

# Follow the Yellow Brick Road: The Single Point of Entry and Chapter 15

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Recently, there has been a divergence of opinion when it comes to whether a foreign liquidator must commence a Chapter 15 case before seeking comity in the United States (the “US”).

In *Moyal v. Münsterland Gruppe GmbH & Co. KG*<sup>1</sup>, a plaintiff commenced an action in New York state court, which was eventually removed to the Southern District of New York, seeking damages from a defendant arising from a breach of a distribution agreement. The defendant decided to default in responding to the complaint due to the lack of financial resources to defend the suit. Soon thereafter the presiding District Court judge referred the suit to a magistrate judge for a contested hearing to determine the quantum of damages owed by the defendant. Two years later, the defendant commenced a proceeding in the District Court of Münster in Germany seeking bankruptcy protection under German insolvency law at which time an insolvency administrator was appointed.

The insolvency administrator filed a motion to dismiss or stay the New York action given that the German Code of Civil Procedure stays all previously filed actions against the defendant. In addition, less than two weeks later, defendant’s counsel filed a motion to withdraw as counsel for the defendant ostensibly because by operation of German law, counsel’s mandate to act for the defendant was terminated upon the filing of the German insolvency proceeding. The plaintiff raised several arguments in response to the motion to dismiss, including whether the insolvency administrator should have commenced a proceeding under Chapter 15 for a stay of the action.

The court found that the defendant was entitled to a stay of the action under principles of comity “since it has shown that the German insolvency proceedings are procedurally fair and do not contravene the laws or public policy of the United States.”<sup>2</sup> The court noted that “plaintiff’s suggestion that the insolvency trustee appointed under German law should have commenced a proceeding in the US bankruptcy court under Chapter 15 of the Bankruptcy Code to seek a stay of the action in the District Court was absurd and would fly in the face of comity principles.”<sup>3</sup>

The court’s statement regarding the need for Chapter 15 relief appears to be at odds with the overwhelming case law addressing the need for Chapter 15 case when seeking comity from a US court. In fact, the District Court cited only one authoritative source in support of its deference to the German proceeding in the absence of a Chapter 15 proceeding. Nevertheless, the magistrate judge was seemingly persuaded that the need for Chapter 15 relief was not warranted given the posture of the proceedings before him. Thus, in response to plaintiff’s argument that counsel did not have authority to file the motion to dismiss or stay under German law when the German insolvency was commenced, the court found such argument “baseless” given that at the time of the submission of the motion, counsel was “still counsel of record.”<sup>4</sup> It should be noted that, notwithstanding the legislative intent that Chapter 15 should be the “single point of entry” for seeking comity and assistance in the US by foreign liquidators, there have been instances where courts have determined that Chapter 15 recognition was not required, particularly in those circumstances not involving the facilitation of cross-border restructurings or when corporate governance or administrative tasks pursuant to local state law are the primary focus of the activity in the US.<sup>5</sup> In a more recent decision, also involving a German insolvency proceeding, however, the District Court for the Southern District of

Texas emphasized that “it is clear from the structure of Chapter 15 that recognition is a prerequisite to obtaining comity from any U.S. court with respect to foreign insolvency proceedings.” *HFOTCO LLC v. Zenia Special Mar. Enter.*<sup>6</sup>

That decision arose from an event that occurred at a terminal owned by HFOTCO LLC located in a shipping channel in Houston, Texas. A vessel, the *Minerva Zenia*, moored at the terminal, allegedly caused damage to the terminal dock when another vessel, the *X-Press Machu Picchu* (f/k/a *M/V Constantin S*) sped by the *Minerva Zenia* at an unsafe velocity for such waters. According to the opinion, HFOTCO “sued *Minerva Zenia Interests* (sic) for negligence” and *Minerva Zenia* filed a third-party complaint against those it thought were responsible, including: MS *Constantin S*, the former owner of *M/V Constantin S*, the *X-press Machu Picchu*, and the German insolvency administrator for MS *Constantin S*, among other parties.<sup>7</sup>

MS *Constantin S* entered insolvency proceedings in Germany in May 2014, and a German administrator was appointed to administer the MS *Constantin S* assets, including the *M/V Constantin S*. It was alleged that the insolvency administrator continued to keep the *M/V Constantin S* operational until it was sold two months before the accident at the HFOTCO terminal. MS *Constantin S* argued that all claims asserted against it should be dismissed because it had commenced bankruptcy proceedings in Germany and that all subsequent court actions were to be directed to the insolvency administrator and, therefore, international comity dictated that the US court should “respect the German insolvency proceedings by dismissing all claims against MS *Constantin S* because it <sup>was</sup> not the proper defendant under German law.”<sup>8</sup>

Upon reviewing the principles of international comity, and the origins of Chapter 15, the District Court stated that it was powerless to grant the relief requested by MS *Constantin S* without the commencement of a Chapter 15 petition. “There is no other mechanism that the court is aware of for MS *Constantin S* to seek the relief it desires outside of Chapter 15. The sensible solution would be for MS *Constantin S* to ensure that the appointed foreign representative of its insolvency proceeding <sup>in Germany</sup> . . . apply for recognition in the bankruptcy court immediately.”<sup>9</sup> In the absence of recognition under Chapter 15, the District Court denied MS *Constantin S*’s request for dismissal of the claims against it.

The District Court in Texas espoused the majority approach when it comes to a foreign representative seeking comity in the US. However, some courts have found exceptions to the requirement of seeking recognition first when presented with unique or expedient circumstances. The more prudent course in all cases is to err on the side of obtaining recognition of the foreign proceeding before relying on a court to excuse the lack of such recognition, particularly when seeking comity of a foreign law or proceeding by a US court.

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1 *Moyal v. Münsterland Gruppe GmbH & Co. KG*, 2021 U.S. Dist. LEXIS 93398 (May 7, 2021).

2 *Id.* at 8.

3 *Id.* at 8 fn 1.

4 *Id.* at 8.

5 See *Trikona Advisors Ltd. v. Chugh*, 846 F.3d 22 (2d Cir.2017) (Party not precluded from seeking collateral estoppel to findings of fact from a Cayman court where no restructuring was involved in the absence of Chapter 15 recognition); *Iida v. Kitahara (In re Iida)*, 377 B.R. 243 (9th Cir. BAP 2007) (When it comes to corporate governance, such as replacing a dissident director or officer, Chapter 15 is not a prerequisite for taking such action); *In re Loy*, 380 B.R. 154 (Bankr. E.D. Va. 2007) (Filing of *lis pendens* under state law or UCC statement should not require Chapter 15 recognition).

6 *HFOTCO LLC v. Zenia Special Mar. Enter.*, No. CV H-19-3595, 2021 WL 2834687 (S.D. Tex. July 7, 2021) at \*4.

7 *Id.* at \*1.

8 *Id.* at \*2.

9 *Id.* at \*4; see also *United States v. J.A. Construction Co.*, 333 B.R. 637, 639 (E.D.N.Y. 2005) (“In the absence of recognition under chapter

15, this Court has no authority to consider the movant's request for a stay"); *Andrus v. Digital Fairway Corp.*, 2009 WL 1849981 (N.D. Tex. June 26, 2009) at 2 ("Chapter 15 proscribes a clear and uniform procedure by which a foreign entity charged with management of a bankruptcy within this jurisdiction may reach out to American courts for assistance.").

## Your Key Contacts



**Lynn P. Harrison III**

Partner, New York

D +1 212 768 5325

M +1 332 234 2875

[lynn.harrisoniii@dentons.com](mailto:lynn.harrisoniii@dentons.com)



**Malka S. Zeefe**

Counsel, Los Angeles

D +1 213 243 6074

[malka.zeefe@dentons.com](mailto:malka.zeefe@dentons.com)



**Michael Wingrave**

Partner, Cayman Islands

D +1 345 745 5007

M +1 202 819 8556

[michael.wingrave@dentons.com](mailto:michael.wingrave@dentons.com)



**Richard Keady**

Partner, Hong Kong

D +852 2533 3663

[richard.keady@dentons.com](mailto:richard.keady@dentons.com)