

December 20, 2022

No Chapter 15 Recognition Absent Qualifying “Foreign Proceeding”

On December 5, 2022, in *In re Global Cord Blood Corp.*, 2022 WL 17478530 (Bankr. S.D.N.Y. Dec. 5, 2022) (“Global Cord”), the U.S. Bankruptcy Court for the Southern District of New York (the “Court”) denied recognition of a proceeding pending in the Grand Court of the Cayman Islands (the “Cayman Proceeding” and the court, the “Cayman Court”) because it was more like a corporate governance and fraud remediation effort than a collective proceeding for the purpose of dealing with reorganization or liquidation, as Chapter 15 of the Bankruptcy Code requires. “To hold otherwise,” the Court stated, “would be to invite recourse to U.S. bankruptcy courts whenever any foreign corporation sustains losses as a result of officer or director fraud or defalcation, so long as that corporation first commences proceedings in its home jurisdiction seeking to install new fiduciaries and right the wrong that the corporation has suffered.”¹

A “Foreign Proceeding” Must Exist for Chapter 15 Recognition to Be Granted

Chapter 15 of the Bankruptcy Code (“Chapter 15”) governs assistance in aid of cross-border insolvencies.² A Chapter 15 case is commenced by filing a petition for recognition of a “foreign proceeding,” and a court can only grant recognition if one exists.³ The Bankruptcy Code defines a “foreign proceeding,” in relevant part as “a collective judicial or administrative proceeding in a foreign country . . . under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.”⁴

Courts construe this definition broadly to ensure the availability of U.S. court assistance to a variety of different foreign insolvency regimes.⁵ This flexibility, however, is not without limits, and courts adjudicating whether a foreign proceeding exists require a petitioner to establish each of the statute’s seven definitional criteria.⁶ These include, of relevance here, (1) the existence of a “collective proceeding”; (2) “under a law relating to insolvency or adjustment of debt” with foreign court control of the debtor’s assets; (3) that is “for the purpose of reorganization or liquidation.”⁷

¹ *In re Global Cord Blood Corp.*, 2022 WL 17478530, *1 (Bankr. S.D.N.Y. Dec. 5, 2022).

² See 11 U.S.C. § 1501(a).

³ See *Global Cord Blood*, 2022 WL 17478530 at **5-6.

⁴ 11 U.S.C. § 101(23).

⁵ See *Global Cord Blood*, 2022 WL 17478530 at *6.

⁶ The seven definitional criteria are (1) the existence of a proceeding; (2) that is either judicial or administrative; (3) that is collective in nature; (4) that is in a foreign country; (5) that is authorized or conducted under a law related to insolvency or the adjustment of debts; (6) in which the debtor’s assets and affairs are subject to the control or supervision of a foreign court; and (7) which proceeding is for the purpose of reorganization or liquidation. See *Global Cord Blood*, 2022 WL 17478530 at *7 (internal citations and quotations omitted).

⁷ See *Global Cord Blood*, 2022 WL 17478530 at *7.

Relevant Case Background

Global Cord Blood Corporation (“Global Cord” or the “Company”) is a Cayman Islands company that primarily operated in the People’s Republic of China. Global Cord collected and stored umbilical cord blood for its stem cell content, and was a sizeable concern, with shares trading on the New York Stock Exchange.⁸ Shareholders alleged that in April 2022, Global Cord entered into questionable transactions pursuant to which it improperly transferred over \$600 million in corporate funds to other companies, among other things.⁹

On May 5, 2022, one of the Company’s shareholders filed a “Winding-Up Petition” in the Cayman Court.¹⁰ The shareholder sought various forms of relief, including, in August 2022, the appointment of joint provisional liquidators pursuant to section 104(2) of the Companies Act.¹¹ In September 2022, after evidence came to light that incumbent board members and/or officers seemingly forged financial records in opposition to the winding-up application, the Cayman Court appointed joint provisional liquidators (the “JPLs”) with the power to take such steps as they concluded were necessary to “protect and preserv[e] the value of the Company’s assets, rights and/or property” and “to prevent[] the dissipation or misuse of the Company’s assets.”¹² The Cayman Court also suspended the powers of the Company’s board unless restored by the JPLs.¹³

On October 7, 2022, the JPLs filed a Chapter 15 petition in the U.S. bankruptcy court seeking recognition of the Cayman Proceeding as a “foreign main proceeding” and other relief, including the ability to examine witnesses and taking evidence.¹⁴ A group of disempowered former directors of the Company, and a shareholder, Golden Meditech Stem Cells (BVI) Company Limited (“Golden Med”), objected to recognition.¹⁵ Golden Med argued that the Cayman Proceeding was not a “foreign proceeding” as was required for Chapter 15 recognition because it was brought under the “just and equitable” corporate remediation – not insolvency or winding-up – provisions of the Companies Act.¹⁶

The Bankruptcy Court Ruling

The Court concluded that the Cayman Proceeding was not a “foreign proceeding” as Chapter 15 requires for recognition because the Cayman Proceeding was neither collective nor for the purpose of reorganization or liquidation.¹⁷

Not a “Collective” Proceeding. The Court found a proceeding “collective” within the meaning of Chapter 15, if it (a) governs the treatment of, and potential benefit to, creditors; (b) concerns all interests or the interests of a creditor body as a whole, not just individuals; (c) provides for the distribution of assets according to statutory priorities; and (d) permits creditor participation.¹⁸ The Court defined the term consistent with Chapter 15’s objective to provide a “fair and efficient administration of cross-border insolvencies that protects the interests of all creditors.”¹⁹

⁸ See *id.* at *2.

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *Global Cord Blood*, 2022 WL 17478530 at *3.

¹² See *id.* at *4.

¹³ See *id.*

¹⁴ See *id.* at *5.

¹⁵ See *id.* at *2.

¹⁶ See *Global Cord Blood*, 2022 WL 17478530 at **2, 5.

¹⁷ There was no dispute that the remaining four elements of a “foreign proceeding” were satisfied. See *id.* at 7.

¹⁸ See *id.* at *7.

¹⁹ 11 U.S.C. § 1501; see *id.* at *8.

Turning to the Cayman Proceeding, the Court found it lacked such attributes and was thus not a “collective” proceeding. Indeed, the JPLs acknowledged that the Cayman Proceeding did not attempt to identify creditors, quantify or classify the Company’s debts, determine a scheme of distribution to creditors on account of those debts, or even provide formal notification to the creditor body of its existence.²⁰ And while the JPLs had been authorized to seek a “winding-up” of the Company, they had not started such a process.²¹ The Court rejected the JPLs’ argument that the Cayman Proceeding was collective because it sought to benefit the corporation as a whole, rather than just one entity or a subset of claimants.²² The Court found under relevant case law that a focus on and involvement of *creditors* – not the company or its investors – was “unequivocally and at length” the main definitional hallmark of collective action within the meaning of the statute.²³

Cayman Companies Act Is a Law “Relating to Insolvency or Adjustment of Debt.” Notwithstanding its conclusion that the Cayman Proceeding under the Companies Act was not collective, the Court held that the Companies Act itself satisfied the definitional element of a law “relating to insolvency or adjustment of debt.”²⁴ It found that the Companies Act is a comprehensive statute that governs general corporate governance and remedies for varied types of corporate malfeasance, as well as insolvencies and the winding-up of insolvent entities.²⁵ The Court found that the relevant test was not whether the currently pending proceeding concerns insolvency or adjustment of debts, or in some sense relates to those objectives, but rather, whether the proceeding is being brought under a *law* that does so.²⁶

Not for the “Purpose of Reorganization or Liquidation.” Lastly, the Court also considered whether the Cayman Proceeding was “for the purpose of reorganization or liquidation” as a foreign proceeding requires, and concluded that it was not.²⁷ The Court found that the JPLs were not conferred powers of reorganization.²⁸ Instead, they had been authorized to preserve the Company’s assets, including investigating and reporting on its affairs.²⁹ The JPLs did not commence a “winding-up” or liquidation process, and in fact sought to avoid the need for such measures because they believed that the Company was solvent.³⁰ The Court relied on the UNCITRAL Enactment Guide (“Guide”) to reinforce its conclusion.³¹ The Guide recognizes that proceedings can satisfy certain elements of a “foreign proceeding” but still prove ineligible for recognition because they are not for the stated

²⁰ See *Global Cord Blood*, 2022 WL 17478530 at *7-8.

²¹ See *id.* at *8.

²² See *id.* at *8.

²³ See *id.* at 8, 9 (“[A]s a general matter, eligibility for Chapter 15 relief is to be ‘broadly construed.’ But ‘broad’ construction cannot be limitless, and here the proposition advanced by the JPLs exceeds the bounds of any prior on-point case law, and the text of Code section 101(23) when construed in keeping with the structure and intent of the statute of which it forms an important part.”) (internal citations and quotations omitted).

²⁴ See *Global Cord Blood*, 2022 WL 17478530 at *9.

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.* at *10.

²⁸ See *id.*

²⁹ See *Global Cord Blood*, 2022 WL 17478530 at *10.

³⁰ See *id.* at 4, 10.

³¹ The UNCITRAL Enactment Guide is an appropriate source for construing the meaning of Chapter 15, the Court found, because Chapter 15 is designed to implement the UNCITRAL Model Law on Cross-Border Insolvency. See *id.* at 12; see also 11 U.S.C. §§ 1501 (“The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency”), 1508 (“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.”).

purpose of reorganization or liquidation.³² Among such proceedings are ones like the Cayman Proceeding, which are designed to prevent corporate dissipation and waste rather than liquidation or reorganization of an insolvency estate.³³

Conclusion

Global Cord is the exception that proves the rule that U.S. bankruptcy courts generally recognize and grant Chapter 15 relief to Cayman proceedings. It is a helpful reminder of Chapter 15's stated purpose – to provide effective mechanisms for dealing with cross-border insolvencies. Under *Global Cord*'s unique facts, the Court found that the Cayman proceeding was most akin to a corporate governance and fraud remediation effort, rather than for the purpose of addressing an insolvency, reorganization, or liquidation as the Bankruptcy Code requires. As such, the Cayman Proceeding fell outside the range of matters that Chapter 15 was designed to assist. Importantly, the Court agreed that the Companies Act itself – a wide-ranging Cayman law governing corporations generally – satisfied the definitional requirements of “a law relating to insolvency or adjustment of debt” for purposes of establishing a “foreign proceeding.” As such, proceedings under the Companies Act that are commenced for the purpose of reorganizing or liquidating a company, and that otherwise satisfy the definitional criteria of a “foreign proceeding,” should continue to enjoy recognition by U.S. bankruptcy courts and benefit from Chapter 15 relief.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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³² See *Global Cord Blood*, 2022 WL 17478530 at *12.

³³ See *id.*