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Problems in the Code

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Reconciling “Additional Assistance” with “Appropriate Relief” in Ch. 15



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Chapter 15 petitions are often filed to help a foreign representative manage cross-border insolvency proceedings. Once a foreign proceeding has been recognized, the foreign representative is automatically entitled to certain protections, such as the application of the automatic stay in favor of the debtor and its property in the U.S., and the imposition of § 363 standards for transfers outside the ordinary course of business.¹ But, as is the case for U.S. debtors that benefit from, *inter alia*, the automatic stay and the application of § 363, the baseline relief provided under § 1520 is rarely enough to accomplish the ultimate goals of the foreign proceeding, including the orderly (and hopefully, fair) realization and distribution of value.

In most chapter 15 proceedings, something beyond the benefits of § 1520 is needed to enable the foreign representative to achieve its purpose. An important example would be the use of a chapter 15 proceeding to enforce and/or implement a foreign reorganization plan in the U.S. This is a common avenue by which foreign representatives enter what currently is — but does not need to be — the quagmire of seeking discretionary relief or assistance from bankruptcy courts. The confusion arises out of courts' inability to reconcile two provisions — §§ 1521 and 1507 — both of which have been generally understood to empower courts to grant discretionary relief after recognition, but subject to different standards (with the balancing tests of § 1522 governing § 1521 relief, and the factors listed in § 1507(b) applying strictly to § 1507(a) relief).²

Courts and commentators alike lament the difficulty of assessing “where section 1521 ends and where section 1507 begins.”³ In one of the most

important chapter 15 cases to emerge since the law's inception, the Fifth Circuit in *In re Vitro* carefully laid out a “framework” for courts to determine whether a request for discretionary relief falls under § 1521 as opposed to § 1507.⁴ While the *Vitro* framework may explain that court's application of § 1521 and 1507, the court shied away from the more important task of *reconciling* the two provisions. The *Vitro* court interpreted § 1507(a) as empowering courts to grant “more extraordinary” relief than what is available under § 1521,⁵ such that § 1507(b) enumerates factors that courts must consider *only* in granting such extraordinary relief. Thus, the *Vitro* court's approach still leaves the quandary of “two statutory provisions that each provide expansive relief, but under different standards.”⁶

The problem with the *Vitro* decision and other cases examining both §§ 1507 and 1521 stems from a misunderstanding of § 1507's origin and its plain meaning in the context of the broader statute. A careful reading of the statute taken as a whole reveals that § 1507 has a different purpose altogether: to *guide* courts in their granting of discretionary relief of any type, including under § 1521, by (1) preserving pre-chapter 15 jurisprudence and (2) clarifying that courts may also employ applicable nonbankruptcy law when fashioning discretionary relief.

Overview of the Relevant Provisions

As background, it is vital to understand that before the enactment of chapter 15, foreign proceedings were dealt with under former § 304 of the Bankruptcy Code. There was no need to delineate

¹ 11 U.S.C. § 1520.

² See *In re Vitro S.A.B. de CV*, 701 F.3d 1031, n.24, 27 (5th Cir. 2012) (citing scholarship and describing the confusion).

³ George W. Schuster, Jr., “The Trust Indenture Act and International Debt Restructurings,” 14 *Am. Bankr. Inst. L. Rev.* 431, 455 (2004), available at abi.org/member-resources/law-review.

⁴ See *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1056-57 (5th Cir. 2012).

⁵ See *id.* at 1057.

⁶ *Id.*

the automatic effects of the commencement of a foreign proceeding under § 304, because provisions (such as §§ 362 and 363) applied to all types of bankruptcy filings, including those seeking recognition of foreign proceedings. Section 304(b) gave courts the power to grant certain specific protections for a foreign debtor and its property, as well as the generic “other appropriate relief,” as determined in light of the considerations enumerated in § 304(c).

Chapter 15 introduced a different scheme, based on the United Nations Commission on International Trade Law’s Model Law on Cross-Border Insolvency (the “Model Law”).⁷ Under chapter 15, § 1519 allows courts to grant “provisional” relief “[f]rom the time of filing a petition for recognition until the court rules on the petition,” where it is “urgently needed to protect the assets of the debtor or the interests of the creditors.”⁸ Section 1521 allows courts to grant discretionary relief after recognition “where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors.”⁹ Modeled in part after § 304(b), § 1521 provides that the court may “grant any appropriate relief,”¹⁰ which encompasses forms of relief that were specifically identified or otherwise would have been appropriate under § 304 jurisprudence.¹¹ Section 1522(a) also requires that before granting relief under §§ 1519 or 1521, the court find that “the interests of creditors and other interested entities, including the debtor, are sufficiently protected.”¹² However, courts and practitioners have cited § 1507 as a basis for providing post-recognition discretionary relief beyond § 1521. Section 1507 provides:

(a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.

(b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure....¹³

Section 1507 then enumerates five factors, such as the “just treatment of all holders of claims against or interests in the debtor’s property”¹⁴ and the “distribution of proceeds of the debtor’s property substantially in accordance with the order prescribed by this title.”¹⁵ These factors embody the guidelines previously contained in § 304(c), with one exception: the principle of comity, which was elevated to the introductory paragraph in § 1507(b) to emphasize its importance.¹⁶ In sum, § 304 jurisprudence is preserved in chapter 15: the *types* of discretionary relief found in § 304(b) were incorporated into § 1521 (as “appropriate relief”), and the *standards* for granting such relief were incorporated, almost verbatim, into § 1507(b).

The Current Approach

As noted, the current approach interprets § 1507(a) as empowering courts to provide foreign representatives with “more extraordinary” relief than that available under § 1521. For example, the *Vitro* court cited the following portion of the legislative history in its analysis:¹⁷ “Subsection (2) [of § 1507] makes the authority for additional relief (beyond that permitted under sections ... 1519-1521, below) subject to the conditions for relief hereto specified in United States law under section 304....”¹⁸ However, the court did not suggest, and it is difficult to imagine, what kind of request would qualify as “additional assistance” but not “appropriate relief.”¹⁹

The Problem with the Current Approach

In the authors’ view, there is no need for courts to consult the legislative history when construing § 1507. The statute’s plain language is unambiguous: an interpretation of § 1507 in light of the “language and design of the statute as a whole”²⁰ reveals that § 1507 is *not* a source of supplemental, “extraordinary” discretionary relief. In any event, § 1508 also sets forth a rule of interpretation that renders the legislative history somewhat unhelpful: “In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”²¹ Upon a reading of § 1507 guided by the Model Law and related materials, it becomes clear that the section functions to *guide* post-recognition discretionary relief — not *provide* such relief.

The Plain Meaning of the Statute as a Whole

Under the current approach to the text, courts focus on the phrase “*the court ... may provide additional assistance*” when construing § 1507(a). Under this reading, courts have attributed a substantive effect to § 1507(a) (*i.e.*, that it gives courts the power to grant “more extraordinary” relief than that provided under § 1521) guided by the conditions enumerated in § 1507(b).²²

However, when a different phrase in § 1507(a) is emphasized, an alternative, more straightforward meaning emerges: “Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative *under this title or under other laws of the United States.*”²³ By this plain language, § 1507(a) simply clarifies that a court may provide a foreign representative with relief beyond that already afforded under § 1520 (*i.e.*, *additional assistance*) not only under the Bankruptcy Code (“this title”), but also under *applicable nonbankruptcy law*. For example, a foreign representative might seek a declaratory judgment that a given contract is invalid. Section 1507(a) provides that the court may grant

7 See 11 U.S.C. § 1501.

8 11 U.S.C. § 1519(a).

9 11 U.S.C. § 1521(a).

10 *Id.*

11 See *In re Vitro*, 701 F.3d at 1057 (describing § 1521 relief as “co-extensive with that previously available under § 304”).

12 11 U.S.C. § 1522(a).

13 11 U.S.C. § 1507(a)-(b).

14 11 U.S.C. § 1507(b)(2).

15 11 U.S.C. § 1507(b)(4).

16 See *In re Atlas Shipping A/S*, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009).

17 See *In re Vitro*, 701 F.3d at 1057.

18 H.R. Rep. No. 109-31, pt. 1 at 109.

19 Indeed, the words “relief” and “assistance” are used interchangeably in the Model Law. See *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (1997), p. 35, § 54.

20 *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1998) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”).

21 11 U.S.C. § 1508.

22 See *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1057 (5th Cir. 2012).

23 11 U.S.C. § 1507(a).

such relief, notwithstanding the fact that the foreign representative's request makes recourse to nonbankruptcy law: the Declaratory Judgment Act.²⁴

In addition, § 1507(b), which also applies to additional assistance granted “under this title,” directs courts to consider its enumerated factors, consistent with the principles of comity, when assessing whether to grant such relief. Notably, assistance provided “under this title” *necessarily includes that granted under § 1521*. Thus, by its very language, § 1507(b) guides the granting of relief under § 1521, just as § 304(c) did for (b). In this way, § 1507(b) preserves — and permits the further development of — § 304 jurisprudence.

Unlike the current approach, the authors' reading of § 1507 coheres with the “language and design of the statute as a whole.” Section 1507 falls within the “General Provisions” subchapter of chapter 15, alongside two other provisions that have guiding or directive functions: § 1506 delimits and guides discretionary relief to accord with U.S. public policy, and § 1508 directs courts as to how to properly interpret chapter 15. Meanwhile, §§ 1519, 1520 and 1521 (statutory sources of substantive relief) are grouped within the “Recognition of a Foreign Proceeding and Relief” subchapter. Taken in this light, the exclusion of § 1507 from the scope of § 1522, which elaborates upon courts' discretionary relief powers under §§ 1519 and 1521, further supports the conclusion that § 1507 is not its own source of any relief at all — much less a source of “more extraordinary” relief than that provided under § 1521. Rather, it provides guideposts for relief granted “under this title” (*e.g.*, under § 1521) or under applicable nonbankruptcy law.

Section 1508

As previously noted, to the extent that courts need guidance beyond statutory language in interpreting chapter 15, § 1508 *requires* that courts “shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”²⁵ Indeed, the very “purpose of [chapter 15] is to incorporate the Model Law on Cross-Border Insolvency.”²⁶ Article 7 of the Model Law reads: “Nothing in this Law limits the power of a court ... to provide additional assistance to a foreign representative under other laws of this State.”²⁷ This comports with the authors' reading of § 1507; by its terms, Article 7 is not a separate source of “more extraordinary” discretionary relief. Rather, like § 1507, Article 7 simply clarifies that the enactment of the Model Law does not preclude courts from granting relief to foreign representatives under other applicable laws. Moreover, the Guide to Enactment and Interpretation of the Model Law (the “Guide”) notes that

post-recognition relief under article 21 is discretionary, as is pre-recognition relief under article 19. The types of relief listed in article 21, paragraph 1, are typical of the relief most frequently granted in insolvency proceedings; however, the list is not exhaustive and the court is not restricted unnecessarily in

*its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case.*²⁸

Thus, the Guide recognizes that under the Model Law, Article 21 is quite adaptable, and there is no need or intent for Article 7 to introduce a new, amorphous category of relief.

Other countries' enactments of the Model Law also comport with our interpretation of § 1507. Section 61(1) of Canada's Companies' Creditors Arrangement Act provides that “Nothing in this Part prevents the court ... from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.” Moreover, Article 7 of the U.K.'s Cross-Border Insolvency Regulations (2006) reads as follows: “Nothing in this Law limits the power of a court or a British insolvency officeholder to provide additional assistance to a foreign representative under other laws of Great Britain.” Thus, the mandatory interpretive lens prescribed in § 1508 supports the authors' conclusion that the guidelines of § 1507(b) apply when discretionary relief is granted under either bankruptcy or nonbankruptcy law, but that no “more extraordinary” relief is contemplated under section § 1507(a) because none is needed in light of what is already available under § 1521 and other applicable law.

Conclusion

The confusion regarding the relationship between §§ 1507 and 1521 stems from a misreading of the Bankruptcy Code. When understood in light of the “language and design of the statute as a whole” through the statutorily prescribed lens of § 1508, and in light of their common origin, §§ 1507 and 1521 do not conflict. In the future, courts can follow the clear language of the statute and the tenets of the Model Law by simply applying the standards of § 1507(b) when considering discretionary relief under § 1521, just as they did under § 304. **abi**

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²⁴ 28 U.S.C. § 2201-02.

²⁵ 11 U.S.C. § 1508.

²⁶ 11 U.S.C. §1501.

²⁷ United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (1997), p. 5.

²⁸ *Id.* at 88 (emphasis added).