

THE REVIEW OF
**BANKING & FINANCIAL
SERVICES**
A PERIODIC REVIEW OF SPECIAL LEGAL DEVELOPMENTS
AFFECTING LENDING AND OTHER FINANCIAL INSTITUTIONS

Vol. 37 No. 10 October 2021

CROSS-BORDER INSOLVENCY PROCEEDINGS – UPDATE

Recent cases decided by the Bankruptcy Courts in the Northern District of Illinois and the Southern District of New York have provided additional support for enforcement of a foreign plan by a foreign debtor in a chapter 15 case, but also the limits of such relief. In this article, the author discusses these cases in detail and the lessons to be derived from them.

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The UNCITRAL Model Law on Cross Border Insolvency was incorporated into the United States Bankruptcy Code as chapter 15 in 2005. Since then, representatives of persons and entities who are the subject of an insolvency proceeding in a foreign jurisdiction have had the option to file a petition in a United States bankruptcy court seeking recognition of such foreign proceedings, as well as other relief under chapter 15.

There are many reasons why a foreign debtor may seek relief under chapter 15. A debtor simply may want to obtain the protection of the automatic stay under section 362, in order to halt litigation and other actions against it and its property located in the United States.¹ The foreign debtor may file a chapter 15 petition in order to obtain access to discovery permitted under Fed. R. Bankr. P. 2004 and other provisions of the Federal Rules

of Bankruptcy Procedure.² It may want to conduct litigation against parties subject to personal jurisdiction in the United States, whether such litigation is brought pursuant to foreign or domestic U.S. federal or state law.³ It may seek court authority to access and obtain turn-over of the foreign debtor's property located in the United States, including property that has been the subject of a pre-filing judicial attachment or other process.⁴ The foreign debtor also may seek an order from the U.S. bankruptcy court granting comity to and enforcing the foreign debtor's insolvency plan or scheme of arrangement in the United States.⁵

¹ *In re Condor Flugdienst GmbH*, 627 B.R. 366 (Bankr. N.D. Ill. 2021).

² *In re PT Bakrie Telecom Tbk*, No. 18-10200 (SHL), 2021 WL 1439953, at *5 (Bankr. S.D.N.Y. Apr. 15, 2021).

³ *Condor*, 627 B.R. at 378.

⁴ *In re AJW Offshore, Ltd.*, 488 B.R. 551, 553 (Bankr. E.D.N.Y. 2013).

⁵ *In re Services de Petroleo Constellation S.A.*, 613 B.R. 497, 500 (Bankr. S.D.N.Y. 2020).

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