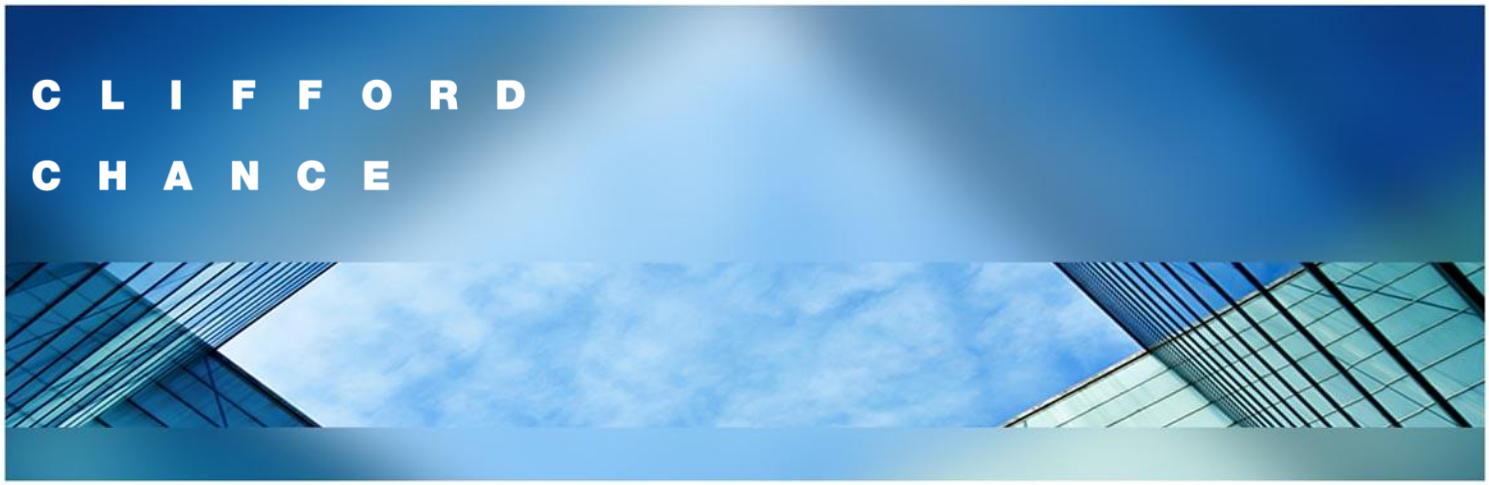

CHAPTER 15: A LIFELINE FOR NONCONSENSUAL THIRD-PARTY RELEASES IN A POST-*PURDUE* WORLD

In *Harrington v. Purdue Pharma*,[1] the U.S. Supreme Court held that Chapter 11 of the US Bankruptcy Code does not provide bankruptcy courts with the authority to approve nonconsensual third-party releases.[2] Shortly thereafter, we published an article theorizing that companies with a multinational presence could nevertheless potentially obtain nonconsensual third-party releases from foreign courts under foreign law and then have those releases "recognized" in the US under Chapter 15 of the Bankruptcy Code. Two recent decisions, one from Judge Horan in the District of Delaware[3] and one from Judge Glenn in the Southern District of New York[4] have now confirmed the availability of Chapter 15 as a vehicle to obtain US recognition of nonconsensual third-party releases granted as part of a foreign insolvency proceeding. In this update, we will explore these two decisions.

CHAPTER 15

Chapter 15 of the Bankruptcy Code governs the process for foreign debtors to obtain assistance from US courts, including recognition of foreign insolvency proceedings and domestication and enforcement of orders entered in those proceedings. Chapter 15 is based on the Model Law on Cross-Border Insolvency, a product of the UN Commission on International Trade Law that's been adopted in more than 60 jurisdictions.

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1 *Harrington v. Purdue Pharma L.P.,* 603 U.S. 204 (2024).
2 Importantly, *Purdue* does not prohibit consensual third-party releases in Chapter 11, and the Supreme Court did not express a view on what qualifies as consent. Since *Purdue*, caselaw on how consent is manifested has varied. The issue remains open, and we continue to monitor developments.
3 *In re Credito Real, S.A.B. de C.V., SOFOM, E.N.R.,* No. 25-10208 (TMH), *2025* WL 977967 (Bankr. D. Del. Apr. 1, 2025)
4 *In re Odebrecht Engenharia e Construção S.A. – Em Recuperação Judicial,* No. 25-10482 (MG), 2025 WL 1156607 (Bankr. S.D.N.Y. April 21, 2025)

The model law's recognition and enforcement mechanisms operate largely without regard to differences in substantive insolvency laws. Courts in one jurisdiction may—and often do—recognize orders from another jurisdiction where the laws of the two countries differ, and where relief in one jurisdiction exceeds (or is less than) what would be available to the debtor if its insolvency proceeding was pending in the other, as long as the foreign proceeding affords parties some level of due process protections.

Prior to *Purdue*, it was well-settled that Chapter 15 permitted US recognition and enforcement of nonconsensual third-party releases contained in foreign plans. After the Supreme Court's ruling, questions arose as to whether such relief would still be available.

CRÉDITO REAL

Crédito Real S.A.B. de C.V., SOFOM, E.N.R. ("**Crédito Real**") was one of Mexico's largest non-bank financial lending institutions. Following a liquidity crisis, Crédito Real commenced insolvency proceedings in Mexico and filed a plan (the "**Concurso Plan**") containing exculpatory provisions that would shield from liability third parties that had played a role in the negotiation and implementation of the company's restructuring (the "**Crédito Release**"). Despite an objection by the United States International Development Finance Corporation (the "**DFC**"), the Mexican court issued an order approving the Concurso Plan, finding that it satisfied all requirements of Mexican law and did not violate Mexican public policy.

On February 7, 2025, Crédito Real's foreign representative sought an order from the Bankruptcy Court for the District of Delaware recognizing the Mexican proceeding as a foreign main proceeding and enforcing the Concurso Plan in the US. The DFC objected. It argued that the bankruptcy court lacked the statutory authority necessary to enforce the Crédito Release and that recognition of the release would be "manifestly contrary" to US public policy under section 1506 of the Bankruptcy Code.

Judge Horan began with a textual analysis of the relevant provisions of Chapter 15. He found that section 1521(a) of the Bankruptcy Code, which provides for the type of relief that can be granted in Chapter 15 cases, was more expansive than section 1123(b). Section 1123(b), which formed the basis of the Supreme Court's analysis in *Purdue*, includes a "catchall" provision that follows a specifically enumerated list of provisions that may be included in a Chapter 11 plan, including "any other appropriate provision not inconsistent with the applicable provisions of the [Bankruptcy Code]." Section 1521(a), on the other hand, permits a bankruptcy court to "grant any appropriate relief" upon recognition, including six specifically enumerated types of relief and a "catchall" provision for "any additional relief that may be available to a trustee," except for specific sections of the Bankruptcy Code that govern avoidance actions and exemptions. Unlike section 1123(b), section 1521 does not direct courts to look to "other" provisions in the Bankruptcy Code to find consistency when providing relief under its catchall provision. Section 1521(a) also identifies (by specific references to sections of the Bankruptcy Code) the types of relief that the court *cannot* grant, none of which relate to nonconsensual third-party releases. This implies that other forms of relief not expressly prohibited, including nonconsensual third-party releases, are permitted.

Judge Horan then turned the analysis to section 1507, another provision of Chapter 15 that allows courts to provide "additional assistance" to a foreign representative. This section is viewed as providing a more expansive grant of power than that found in section 1521 but still has its own limitations. Indeed, the statute states that any assistance should be "[s]ubject to the specific limitations stated elsewhere in [Chapter 15]". Thus when determining if relief should be granted under this section, courts should look to the rest of Chapter 15 to guide their decisions. With this in mind, Judge Horan determined that section 1507 has different limitations compared to section 1123(b). Judge Horan stated, "Chapter 15 has a much different purpose and context—to promote comity and international cooperation—thus demanding different limitations when compared to the Bankruptcy Code at large." Therefore, according to the court, "relief that is appropriate subject to limitations in Chapter 15 must be different than relief that is not inconsistent with the applicable provisions of the Bankruptcy Code."

In addition to the statutory text, Judge Horan found that legislative history helped to prove Congress' intent to permit courts to enforce foreign orders that provide for nonconsensual third-party releases. A major purpose in the enactment of Chapter 15 was to promote comity for orders of foreign courts, and giving US courts the authority to enforce nonconsensual third-party releases approved by foreign courts furthers such purpose. Moreover, courts look to multinational laws in interpreting Chapter 15 and have found that other countries approve nonconsensual third-party releases in bankruptcy proceedings. As relevant for Crédito Real, Mexican law allows for such releases.

Finally, Judge Horan looked to the "public policy exception" under section 1506 of the Bankruptcy Code, which provides that a US court may refuse to take an action governed by Chapter 15 "if the action would be manifestly contrary to the public policy of the United States." Courts have held that section 1506 should be "narrowly interpreted." The relief granted in a foreign proceeding does not have to be identical to relief that might be available in a US proceeding. Instead, the public policy exception generally applies where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections or where recognition would severely impinge a US constitutional or statutory right.

Here, Judge Horan found that the Mexican proceeding was procedurally fair. It followed typical safeguards under Mexican law and the DFC did not demonstrate a lack of fairness in the proceeding. Additionally, the DFC did not identify how the Concurso Plan impinged on a constitutional or statutory right. Moreover, although the Supreme Court held in *Purdue* that Chapter 11 does not authorize nonconsensual third-party releases, such releases are specifically permitted in a limited context under the Bankruptcy Code in connection with asbestos cases. Since permitting nonconsensual third-party releases was a policy decision that Congress can and has made in the past, Judge Horan found that it cannot also be true that enforcing such releases in Chapter 15 would be manifestly contrary to the public policy of the US. The fact that a US court now cannot grant such releases in most Chapter 11 plans does not make them manifestly contrary to US public policy.

Based on these conclusions, Judge Horan overruled the DFC's objection, granted foreign main recognition to the Mexican proceeding and enforced the Concurso Plan (including the Crédito Release) in the US.

ODEBRECHT

Odebrecht Engenharia e Construção S.A. and certain affiliates ("**OEC**") were part of the Novonor Group, one of the largest private business groups in Brazil, with business in engineering, construction and the development and operation of infrastructure. In June 2024, due to the COVID-19 pandemic, a financial crisis, a reduction in infrastructure investments and lower demand for infrastructure projects, OEC filed a Brazilian *recuperação judicial* proceeding (the "RJ Proceeding") in a Brazilian court to implement a comprehensive restructuring of liabilities through a *recuperação judicial* plan (the "**RJ Plan**").

On March 14, 2025, the foreign representative for OEC filed a petition with the Bankruptcy Court for the Southern District of New York that sought recognition of the RJ Proceeding and enforcement of the RJ Plan in the US. Although neither the RJ Plan nor the Brazilian court's order confirming the RJ Plan contained a third-party release, the proposed order submitted to the US court contained a provision that could be construed as a nonconsensual third-party release (the "**OEC Release**"). Specifically, the proposed order provided, in relevant part, that:

> [A]ll persons and entities are permanently enjoined and restrained from (i) commencing or taking any action or asserting any claim, within the territorial jurisdiction of the United States, that is inconsistent with, in contravention with, or would interfere with or impede the administration, implementation and/or consummation of the RJ Plan, the Brazilian Confirmation Order or the terms of this Order; and (ii) taking any action against the Debtors or their property located in the territorial jurisdiction of the United States to recover or offset any debt or claims that are extinguished, novated, cancelled, discharged or released under the RJ Plan and the Brazilian Confirmation Order. No action may be taken within the territorial jurisdiction of the United States to confirm or enforce any award or judgment that would otherwise be in violation of this Order without first obtaining leave of this Court.

On April 1, 2025, the United States Trustee (the "**UST**") objected to OEC's proposed relief, claiming that OEC's proposed order would create an impermissible nonconsensual third-party release. The UST argued that section 1521 of the Bankruptcy Code does not provide courts with a statutory basis for issuing orders that contain nonconsensual third-party releases.

As an initial matter, Judge Glenn questioned whether the language in the OEC Release created nonconsensual third-party releases at all. Judge Glenn then explained that, even if the OEC Release created a nonconsensual third-party release, Judge Horan's decision in *Crédito Real* provided "a lucid explanation why courts can enforce nonconsensual third-party releases found in foreign plans of reorganization." While Judge Glenn seemed to adopt most of Judge Horan's reasoning as to sections 1521 and 1507, he also provided additional reasoning for his decision.

Judge Glenn pointed to pre-*Purdue* case law to support a finding that section 1521 permits the recognition of nonconsensual third-party releases in a foreign debtor's plan. Prior to the enactment of the Bankruptcy Code, case law going as far back as 1883 held that foreign proceedings could strip US parties of rights they held under US law, so long as the foreign court governing the foreign proceeding was a court of competent jurisdiction and enforcement of the foreign proceeding would not violate US public policy. According to Judge Glenn, "[s]o long as these guidelines are respected . . . bankruptcy courts may, acting as ancillaries to foreign proceedings, extinguish claims that would be available in plenary actions in the US in the name of comity."

Likewise, Judge Glenn cited to other cases that concluded that cases under Chapter 15 are fundamentally different from cases under Chapter 11, and that the limitations on a bankruptcy court's powers in a Chapter 11 case do not always carry over in the context of an ancillary Chapter 15 proceeding. In cases where US courts were asked to recognize releases approved by a foreign court, the important question those courts asked was not whether the releases were appropriate, but whether the foreign court's orders should be enforced in the US The only limiting factor in those cases was principles of comity, not whether the releases would have been allowed under Chapter 11. According to Judge Glenn, the Supreme Court's decision in *Purdue* did not place limitations on the power of courts to act as ancillaries to foreign proceedings under Chapter 15.

As to section 1506's public policy exception, Judge Glenn also agreed with Judge Horan and found that *Purdue* cannot be read to hold that nonconsensual third-party releases are "manifestly contrary" to public policy given that the majority expressly stated that "[b]oth sides of this policy debate may have their points."

Accordingly, Judge Glenn overruled the UST's objection and found the court had authority to recognize the RJ Proceeding and give full force and effect to the RJ Plan (including the OEC Release) in the US.

CONCLUSION

Since the *Purdue* decision, there have been a few cases where limited third-party releases or exculpatory provisions were recognized in the absence of any pending objection.[5] However, the well-reasoned decisions in *Crédito Real and Odebrecht* now provide assurances from two of the most popular US bankruptcy courts that the US will continue to recognize and enforce nonconsensual third-party releases obtained in a foreign proceeding.[6]

Clifford Chance is uniquely positioned to handle restructuring and insolvency filings in all major jurisdictions and to obtain recognition and enforcement of the same in the US. We encourage you to reach out to our Restructuring & Insolvency team with any questions.

[5] *See e.g., In re Americanas SA* (Case No. 23-10092 (MEW), 2024 WL 3506637 (Bankr. S.D.N.Y. July 22, 2024)), *In re Nexii Building Solutions Inc.* (Case No. 24-10026 (JKS), (Bankr. D. Del. July 22, 2024) ECF No. 66); and *In re Mega NewCo Ltd..* (Case No. 24-12031 (MEW), 2025 WL 601463 (Bankr. S.D.N.Y. Feb. 24, 2025)).

[6] Notably, the DFC has appealed the *Crédito Real* recognition order. The appeal is ongoing as of the date of this writing, and we will continue to monitor developments.

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