

SPECIAL ISSUE
THE NEW BANKRUPTCY ACT: HOW IT AFFECTS YOUR PRACTICE

Chapter 15 Ancillary and Other Cross-Border Cases

Or: 'What Took You So Long?'

By Adam C. Rogoff

Have you ever been late (really, really late) to something important because you were held up by your spouse/partner who just couldn't seem to get out of the door on time? It's frustrating, isn't it — at least for those of us who give more than a passing nod to punctuality. Well, now you know how Chapter 15 feels — at least if a statutory section could have feelings. After many years of delayed efforts, the Act finally adds a new Chapter 15 to the Bankruptcy Code, which incorporates the provisions of the UNCITRAL Model Law on Cross-Border Insolvency (adopted in May, 1997). Since 1997, strong support has existed in the United States to amend the Bankruptcy Code to modify and apply the Model Law here. However, this non-controversial cross-border amendment was held up by the “all or nothing”

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approach taken by Congress to the bankruptcy amendments. And so, the years went by as Chapter 15 waited.

Eight years later, the United States adapts and adopts the Model Law, which has the goal of harmonizing procedural rules for recognition of foreign insolvency proceedings so that the various countries that enact the Model Law will have generally consistent approaches. (Each country, including the United States, may tailor the Model Law to its particular insolvency scheme; however, the goal requires that generally uniform procedures and defined concepts be applied).

WHAT IT MEANS

Currently, the Bankruptcy Code permits the commencement of “ancillary cases” in aid of a foreign insolvency proceeding under § 304(a), which allows a “foreign representative” in a “foreign proceeding” to seek certain relief under § 304(b), such as: 1) injunctive relief; 2) turnover of estate property; or 3) other appropriate relief (a catch-all used for a variety of purposes, like obtaining discovery in the United States). Whether specific relief was granted was determined by reference to five factors (okay, a sixth applies only to individual debtors) under § 304(c), of which “comity” has long been the overriding

consideration. The bottom line is that current provisions of the Bankruptcy Code, as interpreted by our courts, have been very generous in allowing for foreign trustees, administrators, etc., to come into the United States and stay litigation against assets located here, recover those assets for inclusion in the non-U.S. “estate,” investigate claims against possible U.S. defendants, etc. (*Section 304 is being replaced by new Chapter 15.*) As a result, the old ways will no longer apply, in favor of new specific rules. The good news is that while Chapter 15 has far more extensive provisions than § 304, the force and effect is largely the same — cross-border cooperation.

THE NEW CHAPTER 15

Because new Chapter 15 contains many new procedural requirements (which generally comport with the spirit of § 304, albeit not the specific practices), set forth below is a general summary of its structure.

- Purpose and scope of Chapter 15, and general provisions (§§ 1501-1508): The purpose of this chapter is to help foster cooperation between United States courts, debtors, and trustees and the courts of foreign countries involved in cross-border insolvency cases (§ 1501). The chapter applies

both to cases brought in the United States where assistance is sought in a foreign country and where assistance is sought in the United States by a foreign court in connection with a foreign proceeding (§ 1501).

- Access of foreign representatives and creditors to U.S. courts (§§ 1509-1514): A foreign representative may commence a Chapter 15 case by filing a petition for recognition of a foreign proceeding. If the court grants the petition, the foreign representative may sue and be sued in U.S. courts and may apply directly to U.S. courts for relief (§ 1509). Filing such a petition does not subject the foreign representative to jurisdiction of U.S. courts for any other purpose (§ 1510).

If recognized, a foreign representative may: 1) commence an involuntary case or a voluntary case under §§ 301, 302, and 303 of the Code; or 2) participate as a party in interest in a case under the Code (§§ 1511-1512). Foreign creditors have the same rights as domestic creditors. This also means that foreign creditors are to be given notice whenever notice is given to creditors generally (§ 1513).

- Recognition of foreign proceedings (§§ 1515-1519): Foreign representatives may apply to the court for recognition of a foreign proceeding by filing a petition for recognition (§ 1515). After notice and hearing, the court will determine whether to recognize the foreign proceeding (§ 1517). Foreign representatives are required to notify the court of any substantial change in the status of the foreign proceeding or any other foreign proceeding regarding the debtor that becomes known to the representative (§ 1518). Before ruling on the petition for recognition, the court may, among other things, stay execution against the debtor's assets and entrust administration of the debtor's assets located in the U.S. to a foreign representative (§ 1519). However, a court will not grant such relief if doing so would interfere with the foreign main proceeding (defined to mean a foreign

proceeding pending in the country where the debtor has the center of its main interests). Also, such relief terminates when the petition for recognition is granted (§ 1519).

- If the court grants a petition for recognition of a foreign main proceeding, §§ 361 (regarding adequate protection), 362 (the automatic stay), and 552 (regarding the post-petition effect of security interests) apply with respect to the debtor and the debtor's property within the U.S. Also, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee (§ 520).
- If the court grants a petition for recognition of any foreign proceeding, the court may, among other things, provide the following relief (§ 1521): 1) stay the commencement or continuation of a proceeding regarding the debtor's assets, rights, obligations or liabilities; 2) entrust administration of the debtor's assets within the U.S. to the foreign representative; and 3) provide for the examination of witnesses, the taking of evidence, or the delivery of information regarding the debtor's assets.
- Cooperation with foreign courts and foreign representatives (§§ 1525-1527): Courts and trustees will cooperate to the maximum extent possible with a foreign court or representative, and are entitled to communicate directly with a foreign court or representative (§§ 1525-1526). Cooperation may be implemented by any appropriate means, including coordination of the administration of the debtor's assets, approval and implementation of agreements concerning the coordination of proceedings, and the coordination of concurrent proceedings involving the same debtor (§ 1527).
- Concurrent Proceedings (§§ 1528-1532): After recognition of a foreign main proceeding, a case under the Code may only be commenced if the debtor has assets in the U.S. The effects of such a case would then be limited to the debtor's assets within the U.S. (§

1528). If the U.S. case is filed before the petition for recognition of a foreign proceeding, any relief granted must be consistent with the relief granted in the U.S. case (§ 1529). If the U.S. case is filed after recognition of a foreign proceeding, the relief granted regarding the foreign proceeding will be reviewed by the court and modified if inconsistent with the U.S. case (§ 1529). If there is more than one foreign proceeding regarding the debtor, the relief granted in all foreign proceedings must be consistent with the relief granted in the foreign main proceeding (§ 1530). If a creditor receives a payment on its claim in a foreign proceeding, it may not receive payment for the same claim in a U.S. case, so long as the payment to other creditors of the same class is proportionately less than the payment received by the creditor (§ 1532).

CONCLUSION

Finally, Chapter 15, when read in conjunction with revised § 109(b) — which covers who may be a debtor — makes it clear that foreign banks that have a branch or agency in the United States are not eligible for protection under Chapter 15. This effectively ends ambiguity under § 304 of whether non-U.S. banks in a foreign insolvency proceeding could seek relief under § 304. Unlike other changes brought about by the bankruptcy amendments, Chapter 15 should not require a wholly “new way of thinking” for bankruptcy professionals. Instead, it will require us to learn a few more phrases (“foreign main proceeding” and “foreign nonmain proceeding”) and follow some different procedures. Despite the longer road to be followed, however, the path of cooperation and recognition is still well paved.



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