Managing the Chapter 15 Cross-Border Insolvency Case

A Pocket Guide for Judges

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Introduction

Increasing globalization and cross-border interdependence of business enterprises increase the likelihood that bankruptcy judges, wherever located, will see the occasional chapter 15 case filed in their jurisdictions.[1] As with all novel proceedings, that chapter 15 filing may raise unique case-management questions. This guide attempts to help judges in handling transnational bankruptcy cases.

Chapter 15 is a nearly verbatim adoption of the UNCITRAL[2] Model Law ("Model Law"), an international effort to deal with cross-border insolvency issues. The Model Law was ratified by the United Nations General Assembly in 1997.[3] As of the date of this publication, it has been adopted in 19 countries. The Model Law has not been adopted by the European Union ("EU") as an organization although several EU member states have individually done so.[4] EU countries have their own, somewhat similar, insolvency procedures called the EC Regulation,[5] which govern insolvencies among member states. However, concepts embodied in the EC Regulation—for example, "centre of main interest"—and legal

1. Chapter 15 took effect Oct. 17, 2005, and applies to all United States bankruptcy cases filed on or after that date. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, Title VIII, §§ 801–802 and Title XV, 119 Stat. 23, 134–46. Hereinafter, all chapter and section references refer to 11 U.S.C. §§ 1501–1532 unless otherwise specified.

2. United Nations Commission on International Trade.

3. UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, enacted by G.A. Res. 52/158, U.N. Doc. A/Res/52/158 (Jan. 30, 1998). *See also* www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (last visited April 29, 2010).

4. As of this writing, those states are Great Britain, Romania, Poland, Greece, and Slovenia.

5. Council Reg. (EC) No. 1346/2000 of May 29, 2000.

opinions applying the EC Regulation are helpful to understanding application of the Model Law.

The Model Law is not a law of substantive bankruptcy; rather, it is designed to provide a procedural framework into which local substantive bankruptcy law is integrated. It is a template that countries are encouraged to incorporate into their domestic bankruptcy law, making changes to the Model Law, where necessary, to accommodate the local law.

When the Model Law was adopted by the United States as chapter 15, former 11 U.S.C. §304**,** which had been the procedural mechanism for handling ancillary proceedings under previous U.S. bankruptcy law, was expressly repealed. Although the legislative history to chapter 15 suggests some of the substantive concepts contained in case law construing former §304 may retain their vitality, it is also clear from the directive in 11 U.S.C. §1508[6] that judges wrestling with interpretation of chapter 15 should look outside U.S. case law not only for guidance but also to avoid conflicts and to promote a harmonious interpretation of its provisions. The appendix to this guide provides some research resources to assist in locating foreign court decisions.

Typically, chapter 15 may be invoked in one of two ways. First, the trustee of a domestic case with foreign assets may ask the bankruptcy court for authorization under §1505 to act in a foreign country on behalf of a U.S. case. This authorization—essentially appointing the trustee, examiner**,** or debtor-in-possession as a foreign representative—is an important first step to that person obtaining recognition to act on behalf of the U.S. bankruptcy estate in the foreign country. The concepts of authorizing the requesting party to act in a specific country, and defining the scope of that

6. 11 U.S.C. §1508 provides: "In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."

party's authority, are ones familiar to bankruptcy judges without reference to any other part of chapter 15. In addition, the bankruptcy judge may wish to consider imposing reporting requirements for the representative's activities as a means to control the expenses of the representative's foreign activities.

Second, and more commonly, the foreign representative[7] of an insolvency proceeding pending in another country with assets in the U.S. will ask the U.S. bankruptcy court for recognition—that is, authority—to act on behalf of that foreign proceeding to administer those U.S. assets. In this situation, the U.S. case under chapter 15 will be ancillary to a case pending elsewhere.

This guide will focus only on the management of ancillary cases. It is divided into two major components. Part I of the guide will assist in understanding the process of recognition, including how to deal with requests for interim relief while the recognition process is under way. Parts II–IV of the guide address the problems and considerations of operating a business in chapter 15, court-to-court communication including cross-border agreements or protocols, and claims issues.

The appendix to this guide contains a list of resources that may assist in providing a deeper understanding of this statute.

I. Commencing the Chapter 15 Case

The typical chapter 15 case is commenced by a foreign representative filing a petition for recognition. "Recognition" is the entry of an order conferring status on the foreign representative to proceed before U.S. courts.[8] The process for obtaining recognition is spelled out in § 1515; the presumptions applied to a petition for recognition are contained in § 1516; and the elements of the decision to grant recognition are found in § 1517.

7. 11 U.S.C. § 101(24).
8. 11 U.S.C. § 1502(6)

The foreign representative is not necessarily someone appointed by a foreign court but may be, for example, a receiver or liquidator under a collective out-of-court insolvency scheme. The proposed foreign representative will likely ask the bankruptcy judge for extraordinary interim relief immediately after filing the petition for recognition but before recognition has been granted, at a time when the judge has little information about the case. For that reason, this guide will first discuss interim relief standards, followed by the standards and process for recognition.

A. Interim Relief Before a Petition for Recognition Is Granted

1. What forms of interim relief may be provided before granting a recognition petition?

Typically, the foreign representative seeking recognition is dealing with pending litigation that threatens to seize assets and impair the debtor's value to the creditor body. If the judge is persuaded that interim relief is "urgently needed to protect the assets of the debtor or the interests of the creditors," § 1519 gives the court a toolbox of remedies. They include:

- staying execution;
- staying litigation;
- entrusting U.S. assets that are perishable or susceptible to devaluation to either the foreign representative or to some other person, like an examiner, to protect them;
- freezing the right to transfer or encumber the assets; and
- authorizing witnesses to be examined by the foreign representative (in a manner similar to a Rule 2004 examination) to obtain evidence about the debtor's assets.

2. How does the foreign representative obtain interim relief?

Section 1519(e) has some troublesome language. It states that the "standards, procedures, and limitations applicable to an injunction shall apply to [the] relief under this section." Arguably,

this language could be interpreted to require the foreign representative to proceed as though the representative was obtaining a Fed. R. Civ. P. 65 temporary restraining order or preliminary injunction in order to obtain *any* § 1519 interim relief. This would require a foreign representative to file an adversary proceeding.[9] The legislative history to §1519 seems to support this conclusion: "Subsection (e) makes clear that such [§ 1519] relief is subject to specific rules and a body of jurisprudence."[10]

However, the legislative history to § 1519 also provides that "[t]his section does not expand or reduce the scope of section 105 as determined by cases under section 105 . . . ."[11] In construing the nearly identical language in § 1521(e), the court in *In re Ho Seok Lee*[12] held that an adversary proceeding was not required to grant injunctive relief because the legislative history to § 1521 states: "[t]his section does not expand or reduce the scope of relief currently available under sections 105 and 304" and prior case law authorized injunctive relief under § 304 without requiring an adversary proceeding. [13]

In *In re Pro-Fit Holdings Ltd.*,[14] the court recognized that an adversary proceeding is required to obtain interim injunctive relief such as "staying execution against the debtor's assets" as

9. Fed. R. Bankr. P. 7001(7).

10. H.R. Rep. No. 109-31, 109th Cong., 1st Sess., 114 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 176–77.

11. 11 U.S.C. § 105(a) states: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

12. 348 B.R. 799, 802 (Bankr. W.D. Wash. 2006).

13. *Id.* at 802 (citing H.R. Rep. No. 109-31, 109th Cong., 1st Sess., 116 (2005); Petition of Rukavina, 227 B.R. 234 (Bankr. S.D.N.Y. 1998)).

14. 391 B.R. 850, 860–63 (Bankr. C.D. Cal. 2008).

specifically authorized in § 1519(a)(1), but held that an adversary proceeding is not required to obtain interim application of the § 362 automatic stay.[15] The court concluded that the nature of an automatic stay is fundamentally different from an injunction and held that: "[A]n adversary proceeding is never needed under the bankruptcy code for imposition of the automatic stay, and satisfaction of the requirements for an injunction is never required."[16]

Based on these cases, a judge could decide to sidestep the troublesome language of § 1519(e) by ordering that the automatic stay applies on an interim basis, pending a ruling on the petition for recognition. However, if the judge concludes that § 1519(e) requires adherence to the injunction standards in order to grant the requested interim relief, the foreign representative must show either: (a) irreparable injury and a likelihood of success on the merits; or (b) presence of serious questions and a balance of hardships tipping in its favor, since this is the test generally applicable to obtaining injunctive relief. As a rule irreparable injury exists whenever local creditors are attempting to enforce claims against the foreign debtor's assets to the detriment of other creditors, or if the foreign representative is forced to participate in litigation that threatens to drain the debtor's assets.[17]

B. Filing the Petition for Recognition of a Foreign Proceeding

1. Who may file the petition for recognition?

Section 1515(a) states that a foreign representative is the party who files the petition for recognition. That party may not necessarily be someone appointed by a foreign court but may be, for example, the U.S. equivalent of a receiver or liquidator under a foreign

15. *Id.* at 860–63.

16. *Id.* at 864–65; *see also In re ABC Learning Centres Ltd.*, — B.R —, 2010 WL 5439808 (Bankr. D. Del. 2010).

17. *See In* re MMG LLC, 256 B.R. 544, 555 (Bankr. S.D.N.Y. 2000) (construing former § 304(b) and (c)).

insolvency law or an assignee for benefit of creditors under state law. All that is required is that the representative be appointed under some form of collective proceeding for benefit of creditors, which proceeding could be subject to court review.[18] Obtaining an order from the bankruptcy court granting the petition for recognition is the precursor to any appearance by the foreign representative in other federal or state courts.

2. What proof of capacity to act is required?

Sections 1515(b)(1)–(3) list, in the alternative, the requirements for filing the petition for recognition in the bankruptcy court. Basically, the requirements are some form of proof, satisfactory to the court, that there is a foreign proceeding pending and that the foreign representative was appointed to act on its behalf. Additionally, the foreign representative must submit a statement disclosing any other foreign proceedings pending elsewhere with respect to the debtor (§ 1515(c)). Certified copies of the opening (filing) of the foreign proceeding and appointment of the foreign representative, translated into English, will suffice; however, if not available, any other form of proof acceptable to the judge may be substituted. There is no requirement that this proof be authenticated in any formal way; the judge is entitled to rely on the authenticity of documents submitted in support of the petition. *See* §1516(b).

3. What notice of the petition for recognition is required?

Notice of the petition for recognition must be given as prescribed by Fed. R. Bankr. P. 2002(q)(1). Notice is given by the clerk or as the court otherwise directs. Notice must be given to the debtor, to others who are administering the foreign assets of the debtor (e.g., subsidiaries in other countries), entities in litigation in the U.S. with the debtor**,** and anyone against whom provisional

18. 11 U.S.C. §§ 101(23)–(24); *In re* Betcorp, 400 B.R. 266, 294 (Bankr. D. Nev. 2009).

relief is being requested under § 1519. The minimum period for notice of the hearing on the petition is 20 days. Notice is to be by mail (but see subsection 4(c) below). The notice must state whether the petition seeks recognition as a foreign main proceeding or a foreign nonmain proceeding. As more fully discussed in section C.3 below, a foreign main proceeding is one pending in a country where the debtor has its "center of main interest" or CoMI (§ 1502(4)). In the absence of contrary evidence, the judge is entitled to presume that the case pending where the debtor has its registered office or the individual debtor has his habitual residence is the main case (§ 1516(b)). A foreign nonmain proceeding is one pending in a foreign country other than where the debtor has its center of main interest but has an "establishment" (§ 1502(5)), which is a place where it conducts "nontransitory" activity. The term establishment has been interpreted to exclude the so-called "letter box" company locations from the definition of nonmain cases.[19]

4. Problems or pitfalls and suggested solutions

(a) The 20 days' minimum notice period may be problematic for the foreign representative who urgently needs protection for the debtor's assets or creditors' interests. One solution is to order interim relief on a temporary basis as described in § 1519(a).

(b) Although the statute emphasizes holding a hearing on recognition at the earliest possible time, as a practical matter, if the judge has given the foreign representative sufficient interim relief pending recognition, there may not be a need to rush this process. A judge may wish to wait a bit longer to get complete information about the case and take some time to make the decision about recognition if there is no other urgent need for recognition.

19. *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122 (Bankr. S.D.N.Y.), *aff'd,* 389 B.R. 325 (S.D.N.Y. 2008).

(c) The presumption that mail service actually reaches the foreign parties entitled to get notice is one grounded in the belief that all countries have an efficient mail service. Sadly, that is not the case. One solution is to direct the foreign representative to provide information about other complementary forms of notice likely to reach those foreign parties-in-interest, such as publication, email, facsimile, service on agents for service of process, etc., and require that notice be given in more than one form. If notice is directed to be given in more than one form, it might be helpful to avoid later confusion as to which mode of service is deemed to satisfy due process by entering an order that one form of notice—e.g., notice by publication—is presumed to be sufficient notice to foreign parties under the circumstances.

(d) Sections 1514(c)(1)–(2) require a court to notify foreign creditors of the commencement of the case and, as part of that notice, to indicate the time and place for filing proofs of claim and whether secured creditors must file proofs of claim. A judge may be asked by the foreign representative *not* to give the full notice required upon case commencement by § 1514(c)(1)–(2). Modification of that section to avoid confusion and a conflicting claims process seems to be appropriate in instances in which a bar date has already been fixed in the foreign case and notice has already been given to creditors in that case. Deferral may also be desirable because the claims process has not yet been established in the foreign jurisdiction and the foreign representative may need more time to coordinate the filing of claims as between the U.S. case and foreign case. Finally, if there is some question whether the foreign proceeding is the "main" proceeding, the judge may wish to instruct the parties to defer sending out notice of where to file claims until the judge has decided the issue.

C. Hearing the Petition for Recognition

1. Must a hearing be held on the petition for recognition?

There is no statutory requirement that an actual hearing be held on an uncontested petition for recognition. In districts that use negative notice (notice and opportunity to request a hearing), if the petition is uncontested, it is possible that an order could be entered without a formal hearing. However, it is not recommended that recognition be granted without a formal hearing. Because the foreign representative has the burden of proof of establishing the recognition criteria (see *infra*) and it is possible that interested parties may not have received notice in time to file written opposition, it seems better practice to require an evidentiary presentation in open court where last-minute opposition can be heard.

2. What if the petition for recognition is contested?

(a) *Form of the opposition:* It is important to remember that the foreign representative has the burden of proof on the basic § 1515(a) elements—existence of the foreign proceeding and the representative's authority to file the petition for recognition. Once either of these predicates is challenged by a party-in-interest, the contest is treated under the same rules applied to contested involuntary petitions. Fed. R. Bankr. P. 1011(b) governs the time periods for filing the objections (20 days with some exceptions). Rule 1011(d) limits the substance of that opposition to claims directed to defeating the petition—that is, claims alleging no foreign proceeding pending and/or no authority to act. Rule 1011(e) permits the judge to authorize a reply; otherwise, none is permitted.

(b) *Form of the hearing:* Because opposition to a petition for recognition is treated like a Fed. R. Civ. P. 12(b) motion, it may be decided on the pleadings alone. However, if it is not, it may be treated as civil litigation with the caveat that § 1517(c) of the statute urges courts to decide these matters at the earliest possible

time. Fed. R. Bankr. P. 1018 permits the court to apply some or all of the Part VII adversary rules to the contested petition.

3. What will be the likely subject matter of a contested recognition petition?

Most contested recognition petitions to date have been disputes about whether the case before the court should be recognized as a case ancillary to a foreign main proceeding or a foreign nonmain proceeding (the petition for recognition should state which form of recognition the representative is requesting) or neither. These terms of art are defined in §§ 1502(4) and 1502(5) of chapter 15.

Whether the chapter 15 case is recognized as ancillary to a main proceeding or nonmain proceeding has far more importance to the direction of the chapter 15 case than merely the form of relief available under §§ 1520 and 1521. If the judge determines the chapter 15 case is ancillary to a foreign main proceeding, the decisions in that foreign main proceeding will largely control the direction of the ancillary case. The foreign main proceeding is where the decisions of whether and how to reorganize the debtor and its related entities or whether to liquidate will be made. Those decisions are entitled to deference from the U.S. bankruptcy judge.

In contrast, if the judge decides an ancillary case is nonmain, the U.S. judge is determining that the foreign representative is acting on behalf of a foreign nonmain case that will be taking its instructions from a foreign main case filed in yet another jurisdiction. Decisions in the foreign nonmain case may have no more importance to the overall direction of the foreign main case than those in the U.S. chapter 15 case. Although, on occasion, a foreign court may express an opinion as to whether its proceeding is main or nonmain, the U.S. bankruptcy judge is not bound by this expression of opinion.

The distinction between the two types of proceedings—main and nonmain—turns on the *situs* of the foreign proceeding. The determination of *situs* depends on the court's determination of the

"center of main interest" or CoMI of the entity. CoMI is not defined in chapter 15. As part of the recognition process, the court must determine CoMI.

(a) *Presumptions of CoMI:* Even though CoMI is not defined in chapter 15, § 1516(c) assists a court in this determination by adopting the presumptions that the CoMI of an individual is the habitual residence of that person,[20] and the CoMI of an entity is the debtor's registered office. A "registered office" is akin to the principal place of business for the entity. After exhaustively reviewing the various circuit tests for determining principal place of business, the recent U.S. Supreme Court decision in *Hertz Corp. v. Friend*[21] defined it as being "best read as referring to the place where a corporation's officers direct, control and coordinate the corporation's activities. It is the place that Courts of Appeal have called the corporation's 'nerve center.'"[22] However, the *Hertz* decision is one made in the context of a diversity dispute in a domestic civil action and not a chapter 15 case and, although helpful, it may not be strictly applicable to determining CoMI in all instances.

(b) *Contesting the presumption of CoMI:* Although § 1516(c) appears absolute in its pronouncement that in the absence of contrary evidence, CoMI is presumed to be the chapter 15 debtor's registered office (if an entity) or habitual residence (if an individual), developing U.S. case law supports a more active role for the judge, even in the absence of contrary evidence. Judges have not been shy in demanding additional evidence of CoMI, even when the petition for recognition is unopposed. In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*,[23] the

20. *See* discussion in *In re Chiang*, 437 B.R. 397, 404 (Bankr. C.D. Cal. 2010) (habitual residence of the individual debtor was where he lived, where his children attended school, where he had assets, and where he had a passport).

21. 130 S. Ct. 1181, 1188–94 (2010).

22. *Id.* at 1192.

23. 374 B.R. 122 (Bankr. S.D.N.Y.), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008).

judge looked to the verified pleadings of the petitioner and determined that there were no employees, managers, operations, investor registries or any other indicia of CoMI present in the Cayman Islands, which the foreign representative was claiming to be the *situs* of the main case. In *In re Basis Yield Alpha Fund (Master),* [24] the judge directed the petitioner to provide 21 categories of additional information to assist him in making the decision whether to recognize the case as a main case. In other words, courts are not necessarily rubber-stamping the decision of recognition as a main case.

If the judge finds that CoMI is not located where the foreign representative claims it is, the ancillary case does not automatically revert to a nonmain proceeding. That is because a nonmain proceeding must be a case pending where the debtor has an "establishment." An establishment is defined as any place of operations where the debtor carries out nontransitory economic activity.[25] Therefore, so-called "letter box" companies, which do not have any actual operations, will not qualify as nonmain proceedings either.[26]

In those instances where the judge concludes that the foreign representative represents neither a foreign main proceeding nor a nonmain proceeding,[27] the foreign debtor with assets in the U.S. is not without remedy. A full plenary proceeding (either a voluntary or involuntary chapter 11 or chapter 7) may still be filed if the requirements for filing a domestic case are met.

24. 381 B.R. 37 (Bankr. S.D.N.Y. 2008).
25. 11 U.S.C. § 1502(2).
26. *Supra* at n.17.
27. *Bear Stearns,* 374 B.R. at 132.

4. *What is the effect of determining that a chapter 15 case is ancillary to a foreign main proceeding versus a foreign nonmain proceeding?*

The primary difference in effect between a decision that the foreign proceeding is main or nonmain is the relief automatically available to the foreign representative under chapter 15. Pursuant to § 1520, upon recognition that the chapter 15 case is ancillary to a foreign main proceeding, §§ 361 and 362 automatically apply. Additionally, § 1520 permits the foreign representative to operate the debtor's business, subject to the provisions of §§ 363 and 552. However, it is important for the judge to remember that the additional powers accorded the foreign representative of a main proceeding are limited to property of the debtor within the territorial jurisdiction of the United States. There is no "estate" created under § 541(a) in a chapter 15 case.

If the judge determines that the foreign proceeding is nonmain, the rights provided in § 1520 are not automatically available. However, pursuant to § 1521, in the judge's discretion, some or all of these powers may be available to the foreign representative upon a showing that the relief is necessary to protect assets that should be administered in the foreign nonmain proceeding. *See* § 1521(c).

Further, regardless of whether the foreign proceeding is recognized as main or nonmain, if recognition is granted, § 1507 permits a court to provide "additional assistance" under title 11 or other laws of the United States. This is a catch-all provision that incorporates the jurisprudence under former §§ 304(b) and (c).[28] There have been instances in which a court has determined that the foreign proceeding is neither main nor nonmain. [29] If the determination is that the foreign proceeding is neither main nor nonmain, then no recognition at all is granted.

28. *See* H.R. Rep. 109-31, 109th Cong., 1st Sess., 109 and 119 (2005).

29. *See Bear Stearns*, 374 B.R. at 131–32, *aff'd,* 389 B.R. 325 (S.D.N.Y. 2008).

5. Problems or pitfalls and suggested solutions

(a) Because the statute urges expedited decision of a contested petition for recognition, it may be better practice, if possible, to treat contested petitions as summary judgment motions. Alternatively, some expedited trial procedures such as declarations of percipient witnesses (subject only to cross-examination) or time-limited examination may suffice.

(b) As noted above, if interim relief granted under § 1519 is adequate to protect the chapter 15 debtor while the recognition petition is under consideration, the judge may be able to take the time necessary to develop complete information as to CoMI.

(c) In cases in which the foreign debtor has multiple business locations and has been in foreign proceedings for some time before filing a chapter 15 case, the judge may have to decide the date for determining the CoMI—that is, is it the date of the original foreign filing or the date of the recognition hearing? The *situs* of the case may have changed if foreign liquidators have consolidated operations. Some guidance in making this determination can be found in the discussion in *In re Betcorp Ltd.*[30] and in the analysis of the court in *In re Fairfield Sentry Ltd.*[31]

(d) It is important to scrutinize proposed orders of recognition or proposed orders for interim relief for provisions you may not have anticipated. For example, § 1510 states that a foreign representative is not subject to court jurisdiction of any U.S. court for the "sole fact" that he has filed a petition for recognition under § 1515. You may, for example, see an attempt to use § 1510 to justify expansive language in an order of recognition or for interim relief exempting the foreign representative or its professionals, now and in the future, from U.S. court jurisdiction no matter what they do in the conduct of their duties.

30. 400 B.R. 266, 290–91 (Bankr. D. Nev. 2009).

31. 440 B.R. 60, 63–66 (Bankr. S.D.N.Y. 2010).

II. Debtor Operations in a Chapter 15 Case

A. First Day Orders and the Chapter 15 Debtor

1. Which provisions of Bankruptcy Code chapter 3 and chapter 11 apply to the chapter 15 case?

Although § 1520(a)(3) permits the recognized foreign representative of a foreign main case to operate the debtor's business, the operating chapter 15 debtor is not subject to the same limitations as the operating chapter 11 debtor. A number of chapter 11 provisions simply are not incorporated into chapter 15. These omissions include § 364**,** governing the debtor's obtaining of credit; § 365**,** describing the debtor's rights and obligations with respect to executory contracts and unexpired leases; and § 366**,** governing the debtor's relations with utility service providers.

2. Which Bankruptcy Code avoidance powers apply in the chapter 15 case?

None of the avoidance provisions found in §§ 522, 544, 545, 547, 548, 550, 553, or 724(a) apply in a chapter 15 case, regardless of whether the foreign case is a main or nonmain proceeding.[32] The only way in which a foreign representative can pursue these avoidance actions under U.S. law is by filing a full or plenary case under another chapter of Title 11.[33] At least one court has found that authority exists to permit the pursuit of avoidance actions under the foreign law of the jurisdiction where the main case is pending as a component of "additional relief" under § 1521(a)(7).[34]

However, a foreign representative may be able to use § 549 to avoid unauthorized postpetition transfers of an interest of the debtor in property that is within the territorial jurisdiction of the

32. *See* § 1520; § 1521(a)(7); and § 1523(a) (collectively, providing that these avoidance provisions do not apply in a chapter 15 case).

33. *See* § 1523(a).

34. *In the Matter of Condor Insurance Ltd.*, 601 F.3d 319 (5th Cir. 2010).

United States. *See* §§ 1520(a)(2) and 1521(a)(7). It is unclear whether the § 549 avoidance power runs from the date on which the foreign proceeding was commenced, or whether it runs from the date of filing the chapter 15 ancillary petition for recognition. Arguably, it should run from the date on which the foreign proceeding was commenced since an estate would have been created under the jurisdiction of the foreign court at that time.

3. Are there any creditor protections the judge may apply either before or after recognition of the chapter 15 case?

Interim relief accorded under § 1519 or discretionary relief accorded under § 1521 may be conditioned under § 1522 to protect creditors and other interested parties. The standard for the protection is *not* the § 361 standard of adequate protection; rather § 1522 speaks in terms of "sufficient protection." The legislative history to this section is clear that Congress intended this to be a different standard**;** however, there is no definition in the statute.[35] Some guidance in interpretation of the term "sufficient protection" can be found by consulting not only other domestic decisions but also other international decisions on this issue. Section 1508 suggests that a court consider the international character of chapter 15 and construe the statute consistently with those other foreign jurisdictions that have adopted chapter 15.

4. Problems or pitfalls and suggested solutions

From the court's point of view, the omissions from chapter 15 of key provisions in chapter 3 governing the operation of a business create some interesting dilemmas. Time periods for assumption/rejection of executory contracts and leases do not seem to apply. Indeed, there does not seem to be any obligation on the debtor to perform the lease terms until assumption or rejection occurs. Further, a debtor might be able to obtain post-petition

35. *See* H.R. Rep. 109-31, 109th Cong., 1st Sess., 115–16.

credit without requesting the court for authority to do so. Conversely, the debtor may discover that a utility service provider does not have an obligation to continue service as provided by § 366(a) or that the debtor does not have the benefit of a § 502(b)(6) "cap" on lease rejection damages.

Because the omitted chapter 3 provisions discussed above contain protections for the debtor as well as its creditors, the judge should raise and discuss these issues with the foreign representative and parties in interest at the earliest possible time. The foreign representative may already be subject to similar provisions under the foreign insolvency law. If not, it may be desirable to apply some chapter 3 and chapter 11 provisions to the operating chapter 15 debtor. The foreign representative may request the court to incorporate certain provisions of the Bankruptcy Code and pursuant to § 1507(a) the court could do so as "additional assistance . . . under this title or under other laws of the United States." Alternatively, if there is no request to incorporate these omitted provisions, the court has the leverage provided by § 1520(a)(3) itself**,** which grants the foreign representative power to operate the debtor's business "unless the court orders otherwise."

Although one solution is to import and apply all provisions of chapter 3 and chapter 11 into the chapter 15 case, something more selective and sensitive to the needs of the case should be considered. A cautionary tale of the unintended consequences of importing other Bankruptcy Code sections into a chapter 15 case is found in *In re Qimonda AG Bankruptcy Litigation*.[36] There the court ordered that numerous chapter 3 and chapter 5 sections be applied as additional relief under § 1521(a).[37] (It is unclear whether this was a sua sponte action or at the request of a party.) The major assets of the foreign debtor were patents subject to cross-licensing agreements. When the foreign debtor sought to reject those

36. 443 B.R. 547 (E.D. Va. 2010).

37. *Id.* at 553.

agreements under applicable German insolvency law (which appears to permit the debtor to cease performance), it found itself in direct conflict with "imported" § 365(n), which permits the licensees to reject the debtor's nonperformance and continue use of the patents. The court's belated attempt to reconcile the conflict between German insolvency law and § 365(n) by modifying its discretionary order for reasons of comity satisfied neither side and spun off an appeal.

Chapter 15's international character requires an approach to case problems that is more flexible and accommodating than constraining the case to the straitjacket of chapter 11's rules and time limits. The chapter 15 case is, after all, ancillary to a case pending elsewhere, and judges should carefully consider possible conflicts with the law of that jurisdiction before automatically imposing U.S. insolvency law.

B. Retention of Counsel and Other Professionals and the Chapter 15 Debtor

1. *Are counsel and other professionals in a chapter 15 case governed by the requirements of §§ 327–330?*

Chapter 15 is silent on what standards apply to the employment of counsel and other professionals in a chapter 15 case.

2. *Problems or pitfalls and suggested solutions*

Because the statute is derived from and based on the UNCITRAL Model Law, it is likely that the U.S. requirements of disinterestedness and absence of adverse interest for chapter 11 debtor's counsel and professionals were simply not considered standards universally applicable to other countries. Further, a chapter 15 case is a case ancillary to a case pending in a foreign jurisdiction. As such, there is no chapter 15 corollary to § 541(a) defining the estate created upon filing a voluntary or involuntary case under § 301, 302 or 303. Since there is no estate created in a chapter 15 case, arguably, professionals are not being paid from an

estate to which they could be adverse. Finally, since the chapter 15 case is one ancillary to a case pending elsewhere, so long as the employment of counsel is acceptable to the administrator of the foreign case, it should not be of concern to the U.S. court. Employment of professionals and regulation of their fees is not the problem of the U.S. court but rather of the foreign court, although, of course, professionals are still subject to the duties of counsel appearing in a federal court.

If, despite the above considerations (or because it is a requirement of a cross-border agreement**,** discussed *infra* at III.B), a judge believes it necessary to enter orders authorizing employment, it is unlikely that the court or the U.S. Trustee will be satisfied with excusing counsel and other professionals from demonstrating they do not hold adverse interests and are disinterested, from keeping detailed time records**,** and from seeking court approval for payment of fees. It is suggested that the court discuss its expectations of compliance with §§ 327–330, obtain acknowledgment of those compliance obligations from the affected professionals and enter a court order "importing" application of these sections as a condition of permitting business operations under § 1520(a)(3).

III. Court-to-Court Communication

A. Duty of Cooperation

1. Should I make calls to or answer calls from a foreign judge?

Section 1525 mandates that a bankruptcy judge cooperate with any foreign court or foreign representative "to the maximum extent possible." Direct communication is authorized but it is not mandated. However, establishing communication in cross-border cases is encouraged as a means to obtain a better understanding of the applicable foreign law and any differences from U.S. law that might lead to litigation.

One cannot assume that court-to-court communication will be welcomed by a foreign court. If the UNCITRAL Model Law has not been adopted by the foreign state, the foreign court may lack a framework that permits the foreign judge to talk with the U.S. court. Further, local ethical restrictions may prohibit communication between judges, and language barriers and time zone differences may make direct communication impossible.

Conversely, the judge may get a surprise phone call or even a visit from a foreign judge about the pending chapter 15 case. While the judge's first impulse is to be courteous and cooperative, any extensive discussion about the case with that foreign judge should be deferred until parties in interest have been given notice of the fact the judge will be having this conversation or meeting.

2. *How should communication with a foreign court be established?*

Communication between foreign judges may be indirect or direct. Examples of indirect communication would be an exchange of copies of foreign orders, judgments, opinions, transcripts of hearings, declarations of parties, and the like. It may also be communication through intermediaries, such as between the foreign representatives themselves. Examples of direct communication would be by way of telephone or video conference. There is no proof that one form of communication is more effective than another. The type of communication used may, in large part, be influenced by language, time zone, legal system, technology availability, and other factors. In some instances, simply communicating your ideas in a simple opinion or an in-court statement of which a transcript is made and then directing the foreign representative to deliver this to the foreign judge will suffice.

3. *What subject matter may be covered in communications with a foreign court?*

Obviously the subject matter of court-to-court communications will vary enormously based on the nature of the case, the ju-

risdiction(s) in which it is pending, the laws of the jurisdiction(s) in which it is pending, and, in many instances, the agreements of the cross-border case representatives. (Cross-border agreements, sometimes called protocols, will be discussed *infra.*) Before engaging in court-to-court communication, the initiating judge must consider a number of questions:

- What will be the subject of the communication? Some advance agreement as to the topics to be discussed during court-to-court communication is likely essential to avoid misunderstandings.
- Who is to receive notice of the communication?
- Who may and who will participate in the communication? Will the communications be limited to the judges only or include the parties' representatives? Will parties' representatives be allowed to speak or merely monitor the judges' exchange?
- In what language will the communication be conducted? If English is not the shared language of the courts, what provisions for simultaneous translation will be made?
- Will the parties be required to file written statements of position or documents in advance of the communication? If so, will they be required to file in each jurisdiction? When? Must the documents be translated?
- What record will be made of the communication?
- If the communication is direct, what form will it take? Videoconferencing is the preferred method, but not all U.S. courts or foreign courts have access to it. Further, there may be considerations of time zone differences that make such joint hearings inconvenient.
- Is the court-to-court communication to be an extraordinary event in the case or used on a routine basis to sort out both procedural and substantive matters as they arise?

It is important to remember that, however the foregoing questions or other questions that arise are decided, court-to-court communication is not intended to constrain the decision-making authority of the participant judges. While deferring to a foreign judge may be appropriate or desirable in some instances, court-to-court communication should not be viewed as altering a judge's independence, jurisdiction, or sovereignty.

B. Cross-Border Agreements

Many of the issues raised above may be resolved by means of a cross-border agreement (sometimes called a "protocol") that has been negotiated between and among the insolvency representatives or practitioners in the multiple insolvency proceedings, the debtor-in-possession (if retained), and, in some instances, major secured creditors and official creditors' committees. Protocols were originally developed in cross-border cases in which each court had a plenary case (e.g., a U.S. chapter 11 case and a Canadian C.C.A.A. proceeding) over which each court had full jurisdiction. In those instances, harmonization was necessary to avoid potential conflicts and to promote efficient cross-border administration of the multiple insolvency proceedings. The scope and importance of cross-border agreements in a chapter 15 case may be somewhat diminished if the U.S. court is merely being requested to provide ancillary assistance to a main proceeding located in the foreign jurisdiction. Cross-border agreements are not entered into between courts, although many courts encourage their adoption and in some instances approve the agreement in order to bind participating parties.

1. When should a cross-border agreement be considered?

When there are multiple foreign insolvency proceedings, a complex debtor structure (such as a corporate parent with numerous subsidiaries in different locations), some similarity in insolvency laws, and the possibility of conflicting rulings on substantive

issues, the court should urge the parties to negotiate a cross-border agreement. Of course, timing is critical. In many instances, cross-border agreements are negotiated in advance of the chapter 15 filing to prevent disputes from arising upon filing.

2. *What are typical provisions a judge might see in a cross-border agreement?*

Cross-border agreements vary widely, depending upon the nature of the cases and the similarity of the legal systems in the various jurisdictions participating in the case. A typical cross-border agreement might address the following topics:

- allocation of responsibility between the courts for administration of the case;
- coordination of asset recovery or asset disposition for benefit of creditors;
- submission and treatment of claims;
- framework for future communication between the courts;
- coordination of reorganization plans;
- allocation of responsibility between courts for resolution of substantive law issues;
- agreement between the insolvency representatives as to limitations on their actions without approval of other courts or insolvency representatives;
- provisions for amendment of the cross-border agreement or for dispute resolution in the event of differences in interpretation; and
- legal effect of the cross-border agreement, including whether court approval or creditor approval is required for the agreement to be effective.

An exhaustive discussion of cross-border agreements, including sample provisions and an analysis of agreements adopted in a number of cross-border insolvency cases, can be found in the draft

UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.[38]

IV. Claims

A. May a Creditor File a Claim in More Than One of the Cases in a Cross-Border Proceeding?

Nothing prevents a creditor from filing a claim in more than one of the insolvency proceedings for the same debtor.

B. May a Creditor Receive Distributions on a Claim Filed in More Than One Case in a Cross-Border Proceeding?

Yes, a creditor may receive distributions from the multiple cases pending as to the same debtor**;** however, no claimant may receive more than 100 percent of its claim. Further, until all claimants of the same rank receive the same percentage received by the multiple-filing claimant, that claimant may not receive a distribution. Section 1532 restricts distribution and enforces parity among claimants of the same class.

C. Problems or Pitfalls and Suggested Solutions

The claims area is one fraught with ambiguity and unanswered questions. Some that might occur are:

1. *Must a multiple-filing claimant net out its claim to reflect the distribution in another case?*

Section 1532 adopts the "hotchpot rule" which was embodied in now-repealed § 508(a). There is some support for viewing a claim as a "right to payment," which remains the same in each proceeding regardless of distributions from other cases. It seems

38. http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf.

the preferred view is that before distribution in the current case, the claim is not netted out or reduced by prior distributions in other cases involving the same debtor. In other words, the claim remains the same face amount in each bankruptcy case, regardless of prior distributions. However, no claimant receives an aggregate distribution of more than 100 percent of its claim.

2. *Is a priority claim from another country entitled to priority in a chapter 15 case when U.S. law does not entitle that claim to priority?*

No**,** priority status is determined by local law. The only protection for the foreign claimant having priority under foreign law is that a claim from that foreign creditor may not be treated worse than a general unsecured creditor in the chapter 15 case solely on the basis of nationality (§ 1513(b)(1)). Of course, this does not affect the foreign creditor having superior rights to U.S. property pursuant to U.S. law (e.g., a security interest in tangibles.)

3. *Is it likely that the chapter 15 judge must decide claims issues?*

Claims issues may not arise at all unless the foreign representative decides, upon obtaining recognition, to file a parallel chapter 11 case. In most instances where there is no parallel chapter 11 case, cross-border agreements will address the claims filing and distribution issues. However, in the event of a full-fledged chapter 11 case being filed by the chapter 15 case foreign representative, the judge should be aware that former § 508(a), which was the basis for § 1532, neither restricts distribution nor enforces parity in chapter 11 cases, thus further complicating cases having multiple proceedings.

Conclusion

The purpose of the foregoing guide is to give judges unfamiliar with chapter 15 cases a quick understanding of the case-management issues that may arise and possible solutions. It is not meant to substitute for carefully parsing the statute itself and the treatises that have been written to further explain the nuances of the statute and developing case law. The appendix to this guide contains a non-exhaustive list of resources where additional information and guidance may be found. The case law and other materials discussed are current through December 31, 2010.

Appendix : Selected Additional Resources

American Law Institute, Principles of Cooperation Among the NAFTA Countries: Transnational Insolvency: Cooperation Among the NAFTA Countries (2003).

American Law Institute & The International Insolvency Institute, Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, available at http://www.ali.org/doc/Guidelines.pdf (last visited July 15, 2010).

Andre J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview,* 6 Tul. J. Int'l & Comp. L. 309 (1998).

Samuel L. Bufford, United States International Insolvency Law 2008–2009 (2009).

Case Law on UNCITRAL Texts (CLOUT), available at http://www.uncitral.org/uncitral/en/case_law.html (last visited July 15, 2010).

Leif M. Clark & Daniel M. Glosband, Collier Monograph: Ancillary and Other Cross-Border Insolvency Cases Under Chapter 15 of the Bankruptcy Code (2008).

European Union Insolvency Regulation, Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF (last visited July 15, 2010).

1 W.H. Manz, Bankruptcy Reform: The Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 105–18 (2006).

Paul Lee, *Ancillary Proceeding Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code,* 76 Am. Bankr. L.J. 115 (2002).

Steven Meyerowitz, *Two and One-Half Years and Counting: The Rapidly Maturing Jurisprudence of Chapter 15 of the Bankruptcy Code,* Pratt's Journal of Bankruptcy Law (2008).

UNCITRAL Model Law on Cross-Border Insolvency and Guide to Enactment, available at www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf (last visited July 15, 2010).

UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, available at http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_english.pdf (last visited July 15, 2010).

Jay L. Westbrook, *Locating the Eye of the Financial Storm,* 32 Brook. J. Int'l L. 1019 (2007).

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