

## Chapter 15: Appointing a Foreign Representative after the Conclusion of the Foreign Proceeding is not a Bar to Recognition<sup>1</sup>

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### Synopsis

In another decision broadly interpreting certain requirements of chapter 15, the United States Bankruptcy Court for the Southern District of New York clarified certain requirements for chapter 15 recognition.<sup>2</sup> After the debtor, Indonesian telecommunications company PT Bakrie Telecom Tbk ('BTEL') filed its chapter 15 case, certain objecting noteholders (the 'Objecting Noteholders') filed a motion for summary judgment seeking to deny recognition of its Indonesian proceeding (the 'PKPU Proceeding'), alleging that BTEL could not satisfy three requirements for recognition: (1) the property requirement of Bankruptcy Code § 109(a); (2) the appointment of a foreign representative under § 101(24) and § 115(a); and (3) the requirement that the proceeding be 'collective' under § 101(23) and 'not be manifestly contrary to U.S. public policy' under § 1506. The court declined to grant summary judgment on all three grounds.<sup>3</sup>

Notably, the court concluded the foreign representative requirement was met notwithstanding the fact that the foreign representative was appointed three years after the PKPU Proceeding had closed. The decision signals that a delay in seeking chapter 15 relief, including through the appointment of a foreign representative *after* the conclusion of the foreign proceeding, may not be fatal for chapter 15 recognition – but it may matter if anything related to the foreign proceeding is still pending.

### I. Background

BTEL guaranteed \$380 million in senior notes issued by a subsidiary (the 'Issuer') created solely for the purpose

of issuing the notes. The Issuer loaned the proceeds of the issuance of the notes to BTEL under Intercompany Loan Agreements and, as security for the notes, granted the Indenture Trustee an assignment of all creditor rights under the Intercompany Loan Agreements. The Indenture's forum selection clause provided that any suit, action, or proceeding related to the Indenture, any note, or any guarantee be heard in New York state or federal court. BTEL ultimately defaulted on scheduled interest payments due on the notes in November 2013 and May 2014.

In October 2014, a creditor filed a PKPU application against PTEL in Indonesian commercial court. A PKPU proceeding is 'a court-enforced suspension of payments process in Indonesia that is designed to provide a debtor a definite period of time to restructure its debt and reorganize its affairs pursuant to a composition plan with its creditors'.<sup>4</sup> Two Administrators were named in the PKPU Proceeding to facilitate confirmation of the PKPU Plan. The PKPU Plan that was ultimately approved restructured all of BTEL's debt, including the notes – the Plan provided for 30% of the amount due under the notes to be paid in cash in installments over a 66-month period with a 4% interest rate, with the remaining 70% to be paid in mandatory convertible bonds. BTEL's chapter 15 case was filed in January 2018, three years after the PKPU Proceeding had closed, by a foreign representative who was appointed by BTEL's board of directors. The Objecting Noteholders argued in the chapter 15 case that they were excluded from participating in the PKPU Proceeding because in that Proceeding the Administrators found the Issuer, and not the Indenture Trustee or the Objecting Noteholders, was the creditor that had the right to vote. The Objecting Noteholders argued this violated their due process rights and was contrary to U.S. public policy.

### Notes

- <sup>1</sup> The views expressed herein are solely those of Ms Zerjal and Ms Volin, and not necessarily the views of Proskauer Rose LLP or any of its attorneys.
- <sup>2</sup> *In re PT Bakrie Telecom Tbk*, 601 B.R. 707 (S.D.N.Y. 2019).
- <sup>3</sup> The trial has now taken place, and the parties are awaiting a decision.
- <sup>4</sup> While the PKPU Proceeding was ongoing, the Objecting Noteholders were also litigating in New York state court breach of contract and fraud claims related to the notes and a declaratory judgment action arguing the PKPU Proceeding was invalid. In the chapter 15 case, BTEL stipulated to a \$161 million judgment on the breach of contract claim, which the Objecting Noteholders agreed not to enforce pending resolution of the case.

## II. The broad interpretation of recognition requirements in Chapter 15

Under § 1517, a foreign proceeding must be recognised if ‘(1) such foreign proceeding ... is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of section 1515’. There is, however, a public policy exception – a court may refuse to take action an action that ‘would be manifestly contrary to the public policy of the United States’. § 1506. The exception is narrowly construed and applies to only the ‘most fundamental policies of the United States’.

**The decision confirms an indenture subject to New York law and containing a New York forum selection clause constitutes ‘property in the US’.** The Objecting Noteholders first argued BTEL did not have property in the United States – a jurisdictional requirement for the recognition of a foreign insolvency proceeding in the Second Circuit.<sup>5</sup> The court explained that ‘Section 109’s property requirement is satisfied by maintaining even a nominal amount of property in the United States,’ and the term ‘property’ is broadly construed.<sup>6</sup> Therefore, the court found the indenture subject to New York law and containing New York forum selection clauses constituted property in the United States.

**Appointing the foreign representative after the conclusion of the foreign proceeding does not preclude a finding that the representative was properly appointed.** Next, the Objecting Noteholders argued BTEL’s foreign representative was not properly appointed because he was appointed three years after the PKPU Proceeding had closed, and therefore his appointment did not occur ‘in’ that proceeding. *See* § 101(24) (a foreign representative is ‘a person or body ... authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding’). The Objecting Noteholders also argued that the foreign representative’s appointment was improper because he was appointed by BTEL’s board of directors, and not by the Administrators in the PKPU Proceeding. In response, BTEL argued: ‘BTEL’s foreign restructuring continues because BTEL must still implement its PKPU Plan pursuant to Indonesia’s statutory PKPU framework. Under [Indonesia law], BTEL’s failure to implement the PKPU

Plan could result in BTEL’s being subjected to a court-supervised liquidation.’ BTEL’s position was that, despite the three-year gap, the appointment was still made in the context of its foreign proceeding.

The court declined to grant summary judgment on this ground, finding that a trial was appropriate ‘to examine the circumstances surrounding the timing of the foreign representative’s appointment and the significance, if any, of the delay’.<sup>7</sup> The court was ‘unaware of any authority explicitly precluding the appointment of a foreign representative for purposes of pursuing Chapter 15 relief after the foreign proceeding has been closed’ and explained that a delay in seeking chapter 15 relief, in and of itself, does not preclude a finding that the representative was properly appointed.<sup>8</sup> In addition, the court explained, ‘given the policy underlying Chapter 15, it would be hard to imagine why such action would be categorically prohibited’.<sup>9</sup> The court rejected the Objecting Noteholders’ argument that this holding would allow any entity that has ever undergone a foreign proceeding to decide, years later, that it wants to appoint a foreign representative and obtain the benefits of chapter 15. However, it noted that the PKPU Plan was yet to be implemented in this case.

In response to the Objecting Noteholders’ argument that the foreign representative’s appointment was improper because he was appointed by the board of directors rather than the Administrators, the court explained that ‘the requirement that a foreign representative be authorized in a foreign proceeding is not an onerous one. It has been read broadly in order to facilitate the purposes of Chapter 15’.<sup>10</sup> The court relied on *Vitro*, where the court found that a representative who was appointed by a corporation engaged in a foreign bankruptcy proceeding could be considered ‘authorized in a foreign proceeding’. Therefore, the court explained, the ‘requirement that a representative be authorised in a foreign proceeding is certainly compatible with appointment by a foreign court, but it is hardly necessary’.<sup>11</sup>

**Absent flagrant violations of due process, the ‘collective proceeding’ requirement remains interpreted broadly.** Finally, the Objecting Noteholders argued that the PKPU Proceeding was not ‘collective’ as is required by § 101(23) because it did not include the obligations owed to the Objecting Noteholders. A collective proceeding ‘must be instituted for the benefit of creditors generally rather than for a single creditor or class of

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5 The Second Circuit established this requirement in *In re Barnet*, 737 F.3d 238 (2d Cir. 2013). While it does not appear that other circuits have adopted this requirement, *Barnet* has been followed by a California district court. *See In re Forge Group Power Pty Ltd.*, 2018 WL 827913 \*7 (N.D. Cal. 2018).

6 *PT Bakrie Telecom Tbk*, 601 B.R. at 714–15.

7 *Id.* at 719.

8 *Id.* at 718.

9 *Id.*

10 *PT Bakrie Telecom Tbk*, 601 B.R. at 717 (citing *In re Vitro*, S.A.B. de C.V., 470 B.R. 408, 411 (N.D. Tex. 2012)).

11 *Id.* (quoting *In re Vitro*, S.A.B. de CV, 701 F.3d 1031, 1047 (5th Cir. 2012)).

creditors,' however it 'need not require that all creditors receive a share of the distribution'.<sup>12</sup>

The Objecting Noteholders argued the PKPU Proceeding was not collective because BTEL manipulated the process that governs the treatment of claims in a PKPU Proceeding to achieve a result where the Objecting Noteholders' and Indenture Trustee's claims were denied for voting purposes, while the Issuer was permitted to vote. Under Indonesian law, the administrators in a PKPU proceeding must compile a list of creditors' claims, including whether those claims are recognised or denied, and that list must be verified against the debtor's records. The Objecting Noteholders argued that, because the records used by the Administrators to prepare the list of claims was prepared by BTEL and did not include the Indenture Trustee's claim, the Administrators were either misled by BTEL or their hands were tied and they were required to conform the list of creditors to BTEL's records, which were manipulated. For the same reasons, the Objecting Noteholders also argued that the PKPU Proceeding was contrary to

U.S. public policy. However, the court found that the Objecting Noteholders and the Indenture Trustee were permitted to submit arguments to the Administrators and the judge and that the Indonesian courts had approved the PKPU Plan even though there were safeguards in the court system providing for rejection of a plan if the process by which it was reached was unfair.<sup>13</sup>

The court also found that there were significant issues of fact regarding the independence of the Administrators and whether the outcome would have actually been different had the Indenture Trustee been permitted to vote, and the court rejected the Objecting Noteholders' argument that the Proceeding was influenced by corruption in the Indonesian court system because they had produced no evidence of corruption.<sup>14</sup> Therefore, the court denied summary judgment because there were issues of fact regarding whether the PKPU Proceeding was not collective or was contrary to public policy.

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## Notes

<sup>12</sup> *Id.* at 719–20 (quoting *In re British Am. Ins. Co.*, 425 B.R. 884, 902–03 (Bankr. S.D. Fla. 2010)).

<sup>13</sup> *Id.* at 721.

<sup>14</sup> *PT Bakrie Telecom Tbk*, 601 B.R. at 722–24.