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The Timing Requirement under Chapter 15

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This article discusses *Lavie v. Ran* (*In re Ran*),¹ a case recently decided by the U.S. Court of Appeals for the Fifth Circuit, and the implications it will have on chapter 15 jurisprudence. *In re Ran* is a watershed case, not only because it is the first circuit court case to address the contours of recognition under chapter 15,² but it also clarifies the landscape for understanding the substantive framework for foreign main and nonmain recognition proceedings by defining a timeframe in which to view the factual predicates required for recognition. *In re Ran* may also have significant global implications because the Fifth Circuit's interpretation of chapter 15, which is based on the Model Law on Cross-Border Insolvency promulgated by the United Nations (the "Model Law"), may influence courts throughout Europe and the world.

Facts of *In re Ran*



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The facts of *In re Ran* are simple and straightforward. In 1997, involuntary bankruptcy proceedings were commenced against Yuval Ran in Tel Aviv (the "Israeli proceeding"),³ and Zuriel Lavie was appointed as the permanent receiver in the Israeli proceeding.⁴ Immediately before the Israeli proceeding commenced, Ran and his family moved to the U.S., where they have resided ever

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since.⁵ Ran initially assisted Lavie in collecting assets but ceased doing so in 1998.⁶ In 2006, Lavie, acting as foreign representative for the Israeli proceeding, petitioned the U.S. Bankruptcy Court for the Southern District of Texas for recognition of the Israeli proceeding as either a foreign main or nonmain proceeding under chapter 15 of the Bankruptcy Code. The bankruptcy court denied recognition in the chapter 15 proceeding, and after a series of appeals, the Fifth Circuit affirmed.

representative is a person or body; and (3) the petition meets certain procedural requirements.⁷ Section 1502 of the Code defines "foreign main proceeding" as "a foreign proceeding pending in the country where the debtor has the center of its main interests" (COMI).⁸ A foreign non-main proceeding, on the other hand, "means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."⁹ A statutory presumption exists only in the context of foreign main proceedings, which provides that "[i]n the absence of evidence to the contrary, the debtor's registered office or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."¹⁰

Once recognition has been granted, many provisions of the Bankruptcy

Feature

General Framework for Chapter 15 Recognition

Chapter 15 is the gateway through which foreign representatives administering foreign insolvency proceedings must pass to gain access to the judicial process in the United States. To be sure, many authors and courts have propounded on the framework, requirements and benefits of chapter 15 recognition, which are not belabored in this article. A basic understanding of the framework for recognition, however, is needed for the purposes of understanding the significance of *In re Ran*.

Simply, a foreign proceeding will be recognized under chapter 15 if the following three requirements are met: (1) the foreign proceeding is a foreign main or non-main proceeding; (2) the foreign

Code apply. For example, §§ 361, 362, 363, 549 and 552 of the Code apply to a debtor and its estate if a court grants foreign main recognition, and the court may grant various other forms of relief regardless of whether the foreign proceeding is main or nonmain.¹¹ For example, the foreign representative can file an involuntary petition under § 303 of the Code if the debtor is granted recognition, and if the foreign debtor is granted foreign main recognition, a voluntary case may be commenced under § 301.¹²

The Fifth Circuit's Analysis of Chapter 15

The Fifth Circuit's discussion of the second and third requirements for recog-

¹ *Lavie v. Ran* (*In re Ran*), 607 F.3d 1017 (5th Cir. 2010).

² *Fogerty v. Petroquest Res. Inc.* (*In re Condor Ins.*), 601 F.3d 319 (5th Cir. 2010) (addressed chapter 15 but only in context of whether chapter 15 permits foreign representatives to pursue avoidance actions in U.S. based on foreign law, but it did not address requirements of recognition in any substantive way).

³ *In re Ran*, 607 F.3d at 1019.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 1020.

⁷ 11 U.S.C. § 1517.

⁸ 11 U.S.C. § 1502(4) (emphasis added).

⁹ 11 U.S.C. § 1502(5) (emphasis added).

¹⁰ 11 U.S.C. § 1516(c).

¹¹ 11 U.S.C. §§ 1520, 1521.

¹² 11 U.S.C. § 1511.

tion—whether the foreign representative is a person or body and whether the petition meets certain procedural requirements—is largely unremarkable. Rather, the Fifth Circuit focused on the contours of the terms “COMI” and “establishment,” at least as they are understood in the context of main and non-main proceedings, respectively.

In determining whether Ran’s COMI was the United States, the court started with the statutory presumption under § 1516. Since Ran is an individual, his presumptive COMI is the location of his “habitual residence.” The Fifth Circuit analogized “habitual residence” to domicile, which is established by physical presence with intent to remain, and concluded that Ran’s habitual residence was the United States.¹³ Because evidence was introduced to suggest that Israel was Ran’s COMI, however, the Fifth Circuit then turned to the non-exhaustive factors courts have identified to determine a COMI. The court expressly declined to address whether the COMI factors typically used for entity debtors also apply in the context of individuals.¹⁴ Nonetheless, the court considered (1) the location of Ran’s creditors, (2) whether his principal assets were being administered in Israel, (3) what law would apply in the Israeli proceeding, (4) the amount of time that had passed since Ran moved to the United States, (5) whether he intended to return to Israel, (6) his employment history, (7) his legal status in the United States and (8) the current status of Ran’s financial affairs in the United States.¹⁵ Upon identifying these factors, the Fifth Circuit, without assigning weight to any particular factor, summarily concluded that Ran’s COMI was the United States.¹⁶

The most significant holding of *In re Ran* is the court’s analysis when it rejected Lavie’s alternative argument—that Ran’s COMI should be viewed through a look-back period. In other words, Lavie argued that “because Ran’s COMI was located in Israel at some point in time before he filed the petition for recognition, [the court] should lookback at Ran’s operational history in Israel to conclude that his COMI lies in Israel.”¹⁷

The Fifth Circuit analyzed Lavie’s timing argument by starting with the text of chapter 15 and analyzing the grammatical tense in which it is written. The court concluded that because

§ 1517(b)(1) is written in the present tense—it refers to where the debtor “has the center of its main interests” and courts must construe the COMI inquiry as of the time the chapter 15 petition is filed. The court noted that, if Congress had intended to impose a look-back period, it is clearly capable of doing so as it has done in other contexts in the Code.¹⁸ The court buttressed its conclusion by noting that construing COMI through a look-back period would lead to an increased likelihood of conflicting COMI determinations because courts would attach greater significance to certain historical facts.¹⁹ The court did note that if Ran had moved to the U.S. immediately after the Israeli proceeding began, the result may have been different.²⁰ The court concluded that Lavie did not overcome his burden to show that Ran’s COMI was located in Israel.

The court also rejected Lavie’s request for recognition of the Israeli proceeding as a foreign nonmain proceeding. As with its COMI analysis, the court determined that because §§ 1517(b)(2) and 1502(2) are written in the present tense—they refer to where the debtor “has an establishment” or “any place of operations where the debtor carries out a nontransitory economic activity”—courts must construe the “establishment” inquiry at the time the chapter 15 petition is filed.²¹ Therefore, the court concluded that a debtor’s “place of operations” means the place where economic activities are exercised on the market at the time the chapter 15 petition is filed.²² The court concluded that there was no evidence of any economic activity by Ran in Israel as of the chapter 15 petition date.²³ The court determined that Ran’s debt, which existed in Israel, was evidence only of historical economic activity, which is not relevant for the purpose of an “establishment” determination under chapter 15.²⁴

Significance of *In re Ran*

As a case of first impression, *In re Ran* will prove to be significant for many reasons. First, the decision highlights the important timing issue that chapter 15 practitioners and judges have largely overlooked when making the COMI and

establishment determination.²⁵ Second, the court’s textual analysis applies equally to individual and entity debtors. Practitioners should anticipate that courts will follow the Fifth Circuit’s lead by construing COMI and “establishment” as of the chapter 15 petition date. Third, the court’s textual analysis also signals that U.S. courts will apply the plain-meaning rule of statutory construction when interpreting chapter 15. It begs the question, therefore, of what significance courts will place on § 1508 (directing courts to look to foreign law)²⁶ if looking to foreign law conflicts with the plain meaning of the text as adopted by Congress.

Fourth, *In re Ran* is likely to be influential in chapter 15 cases where the debtor moves its COMI or “establishment” before the commencement of the foreign proceeding. It will also be influential in cases where the COMI or “establishment” is moved for the debtor after the commencement of foreign proceedings as a consequence of a statutorily mandated insolvency scheme promulgated by the sovereign under which the debtor is organized. Indeed, shifting COMIs often occur in hedge fund liquidations such as *In re Bear Stearns*.²⁷ The reported decisions in hedge fund cases have not addressed the timing argument raised in *In re Ran*. The Fifth Circuit hinted that the impact of shifting COMIs may be an open question when it stated that “this case does not involve a recent change of domicile by the party in question.”²⁸ The court also noted that a “similar case brought immediately after the party’s arrival in the United States following a long period of domicile in the country where the bankruptcy is pending would likely lead to a different result.”²⁹ In any event, the Fifth Circuit’s *dicta* should be viewed with caution in the context of entity debtors, however, because individual debtors are not organized or dissolved under the laws of any country.

Finally, *In re Ran* will likely influence foreign courts as they, like U.S. courts, continue to struggle with defining the contours of COMI and “establishment” under their country’s version of the Model Law. *In re Ran* will no doubt aid foreign courts in the area of statutory construction—that is, by reading the

¹³ *In re Ran*, 607 F.3d at 1022.

¹⁴ *Id.* at 1024.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1025.

¹⁸ *Id.* Section 522(b)(3)(A), which was adopted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 along with chapter 15, provides one example of a look-back period in the context of property exemptions.

¹⁹ *In re Ran*, 607 F.3d at 1025. See also *In re Betcorp*, 400 B.R. 266 (Bankr. D. Nev. 2009).

²⁰ *In re Ran*, 607 F.3d at 1026.

²¹ *Id.* at 1027.

²² *Id.*

²³ *Id.* at 1027-28.

²⁴ *Id.* at 1028.

²⁵ *In re Betcorp*, 400 B.R. 266 (addressed timing argument, and reached same holding as *In re Ran*, but did not rely on plain text of statute like Fifth Circuit).

²⁶ Section 1508 provides that, “[i]n 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.”

²⁷ 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

²⁸ *In re Ran*, 607 F.3d at 1026.

²⁹ *Id.*

statute to focus on the present. The Fifth Circuit's reasoning correctly supports the notion that determinations based on up-to-date, present information properly focus the inquiry and further the goal of value maximization, because historical facts are not always relevant and, where stale, may actually hinder that goal.

Conclusion

In re Ran is a watershed case in chapter 15 jurisprudence not only because it is the first circuit court case to address the contours of recognition under chapter 15, but also because it clarifies the landscape for understanding the substantive framework for foreign main and non-main recognition proceedings by defining the timeframe in which to view the factual predicates required for recognition to be measured as of the chapter 15 petition date.³⁰ ■

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³⁰ For a further and more detailed analysis of the timing argument, see Mark Lightner, "Determining the Center of Main Interests under Chapter 15," 17 *J. Bankr. L. & Prac.* 5, art. 2 (2009).