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No Registration? No Problem

Application of Bankruptcy Code's Securities Registration Exemption in Chapter 15 Proceedings

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Cementing a recent trend in chapter 15 proceedings, the U.S. Bankruptcy Court for the Southern District of New York recently entered an order that explicitly applied the exemption from registration in § 1145 of the Bankruptcy Code to securities issued pursuant to a foreign reorganization plan.[1] This order, entered in the chapter 15 proceedings for Oi SA and certain of its affiliates (collectively, "Oi"),[2] reinforces a recent trend in New York and Delaware, as it is the third court in the last two years to explicitly approve or state that it would approve the use of § 1145 in a chapter 15 proceeding.

This is particularly remarkable as just a few years ago, commentators had speculated as to whether § 1145 could ever be used in a chapter 15 case,[3] and no court had ever explicitly done so prior to 2016. While this provides a powerful potential tool for debtors seeking to issue new securities through a foreign reorganization plan, a careful review of these decisions suggests that in order to ensure reliance on § 1145, practitioners should ensure that fulsome disclosures are made concerning the debtor's business and potential risk factors. Since none of these precedents involved creditor opposition to § 1145 relief, this will be particularly important if there are dissident creditors who might oppose proposed relief under § 1145 in future proceedings.

1 *See* Order (I) Granting Full Force and Effect in the United States to the Brazilian Reorganization Plan and (II) Granting Related Relief, *In re Oi SA, et al.*, Case No. 16-11791 (Bankr. S.D.N.Y. June 15, 2018, ECF No. 277 (the "Oi Enforcement Order"). The Oi Enforcement Order memorialized an oral ruling from the bench on June 14, 2018. Terms used but not defined herein shall have the meanings ascribed to them in the Oi Enforcement Order.

2 Cleary Gottlieb Steen & Hamilton LLP represents the steering committee of an ad hoc group of bondholders in connection with Oi's restructuring.

3 *See, e.g.*, Kurt A. Mayr, "Using Chapter 15 to Overcome U.S. Securities Law Impediments to Effective Ancillary Relief in Cross-Border Reorganizations," 15 *J. Bankr. L. & Prac.* 4 Art. 2 (August 2006).

Section 1145 Background and Textual Debate in Chapter 15

Section 1145 provides an exemption from securities registration requirements under the Securities Act of 1933 where, *inter alia*, securities are issued by a debtor, affiliate or successor of the debtor on account of pre-petition claims against the debtor.[4] From a policy perspective, the exemption is based on the assumption that the disclosure requirements in a chapter 11 proceeding are sufficiently fulsome that there is little risk of investors lacking access to material information regarding securities issued in connection with a restructuring. In other words, the bankruptcy disclosures are intended to take the place of the disclosures that would be contained in Securities and Exchange Commission filings for registered securities.[5]

Although its use in chapter 11 has long been uncontroversial, following chapter 15's enactment in 2005 a textual debate arose as to § 1145's availability in chapter 15 proceedings with respect to securities issued pursuant to plans confirmed in foreign jurisdictions. Those arguing against § 1145's availability relied primarily on the basic textual point that while the Bankruptcy Code expressly applies a number of provisions from chap-

4 *See* 11 U.S.C. § 1145(a)(1). Other subsections of § 1145 provide for additional exemptions, and for the text of § 1145(a)(1), visit law.abi.org/title11/1145 (last visited Aug. 7, 2018).

5 *See* 8 *Collier on Bankruptcy* ¶ 1145.01[1] (16th ed. 2018) ("Exemptions from the securities law registration requirements in connection with a chapter 11 case are justified in part by the protections of chapter 11 itself — including the separate disclosure obligations in connection with a bankruptcy plan, and the bankruptcy court approval of the bankruptcy plan and disclosure statement — as well as by the perceived unfairness of fettering participants in the chapter 11 process with the added burdens of complying with securities law requirements."); H.R. Rep. 95-595 at *226-28 ("If adequate disclosure is provided to all creditors and stockholders whose rights are to be affected, then they should be able to make an informed judgment of their own.... Therefore, the key ... is the disclosure section.... The bill also permits the disclosure statement to be approved without compliance with the very strict rules [imposed by the Securities Act of 1933 because] ... because court supervision of the disclosure statement will protect the public investor from any serious [disclosure inadequacies].").

ter 11 in chapter 15 cases, § 1145 was not among them. Instead, § 103 of the Bankruptcy Code (the "Applicability of Chapters") provides that "except as provided [in chapter 9 (the "Adjustment of Debts of a Municipality")], subchapters I, II and III of chapter 11 [(which includes § 1145)] ... apply *only* in a case under [chapter 11]."[6]

Accordingly, so the argument went, the negative implication created by § 103's failure to reference chapter 15 meant that § 1145 relief was not available in chapter 15. This textual argument could also be rationalized by the policy concerns: The exclusion from chapter 15 makes sense because the disclosure requirements in foreign proceedings might be less fulsome than in chapter 11, where § 1125 of the Bankruptcy Code requires approval of a disclosure statement containing adequate information for a hypothetical investor.[7]

Notwithstanding these textual and policy arguments against granting § 1145 relief in chapter 15, strong arguments — which to date have prevailed — supported the availability of such relief. Specifically, chapter 15 provides broad powers for courts to grant "any appropriate relief" and "additional assistance" in furtherance of foreign restructurings.[8] Moreover, chapter 15 specifically provides that "any appropriate relief" may include "any additional relief that may be available to a trustee" with certain exclusions unrelated to § 1145.[9] Since chapter 15 courts are empowered to grant "relief that may be available to a trustee," there should be no bar to the application of § 1145 in chapter 15. Taken to its logical conclusion, reading § 1145 out of chapter 15 threatens to render the concepts of "any appropriate relief" and "additional assistance" all but meaningless. Courts can also address any policy concerns about adequate disclosure by ensuring that creditors and investors have received sufficient material disclosures in the applicable foreign proceeding regarding the debtor and the restructuring.

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Recent Uses of § 1145 in Chapter 15

Although some chapter 15 courts have avoided explicitly relying on § 1145 when granting relief,[10] in the last two years § 1145 has become a more reliable tool for debtors in chapter 15 proceedings seeking to effectuate cross-border restructurings in New York and Delaware. This is at least where the filings made in the foreign proceeding provided sufficient disclosures to creditors and investors.

In late 2016, in Abengoa SA's restructuring, the U.S. Bankruptcy Court for the District of Delaware issued an order enforcing Abengoa's Spanish-approved master restructuring agreement. The court held that "[b]y virtue of 11 U.S.C. § 1521 [("any appropriate relief" or "additional relief") or] in the alternative 11 U.S.C. § 1507 [("additional assistance")], 11 U.S.C. § 1145 applies in these cases such that [the applicable securities issuances are] exempt from registration under the Securities Act of 1933 and under other applicable state securities laws."[11] Although this was an important development, the order was not marked for publication and there were no objections relating to § 1145. Accordingly, the precedential value of the *Abengoa* court's order standing alone remained limited.

Only a few months later, in mid-2017, in connection with OAS SA's restructuring, the Southern District of New York Bankruptcy Court noted in a hearing that "certainly the Debtor has made the colorable argument that under Section 1521(a)(7) [("any additional relief that may be available to a trustee")], and I guess 1507 [("additional assistance"),] ... 1145 ... is available to the foreign representative [and thus the debtor,] ... so assuming you can satisfy the requirements of 1145, I'm prepared to make it applicable."[12] Although a final chapter 15 order enforcing OAS's Brazilian-confirmed plan remains pending, the court's amenability to § 1145's use in chapter 15 was a signal that any remaining controversy was disappearing.

Next, in late 2017, in connection with the enforcement of CGG SA's French-confirmed plan, a New York court spoke definitively by issuing the first published decision explicitly approving the use of § 1145 in a chapter 15 proceeding.[13] In so doing, the court presented § 1145's use in chapter 15 as entirely uncontroversial. The court also addressed any policy-based concerns around disclosure by expressly finding that the disclosures made in the underlying French proceeding provided creditors and investors with sufficient information concerning the securities to be issued:

> Courts in Chapter 15 cases have granted relief under sections 1507 and 1521, applying the section 1145 exemption to the issuance of securities by foreign debtors pursuant to a plan that satisfies the requirements of section 1145.... The Court concludes that the French Safeguard Plan provides sufficient disclosure concerning the securities that will be issued under the Safeguard Plan.[14]

6 11 U.S.C. § 103(g) (emphasis added).

7 *See also* Mayr, *supra* n.3 (discussing arguments and taking position that § 1145 could be used in chapter 15).

8 *See* 11 U.S.C. §§ 1521(a), 1507.

9 *See* 11 U.S.C. § 1521(a)(7).

10 *See, e.g.*, Order Granting Recognition and Enforcement of Canadian Sanction Order and Related Relief, *In re Quebecor World Inc.*, Case No. 08-13814 (Bankr. S.D.N.Y. July 1, 2009), ECF No. 12, Exhibit 1, ¶ 7(c) (not specifically addressing § 1145, but approving enforcement of Canadian reorganization plan where Canadian confirmation order provided that debtor "advised the Court that it would be relying on the Section 3(a)(10) exemption under the U.S. Securities Act, and the exemption under Section 1145 of the U.S. Bankruptcy Code in order to issue [unregistered securities]"); Order Granting Recognition of Foreign Proceeding and Certain Related Relief, *In re PT Bumi Res. TBK*, Case No. 17-10115 (Bankr. S.D.N.Y. March 17, 2017), ECF No. 17, ¶ 11 (not explicitly relying on § 1145, but finding that securities issued under Indonesian plan were exempt from registration where debtor argued in its plan-enforcement motion for such relief pursuant to § 1145).

11 Order Under 11 U.S.C. §§ 1507 and 1521 Recognizing and Enforcing the Order of the Spanish Court Homologating a Restructuring Agreement and Granting Related Relief, *In re Abengoa SA, et al.*, Case No. 16-10754 (Bankr. D. Del. Dec. 8, 2016), ECF No. 169, ¶ 8.

12 Hearing Tr., *In re OAS SA, et al.*, Case No. 15-10937 (Bankr. S.D.N.Y. May 9, 2017), ECF No. 155, at 7.

13 *In re CGG SA*, 579 B.R. 716 (Bankr. S.D.N.Y. 2017).

14 *Id.* at 721.

In this context, the *Oi* enforcement order must be understood as the latest in a growing line of cases that are normalizing § 1145's use in chapter 15. That being said, it is important to note that none of these cases involved creditor or regulator opposition to the application of § 1145, leaving open the prospect for challenge even in New York or Delaware.

Conclusion

The increasingly widespread judicial acceptance of § 1145's use in chapter 15 is a positive development for debtors and creditors alike: Section 1145 can be a powerful tool in implementing cross-border restructurings where a plan has been approved in a foreign jurisdiction. However, recent case law should not be understood as a blanket approval of § 1145's use when the elements of § 1145 have been met. Instead, as indicated by the *CGG* court, in addition to the elements of the exemption set forth in § 1145 itself, chapter 15 courts may consider the level of disclosure required in the applicable foreign proceeding, and whether such disclosure is "sufficient" to ensure adequate disclosure of material information.

Cognizant of this approach, Abengoa, OAS, CGG and Oi made representations when seeking § 1145 relief as to the substantial disclosures made in their foreign proceedings. Accordingly, a debtor seeking § 1145 relief in its chapter 15 proceeding should carefully examine the disclosure requirements in its foreign proceeding, and consider making additional disclosures so as to provide comfort to the chapter 15 court when it approves relief under § 1145. abi

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