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Court's ability to modify or terminate a prior recognition order under §1517(d) of the Bankruptcy Code

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I. Introduction

Chapter 15 of title 11 of the United States Code (the "Bankruptcy Code") governs the process for obtaining recognition of foreign insolvency proceedings in the U.S.[1] Section 1517 governs recognition of foreign proceedings and addresses two distinct, but related, issues: (1) whether a court must recognize a foreign court's foreign proceeding; and (2) whether a court may modify or terminate a prior recognition of a foreign proceeding.[2] This memorandum analyzes the second issue, which is governed by §1517(d) of the Bankruptcy Code.

This memorandum first examines the scope of §1517(d) and whether and when a court may modify or terminate a prior recognition. Next, this memorandum discusses the various factors courts will likely consider in determining whether to modify or terminate a prior recognition based on existing case law.

II. Scope of §1517(d)

Under §1517(d), "a court may modify or terminate prior recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but . . . shall give

[1] *See generally* 11 U.S.C. § 1501.
[2] *Id.* § 1517(a)–(d).

due weight to possible prejudice to parties that have relied upon the order granting recognition."[3] A court reviewing whether to modify or terminate a prior recognition order must therefore ask two questions: (1) whether the grounds for granting recognition in the first instance were lacking at the time recognition was granted; and (2) whether circumstances have changed such that the grounds for granting recognition in the first instance have ceased to exist.[4]

Cases addressing modification and termination of prior recognition under §1517(d) are scarce. That said, a court's decision to revisit a prior recognition order is within its discretionary powers.[5] Further, "[t]he same factors relevant in determining whether to grant recognition are therefore relevant in determining whether to terminate a recognition order."[6] Consequently, a court, in considering a request to modify or terminate recognition, will likely consider: (1) the location of the debtor's center of main interest ("COMI"); (2) whether comity principles weigh in favor of modification or termination; (3) whether public policy weighs in favor of modification or termination; and (4) whether the previous recognition continues to sufficiently protect the interests of all or substantially all creditors.[7]

III. Discussion

In re Oi Brasil Holdings Cooperatief U.A. is the leading case addressing modification or termination under §1517(d).[8] The debtor, Oi Brasil Holdings Cooperatief U.A. ("Coop"), was a special financing vehicle for its parent company involved in concurrent insolvency proceedings

[3] *Id.* § 1517(d).
[4] *Id.*
[5] *See In re* Loy, 448 B.R. 420 (Bankr. E.D. Va. 2011) (finding §1517(d)'s plain language discretionary and refusing to terminate prior recognition absent clear and complete evidence).
[6] *In re* Cozumel Caribe, S.A. de C.V., 508 B.R. 330, 335 (Bankr. S.D.N.Y. 2012) (refusing to terminate prior recognition of Mexican proceeding where questionable conduct of foreign representative not manifestly contrary to U.S. public policy).
[7] *See id.*
[8] 578 B.R. 169 (Bankr. S.D.N.Y. 2017).

in Brazil and the Netherlands.[9] The bankruptcy court subsequently granted the Brazilian foreign representative's chapter 15 recognition petition after determining that Coop's creditor expectations were that Brazil was its COMI because of creditor's extensive dealings with Coop as a special financing vehicle for its parent company.[10] Some of Coop's creditors in the Netherlands thereafter petitioned the bankruptcy court claiming that it was required to terminate its prior recognition because Coop's COMI was the Netherlands, not Brazil.[11] The bankruptcy court declined to terminate its prior recognition after engaging in a two-step analysis.

First, after reviewing the plain language of §1517(d) and previous case law, the court determined that whether to modify or terminate its prior recognition was discretionary relief that should only be granted after considering the various factors discussed above.[12] Second, the court analyzed those various factors, including: (1) whether Coop's COMI had not actually been Brazil at the time of recognition; (2) whether circumstances had so changed such that Coop's COMI has shifted to the Netherlands because of actions taken by the Netherlands foreign representative; (3) whether, in light of those actions, creditor expectations had similarly changed; and (4) whether comity principles or public policy warranted terminating its prior recognition of the Brazilian proceeding.[13] Finding these factors unavailing, the bankruptcy court refused to terminate its prior recognition.[14]

i. Location of Debtor's COMI at Time of Recognition

Considering *Oi*, a party may argue that the bankruptcy court incorrectly determined that the recognized foreign proceeding was the debtor's COMI at the time the court granted

[9] *Id*. at 175.
[10] *Id*.
[11] *Id*.
[12] *Id*. at 212; *accord In re* Loy, 448 B.R. at 438.
[13] *Id*. at 216–35.
[14] *Id*. at 235 ("Movants have not satisfied their burden of showing that the COMI of Coop has shifted from Brasil to the Netherlands based on events after the Prior Recognition Order."). *See also In re* Oi S.A., 587 B.R. 253 (Bankr. S.D.N.Y. 2018) (granting subsequent motion to enforce Brazilian restructuring plan).

recognition. The primary factors here would be the "nerve center" of the debtor at the time of recognition and what creditor expectations were regarding their dealings with the debtor.[15] However, a party will likely face a higher burden here because they are contesting a court's own prior recognition determination.

For example, *In re Loy* addressed this issue in the context of a *pro se* debtor who was a former owner of a furniture business in England that later declared bankruptcy.[16] After the bankruptcy court granted recognition to the English insolvency proceeding, the debtor moved under §1517(d) to terminate the court's recognition by claiming that the English trustee had misrepresented that "his COMI at all relevant times was Hampton, VA, not the United Kingdom."[17] Like in *Oi*, the *Loy* court emphasized that "revisiting a recognition determination is . . . within the Court's jurisdiction" and that it was "not limited to considering only the evidence . . . available at the time" of recognition.[18] That said, despite significant leeway to the *pro se* debtor, the *Loy* court refused to "afford . . . the extraordinary remedy of revocation of recognition without a complete factual record."[19] This determination was materially based on the debtor's failure to disclose his relocation to France while the case was ongoing.[20]

ii. COMI Shift Between Recognition and §1517(d) Petition

Alternatively, a party may argue that the debtor's COMI has shifted under the changed circumstances prong of §1517(d). "[A] debtor's COMI is determined as of the time of the filing of the Chapter 15 petition [but]… a court may also look at the time period between initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition."[21] "In the absence of

[15] *See In re* OAS S.A., 533 B.R. 82, 101 (Bankr. S.D.N.Y. 2015).
[16] 448 B.R at 424.
[17] *Id*. at 435.
[18] *Id*. at 438–39.
[19] *Id*. at 436.
[20] *Id*.
[21] Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 133 (2d Cir. 2013).

evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."[22] To rebut this presumption, a party must show that the debtor's "head office functions" are carried out in a different jurisdiction.[23] Factors include "the location of the debtor's headquarters; the location of those who actually manage the debtor; the location of the debtor's primary assets; the location of the majority of the debtor's creditors…and/or the jurisdiction whose law would apply to most disputes."[24]

a. COMI Shift: Foreign Representative Actions

Accordingly, under §1517(d), a foreign representative who undertakes substantial actions between recognition of a foreign proceeding and a subsequent modification or termination petition may shift the debtor's COMI upon showing that the debtor's "head office functions" have shifted to another jurisdiction.[25]

For example, in *Suntech*, the debtor's COMI was in China when it defaulted on its obligations and subsequently commenced a restructuring agreement with its creditors in the Cayman Islands because of the flexibility that jurisdiction offered.[26] Various U.S. creditors later obtained a judgment against its U.S. assets in an involuntary New York insolvency proceeding.[27] In response, the Cayman representatives filed a chapter 15 petition for recognition, which the court granted upon finding that the representatives had undertaken substantial restructuring

[22] 11 U.S.C. § 1516(c); *see also* 8 Collier on Bankruptcy ¶1506.03 (16th ed. 2013) (defining "registered office" as "the place of incorporation or the equivalent for an entity that is not a natural person").
[23] *See In re* OAS S.A., 533 B.R. at 82.
[24] *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).
[25] *See In re* Creative Fin Ltd., 542 B.R. 498 (Bankr. S.D.N.Y. 2016) (changing state of incorporation insufficient); *In re* Suntech Power Holdings Co., Ltd., 520 B.R. 399 (Bankr. S.D.N.Y. 2014) (substantial restructuring actions by foreign representative shifted COMI).
[26] *In re* Suntech, 520 B.R. at 405.
[27] *Id*. at 408–09.

activities on the debtor's behalf.[28] Thus, the Cayman representatives' actions shifted the debtor's COMI from China to the Cayman Islands.[29]

b. COMI Shift: Creditor Expectations

Similarly, material changes in the expectations of *affected* creditors between recognition of a foreign proceeding and a subsequent §1517(d) petition may also shift the debtor's COMI.[30] Unlike in *Suntech*, in *Bear Stearns* the Southern District upheld the bankruptcy court's determination that the debtor's COMI was in New York, rather than the Cayman Islands, considering three key factors.[31] First, that no employees or managers were in the Cayman Islands.[32] Second, that all the debtor's records prior to the Cayman insolvency proceeding were in the United States.[33] Third, that all the debtor's *liquid* assets were also located in the United States.[34] The *Bear Stearns* court reiterated that §1516(c) "creates no more than a rebuttable evidentiary presumption, which may be rebutted notwithstanding a lack of party opposition."[35] Considering the factors previously listed, the court found the presumption that the debtor's COMI was the Cayman Islands rebutted.[36]

As *Oi* demonstrates, this same analysis applies in the context of modifying or terminating recognition.[37] Indeed, in direct contrast to the actions taken by the *Suntech* representatives, the *Oi* court emphasized the "significant and pragmatic limitations" on the Netherlands foreign

[28] *Id*. at 417–19.
[29] *Id*. (listing actions including taking possession of debtor property, handling all restructuring issues and disputes with creditors, supervising and opening bank accounts, and reincorporating in Cayman Islands).
[30] *See In re* Bear Stearns, 389 B.R. 325 (S.D.N.Y. 2008) (denying foreign COMI recognition because of substantial objections raised by creditors) ("Bear Stearns").
[31] *Id*.
[32] *Id*. at 337.
[33] *Id*.
[34] *Id*. at 338.
[35] *Id*. at 335.
[36] *Id*. at 339.
[37] *See In re* Oi, 578 B.R. at 235 ("Movants have not satisfied their burden of showing that the COMI of Coop has shifted from Brasil to the Netherlands based on events after the Prior Recognition Order.").

representative in rejecting the petitioner's claim that the debtor's COMI had shifted to the Netherlands.[38]

c. Comity

Comity is another significant factor that courts consider in recognition cases.[39] "Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy."[40] Comity factors include whether: (1) creditors of the same class are treated equally; (2) liquidators are considered fiduciaries and held accountable; (3) creditors have the right to submit claims; (4) liquidators are required to give adequate notice to claimants; (5) provisions for creditor meeting exist; (6) foreign insolvency law is prejudicial in favor of its own citizens; (7) all assets are before one court for distribution; and (8) provisions for automatic stay and lifting to facilitate claims exist.[41]

Whether a bankruptcy court grants comity deference to a foreign proceeding depends on whether basic fairness and due process were provided to all affected parties in that jurisdiction.[42] In such circumstances, a court may grant deference despite the foreign jurisdiction providing relief inconsistent with the Bankruptcy Code.[43]

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[38] *Id*. at 225.
[39] *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) (defining comity as recognition one nation affords to the acts of another).
[40] *In re* Atlas Shipping A/S, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009) (turning over garnished funds previously subjected to domestic attachments to Danish court).
[41] *See In re* Cozumel, 482 B.R. 96, 114, 115. (Bankr. S.D.N.Y. 2012).
[42] *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482 cmt. b. (1987) ("A court asked to recognize or enforce the judgement…must satisfy itself of the essential fairness of the judicial system under which the judgment was rendered.").
[43] *See, e.g.*, Society of Lloyd's v. Reinhart, 402 F.3d 982, 987 (10th Cir. 2015) (granting deference to English monetary judgment waiving procedural rights of defendants because waivers common in English jurisprudence); *In re* Vitro C.V., 701 F.3d 1031, 1066, 1067 (5th Cir. 2012) (refusing to grant recognition to Mexican restructuring order including non-debtor releases approved by insiders and without consent of affected creditors); *In re* Sino Forest, 501 B.R. 655 (Bankr. S.D.N.Y. 2015) (granting recognition to Canadian order including third-party releases not otherwise available in United States because of similar common law system); *In re* Metcalfe & Mansfield Alternative Investments, 421 B.R. 696, 698 (Bankr. S.D.N.Y. 2010) (same).

Like each of these cases, the *Oi* court applied this comity fairness analysis in finding that the "bad-faith motive" by certain Dutch creditors petitioning the court for termination under §1517(d) was an *independent* ground for refusing to terminate its prior recognition.[44] Similarly, in *Cozumel*, a previous case addressing termination under §1517(d), the Southern District emphasized comity in refusing to terminate its prior recognition of a Mexican proceeding despite evidence by a relevant creditor of the foreign representative's questionable conduct.[45] The *Cozumel* court largely reasoned that at the current stage the recognized Mexican foreign proceeding was the proper court for adjudicating the issues alleged by the creditor.[46]

iii. Public Policy & Sufficient Protection to Creditors

Finally, a court may also consider public policy under §1506, stating that: "[n]othing in this chapter prevents the court from refusing to take action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."[47]

This provision runs in tandem with §1521(a), providing that a court may grant "any appropriate relief" that is necessary to: (1) give effect to the purpose of chapter 15; (2) protect the assets of debtors; or (3) protect the interests of creditors.[48] These two provisions provide the framework for chapter 15's public policy exception for granting, modifying, or terminating recognition of foreign proceedings.

That said, the public policy exception is narrowly construed as a bar to recognition or as a basis for modification or termination of a prior recognition.[49] Likewise, §1522(a) of the

[44] 578 B.R. at 240.
[45] 508 B.R. at 335.
[46] *Id*. (stating that "[d]issatisfaction with the rulings of the lower Mexican courts is the proper subject for Mexican appellate proceedings").
[47] 11 U.S.C. § 1506.
[48] *Id*. § 1521(a).
[49] *See In re* Oi, 578 B.R. at 195 (dismissing public policy concerns because ''Brazilian bankruptcy law meets our fundamental standards of fairness and accords with the course of civilized jurisprudence.'') (quoting *In re* OAS, 533

Bankruptcy Code provides a catch-all requirement to any recognition relief granted by a court under chapter 15 by conditioning it on the requirement that relevant creditors' interests are sufficiently protected.[50] This relief also applies to §1517(d) modification or termination relief under §1522(c) because it is subject to §1522(a)'s sufficient creditor protection requirement.[51] Courts may raise these provisions *sua sponte*.[52] Thus, whether a court is evaluating a debtor's COMI, issues of comity, or concerns of public policy, the requirements of §1522 are usually considered.

IV. **Conclusion**

Minimal case law exists regarding modification and termination of prior recognitions under §1517(d). Still, as the preceding discussion demonstrates, absent clear evidence of an error in a court's initial recognition determination, a party will likely have to present evidence of events so substantial that they, in effect, shift creditor's expectations of the debtor's COMI. This in turn may satisfy the second prong of §1517(d). Otherwise, a court is unlikely to exercise its discretion in granting modification or termination relief absent a showing of substantial procedural unfairness to *affected* creditors or fundamental differences between the foreign insolvency regime and the Bankruptcy Code. In those circumstances, relief may be granted under §1506's public policy exception or §1522(a)'s mandate of ensuring sufficient protection to all creditors.

B.R. at 103–04) (dismissing public policy concerns over pending Brazilian plan disallowing creditor claims); *In re* Cozumel, 503 B.R. at 337–338 (dismissing public policy concerns over foreign representative's inconsistent representations and non-disclosure of material developments in foreign proceeding) (citing *In re* Ephedra, 349 B.R. 333, 336 (S.D.N.Y. 2006) (dismissing public policy concerns over majority creditor approved Canadian resolution depriving U.S. claimants of jury trial in pending drug suit against debtor); *see also In re* Cozumel Caribe, 482 B.R. at 115–16 (dismissing public policy concerns over ex parte measures by foreign representative preventing creditors from exercising rights against guarantor non-debtor affiliates of the debtor).

[50] 11 U.S.C. § 1522(a).

[51] *Id.* § 1522(c).

[52] *Id.* ("The court may…at its own motion, modify or terminate such relief."); *see also* Jaffe v. Samsung Electronics Co., Ltd., 737 F.3d 14, 26 (4th Cir. 2013) (raising §1522(a) *sua sponte* in conditioning recognition of German insolvency proceeding on equal treatment to debtor's U.S. patents).