

THE NEW CHAPTER 15

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Background: -

The amendments to the Bankruptcy Code have added an entirely new chapter, chapter 15, to deal with international and cross-border cases. The new chapter 15 almost entirely replaces Section 304 which was the previous provision for dealing with cross-border cases. The new chapter 15 is a very close adaptation of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (the “Model Law”). While the new chapter 15 is the successor to Section 304 of the Bankruptcy Code, it is much broader and much more detailed than Section 304.

For an extensive treatment of the origins of chapter 15 and a comprehensive commentary on the provisions that form the basis for chapter 15, the American College of Bankruptcy has placed on its website (www.americal.org) the text of the Model Law and the *Guide to Enactment* prepared by UNCITRAL to assist in the implementation of the Model Law into domestic insolvency legislation.

By way of background, UNCITRAL is a major United Nations organization headquartered in Vienna, Austria, which has undertaken exhaustive studies and reviews in many significant areas of international commercial law. Its efforts have led to a number of international conventions and model laws which have been widely adopted around the world. Several UNCITRAL conventions and model laws have been adopted in the United States, including, in particular, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the UNCITRAL Model Law on Electronic Commerce, the United Nations Convention on Contracts for the International Sale of Goods and the UNCITRAL Convention on Limitation Periods in the International Sale of Goods, among others. Most recently, UNCITRAL produced the Model Law which forms the basis of chapter 15.

Objects and Purpose: -

The objective of the Model Law is to establish a set of uniform principles to deal with the requirements that a foreign insolvency representative must meet in order to have access to the courts of other countries in cross-border cases. The Model Law is an agreed-upon international model for domestic legislation dealing with cross-border insolvencies. The official text of the Model Law has now been published and widely disseminated and is available on UNCITRAL's web site at <http://www.uncitral.org/en-index.htm> (click on Adopted Texts/Insolvency) together with the explanatory *Guide to Enactment* which provides a commentary and description of the Model Law. In this

description, references to the applicable sections of chapter 15 are accompanied by references to the comparable provisions of the Model Law to assist readers in consulting the very helpful *Guide to Enactment*.

The primary goals of the Model Law are to facilitate domestic recognition of foreign insolvency proceedings and to increase international cooperation in multinational cases. Section 1501 specifically provides that the purpose of chapter 15 is to incorporate the Model Law on Cross-Border Insolvency with the objectives of increasing co-operation between courts and insolvency administrators in the United States and courts and insolvency administrators in foreign countries and providing greater legal certainty for trade and investment and to facilitate the rescue of financially troubled businesses (Model Law: Article 1).

Main vs. Non-Main Proceedings: -

In chapter 15, foreign insolvency proceedings are divided into two categories, i.e., “main” proceedings and “non-main” proceedings. A *main* proceeding is one which is taking place in the country where the debtor has its main operations. If the foreign proceeding is recognized as a *main* proceeding, chapter 15 provides an automatic stay of proceedings by creditors against the debtor's assets and suspends the debtor's right to transfer, encumber or otherwise dispose of its assets. Specifically, sections 361 and 362 apply to the debtor's property in the United States, sections 363, 549 and 552 apply to transfers of property of the debtor within the United States and section 552 applies to property of the debtor within the United States. Unless the court otherwise orders, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee to the extent provided by sections 363 and 552: § 1520 (Article 20). The scope and terms of the stay of proceedings are subject to the normal requirements of the Bankruptcy Code.

Commencement of a Chapter 15 Case: -

Cases under chapter 15 are brought by a “foreign representative”, i.e., a person or entity appointed or authorized in a foreign proceeding to administer the reorganization or liquidation of a debtor's assets: § 101(24) (Article 2(d)). A “foreign proceeding” is one which takes place under laws relating to insolvency or the adjustment of debt in which the assets of the debtor are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation: § 101(23). (Article 2(a)).

The application must be brought where the debtor has its principal place of business or, if there is no such venue, where litigation is pending against the debtor and, failing that, where the venue will be consistent with the interests of justice and the convenience of

the parties having regard to the relief sought: 28 U.S.C. § 1410. An application by a foreign representative, however, does not subject it to the jurisdiction of United States courts for any other purpose: § 1510 (Article 10). When a foreign insolvency representative is recognized as representing a foreign main proceeding, the foreign insolvency representative may commence normal proceedings under the Bankruptcy Code such as an involuntary case under section 303 or a voluntary case under sections 301 or 302: § 1511 (Article 11). Upon recognition of a foreign proceeding, the foreign representative can participate as a party in interest in a case involving the debtor: § 1512 (Article 12).

In applying for recognition of a foreign proceeding, chapter 15 provides certain presumptions concerning recognition. If the foreign filing indicates that the foreign case is a foreign proceeding and that the applicant/petitioner is a foreign representative within the definition of the Bankruptcy Code, the court may presume that to be the case: § 1516(a) (Article 16(1)). The court is also entitled to presume that documents submitted in support of a petition for recognition are authentic, regardless of whether they been legalized and, absent evidence to the contrary, that the debtor's registered office is presumed to be the centre of the debtor's main interests: § 1516(b) and (c)(Article 16(2) and (3)).

Co-operation between Courts: -

Chapter 15 contemplates a high level of cooperation between courts in cross-border cases. Courts are directed to cooperate "to the maximum extent possible" with foreign courts and foreign insolvency representatives in chapter 15: § 1526(a) (Article 26(a)). Courts may communicate directly with each other and may request information or assistance directly from the foreign court or from the foreign insolvency representative: § 1525 (Article 25). Cooperation can, for example, consist of appointing someone to act at the direction of the court, communicating information by any means considered appropriate by the court and co-ordinating the administration of the debtor's assets and affairs in both jurisdictions: § 1527 (Article 27). The courts may also approve or implement agreements concerning the co-ordination of concurrent proceedings involving the same debtor: § 1530 (Article 30).

United States Creditors, United States Proceedings and Chapter 15: -

Inevitably, some concerns were expressed that enacting chapter 15 based on the Model Law would be prejudicial to individual creditors. The Model Law and chapter 15 are intended to put in place a system to aid and assist international trade and commerce and enhance and facilitate investment and credit availability. Greater certainty in matters of trade and investment inevitably increase cross-border trade and investment

and improve international commerce for the benefit of everyone who participates in it. If parties to international agreements and treaties each insisted that preference be given to their own investors or creditors over others or that their investors and creditors should not be prejudiced while those in other countries could be, there would be no international economic and commercial progress and the international economy would go back to the “beggar my neighbour” regimes of the 1930’s.

The recognition of a foreign proceeding under chapter 15 therefore does not bar creditors from commencing a case under the Bankruptcy Code: § 1520(c) (Article 20(4)). If a local proceeding is commenced after an application for recognition of the foreign proceeding is brought, the bankruptcy court must review the relief sought by the foreign representative and must modify that relief if it is inconsistent with the Bankruptcy Code: § 1529(2)(A) (Article 29(b)(i)). As a consequence, chapter 15 permits insolvency proceedings to be commenced and continued and directs that relief granted to a foreign insolvency representative or a foreign insolvency administration be modified if it is inconsistent with the Bankruptcy Code. These measures ensure that creditors will not be unfairly treated by the recognition of foreign proceedings under chapter 15 and that proceedings under the Bankruptcy Code will take precedence over the recognition accorded to the foreign insolvency proceedings by the bankruptcy court in the event of a conflict between them.

The Model Law on Cross-Border Insolvency is an attempt to improve the world-wide regime for trade and commerce and investment for the benefit of everyone involved in the global economy. Concerns relating to issues that are particularly local or domestic were addressed in the development of the Model Law. Consequently:

1. Chapter 15 contemplates that a domestic court may decline to act where doing so would be “manifestly contrary” to United States public policy: § 1506 (Article 6).
2. Chapter 15 provides that it is to be interpreted having regard to its international origin and the need to promote uniformity in its application with similar foreign legislation: § 1508 (Article 8).
3. Chapter 15 does not affect the ranking of claims in a proceeding under the Bankruptcy Code except that the claims of foreign creditors must not be ranked lower than the claims of general domestic creditors: § 1513(b)(1) (Article 13(2)).
4. Subsequent to a foreign insolvency representative’s application for recognition, it must inform the bankruptcy court promptly of any change in the status of the foreign proceeding or in its appointment: § 1518(l) (Article 18(a)).

5. The recognition of a foreign proceeding does not affect the rights of creditors to commence proceedings under the Bankruptcy Code or the right to file claims in such a proceeding: § 1520(c) (Article 20(4)).
6. In granting, denying or modifying relief under chapter 15, the bankruptcy court “must be satisfied that the interests of creditors and other interested persons including the debtor are sufficiently protected”: § 1522(a) (Article 22(1)).
7. The bankruptcy court is entitled to communicate with or request information or assistance directly from foreign courts or foreign representatives: § 1525(b) (Article 25(2)).
8. Where a United States case and a foreign proceeding are both taking place, the bankruptcy court and the foreign court are obliged to cooperate with each other. If the United States case began before an application for recognition of the foreign proceeding was filed, the relief granted to the foreign representative must be consistent with the United States case: § 1529(l)(A) (Article 29(a)(i)).
9. Where a domestic proceeding is commenced after an application for recognition of a foreign proceeding is filed, the relief in effect in favour of the foreign representative must be reviewed by the bankruptcy court and must be modified or terminated if it is inconsistent with the United States case: § 1529(2)(A) (Article 29(b)).
10. In determining whether relief should be granted to a foreign insolvency representative in a non-main proceeding, the bankruptcy court must be satisfied that the relief relates to assets that, under United States law, should be administered in that foreign proceeding: § 1529(3) (Article 29(c)).

The international consensus on which the Model Law was developed was that domestic creditors would not be prejudiced by the Model Law and the structure of chapter 15 itself bears this out.

International Adoption of the Model Law: -

Over 70 countries and international organizations including the United States participated in the development of the Model Law and, at each stage of the way, there was a consensus on each of the provisions of the Model Law. Consequently, the Model Law is a broad expression of international co-operation in an important commercial area. The Model Law has been passed by Japan, Mexico, Poland, Romania and Spain, among others, and enabling legislation has been passed in the United Kingdom. Recommendations for the adoption of the Model Law have been made in Australia,

Canada and New Zealand and a number of other countries are currently considering the adoption of the Model Law. Several other countries have been watching the progress of chapter 15 in the United States legislative system and it is expected that many of these countries will formally adopt the Model Law and look to the United States experience with it in dealing with future multinational or cross-border reorganizations or liquidations.

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