a possible restructuring with an *ad hoc* group of approximately 25 percent of the holders of the U.S. notes. However, the proposed restructuring of the U.S. notes posed logistical issues: The U.S. notes had to be

1 With apologies to Culture Club.
2 *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 132 (2d Cir. 2013) (quoting 11 U.S.C. § 1501(a)).
3 11 U.S.C. § 1517(b)(1).
4 11 U.S.C. § 1520(a).
5 11 U.S.C. § 1521(a).
6 Bruce A. Markell, "The International Two-Step: Recognizing Domestic Chapter 15 Reorganizations," 98 *Am. Bankr. L. J.* 1, 4 (2024).
7 *See id.* at 10-11.
8 *Re Haya Holdco 2 Plc*, [2022] EWHC (Ch) 1079 at [38] (Eng.) (quoting *Re Lehman Bros. Int'l*, [2009] EWCA Civ. 1161).
9 *See, e.g., Fairfeld Sentry*, 714 F.3d at 135 (discussing *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1026 (5th Cir. 2010)); *In re Intercement Brasil S.A.*, 668 B.R. 802, 819 (Bankr. S.D.N.Y. 2025).
10 *See e.g.*, Markell, *supra* n.6; Anthony J. Casey & Joshua C. Macey, "Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars," 37 *Emory Bankr. Dev. J.* 463 (2021).
11 In this article, the authors refer to the deliberate creation of COMI in a particular country for the sole intent of commencing a plenary proceeding in such jurisdiction as "COMI manipulation." This terminology is intended to contrast with what is frequently referred to as "forum-shopping," which is when a company has existing options of where it could commence a plenary proceeding under applicable laws. The use of these terms are not intended to evoke any connotation (pejorative or otherwise), but rather to distinguish between different factual situations.
12 No. 24-12031, 2025 Bankr. LEXIS 398 (Bankr. S.D.N.Y. Feb. 24, 2025).
13 2025 Bankr. LEXIS 398, at *5 ("The papers submitted to the English Court made clear that Mega Newco was created for the purpose of enabling the English Court to take jurisdiction over the proposed scheme of arrangement.").
14 *Id.* at *2; *see also* Verified Petition for (I) Recognition of Foreign Proceeding, (II) Recognition of Foreign Representative, (III) Recognition of Sanction Order and Related Scheme and (IV) Related Relief Under Chapter 15 of the Bankruptcy Code, No. 24-12031 (Bankr. S.D.N.Y. Nov. 25, 2024), ECF No. 2, ¶¶ 4-5.

restructured through a bankruptcy proceeding because without one, the parent required the affirmative consent of 100 percent of the holders of the U.S. notes (an essentially impossible task) to effectuate the restructuring, and the parties wanted "a surgical restructuring" of only the U.S. notes.[15] Given these constraints, the parties set their eyes on pursuing a scheme of arrangement under English law, which would allow all parties to propose a scheme of arrangement that just dealt with a single set of note obligations.[16]

Accordingly, approximately 45 days before Mega Newco filed papers to commence a scheme of arrangement proceeding in the High Court of Justice Business and Property Courts of England and Wales, Mega Newco was incorporated under the laws of England and Wales, listing a registered office with an address in London.[17] Mega Newco was incorporated for the sole purpose of commencing the English scheme proceeding and proposing a scheme of arrangement to restructure the U.S. notes in accordance with the parties' agreement.[18] The scheme was approved unanimously by those who voted (more than 75 percent of the holders of the U.S. notes), and no objections were filed with the English court.[19]

While the English scheme proceeding was pending, Mega Newco filed a petition under chapter 15 in the U.S. Bankruptcy Court for the Southern District of New York. Mega Newco sought recognition of the English scheme proceeding and enforcement, in the U.S., of the order entered by the English court approving Mega Newco's scheme.[20] Mega Newco "represented to the English Court that it has never engaged in any business, let alone any market-facing activities that it conducted from a location in the U.K.," sufficient to show the existence of an "establishment" in England.[21]

Thus, as to the recognition of the English scheme proceeding under chapter 15 of the Bankruptcy Code, the issue before Hon. **Michael E. Wiles** was whether the English scheme proceeding was a "foreign main proceeding" taking place where Mega Newco has its COMI.[22]

Given that "[c]hapter 15 is premised on the idea that a debtor who seeks to restructure an obligation is actually the subject of a foreign proceeding, and that the foreign proceeding is located in the country where that debtor has its COMI," the court noted that the "whole structure" in Mega Newco's restructuring was created for restructuring the parent's obligations. However, the parent's COMI was in Mexico, and the parent was not party to the English scheme proceeding.[23] In light of the admitted COMI manipulation, the court expressed concern over the "significant risks" of recognizing the English scheme proceeding as a foreign main proceeding:

> If we were routinely to allow this structure in all cases, no matter what the circumstances, the ordinary predicates for Chapter 15 relief could be stripped of meaning. Any debtor company could restructure its obligations anywhere it chose without even subjecting itself to a foreign proceeding. All that a debtor would need to do is to form a new subsidiary in a jurisdiction of its choice and then cause that new subsidiary to assume the parent company's obligations. The parent company's COMI would no longer be relevant to the parent's restructuring of its debts. The laws of the chosen jurisdiction would govern a restructuring, no matter how those laws might affect the legitimate expectations of creditors and regardless of whether the debtor had chosen a particular jurisdiction for the purpose of favoring insiders or for other improper reasons.[24]

Considering the facts of the case, Judge Wiles framed the issue before him as follows: "[D]oes the underlying structure in this case constitute an improper manipulation of COMI?"[25] In addition, "should [the court] disregard the form of the transactions and disregard the participation by Mega Newco, and look instead to whether the Parent, on its own, has satisfied the conditions for relief under Chapter 15?"[26]

Although the court recognized that the structure of the enterprise group's restructuring "could be used in another case as a way of frustrating and thwarting the legitimate expectations of creditors,"[27] Mega Newco did no such thing. Quite to the contrary, Judge Wiles commented that the scheme was pursued for "laudable objectives."[28]

Rather than frustrate creditors' expectations, the whole process "was worked out with the involvement and consent of the affected creditors."[29] "Ironically," the court noted, "the only thing that would thwart creditor expectations in the case before me would be if I were to decline to enforce the English Court Order."[30]

Is COMI Manipulation Becoming a Problem?

With respect to recognition of foreign main proceedings under chapter 15 of the Bankruptcy Code, the oft-repeated specter of a debtor's "bad-faith COMI manipulation"[31] is, at least today, largely theoretical.[32] In *Mega Newco*, the foreign debtor's COMI manipulation was far from bad faith; it was a deliberate and consensual restructuring of

15 *Mega Newco*, 2025 Bankr. LEXIS 398, at *3-4.
16 *Id.* at *3.
17 *Id.* at *4-5.
18 *Id.*; *see* Verified Petition, *supra* n.14 at ¶ 11.
19 *Mega Newco*, 2025 Bankr. LEXIS 398, at *6.
20 *Id.* at *5.
21 *Id.* at * 7.
22 *Id.* at *7-9.
23 *Id.* at * 8-9.
24 *Id.* at * 8-10.
25 *Id.* at *10.
26 *Id.*
27 *Id.* at *11.
28 *Id.*
29 *Id.*
30 *Id.* at *12.
31 *Fairfield Sentry*, 714 F.3d at 135.
32 *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169 (Bankr. S.D.N.Y. 2017), perhaps presents the closest that a U.S. court has come to declining to recognize a foreign proceeding due to alleged bad-faith COMI manipulation. However, in *Oi Brasil*, it was a creditor — not the debtor — that allegedly engaged in COMI manipulation.

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a portion of the enterprise group's financial (as opposed to operational) debt that used legal mechanisms that would have been unavailable under a plenary chapter 11 proceeding.

With other countries' implementation of increasingly robust restructuring regimes occurring at the same time that less relief is available to chapter 11 debtors,[33] some believe that it is only a matter of time before a U.S. bankruptcy court is faced with a contested case of COMI manipulation in connection with chapter 15 recognition. How a bankruptcy court would approach a hotly disputed case of a debtor's COMI manipulation remains to be seen, but what is clear is that bankruptcy judges are ever vigilant about such a possibility, and appropriately approach even "laudable" cases of COMI manipulation with care. abi

33 *See, e.g., Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024).