

Chapman Client Alert

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Current Issues Relevant to Our Clients

Non-Consensual Third-Party Releases Held Enforceable in Chapter 15 Proceeding

On April 9, 2018, Judge Martin Glenn of the United States Bankruptcy Court for the Southern District of New York (the “U.S. Court”), in *In re Avanti Communications Group PLC*, held that non-consensual third-party releases included in a U.K. scheme of arrangement were enforceable under chapter 15 of the United States Bankruptcy Code (the “Bankruptcy Code”).¹ Provisions releasing non-debtor third-parties in chapter 11 plans are often problematic. However, Judge Glenn’s decision suggests that release provisions included in foreign debtors’ approved restructurings plans that might not have been authorized in a U.S. chapter 11 proceeding may be recognized and enforced under chapter 15 due to principles of comity, if the foreign proceedings otherwise meet U.S. standards for due process.

Factual Background

On February 21, 2018, the foreign representative of Avanti Communications Group plc (the “Company”), a public limited company incorporated under the laws of England and Wales, with subsidiaries throughout the world, commenced the chapter 15 proceeding in the U.S. Court. Due to various production and launch delays related to its fixed satellite operations, the Company needed to restructure \$550 million of its senior secured notes (the “Notes”), which certain of the Company’s direct and indirect subsidiaries guaranteed (the “Guarantors”). The Company initiated a proceeding under Part 26 of the Companies Act 2006 pending before the High Court of Justice of England and Wales (the “U.K. Court”) concerning a scheme of arrangement (the “Scheme”) that included third-party releases of the Guarantors, among others (the “Releases”). Because the Company’s affiliated group’s collective assets were needed to support the restructured debt, the Releases were critical to the Company’s restructuring. At a creditors’ meeting, over 98% of the holders of the Notes (the “Noteholders”) by value voted for the Scheme, which was subsequently approved by the U.K. Court. Those Noteholders were the only class of creditors that the Scheme impaired. The Company’s foreign representative thereafter petitioned the U.S. Court seeking, among other relief, the U.K. proceeding’s recognition as the Company’s foreign main proceeding and the Scheme’s enforcement, including with respect to the Releases. Judge Glenn granted the petition. Even though no objections to the petition were filed, Judge Glenn issued a detailed explanation of his ruling (the “Opinion”).

Discussion

Although the Releases were non-consensual because they would bind a small number of non-voting creditors that were impaired by the Scheme, Judge Glenn ruled that it was unnecessary to analyze the court’s authority to approve third-party releases under chapter 11 because principles of comity and enforcement of foreign judgments were more pressing concerns under chapter 15.

Third-party releases, especially non-consensual third-party releases, are often problematic in chapter 11 proceedings. Circuit courts in the Fifth, Ninth, Tenth and the District of Columbia Circuits have held that the Bankruptcy Code only permits releases against a debtor, and prohibits third-party releases absent consent. Circuit courts in the Second, Fourth, Sixth, Seventh and Eleventh Circuits have reasoned that third-party releases may be approved without consent, but only in limited circumstances. What constitutes consent is also subject to conflicting decisions.

However, Judge Glenn noted that two sections of chapter 15 of the Bankruptcy Code informed the U.S. Court’s ability to approve the Releases. Section 1521(a) allows the courts to grant “any appropriate relief.” Section 1507(a)-(b) also provides that courts may grant “additional assistance” to foreign representatives in chapter 15 proceedings upon consideration whether such additional assistance would, consistent with principles of comity, reasonably assure creditors’ just treatment, among other enumerated goals. Citing the U.S. Supreme Court, Judge Glenn also wrote:

[A] foreign judgment should not be challenged in the US if the foreign forum provides: ‘[A] full and fair trial abroad before a court of competent jurisdiction,

conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it [is] sitting²

Further, Judge Glenn noted that bankruptcy judges in the Second Circuit often enforce third-party releases in chapter 15 proceedings. On the other hand, in *In re Vitro S.A.B. de C.V.*, 70 F.3d 1031 (5th Cir. 2012), the Fifth Circuit declined to grant comity and enforce a Mexican court order approving a Mexican reorganization plan that released non-debtor affiliates' guarantees. However, Judge Glenn explained that *Vitro* "had a number of very troubling facts," including that the necessary creditor votes to approve the plan were achieved only by counting insiders' votes, which concern was not present in the instant proceeding. In recognizing and enforcing the Scheme, Judge Glenn indicated that the Company's creditors had a full and fair opportunity to vote and be heard. The U.K. Court proceeding also afforded creditors due process consistent with U.S. standards. The Scheme only adjusted a single class of creditors' claims that voted overwhelmingly to approve the Scheme. Further, the failure to enforce the Releases could result in creditors' prejudicial treatment and prevent the Company's fair and efficient restructuring. Judge Glenn therefore held that principles of comity permitted the U.S. Court to recognize the Scheme and enforce the Releases.

Conclusion

Bankruptcy courts may be more willing to approve third-party releases in restructuring plans submitted under chapter 15 than under chapter 11. In the Opinion, Judge Glenn indicates that the issues restricting bankruptcy courts' authority to grant third-party releases in a chapter 11 proceeding do not apply under chapter 15. Under principles of comity, third-party releases are likely to be recognized and enforced in the U.S. Court under chapter 15, if the foreign proceeding otherwise meets U.S. standards for due process, even if not otherwise available under chapter 11. Thus, with respect to a debtor's ability to obtain approval of third-party releases in a restructuring plan, a foreign debtor may be entitled to more favorable treatment under the Bankruptcy Code than a domestic debtor.

For More Information

If you would like further information concerning the matters discussed in this article, please contact any of the following attorneys or the Chapman attorney with whom you regularly work:

Michael Friedman

New York

212.655.2508

friedman@chapman.com

Scott A. Lewis

Chicago

312.845.3010

slewis@chapman.com

- 1 *In re Avanti Communications Group PLC*, Case No. 18-10458 (MG), 2018 WL 1725544 (Bankr. S.D.N.Y. Apr. 9, 2018).
- 2 *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895). Judge Glenn also noted that "[w]ell-settled case law in the UK expressly authorizes third-party releases in scheme proceedings, particularly the release of affiliate-guarantees."

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