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## BANKRUPTCY LAW

### Chapter 15: The U.S. Version of The Model of Insolvency Law

Understanding where the genesis lies

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As the burst global economic bubble blows more companies into bankruptcy, one area of U.S. insolvency practice seems particularly likely to gain attention: cases with international issues and implications. In the United States, the law governing matters of international insolvency is contained in Chapter 15 of the bankruptcy code. Enacted in 2005 as part of the sweeping Bankruptcy Abuse Prevention and Consumer Act ("BAPCA"), Chapter 15 is based on a United Nations model for international insolvency law and deals with administration of insolvent companies and individuals whose assets or interests extend beyond national borders.

Since 2005, courts around the world have struggled with the model law, which is literally in its infancy in this country and many others. Today's worldwide economic stressors and increasingly intertwined global marketplace are almost certain to ratchet up the pace — and the

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stakes — of shaping international insolvency law.

Most insolvency professionals have probably heard of Chapter 15, but many may not know its genesis: the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency ("Model Law") and, to a lesser extent, the European Union Insolvency Regulation ("EU Regulations"). These laws are intended to promote cooperation between courts, trustees, debtors and representatives of different countries who are involved with international insolvency. As of 2004, almost every member of the European Union had adopted the Model Law as promulgated by UNCITRAL in the form of the EU Regulations. Soon thereafter, in 2005, the United States Congress adopted Chapter 15.

Chapter 15 permits a foreign representative of an insolvent company to petition the bankruptcy court for certain types of relief under the bankruptcy code. The foreign representative is entitled to file the petition directly with the bankruptcy court. 11 U.S.C. 1509. The foreign representative (typically an administrator or trustee) is required to file a petition with the U.S. bankruptcy court seeking recognition of the foreign insolvency proceeding either as a main proceeding or as a nonmain proceeding. 11 U.S.C. 1502, 1515.

The petition must be accompanied

by a certificate or decision of the foreign court indicating that the foreign proceeding is in fact a "foreign proceeding" and the petitioner is a "foreign representative." 11 U.S.C. 1515. The court is entitled to presume the petition and accompanying certification are correct but it may take evidence on the issue if there is a contest, or even on its own accord. 11 U.S.C. 1516; See, *In re Oversight and Control Commission of Avanzit, S.A.*, 385 B.R. 525, 532-33 (Bankr. S.D.N.Y. 2008).

#### Where Are You COMING from?

A foreign proceeding is a proceeding pending in the country where the debtor has its main center of interest (known as its COMI). The debtor's center of main interest is not always obvious. The place of the registered office is presumed to be its COMI, although that presumption may be rebutted by presentation of evidence to the contrary. 11 U.S.C. 1516; see also *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 2008 WL 2198272, at page 10 (S.D.N.Y.). The foreign representative has the burden of proof on the issue of COMI if the registered office presumption is challenged by an objecting party or the court raises the issue sua sponte.

In determining COMI, the court will consider the location of the debtor's headquarters, the location of those who actually manage the debtor, the location of

the debtor's primary assets, the location of the debtor's creditors or the majority of the creditors who would be affected by the case, and/or the jurisdiction whose law would apply to most disputes. Accordingly, the fact that a debtor may register its business in an offshore "haven" does not necessarily mean that the U.S. bankruptcy court must recognize a foreign proceeding as a main proceeding where the debtor's main offices, management, assets and creditors are largely elsewhere. *In re Eurofood IFSC Ltd.*, 2006 E.C.R. I -3813, paras. 34-35 (COMI in Ireland where debtor was registered and conducting its business in Ireland); and *In re Daisytek-ISA Ltd.*, 2003, All E.R. (D) 312 (Ch. May 16, 2003)(COMI in UK since a majority of the administration of the company was conducted from the head office located in the UK).

The court may also be called upon to make a determination whether or not the foreign proceeding may be recognized in the U.S. as a foreign nonmain proceeding. A nonmain proceeding is a foreign proceeding, other than a main proceeding, pending in a country where the debtor maintains an establishment. An establishment is any place of business where the debtor carries out nontransitory economic activity. The existence of an establishment is a factual question without any presumption in its favor.

Where debtor had no assets located in the Cayman Islands at the time of filing of the petition under Chapter 15 for recognition of foreign proceedings, debtor did not have an establishment for purposes of the court designating insolvency proceedings in the Cayman Islands as foreign nonmain proceedings. Further, the fact that the debtor had some auditing activities and filed papers of incorporation in the Cayman Islands did not constitute nontransitory economic activity nor did the debtor's transfer of cash to the Caymans after the case was filed.

### Recognition Is Key

The bankruptcy court's recognition of a foreign proceeding has significant consequences for the debtor and its creditors. If the court recognizes the foreign proceeding as a main or nonmain proceeding, many of the provisions of the bankruptcy code will apply to the assets of the debtor located within the United States. Actions by creditors against assets of the debtor within the United States will be stayed. Section 11 U.S.C. 363, which deals with the debtor's use of a creditors collateral, will apply upon the recognition of a foreign main proceeding. Assets and operations of the debtor within the U.S. may be entrusted to the administration by the foreign representative. The foreign representative may be entitled to take discovery, prevent the transfer of assets of the debtor, and even make distributions to creditors from asset of the debtor located within the U.S. if permitted by the court. The foreign representative may not bring avoidance actions to recover preferential or fraudulent transfers unless there are other proceedings pending under the bankruptcy code against the debtor in the U.S. Bankruptcy Court. However, the foreign representative may intervene in proceedings pending against or by the debtor in federal or state courts in the United States.

### Court's Cooperation Required

Another key aspect of recognition is Chapter 15's requirement that the court and the foreign representative cooperate with foreign courts. In fact, the court is authorized, either directly or through a trustee or examiner, to communicate directly with the foreign court where the main or nonmain proceeding is pending. Chapter 15 requires the court to establish means with the foreign court of coordinating and supervising the debtor's assets and affairs. This is often established through adoption of case administration protocols pending in the U.S. under Chapter

15 and in the foreign jurisdiction. See *In re Progressive Modeled Products*, Bankr. Pet. No. 08-11253-KJC, (Bankr. D. Del. June 20, 2008) (Docket No. 132). Chapter 15 contains provisions which require the Court to fashion relief consistent with any pending bankruptcy proceeding of the debtor pending when the petition for recognition under Chapter 15 is filed. This basic premise also applies where there are one or more foreign proceedings pending at the time of the petition for relief. The court must not grant relief in the Chapter 15 petition which is inconsistent with the foreign main or nonmain proceeding.

A creditor who has received payment in a foreign proceeding may not receive duplicate payment in the Chapter 15 proceeding. Foreign creditors are, however, protected under Chapter 15 through due process provisions. Generally, the foreign representative is required to give foreign creditors individual notice of the commencement of a Chapter 15 case. The notice must indicate the time period and place for filing proofs of claims, whether secured creditors must file claims and contain other information as required by the court. The court is also permitted to modify relief granted to the foreign representative when necessary to protect the interests of creditors.

U.S. courts are not the only ones facing the challenge of managing international insolvency cases. Since adoption of the Model Law in Europe under the EU Regulations, courts of the European Union, including the Europe High Court of Justice, have been called upon with increasing frequency to determine issues arising under the Model Law. There should be little doubt over the future of the Model Law under Chapter 15. As the global economy becomes increasingly intertwined, filings for recognition under Chapter 15 will increase which, in turn, will require our bankruptcy courts to cooperate more and more with foreign courts and continue to apply and interpret Chapter 15 in cross-border insolvency cases. ■