AMERICAN COLLEGE OF BANKRUPTCY
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The Latest on Chapter 15 and Other Cross-Border Cases

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CHAPTER 15: OVERVIEW AND CURRENT DEVELOPMENTS

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OVERVIEW

Chapter 15 is entitled Ancillary and other Cross-Border Cases

- It is the U.S. enactment of the UNCITRAL Model Law on Cross-Border Insolvency

41 States and two territories adopted the Model Law

The Model Law provides a framework for countries to address cross-border insolvency proceedings

- Cross-border insolvency involves a debtor with assets or issues in more than one country

OVERVIEW, Cont.

Four key concepts are embodied in the Model Law:

- Access: enabling representatives of foreign proceedings and creditors to seek assistance from courts in an enacting country
- Recognition: creating a simple, efficient process to validate the eligibility of a foreign proceeding and its foreign representative to obtain access
- Relief: establishing the nature and scope of the assistance that will apply automatically on recognition or that a court can grant to a foreign representative before or after recognition
- Cooperation and coordination: encouraging and authorizing cooperation among courts and representatives of proceedings in countries implicated in an insolvency proceeding

OVERVIEW, Cont.

- The Model Law is not identical in each adopting country because it was adapted for the country's legal system and, sometimes, because a country included a non-uniform provision or omitted a provision
  - For example, Article 20 of the Model Law says that certain actions are stayed upon recognition while section 1520 of chapter 15 applies section 362 (automatic stay) of the Bankruptcy Code.

Congress enacted chapter 15 in 2005 and specifically acknowledged that it was adopting the Model Law

- It noted that chapter 15 cases were intended to be "ancillary" to cases brought in a debtor's home country
- Chapter 15 largely tracked the Model Law; variations to fit the existing U.S. Bankruptcy Code and system were explained in the report of the House Judiciary Committee that accompanied the legislation

OVERVIEW, Cont.

Chapter 15 adopts the four key concepts of the Model Law

- Access to U.S. Courts for foreign representatives and creditors is primarily governed by section 1509, *Right of Direct Access*; section 1513, *Access of Foreign Creditors to a case under this title*; and section 1514, *Notification to foreign creditors concerning a case under this title*
- Recognition is specifically governed by section 1515, *Application for recognition*; section 1517, *Order granting recognition*; and is facilitated by section 1516, [evidentiary] *Presumptions concerning recognition*

Jurisdiction for Chapter 15 Cases

- A chapter 15 case is a case under title 11 (the Bankruptcy Code)
- The U.S. district courts have original and exclusive jurisdiction over cases under title11 pursuant to 28 U.S.C. § 1334 (a)
- 28 U.S.C.§ 157 provides that the district courts may refer all title 11 cases to the bankruptcy courts (and they do)
  - While the jurisdiction of the bankruptcy courts is limited in certain cases to submitting proposed findings of fact and conclusions of law to the district courts, the bankruptcy courts can “hear and determine” recognition of foreign proceedings, which are “core matters” under 28 U.S.C. § 157

OVERVIEW, Cont.

- Urgent relief can be granted under section 1519, *Relief that may be granted upon filing petition for recognition*; automatic relief is provided on recognition by section 1520 *Effects of recognition of a foreign main proceeding*; discretionary relief is available under section 1521, *Relief that may be granted upon recognition* and section 1507, *Additional Assistance*
- Cooperation and coordination are guided by section 1525, *Cooperation and direct communication between the court and foreign courts or foreign representatives;* section 1526; *Cooperation and direct communication between the trustee and foreign courts or foreign representatives*, section 1527, *Forms of cooperation*, section 1528, *Commencement of a case under this title after recognition of a foreign main proceeding*; section 1529, *Coordination of a case under this title and a foreign proceeding;* section 1530, *Coordination of more than 1 foreign proceeding*

OVERVIEW, Cont.

Chapter 15 enables representatives of an insolvency proceeding in a foreign country to access courts in the U.S. and seek assistance for the foreign proceeding

- The chapter 15 case will support the foreign case and will not be a "full" bankruptcy case like a chapter 7 liquidation or a chapter 11 reorganization
- A chapter 15 case can only be commenced by a foreign representative of a foreign proceeding; consequently there can be no chapter 15 case unless there is an antecedent foreign proceeding
- A debtor cannot commence a chapter 15 case
- The foreign proceeding is the subject of chapter 15 – NOT THE DEBTOR
  - The U.S. Court assists the foreign proceeding and its foreign representative

OVERVIEW, Cont.

A foreign main proceeding will be a “full” proceeding in a foreign country, similar to a liquidation case under chapter 7 or a reorganization case under chapter 11 in the U.S.

A full proceeding has attributes that are absent from a chapter 15 ancillary case, such as

- Allowing a debtor or creditors to commence the proceeding (as opposed to only the foreign representative)
- Creating an “estate” comprised of the debtor’s assets wherever located, including outside the territory of the country in which the proceeding is being conducted
- Often, requiring appointment of a trustee or other representative to supervise or replace the debtor as the owner of assets or manager of a business
- Enabling collection and monetization of assets, including by setting aside preferential or fraudulent transfers detrimental to creditors
- Providing a process for creditors to submit claims and participate in distribution of assets

OVERVIEW, Cont.

- Permitting participation of creditors through committees and by voting on reorganization proposals
- Providing for discharge of pre-insolvency proceeding liabilities

Conversely, a chapter 15 case will be ancillary to a plenary foreign proceeding and will provide assistance to or coordination with the foreign proceeding

In addition to the four key concepts, chapter 15 adopts several important definitions from the Model Law.

- FOREIGN PROCEEDING: a reorganization or liquidation proceeding under a law relating to insolvency or debt adjustment and subject to court supervision or a right to seek court review
- FOREIGN REPRESENTATIVE: a person or body authorized or appointed to act on behalf of the foreign proceeding
- COMI: the “center of main interests” or principal place of business of the debtor in the foreign proceeding

OVERVIEW, Cont.

- ESTABLISHMENT: a permanent place of business, other than the COMI, of the debtor in the foreign proceeding
- FOREIGN MAIN PROCEEDING: a foreign proceeding taking place in the country of the debtor's COMI
- FOREIGN NONMAIN PROCEEDING: a foreign proceeding taking place where the debtor has an establishment; likely either a liquidation of local assets or an ancillary proceeding but sometimes the only foreign proceeding
- SUFFICIENT PROTECTION: the condition that relief can be granted or continued only if the interests of parties other than the foreign representative are considered and balanced
- PUBLIC POLICY: recognition and relief cannot be granted if they are "manifestly contrary to the public policy of the United States"
- INTERPRETATION: the direction in chapter 15 that it should be interpreted in light of its international origin and with a view to being consistent with interpretation by other Model Law countries

OVERVIEW, Cont.

A foreign representative of a foreign proceeding files a petition with the bankruptcy court to commence a chapter 15 case

- Recognition must be granted if it is not manifestly contrary to public policy, if the foreign proceeding is a foreign main proceeding or a foreign nonmain proceeding and if the foreign representative was duly appointed
- When recognition has been granted, the U.S. court must cooperate with the foreign representative and the foreign court to the maximum extent possible

Chapter 15 is primarily a gateway for a foreign representative to gain **access** to courts in the U.S.

- To pass through the gateway, the foreign representative must obtain recognition of the foreign proceeding
  - Recognition validates the eligibility of the foreign proceeding and the foreign representative under statutory criteria
- After recognition has been granted, **relief**, **cooperation** and **coordination** are mostly provided by the U.S. bankruptcy courts but the foreign representative can also proceed in any court in the U.S.

OVERVIEW cont'd

Relief – Assistance - may include:

- Protection of the debtor and its assets located in the U.S. against creditor action and litigation – the automatic stay takes effect on recognition of a foreign main proceeding
  - Pre-recognition relief can be granted if urgently needed
- Collection of information and investigation through judicially sanctioned discovery
- Sale of assets in the U.S. or coordinated sale of domestic and foreign assets to realize going concern value
- Collection of accounts and recovery of assets for distribution in the foreign proceeding
- Coordination of parallel domestic and foreign reorganization proceedings
- Enforcement of foreign reorganization plans

Relief is conditioned on (a) not being manifestly contrary to public policy and (b) providing sufficient protection to creditors and other parties, including the debtor

§1501(a) Purpose of Chapter 15

To provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of…

- Cooperation between courts/authorities in cross-border insolvency cases
- Greater legal certainty for trade and investment
- Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor
- Protection and maximization of the value of the debtor's assets; and
- Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment

§1501(b) Scope of Chapter 15

Chapter 15 applies where:

- Assistance is sought in the U.S. by a foreign court or foreign representative in connection with a foreign proceeding;
- Assistance is sought in a foreign country in connection with a case under Title 11;
- A foreign proceeding **and** a case under title 11 with respect to the **same debtor** are pending concurrently; or
- Creditors or other interested parties in a foreign country have an interest in commencing , or participating in, a case or proceeding under Title 11

§101 Definitions

(23) The term “foreign proceeding” means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, 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.

(24) The term “foreign representative” means a person or body, including a person or body appointed on an interim basis, 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.

(42) The term “petition” means petition filed under section **301**, **302**, **303** and **1504** of this title, as the case may be, commencing a case under this title.

§1502 Definitions

For the purposes of this chapter, the term –

(1) "debtor" means an entity that is the subject to a foreign proceeding; [Contrast §101(13) The term "debtor" means person or municipality concerning which a case under this title has been commenced]

(2) "establishment" means any place of operations where the debtor carries out a nontransitory economic activity;

(3) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(4) "foreign main proceeding" means a foreign proceeding pending in the country where the debtor has the center of its main interests;

(5) "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment;

(6) "trustee" includes a trustee, a debtor in possession in a case under any chapter of this title, or a debtor under chapter 9 of this title;

§1502 Definitions

(7) "recognition" means the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter; and

(8) "within the territorial jurisdiction of the United States", when used with reference to property of a debtor, refers to tangible property located within the territory of the United States…
[Contrast §541(a) "…estate is comprised of all…property, wherever located and by whomever held".]

§1508 Interpretation

Chapter 15's international origin and implications affect its construction

- In interpreting chapter 15, the court must consider its international origin and the goal of uniform application among adopting countries – "consistent with the application of similar statutes adopted by foreign jurisdictions"
- International obligations of the United States will prevail if they conflict with chapter 15 (§1503)

§ 1506 Public Policy Exception

"Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."

§1410. Venue of cases ancillary to foreign proceedings

- 28 U.S.C. §1410 provides that a case under chapter 15 of title 11 may be commenced in the district court of the United States for the district –
- (1) in which the debtor has its principal place of business or principal assets in the United States;
- (2) if the debtor does not have a place of business or assets in the United States, in which there is pending against the debtor an action or proceeding in a Federal or State Court; or
- (3) in a case other than those specified in paragraph (1) or (2), in which venue will be consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative.

Getting to Recognition

- Per § 1504, a chapter 15 case is commenced by filing a petition for recognition under § 1515
- Under § 1515, a foreign representative applies for recognition by filing a petition accompanied by evidentiary materials demonstrating the commencement of the foreign proceeding and the appointment of the foreign representative
- §1509 authorizes a foreign representative to file the petition for recognition directly with the bankruptcy court
- §1515, Federal Rule of Bankruptcy Procedure 1004.2 and Official Form 401 govern the application for recognition

New Forms and Rules

- New procedural rules in Chapter 15 cases now apply. The Federal Rules of Bankruptcy Procedure ("Rules") were revised effective December 1, 2016. The Official Bankruptcy Forms ("Forms") were previously revised effective December 1, 2015.
- Official Form 1 had been an omnibus form of petition to commence cases under all chapters of the Bankruptcy Code including chapter 15. Form 1 has been replaced with a series of chapter-specific forms, with Forms 309A-309I applying to cases under chapters other than chapter 15 and Form 401 – Chapter 15 Petition for Recognition of Foreign Proceeding – applying to chapter 15. Form 401 requires the following disclosures: the name of the debtor, its address and website; whether the debtor is an individual or an entity; the name of

New Forms and Rules, Cont.

the foreign representative; identification of the foreign proceeding and whether it is a foreign main proceeding or a foreign nonmain proceeding; the country where the debtor has its center of main interests; evidence of the foreign proceeding; whether there are additional foreign proceedings; a list of parties entitled to notice; and the basis for venue in the filing district.

New Forms and Rules, Cont.

The fee for filing a chapter 15 petition is the same as the fee for filing a chapter 11 petition. Effective December 1, 2016, the basic fee is $1,167 plus an "administrative fee" add-on of $550 for a total of $1,717.

Before December 1, 2016, Rules 1010(a) and 1011(a) and (f) governed the procedures for service of notice and for responses to chapter 15 petitions, while Rule 2002(q) also contained notice requirements for a chapter 15 petition. Rule 1010(a) required that a summons issue for service upon the debtor, any entity against which provisional relief is sought under section 1519 of the Bankruptcy Code and on any other party as the court may direct. Rule 1011 set forth the procedures to respond to a chapter 15 petition. The chapter 15 provisions were removed from Rules 1010(a) and 1011(a) and (f) by the December 1, 2016 rule change.

New Forms and Rules, Cont.

Consequently, instead of complementary and somewhat duplicative notice requirements in both Rule 1010 and Rule 2002, now an amended Rule 2002(q)(1) alone establishes the notice requirements for chapter 15 petitions for recognition. Rule 2002(q)(1) requires that at least 21 days' notice by mail of the hearing on the petition for recognition of a foreign proceeding be given to the debtor, all administrators in foreign proceedings of the debtor, entities against whom provisional relief is sought, entities with whom the debtor is engaged in litigation at the time of commencement of the case and such other entities as the court may direct. The notice must specify whether the petition seeks recognition of a foreign main proceeding or a foreign nonmain proceeding. The Rule also provides that the court may shorten the notice period if it consolidates the hearing on the petition with a hearing on a request for provisional relief.

New Forms and Rules, Cont.

New Rule 1012 provides that the debtor or any party in interest may contest a petition for recognition of a foreign proceeding. Unless the court specifies some other time or manner for response, objections and other responses must be filed not later than seven days before the date set for the hearing on the petition. If the responding entity is a corporation, then it must file a corporate ownership statement that complies with Rule 7007.1.

Rule 1018 continues to apply to contested chapter 15 petitions and—similarly to Rule 9014, which applies to contested matters—invokes components of the Part VII rules that apply to adversary proceedings.

Recognition Procedure: Evidence

- The petition must be accompanied by (1) evidence of the existence of the foreign proceeding and of the appointment of the foreign representative and (2) a statement identifying all other known foreign proceedings of the debtor (all translated into English) (§1515(b))
  - Typically, evidence will be presented by a combination of a verified petition, a declaration of the foreign representative and exhibits to the declaration
- §1516 contains evidentiary presumptions concerning recognition
  - The court can presume that the foreign case is a foreign proceeding and that the representative is a foreign representative based on a certified copy of the decision commencing the foreign proceeding or on a certificate from the foreign court
  - Documents submitted in support of the petition for recognition are presumed to be authentic
  - Absent evidence to the contrary, the debtor's registered office is presumed to be its COMI
    - Burden of proof remains on the foreign representative

Order Granting Recognition- §1517

- Subject to §1506 (public Policy), order recognizing foreign proceeding shall enter if:
  - Foreign proceeding is a foreign main proceeding or a foreign non-main proceeding and foreign representative is a person or body as defined
  - A foreign proceeding in the country where the debtor has the center of its main interests will be a foreign main proceeding
  - A foreign proceeding in a country where the debtor has an establishment (place of operations) will be a foreign non-main proceeding; presence of assets alone insufficient for eligibility
  - No recognition in the abstract, i.e. if there is not a main or non-main proceeding

Order Granting Recognition- §1517, Cont.

Foreign Main Proceeding or Foreign Nonmain Proceeding

- UNCITRAL Model Law required significant economic presence to guard against manipulative forum selection – either center of main interests (COMI) or a "nontransitory economic activity"
- COMI taken from EU Regulation
- Recital 13 to the EU Regulation provides:
  - "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

Order Granting Recognition- §1517, Cont.

Purpose and timing differences:

- Under the EU Regulation, COMI determination made to establish jurisdiction of one EU court over entire case
- Determination made at time of commencement of the main case
- Under chapter 15, COMI determination made to establish eligibility of foreign proceeding for U.S. assistance
- Determination made while foreign proceeding is pending and often long after its commencement

U.S. courts equate COMI with principal place of business

Order Granting Recognition- §1517, Cont.

U.S. courts wrestle with eligibility of foreign proceedings pending in countries where debtor no longer has (or maybe never had) a significant economic presence

- Cases went from refusal to recognize such foreign proceedings (Bear Stearns, 389 B.R. 325 (S.D.N.Y. 2008)) to accepting that the control of the debtor's remains –its liquidation –became its main interests and the locus of the foreign proceeding became its COMI (Fairfield Sentry, 714 F.3d 127 (2d Cir. 2013))
- To adopt this approach, COMI had to be measured as of the date of the chapter 15 petition not as of the date that the foreign proceeding was commenced or during the debtor's pre-insolvency business life

- Recent update to UNCITRAL Guide to Enactment of Model Law adopts position that COMI should be measured as of date of commencement of foreign proceeding

11 U.S. Code § 1509 - Right of direct access

- (a) A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.
- (b) If the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter—
  - (1) the foreign representative has the capacity to sue and be sued in a court in the United States;
  - (2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court…
  - (3) a court in the United States shall grant comity or cooperation to the foreign representative.
- (c) A request for comity or cooperation by a foreign representative in a court in the United States other than the court which granted recognition shall be accompanied by a certified copy of an order granting recognition under section 1517.

11 U.S. Code § 1509 – Right of direct access, Cont.

- (d) If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States.
- (e) Whether or not the court grants recognition, and subject to sections 306 and 1510, a foreign representative is subject to applicable nonbankruptcy law.
- (f) Notwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor.

11 U.S. Code § 1511 – Commencement of case under Section 301, 302, or 303

- (a) Upon recognition, a foreign representative may commence—
  - (1) an involuntary case under section 303; or
  - (2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.

11 U.S. Code § 1512 - Participation of a foreign representative in a case under this title

Upon recognition of a foreign proceeding, the foreign representative in the recognized proceeding is entitled to participate as a party in interest in a case regarding the debtor under this title.

11 U.S. Code § 1513 – Access of foreign creditors to a case under this title

- Foreign creditors have the same rights regarding the commencement of, and participation in, a case under this title as domestic creditors.

11 U.S. Code § 1514 - Notification to foreign creditors concerning a case under this title

- (a) Whenever in a case under this title notice is to be given to creditors generally or to any class or category of creditors, such notice shall also be given to the known creditors generally, or to creditors in the notified class or category, that do not have addresses in the United States. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known
- Rule 2002 (p) Notice to a Creditor With a Foreign Address.
  - (1) If, at the request of the United States trustee or a party in interest, or on its own initiative, the court finds that a notice mailed within the time prescribed by these rules would not be sufficient to give a creditor with a foreign address to which notices under these rules are mailed reasonable notice under the circumstances, the court may order that the notice be supplemented with notice by other means or that the time prescribed for the notice by mail be enlarged.
  - (2) Unless the court for cause orders otherwise, a creditor with a foreign address to which notices under this rule are mailed shall be given at least 30 days' notice of the time fixed for filing a proof of claim under Rule 3002(c) or Rule 3003(c).
  - (3) Unless the court for cause orders otherwise, the mailing address of a creditor with a foreign address shall be determined under Rule 2002(g).

11 U.S. Code § 1519 – Relief that may be granted upon filing petition for recognition

- (a) From the time of filing a petition for recognition until the court rules on the petition, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including—
  - (1) staying execution against the debtor's assets;
  - (2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign … in order to protect and preserve the value of assets that… are perishable, susceptible to devaluation or otherwise in jeopardy; and
  - (3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a).
- (d) The court may not enjoin a police or regulatory act of a governmental unit…

11 U.S. Code § 1519 – Relief that may be granted upon filing petition for recognition, Cont.

- (e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under this section.
- (f) The exercise of rights not subject to the stay arising under section 362 (a) pursuant to paragraph (6), (7), (17), or (27) of section 362 (b) or pursuant to section 362 (o) shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter

11 U.S. Code § 1520 - Effects of recognition of a foreign main proceeding

- (a) Upon recognition of a foreign proceeding that is a foreign main proceeding—
  - (1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;
  - (2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;
  - (3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and
  - (4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.

11 U.S. Code § 1521 – Relief that may be granted upon recognition

(a) Upon recognition of a foreign proceeding, whether main or nonmain, … the court may, at the request of the foreign representative, grant any appropriate relief, including—

- (1) staying the commencement or continuation of an individual action or proceeding …to the extent they have not been stayed under section 1520 (a);
- (2) staying execution …the extent it has not been stayed under section 1520 (a);
- (3) suspending the right to transfer… any assets of the debtor to the extent this right has not been suspended under section 1520 (a);
- (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

11 U.S. Code § 1521 – Relief that may be granted upon recognition, Cont.

(5) entrusting the administration or realization of … debtor's assets within the territorial jurisdiction of the United States to the foreign representative …;

(6) extending relief granted under section 1519 (a); and

(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724 (a).

11 U.S. Code § 1521 - Relief that may be granted upon recognition, Cont.

(b) … the court may… entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative … provided that … the interests of creditors in the United States are sufficiently protected

(c) … relief … to a representative of a foreign nonmain proceeding… relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

(d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.

(e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under paragraphs (1), (2), (3), and (6) of subsection (a).

11 U.S. Code § 1521 - Relief that may be granted upon recognition, Cont.

(f) [financial contract safe harbor]

NB: 1521(a)(7) specifically prohibits granting relief under most avoidance provisions of the Bankruptcy Code: sections 522 (avoidance concerning exempt assets of individual debtors), 544 (exercise certain state law avoidance powers), 545 (avoid certain statutory liens), 547 (preferences), 548 (fraudulent transfers), 550 (recovery from transferees of avoided transfers), and 724 (a) (avoidance of liens securing certain claims, e.g. penalties, punitive damages)

11 USC § 1522 –Protection of Creditors and other interested persons

- (a) The court may grant relief under section 1519 or 1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.
- (b) The court may subject relief granted under section 1519 or 1521, or the operation of the debtor's business under section 1520 (a)(3), to conditions it considers appropriate, including the giving of security or the filing of a bond.

§ 1523 ACTIONS TO AVOID ACTS DETRIMENTAL TO CREDITORS

- (a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724 (a)

11 U.S. Code Chapter 15, Subchapter IV – Cooperation with Foreign Courts and Foreign Representatives

- § 1525. Cooperation and direct communication between the court and foreign courts or foreign representatives
- § 1526. Cooperation and direct communication between the trustee and foreign courts or foreign representatives
- § 1527. Forms of cooperation

11 U.S. Code Chapter 15, Subchapter V –Concurrent Proceedings

- § 1528. Commencement of a case under this title after recognition of a foreign main proceeding
- § 1529. Coordination of a case under this title and a foreign proceeding § 1530. Coordination of more than 1 foreign proceeding
- § 1531. Presumption of insolvency based on recognition of a foreign main proceeding
- § 1532. Rule of payment in concurrent proceedings

In re Hellas Telecommunications (Luxembourg) II SCA, Debtor in foreign proceeding, 555 B.R. 323 (Bankr. S.D.N.Y. 2016)

Latest (and likely last) of several chapters in saga of English Liquidators' quest to collapse a series of complicated transactions and avoid fraudulent transfers

- Hellas II, a Greek telecommunications company, was a debtor in a compulsory liquidation proceeding in England
- Liquidators obtained chapter 15 recognition of English proceeding

A series of transactions begun in December 2006 culminated in borrowings used to fund the redemption of equity securities and, to a lesser extent, pay fees to affiliates of owners of those securities

- Liquidators challenged initial transfers of €1.57 billion and subsequent transfers of €973.7 million

Hellas, Cont.

Liquidators' adversary proceeding in the chapter 15 asserted fraudulent transfer claims against U.S.-based and foreign-based defendants under New York law and also asserted common law unjust enrichment claims against U.S.-based and foreign-based defendants

- The Court dismissed (a) all claims against the foreign-based defendants for lack of personal jurisdiction; (b) the fraudulent transfer claims against U.S.-based defendants for lack of standing; and (c) the unjust enrichment claims against the foreign-based defendants for lack of personal jurisdiction.
  - The Court did not dismiss the unjust enrichment claims against the U.S.-based defendants.

- English law did not empower Liquidators to exercise rights of individual creditors to avoid fraudulent transfers

Hellas, Cont.

§ 1521(a)(7) prevented the use of § 544 as portal to apply New York avoidance law;

- § 1521(a)(7) provides "**(a)** Upon recognition of a foreign proceeding, … the court may, at the request of the foreign representative, grant any appropriate relief, including—**(7)** granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

The Liquidators next sought leave to amend their complaint to plead avoidance claims under English law and the Court allowed the amendment

- The Court held that it could adjudicate claims under U.K. avoidance law
- At this stage, the court rejected an objection to the amendment asserting that the amended complaint would be subject to dismissal on *forum non conveniens* grounds
- There was no avoidance action pending in the U.K at the time and only one defendant had acknowledged jurisdiction in the U.K.

Hellas, Cont.

The plaintiff Liquidators then filed an avoidance action in England "on a protective basis…" which they intended would be stayed in favor of the more advanced U.S. action

- Instead, the U.K. case triggered reconsideration of the *forum non conveniens* issue
- The Court noted that its function in a chapter 15 case was to provide assistance to the U.K. court, not to supplant the U.K. court on matters properly pending before it
- All defendants consented to the jurisdiction of the U.K. court and agreed that all discovery previously taken in the U.S. could be used in the U.K. action
- The Court stated that the U.K court should decide a matter of its own law and that the U.K, court provided an adequate alternative forum
- Consequently, the Court granted the *forum non conveniens* motion but stayed the U.S. case, rather than dismiss it, to assure that the defendants would essentially not try to escape from the U.K case

In re Irish Bank Resolution Corporation Limited (in Special Liquidation), Debtor in a foreign proceeding, 559 B.R. 627 (Bankr. D. Del. 2016)

- Liquidators of failed Irish bank obtained chapter 15 recognition in 2013
  - They were pursuing litigation in Ireland to recover €2.8 billion in loans from IBRC to the Quinn family and companies it owned or controlled
    - Irish courts found that Quinns engaged in a sophisticated scheme to evade repayment
  - Liquidators obtained information from informants about "certain email addresses" used in connection with scheme, including abdrasim@yahoo.com, ostensibly the account of Abdullah Rasimov (the "Yahoo Account")

Irish Bank Resolution Corporation, Cont.

Obtained *ex parte* order from English High Court authorizing discovery from certain respondents, including Yahoo! Inc. UK

- Liquidators then obtained *ex parte* orders from the bankruptcy court under Rule 2004 seeking discovery from email service providers
- Liquidators served subpoenas on Yahoo! Inc. [U.S.] seeking all documents relating to the Rasimov Yahoo Account and the IP addresses of all computers used to access the account and Yahoo produced some material
- A second subpoena sought "all electronically stored information contained in the Yahoo Account…" and Yahoo said it was barred from complying by the Stored Communications Act ("SCA")

Irish Bank Resolution Corporation Limited, Cont.

- Liquidators next obtained an order directing Rasimov to consent to the release of the email information or, alternatively, authorizing the Liquidators to consent on Rasimov's behalf
  - Liquidators provided this "consent" to Yahoo but Yahoo said it did not comprise the "lawful consent" of a party as contemplated by the SCA
  - Liquidators' next clever idea was to have the Court designate them as the "subscriber" of the Yahoo account, but Yahoo continued to demur
- Ever resourceful, the Liquidators sought additional relief under § 1521(a)(5) [entrustment] and § 1521(a)(7) seeking to apply § 542 (turnover) and obtain order directing Yahoo to turn over all of the electronically stored information

Irish Bank Resolution Corporation Limited, Cont.

- Additional relief under § 1521 is discretionary
- § 1521(a)(5) provides that the court can grant relief "entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative …"
- § 1521(a)(7) provides that the court can grant "any additional relief that may be available to a trustee [except under U.S. avoidance law]" and § 542 provides "… an entity… in possession, custody, or control… of property that the trustee may use, sell, or lease under section 363 of this title… shall deliver to the trustee… such property …"

Irish Bank Resolution Corporation Limited, Cont.

- The Court concluded that turnover relief is generally available in chapter 15, probably subject to the requirements of § 1522 (sufficient protection of affected parties)
  - However the Liquidators failed to present evidence necessary to support § 542 relief – that the contents of the Yahoo Account were either property of the debtor at the commencement of the case or contained information that related to the debtor's estate
  - Even if the Liquidators had satisfied their burden of proof, the Court concluded that the SCA "presents a compelling reason why the Court should refrain…" from ordering turnover of the Yahoo Account
  - Court further relies on Judge Gropper's decision in In re Toft, 453 B.R. 186 (Bankr. S.D.N.Y., 2011) addressing the interplay between chapter 15 and the SCA

In re Sanjel (USA) Inc., 2016 WL 4427075 (Bankr. W.D. Tex. 2016)

- Debtors in Canadian Companies' Creditor Arrangement Act ("CCAA") restructuring proceeding obtained "Initial Order" granting broad stay protection to its directors and officers and also its CRO ("D&O Stay")
  - Monitor, as foreign representative, filed for chapter 15 recognition as foreign main proceeding and sought emergency relief under § 1519
  - Court granted TRO pre-recognition that enforced the Initial Order
  - Three weeks later, court granted recognition as foreign main proceeding (which automatically applies the automatic stay of § 362) and under §1521 extended the discretionary relief provisionally granted under § 1519, including the D&O stay provisions

Sanjel, Cont.

- Plaintiffs who were part of a class with Fair Labor Standards Act claims against the debtor sought relief from stay to pursue statutory cause of action against officers and directors
    - Debtors argued that plaintiffs could seek relief from the Canadian courts and that the litigation would interfere with the restructuring
    - Movants sought relief from the automatic stay and, less clearly, from the D&O stay imposed by the recognition order and its imposition of the Initial Order

Sanjel, Cont.

Court notes that the automatic stay only protects the debtor and its property so relief from the § 362 stay would not allow plaintiffs to proceed

- However, court could modify the recognition order's imposition of the D&O stay
- Modification is permitted under § 1522(c), which provides: "The court may, at the request of the foreign representative or an entity affected by relief granted under section 1519 or 1521, or at its own motion, modify or terminate such relief."
- § 1522(a) imposes a condition on modification that "…the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."
- This, then, requires courts to balance the relative hardships of the parties

Sanjel, Cont.

- The plaintiffs were obligated to file a consent with the court in which the FLSA class action against the Ds & Os was filed for their action to commence
  - The statute of limitations continued to run against them and was not tolled by § 108(c), which only applied to the debtor
  - Protecting the plaintiffs against the loss of their claims outweighed the additional burden imposed on the debtor
  - Court modified the recognition order to permit plaintiffs to take discovery to learn the names of the Ds & Os and to then allow them to file the consents necessary to commence the actions against those Ds & Os

Trikona Advisers Limited v. Rakshitt Chugh, et al, ___ F.3d ____, 2017 WL 191936 (2d Cir. Jan. 18, 2017)

- Messrs. Chugh and Kalra formed Trinity Capital Plc.(“Trinity”), a closed end fund, and Trikona Advisers Limited (“TAL”), which managed Trinity. Each of Chugh and Kalra indirectly owned 50% of TAL.
  - A series of unfortunate events led to the ouster of Chugh from the Trinity board, the collapse of Trinity and TAL and then Chugh’s ouster from the TAL board
  - According to Chugh, Kalra caused the cataclysm. Kalra attributed the disaster to Chugh

Trikona, Cont.

- Chugh's entities petitioned for TAL's winding up in the Cayman Islands
  - Kalra opposed the winding-up, arguing in affirmative defenses that Chugh's breaches of fiduciary duties in allegedly sabotaging deals and stealing assets precluded him from invoking the equitable jurisdiction of the Cayman court to conduct the winding-up
  - After a seven-day trial, the Cayman court rejected each of Kalra's affirmative defenses and found that it was just and equitable to wind up TAL

Trikona, Cont.

- Two months prior to the commencement of the winding-up proceeding, Kalra had caused TAL to sue Chugh and his entities in the U.S. District Court in Connecticut, asserting essentially the same fiduciary duty claims that he had raised in opposition to the winding-up
  - After the Cayman court ruling denying the affirmative defenses, Chugh moved for summary judgment based on collateral estoppel and the USDC granted the motion
- TAL appealed and - for those of you who were wondering, here is where chapter 15 comes in – asserted that chapter 15 precluded the USDC from applying collateral estoppel to the findings of fact from the Cayman court. The 2d Circuit disagreed

Trikona, Cont.

- After a partially accurate reprise of chapter 15, the 2d Circuit notes “In the interests of uniformity and efficiency, Chapter 15 provides for the coordination of domestic and foreign proceedings into a single bankruptcy [sic] and, with specific relevance to the issue raised by TAL, allows foreign representatives appointed in connection with foreign proceedings to seek recognition of those proceedings in United States courts as a means of requesting United States assistance in administering the main liquidation.”
- The court goes on: “No party to the district court proceeding is a ‘representative’ of a ‘foreign proceeding,’ … And no party to the district court proceeding is seeking the assistance of the district court in enforcing or administering a foreign liquidation proceeding… nor is any party seeking the assistance of a foreign country…; nor does

Trikona, Cont.

the case involve a proceeding under the Bankruptcy Code pending concurrently with a foreign liquidation proceeding…; nor are foreign creditors seeking to commence an action under the Bankruptcy Code…. **Even assuming, *arguendo*, that the wind-up proceeding is the type of case that Chapter 15 would ordinarily cover, Chapter 15 does not apply when a court in the United States simply gives preclusive effect to factual findings from an otherwise unrelated foreign liquidation proceeding, as was done here**. (emphasis added).

In re Bluberi Gaming Technologies, Inc., 554 B.R. 841 (Bankr. N.D. Ill. 2016)

- Bluberi Gaming Technologies, Inc. and affiliates ("Bluberi") is a Canadian company that sells gaming machines to casinos in the U.S. It commenced a restructuring proceeding under the Canadian Companies' Creditor Arrangement Act ("CCAA") and later obtained authority to sell its assets to its largest creditor, Callidus.
  - The Canadian court authorized Bluberi to act as its own foreign representative and Bluberi sought chapter 15 recognition of the CCAA proceeding
  - Bluberi sought emergency relief ordering that the protections of § 365(e) apply (prohibition of *ipso facto* contract termination)
  - Court was hesitant about applying parts of § 365 selectively but ultimately did so
  - Later, Bluberi asked that the recognition order apply § 365 in its entirety

Bluberi, Cont.

- AGS, a party to which Bluberi had granted “a perpetual, fully paid-up license to use ... the Bluberi gaming software,” objected to the provisional relief and to the relief requested on recognition
  - Specifically, AGS argued that the chapter 15 case should not be allowed to interfere with its rights to escrowed source code
  - The court granted recognition since the issues raised by AGS were really a contractual dispute and did not bear on recognition
  - AGS shot back with a Motion to Compel Performance of its contracts with Bluberi
- The court, on its own, raised the issue of its constitutional authority to entertain the Motion in light of Stern v. Marshall

Bluberi, Cont.

- Determinations under § 365 in plenary cases under chapter of the Bankruptcy Code other than chapter 15 are regarded as being clearly within the court's constitutional authority ("[B]ecause § 365 is closely-linked to the claims allowance process (at least for claims arising from executory contracts and unexpired leases), the proceeding to this extent is a continuation of the 'core' claims proceeding ..., a proceeding in which the court's authority is at its 'constitutional maximum.' "). (citation omitted)
  - § 365(n) issues fall within this logic (Rejection of a contract and the effects thereof are creations purely of bankruptcy law. This action clearly "stems from the bankruptcy itself.") (citation omitted)

Bluberi, Cont.

- The question then is whether there is constitutional authority to determine § 365 issues when § 365 is applied on a discretionary basis in a chapter 15 case under § 1521(a)(7) –
  - "Upon recognition of a foreign proceeding… the court may, at the request of the foreign representative, grant any appropriate relief, including
  - (a)(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)."

Bluberi, Cont.

- The court concluded that it has the requisite authority to consider the Motion:
  - But this is a case under chapter 15. And, as noted above, section 365 applies only pursuant to the Recognition Order entered, in this regard, under section1521. 11 U.S.C. § 1521(a)(7). And because this court has granted relief under section 1521, the protections afforded creditors under section 1522 apply. It appears, therefore, that AGS's request may properly fall within the court's authority under either section 1522(b) or (c), and neither the Foreign Representative nor Callidus has argued otherwise. The court will, as previously determined, continue under the presumption that the order compelling requirement with section 365(n)(4) requested by AGS is within the court's authority. (citations omitted)

Bluberi, Cont.

- While the ultimate interpretation of the contracts is entertaining ("At its heart, this is purely a dispute over how to interpret and apply a poorly drafted series of contracts."), it does not add to the chapter 15 jurisprudence. But since you probably want to know, Bluberi won and AGS lost – its motives were not pure.

Chapter 15 Quarterly Filings (2005- Present)

Ancillary and Other Cross-Border Cases

	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
2005				6	6
2006	22	11	29	13	75
2007	3	7	26	6	42
2008	3	15	19	28	65
2009	38	59	15	24	136
2010	35	17	19	53	124
2011	24	19	8	6	57
2012	83	21	11	6	121
2013	26	20	19	22	87
2014	18	15	15	10	58
2015	31	17	14	28	90
2016	44	54	25	55	178

Source: Administrative Office of U.S. Courts

Average: 87
Median: 81

CURRENT WORK

1. Develop a Model Law and Guide to Enactment for Enterprise Groups

2. Develop a Model Law and Guide to Enactment for the Recognition of Cross-Border Insolvency-Related Judgments

3. Consider insolvency-related issues in regard to the development of a Model Law or legislative provisions in regard to MSMEs.

FUTURE WORK BEING CONSIDERED

1. III proposal on Arbitration and International Insolvency

2. Proposal by the United States for a colloquium on tools available for Post-Fraud Civil Asset Recovery, including in the context of insolvency.

- **European Insolvency Regulation 1346/2000** came into force on May 31, 2002.

- **Recast Insolvency Regulation 2015/848** came into force on June 25, 2015 and affects insolvency proceedings on or after June 26, 2017.

Four Main Areas are Affected by the Recast Regulations

I. COMI (Centre of Main Interest)

The presumption the COMI of the debtor is in the place of the registered office will not apply if the COMI of the debtor has shifted in the proceeding three months prior to an insolvency filing.

Four Main Areas are Affected by the Recast Regulations

COMI (Centre of Main Interest)

If the COMI has shifted, the court or officeholder as the case may be is charged with examining jurisdiction ex officio.

Four Main Areas are Affected by the Recast Regulations

COMI (Centre of Main Interest)

Individuals in business are the same but for individuals not in business the look back period is six months.

Four Main Areas are Affected by the Recast Regulations

Formal definition of COMI:

"The place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties." (Art. 3(1))

Four Main Areas are Affected by the Recast Regulations

Formal definition of Establishment:

"A place of operations where the debtor carries out or has carried out in the three months prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets." (Art. 2(10))

Four Main Areas are Affected by the Recast Regulations

II. Enlarging the Scope of Insolvency Proceedings

The definition of main proceedings has been expanded to include pre-insolvency rescue proceedings.

Four Main Areas are Affected by the Recast Regulations

Enlarging the Scope of Insolvency Proceedings

Also, the prior requirement that secondary proceedings be winding up proceedings has been modified and now can also include rescue proceedings.

Four Main Areas are Affected by the Recast Regulations

Enlarging the Scope of Insolvency Proceedings

As before, schemes of arrangement remain outside the scope of the recast regulations annex and will provide a definite list of the proceedings which are covered by this provision.

Four Main Areas are Affected by the Recast Regulations

III. Synthetic Secondary Proceedings

The Recast Regulations provides for the officeholder of the main proceedings to give an undertaking to foreign creditors where secondary proceedings could have been opened, so that secondary procedings do not have to be opened.

Four Main Areas are Affected by the Recast Regulations

Synthetic Secondary Proceedings

This provision does require the appropriate support from “Known Local Creditors.”

Four Main Areas are Affected by the Recast Regulations

Definition of Known Local Creditor:

A creditor whose claim against the debtor arises from or in connection with the operation of an establishment situated in a member state other than the one where the debtor has his COMI.

Four Main Areas are Affected by the Recast Regulations

IV. Group Insolvencies and Communications

An office holder appointed in any one proceeding will be able to request the opening of group coordination proceedings.

Four Main Areas are Affected by the Recast Regulations

Group Insolvencies and Communications

When the opening of group proceedings is requested at a number of State courts, the Court first seized will have jurisdiction to consider the request.

Four Main Areas are Affected by the Recast Regulations

Group Insolvencies and Communications

To open a group coordinating proceeding, the Court hearing the request must determine:

i) no group member anticipated to participate is likely to be financially disadvantaged; and

ii) that it is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members.

Four Main Areas are Affected by the Recast Regulations

Group Insolvencies and Communications

The group coordinating proceeding is voluntary. Where opened, a group coordinator will be appointed.

Four Main Areas are Affected by the Recast Regulations

Group Insolvencies and Communications

An obligation to co-operate and communicate are binding on all parties.

This includes between insolvency office holders (Art. 56), courts (Art. 57) and also insolvency office holders and courts (Art. 58).

III Proposal to UNCITRAL on Arbitration & International Insolvency

I. Introduction

As international insolvency proceedings become more common, more widespread, and more significant to the world economy, there is a major opportunity for UNCITRAL to provide very significant advice on issues involving the intersection of insolvency law and international arbitration.

The New York Convention / Model Law / Arbitration Rules are effective, universally respected and have stood the test of time. Less clear is the link between the New York Convention / Model Law / Arbitration Rules dispute resolution systems and insolvency systems, which come into play when financial problems of multinational businesses demand resolution. While existing rules and model laws on arbitration and insolvency have created valuable tools fostering international trade, the connection and collision of these regimes should be clarified to the extent necessary to establish a more harmonized and efficient common set of rules.

The purpose of this proposal is to request that UNCITRAL consider undertaking a project on the intersection between international arbitration and international insolvency law and to authorize the assignment of this work to a working group or representatives from more than one working group.

This project would study the impact on a pending arbitration of the commencement of insolvency proceedings by a party to the arbitration. Among the questions that this project should address would be whether, and to what extent, an international arbitration may proceed after the opening of such an insolvency case, and how the arbitration case should interact with (a) the insolvency case and (b) any related insolvency cases that may be opened in other countries respecting the same debtor or the other members of a corporate group of which the insolvency debtor is a member.[1]

This project would also study the question whether a prepetition agreement to arbitrate should be enforced after the commencement of an insolvency case to resolve a dispute between the debtor and a creditor or to determine the monetary value of the creditor's claim in the insolvency case. Countries have taken divergent views on the question whether an

[1] *See, e.g.,* Sara Nadau-Séguin, When Bankruptcy and Arbitration Meet: A look at Recent ICC Practice, 5 No. 1 DISP. RESOL. INT'L 79 (2011).

agreement to arbitrate is enforceable after an insolvency filing by one of the parties. It would be useful for UNCITRAL to clarify the circumstances under which an agreement to arbitrate, or an arbitral award, should be enforceable even though the award arises in or relates to an insolvency case.

At a later date, UNCITRAL might authorize a study of the use of international arbitration proceedings in international insolvency cases to resolve conflicts between such insolvency cases pending for the same or related debtors in more than one country (such as the Nortel case), where there is no single insolvency court that can take jurisdiction over the entire group of cases.

Each project could result in UNCITRAL recommendations to be published in a Legislative Guide and Explanatory Notes.[2] Perhaps a separate Legislative Guide and set of Explanatory Notes would be useful for these projects.

Each of these projects is urgent because there is no other group that can address these matters as effectively on an international basis,[3] and they have become increasingly important in connection with the reorganization or rehabilitation of financially troubled business entities that are heavily involved in international trade and commerce.

II. Background

International commerce has changed dramatically, particularly in the last 15 to 20 years. In today's world, it is unusual to find a significant financial insolvency or restructuring that does *not* have significant and occasionally critical international aspects. In contrast, international arbitration has a somewhat older and more developed provenance.

In the 19th and 20th centuries, prior to the New York Convention / Model Law / Arbitration Rules, business financial crises were departmentalized and, for the most part, localized in the countries in which a business had its primary operations. Consequently, the financial difficulties of a business were resolved within national boundaries and under the supervision of a domestic court, which had sufficient jurisdiction and authority to oversee, guide and control all aspects of the company's insolvency or restructuring.

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[2] See Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 (published as Part Two of UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments adopted in 2006).

[3] This proposal does not address purely domestic insolvency law and domestic arbitration cases, which can be regulated by a State's internal law.

With globalization, all of that has changed. Major businesses have almost universally become globalized with operations in many different countries. For example, Nortel carried on business in 141 countries and Lehman carried on business in even more countries. Under classical territorial insolvency systems, when a financial crisis would hit a parent company and affect its subsidiaries, individual insolvency cases would be opened in many countries where the company or a subsidiary had operations. For instance, that might have involved up to 141 separate insolvency proceedings for the Nortel entities.

Under conventional procedures, each reorganization would have no connection with any of the others, and business between the units of the global enterprise would come to a halt as insolvency cases in each country would open proceedings to take control of the assets in that particular country.[4] Such an approach is not optimal, because economic values of enormous magnitude may be dissipated as a result of the fragmentation of such cases or intercompany disputes may be so expensive that there is far less for distribution to creditors.

The modified universalist insolvency regimes that have largely replaced territorial insolvency systems in most countries, together with the UNICTRAL Model Law on Cross-Border Insolvency, have promoted cooperation among national insolvency cases filed by cross-border entities. UNCITRAL Working Group V is now drafting a model law on the cross-border insolvency of enterprise groups that is expected to further clarify certain of the law in this area. Nevertheless, any Model Law depends on the discretion of local courts for the implementation of coordination and cooperation provisions relating to international insolvency cases.[5] In addition, there is no international court that can resolve cross-border disputes with finality and certainty.

In our view, international arbitration would provide a valuable tool for resolving cross-border disputes so that prospects for successful reorganizations can be dramatically improved. The New York Convention / Model Law / Arbitration Rules are, in fact, the only way in which international businesses in financial difficulty with serious creditor problems can avoid the worst effects of the international compartmentalization of multinational businesses. The international

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[4] This is largely what happened in the Lehman Brothers cases, even though fewer than a hundred of the possible 7,000 insolvency cases were commenced in approximately 20 countries.

[5] While, in form, articles 25 and 26 of the UNCITRAL Model Law on Cross-Border Insolvency mandate cooperation and communication between courts and administrators in international insolvency cases in general terms, the details of such cooperation and communication are left to the discretion of the courts, the administrators and the parties.

arbitration system results in arbitral awards that are enforceable[6] essentially worldwide.[7] If the general acceptance of the New York Convention can be harnessed to the international insolvency regime, the resulting team can provide a much more powerful international dispute resolution system to deal with the financial crises of international enterprises.

In the United States, courts have begun to make use of alternative dispute resolution ("ADR") techniques, and arbitration in particular, in international insolvency cases. In prominent U.S. bankruptcy cases such as Madoff, General Motors and Enron, U.S. bankruptcy courts have required the use of ADR procedures such as settlement negotiations and mediations. In some cases, the courts have mandated arbitration to be followed by court review de novo if any of the parties refused to accept the award.[8] Indeed, U.S. insolvency law specifically permits an insolvency tribunal, with the express agreement of the parties, to authorize "final and binding arbitration" of "any controversy affecting the estate."[9] While the use of arbitration in such cases thus far has been limited, there is clearly a growing interest among U.S. bankruptcy judges and insolvency practitioners to use arbitration to resolve complex insolvency disputes where appropriate. Insolvency practice tends to expand the use of ADR gradually from negotiations and mediation to arbitration. The broader international use of such techniques in international insolvency cases could make a major contribution to the success of international insolvency cases.

III. A Project to Study the Intersection of Arbitration and Insolvency Law

[6] Where proper procedures are followed in structuring an international arbitration, the main impediment to the enforcement of an arbitral award is the public policy of the country where enforcement is sought. *See* NY Convention, art. 5.

[7] At the present time, more than 150 countries (including every active trading country) are parties to the New York Convention on Arbitration.

[8] Edna Sussmann & Jennifer L. Gorski, *Capturing the Benefits of Arbitration for Cross Border Insolvency Disputes*, Arthur W. Rovine (ed.), Contemporary Issues in International Arbitration and Mediation: the Fordham papers 2013, Kluwer 2013, 158, 168.

[9] *See* FED. R. BANKR. P. 9019(c). Notably, this rule does not require that the stipulation of the parties be in writing. Typically the stipulation would be made oral in open court on the record, and confirmed with a written court order.

If an insolvency case is opened for a party to a pending domestic arbitration proceeding, the domestic insolvency law usually determines whether the arbitration may continue. However, domestic laws often vary as to whether an international arbitration may continue if it violates an insolvency moratorium (or a court order) emanating from the country where the insolvency case is pending.[10]

In most such cases, there is a moratorium under the insolvency law of the country where the insolvency case has been opened. Any attempt by a creditor to arbitrate the dispute may be a violation of the moratorium.[11] However, if the creditor commences arbitration in another country, the court administering the insolvency case may lack any power to punish the violation. In addition, the arbitrator may not even be informed of the pending insolvency case and the applicable moratorium. UNCITRAL's recommendations should clarify the law in this area, we believe in support of a moratorium on the arbitration.

Even if the arbitration demand is not covered by an insolvency moratorium (for example, because the insolvency law is territorial and the arbitration is outside of the country where the insolvency case is opened, or the creditor demanding arbitration is not covered by the moratorium), the debtor's power to participate in the arbitration may be substantially impaired. The debtor may have insufficient funds to pursue the arbitration or the insolvency court may refuse permission to the debtor or administrator to spend insolvency estate money (principally belonging to other creditors) on such an arbitration case.[12]

Under the modified universalist view of insolvency law (which is supported in UNCITRAL documents on insolvency law), such an arbitration case should not be permitted to proceed absent authorization from the relevant insolvency court. For such issues, we believe UNCITRAL should clarify the primacy of the insolvency law of the State where the insolvency case is opened, and the circumstances where it is appropriate for the court to permit the arbitration to proceed by vacating or modifying the moratorium

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[10] While a moratorium on creditor collection actions in light of a pending insolvency case may result from a court order, the laws of many countries provide for the automatic imposition of a moratorium on creditor collection activities upon the opening of an insolvency case.

[11] The arbitration case may not be in violation of a moratorium resulting from the commencement of an insolvency case in a universalist country. This outcome depends on whether the moratorium covers the dispute to be arbitrated. If, for example, the party requesting the arbitration of a dispute is a secured creditor, and the applicable moratorium does not apply to secured creditors, there is no violation of the moratorium.

[12] A party to an arbitration case is typically required to pay a fee to the arbitration seat for the administration of the arbitration, and to make a deposit for the fees of the arbitrators, as well as to pay its own lawyers to participate in the arbitration).

A dispute between a debtor/administrator and a creditor may also arise in an insolvency proceeding where an underlying pre-insolvency agreement contains an arbitration clause. In some circumstances, the insolvency court may consider an arbitration case to be an appropriate method to liquidate the claim, which then becomes allowed in the insolvency case and the creditor receives its pro rata share of the insolvency estate in due course.[13] We believe that the reference of such a dispute to arbitration (especially where the parties are from different countries) should often be authorized under both insolvency law and arbitration law. However, public policy considerations may be involved and a court may conclude that the issue should not be arbitrated under the circumstances. We believe that UNCITRAL's review of the law on this question and its recommendations would be useful to both the insolvency and the arbitration communities.

[13] If such an arbitration case is already in process, the insolvency tribunal may wish to have the parties complete the arbitration to liquidate the claim for the purposes of the insolvency case.

Proposal by the United States of America for a Colloquium on Tools Available for Post-Fraud Civil Asset Recovery, Including in the Context of Insolvency

The UNCITRAL Secretariat has previously identified commercial fraud as a "serious international problem" that causes "direct losses of billions" of dollars per year.[1] As cross-border commerce increases, so does the ability of the perpetrators of fraud to divert funds to multiple jurisdictions in an attempt to conceal the location of the assets.

Although UNCITRAL has previously done work on recognizing and preventing commercial fraud (i.e., the list of indicators of commercial fraud), UNCITRAL has not yet done any work on the development of tools that can assist in redressing commercial fraud after it has occurred. Whether or not the perpetrators of fraud are subjected to criminal penalties in particular instances, separating the perpetrators of fraud from their ill-gotten gains can frustrate the continuation of fraud schemes and deter future fraud. (Even those perpetrators of fraud who are convicted of crimes may seek to transfer funds to accounts in different jurisdictions in an attempt to retain funds for use after serving a prison sentence.) Moreover, civil asset recovery tools can assist in returning assets to their legitimate owners and, in the context of insolvency, to creditors.

Currently, many jurisdictions lack adequate tools by which fraudulently-conveyed assets can be recovered, and those jurisdictions that do have tools in place do not have uniform procedures. Examples of approaches available in different jurisdictions include the Bankers' Books Evidence Act (permitting courts to order the inspection of banking records by parties to a legal proceeding), Norwich Pharmacal orders (court orders for the disclosure of documents by innocent third parties connected to unlawful conduct), Mareva injunctions (court orders freezing assets to prevent their dissipation to other jurisdictions), Anton Piller orders (orders providing the right to search premises and acquire evidence to prevent the destruction of evidence), and statutes enabling courts to provide assistance to foreign tribunals (and to litigants before such tribunals). Insolvency and receivership proceedings can also, in appropriate circumstances, provide useful tools for recovering diverted assets. Many of these various types of tools are used for obtaining information regarding the location of the proceeds of fraud, in order to enable the tracing and recovery of the assets and their eventual turnover for the benefit of the victims of the commercial fraud.

Given the particular relevance of these tools to the insolvency context—i.e., enabling the recovery of fraudulently-conveyed assets for the benefit of the insolvency estate—exploration of this topic by Working Group V may be appropriate. The United States suggests that, as an initial step, UNCITRAL hold a colloquium to determine whether Working Group V should undertake a project on this topic, such as the development of a set of model legislative provisions containing a menu of options from which states could select and enact tools that would facilitate the location and recovery of the proceeds of commercial fraud.

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[1] See, e.g., A/CN.9/540 (2003) at paras. 5-6.