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WHITE PAPER

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Chapter 15 Recognition Is No Rubber Stamp: Recent Trends Regarding Foreign Main and Nonmain Recognition

The number of complex cross-border restructurings continues to rise as the various economies of the world become more integrated. A growing contingent of countries has enacted sophisticated restructuring regimes or refined existing statutory structures offering distressed companies and their lenders foreign restructuring alternatives other than, or in addition to, U.S. chapter 11 to effectuate a worldwide balance sheet restructuring. This trend has resulted in an uptick in filings under chapter 15 of the U.S. Bankruptcy Code to obtain recognition of foreign restructuring proceedings, plan confirmation orders, and additional relief applicable to assets located in the United States.

This *White Paper* highlights certain of the advantages of pairing a foreign restructuring proceeding with chapter 15 recognition while examining recent trends emphasizing that access to chapter 15 relief is far from a rubber stamp. Indeed, debtors seeking to obtain chapter 15 recognition for a foreign proceeding must carefully navigate the Bankruptcy Code's recognition provisions, in addition to the legal requirements in the "primary" foreign proceeding, in order to implement a comprehensive restructuring. These aspects are examined in the context of actual case examples illustrating the burden a foreign representative must satisfy to qualify for chapter 15 relief.

INTRODUCTION

The number of complex cross-border restructurings continues to rise as the various economies of the world become more integrated. A growing contingent of countries has enacted sophisticated restructuring regimes—including Germany and the Netherlands—or refined existing statutory structures—the United Kingdom and Singapore—with distressed companies and their lenders increasingly turning to such foreign restructuring alternatives other than or in addition to U.S. chapter 11 to effectuate a worldwide balance sheet restructuring. This trend has resulted in an uptick in U.S. chapter 15 filings to obtain recognition of foreign restructuring proceedings, plan confirmation orders, and additional relief applicable to assets located in the United States.

Indeed, pairing a foreign restructuring proceeding with chapter 15 recognition can achieve worldwide coverage and enforcement against actions seeking to disturb a debtor's U.S. assets while still typically resulting in fewer expenses than in a traditional chapter 11 restructuring. What's more, a foreign restructuring coupled with chapter 15 recognition can result in a one-two punch of benefits: Debtors can obtain relief that may not be as readily available in the United States, such as third-party releases, while preserving access to U.S. tools that may not be present in the foreign jurisdiction, such as robust discovery, free and clear asset sales, avoidance actions, and, in certain circumstances, debtor-in-possession financing and rejection or assumption of executory contracts.

Restructuring abroad supplemented with a chapter 15 filing can also avoid the need for certain chapter 11 procedural elements—such as the requirement under chapter 11 that each debtor entity be a debtor under chapter 11 individually, that an official creditors' committee be appointed, that professional retention and fee applications be filed, etc.—that result in additional complexity, duration, and expense. As indicated by recent chapter 15 cases, however, chapter 15 recognition is no rubber stamp. Debtors seeking to obtain recognition for a foreign proceeding must carefully navigate both the legal requirements in the "primary" foreign proceeding, whose standards may differ from U.S. standards for justification of the relief requested, along with the Bankruptcy Code's recognition provisions in order to implement a comprehensive restructuring.

CHAPTER 15 RECOGNITION REQUIREMENTS AND JUDICIAL LANDSCAPE

Requirements

Section 1515 of the Bankruptcy Code (11 U.S.C. § 1515) permits the debtor's foreign representative to file a petition in a U.S. bankruptcy court for recognition of a "foreign proceeding." In the context of chapter 15, a debtor is an entity that is the "subject of" a foreign proceeding. 11 U.S.C. § 1502. Importantly, section 1517(a) outlines that recognition under chapter 15 requires that the foreign proceeding must be "a foreign main proceeding or foreign nonmain proceeding" within the meaning of section 1502.

A proceeding qualifies as a foreign "main" proceeding if it is pending in the country in which the foreign debtor's center of main interests ("COMI") is located. 11 U.S.C. § 1502(4). Generally, a corporate debtor's COMI is presumed to be the location of its registered office. 11 U.S.C. § 1516(c). It is a rebuttable presumption, however, and if rebutted, a court may evaluate the location of the debtor's headquarters, actual managers, primary assets, creditors, and the jurisdiction whose law applies in most disputes, among other factors. *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007). A foreign "nonmain" proceeding, on the other hand, is one in which the debtor has only an "establishment" in the country in which its case is pending. 11 U.S.C. § 1502(5). A debtor has an establishment anywhere it "carries out a nontransitory economic activity." 11 U.S.C. § 1502(2). Courts have held that, for a debtor to have nontransitory economic activity, it must have "a seat for local business activity" in the relevant foreign country and engage in activity that has a "local effect on the marketplace," more than mere incorporation, recordkeeping, or maintenance of the property. *In re Creative Fin. Ltd.*, 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016).

As the statutes and relevant precedent make clear, determining whether foreign main or foreign nonmain recognition is warranted is a fact-specific exercise, and foreign representatives must closely analyze the operations of an entity to assess holistically whether chapter 15 recognition is a viable option. Although, as discussed below, somewhat disparate jurisprudence exists within certain U.S. restructuring venues, foreign representatives continue to seek creative use of chapter 15 recognition, and courts appear relatively united in requiring that a robust factual justification be present.

Once obtained, chapter 15 recognition of a foreign proceeding unlocks a host of protections under the U.S. Bankruptcy Code, and courts are increasingly scrutinizing requests for chapter 15 recognition to ensure these benefits are actually justified and warranted. *See*, *e.g.*, *In re Servicos de Petroleo Constellation S.A.*, 613 B.R. 497, 500 (Bankr. S.D.N.Y. 2020); *In re Servicos de Petroleo Constellation S.A.*, 600 B.R. 237, 293 (Bankr. S.D.N.Y. 2019).

Judicial Landscape Regarding Recognition of Foreign Proceedings

U.S. jurisdictions can vary in their willingness to recognize foreign proceedings for U.S. domiciled entities. In addition to examining the foreign proceeding itself, courts consider the assets, operations, and structure of companies to verify that a foreign proceeding merits chapter 15 recognition as to each entity. The following cases illustrate the recognition process in action and provide examples of how jurisdictions may differ in determining whether recognition of a foreign proceeding for a U.S. entity is permissible.

In *In re Mood Media Corp.*, the U.S. Bankruptcy Court for the Southern District of New York concluded that certain U.S. subsidiaries of a foreign company neither qualified as foreign debtors nor as having an "establishment" in the foreign jurisdiction for purposes of chapter 15. 569 B.R. 556 (Bankr. S.D.N.Y. 2017). Mood Media Corporation, a Canadian company, and its 14 U.S. subsidiaries sought chapter 15 recognition for a Canadian court proceeding commenced under Section 192 of the Canadian Business Corporations Act ("CBCA"). *Id.* at 558. The court accepted that the Canadian proceeding should be recognized as a foreign main proceeding as to the parent company, Mood Media, which, according to the court, had its COMI in Canada. *Id.* at 561. But the court refused recognition for the U.S. subsidiaries, even if construed as a foreign nonmain proceeding. *Id.* at 563.

First, the court concluded that the U.S. subsidiaries were not debtors for purposes of chapter 15, i.e., such subsidiaries were not entities that were subject to the foreign proceeding. *Id.* at 561. The court held that a debtor under chapter 15 "is the company whose restructuring or liquidation is the subject of the foreign proceeding." *Id.* at 560–61. The court found that only the parent company had applied for the commencement of the Canadian proceeding and that the relevant court orders made only passing references to the subsidiaries. *Id.* at 559. On the contrary, the reorganization almost exclusively consisted of the parent company's restructuring and replacement of notes and common stock. The ultimate restructuring did not affect the assets or operations of the U.S. companies and required noteholders of Mood Media only to release guarantees against the subsidiaries. *Id.* The court found that the Canadian court "exercised no control, gave no directions and organized no procedures" requiring the U.S. companies to do anything. *Id.* at 559. In other words, the U.S. companies "were just there as beneficiaries of orders that related to the restructuring of the parent company's obligations." *Id.*

Second, the court concluded that, even if the U.S. subsidiaries were debtors, they did not have an establishment in Canada. The court noted that the U.S. subsidiaries lacked an office or physical presence of any kind in Canada. That is, there was not a "place of business in the foreign country from which market activities are conducted." *Id.* 562. That the company operated as an integrated enterprise to an extent—sharing management, human resources, and accounting, among other functions—was insufficient to show that the subsidiaries themselves had an establishment in Canada. *Id.* at 562. The court thus declined to grant foreign nonmain recognition of the proceedings even if the U.S. subsidiaries had been foreign debtors for purposes of chapter 15. *Id.* at 563.

In contrast, the U.S. Bankruptcy Court for the District of Delaware in *In re Catalyst Paper Corp.* granted foreign main recognition for certain U.S. affiliates of a Canadian company. No. 12-10221 (Bankr. D. Del. Mar. 5, 2012). Catalyst Paper and its affiliates, including eight U.S. entities, sought chapter 15 recognition for their proceeding under Canada's Companies' Creditors Arrangement Act (the "CCAA"). In concluding that even the U.S. debtors had their COMI in Canada, the court emphasized that "the number and activity of the Canadian debtors outweighs the number and activity of the U.S. debtors" and that "the shots that are called come out of Canada, not the United States." Transcript of Hearing at 28:16-19. The court characterized it as "a very conventional recognition." *Id*. at 28:19-20. Thus, unlike the court in *Mood Media*, the Delaware bankruptcy court in *Catalyst Paper* focused more on the integrated nature of the entire enterprise as opposed to a strict entity-by-entity analysis to determine that foreign main recognition for the U.S. entities was warranted.

Similarly, in *In re Mega Brands Inc.*, the Delaware bankruptcy court granted foreign nonmain recognition for certain U.S. subsidiaries of a Canadian company. No. 10-10485 (Bankr. D. Del. Mar. 19, 2010). Mega Brands sought chapter 15 recognition for its proceeding under the CBCA. And similar to Mood Media and Catalyst Paper, Mega Brands' Canadian entities received foreign main recognition. Transcript of Hearing at 22:6-13. But the court in *Mega Brands* nevertheless concluded that the Canadian proceeding was a foreign *nonmain* proceeding as to the U.S. subsidiaries. *Id.* at 21:23-24:25.

The *Mega Brands* court rejected the U.S. Trustee's argument that the Canadian proceeding could not be both a foreign main proceeding as to some entities and a foreign nonmain proceeding as to other entities. *Id.* at 22:20-22. The court analogized multiple foreign proceedings under chapter 15 to jointly administered cases under chapter 11 and "[did not] find it at all troubling that there could be a mix" of foreign main and foreign nonmain proceedings. *Id.* at 24:6-16. And in contrast to *Mood Media*, no party had contested that the U.S. subsidiaries both were debtors for purposes of chapter 15 and had an establishment in Canada. The court thus recognized the Canadian proceeding as a foreign nonmain proceeding with respect to the U.S. subsidiaries.

These cases demonstrate that courts may differ in their receptiveness to the fact-specific exercise of recognition, particularly as it relates to U.S. entities seeking chapter 15 foreign recognition. Key factors can include the location of assets, operations, and management, as well as an entity's degree of involvement in the foreign proceeding and the overall balance of the corporate structure, including the location of subsidiaries' operations.

RECENT CHAPTER 15 CASES

Two recent cases, *Black Press* and *Spark Networks*, illustrate, on the one hand, the challenges that a foreign representative can face when there are insufficient facts to support COMI or an "establishment" for foreign main or nonmain recognition and, on the other hand, that foreign nonmain recognition can be achieved for U.S. entities where the facts demonstrate sufficient "establishment" in a foreign jurisdiction. As noted, courts in the United States have shown a willingness to deny foreign nonmain recognition to entities that cannot satisfy the requirements for an establishment under section 1502.

In re Black Press Ltd., **No. 24-100044 (Bankr. D. Del.)**

Black Press Group Ltd., a Canadian commercial printer and newspaper editor with headquarters in Surrey, British Columbia, had Canadian subsidiaries operating in Canada as well as three U.S. incorporated subsidiaries that conducted business in Hawaii, Alaska, and Washington. Black Press had approximately 700 employees in Canada and 500 in the United States. Importantly, subsidiaries guaranteed Black Press's Canadian-issued funded debt.

Black Press initiated reorganization proceedings under the CCAA in Canada in 2024 after a financial decline due to growing competition from online news and advertisements. In addition to the Canadian proceedings and attendant debt collection moratorium, Black Press filed a chapter 15 petition in the Delaware bankruptcy court seeking recognition of the Canadian proceedings to protect both its Canadian and U.S. subsidiaries from actions to collect debts.

Black Press contended that the COMI and "nerve center" of the U.S. subsidiaries were in Canada, the location of Black Press's headquarters and registered offices as well as where its corporate officers directed the business of the U.S. subsidiaries. Moreover, Black Press described the business operations of its U.S. subsidiaries as being completely integrated with the rest of the company such that they could not operate independently of the services from the holding company.

The Pension Benefit Guaranty Corporation (the "PBGC") filed a limited objection to chapter 15 recognition for the U.S. subsidiaries. During the recognition hearing, counsel for the PBGC insisted "emphatically" that the subsidiaries "are not Canadian companies" and that "their COMI is not in Canada." Transcript of Feb. 14, 2024 Recognition Hearing at 78:23-24. Ultimately, Judge Mary Walrath granted foreign main recognition to the Canadian subsidiaries, but she refused to grant foreign main recognition to the U.S. subsidiaries, concluding that they did not have their COMI in Canada. *Id.* at 99:7-10.

Rather than consider the COMI of the entire enterprise, Judge Walrath concluded that she should look at each entity individually, describing each of the U.S. subsidiaries as "a local

newspaper operating in the United States." *Id*. at 99:10-15. Even under the nerve center test, Judge Walrath concluded she should look at the nerve center of the business operations of the subsidiaries, not the holding company. The subsidiaries, she noted, were both incorporated in and operating throughout the United States. *Id.* at 100:5-7. Moreover, the U.S. subsidiaries had publishers on site, did their own printing, solicited ads, serviced their customers, and paid their vendors in the United States. *Id.* at 99-100:23-1. Ultimately, Judge Walrath concluded that each U.S. debtor "could function independently," had done so in the past, and had proposed doing so again. *Id.* at 100:9-12.

Judge Walrath explained that the opposite conclusion—i.e., the U.S. subsidiaries, incorporated and operating in the United States, having COMI in Canada because they are part of a group of subsidiaries held by a Canadian holding company—would effectively require piercing the corporate veil. *Id*. at 100:15-21.

Judge Walrath likewise noted that she was skeptical that the U.S. subsidiaries had sufficient relationships to Canada to demonstrate that they had an "establishment" for foreign nonmain recognition. *Id.* at 114:20-24. She noted that the subsidiaries' operations had little impact on the market in Canada and that she did not consider the U.S. subsidiaries' guarantee of Black Press debt sufficient for the economic impact needed for an establishment. *Id.* at 114-115:25-5.

***In re Spark Networks SE*, No. 23–11883 (Bankr. D. Del.)**

Spark Networks, a Germany-based social dating platform, confronted financial headwinds following the acquisition of another social dating platform, Zoosk, Inc., which it financed with a $100 million loan from a U.S.-based credit fund (the "lender"), as well as notes issued by Spark Networks and later acquired by the lender.

After a failed attempt for a sale or M&A process and a series of amendments and forbearances between the lender and Spark Networks SE and two of its U.S. subsidiaries incorporated in Delaware—Spark Networks, Inc. and Zoosk, Inc. (the "Delaware Entities")—Spark Networks SE initiated a proceeding under the recently enacted German restructuring law (a "StaRUG Proceeding") in the Berlin-based Local Court Charlottenburg–Restructuring Court. Subsequently, Spark Networks SE and the Delaware Entities filed chapter 15 petitions in the Delaware bankruptcy court and sought chapter 15 recognition of the StaRUG Proceeding.

Initiating the StaRUG Proceeding, as well as pairing it with chapter 15 recognition, was essential to preserve Spark Networks SE and its subsidiaries (the "Spark Group") as a going concern. Due to the particular requirements of German insolvency law, commencing U.S. chapter 11 cases would have triggered obligations to commence value-destructive German insolvency proceedings. And many of the Spark Group's shareholders and creditors were likely not subject to the U.S. court's jurisdiction. Through the StaRUG Proceeding, however, the Spark Group was able to secure liquidity to achieve its operational turnaround plan; deleverage its balance sheet without impairing its obligations to employees, customers, suppliers, and others; and avoid the commencement of any German insolvency proceedings.

To secure foreign main recognition for parent company Spark Networks SE, the company stressed to the Delaware bankruptcy court that Spark Networks SE's COMI was in Germany. In filings, it noted that 132 of the 154 full-time employees were based in Berlin, that members of the executive leadership team and a board member were based in Berlin, that board meetings had traditionally taken place in Germany (although they had been virtual since the COVID-19 pandemic), and that strategic decisions of the board and executive management were generally implemented by Berlin-based employees. (Doc. No. 7 at p. 6 (Declaration of Kristie Goodgion)).

To obtain foreign nonmain recognition for its Delaware Entities, the debtors established in filings that the subsidiaries were subjects of the StaRUG Proceeding notwithstanding the fact that only the parent company, Spark Networks SE, was formally the debtor before the German restructuring court. Indeed, one objector raised the point, although obliquely, that the Delaware Entities could not be debtors in a StaRUG Proceeding. (Doc. No. 23 at p. 3 (Objection of PM Service GmBH)). Spark Networks SE submitted a foreign law declaration describing the contours of German bankruptcy law. The declaration clarified that, although only Spark Networks SE initiated the StaRUG Proceeding and was the formal entity, its affiliates nevertheless were subject to the court's jurisdiction and would be bound by such court's orders and, as such, were subjects

of the restructuring plan under German law. (Docket No. 6 at 7 (Declaration of Christoph Morgen)). And the declaration described how affiliates like the Delaware Entities could enjoy the same release from the liabilities for which Spark Networks SE and its affiliated entities were jointly and severally liable. *Id.*

Spark Networks also maintained that the Delaware Entities had establishments in Germany within the meaning of section 1502(2) of the Bankruptcy Code. It cited specifically to the shared management and employees of the Spark Group, which operated pursuant to intercompany agreements. (Doc. No. 4 at p. 34 (Motion for Recognition)). It also noted that Zoosk, Inc.'s key assets included German-registered patents and trademarks—intellectual property that was managed and maintained by the shared employees based in Berlin. *Id.* at 35.

The court recognized Spark's StaRUG Proceeding as a foreign main proceeding with regard to Spark Networks SE and as a foreign nonmain proceeding with regard to the two U.S. subsidiaries. The court subsequently entered an order recognizing and enforcing in the United States the restructuring plan and the German order confirming it.

LOOKING FORWARD

As corporations expand their operations across more jurisdictions, and as capital flows to more far-flung regions of the world, utilizing one or more proceedings to implement a cross-border restructuring may become both a more attractive and more necessary choice for borrowers and lenders. From a purely U.S. perspective, an ever-more connected world with a growing variety of foreign restructuring regimes means that chapter 15 proceedings are likely to become an increasingly robust and strategic tool. Corporations, and their restructuring advisors, have and will continue to develop and test measures to ensure chapter 15 recognition of their foreign proceedings, even for U.S. entities. These could include strategic efforts to shift a company's COMI, either through transferring the registered office or transferring sufficient administration (and such COMI migration may be viewed favorably in certain circumstances, as in *In re Ocean Rig UDW Inc.*, in which the debtors shifted their COMI from the Marshall Islands, where the law did not permit corporate restructurings, to the Cayman Islands (570 B.R. 687 (Bankr. S.D.N.Y. 2017)), or methods to tie a U.S. entity more closely to an integrated enterprise with a foreign COMI.

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