

Chapter 15's Use by Foreign Debtors as a Discovery Tool in the US

WRITTEN BY

Francis J. Lawall | Patrick M. Ryan

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When a debtor that is subject to a foreign insolvency proceeding holds assets, contracts or other rights in this country, it requires a mechanism to ensure that it can deal with creditor claims in a manner consistent with the foreign restructuring regime. Chapter 15 specifically provides such relief by permitting foreign parties access to the U.S. federal court system for the purpose of facilitating cooperation between the courts and other authorities of foreign countries and U.S. courts. At first glance, Chapter 15 might appear to have the relatively minor role of staying actions against U.S. assets while the main foreign proceeding moves forward. However, as one recent case out of the Southern District of New York demonstrates, Chapter 15 carries the potential to significantly impact not only the main foreign bankruptcy, but civil litigation in the United States as well.

In *In re Comair Limited (In Business Rescue)* (S.D.N.Y. Bankr. Nov. 15, 2021), U.S. District Court Judge James L. Garrity Jr. of the Southern District of New York was tasked with analyzing Chapter 15 in the context of a discovery motion by the debtor in a South African restructuring proceeding. Specifically, the foreign representatives of Comair Limited moved for entry of an order permitting them to conduct discovery of The Boeing Company pursuant to section 1521 of the Bankruptcy Code and Rules 2004 and 9016 of the Federal Rules of Bankruptcy Procedure. After considering the purpose of Chapter 15's discovery provisions in light of the facts and posture of the parties' claims, Garrity found that Comair's foreign representative had established grounds under Section 1521(a)(4) to conduct discovery of Boeing.

Background

The history of the parties here involves a few of the major issues facing airlines in recent years. Comair is a large regional commercial airline company operating in southern Africa. In 2010, it entered into an agreement with Boeing, under which it agreed to purchase aircraft for Comair to operate. A subsequent purchase agreement entered in 2013 called for the manufacture and delivery of eight 737 MAX 8 aircraft. After one aircraft was delivered in February 2019, the remaining seven were scheduled to be delivered between March 2019 and March 2024. However, following the fatal 737 MAX 8 crashes in October 2018 and March 2019, all 737 MAX 8 aircraft worldwide were grounded, and the parties abandoned the delivery plan. Ultimately, in February 2020, Comair declared that it had terminated the 2013 purchase agreement, which Boeing disputed.

Shortly thereafter, nearly all travel came to halt as the COVID-19 pandemic spread internationally. In March 2020,

the president of South Africa imposed a nationwide lockdown and travel ban to curb the virus' spread, severely affecting Comair. As a result, in May 2020, it commenced business rescue proceedings under the South African Companies Act 71 of 2008, appointing two individuals as business rescue practitioners and entering that jurisdiction's version of the corporate bankruptcy process. By September of that year, a business rescue plan had been established with the goal of saving the company from liquidation.

In February 2021, the business rescue practitioners informed Boeing that they were "reaffirming" Comair's previous termination of the purchase agreement. In response, Boeing argued that the purported termination constituted a repudiation and material breach of the purchase agreement, which caused Comair to amend its rescue plan to formally authorize the cancellation or rejection of the purchase agreement. Concurrently, the business rescue practitioners commenced their Chapter 15 case, seeking recognition of the South African proceeding and of the business rescue practitioners as foreign representatives, and discretionary application of 11 U.S.C. Section 365 to the Chapter 15 case.

In July of this year, following the court's April entry of an order granting Chapter 15 relief, attorneys for the business rescue practitioners also sought discovery against Boeing under Section 1521 and Rule 2004. Within Chapter 15, Section 1521 defines the range of relief available to foreign representatives. In the case at hand, Comair moved under Section 1521's discovery provision, Section 1521(a)(4). This subsection states that where "necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors," the court may provide for the "examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities."

Boeing's argument against relief under Section 1521(a)(4) rested on three essential contentions, drawn from the language of that subsection: the requested discovery would not effectuate the purpose of Chapter 15; the requested discovery would not be necessary to protect Comair's assets; and the requested relief would not sufficiently protect Boeing's interests. However, Boeing also separately argued that Rule 2004 does not apply to Chapter 15 cases, citing *In re Glitnir Banki HF*, No. 08-14757 (SMB), (Bankr. S.D.N.Y. Aug. 19, 2011) for the proposition that while Rule 2004 may complement rights under Section 1521(a)(4), a movant must demonstrate that its request meets Section 1521's criteria. As to this threshold issue, Garrity determined that while several courts, including the S.D.N.Y. Bankruptcy Court, had found Rule 2004 to apply in Chapter 15 cases, because the foreign representative is capable of obtaining its discovery under Section 1521, there was no need to consider the application of Rule 2004 here.

Judge Garrity's Analysis

Turning to Boeing's Section 1521(a)(4) arguments, the court first addressed the question of "effectuating the purpose" of Chapter 15, as required by that subsection. Garrity identified this purpose as chiefly the "protection and maximization of the value of the debtor's assets," quoting 11 U.S.C. Section 1501(a)(4). Furthermore, the court noted that Chapter 15 is largely concerned with the principles of comity, or the recognition by one nation within its territory of the legislative or judicial acts of another nation. Here, the court observed that the foreign representatives have a statutory duty under South African law to investigate the company's affairs, business, property and financial situation. According to the court, approval of the discovery motion would clearly assist in this duty, and more broadly work to protect and maximize the debtor's assets. For this reason, the court found that the discovery sought by the foreign representatives would effectuate the purpose of Chapter 15.

As to the necessity of the requested discovery for the protection of Comair's assets, the court was not convinced by Boeing's argument that Comair's reorganization was essentially complete, rendering the requested discovery unnecessary. Per the Southern District, the business rescue practitioners in charge of Comair's estate had regularly amended, revised, and corrected the rescue plan over the course of its existence, and published frequent status updates on the progress of the South African proceeding, required under South African law because the rescue plan is not yet complete. The court found that because the business rescue plan is still in progress, the requested discovery is necessary to protect Comair's assets.

Finally, as to the sufficiency of the requested discovery to protect Boeing's interests, the court turned to another section of Chapter 15. Counterbalancing the rights set forth in the preceding section, Section 1522(a) limits the relief available under Section 1521 to only those instances in which "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." Pursuant to relevant case law, including *In re Tri-Continental Exchange*, 349 B.R. 627 (Bankr. E.D. Cal. 2006), Garrity identified the court's role here as balancing the foreign representative's need for discovery with Boeing's interests, such that the resulting relief does not unduly favor the foreign representative over Boeing. Boeing contended that such a balance would not be struck by the requested discovery, because Boeing is not merely a hypothetical future litigant—Comair had already identified specific claims against it in the March 26 letter. According to Boeing, Comair's requested relief would subject the creditor to expensive and time-consuming discovery before Comair ever files a suit. However, the court found Boeing's reliance on the March 26 letter to be overstated. Aside from one potential cause of action supported solely by facts garnered from publicly available information, the claims identified in the letter could only be substantiated by facts not available in the public domain. Per the court, the foreign representatives require discovery to complete their investigation and satisfy their duties under South African law.

Garrity's analysis provides an excellent framework for the application of Section 1521 in a Chapter 15 case. Perhaps the most significant conclusion here concerns the third element set forth above—the balancing test established by Section 1522(a). As the court notes, citing *In re Enron*, 281 B.R. 836 (Bankr. S.D.N.Y. 2002), litigants are generally not permitted to use the bankruptcy process or courts as a "back door" to further their interests in a pending litigation outside of the bankruptcy court. However, the court's examination of Section 1521(a)(4) and its chief purposes, as well as the posture of Comair's ongoing bankruptcy proceeding, reveals that discovery of potential claims against Boeing was the only way for the foreign representatives to satisfy their responsibilities vis-à-vis Comair's financial rights and obligations in its restructuring. That this discovery might give a debtor party a leg up in subsequent nonbankruptcy litigation against the creditor is not reason enough to disregard Section 1521(a)(4)'s purposes and provisions.

Ultimately, Section 1521 is not nearly as limited as Boeing or other potential U.S. litigants might like. Whether on its own or as a complement to Rule 2004, it is designed to help facilitate the protection and maximization of the value of the debtor's assets and not necessarily curtailed by the availability of civil litigation outside the bankruptcy courts.

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